

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704493

ALDOLFO RIOJAS	CLAIMANT
BUTTERBALL TURKEY	RESPONDENT
ESIS, INC. CARRIER	RESPONDENT

OPINION FILED JULY 3, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On April 1, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 28, 2007, and a pre-hearing order was filed on August 29, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On April 24, 2007, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$287.00 for temporary total disability and \$215.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury to his right leg.
2. Claimant's entitlement to related medical.
3. Temporary total disability from April 25, 2007, to a date to be determined.
4. Attorney's fees.
5. Horseplay defense.

The claimant contends that:

"The employee/employer relationship existed on or about April 24, 2007. On that date, claimant sustained a compensable injury to his right leg when a co-worker ran over him in a forklift. Claimant was hospitalized and has sought extensive medical treatment from an orthopedic doctor in Berryville. Claimant has been off work since the incident and has been under doctor's care and is entitled to temporary total disability benefits. The claim has been controverted in its entirety. The claimant is entitled to a controverted attorney's fee."

The respondents contend that:

"The claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. The respondents' defense include, but is not limited to, the allegation that the claimant was engaged in horseplay and not performing employment services at the time of the incident of April 24, 2007."

DISCUSSION

I. COMPENSABILITY

The central issue in this case is whether the claimant was engaged in an employment service when he sustained injuries to his right leg, knee, and ankle in an employment related accident on April 24, 2007. The burden rests upon the claimant to prove these injuries compensable.

In order to meet this burden, the claimant must first show that his alleged injuries satisfied that statutory requirements of Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injuries alleged to be compensable. Further, this subsection requires that the actual existence of a physical injury must be based upon or supported by objective findings as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The claimant went to the North Arkansas Regional Medical Center on April 24, 2007, and saw Dr. Blake Chitsey and Charles Ledbetter, M.D., concerning his injuries. The North Arkansas Regional Medical Center history and physical prepared by Charles Ledbetter, M. D., regarding the claimant reflects the following:

“The forklift went over his right leg and had extreme amount of pain in his leg. He was brought to the emergency room and x-rays were taken, which revealed a bimalleolar fracture of the right ankle. There is also extreme bruising, ecchymosis, and fracture blisters already forming over his leg. He has a large effusion of his knee joint and we have CT scanned his knee and MRI'd his knee and he has a severe tibial bruise. His ligaments are intact and his meniscus is intact. He does not seem to have any significant internal

derangement of his knee except for the severe bruising of the bone and the hemarthrosis. He has lesions over the lateral calf and medial calf where the forklift has run over him where the skin is sheared.”

After consideration of all the medical evidence presented it is my opinion that the claimant has established by objective medical evidence (i.e. the independent observation of findings beyond the claimant’s voluntary control), the actual existence of physical injury or damage to his right leg, knee, and ankle.

Next, the claimant must prove that his injuries meet the definitional requirements found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The injury arose out of and occurred in the course of the employment.
- (2) The injury was caused by a specific incident.
- (3) The injury is identifiable by time and place of occurrence.
- (4) The injury caused internal or external physical harm to the claimant’s body.
- (5) The injury required medical services or resulted in disability.

Whether the claimant was providing employment services are the major issue herein. In Texarkana School District v Ronnie R. Conner, ___ Ark. ___ S.W.2d ___ (May 8, 2008) the Supreme Court found as follows:

“This court has held several times that an employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer....” wallace, 365 Ark. at 72, 225 S.W.3d at 365 (quoting Pifer, 347 Ark. at 857, 69 S.W.3d at 3-4); see also Collins v. Excel Specialty

Prods., 347 Ark. 811, 69 S.W.3d 14 (2002); White, 339 Ark. 474, 6 S.W.3d 98. We use the same test to determine whether an employee was performing employment services as we do when determining whether an employee was acting within the course of employment. Wallace, 365 Ark. 68, 225 S.W.3d 361. Specifically, we have held that the test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." Id. (quoting White, 339 Ark. at 478, 6 S.W.3d at 100). The critical inquiry is whether the interest of the employer were being directly or indirectly advanced by the employee at the time of the injury. Id. Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. Id.; see also Moncus v. Billingsley Logging & Am. Ins. Co., 366 Ark. 383, 235 S.W.3d 877 (2006)."

The claimant testified that on alternating weeks, he was a forklift driver or production line worker. On April 24, 2007, he stated he was scanning turkeys and another individual was driving the forklift. The claimant testified on direct examination as follows:

Q. Okay. What -- were you doing when it happened?

A. I was scanning a pallet.

Q. All right. And then what happened?

A. A coworker showed up, and we had -- a coworker had shown up. We had gone out on a break. We came back in, and the coworker came back, and he just got on the forklift. Did not have a license. I told him, "You don't have a license. Get down." One of the guys that drove the forklift left the key in there. He saw the key, got on, turned it on, and backed up. I was just standing behind.

Q. Okay. And so you -- you were standing and scanning?

A. Yes. Yes.

Q. And the forklift ran over you?

A. Correct, and got my foot.

Q. Okay. Did it -- did it back over you, or was it going forward? How -- how did that happen?

A. The forklift was stopped with the turn broken completely. And the -- the -- friend to on, hit the accelerator, and it did like this, came back, came back (indicating).

Q. And what -- what part caught your leg?

A. The wheel.

Q. Okay.

THE INTERPRETER: Or tire, I'm sorry.

Q. (Mr. Odom continued.) And -- and what happened when the wheel caught your leg?

A. I told him to stop. He stopped, and he got real nervous. It had just gotten the tip of the boot. And so I said, "Stop." That boot has protection. No problem. And when he saw me, he got nervous and backed it up even more, and I went like this (indicating).

Q. You -- you fell backwards?

A. Yes. Because if I had stayed up, it would've been worse. I threw myself back.

Q. Okay. And did the forklift -- well, how did it hurt your leg?

A. I don't understand.

Q. How did your leg get hurt?

A. Because the forklift -- and so the forklift came, grabbed me here (indicating). I threw myself back. The friend got nervous, made it

go back more, and it caught me right her (indicating).

Q. Was your foot caught by -- under the forklift?

A. Yes, that's true.

A deposition of Graciano Torres was taken by the respondents and submitted to the Commission subsequent to the hearing. In questioning by the respondents' attorney on direct examination the following exchange occurred:

Q. How long after the break would you estimate that this accident happened?

A. About maybe ten minutes.

Q. And were you able to be an eye witness to this accident?

A. Yes.

Q. Tell me what you witnessed.

A. Okay. well, like I told you before, when I was walking down, he was pulling him from the smock. He was going backward and forward and backward and then he makes about one or two turns.

Q. Let's slow down a second. You said someone was pulling someone by the smock. Is that right?

A. Mr. Riojas was pulling. The driver was riding -- the other guy was driving -- I forgot his name.

Q. Jason Luna?

A. Jason Luna, yeah.

Q. So Mr. Riojas was pulling Mr. Luna's smock?

A. Yes.

Q. And do you know why he was pulling his smock?

A. No. I don't know.

Q. Could you tell if Mr. Riojas appeared angry or happy or sad or could you tell?

A. He was acting like angry, angry.

Q. And the forklift driver, Mr. Luna, what was he doing?

A. He was driving the forklift.

Q. You were saying something about back and forth?

A. Yes. He was moving forward and then backwards and then he made a couple of turns.

Q. And then what happened?

A. And he went on back and the accident happened.

Q. The forklift was going back when the accident happened?

A. Yes.

Q. Could you tell or were you able to see what Mr. Riojas was doing at the time the forklift hit him?

A. No. I didn't see because a forklift was in front of me.

Q. So you didn't see what Mr. Riojas was doing at the time of the accident?

A. No.

It is clear from the testimony of the claimant that Mr. Luna, the driver of the forklift was not an authorized driver. The testimony of both the claimant and Mr. Torres placed the claimant back from break and in a position to be doing work. It was the testimony of the claimant that he was scanning at the time the actual accident occurred; however, Mr. Torres was unable to

actually see the claimant when the incident itself happened. The claimant contends that he was trying to get Mr. Luna off the forklift because he was not supposed to be there. Mr. Torres contends that the claimant was pulling on the smock of Mr. Luna and that he seemed to be angry. Although the claimant in his sworn testimony states that he did not pull on the smock of Mr. Luna.

This is a clear contradiction in testimony to the Commission; however, I believe the testimony shows that the claimant was trying to prevent Mr. Luna from operating the forklift without authorization. I do believe the testimony of Mr. Torres that the claimant was pulling on Mr. Luna's smock and that he seemed angry while doing so. I believe that the claimant's actions were in an attempt to remove Mr. Luna from the forklift which he was not suppose to be driving.

Pulling on the smock of someone driving a forklift shows very poor judgement by the claimant and he put himself in a position of danger. However, I believe from the testimony of Mr. Torres that the claimant appeared angry and the testimony of the claimant that he was trying to get Mr. Luna off the forklift that he was not authorized to drive. Although it was not the responsibility of the claimant to do so, I find that removing an unauthorized person from a forklift directly advances the respondent's interest. I also find that this conduct was within the time and space of his employment. I find that this was not an act of horseplay by the claimant. It was in extreme poor judgement, but his actions, while dangerous, were taken to benefit the

employer by removing someone from a piece of equipment that they had no business operating. Thus, I find that at the time of the accident the claimant was providing employment services to the respondent.

Being hit by the forklift was a specific incident causing the claimant's injuries and being identifiable by place and time of occurrence. The medical evidence establishes that the injury caused internal and external injury that most certainly required medical services due to their severity. Having met all of the requirements of a compensable injury and having found that the claimant did not engage in horseplay, I find that the claimant suffered a compensable injury.

II. BENEFITS

The respondents have made no argument that any of the medical services received by the claimant were not reasonable and necessary. After a review of all medical evidence in this matter, I find that the medical services provided to the claimant that were admitted as evidence in this matter are reasonable and necessary.

The claimant testified that he returned to work sometime in August of 2007. I find that he is entitled to temporary total disability from April 25, 2007 until he returned to work in August of 2007.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of

fact and conclusions of law are made in accordance with A.C.A. §11-9-704.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 28, 2007, and contained in a pre-hearing order filed August 29, 2007, are hereby accepted as fact.

2. That the claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his leg, knee, and ankle on April 24, 2007.

3. That the claimant has proven by a preponderance of the evidence that he is entitled to the reasonable and necessary medical services provided for his compensable injuries.

4. That the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from April 25, 2007 until he returned to work in August of 2007.

5. That the claimant has proven by a preponderance of the evidence that he is entitled to an attorney's fee in this matter as it was controverted by the respondents.

6. That the claimant has proven by a preponderance of the evidence that his injuries were not occasioned by any horseplay.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 25, 2007 until he returned to work in August of 2007.

The claimant has proven by a preponderance of the evidence that he is entitled to the reasonable and necessary medical services provided for his compensable injuries.

The respondents shall pay to the claimant's attorney the statutory attorney's fee on the benefits awarded herein with one-half of said attorney's fee to be paid by the respondents in addition to such benefits and one-half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE