

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313638

SARIO MONDRAGON, EMPLOYEE (DECEASED)	CLAIMANT
MELVIN & NONNIE CARPENTER D/B/A NONNIE'S ANTIQUES, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE, CARRIER	RESPONDENT

OPINION FILED JUNE 21, 2006

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

Claimant represented by HONORABLE PAUL KEITH, Attorney at Law, Monticello, Arkansas.

Respondent represented by HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal a decision of an Administrative Law Judge finding that the claimant's death was the result of a compensable injury sustained during the performance of employment services. They argue that the claimant was not performing employment services at the time of his injury.

After a de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed. In our opinion, the preponderance of the evidence

shows that the claimant was acting in course and scope of employment and was performing employment services at the time of his injury. Accordingly, we affirm the decision of the Administrative Law Judge finding that the claimant's injury was compensable and awarding related medical and funeral expenses.

At the time of the accident, the claimant had been working for the respondent for over a year. He lived and worked onsite. His job duties consisted of moving, repairing, and refinishing furniture. In addition, he was to perform other, unnamed tasks as needed. The portion of the business open to the general public was usually open until 5:00 p.m., but employees were allowed to continue working in the shop area after that time. Employees placed furniture on the porch while working on it. At the end of the day, they were required to take all tools and furniture inside the shop. This requirement was to prevent theft and the workday was not considered over until that task was completed.

The claimant worked with Chris Carpenter, coworker, and grandson of the owner. Chris Carpenter had received permission to use his bow and arrow at the work site in order to prepare for hunting season. When the end

of the day approached and it was time for the other workers to put things up, Carpenter would go to the side of the workshop and practice shooting his bow and arrow into a makeshift target that looked similar to a bale of hay.

On the date of the accident, when all work but cleanup was finished, Chris Carpenter went to practice with the bow and arrow. The claimant was walking around the corner of the building and an arrow struck him in the eye. The claimant was transported to the hospital and was airlifted for additional treatment, but later died. Melvin Carpenter, Owner, was notified of the accident at around 5:30 p.m. When he returned to the work site, furniture remained on the porches and the workshop had not been closed.

The claimant's family now brings this claim on behalf of the claimant. They are seeking medical benefits and funeral expenses incurred due to the claimant's death. The sole issue on appeal is whether the claimant was performing employment services at the time of his injury. In our opinion, the record shows that at the time of the injury, the claimant was attempting to find a coworker to help him put up tools or take the furniture inside prior to the close of a business day. Since such task was required

as part of his job duties, the claimant was performing employment services at the time of his injury.

A "compensable injury" is defined as an accidental injury causing internal or external physical harm to the body arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4) (A). Further, Act 793 redefined the term "compensable injury" to exclude an injury that was inflicted upon the employee at a time when employment services were not being performed. Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1997); Ark. Code Ann. § 11-9-102(4) (B) (iii).

As noted by the Supreme Court recently in Wallace v. West Fraser South, Inc., \_\_\_ Ark. \_\_\_; \_\_\_ S.W.3d \_\_\_, (Opinion filed January 26, 2006),

Since 1993, 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. . . ." . 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." 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." The critical issue is

whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury.(Internal citations omitted).

The respondents argue that it is unknown why the claimant was walking around the corner at the time of his injury, and that accordingly, he has not proven he was acting in the course and scope of employment at the time of his injury. We find this argument to be unconvincing.

The record reflects that the claimant was required to put away all furniture prior to the time of leaving work. Melvin Carpenter testified that his grandson, Chris Carpenter notified him of the injury. He testified that when he arrived at the work site the furniture had not been placed indoors and that the shop door was not locked. He also said that the claimant's and other employees' work had not been completed when he arrived at the work site. He testified that while the store closed at five o'clock, the employees often worked later. He also said that at the time of the accident, the workers, including his grandson, were supposed to be placing the furniture inside the shop for the day.

Chris Carpenter corroborated Melvin Carpenter's testimony that all furniture had to be placed inside the

shop before closing and indicated that at the time of the claimant's injury, all work had not been completed. He said that he was practicing shooting with his bow and arrow at the time of the accident, and indicated that he began practicing near the end of the day when it was time to start putting items away.

Chris Carpenter denied knowing the reason for the claimant coming around the corner and testified that the accident occurred during the time that work was usually being completed. He admitted that at the time of the accident, the claimant would have had to come to his location to have himself or Martinez help if a heavy piece of furniture needed to be moved. Carpenter indicated that the claimant was unaware of the fact that he was practicing and denied conversing with him immediately before the accident. Carpenter also said that the claimant was walking around the corner when he was struck by the arrow. Carpenter indicated that he was unaware the claimant was coming around the corner and testified that he did not know of the claimant's existence until he yelled after being struck by the bow and arrow. Carpenter testified,

And I was trying to get it ready to hunt with, so when it got time to start gathering up our tools and kind of

straightening up the shop, calling it a day, I would go around back and shoot with the little bit of daylight what I had, to try and get it ready. And I guess he come to see what I was doing, or I don't know.

Chris Carpenter also testified that at the time of the accident it was beginning to get dark and that he believed his coworker, Juan Martinez had already come around the corner a short time before. He also said that he believed Martinez was with him during the time while he was shooting the bow and arrow. He testified that he was uncertain of Martinez's exact location, but that he believed Martinez was behind him at the time the claimant was hit. These statements are corroborated by the Lake Village Police Department Incident Report, which was completed on the day of the accident. The report provides that Chris Carpenter,

TOLD ME THAT HE AND WITNESS WERE BEHIND THE SHOP. CARPENTER WAS SEEING HOW WELL HIS COMPOUND BOW SIGHTS COULD BE SEEN AT NIGHT. HE SAID AS HE DREW BACK TO FIRE THE BOW, THE TRIGGER SLIPPED AND LAUNCHED THE ARROW. UNBEKNOWNED (sic) TO HIM, VICTIM HAD WALKED AROUND THE CORNER OF THE SHOP AND WAS STRUCK IN THE EYE BY THE ARROW.

In our opinion, the aforementioned testimony by Chris and Melvin Carpenter and the police report are indicative that the claimant was likely in the act of

attempting to get help lifting furniture or putting other items away at the time of the accident. We acknowledge that Chris Carpenter was unable to definitively state what the claimant's motive was for coming around the corner.

However, we find his purpose was to see if Carpenter or Martinez could help him move furniture. That was the time of the day that furniture and tools were supposed to be put up and Chris Carpenter testified that he left the workshop when it was time for workers to perform that task. Since the claimant was unaware of Chris Carpenter's intent to practice with the bow and arrow, and Carpenter testified Martinez was already there, we find that the likely explanation for the claimant's arrival was to seek assistance in putting away tools or moving furniture.

The respondents assert that all work had been completed, that the claimant was seeking a cigarette, and that he was on break at the time of the accident. In making this argument they point to the statement given by Juan Barajas Martinez. Martinez's statement was given to an insurance company in the form of a recorded statement. It is unknown whether the interpreter was certified, and it is apparent that Martinez often had difficulty understanding and providing his statement. Furthermore, it appears that

during the interview, the insurance adjustor and Melvin Carpenter were allowed to assert their opinion or to give statements to the interpreter. It appears their statements were not translated to Martinez. Also, there are several portions of the statement where there appears to be some controversy as to what the proper translation was as to some portions of Martinez's testimony.

Last, and perhaps most importantly, the claimant's representative did not participate in the questioning during the statement and Martinez was not available at the time of the hearing for questioning. As a result, the parties were unable to question or clarify many of the statements made by Martinez. For these reasons, the Administrative Law Judge correctly gave little weight to the statement.

Additionally, we note that when viewing the content of Martinez's testimony, it is apparent that it should be given no weight. Martinez's testimony was contrary to that of both of the Carpenters, and when considering the previously mentioned problems with his statement, we find that their testimony should be preferred.

Initially Martinez gave the following statement,

Uh-huh, and Sario was also with the guy,  
the other one; they were talking, but  
they were talking in English, you know?

And I don't understand English. So then I went to the other side, I took out a cigarette and I walked around; then when I got to where they were, the guy Sario says to me, "give me a cigarette". I tell him, "I don't have any, they are inside." But since it was dark, since, you know, at 6 pm. (sic) it was getting, you know, dark, night was falling, you could say. And that guy was putting away the spears, or, you know, the - what are they? - well, the hunting bows- what are they called?

Martinez then went on to indicate the claimant did not leave to get a cigarette but instead continued to converse with the other guy (Chris Carpenter) and that is when the arrow hit him. He also said that all work was done, that the furniture had been put inside, and that he and the claimant had been "resting" since completing their work for the day. He also said that he and the claimant went to watch Carpenter practice.

We note that the Martinez's statements are contrary to those of the Carpenters'. Both Carpenters testified that work had not been completed for the day and that furniture needed to be put away before the completion of the work day. Likewise, Chris Carpenter testified that the claimant did not know he was practicing and denied speaking with the claimant immediately before the accident. In fact, Chris Carpenter said that he was totally unaware of

the claimant's presence until after the accident had occurred. Furthermore, Chris Carpenter testified he was shooting an arrow at the time of the accident. This is corroborated by the Police Incident Report, indicating that Chris Carpenter was in the act of shooting an arrow at the time of the accident. This is in direct contradiction to Martinez's statement that Chris Carpenter was putting the bow and arrow away when the accident occurred.

After considering the myriad evidentiary and procedural problems with Martinez's statement in contrast with the consistent testimony of Melvin and Chris Carpenter, we find Martinez's statements to be less than credible. Accordingly, we give no weight to the statement of Martinez and prefer the testimony of Melvin and Chris Carpenter.

Ultimately, we find that the claimant's injury occurred when he was turning the corner to seek assistance from his coworkers. While the respondents are correct that the reason for the claimant's approaching Chris Carpenter is not conclusive, it is not required to be so. Instead, only a preponderance of the evidence needs to be established, and in our opinion, the testimony of the Carpenters shows that the claimant was within the time and space boundaries of employment and was acting in the course and scope of

employment at the time of the accident. Accordingly, we affirm the decision of the Administrative Law Judge finding that the respondents are to pay medical and funeral expenses related to the claimant's compensable injury.

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).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 (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(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was performing employment services when he sustained a fatal injury on December 18, 2003. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

This is a tragic case. The claimant was accidentally shot in the eye with an arrow accidentally shot by a fellow co-worker and grandson of the employer. Immediately following the accident, the claimant was transported to the local hospital and was later airlifted to a hospital in Memphis, Tennessee where he later died from his injuries. The only issue for determination on appeal is whether the claimant was performing employment services at the time of his injury.

Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case. In the present case, the evidence reveals that the claimant was injured on the evening of December 18, 2003, sometime after 5:00 p.m. Melvin Carpenter, the owner of respondent-employer,

testified that he had left work at 5:00, and was called sometime around 5:30 or so and was told that there had been an accident at the shop. Mr. Carpenter further testified that he trusted his employees to perform the work that needed to be done and that they worked until they were finished for the day. After working on the furniture, the employees would move the furniture and tools back in to the shop before locking up for the evening. According to Mr. Carpenter, when he arrived at the shop after receiving word of the accident, there was still furniture outside that had not been put away for the evening. Chris Carpenter, Mr. Carpenter's grandson, was a co-worker of the claimant. Chris Carpenter testified that when it was time to quit work for the day, he left the claimant and another co-worker to put the furniture away while he went out back to practice with his new crossbow while he still had some daylight. Chris Carpenter testified that it was "getting to the point where I couldn't see no more..." He further testified that he never heard anything and did not see the claimant before the crossbow discharged. Chris Carpenter candidly admitted that he had no idea why the claimant had come behind the shop. Chris Carpenter specifically stated:

He made a good point that I didn't think of, he could have been coming to ask for help to move a piece of furniture, but no, ma'am, I don't. I have no idea why he come around the corner.

Also in evidence is a transcribed recorded telephone statement the adjuster took of Juan Martinez. Mr. Martinez worked with the claimant and Chris Carpenter. At the time of the hearing, Mr. Martinez was unavailable to testify as he had returned to Mexico. Pursuant to Mr. Martinez's unsworn statement, he, the claimant, and Chris Carpenter had finished work for the day and they were all out back watching Chris shoot the crossbow when the accident happened. Although Mr. Martinez stated that there was still furniture and tools to put away, they had quit work for the day. In this regard, it appears that Mr. Martinez did not consider the cleaning up and putting away of furniture and tools to be work. Martinez stated that just before the accident, the claimant had asked him for a cigarette.

The Administrative Law Judge did not give much weight to Mr. Martinez's statement as it was not given under oath and it was inherently inconsistent with testimony of Melvin and Chris Carpenter.

After reviewing all the evidence of record, even giving the Carpenters' testimony more weight than that of Juan Martinez, I am unable to find that the claimant has proven by a preponderance of the evidence that the claimant was performing employment services at the time of his injury. This is the most unfortunate of accidents. Even more unfortunate is the fact that the claimant was unavailable to provide any evidence as to what he was doing going behind the shop when he was struck by the crossbow. While it is possible that the claimant was looking for Chris Carpenter to help him move a piece of furniture, we will never know the reason for the claimant being where he was at the time of the accident. The claimant did not say anything to Chris before he was struck to let on as to his purpose for coming around the shop. Mr. Martinez's statement is of little help as it was clear that there was some translation misunderstandings during his statement. Nevertheless, according to Mr. Martinez work was not being performed by either him, Chris Carpenter, or the claimant when the accident occurred. Chris Carpenter was obviously concentrating on this target practice when the injury occurred and was not aware of Mr. Martinez's or the

claimant's presence. Mr. Martinez was not working as he was on a cigarette break; and if Mr. Martinez is to be believed, the claimant was in search of a cigarette when the accident occurred.

Given these facts, I am unable to find that the claimant was performing employment services at the time of his injury. He was not moving furniture; he was not coming off of a break; and, there is no credible evidence that he was seeking help to finish up the last of the work for the day. Under the circumstances of this claim, to find that the claimant was working and that he is entitled to benefits, is nothing more than speculation and conjecture. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Therefore, for those reasons set forth above, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury for which he is entitled to benefits.

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Therefore, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner