

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F207861**

JAMES WILLIAM SAULSBURY, JR., EMPLOYEE

CLAIMANT

VS.

BRAMBLES USA, INC., EMPLOYER

RESPONDENT

AIG CLAIMS SERVICES, INC., CARRIER

RESPONDENT

OPINION FILED AUGUST 6, 2003

Hearing held June 19, 2003, in El Dorado, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Robert L. Depper, Jr., Attorney at Law, 314 East Oak Street, El Dorado, AR 71730.

Respondents are represented by Ms. Carol Worley, Attorney at Law, 400 West Capitol, Suite 1900, Little Rock, AR 72201.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in El Dorado, Arkansas, on June 19, 2003. A prehearing telephone conference was held on this claim on April 21, 2003, with a Prehearing Conference Order filed that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The employee-employer-carrier relationship existed between the parties on January 17, 1999;
2. No benefits have been paid on this claim;
3. Claimant filed his claim on June 17, 2002.

At the beginning of the hearing, the parties agreed that the employer paid claimant's medical benefits, but the payments came directly from the employer, not the employer's workers' compensation third party administrator.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Act for which he is entitled to benefits;
2. If claimant sustained a compensable injury, whether this claim is barred by the statute of limitations.

With regard to these issues, claimant contends that he was attacked in the employer's parking lot on January 17, 1999, at a time when he was not performing employment services and was not within the course and scope of his employment as he was checking his own personal vehicle for damage. If the claim is compensable, claimant acknowledges that his claim was filed late, but such late filing is excused by claimant's civil litigation involving this claim. Respondents contend that this claim is barred by the statute of limitations. Alternatively, respondents contend that the claimant was not in the course and scope of his employment or performing employment related services at the time of this injury. Finally, respondents contend that if the claim is compensable and claimant overcomes the statute of limitations defense, then the claimant is not entitled to any temporary total disability or permanent partial disability benefits, and all medical bills have been paid.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on April 21, 2003, and contained in the Prehearing Order filed that same date, are hereby accepted as fact.

2. Claimant was not performing employment services at the time of his injury.

3. Claimant did not sustain a compensable injury which falls within the jurisdiction of the Arkansas Workers' Compensation Act.

CONCLUSION

The facts in this claim are not in dispute. On January 17, 1999, claimant was at work for respondent-employer when he received an in-plant telephone call advising the claimant that someone had struck his truck in the parking lot. Claimant advised his supervisor that he needed to go to the parking lot to investigate the damage to his truck and to discuss the situation with the person responsible. Claimant's supervisor excused him from work at that time. Claimant dressed out, took off his personal protective equipment, and proceeded to the parking lot. Upon arriving at his truck, claimant observed two men leaning on his truck, one man

pointed to the front fender which prompted the claimant to look at the fender. Claimant was attacked by these men as he looked at the fender. After the men left, claimant went to the employee services complex and asked a guard for help. Claimant called his mother to take him to the hospital where he received treatment for multiple contusions and abrasions to his head, nose, left wrist, chest and knees.

Ultimately, it came to light that the reason behind the attack involved an incident between claimant and his stepdaughter. Claimant's attackers were not in any way involved with employment for respondents, and the attack was not in any way related to claimant's work activities.

Claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. § 11-9-102(5)(B)(iii) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Act 796 further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996) In Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002), the Arkansas Supreme Court stated:

Act 796 defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed. . . ." Ark. Code Ann. § 11-9-102(4)(B)(iii) (emphasis added). However, Act 796 does not

define the phrase "in the course of employment" or the term "employment services," Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Stephens v. Arkansas Sch. for the Blind, 341 Ark. 939, 20 S.W.3d 397 (2000). Although the statute does not define the term "employment services," the Commission as well as the Arkansas appellate courts have previously held that an employee is performing employment services when he is engaging in an activity which carries out the employer's purpose or advances the employer's interest directly or indirectly. Cheri Pettey v. Olsten Kimberly Quality Care, Full Commission Opinion Sept. 13, 1995 (E405037); 328 Ark. 381, 944 S.W.2d 381 (1997). An employee carries out the employer's purpose or advances the employer's interest when he engages in the primary activity which he was hired to perform. Id.; Kenneth Behr v. Universal Antenna, Full Commission Opinion Dec. 6, 1995 (E408376). When an employee engages in incidental activities which are inherently necessary for the performance of the primary employment activity, the employee carries out the employer's purpose or advances the employer's interest. Id.

The Arkansas Supreme Court has held that the same test used to determine whether an employee was acting within "the course of employment" is to be used to determine whether the employee was performing "employment services." Collins v. Excel Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (Mar. 7, 2002); Pifer v. Single Source Transp., supra. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." Id. This test has also been previous stated as whether the employee is "engaged in the

primary activity that [s]he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1996), aff'd, 328 Ark. 381, 944 S.W.2d 524 (1997). Employment services are performed when the employee does something that is generally required by his or her employer.

In Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491), the Full Commission found that the claimant "was not engaged in any activity that carried out the employer's purpose or advanced the employer's interest when the claimant deviated from her duties to go outside and smoke before she got "real busy." Likewise, in Carla Ann Cole v. Prince Gardner, Inc., Full Commission Opinion filed August 26, 1996 (E408046), the Full Commission found that when a claimant has finished work and is injured while walking across the employer parking lot, the injury was not compensable since employment services were not being performed. See also, Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case. After considering all the evidence, I find that the claimant was not performing employment services at the time of his injury. Claimant requested permission from his supervisor to be excused from work to check on an incident with his truck. Claimant "dressed out" and he left

the building to check on his truck. Claimant was not performing any activities at the time of his injury that either advanced his employer's interests or carried out his employer's purpose. Claimant was attacked on his employer's parking lot for reasons completely unrelated to his employment. Accordingly, I find that the claimant was not performing employment related activities on January 17, 1999, when he sustained injuries after being attacked by his stepdaughter's friends. Therefore, I find that the claimant did not sustain an injury which falls within the jurisdiction of the Arkansas Workers' Compensation Act.

AWARD

The Arkansas Workers' Compensation Commission does not have jurisdiction over the injuries sustained by claimant on January 17, 1999. Therefore, this claim is hereby dismissed.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge