STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
GAINESVILLE DISTRICT OFFICE

Anthony Q. Villa, Employee/Claimant, vs. Astellas US Holdings, Inc./Tokio Marine, Employer/ Carrier/Servicing Agent.	)	OJCC Case No. 09-027723 MRH Accident date: 10/30/2007 Judge: Marjorie Renee Hill

FINAL COMPENSATION ORDER

The final hearing in this case occurred on May 13, 2010. Claimant was represented by Lloyd M. Basso and the Employer/Carrier was represented by W. Rogers Turner. The hearing and this Final Compensation Order resolve only the issue of compensability contained in the Petition for Benefits filed on October 28, 2009. Specifically, pursuant to the parties' stipulation, the issue of compensability has been bifurcated to address only whether Claimant's accident occurred in the course and scope of employment as a traveling employee.

A. Pre-trial proceedings. Prior to trial, E/C's counsel requested this court take judicial notice of chapter 773, Florida Statutes, regarding Equine Activities. The Florida Statutes are a matter that may be judicially noticed. *See* § 90.202, Fla. Stat. Accordingly, this court takes judicial notice of chapter 773, Florida Statutes.

B. Stipulations:

The parties stipulated to the following:

1. This court has jurisdiction over the parties and subject matter.
2. Venue is in Alachua County.
3. An employer/employee relationship existed on the date of accident.
4. Workers' Compensation insurance coverage was in effect on the date of accident.
5. Due to the nature and the extent of the injuries and the volume of medical records needed to be admitted into evidence, the parties stipulate to bifurcating the issue of compensability to address only whether Claimant's accident occurred in the course and scope of employment as a traveling employee.

C. Claims:

1. Compensability of Claimant's traumatic brain injury
2. Penalties, interest, costs and attorney's fees

D. Defenses:

1. Claimant accident did not occur in the course and scope of his employment.

2. Claimant was engaged in a purely personal, high risk activity which created no direct or indirect benefit to the Employer.
3. The Employer was unaware Claimant was engaged in such activity.
4. Claimant deviated from the normal expected duties of a traveling employee.
5. The E/C is entitled to a Social Security Disability offset if the claim is found compensable.
6. No penalties, interest, costs or attorney's fees are due or owing

E. Joint Exhibits

1. Pre-Trial Stipulation with amendments
2. Deposition of Andrew Rabinovich
3. Deposition of Joanne Villa, with attachments
4. Deposition of John Bazini taken on April 26, 2010
5. Deposition of Janet Bazini taken on April 26, 2010
6. Deposition of Anne Allison taken on April 30, 2010

F. Claimant Exhibits

1. Petition for Benefits dated October 28, 2009 and Response to Petition for Benefits
2. Employee handbook dated April 2005
3. Travel and Entertainment Policy

G. Employer/Carrier Exhibits

1. Expense report
2. Map showing distance from Claimant's hotel to the Bazini's residence
3. Map showing distance from Claimant's last appointment to the Bazini's residence

H. Court Exhibits

1. Trial Memorandum – Claimant (argument only)
2. Trial Memorandum – Employer/Carrier (argument only)
3. Section 773.01-773.05, Florida Statutes (judicial notice)

H. Live Testimony: None

I. Findings of Fact and Conclusions of Law: I have not written a detailed summary of all facts and evidence presented. *See* § 440.25(4)(e), Fla. Stat.; *Garcia v. Fence Masters, Inc.*, 16 So. 3d 200 (Fla. 1st DCA 2009) (noting compensation order need only contain findings of ultimate material fact necessary to support the mandate, and need not contain a recitation of all of the evidence presented). However, I carefully considered all of the evidence before me in making my findings of fact and conclusions of law. I read the depositions and fully considered all of the exhibits. I have weighed the evidence, resolved all conflicts where they existed, and rejected all evidence and inferences inconsistent with my findings. Upon full consideration of the parties' stipulations and all of the evidence before me, I find as follows:

FINDINGS OF FACT

1. On October 30, 2007, Claimant was a pharmaceutical sales representative for the employer. Claimant was based out of his home in Fort Lauderdale, but had sales territories from "Coral Springs, all the way up to Orlando, and then west." (Rabinovich depo. p. 6, 9).

2. Claimant's job required him to meet face-to-face with the doctors and medical groups on his list approximately twice per month to get them to prescribe the medications offered by the employer. (Rabinovich depo. p. 9, 35-36, 42, 46).

3. Andrew Rabinovich was a sales manager with the employer. He managed the sales and administrative processes of the sales representatives. Claimant was one of the representatives Rabinovich supervised. (Rabinovich depo. p. 7, 40).

4. Claimant's territory was "vast." He was required to travel two weeks out of each month in order to conduct the face-to-face meetings in the frequency required. (Rabinovich depo. p. 9, 35-36, 42, 46).

5. There was "definitely turn over" in the sales jobs and, depending on the individual, the job could be stressful having to meet the required goals. It was "a lot" for Claimant to have to drive his territory. (Rabinovich depo. pp. 31, 34).

6. The employer held national, regional and local sales meetings. The meetings were not all business. The sales representatives "definitely" went to nice hotels, and had functions and free time. (Rabinovich depo. pp. 10-12).

7. The employer sponsored "team building" activities such as playing "ball," whale watching, and a "Navy SEAL type training program." (Rabinovich depo. p. 12).

8. Claimant was "very athletic," and "outdoors." He played softball, rode a bicycle, a motorcycle, and went to the gym. The employer paid for traveling sales representatives to go to the gym if the hotel in which the sales representative was staying did not have one. (Rabinovich depo. p. 16, 29, 32-33, 39; J.Ex. 4, p. 19).

9. When Rabinovich was a sales representative for the employer, no one told him there were things he should or should not do when traveling. When Rabinovich was a manager, he did not instruct Claimant as to what he should or should not do when traveling. Rabinovich never told his sales representatives they should not do a particular activity because the company believed it was too dangerous. The employer had no prohibitions regarding what employees in travel status could do at the end of the business day. (Rabinovich depo. pp. 13, 18, 33, 50).

10. There was no policy about which Rabinovich was aware that required employees on travel status to go back to their hotel and stay after completing the day's business. (Rabinovich depo. p. 36).

11. Employees in travel status could do "whatever they wanted" after completing the day's business. "They were on their own time. They could do whatever." (Rabinovich depo. pp. 49-50).

12. On October 30, 2007, Claimant was in Orlando in travel status working for the employer. He was also visiting doctors in Ocala and the surrounding areas and being paid by the employer while doing so. (Rabinovich depo. p. 17, 51-52).

13. Starting October 29, 2007, Claimant was going to be traveling for work for approximately one week. He was going to be meeting with a doctor for work on October 31, 2007. (Villa depo. pp. 16, 18-20, 22).

14. On October 30, 2007, at the conclusion of his business day, Claimant traveled approximately 36 miles from the place of his last appointment to visit his friends, John and Janet Bazini, to have dinner in their home and go horseback riding on their ranch. (John Bazini depo. pp. 21-22; Janet Bazini depo. pp. 11-12, 21; J. Ex. 4. p. 5; J.Ex. 5, p. 6; E/C Ex. 3.).

15. Claimant arrived between 4:45 p.m. and 5:30 p.m. (John Bazini depo. p. 21-22; Janet Bazini depo. pp. 11-12, 21; J. Ex. 4. p. 5).

16. Although Claimant was in the area on business, he did not go to the Bazini's as part of his job. He went to "have fun, and go horseback riding and have a nice steak." They were going to eat dinner after they went horseback riding. (J.Ex. 4, pp. 12, 15; J.Ex.5, p. 12).

17. After dinner with the Bazini's, Claimant was going to return to the hotel, which was approximately 90 miles away. (J.Ex. 4, p. 12, 15; J.Ex.5, p. 12; E/C 2).

18. John and Janet Bazini believed Claimant knew how to ride a horse because he told them he knew how to ride a horse. When John Bazini suggested riding in the paddock first, Claimant responded "John, I didn't drive all the way here from Fort Lauderdale to ride in the paddock. I want to go in the woods." (John Bazini depo. pp. 31-32; Janet Bazini depo. pp. 19-21; J.Ex. 4, p. 11; J. Ex. 5, pp. 6-7).

19. Claimant attempted to mount the horse on the grass. While he was attempting to mount, John Bazini was holding the bridle, reigns and stirrup on the other side to enable Claimant to safely mount. However, while attempting to mount, Claimant slipped, accidently kicked the horse in the stomach, and the horse bolted. (John Bazini depo. pp. 32-33, 40-41; Janet Bazini depo. pp. 18-20).

20. When the horse bolted, Claimant was hanging on the side of the saddle. It happened very fast. Janet Bazini was shocked that the horse "took off like that." (John Bazini depo. p. 33; Janet Bazini depo. p. 23).

21. It is uncontested that, as a result of the horse bolting, Claimant suffered a severe brain injury. Claimant currently resides in a skilled nursing facility receiving 24 hour care paid for by Claimant's wife. (Villa depo. pp. 7, 9).

22. Chapter 773, Florida Statutes, defines an "equine," in relevant part, to mean a horse. *See* § 773.01(2), Fla. Stat. An "equine activity" includes riding a horse. *See* § 773.01(3)(d), (e), Fla. Stat. A "participant" is any person, whether amateur or professional, who engages in any equine activity, whether or not a fee is paid to participate in the equine activity. *See* § 773.01(7), Fla. Stat.

23. Any individual (equine sponsor), whether or not for profit, who provides facilities for an equine activity is required to post clearly visible signs warning, in relevant part, that the equine sponsor is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities. *See* § 773.01(4), Fla. Stat.; § 773.04(1)-(2), Fla. Stat.

24. "'Inherent risks of equine activities' means those dangers or conditions which are an integral part of equine activities, including but not limited to: (a) the propensity of equines to behave in ways that may result in *injury, harm, or death* to persons on or around them; (b) the unpredictability of an equine's reaction to such things as sounds, sudden movements, and unfamiliar objects, persons, or other animals. . . . (e) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability." *See* § 773.01(6)(a), (b), (e), Fla. Stat. (emphasis added).

25. The Bazini's property and the entrance to the development in which the Bazinis lived had clearly visible signs posted, "as required by law," indicating it was an equine facility, and warning potential riders of the dangers and risks of horseback riding, including death, and that riders ride at their own risk. (John Bazini depo. p. 23; J.Ex. 4, p. 20; J.Ex. 5, pp. 8-10).

CONCLUSIONS OF LAW

"An employee who is required to travel in connection with his . . . employment who suffers an injury while in travel status shall be eligible for benefits . . . only if the injury arises out of and in the course of employment while he . . . is actively engaged in the duties of employment. . . ." § 440.092(4), Fla. Stat. (2007).

Whether a claimant was "actively engaged in the duties of his employment," under section 440.092(4), Florida Statutes, is a question of fact for the Judge of Compensation Claims. *Am. Airlines v. LeFevers*, 674 So. 2d 940, 942 (Fla. 1st DCA 1996).

The common thread in "traveling employee" cases is either a forced layover or a period of "down time" during a business trip in a location subject to the employer's requirements. *See Houck v. Tarragon Mgmt.*, 4 So. 3d 73, 75-76 (Fla. 1st DCA 2009) (citing e.g., *LeFevers*, 674 So.

2d at 942; *Garver v. E. Airlines*, 553 So. 2d 263, 267 (Fla. 1st DCA 1990); *Gray v. E. Airlines*, 475 So. 2d 1288 (Fla. 1st DCA 1985)). As a general rule, where an employee, as part of his duties, must remain in a particular place or locality until directed otherwise, or for a specified length of time, such an employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so, the risk inherent in such activity is an incident of employment. *See Houck*, 4 So. 3d at 75 (citing *Garver*, 553 So. 2d at 267). A traveling employee may satisfy physical needs, including relaxation. *Id.*

The test as to whether a specific activity is considered to be within the scope of employment or purely personal is the reasonableness of the activity. *See id.* In deciding whether a particular activity was reasonable, the judge should consider a number of factors. *See Garver*, 553 So. 2d at 267-268. Factors to be considered include whether the employer placed restrictions on the employee's activities during a layover, and whether the employer reimbursed the employee for personal activities the employee engaged in while not actively engaged in duties on the employer's behalf. *See id.* at 268. Here, the employer did not place any restrictions on Claimant's activities while he was traveling, but had completed his work for the day. However, the employer did not pay for Claimant's recreational activities, other than use of a gym.

It is not unreasonable or unforeseeable that an employee traveling on the employer's business might eat meals or engage in a social visit with a friend. *See id.* Additionally, exercise at a nearby facility made available to hotel guests may be regarded as activity reasonably required for personal health and comfort. *See Gray v. E. Airlines*, 475 So. 2d 1288 (Fla. 1st DCA 1985) (holding compensable injury sustained during a basketball game played at a YMCA near the claimant's hotel room, and at which hotel guests were entitled to visitation rights); *LeFevers*, 674 So. 2d at 942 (affirming ruling that accident occurred while claimant actively engaged in duties of her employment where claimant was injured diving into a hotel pool during a layover).

However, activities conducive to the occurrence of serious injury, and that are not offered by the hotel or sponsored by the employer are not compensable. *See generally, E. Airlines v. Rigdon*, 543 So. 2d 822 (Fla. 1st DCA 1989) (holding injuries sustained downhill skiing at a resort located 58 miles from the employee's hotel was outside the personal comfort doctrine and not compensable); *see also Garver*, 553 So. 2d at 265 (reconciling traveling employee case law and noting reasonable minds would generally agree that downhill skiing is an activity far more conducive to the occurrence of a serious injury than that of basketball).

The case at bar is distinguishable from those where the activity was offered at the hotel (*LeFevers*, swimming) or by the hotel (*Gray*, playing basketball at a nearby gym hotel guests were permitted to use). It is also distinguishable from those accidents that occurred while the employee was traveling to or from meals or engaging in a social visit after a meal. *See generally, Ramirez v. W.S. Farish, Jr., d/b/a Lanes' End Farm & Brentwood Mgmt Servs., Inc.*, 855 So. 2d 1182 (Fla. 1st DCA 2003); *Garver*, 553 So. 2d at 268. Instead, the facts are most similar to those in *Rigdon*, where the claimant drove 58 miles from her hotel to engage in downhill skiing.

Here, Claimant drove 36 miles to his friends' home to have dinner, but also to engage in horseback riding, an activity that, by statute, is defined as inherently dangerous. Because of the

inherently dangerous nature of horseback riding, the Bazinis were required by statute to post clearly visible signs warning of the risks involved in horseback riding. The entrance to the community in which the Bazinis lived, as well as the Bazinis' property was posted with clearly visible signs warning potential horseback riders of the dangers inherent in horseback riding, including death.

Clearly, it was reasonably foreseeable that Claimant would have meals, and/or engage in social visits with friends, even if he had to drive 36 miles to do so. It would also be reasonably foreseeable for Claimant to participate in any "team building" activities sponsored by the employer. However, it is not reasonably foreseeable that Claimant would engage in what is a per se inherently dangerous activity which requires, by statute, that signs be posted around the area the activity is to occur warning those who engage in the activity of the risk of serious injury, including death.

Accordingly, Claimant was not actively engaged in the duties of his employment nor was he engaged in a reasonably foreseeable relaxation activity when he participated in the per se inherently dangerous activity of horseback riding. The risk of the injury which actually occurred here was not reasonably incidental to the conditions of employment.

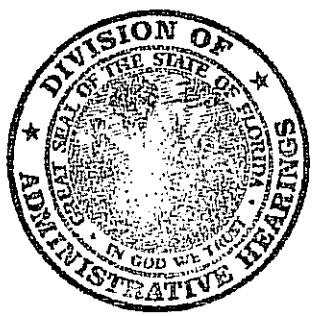
Based on the foregoing, it is hereby **ORDERED and ADJUDGED** that:

1. Claimant's accident did not occur during the course and scope of his employment as a traveling employee, and is **NOT COMPENSABLE.** Consequently, he is not entitled to Permanent Total Disability Benefits.

2. The claim for penalties, interest, costs and attorney's fees is **DENIED.**

3. This order resolves compensability only. This court certifies addressing compensability alone was necessary because a determination of the exact nature and amount of benefits potentially due to Claimant would require substantial expense and time.

DONE and ELECTRONICALLY MAILED to counsel this 14th day of June, 2010.



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