

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206461

JOHNNY L. RODGERS, SR.,
EMPLOYEE

CLAIMANT

ALLENSWORTH TRANSMISSION,
EMPLOYER

RESPONDENT

OHIO CASUALTY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED AUGUST 7, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE TODD WILLIAMS, Attorney at
Law, Jonesboro, Arkansas.

Respondents represented by HONORABLE CAROL WORLEY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on November 15, 2002.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction over
this claim.
2. The stipulations agreed to by the
parties are reasonable and are
hereby accepted as fact.

3. On February 28, 2002, the claimant sustained a compensable injury to his right knee as the result of an altercation with a co-worker which arose out of a work-related dispute.
4. A preponderance of the credible evidence of record reflects that the altercation at the workplace, and the claimant's resulting injury was the result of an employment related hostility and is, therefore, compensable under our workers' compensation laws.
5. Respondent is responsible for all outstanding medical and related expenses, and, respondent remains responsible for continued reasonably necessary medical treatment, including, but not limited to proposed arthroscopic surgery, together with additional treatment, if warranted.
6. Respondent has controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Respondent appeals the Administrative Law Judge's finding that claimant sustained a compensable injury to his knee during an altercation with a co-worker that was a

result of an employment-related hostility or animus. There are three elements to the assault defense and all three must be proven by a preponderance of the evidence to establish the defense. The three elements are:

- (1) That claimant was an active participant in the assault or combat;
- (2) That the assault or combat was the result of a nonemployment-related hostility or animosity; and
- (3) That the assault or combat amounts to a deviation from customary duties.

See Dorothy L. Walker v. Independent Case Management, Full Commission Opinion filed June 15, 1999 (E705055).

It is undisputed that the argument that lead to the altercation was over whether to keep the door to the shop open or closed or, in other words, the dispute was over controlling the temperature in the workplace. In its brief, respondent acknowledged that "the testimony revealed that the parties were fighting over whether the back door should be left open or closed."

Respondent points to the evidence that claimant and the co-worker had known each other for many years and were "constantly bickering." However, that does not change the fact that the fight was over controlling the working conditions. While their personal relationship with each other may explain why the dispute culminated in a physical

altercation, the underlying reason for the conflict remained work related.

We therefore affirm the November 15, 2002 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. It is undisputed that the claimant and his co-worker, Terry Henry, were involved in an altercation at their place of employment on February 28, 2002. Ark. Code Ann. §11-9-

102(4)(B) (Repl. 2002) states, in relevant part, that a compensable injury does not include:

[An] injury to an active participant in assaults or combats which, although they may occur in the workplace, are the result of a non-employment-related hostility or animus of one, both, or all of the combatants, and which said assault or combat amounts to a deviation from customary duties.

Citing only the testimony of the claimant, the Administrative Law Judge found that while the claimant actively participated in the altercation, the combat resulted from an employment-related dispute over controlling the temperature of the workplace, and that the injury to the claimant's right knee incurred during the altercation was therefore compensable. Based upon my review of the testimony and evidence in this case, I find that the Administrative Law Judge's decision is in error, and should be reversed.

The claimant and Terry Henry had known each other for 20 years and argued so often that co-workers compared them to a married couple. The altercation that is the subject of this claim was associated with a long-standing non-employment-related hostility and, therefore, any injury which the claimant may have sustained as a result of that altercation is not compensable.

Terry Henry testified regarding the poor relationship he had with the claimant and the following exchange occurred during his examination:

Q. Is yelling at each other something you're able to do at work, I mean --

A. Well, we do that. We have done this several times there, you know.

Q. So that's not unusual?

A. No, that's not unusual for me and him to get to hollering and fussing at each other.

Q. Okay.

A. I mean, we've done it before.

Q. Have you done that since you've worked there?

A. Yeah.

Q. On and off?

A. Yeah, you know, on and off occasionally. Anytime you work with somebody, you're not always going to agree on what they agree on it. I mean, you have different opinions about things.

Q. Were they different opinions about personal stuff or --

A. Right.

Q. -- Anything in general?

A. Right. Personal, just religion in general, a few other things. I mean, his opinion -- he has one opinion, I got another. I mean, it's just we're two different people.

Q. Nothing to do with work?

A. No, nothing to do with work really.

Regarding the specific altercation at issue, Henry testified as follows:

Q. Why is it you lunged after him?

A. Because he had slapped me in my face. Well, all I was really trying to do was just calm him down, because me and Johnny's been friends so long. And I mean, I would never try to hurt him, not intentionally at all. I mean, I could if I wanted to, but I really didn't.

Q. Were you all fussing about anything that had to do with work?

A. No.

Q. It just had to do with the door?

A. Just me and him just got into it.

Q. Had you gotten into it earlier that day, anything happen earlier?

A. Not really. He just come in in a bad mood that day.

Q. Why do you say that?

A. Just he wasn't his normal self. I mean, I've been knowing Johnny a long time, and I know he just had a lot on his mind. I'll say that.

One of the owners of the respondent-employer, Charles Allensworth, witnessed the altercation at issue and testified as follows:

Q. Before that incident happened, were those two, Terry and Johnny, squabbling in the workplace?

A. They bickered all of the time.

Q. Are you the one that said they were like an old married couple?

A. Yeah, I thought they ought to be married, because they act like married people.

In the case of Flowers v. Arkansas Hwy. & Transp. Dept., 62 Ark. App. 108, 968 S.W.2d 660 (1998), a claim is not compensable if it is shown:

- [1] That the injured employee was an active participant in the assault of combat;
- [2] That the assault or combat is the result of non-employment-related hostility or animosity; and
- [3] That the assault or combat amounts to a deviation from customary duties.

Based on this three-prong test, I find that Ark. Code Ann. §11-9-102(4)(B) acts to bar this claimant's claim. The claimant and Terry Henry had known each other for 20 years and the testimony established that they constantly bickered over non-employment-related issues. This constant bickering resulted in hostility which got out of hand and led to an altercation in the workplace. Because I find that any injury the claimant may have sustained to his knee is

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not compensable, I must respectfully dissent from the majority opinion.

JOE E. YATES, Commissioner