

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609713

ROBERT TRAHAN, EMPLOYEE	CLAIMANT
PERRY BAKER CONSTRUCTION, INC., EMPLOYER	RESPONDENT
UNION INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 31, 2008

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

Claimant represented by HONORABLE C. ERIC VESTER, Attorney at Law, Rogers, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, North 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 10, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on August 21, 2006.

3. The respondent has controverted this claim in its entirety.

4. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent. Claimant was not performing "employment services" at the time of his injury.

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 opinion. After a de novo review of the record, I find that the claimant sustained compensable injuries while performing employment services for the respondent on August 21, 2006 and is entitled to all associated workers' compensation benefits.

On August 21, 2006, the claimant and other employees of the respondent were setting roof trusses on a

wall. In order to set the roof trusses, the claimant and the other employees had to work on top of the wall. On the ground that day were other employees including Perry Baker, Jr., the son of the respondent's owner. The claimant testified that Baker, Jr. and another employee named Gary Owens became involved in an argument and shoving match. The argument between Baker, Jr. and Owens involved whether a wall was out of plumb. During the course of this argument and shoving match between Baker, Jr. and Owens, the claimant informed Owens that he would not put up with Baker, Jr. pushing him around and that Owens should not put up with it, either. According to claimant's testimony, Baker, Jr. informed him that if he was down on the ground, he would "show him." At this point claimant began climbing down the wall brace. The claimant testified that while he was in the process of climbing down from the wall brace he was pushed off the wall brace by Baker, Jr., landed on a two-by-four, and suffered injuries to both of his feet including a fracture to his right foot. Baker, Jr. testified that he did

not push the claimant, but that the claimant, halfway down the wall, jumped.

Ark. Code Ann. §11-9-102(4)(B)(i), states:

"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 nonemployment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties; furthermore, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries.

Here, the claimant was engaged in a verbal altercation with two co-workers, an argument that, according to the testimony of record, was about whether or not a wall was out of plumb. As the "combat" the claimant was apparently verbally engaged in at the time of the injury, and allegedly trying to physically engage in, was work related, Ark. Code Ann. §Ark. Code Ann. §11-9-102(4)(B)(i) does not bar this claim.

Ark. Code Ann. §11-9-102(4)(B)(i) states:

"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 nonemployment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties; furthermore, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries.

As the statute specifically enacted by the legislature addressing injuries resulting from work-related combats, Ark. Code Ann. §11-9-102 (4) (B) (i) deems injuries arising from employment related hostilities compensable, I must find that the claimant's injuries are compensable.

However, deviating from the specific statute, the majority finds, by affirming and adopting the Administrative Law Judge, that Ark. Code Ann. §11-9-102 (4) (B) (iii) bars this claim.

Ark. Code Ann. §11-9-102 (4) (B) (iii) states:

"Compensable injury" does not include: Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated.

First, in reviewing relevant case law, specifically, Flowers v. Arkansas Hwy. and Transp. Dept., 62 Ark. App. 108, 968 S.W.2d 660 (1998), which sets out the three prong test for compensability, as well as Johnson v. Safreed, 224 Ark. 397, 273 S.W.2d 545 (1954), I can find no justification for the majority's deviation from statute. Historically, the rule in this jurisdiction has been that injuries resulting from assaults are compensable where the assault is causally related to the employment, but not compensable where the assault rises out of purely personal reasons. Daggs v. Garrison Furniture Company, 250 Ark. 197, 464 S.W.2d 593 (1971); Townsend Paneling v. Butler, 247 Ark. 818, 448 S.W.2d 347 (1969); Bagwell v. Falcon Jet Corporation, 8 Ark. App. 192, 649 S.W.2d 841 (1983). Ark. Code Ann. §11-9-102 (4) (B) (i) codifies this rule. The preponderance of the evidence of record shows that the combat was work-related.

Second, I find that the majority has erred in finding that the claimant was not performing employment services at the time of his injury. The Supreme Court of

Arkansas 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...." Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002); Collins v. Excel Specialty Prods., 347 Ark. 811, 69 S.W.3d 14 (2002). Specifically, the Court has held that 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." Wallace v. West Fraser South, Inc., 365 Ark. 68, 225 S.W.3d 361 (2006).

Here, the claimant was injured while coming down from a wall that he had to be on to complete his job duties, setting roof trusses. The claimant testified that when he was halfway down the wall, he was pushed by Baker, Jr.. Baker, Jr., while agreeing that the claimant was halfway down the wall, testified that he did not push the claimant, but that the claimant jumped. Regardless of the combatant's inconsistent testimonies, the evidence of record clearly

shows that the claimant was injured during his downward exit from the wall. I find that climbing up the wall benefits the employer. I find that the claimant setting roof trusses on the wall benefits the employer. I find that it cannot reasonably be said that the claimant is performing employment services when he climbs up the wall, is performing employment services when he is on the wall, but is not performing employment services during his journey down from the wall. Simply put, what goes up must come down. An integral part of performing employment services on top of a wall is coming down from the wall.

In conclusion, I find that this claim is not barred by Ark. Code Ann. §11-9-102(4)(B)(i). Furthermore, I find that under Ark. Code Ann. §11-9-102(4)(B)(iii), the claimant was performing employment services when he sustained compensable injuries, and is entitled to associated workers' compensation benefits.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner