

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED

SHAWN FAIRBURN,)
)
Claimant,)
)
vs.)
)
STATE OF TENNESSEE,)
)
Defendant.)

Claim No. 20060636326

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Tennessee Claims Commission
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WORKERS' COMPENSATION JUDGMENT ON LIABILITY

This claim for workers' compensation benefits was heard by the Claims Commission on May 28, 2009. The claimant was represented by Mike Walker, Esq. Associate Deputy Attorney General Martha Campbell and Assistant Attorney General Robin Dixon appeared for the State. P. Alexander Vogel, Esq. appeared on behalf of the intervenor, Blue Cross Blue Shield of Tennessee. The parties have submitted proposed findings of fact and conclusions of law in support of their respective positions and the matter is ready for decision.

By agreement of the parties, this matter has been bifurcated as to liability and damages. Therefore, the sole issue currently before the Commission is the State's liability for Mr. Fairburn's workers'

compensation claim arising from the injury incurred on June 18, 2006, while wrestling with another employee. As required by Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law with respect to this matter.

FINDINGS OF FACT

CUMBERLAND MOUNTAIN STATE PARK

On June 18, 2006, Shawn Fairburn, was employed as a Lifeguard I at Cumberland Mountain State Park near Crossville, Tennessee. Mr. Fairburn, who was 18 years old, was in his third summer as a lifeguard at the park. He had recently graduated high school at Cumberland County High School.

Cumberland Mountain State Park is a 1,720 acre state park operated by the Department of Environment and Conservation. The Park Manager is Ivory "Chip" Hillis, who enforces the law within the park and has oversight of the park and its facilities. Lifeguard positions at the park are seasonal positions generally filled by high school and college students. The Olympic sized pool is open from Memorial Day weekend until Labor Day weekend. Meredith Mullen, one of the three rangers in addition to

Mr. Hillis, was the ranger over the swimming pool at the time of Mr. Fairburn's accident.

LIFEGUARDS

At the time of Mr. Fairburn's injury there were nine lifeguards working at the pool: Mr. Fairburn, Jeremy Wolfe, Matthew Smith, Tryston Henry, Zach Brumfield, Kahla Morton, Whitney Isaacson, Lana Martin and Farrah Martin. Matthew Smith, who was 17 years old, was in his first year as a lifeguard at the park and had been there since school had recessed for the summer.

Lifeguards were required to sign in at approximately 9:30 a.m. The lifeguards' first duties of the day were to get the pool ready to open to the public at 10:00 a.m. To accomplish this, the head lifeguard assigned them various tasks, such as sweeping, vacuuming the pool, picking up trash, cleaning the bathrooms, and straightening the chairs.

There was a duty board posted with job duties for each lifeguard every thirty minutes throughout the day. In addition to the thirty minute sessions of daily chores, there were long-term projects to be completed by the lifeguards if there was idle time.

MR. FAIRBURN'S INJURY

There were very differing accounts given by the lifeguards present that day as to how the incident began. Shawn Fairburn testified that on that morning, which was a Sunday, he arrived for work at about 8:30 a.m. He had been on vacation in Florida the previous week and had just returned on Saturday night. After he arrived, he waited for Jeremy Wolfe, the head lifeguard, to get there with the key to unlock the gate. As the head lifeguard, Wolfe supervised the other lifeguards.

Mr. Fairburn had known Jeremy Wolfe since high school. They had been on the football team together and were good friends. Although Fairburn had worked at the park longer, Wolfe, who was a year older and in college, had been able to take the Lifeguard II course, which was a requirement for the head lifeguard position. This season was Jeremy Wolfe's first year as a supervisor. He had been in the position since the season started in May, a period of less than month. Because Fairburn had been there longest, if Wolfe was out, Fairburn was in charge and assigned duties to the other lifeguards at the beginning of their day.

Fairburn testified that the first thing that he did that day was to get everything ready to open. He helped straighten lawn chairs and tables, put some things on the lifeguard stands, and skim the pool. He had completed his tasks and was getting ready to go on the lifeguard stand. Fairburn testified that he believed the wrestling took place sometime between 9:30 a.m. and 10:15 a.m. He thought that the pool had already opened, but was not certain. Asked how it had come about that he and Smith wrestled, Fairburn testified:

A. The situation was apparently while I was gone, a few of the other guys had wrestled each other and they were, that Matt guy was bragging back and forth about it. And he looked over at me and he asked me about it, he asked me if I ever wrestled and of course I said no. I told him before I'm not a wrestler and never took karate or nothing like that. And he was talking about it and then after he finished talking about it, he said, you know, he asked me if I wanted to go to the grassy area and wrestle. And I had told him that, you know, yeah, I would go over there and do it, you know. I didn't want to say no, so like I went over there and did it.

Q. So, he suggested it verbally but you consented to doing it?

A. Yes.

Q. In other words, he didn't like grab you and throw you down to start it. He asked you verbally to do so?

A. Yes. Basically, he just brought it in my face saying he though he was going to beat me wrestling and asked me if I wanted to wrestle, so I said yeah.

Exhibit 1, p. 35-36.

Jeremy Wolfe gave a recorded oral statement to Mr. Hillis the day after the incident in which he stated that when he arrived at work that day Fairburn and Smith were "debating" on a wrestling match. As soon as he opened the gate to go in, they went directly to the grassy area and began to wrestle. Wolfe testified by deposition, however, that on the morning in question, they had signed in and finished their duties, but the pool had not opened when Fairburn and Smith decided to wrestle. Mr. Wolfe also signed a written statement the day after the incident, which reflected that the incident had taken place "before" work at about 9:15 a.m.

Matthew Smith testified that he arrived between 9:07 and 9:08 a.m. The rest of the lifeguards came in and Jeremy Wolfe opened the gate. The lifeguards threw down their bags, opened everything up, and got ready for the pool to open. Smith had lain down in a lawn chair, waiting for Wolfe to put money in the cash register when Fairburn came over and asked whether he wanted to wrestle. At first, Smith said he did not want to. After Fairburn persisted, however, he gave in.

Tryston Henry gave an oral statement the day following the incident in which he stated that that he arrived about 9:10. They got equipment out and cleaned the pool. He and Kahla Morton walked past the deep end to put the equipment up. According to Henry, "Matt, Jeremy and Shawn were talking about wrestling," "egging each other on." When he and Kahla returned, they were walking toward the grassy area, where they all watched them wrestle.

Zach Brumfield's recorded statement reflected that he got there about 9:20 a.m. and waited for the pool to open. According to Brumfield, "they walked in . . . there really wasn't anything to do except wait to open . . . for a couple of minutes. And then ... we just walked over to the grass. They were just messing around."

Whitney Isaacson gave an oral statement following the incident reflecting that she arrived at work about 9:30 a.m. and went inside. The lifeguards were all sitting around and the guys were talking about wrestling. According to Ms. Isaacson, not long after she got there, the guys decided to wrestle. At the trial in this matter, Ms. Isaacson testified:

Q. Now, were you actually working the day that this occurred?

A. Yes.

Q. Did you – just in your own words describe, if -- if -- if you witnessed it, what you saw.

A. I just remember they were over in the grassy area and I think Matt had Shawn in a headlock and then somehow in wrestling Shawn fell and hit his head.

Q. So when you saw it they had already -- they were already engaged in the -- wrestling incident, --

A. Yes.

Kayla Morton's oral statement reflects that she got to work at about 9:20 a.m. The lifeguards were getting ready to open the pool. Smith and Fairburn were sitting down talking about wrestling. Contrary to Mr. Fairburn's testimony, Ms. Morton's statement reflected that it was Fairburn, not Smith, who initiated the wrestling that day. According to Ms. Morton:

And then Shawn's like "well Matt let's go, let's you and me wrestle." And Matt's like "I don't know, I don't know." And Shawn's like "come on, come on." So he was just like, "ok let's go."

See Exhibit 7.

While the witnesses' recollections differ as to the events preceding the incident, the testimony concerning the manner of Mr. Fairburn's injury does not appear to be in dispute. Fairburn and Smith walked over to a

grassy area and started to wrestle. After a short time, Smith got Fairburn into a "headlock." Fairburn then picked Smith up and attempted to "body slam" Smith to the ground. In the process, Fairburn, who was still in the headlock, fell to the ground with Smith, landing on his face and injuring his neck.

Kahla Morton's written statement made the following day reflects that after Fairburn's injury, she walked away to go to the ticket booth because it was past 10:00 a.m. and there were people waiting. Wolfe and the other lifeguards spent approximately ten minutes with Fairburn, before they concluded that emergency assistance was necessary and called 911. Contrary to park policy, Wolfe did not notify Chip Hillis of the injury and Hillis did not discover that it had occurred until the following day. According to Wolfe, after the incident they opened the pool as if nothing had happened.

PRIOR INCIDENTS OF WRESTLING

There was little consensus among the witnesses as to whether there had been previous incidents of wrestling by the lifeguards and the circumstances of those events. Mr. Fairburn testified that he had seen

wrestling at the pool once or twice before. He understood, however, that there had been wrestling while he had been on vacation the previous week.

Asked whether he had wrestled prior to June 18, 2006, Fairburn testified:

Q. Is this something you had done before June 18, 2006?

A. I had done it before when I was younger, but I never, you know, like with family members or close friends or something. I never, like every once in a while. I never really made an activity out of it.

Q. Had you wrestled or grappled with Jeremy Wolfe

A. No. He's a lot bigger than I am so.

Exhibit 1, p. 13-14.

Jeremy Wolfe, however, testified:

Q. . . . I will ask you just tell us what would happen between nine-thirty and ten generally.

A. Like as far as my words at the time, recollection, I'm not positive. Like I said, we could have been there at eight-thirty, for all I know. I don't know what time it was. I don't know if it was before work. I know it started before work and then, you know, let up, and it might have happened during work. Like I said, there isn't any people that come in the pool. We start work at probably nine-thirty, so we have thirty minutes to have time to get everything set up and then we just have spare time until prior to opening the pool.

During that, what happened was, you know, just a little, we went out in the grass, we did it all the time, just playing around. Friendly game of wrestling. I mean we went out there. Shawn comes back. The guy loves to wrestle. Me and him are buddies. We wrestled all the time. Just playing around, friendly match.

Exhibit 2, p. 10-11.

Q. Had you and Matt wrestled before?

A. Yes.

Q. Had you and Shawn wrestled before?

A. Yeah. Always. Yeah. Wrestle all the time.

Exhibit 2, p. 46.

Q. Okay. Now, had you yourself also participated in wrestling after you had cleaned up the area, policed the area, but before the pool was open to the general public?

A. Yes.

Q. And would you have done that during the summer of 2005 or just only in 2006?

A. We wrestled all the time. It was always some kind of, you know, we always, when we had free time we were just playing with each other. So I guess I mean.

Exhibit 2, p. 72. Later, however, Wolfe testified that there had only been three occasions during which wrestling had taken place:

Q. Did you ever see them, did you ever see any of your supervisors at any point before the pool was opened to the public while you were participating in nonpool related activities?

A. They never -- No. The situation with the wrestling, it wasn't like it was an every day thing. It was a spur of the moment type deal, probably happened a total of three times including the accident. We did not horseplay all the time. I was one of the strictest bosses that was ever there. Matt, you know, he come out of, you know, he pretty much challenged everybody. And, you know, I'd go down there with him and what it was, it's a sport called grappling and it started out as he was trying to teach the

other boys how to do it. So, like I said, a lot of times it was a teaching method type deal that lead to a wrestling match. Once Shawn got there, because Shawn loves to wrestle and, you know Matt running his mouth 24/7, and so just let them wrestle.

Exhibit 2, p. 73

Q. I would imagine you guys would just sit around and talk or hang out?

A. Yeah. Usually we would do that. The situation with the wrestling, like I said, it only happened three times. The situation that got brought up was more of a teaching method. The kid, Matt, he acted like he, you know, he was fascinated with grappling then. A lot of times it was just as far as teaching method and then three times total there was a wrestling match. That's it. Like I said, it started out as more of a teaching than as far as back yard wrestling. There was actually going through and talking about it and all of this, but as far as him showing us, you know.

Exhibit 2, p. 77.

Matthew Smith testified that he had joined the Marines in the Marines Delayed Entry Program in February of 2006, and had participated in Marine Corps Martial Arts Program ("MCAP") prior to the incident. Wrestling was a part of this training. Asked about wrestling at the pool, Smith testified:

Q. When you started working at the pool, did you wrestle with any of the lifeguards?

A. No, ma'am.

Q. Was it your understanding that was permissible by the park, or not permissible?

A. I really don't recall anything, ma'am.

Q. Okay. Did you consider that part of your park duties?

A. No, ma'am.

Exhibit 4, p. 14-15

Q. Okay. June 18, 2006. Before that morning, and we'll get to that in a minute when you had the wrestling match with Shawn that we're here about today, had you engaged in any other wrestling matches with the other - - or playful wrestling matches with any of the other lifeguards?

A. I can't recall.

Q. If you had or not?

A. No, ma'am.

Q. Had you seen any of the other lifeguards doing that?

A. Not that I can remember. My memories of it is very, very vague.

Q. Okay. Do you ever recall discussing it with Jeremy Wolfe or seeing him wrestle or anything?

A. No, ma'am.

Exhibit 4, p. 16. Later, Smith gave the following testimony:

Q. Okay. I believe you stated earlier that you hadn't wrestled before the day in question.

A. No.

Q. Did you do any wrestling after the day in question - -

A. No.

Exhibit 4, p. 39. Asked whether he had discussed his Marine Corps training with Fairburn and Wolfe, Smith testified:

Q. To your knowledge, did Shawn and Jeremy know that you'd had this type of training in the service, the MCAP?

A. Yes, I think so.

Q. Did you tell them that?

A. Yes.

Q. You-all had discussions about that?

A. Yes.

Exhibit 4, p. 23.

Smith also testified:

Q. Okay. How often did you discuss your training?

A. Not very often. I kept it to a very minimal.

Exhibit 4, p. 30.

Whitney Isaacson testified at trial that she was in her second year as a Lifeguard I with the park when the accident occurred. Isaacson testified that she saw Fairburn and Smith over in the grassy area wrestling. She recalled being surprised by this because it was against the rules, which forbid horseplay. According to Isaacson, lifeguards were instructed to enforce and obey the pool rules. She did not recall seeing other instances of wrestling during that time.

In his oral statement, Zach Brumfield stated that he had seen wrestling among the lifeguards before when it was slow toward the end of the day when everything was done. Brumfield, however, denied that wrestling had taken place during work hours and stated that it had only occurred either before or after work.

The testimony of the three main actors, Mr. Fairburn, Mr. Smith, and Mr. Wolfe is difficult to reconcile. Mr. Fairburn testified that he had seen wrestling once or twice before and understood that there had been wrestling the previous week, but that he personally had not wrestled since he was younger and had never wrestled Jeremy Wolfe.

Wolfe testified both that there was wrestling "all the time" and that it had only occurred on three occasions. He was clear, however, both to the fact that Mr. Fairburn loved to wrestle and that he and Fairburn had wrestled before, although it was not clear that this had occurred either at work or during working hours. Mr. Smith's testimony was that this was the first instance of wrestling that he could recall.

Finding each of their statements credible would require the Commission to conclude both that wrestling occurred frequently and that

it occurred only a limited number of times, if at all; that Fairburn had not wrestled in years and that he “wrestled all the time;” and that Smith asked Fairburn to wrestle and that Fairburn asked Smith to wrestle. All of these things cannot be true.

The pool had only been open since Memorial Day when the accident occurred on June 18, 2006. There was no proof that there had been any wrestling among the lifeguards prior to the summer of 2006. The Commission concludes that this may not have been the first occasion that there was wrestling among certain of the male lifeguards during the brief period that the pool had been open that year, although the circumstances under which such an event may have occurred are not clear from the proof. Having reviewed the evidence, however, the Commission cannot conclude that any wrestling that may have taken place in the course of the lifeguard’s employment was sufficiently frequent or widespread to constitute a custom or common practice of the position.

What does appear far more certain, however, based on their testimony, including their apparent forgetfulness of certain incriminating facts, is that Fairburn, Smith, and Wolfe understood that they should not

have been engaging in this activity in which they were willing, if not eager, participants.

POOL RULES

Meredith Mullen was the Park Ranger in charge of the pool at the time of Mr. Fairburn's injury. She had also previously held the position of Lifeguard II at the pool. At the beginning of each summer Mullen held an orientation, during which she went over the lifeguards' responsibilities and their job performance. As part of this training, she discussed the rules of the park and the pool. The lifeguards were instructed to obey and enforce the rules of the pool, which included no running or horseplay. The rules were posted in the pool area. Although wrestling had apparently not been specifically mentioned, the lifeguards had been warned about football in the grassy area and roughhousing.

No wrestling ever occurred while the public was present or in Ms. Mullen's or Mr. Hillis's presence and they were never aware of wrestling at the pool by the lifeguards. Mr. Fairburn knew that Ms. Mullen would not have approved of the wrestling.

CLAIMANT'S INCAPACITY AND FILING OF CLAIM

Mr. Fairburn was transported by helicopter to the UT Medical Center where he underwent surgery on his broken vertebrae. He remained at UT for seven to ten days before he was transferred to the Shepherd Center in Atlanta, Georgia for rehabilitation. He was treated at Shepherd Center on an inpatient basis for two and a half months and on an outpatient basis for two and a half months. By the time that he left, Mr. Fairburn testified that he was able to do some things for himself such as feed himself. He had also regained lung capacity, enabling him to speak audibly. At the time of his deposition, Mr. Fairburn testified that he had no movement in his legs. Although he had regained movement in his arms, he still had difficulty performing tasks like typing.

Following his treatment at the Shepherd Center, Mr. Fairburn lived with his parents who cared for him. During this time, he became ill with a urinary tract infection for which he was eventually hospitalized. In November of 2006, he was moved to Wyndridge Health and Rehabilitation Center, where he remained until December of 2007. He now lives in his own home by himself.

Cumberland Mountain State Park staff submitted a First Report of Injury to Sedgwick CMS on June 19, 2006. Mr. Fairburn was notified that his claim had been denied on June 21, 2006. On May 31, 2007, a Request for Assistance was submitted on behalf of Mr. Fairburn by counsel.

CONCLUSIONS OF LAW

I. TIMELINESS OF CLAIM

The State argues that because Mr. Fairburn failed to request a benefit review conference within 90 days of the denial of his claim for compensation, his claim should be barred as untimely. Tenn. Code Ann. § 9-8-402(d)(1) requires that a workers' compensation claimant who has been informed of the Division of Claims Administrations denial of his claim request a benefit review conference pursuant to § 50-6-239, within ninety (90) days from the date of the denial notice.

It is not disputed that Mr. Fairburn was notified of the denial of workers' compensation benefits on June 21, 2006, and that although the ninety day period expired on September 20, 2006, no benefit review conference was requested until May 31, 2007.

In support of his claim, Mr. Fairburn relies upon Tenn. Code Ann. § 9-8-402(d)(7), which provides:

In case of physical or mental incapacity, other than minority, of the injured person or such injured person's dependents to perform or cause to be performed any action required within the time specified in this section, then the period of limitation in such case shall be extended for one (1) year from the date when such incapacity ceases.

Tenn. Code Ann. § 9-8-402(d)(7). Because he was physically incapacitated and unable to submit the request for benefit review within the specified period, he contends that the limitations period was tolled.

The proof demonstrated that following his hospitalization at the UT Medical Center, Mr. Fairburn underwent rehabilitation for his spinal injury at the Shepherd Center in Georgia for a period of five months. Based on Mr. Fairburn's testimony concerning his breathing and speech difficulties as well as his physical limitations during that period, the Commission concludes that Mr. Fairburn was physically incapacitated while undergoing such treatment and that the statute of limitations should be extended for one year from its conclusion. Therefore, the Commission finds that the request for benefit review, which was submitted within that one year period, was timely.

II. COMPENSABILITY

An employee seeking workers' compensation has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992). Those elements are that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer. Tenn. Code Ann. § 50-6-103(a); *Long v. Tri-Con Ind., Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999).

An injury occurs "in the course of" employment if it takes place while the employee was performing a duty he or she was employed to perform. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). The course of employment requirement focuses on the "time, place and circumstances" of the injury. *Id.*

An injury arises out of employment when a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. *Id.* The mere presence of the employee at the place of injury because of employment will not alone result in the injury being considered as arising out of the employment. A compensable injury

“must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work.” *Houser v. Bi-Lo, Inc.*, 36 S.W.3d at 71.

Injuries incurred while an employee is engaged in horseplay amounting to willful misconduct under Tenn. Code Ann. § 50-6-110(a), are not compensable, however. Although willful misconduct is not defined in the statute, the Tennessee Supreme Court has held that the elements needed to constitute willful misconduct for purposes of the statute are: (1) an intention to do the act, (2) purposeful violation of orders, and (3) an element of perversiveness. *Insurance Company of America v. Hogsett*, 486 S.W.2d 730, 733 (Tenn. 1972). In *Wright v. Gunther Nash Min. Const. Co.*, 614 S.W.2d 796, 798 (Tenn. 1981), the Court noted, quoting Larson's, *Workmen's Compensation Law*, at § 32.00 (1979), that the “‘willful misconduct’ defense, whatever its actual general definition, has in practical application been largely limited to the deliberate and intentional violation of known regulations designed to preserve the employee from serious bodily harm.” *Id.* at 798.

Defendant has raised the defense of willful misconduct and argues that Mr. Fairburn's claim is precluded because his injuries occurred during horseplay, a violation of the pool rules that he was charged with enforcing and obeying. Because Mr. Fairburn admits that he voluntarily and intentionally engaged in wrestling, which violated the pool rules forbidding horseplay, defendant argues that the three pronged test for willful misconduct is satisfied. The Commission agrees.

In response to the affirmative defense offered by the defendant, Mr. Fairburn relies upon the exception to the willful misconduct rule recognized where the employment involves periods of forced idleness. Citing *Ransom v. H.G. Hill Co.*, 205 Tenn. 377, 326 S.W. 2d 659 (Tenn. 1959), Mr. Fairburn contends that because there were no duties to be performed at the time of the incident, none could be abandoned by the lifeguards.

In *Ransom, supra*, the Court considered whether a truck driver waiting for a work assignment incurred an injury arising out of his employment when he grabbed another employee by the seat of his pants and fell, injuring his leg. Relying on Larson on Workers' Compensation, Section 23.00 Volume 1, the Court concluded:

We think that when these employees are hired and directed by their boss to stay in this lot subject to call, or what not, that the suspect that certain incidents of the kind should happen and that this is such a slight or insubstantial deviation that it is not getting away from the employment. We are constrained to hold that an accident of the kind does arise out of the employment.

Ransom, 326 S.W.2d at 385. Mr. Fairburn argues that like *Ransom*, his injury occurred during a period of forced idleness while he was waiting to open the pool and should therefore be compensable.

The testimony was that the lifeguards were to arrive by 9:30 and had a half hour in which to ready the pool for opening by performing tasks such as straightening the chairs, sweeping, vacuuming the pool, picking up trash, and cleaning the bathrooms. The lifeguards also apparently had long term tasks. Although Mr. Fairburn testified that sometimes if they finished their chores there was nothing to do until opening, he also testified “[he] didn’t really have a lot of time during the day to hang out and socialize.”

According to Fairburn, he had straightened up the lawn chairs and tables and put some things on the lifeguard stands that needed to be there. He had also helped skim the pool. He testified that he had completed

these tasks and was about to go on the lifeguard stand when Smith suggested they wrestle.

Not all of the lifeguards, however, were unengaged during the period that the accident took place. Tryston Henry's oral statement following the incident reflected that he and Kahla Morton had been on their way to put up equipment when he overheard the discussion about wrestling. When the two returned, Fairburn, Smith and Wolfe had been heading toward the grassy area. The incident occurred so close to 10:00 a.m., when the pool was scheduled to open that the brief delay while the lifeguards attended to Fairburn and waited on an ambulance caused the pool to open late that day.

Based on the description of the events and Mr. Fairburn's statement that he was about to get on the lifeguard stand when he agreed to wrestle, the Commission cannot conclude that, like the plaintiff in *Ransom*, he had no duties to abandon. Furthermore, perhaps more important than idleness to the decision in *Ransom* was the Court's determination that the act from which the injury resulted was an "insignificant antic." See *Cleveland v. Jensen's Inc.*, 1989 WL 41665 (Tenn. 1989)(finding that plaintiff's acts of

play – laughing, making fun, and jokingly getting down in a Kung Fu position “were trivial and too insignificant to support a finding that the accident did not arise out of and in the course of employment”); *Rhea v. Shoney’s South*, 1986 WL 13706 (Tenn. 1986)(denying employer’s claim of willful misconduct where employee fell while dancing on wet floor of restaurant and stating “[p]laintiff did no more than move his feet to the beat of music played over a co-worker’s radio. There is nothing to indicate that the movement to music was any more dangerous than walking without a beat. To say that plaintiff, by this trifling act, was guilty of willful misconduct, or that he stepped out of his role as a worker, would be to magnify unfairly what was a most insignificant antic.”)

Ransom is distinguishable from the instant case both because of the nature of the act and the degree of Mr. Fairburn’s departure from his lifeguard duties. Unlike, *Ransom*, the circumstances of Mr. Fairburn’s injury were more deliberate and less innocuous.

This was no momentary, impulsive tussle, bump, jab or other insubstantial deviation. The proof shows that Smith and Fairburn discussed whether they should wrestle and agreed to do so. Even then

they did not do so on the spot, but took time to walk over to the grassy area, which was more conducive to the activity. It is not disputed that Fairburn picked Smith up and tried to body slam him to the ground.

The Commission has no illusions about the capacity of seventeen and eighteen year olds to seek out activities to amuse themselves and certainly not every breach of the rules would render an injury non-compensable. However, despite their youth, it does not appear to have been an unreasonable expectation that the lifeguards would be able to withstand the brief transitional period between the completion of their chores and the opening of the pool without attempting to body slam each other to the ground.

Claimant also relies upon application of the principle that disobedience of a "rule" is not willful misconduct where the "rule" is habitually disregarded with the knowledge and acquiescence of the employer. In cases adopting that premise, courts have held that the employer was estopped from invoking the rule against a misled employee. *See Bryan v. Paramount Packaging Corp.*, 677 S.W.2d 453, 455 (Tenn. 1984)(finding that an employer who over years permitted employees to

clean laminator drums while machine was in operation was estopped to contend that the practice was willful misconduct.) Mr. Fairburn argues that because Jeremy Wolfe was complicit in the incident, the State acquiesced to activity and should not be permitted to argue that Fairburn violated the rule against horseplay.

The pool rules were posted at the pool and were included in the orientation that Ms. Mullen gave to the lifeguards. Mr. Fairburn, who was in his third year as a lifeguard and had the most experience of all of the lifeguard staff, admitted he understood the pool rules were safety measures. He was aware of the prohibition against horseplay and he also knew that Meredith Mullen, the ranger in charge of the pool, would likely not have condoned the wrestling. Jeremy Wolfe testified that lifeguards were warned not to roughhouse. He testified that they had also been warned about football, even though it was not tackle.

Despite this knowledge, Fairburn admits that he was a willing participant in the wrestling, testifying that he agreed to wrestle when asked by Smith. Based on the statement provided by Kahla Morton, who

was not involved in the incident but witnessed it, Mr. Fairburn may in fact have been the person who initiated the match.

Although there may be circumstances where an employer has condoned certain behavior by its employees for so long that it may be deemed to have become a part of the work activities, this does not appear to be such a case. The proof did not establish that wrestling had become common during the brief time the pool had been open. Nor can the Commission cannot conclude that Fairburn was misled by Wolfe's involvement to believe that wrestling was permissible or sanctioned by the park. Even accepting that isolated occurrences may have taken place, it appears that care was taken to conceal them from the rangers and the public.

Moreover, assuming that some playful activity might occur during the period between the completion of the chores required to open the pool and its opening, the very obvious dangerousness of body slamming another employee mitigates in favor of a finding that this activity was a substantial deviation from Mr. Fairburn's work duties and took it outside of the course and scope of his employment. "An accidental injury arises

out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Wilhelm v. Krogers*, 235 S.W.3d 122, 127 (Tenn. 2007). In *Webster v. Seven-Up Bottling Co.*, 211 Tenn. 8, 362 S.W.2d 244 (Tenn. 1962), the Court considered the claim of an employee who placed an open flame near a can of gasoline after working hours after he had been warned against the action. The Court noted:

If the accident arose out of the employment there must be a causal connection between the work required to be done and the resulting injury. In the present case there was no causal connection between the employee's injury and the work required to be done. Nothing in the work to be done by the employee required him to place an open flame over a container of gasoline just to demonstrate to some companions that the stuff won't burn.

What Webster did was a willful failure to follow a course of safety required by common sense and common knowledge in the handling of the dangerous agency of gasoline.

Webster v. Seven-Up Bottling Co., 211 Tenn. 8,11, 362 S.W.2d 244, 245 (Tenn. 1962).

It is not disputed that, although the accident happened at work and apparently while he was on duty, there is nothing about Mr. Fairburn's

lifeguard responsibilities that required that he wrestle Mr. Smith.

Wrestling, and in particular his attempt to execute a body slam, was a dangerous activity of his own choosing, which exceeded any reasonable requirement of his position. The Commission finds that the proof did not demonstrate either that Mr. Fairburn was performing a duty related to his employment or that that the risk originating from this activity arose out of his employment.

The claim for workers' compensation benefits is respectfully denied.

It is so **ORDERED** this the 5th day of November, 2009.



STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 10 day of November, 2009.



Marsha Richeson, Administrative Clerk
Tennessee Claims Commission