

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409072

KELLY L. HOLDER, EMPLOYEE	CLAIMANT
AMBASSADOR PERSONNEL OF ARKANSAS, EMPLOYER	RESPONDENT
ALEA NORTH AMERICA INS. CO./ GALLAGHER BASSETT SERVICES, TPA	RESPONDENT

OPINION FILED MAY 17, 2007

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

Claimant is not represented by counsel but appears *pro se*.

Respondent represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 8, 2006.

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 hereby accepted as fact.

3. The claimant failed to prove by a preponderance of the evidence the elements of a compensable injury under the Arkansas workers' compensation laws.

4. The respondents controverted the claim in its entirety.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable work-related injury on August 29, 2004. The Majority affirms the Administrative Law Judge's opinion that the claimant was not credible, that she was involved in horseplay at the time of the accident, and as such she was not entitled to medical or temporary total disability benefits.

I find that the claimant's injury was due to falling while in the course and scope of her employment. I further find the Majority erroneously concludes the claimant was actively involved in horseplay. The claimant testified that she was not swinging her legs at co-worker, Adkisson, and the corroborating testimony of witness Garrison bolsters her credibility. Adkisson, pushed upon the claimant's legs, causing her to fall backwards and fracturing her cervical spine. Furthermore, even if the claimant swinging her legs, such activity simply does not rise to the level of horseplay. Therefore, I would have reversed the Administrative Law Judge and awarded related medical and temporary total disability benefits.

The Majority, by affirming and adopting the Administrative Law Judge's opinion as their own, contends that the claimant was not performing employment services at the time she sustained her injury and that she was a participant in horseplay when the injury occurred. Workers' compensation laws define a compensable injury as, "An accidental injury causing internal or external physical harm

to the body ... arising out of the course of employment and which requires medical services or results in disability or death. A.C.A. §11-9-102(4)(A)(i). Employment services are performed when the employee does something, "within the time and space boundaries of employment," and the injury occurred when the employee was acting to benefit the employer directly or indirectly. Collins v. Excel Spec. Products, 347 Ark. 811, 69S.W.3d 14(2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1(2002).

Claimants have been determined to be providing employment services when the employee is doing something that is generally required by his or her employer. White v. Georgia-Pacific Corporation, 339 Ark. 474, 6 S.W.3d 98(1999); see Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558(1999); Shultz v. Pulaski County Special Sch. Dist., 63 Ark. App. 171, 976 S.W.2d 339(1998). Horseplay has generally been considered within the scope and course of employment. See Southern Cotton and Oil Division v. Childress, 237 Ark. 909, 377 S.W.2d 167(1964).

In the present case, the claimant was performing employment services because she was furthering Flowers's interests by remaining at her work station. It was imperative to Flowers to occasionally change the type of bun in the machine and that the claimant wait by the machine until it restarted. During this time, the claimant was required to keep her eye on the machine and be prepared to work at any given moment. This rule helped to increase productivity for Flowers. Furthermore, the claimant was waiting in her designated work area for the machine to restart when her injury occurred, and if she had left that area, she most likely would have been reprimanded. Therefore, the claimant was providing a service within the time and space boundaries of her employment that was not only required by her employer, but also directly benefitted her employer by increasing production. As such, she was providing an employment service at the time of the injury.

Claimant established proof by a preponderance of the evidence that she sustained a compensable injury which arose out of and in the course of employment and that she

was not a participant in horseplay when the injury occurred. The Majority, by affirming and adopting the Administrative Law Judge's opinion as their own, erroneously relied on the inconsistent testimonies from Jackson and Adkisson that the claimant was swinging her legs at Adkisson, when in fact, Garrison corroborated the claimant's testimony that although she was joking with Adkisson at the time, she did not swing her legs at him. Even if the claimant was swinging her legs, such activity does not constitute horseplay. As such, I find that the Majority errs in denying the claim.

Arkansas Code Annotated § 11-9-102(4) (B) (Supp. 1997) reads that a compensable injury does not include "injury to any active participant in assaults or combats which, although they may occur at the workplace, are the result of 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; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries."

Although Arkansas Code Annotated § 11-9-102(4)(B) prohibits "horseplay," the term has not been defined by statute or case law, except to note that its meaning is synonymous with the term "skylarking." Morales v. Martinez, 198 S.W.3d 134 (2004); citing Southern Cotton and Oil Division v. Childress, supra. The term "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." Id. citing Webster's Third New International Dictionary (1961). In Morales, the claimant was injured when operating a forklift that he was prohibited from driving. There was evidence that the operators of the forklift were distracted by a fire, when the claimant got behind the wheel of the forklift and began driving the forklift very fast in tight circles "like a game," and that he was "wasting time" and "playing" while doing so. The claimant was found to be involved in horseplay. Essentially, the Morales decision reflects not only the change in legislation in adopting Arkansas Code Annotated § 11-9-102(4)(B), but also the

court's continued reliance on well established case law, as evidenced by the fact that they continue to cite and rely on cases decided before the statute was changed.

In Patteson, the Commission has continued to follow Morales, by determining whether the claimant was involved in horseplay. The Commission continued to define horseplay or "skylarking" as "rough or boisterous play." In Patteson, part of the claimant's employment duties included answering the telephone, however, the claimant was prohibited from sitting in booths at work. On this particular occasion, the phone rang while the claimant was sitting in a booth. The claimant jumped up and tried to jump over the booth when she tripped, fell, and broke her hand. The claimant testified that she knew that she was not supposed to be sitting in a booth, but that she did it every day. The Administrative Law Judge found that the injury was not compensable because the claimant was involved in horseplay, but the Commission reversed the Administrative Law Judge's decision, finding that the claimant was providing a service, which was required by her employer, and

that she was not "skylarking," which would involve wasting time or playing a game that did not benefit her employer. Therefore the claimant was determined not to be engaged in horseplay. Patteson v. Ozark Waffles, LLC, Full Commission Opinion Filed November 30, 2005 (F412585). Essentially, the Court of Appeals's definition of horseplay as "rough and boisterous play" as found in Morales, is upheld by the Commission in Patteson.

Although decided prior to the establishment of Arkansas Code Annotated § 11-9-102(4)(B), the Arkansas Court of Appeals found that non-participating victims were not engaged in horseplay. In finding that minor acts of horseplay may be insubstantial, the Court developed a four part test to determine whether the horseplay was an actual deviation from one's course of employment. In Ringer, the claimant asked to borrow a pocket knife from a co-worker, so that he could cut the wrapping on a magazine loaded pallet, as his job required him to do. When the claimant felt a nudge from behind, he reached back with his hand to receive the knife and was severely cut. The co-worker testified that

he and the claimant had in the past engaged in cutting, or attempting to cut each others belt loops with pocket knives. At the time of the accident, the witness was trying to cut the claimant's belt loop. The Arkansas Court of Appeals found that the claimant was a non-participating victim of horseplay, and therefore, that his injury was compensable. Ringer AM v. Combs, 41 Ark. App. 47, 849 S.W.2d 1(1993).

The Court in Ringer also noted that minor acts of horseplay do not automatically constitute departures from employment but may be found to be insubstantial. Id. Whether initiation of horseplay is a deviation from one's course of employment depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., whether it was commingled with the performance of a duty or involved in the abandonment of a duty); (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. Id. citing 1A Larson, The Law of Workmen's Compensation,

23.00 - 23.66 (1992); See Southern Cotton and Oil Division v. Childress, 237 Ark. 909, 377 S.W.2d 167(1964).

The Majority asserts that Ringer is no longer applicable. I cannot agree with that conclusion as the Appellate Court and the Commission rely on the standards set forth in it. Even though the Ringer decision was made prior to Arkansas Code Annotated § 11-9-102(4)(B), the Commission still appears to apply the Ringer test to determine whether a minor act of horseplay constitutes an actual deviation from one's course of employment. In Stevenson v. Dillards, Full Commission Opinion Filed July 13, 1999 (E803864), the claimant was sitting at her desk and became "all caught up" on her work. She was waiting on the next telephone call to come in, when she decided to communicate with her co-worker, who sat directly behind the claimant. When the claimant leaned back in her chair, the chair overturned, causing the claimant to fall and hit the floor. The Commission affirmed the Administrative Law Judge's opinion that the claimant was not involved in horseplay, citing, "the mere movement of her chair to communicate with a fellow employee between job

assignments, would not constitute a substantial diversion which would bring her out of the reach of the scope of her employment." Id. Accordingly, even though the Commission in Stevenson did not cite Ringer, they upheld the principle of Ringer in finding that a minor act of horseplay does not automatically constitute departure from employment.

The Majority cites Ark. Code Ann. § 11-9-102(4) (B) and erroneously concludes that the claimant must have been swinging her legs and was therefore involved in horseplay. The Majority, however, clearly misstates the statute, because it only prohibits *participants* in horseplay from recovering. The claimant testified that she was sitting on the machine, talking to Jackson, when Adkisson pulled up on her legs and flipped her over backwards. The claimant testified that she did not swing her legs at Adkisson. Garrison corroborated this testimony. Clearly, the claimant was not an active participant in horseplay, and in fact was a non-participating victim. Garrison's testimony is proof that the claimant was not swinging her legs at Adkisson, and

therefore she cannot be found to be a participant in horseplay.

Yet even if the claimant was swinging her legs, it simply does not constitute horseplay as defined by the Court of Appeals. In order to be involved in horseplay, the claimant must be involved in "rough or boisterous play." Swinging one's legs simply cannot be interpreted as "rough or boisterous play." The present case is clearly distinguishable from Morales, in that the claimant in Morales was engaged in a dangerous activity by driving the forklift very fast in tight circles "like a game." Such activity was determined to be rough or boisterous play. Yet in the present case, the claimant was sitting on the machine, allegedly flirting and swinging her legs, which could hardly be described as rough or boisterous play. Flirting does not constitute horseplay. Likewise, in Stevenson, the claimant was sitting in a chair when it fell over backwards as she leaned back to talk to a co-worker. The Court determined that her activity did not constitute horseplay. Just as sitting in a chair did not constitute

rough or boisterous play in Stevenson, in the present case, I find that the claimant sitting on a machine, allegedly flirting and swinging her legs in no way constitutes rough or boisterous play.

Likewise, as in Patteson, even if the claimant was swinging her legs, such activity did not rise to the level of horseplay because it does not constitute rough or boisterous play. Additionally, it is unclear if the claimant even touched Adkisson while she was allegedly swinging her legs. Even Adkisson's testimony suggests that the claimant did not touch him. As such, the claimant did not engage in any physical activity, and there was no reason for Adkisson to flip her. Furthermore, there was certainly no reason for the claimant to expect to be flipped upside down. Essentially, there is no evidence that the claimant was involved in rough or boisterous play.

Even assuming that the claimant was swinging her legs and therefore involved in horseplay, such a minor act, under the Ringer four part test, is insubstantial because it was not a serious deviation from her course of employment.

First, the extent of the claimant's deviation from her employment was negligible in that the claimant was at her work station, waiting on the machine to begin when the accident occurred. This was not a deviation from her employment, as the employer required her to stay in that place while they were changing the buns. In fact, the claimant would have been fired if she had left her work station at that time. Second, the completeness of the deviation was insubstantial as she had not abandoned her duty. Rather, the claimant's actions were co-mingled with her duties, in that she remained in her work area, waiting on the machine. Clearly, the claimant had not abandoned her duties. Third, horseplay had been accepted as part of the employment. The claimant, Jackson, and Adkisson all testified that sitting on the machines was common practice, even though they were not supposed to sit on them. Additionally, Adkisson admitted that employees often joked around, throwing dough balls at each other and bantering back and forth. Such activity was not stopped by the managers. In fact, Adkisson, as leadman, could have stopped

the other employees from any unwanted behavior, but he did not. Fourth, the nature of the employment is expected to include some horseplay. The employees were expected to wait by the machines from five to fifteen minutes without actually working, leaving time for employees to partake in horseplay. Obviously, horseplay was common during these down times, evident by Adkisson's testimony that dough balls were thrown at other employees. Also, the claimant worked the third shift, when there were not as many supervisors around to stop any horseplay which might occur. Jackson even admitted that they sat on the machines because no one stopped them. Accordingly, even if the claimant was involved in innocent bantering, under the Ringer test she was still performing an employment service and such a minor deviation should be considered insubstantial.

As in Stevenson, a minor act of swinging one's legs does not constitute a substantial diversion which would bring her out of the scope of her employment. In Stevenson, the claimant leaned back in her chair to talk to another employee, and the chair overturned, causing the claimant to

fall and hit the floor. It was common for the co-workers in Stevenson to sit around and talk to each other, yet it was determined that such activity was not a substantial diversion. In the present case, the workers were essentially sitting around and talking as well. The claimant was merely talking and flirting with her co-worker, and as a result Adkisson pulled up on her legs and flipped her over. The claimant, who could not have foreseen Adkisson's actions, was only an innocent victim, and as such her actions simply do not constitute a substantial diversion. Furthermore, horseplay was so common at Flowers that Adkisson even admitted that they often threw dough balls at one another, yet no one had been disciplined for that behavior. Even Garrison admitted that the claimant and Adkisson were joking around at the time of the accident. Yet, the joking must have been so insubstantial, that even Jackson could not remember what really happened. Additionally, the supervisors at Flowers never put a stop to any unwanted behavior, as evidenced by their testimony that they had never fired anyone for sitting on the machine. Accordingly, swinging

one's legs would have been an insubstantial deviation from the normal course of employment.

Finally, I find it curious that the Majority chooses to rely on the testimony of Jackson and Adkisson over the Claimant and Garrison. The claimant testified that she was not swinging her legs or inviting Adkisson to push up on her legs. Garrison, a Respondent witness, corroborated the claimant's testimony that she was not swinging her legs. Jackson's testimony was, at best, inconsistent. Jackson testified that the claimant was not swinging her legs. However, six months after the accident Jackson had signed a statement which stated that the claimant was swinging her legs at Adkisson as he walked by, and that it appeared the she was almost inviting him to grab her legs. When asked which statement was true, Jackson stated that she could not really remember what happened, so the written statement must be true. I find it peculiar that the Respondents asked for a statement six months after the accident, and that they actually typed up the statement, when Jackson, was completely capable of writing her own statement. Clearly,

Jackson is not a reliable witness. Furthermore, the typed statement was not contemporaneous and is therefore no more credible than Jackson's testimony.

Additionally, it is even more peculiar that the Respondents did not have a written statement from Garrison, who also witnessed the accident. As such, the only testimony that the claimant was swinging her legs came from Adkisson. Accordingly, it was in Adkisson's best interest to lie about the situation and claim that the claimant initiated the contact, because he was having an extra-marital affair with Jackson at the time and he was subsequently subjected to disciplinary action and lost his job at Flowers. The Majority erroneously gave more weight to the testimony of Adkisson than to either the claimant or the Respondent's unbiased witness, Garrison.

The Majority also argues that the claimant agreed that she was involved in horseplay in the Letter of Termination that she signed. The Letter of Termination, however, was not an admission, but rather an acknowledgment that the Respondents cited insubordination, sitting on the

machine, and horseplay as reasons for firing her and that she would not be eligible for rehire. Furthermore, the claimant believed that she had to sign the Letter of Termination in order to receive her last pay check. Ultimately, the claimant did not agree with their allegations, but did acknowledge their reasons for her termination.

The Majority's last argument is that the claimant's testimony is inconsistent with her medical records. The Respondents cite the February 2, 2005 medical records from the White County Emergency Room, which indicate that the claimant was in a motor vehicle accident in August of 2004. The claimant contends that she had not been in a motor vehicle accident in August of 2004 and that the medical records must have been a mistake. In fact, it is uncontroverted that the claimant sustained an injury at work on August 29, 2004.

The claimant, Jackson, Adkisson, and Garrison all witnessed the accident. The claimant was in so much pain after the accident that she could not finish her shift and

sought medical treatment that night at the White County Hospital, where the records indicate that the claimant fell and now suffered neck and back pain. After x-rays were performed, the claimant was diagnosed as having muscle spasms in the cervical spine, a cervical contusion, and a thoracic contusion with a strain, for which she was prescribed Valium, a muscle relaxer, and Lortab, a pain killer. Less than two weeks later, Dr. Henning performed an MRI and found that the claimant suffered a fracture and edema in her cervical spine and mild disc bulging at C5-6. Dr. Henning also noted that the patient was flipped over and landed on her neck at a three feet drop. The claimant's injury is consistent with the fall, and the claimant did not suffer from pain in her neck prior to the accident occurring. In fact, the claimant was unable to work after the accident due to the pain in her neck. It is unlikely that the claimant suffered a fractured vertebrae prior to the accident because she was able to fully function at work without pain before the accident occurred. Accordingly, the February 2, 2005 medical records that indicated that the

claimant was injured in a motor vehicle accident are incorrect. The White County Hospital clearly made a mistake in its records, and the claimant should not be punished for their inadequacies.

Therefore, for the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner