

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F709452

DANNY NELSON, EMPLOYEE

CLAIMANT

**TANCO CONSTRUCTION,
UNINSURED EMPLOYER**

RESPONDENT

OPINION FILED AUGUST 5, 2008

Hearing before Administrative Law Judge Barbara W. Webb on May 8, 2008, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Jeffrey H. Kearney, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on May 8, 2008. A Pre-hearing Order was entered in this case on January 15, 2008. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties and the Pre-hearing Order as amended on the record are hereby accepted:

1. The claimant sustained an injury to his right ring finger on January 11, 2006.

By agreement of the parties, the issues to be adjudicated are as follows:

1. Employment relationship between claimant and respondent.
2. Compensability of claimant's alleged January 11, 2006, injury.

3. Whether the claimant is entitled to temporary total and permanent partial indemnity benefits.
4. Whether the claimant is entitled to wage loss.
5. Whether the claimant is barred from receiving benefits due to drug use.
6. Controversion and attorneys fees.

The record consists of a one volume transcript of the May 8, 2008, hearing consisting of the testimony of Danny Nelson, Les Abernathy, Richard Tanner, Sandra Fletcher, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order), Claimant's Exhibit No. 1 (medical records and correspondence).

FACTUAL BACKGROUND

The claimant is 27 years of age (b.d. 1/20/81). He is employed full-time as a bail bondsman for Bail Bond Financing, Inc. The company is operated by his parents. He is paid on commission. He has worked in the bail bond business for over seven years. He graduated high school in 1999 and attended approximately two years of college with additional training in computers. He is a licensed bail bondsman. He testified that he met Richard Tanner when he bonded him out of jail. He worked for Tanner part-time doing various tasks a couple of times prior to January 11, 2006. He testified that he performed maintenance work for Tanner at the arsenal and delivered and unloaded chemicals between October and December of 2005. At that time, he was paid \$10.00 per hour. He testified that he also helped

Tanner complete a carwash on Ridgeway Road on January 2, 2006. At that time, he was staying with Tanner. He testified that he was paid \$15.00 an hour at that time. He worked with another person, Abernathy, who was hired to work for Richard Tanner to complete the carwash. Abernathy performed the skilled labor such as wiring and other technical type jobs. Nelson testified that Abernathy was not getting paid cash, but was getting paid in steel that belonged to Tanner for a steel building that he wanted to erect.

On the date of the injury, he testified that Tanner, Abernathy, and he went to Tanner's property. He testified that Tanner and he drove separately from Abernathy. He testified that they began loading the steel beams onto a trailer using a tractor with a front end loader. He explained that it was getting dark and Tanner told him to get in the back of the truck because the beams were getting jagged. The beams were large steel I-beams which weighed several hundred pounds. The beams were estimated between 12 and 18 foot in length and 6-8 inches wide. The beams were lifted one at a time. He testified that at the time of the accident, a large beam was being hoisted by the tractor with a chain. Nelson estimated that they had worked a couple of hours and loaded approximately 15 beams prior to the accident.

Nelson described the accident:

I was in the bed of the truck, and the one beam had gotten hung to one that we were loading. Mr. Abernathy at that time said, "Lift," and I'm still not clear to this day whether he was telling me to lift or Mr. Tanner to lift, but we both lifted at the same time. I lifted manually, and he lifted on the tractor."

When he did, the beam shifted and it caught my hand in the loader. Immediately then I knew it severed my finger off. I ripped it off

because it was about to cut off my middle finger. I ripped my hand out and just started screaming, you, "You cut my finger off. You cut my finger off."

He explained that the glove with his finger tip was actually still stuck in the beam. He jumped down from the truck and ran because of the pain. Abernathy and Tanner wrapped his hand in one of their shirts and took him to the emergency room at Jefferson Regional Medical Center. The highway police retrieved his fingertip, but it could not be reattached. Surgery was performed that night by Dr. Marc Stevens, an orthopedic surgeon, and he was released that night. In March, he returned for follow-up with Dr. Stevens and his bandages were changed. He explained that he could not work because his hand was bandaged and his job required him to write. He returned to Dr. Stevens in April to remove the second bandage. He returned to work, but continued to have pain as a result of sensitivity of the finger tip due to the surviving nail bed. He returned to Dr. Stevens later but did not pursue further treatment. He explained that Dr. Stevens told him that it would take an additional surgery to remove the nail bed.

On cross-examination, Nelson testified that at the time of the accident, his 1995 Jaguar XJ6 had broken down and he was living with Tanner. He was employed by the bail bond company but wasn't working for them for the nine days he was employed by Tanner. He testified that at the time he had a misdemeanor criminal charge pending for possession of marijuana. He explained that his job with the bail bond company required him to travel and fill out paperwork to collateralize the bonds and also involved bail recovery. He agreed that he told the doctor on

January 20, 2006, that his pain level was 1 out of 10 and that he was planning to go to Texas by February 1st to take care of his uncle who was having knee surgery. He testified that he was working for Richard Tanner from January 2nd to January 11th, the date of the accident. He was paid in cash. He was told by Tanner that Tanner was diffusing his business partnership on the carwash project. He did not know if Abernathy's truck insurance helped pay some of his medical bills.

He explained that the chain was looped around the middle of the beam and the beam was "walked" over to the trailer. He did not pay Tanner rent during the time he was living with him nor did Tanner pay rent when he lived with the claimant's family. He did not have any other income because he could not perform his job duties at the bail bond company without a car. He testified that at the time, Tanner and he were friends and socialized together.

He testified that on the day of the accident, he believed Tanner had some independent contractors working as electricians and painters at the carwash, but had no other employees.

Les Abernathy testified for the respondents. He drives a train for Potlatch Corporation. He was hired by Tanco Construction Company as a contractor to put up two carwashes. He was paid by the job and not by the hour. He testified that he made a deal with Richard Tanner to tear down a building on University Street with the understanding that he would get half of the material and Tanner would get half of the material. After he finished tearing down the building, they entered into a new agreement for Tanner to give him the rest of the iron in exchange for him

doing something else for him because Tanner no longer had a use of the iron. The iron was in Tanner's front yard. He testified that when he arrived at the property, Tanner was bush-hogging on a tractor. He did not see anyone else there. He explained that Tanner and he started loading the iron with the chain and front end loader. He explained that the chain was looped around both ends of the steel and the bucket of the tractor would go in the middle underneath the chain to pick it up and load it on his 16 foot trailer. He testified the steel beams were 11 feet and 20 feet long. He explained that the beam would be set down on a roll bar and the other end was at a slant. He testified that they were about half complete when Nelson arrived in an old Jaguar. He got out of the car drinking a beer and started talking to Tanner. Abernathy told Nelson, "to get out of the way." He testified that he said "If you can't get out of the way, get up in the back of my truck and just stand there.' I said, 'That is out of the way.' I said 'It won't be nothing— nothing will hit you there,' I said, 'You're in the clear.'" He observed Nelson putting his hands on the front of the iron up on the truck and Abernathy told Nelson to stay away from the iron and to watch out and be careful. Nelson filed a claim against Abernathy's automobile insurance and his insurance paid some of Nelson's medical bills. He testified that Tanner was not obligated to help him load the steel but that he volunteered to do it. He did not pay Tanner for help in loading the steel.

On cross-examination, Abernathy testified that he did not pay Nelson any wages for the day of the accident. Abernathy reported the accident to his insurance since it happened in the back of his truck. He testified that he was in a hurry to get

the steel loaded. He testified that Nelson was leaning on the steel in the truck and was not loading the steel. He explained that he had not seen Nelson at the carwash earlier. He testified that he had torn down the building months before. He explained that he was Tanner's cousin. He had seen Nelson and Tanner together riding around on several occasions but had never seen Nelson working at the carwash site.

Richard Tanner testified that he was the owner of Tanco Construction. He explained that the carwash at University Avenue was owned by Perry Oldner and not Tanco Construction. He testified that he was supposed to have been a part owner but was never put on the books as a member of the company. He testified that Perry and he worked as their own general contractor on the construction of the carwash but that he was completely out of it in January of 2006. He testified that Nelson had not worked at the carwash from January 2 to January 11, or had ever been his employee. He testified that Nelson had never been an employee of Tanco Construction. He explained that Tanco Construction was a general contractor that builds condominiums over in Hot Springs. He explained that on January 11, 2006, Tanco was dormant and Tanner was working for Perry Oldner. He explained that Nelson and he were best friends and spent a lot of time together. He testified that Nelson stayed at his house regularly, ate his food, borrowed clothes, and was a regular bum around the house.

On January 11, 2006, he was bush-hogging at his house prior to Abernathy's arrival. Abernathy arrived later in the afternoon. He did not recall Nelson being

there when Abernathy arrived. He recalled that Nelson and he were going to go clubbing in Little Rock so Nelson was waiting on Tanner to get done. The first time he saw Nelson was around his car approximately 50 to 60 yards away from the steel beams. He did not know if Nelson drove the Jaguar that day. He testified that Nelson was drinking a beer and smoking a joint and offered Tanner a beer which he declined. He did not hire Nelson to help with the steel. He explained that Nelson was not cut out for labor.

Tanner testified that Nelson was hanging out drinking a beer and waiting for him and he told him specifically to get out of the way within five minutes before the accident. Tanner told Nelson, "Danny, get your hand off those steel beams because you're going to get your hand cut off." He testified that he believed the beam was already on the trailer and fell over and landed on Nelson's hand. He did not see it happen but did see Nelson running around the truck "white as a sheet" and heard him hollering. He testified that Nelson was not at his house to work but was there trying to get him to hurry up so they could leave and go to a club.

He explained that he traded Abernathy the beams in return for helping him install dryers at the University Carwash. He explained that Nelson did not install the dryers as he testified but that Abernathy did the work. He never hired Nelson for pay or as an employee. He testified that Nelson had lived with him for about a year prior to the accident and left to go to college in Houston after he got his finger cut off. He testified that Nelson never did any work for him and that he never paid Nelson as an employee. Tanner testified that Nelson was not at the house when

they started loading the steel beams, but could not recall whether he arrived in his Jaguar or had gotten a ride with a friend or his mother. He first saw him in the yard. He explained that he had initially partnered with Perry Oldner and formed a company called PL Investments which built a carwash on Hazel and Ridgeway. He explained that they started OT Investments to operate the carwash, but he never became a full partner. Tanco bought the equipment under its distributorship but did not profit from the purchase of the equipment. Tanner testified that in 2006 he was getting paid by OT Investments as an employee. Nelson was never an employee of OT Investments. He testified that they were not installing blowers at the carwash earlier in the day prior to the accident because the new facility had not been built and was not completed until May of 2006.

Sandra Fletcher testified for the claimant. She is the claimant's mother. She testified that she met Richard Tanner prior to January 11, 2006, because her other son had worked for him. She testified that Tanner had told her that he was going to hire the claimant because he wanted a job because the bail bond business was slow. She told him that Nelson was not good at manual labor, but Tanner said that he would do all the contracting and heavy stuff himself. She testified that Nelson's car had broken down at Tanner's house at least a week prior to the accident and she had taken him to work or to Tanner's house a couple of times. She testified that Nelson had worked for Tanner between two weeks and a month prior to the accident. She explained that Tanner called her on the way to the hospital and told her that Nelson had injured his finger and that he would take care of it. Abernathy

told her that they were loading I-beams when the accident happened. She never saw Tanner pay Nelson.

The records reflect that the claimant did not accept the medical payments under the Abernathy insurance policy based on his attorney's advice.

The emergency room record reflects that the claimant sought treatment on January 11, 2006, at approximately 5:37 p.m. with the complaint that "Loading some iron up slipped and cut my finger off." A surgical closure was performed by Dr. Marc Stevens and the notes reflect that the claimant was "very pleased with his final appearance of his finger with the closure." He was released with antibiotics and pain relievers.

Medical records reflect that he returned to Dr. Stevens for follow-up on January 20, 2006. It is noted that "Current pain level one/10. The patient complains of nothing today. Overall he is pleased with the length of his finger and its functionality." The notes reflect that he will continue to change the dressings daily and would return in one week. It is noted that he plans to return to Texas by the first of February and can arrange a follow-up with a physician in Texas. On January 27, 2006, the claimant returned to Dr. Stevens for a follow-up examination. It is noted "Current pain level 2/10. The patient complains of pain at the first of the week because he has hit it a few times". Notes further reflect that the injury appears to be healing very nicely. The doctor notes that he told him that he can follow up with him before he leaves or can see a doctor in Houston. Dr. Stevens notes "At this point it looks so nice he may not even need any further follow-ups."

On October 24, 2006, the claimant again presented for treatment with Dr. Stevens with complaints about the appearance of the finger. The doctor notes that he advised that the only treatment for removal of the surviving nail bed would be excision. Notes reflect that Nelson told him that he wanted to discuss his options with his lawyer before proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim and to determine whether Nelson was an employee of respondent, Tanco Construction.
2. Claimant has failed to prove by a preponderance of the evidence that he was employed by respondent on January 11, 2006.
3. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on or about January 11, 2006, in that claimant has failed to prove by a preponderance of the evidence that he was performing employment related services at the time of the alleged injury.

DISCUSSION

The claimant contends he was a paid employee of the respondent both on and prior to the date of this incident and that he had done separate work and tasks for the respondent earlier on the date of incident. He further contends that on or about January 11, 2006, while engaged in the task of lifting and moving steel beams on the respondent's work truck as personally instructed and supervised by his

employer, Richard Tanner, a steel beam was dropped upon the claimant's right hand, immediately amputating the fore portion of his right ring finger. The claimant underwent medical treatment of and surgery to the finger, which has partially healed to date, and has been advised that further surgery may be necessary to resolve these ongoing problems. The claimant contends that he incurred substantial medical expenses, some of which were paid by an insurance company at respondent's request, however, substantial unpaid medical expenses related to this claim remain outstanding. The claimant contends that he did not return to respondent's employ, and lost substantial wages from respondent and from another job which the claimant had prior to the injury herein, due to claimant's inability to perform his duties. The claimant contends he was released from care on a date certain and returned to work for the other employer, but continues to suffer substantial infection, pain and swelling to his finger, including an open wound. The claimant contends he is entitled to a period of temporary total disability; loss of wages; medical and rehabilitation expenses to date and in the future; need for rehabilitation; and permanent partial disability.

The respondent, Tanco Construction, contends that it has no employees. Tanco contends that the claimant was a personal friend of Richard Tanner who drove up where Richard Tanner and another person were loading steel onto a trailer with a tractor. The respondents contends that at the time the claimant drove up he was smoking a marijuana cigarette. The claimant offered to help loading but was told to not help. He sat in the back of the truck while Mr. Tanner and the other

person loaded steel beams. On at least one occasion prior to claimant's injury, he was instructed by Mr. Tanner and the other person to not place his hands around the steel beams. Respondent contends that the claimant ignored that direction. Respondent contends that there was no employment contract and that the claimant was not assisting in the task being performed by Mr. Tanner. The claimant was not under a contract of hire or receiving wages from Richard Tanner or Tanco Construction at the time he was injured. Respondent contends that Richard Tanner was not performing services for Tanco Construction at the time claimant was injured. The claimant has never been employed by Tanco Construction or Richard Tanner.

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accident injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the

requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

Ark. Code Ann. § 11-9-102(9)(A) defines an employee to mean “any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer...” Ark. Code Ann. § 11-9-102(4)(B)(iii) provides that a compensable injury does not include “injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated.” After a careful review of the evidence in this case, I find that the claimant has failed to meet his burden of proof in establishing by a preponderance of the evidence that he was, in fact, an employee under a contract of hire with Tanco Construction at the time of his injury. I further find that the claimant was not an employee of Richard Tanner, Les Abernathy, or any other subcontractor at the time claimant was injured. The evidence clearly establishes that the injuries suffered by the claimant occurred while he was at the home of his friend, Richard Tanner, where he had been staying. Although there was some evidence that the claimant had worked odd jobs for Richard Tanner, there was no evidence of any discussion of employment terms or specific direction of work to be performed between Tanco or Richard Tanner and the claimant at the time of the injury.

The only reasonable conclusion that can be reached from the credible evidence is that the claimant came to Tanner's home for the purpose of going with Tanner later that evening to socialize. In fact, the claimant did not dispute the testimony of Tanner and Abernathy that he was drinking a beer and smoking a joint on the day in question. I find the testimony credible that Tanner and Abernathy tried to warn the claimant to get out of the way of the steel beams. There is simply no credible evidence that claimant performed any work at all. Claimant has not met his burden of proof to show that he was employed by Tanco or that he was performing employment services at the time of his injury. Moreover, I find that there is no evidence that the claimant ever received wages from Tanco in connection with any work performed. In conclusion, there is simply no evidence of a "meeting of the minds" establishing a contract of hire, either express or implied, between the claimant and Tanco or Richard Tanner prior to his injury. See Sharp County Sheriff's Office v. Ozark Acres, 349 Ark. 20, 75 S.W.3d 690 (2002).

Employment services are being performed when the employee does something that is generally required by his or her employer. Collins v. Excel Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S. W.3d 1 (2002). The test is whether the injury occurred within the time and space boundaries of employment, when the employee is carrying out the employer's purpose or advancing, directly or indirectly, the employer's interests. Collins, *supra* at 817, 69 S. W.3d at 18; Pifer, *supra*; Schultz v. Pulaski County Special School District, 63 Ark. App. 171, 976 S.W.2d 399 (1998); Ray v. University

of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999). If the activity in which the employee is engaged only indirectly advances the employer's interest and is not inherently necessary for the performance of the job for which the employee was hired to perform, the activity is not sufficient to constitute "employment services" under the statute. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998). One's mere presence at his place of employment does not equate to the performance of employment services. Hoyt v. Discovery, Inc., 1997 AWCC 414 (E602380).

The claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, i.e., that he sustained an injury while engaged in the performance of employment services. Morales v. Martinez, ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 10, 2004). In Morales, the Court of Appeals rejected the contention that horseplay was an affirmative defense which must be proven by the employer. In addressing the issue of horseplay, the Court noted the following:

"Horseplay" has not been defined by statute or case law in Arkansas, except to note that its meaning is synonymous with the term "skylarking," which is chiefly employed in English case law. *Southern Cotton Oil Division v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (1964). This is instructive, as the verb "to skylark" describes a practice in which a sailor would run up and down the rigging of a ship in sport, graphically exemplifying the dictionary definition of "horseplay" as "rough or boisterous play." Webster's Third New International Dictionary (1961).

In the Morales decision, the Court of Appeals affirmed the Commission in holding that a claimant who was not authorized to operate a forklift but began

driving the forklift “like a game” and “playing” in the warehouse was not compensable since the injury claimant sustained when the forklift overturned was the result of horseplay.

In Daniels v. Arkansas Waffles, Inc., 83 Ark. App. 106, 117 S.W.3d 653 (2003), the Arkansas Court of Appeals affirmed a decision of the Workers’ Compensation Commission holding that an employee was not performing employment services at the time of her alleged injury when she was not supposed to be working on the day of the incident.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant’s testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

After a careful review of all of the relevant and credible evidence, I find that the claimant has failed to meet his burden of proof in establishing by a preponderance of the evidence that he was performing employment services for the respondent.

There is simply no credible evidence that claimant performed any work at all on the job site. Claimant has not met his burden of proof to show that he was performing employment services at the time of his injury.

It is not necessary to address the defense of intoxication raised by respondent in light of my determination that the claimant has failed to establish that he was an employee or was performing employment services for Tanco within the time and space of his employment at the time of his injury.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge