STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
June 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FAB-TEC CORPORATION
Claimant Below, Appellant

vs.) No. 100894 (BOR Appeal No. 2043947)
(Claim No. 2008025255)

WEST VIRGINIA OFFICE INSURANCE COMMISSION and ROY L. BLAIR, JR.,
Appellees

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review order dated June 25, 2010, in which the Board affirmed a December 7, 2009, order of the Workers' Compensation Office of Judges which reversed the finding of the Claims Administrator that a claim by Roy L. Blair, Jr., was non-compensable. In this appeal, the employer, Fab-Tec Corporation, contends that the Claims Administrator was correct in concluding that the claim was non-compensable based upon the fact that the claimant was injured while engaged in horseplay which did not occur in the course of and as a result of his employment. The employer requests that this Court reverse the Board's June 25, 2010, order, and reinstate the Claims Administrator's order of August 14, 2008, which rejected the claim.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, considered under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, this Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The claimant sprained his ankle and suffered a mild contusion of his buttock on August 7, 2008, while employed by Fab-Tec Corporation. According to the reports of witnesses, the claimant was engaged in horseplay with a coworker, Richard Egnor, when he injured himself. The claimant testified that Mr. Egnor had complained about his weight, prompting a jokingly derogatory comment by the claimant. According the witnesses, the two men engaged in some "shadow boxing," and as Mr. Egnor pushed the claimant, the claimant hit a coal rock, causing his ankle to "hit the ground before my feet did."

The Claims Administrator denied the claim, finding that the injury did not occur in the course of and as a result of the claimant's employment. The Office Of Judges reversed that finding and held the claim compensable, reasoning that horseplay is not a defense to compensability. In affirming the finding of compensability, the Board relied upon this Court's pronouncements in *Geeslin v. Workmen's Compensation Commissioner*, 170 W. Va. 347, 294 S.E.2d 150 (1982), regarding the issue of a worker's status as an aggressor in an altercation and the impact of wilful misconduct on compensability for an injury. In *Geeslin*, this Court held that "[w]here an altercation arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workmen's Compensation Act, W. Va. Code, 23-1-1 et seq., for injuries claimant sustained in the altercation." *Id.* at 347, 294 S.E.2d at 150, Syl. Pt. 1. In syllabus point three of *Geeslin*, this Court also stated that "'Under *Code, 23-4-2*, wilful misconduct will not bar compensation unless the injury is the result thereof.' Syllabus Point 2, *Billings v. State Compensation Commissioner*, 123 W.Va. 498, 16 S.E.2d 804 (1941)."

In its appeal to this Court, the employer contends that the Board misapplied the holdings of *Geeslin* related specifically to the issues of an aggressor in an altercation and wilful misconduct. The claimant in this case was not deemed ineligible for coverage by the Claims Administrator due to being an aggressor in a conflict or due to his wilful misconduct. He was simply engaged in horseplay, and the inquiry thus became whether the horseplay activity is to be considered as an injury occurring in the course of and as a result of the claimant's employment. Further, the employer contends that the Board failed to address additional cases more precisely applicable to the facts of the present case. In *Shapaka v. Compensation Commissioner*, 146 W. Va. 319, 199 S.E.2d 821 (1961), for example, this Court held as follows:

> No compensation is recoverable under the Workmen's Compensation Acts by an employee for injuries sustained by him by horseplay which was engaged in independently of, disconnected with, or disassociated from the performance of any duty of the employment, for the reason that such injuries do not result from the employment, within the meaning of such acts, but are in substance and in their nature foreign to the character of the work and are not within any duty of the employee to the employer.

Id. at 324-25, 199 S.E.2d at 824. The *Shapaka* Court recognized several exceptions to that general rule, none of which is applicable to the case sub judice based upon the facts

established by testimony in this matter.[1]

The evidence presented in this case indicated that the claimant's injuries were sustained through horseplay completely unrelated to his duties of employment. The shadow boxing described by his coworkers bears no conceivable relation to the accomplishment of his employment responsibilities. The Claims Administrator was correct in finding the claim non-compensable.

Based upon the foregoing, this Court finds that the decision of the Board is in clear violation of statutory provisions and is clearly the result of an erroneous conclusion of law. This Court consequently reverses the Board's order and remands with directions to enter an order reinstating the August 14, 2008, order of the Claims Administrator.

Reversed and remanded with directions.

ISSUED: June 1, 2011

CONCURRED IN BY:

Justice Robin Davis
Justice Brent Benjamin
Justice Menis Ketchum
Justice Thomas McHugh

DISSENTING:

Chief Justice Margaret Workman

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[1]The exceptions referenced include such scenarios as injuries occurring when an employer with knowledge of horseplay continues to permit it without interference or misuse of dangerous instrumentalities within an employer's contemplation. Additionally, this Court has recognized that "[a]n innocent victim of horseplay injured during the course of his employment is entitled to Workmen's Compensation benefits for such injury." Syl., *Sizemore v. State Workmen's Comp. Com'r*, 160 W.Va. 407, 235 S.E.2d 473 (1977).