

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F800250

MARIA VIDALES DE BARRON, Widow of MIGUEL BARRON (DEC'D)	CLAIMANT
WEST ARK STEEL & PIPE, INC., Employer	RESPONDENT #1
AIG CLAIMS SERVICE, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED AUGUST 11, 2010

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by JARROD PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 15, 2010, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 2, 2010, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #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 the within claim.
2. The employee/employer/carrier relationship existed between claimant and respondent #1 on December 28, 2007.
3. The claimant was earning an average weekly wage of \$545.39 which would entitle him to benefits at the weekly rates of \$364.00 for total disability benefits and \$273.00 for permanent partial disability benefits.
4. If the death is compensable, respondent #1 and the Trust Fund will accept the

widow, the natural minor child, and the minor stepchild of Miguel Barron as lawful dependents.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of claimant's death.
2. Survivor benefits for widow and two minor children.
3. Attorney fee.

The claimant, Maria Vidales de Barron, contends that her husband, Miguel Barron, was injured at his workplace when two of his co-workers assaulted him. As a result of the injury, Miguel Barron, while hospitalized at Northwest Medical Center, died on January 5, 2008. Claimant was totally dependent on Miguel Barron and is entitled to payment for her and two minor children as allowed by A.C.A. §11-9-527; further, medical benefits and funeral expenses should be paid, as well as an attorney fee.

Respondent #1 contends the decedent was not performing employment related services at the time of his fatal injury. Respondent #1 also contends decedent's fatal injury was substantially occasioned by the use of alcohol and under A.C.A. §11-9-102(4)(B)(iv)(a) respondents are not liable for benefits associated with the injury. Alternatively, respondent #1 contends the decedent was an active participant in an assault or combat resulting from a non-employment hostility which results in his fatal injury not being compensable under the Arkansas Workers' Compensation Act.

Respondent #2, Death & Permanent Total Disability Trust Fund, defers to litigation on the issue of compensability. The Trust Fund will accept the widow and two children as lawful dependents if the claim is found to be compensable.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, 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 June 2, 2010, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The decedent's death as a result of the injury on December 28, 2007 is a compensable injury.
3. Claimant, the decedent's widow, and two minor children are entitled to appropriate compensation benefits pursuant to A.C.A. §11-9-527. Respondent #1 is also liable for payment of medical benefits and funeral benefits.
4. Respondent #1 has controverted claimant's entitlement to compensation benefits.

FACTUAL BACKGROUND

_____ This claim involves the tragic case of the death of the decedent and the incarceration of a co-employee, Willie Blackston. The decedent worked for the respondent as a welder. Other welders working for the respondent included Willie Blackston; Darrell Day; Miguel Barron Villeda, the decedent's nephew, and also a/k/a "Little Miguel"; and Fredrico Barron, the decedent's brother.

Apparently, it was not uncommon for the employees' wives to come to the respondent's place of business before closing time to pick up their husbands. On December 27, 2007, Blackston's wife came to pick him up and Little Miguel made some type of comment in Spanish to which Blackston's wife took offense. She later informed Blackston that one of the Hispanics had said something to her. The next day, December 28, 2007, after arriving at work Blackston confronted the Hispanic welders and attempted to determine who made the comment to his wife the night before. It is unclear whether Blackston made that determination at that time. At any rate, there was not any physical

altercation at that point.

On December 28, 2007, the primary supervisors were not present at the work site that day. Instead, Darrell Day acted as welder supervisor and Matt Dunham as the yard supervisor. In addition, there were also employees present in the respondent's office.

Apparently on December 28 the decedent brought alcohol in the form of tequila to work that day and at a minimum the decedent, Day, and Blackston, spent a portion of the day drinking tequila. In fact, tests following the incident on December 28 revealed that Blackston had an alcohol level of .107 four hours after the altercation and the decedent had a level of .183 several hours later.

At some point before 3:00 p.m. Blackston's wife came to the shop to pick him up. When she came into the shop she pointed out Little Miguel as the individual who had made the comment to her the night before. Blackston began yelling at Little Miguel and punched him, knocking him to the ground. At that point, the decedent approached Blackston and asked something to the effect of "Why did you do that?" Blackston then punched claimant in the face, knocking him unconscious. Day apparently attempted to get Blackston to leave but was unsuccessful. When the decedent regained consciousness and stood up Blackston proceeded to hit him two more times. According to witnesses the decedent was unconscious and bleeding. Attempts were made to revive the decedent and an ambulance was called with the decedent taken to the hospital. The decedent did not recover, but instead died on January 5, 2008.

According to an Agreed Statement of Facts filed in the Circuit Court of Benton County, an autopsy was performed by the State Medical Examiner and determined that the claimant died of a brain injury most likely caused by his head striking the floor rather than a direct result of a punch or kick by Blackston. Blackston pled guilty to second degree murder and is currently incarcerated. Claimant, the decedent's widow, has filed this claim contending that the death was a compensable injury and is requesting compensation

benefits. A hearing on this claim was conducted on July 15, 2010. In lieu of live testimony, the parties submitted sworn statements from various witnesses taken primarily in conjunction with the criminal investigation. The parties also submitted an abstract of the testimony and documentary evidence. A review of the testimony submitted indicates that there are various other issues addressed in those statements such as whether Blackston kicked the claimant, whether Day hit the claimant or anyone else, whether employees were instructed not to call the police, et cetera.

ADJUDICATION

_____ There are three primarily issues which need to be addressed. First is the application of A.C.A. §11-9-102(4)(B)(i) regarding assaults and horseplay in the workplace.

That subsection indicates that a compensable injury does not include:

... injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of non employment-related hostility or animus of one, both, or all of the combatants in which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injury;

In order for this subsection to bar this claim, the decedent must have been an active participant in the altercation. There is no evidence that the decedent was an active participant. Testimony from witnesses indicates that decedent simply attempted to stop the assault on Little Miguel in a non-threatening manner by asking Blackston why he had struck him. Paul Jones, who worked in the yard for the respondent, was present during the altercation. He testified that he did not see the claimant attempt to fight back against Blackston, but that the decedent only tried “to get in the middle and put his hands up like telling him to stop, you know, not - - not no fists, anything like that at all.” Present for the entire altercation was another employee, Tyler Fields. Upon questioning, Fields testified

that the decedent never acted as if he was going to hit Blackston but that his hands were in his pockets or down by his side. Fields testified that he did not see the decedent throw a punch or act like he was trying to fight anyone. In fact, Fields testified that he could tell that decedent was not a threat when he approached Blackston after he had struck Little Miguel.

In short, in order for A.C.A. §11-9-102(4)(B)(i) to apply, the decedent must have been an active participant. There is insufficient evidence indicating that decedent was an active participant in this altercation. Instead, it appears that decedent was simply attempting to stop the assault on Little Miguel in a non-threatening manner. I find the testimony of Jones and Fields to be credible. Therefore, I find that A.C.A. §11-9-102(4)(B)(i) is not applicable.

The second issue to be considered is whether the decedent was performing “employment services” at the time of the injury. A compensable injury does not include “[i]njury which was inflicted upon the employee at a time when employment services were not being performed.” A.C.A. §11-9-102(4)(B)(iii). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” *Texarkana School District v. Conner*, 373 Ark. 372, 284 S.W. 3d 57 (2008). We are to 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. *Id*, 284 S.W. 3d at 61. 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* at 376-77, 284 S.W. 3d at 61. The critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Id* at 377, 284 S.W. 3d at 61.

Based upon the evidence presented in this case, I find that the decedent was

performing employment services at the time of his injury because he was attempting to stop the physical assault of Little Miguel by Blackston. While it is true that Little Miguel was the nephew of the decedent, he was also an employee of the respondent and clearly respondent's interests would be advanced either directly or indirectly by not having one of its employees beaten. While Blackston ultimately assaulted the decedent which resulted in his death, there was no way of knowing that that would be the outcome of the decedent's attempt to intervene. In fact, the evidence indicates that Day also made several attempts to intervene and break up this altercation. According to Jones, Day tried at least twice to pull Blackston away and break up the fight.

In short, I find that the decedent was performing employment services at the time he was assaulted by Blackston. The decedent was attempting to stop Blackston from hitting Little Miguel. While Little Miguel was his nephew, he was also an employee of the respondent. It would make no sense to say that Day was performing employment services by attempting to stop this altercation while at the same time stating that the decedent was not also performing employment services when there is no evidence that the decedent was attempting to fight or escalate the altercation. Instead, the decedent simply asked Blackston why he had struck Little Miguel before he himself was hit. Accordingly, I find that the decedent was performing employment services at the time of his injury.

The third issue to be addressed is the decedent's intoxication. The respondent contends that the decedent was intoxicated on the date in question and that the decedent actually brought the alcohol to work and gave it to Blackston. Respondent contends that everyone's actions that day were fueled by alcohol. However, the fact that the decedent had been drinking at work and had a blood alcohol level of .183 does not automatically bar him from receiving workers' compensation benefits in Arkansas. The applicable statute is codified at A.C.A. §11-9-102(4)(B)(iv)(a)-(d). That statute indicates that compensable injuries do not include injuries where the accident was substantially occasioned by the use

of alcohol. The statute also indicates that the presence of alcohol creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of the alcohol. An employee is not entitled to compensation unless it is proven by a preponderance of the evidence that the alcohol did not substantially occasion the injury or accident.

Here, the decedent clearly had the presence of alcohol in him at the time of the injury as evidenced by the tests taken at the hospital. Therefore, a rebuttable presumption is raised that his injury was substantially occasioned by the use of the alcohol. I find based upon the evidence presented that claimant has met her burden of proving by a preponderance of the evidence that the decedent's injury was not substantially occasioned by the use of alcohol. Here, the cause of the decedent's injury was a punch to the face which knocked the decedent unconscious and resulted in him falling and striking his head on the floor.

According to the testimony of Jones, he saw the decedent get knocked down three times by Blackston. Jones testified that Blackston hit the decedent in the face and that the decedent collapsed to the ground. After the decedent got up he was hit again by Blackston. Jones testified that the decedent looked dazed and it took him longer to get up after the second blow. Finally, Jones testified that the decedent was hit a third time and fell straight to the ground with his head bouncing off the ground and he did not move. Similar testimony was provided by William Waltrous who saw Blackston hit the decedent and after the third time the decedent fell back "like a board."

Based upon the evidence presented in this case, I find that the rebuttable presumption that the decedent's injury was caused by the use of alcohol has been overcome. The decedent's injury and death in this case were not caused by a lack of judgment or a physical impairment caused by his intoxication. Instead, decedent's injury and his resulting death was specifically caused by a surprise punch thrown by Blackston

to the decedent's face which knocked him unconscious, causing him to hit the ground with his head which resulted in a fatal brain injury. The decedent's asking Blackston why he hit Little Miguel under these circumstances is the type of action one would take regardless of whether one were intoxicated. This is particularly true given the fact that the decedent and Blackston had been friends in the past. Accordingly, I find based upon a preponderance of the evidence, that the alcohol did not substantially occasion the decedent's injury or accident.

In summary, I do not find that the decedent was an active participant in an assault or combat at the time of his injury. Therefore, A.C.A. §11-9-102(4)(B)(i) is not applicable. I also find that decedent was performing employment services at the time of his injury and that he was attempting to prevent an assault on Little Miguel by Blackston. While Little Miguel was his nephew, he was also an employee of the respondent and respondent would directly benefit from not having one of its employees beaten. As previously noted, while Blackston ultimately assaulted the decedent which resulted in his death, there was no way of knowing that would be the outcome of the decedent's attempt to intervene. It should also be noted that Day also attempted to intervene and break up this altercation. Finally, although the decedent was clearly intoxicated at the time of his injury, that is not an automatic bar to compensation benefits. Instead, the presence of alcohol raised a rebuttable presumption that the injury was substantially occasioned by the use of alcohol. I find based upon the evidence presented in this case that that presumption has been overcome and that claimant has met her burden of proving by a preponderance of the evidence that the decedent's injury was not substantially occasioned by the use of alcohol. Instead, the decedent's injury was directly caused by him being knocked unconscious and falling and striking his head.

Accordingly, I find that the injury and death of the decedent on December 28, 2007 was a compensable injury. Claimant, the decedent's widow, and his two minor children are

entitled to appropriate compensation benefits pursuant to A.C.A. §11-9-527. Respondent #1 is also liable for medical expenses and funeral expenses. In addition, I find that respondent #1 has controverted entitlement to these compensation benefits.

AWARD

The decedent suffered a compensable injury which resulted in his death while working for respondent on December 28, 2007. Claimant, the decedent's widow, and his two minor children are entitled to appropriate compensation benefits pursuant to A.C.A. §11-9-527. In addition, claimant's attorney is entitled to the maximum statutory attorney fee on those benefits based upon respondent #1's controversion of the claim.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent #1 is ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$1,010.50.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE