

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603906

JIMMY MORARA, EMPLOYEE	CLAIMANT
RICKS EXPRESS, INC., EMPLOYER	RESPONDENT
BRIDGEFIELD CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 6, 2007

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, 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 May 2, 2007.

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

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employer-employee-carrier relationship existed among the parties on February 18, 2006.

2. The claimant's compensation rate is \$20.00, in the absence of wage records or credible testimony.

3. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102. This claim is respectfully denied and dismissed.

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 concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

The Majority, by affirming and adopting the Administrative Law Judge's opinion, found that the claimant was employed by the respondents at the time of his injury and that his minimum compensation rate would be \$20. The Majority also found that the claimant sustained a left

shoulder injury, a rotator tear, after slipping and falling in the parking lot. I concur with these findings. However, the Majority also found claimant is not entitled to receive medical or temporary total disability benefits because he was not performing an employment service at the time of his injury. Based upon a de novo review of the record in its entirety, I find the claimant suffered a compensable work-related injury, and the claimant is entitled to medical benefits. As such, I must respectfully concur in part and dissent in part.

The Majority's finding that the claimant was not performing an employment service at the time of the accident is simply not consistent with the testimony of the claimant, Mr. Clark, or Mr. Wallace.

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).

The claimant, Mr. Clark, Mr. Wallace, and Ms. King all testified that the claimant's job duties included taking out the trash. Furthermore, the testimony presented establishes by a preponderance of the evidence that the claimant was performing an employment service at the time of his injury, as established by the claimant's daily pattern of performing his work duties. The claimant testified that on the date of his injury, he had just parked his car and was on his way to the trash cans before he entered the store when he slipped and fell in the parking lot, injuring his shoulder. Additionally, Mr. Clark testified that he witnessed the claimant slip and fall on the ice at work on February 18, 2006. Mr. Clark testified that the claimant normally got to work and took out the trash prior to going

inside the building. Furthermore, Mr. Wallace even testified that the first thing that the claimant would do when he got to work was get out of his truck, go to the diesel pumps and pick up the trash. Then, the claimant would go and get clean bags and put them in the trash cans.

It is evident that the claimant was extremely consistent with performing his duties while at work. Ms. King testified that there would be no need for the claimant to empty the trash cans the first thing in the morning. However, Ms. King's testimony is inconsistent at best. First, Ms. King testified that HJ Winslow's employment ended shortly before the claimant's accident. However, Ms. King testified that HJ Winslow told her the claimant would no longer be allowed to charge items at the store. Ms. King interpreted this as an indication that the claimant was no longer an employee. Ms. King stated that she allowed the claimant to charge cigarettes on her account since he no longer had an account with the store. However, this does not explain why the claimant was in possession of a February 10, 2006 charge ticket. It is not reasonable for Ms. King to

believe that the claimant was fired before HJ Winslow left, yet she continued to allow him to charge goods against his account.

Second, Ms. King testified that there would be no need for the claimant to empty the trash cans the first thing in the morning. Even if it was not necessary for the claimant to empty the trash cans in the morning, that is not the issue. The issue is whether or not the claimant was emptying the trash cans in the morning. As the claimant, Mr. Clark, and Mr. Wallace all testified that the claimant emptied the trash cans every morning, Ms. King's testimony should be given very little weight.

Third, Ms. King testified that the claimant reported the injury to her on the date that it occurred. It stands to reason that the claimant would not have reported an injury to Ms. King if he had not been working at the time of the injury. Additionally, the Majority noted that the claimant was very hostile.

Therefore, it is erroneous for the Majority to conclude that the claimant was not performing an employment

service at the time the injury occurred. It is evident from the testimony of the claimant, Mr. Clark, and Mr. Wallace that the claimant had a daily routine, which included taking the trash out every morning while in the employment of the respondents. As such, the claimant sustained a compensable injury while in the course and scope of employment and he is entitled to receive medical benefits pursuant to his injury. However, the claimant did not prove by a preponderance of the evidence that he is entitled to receive temporary total disability benefits, as he was never taken off of work by a physician and he continued to mow lawns for income.

_____For the aforementioned reasons, I must respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner