

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400569

MARTIN FLORES, EMPLOYEE	CLAIMANT
BENNETT LANDSCAPING & DEVELOPMENT, EMPLOYER	RESPONDENT
FirstCOMP INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 21, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on June 4, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Kristofer E. Richardson, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 4, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on April 21, 2004, and an Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an amendment by the claimant concerning entitlement to temporary total disability. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record

without objection.

It was stipulated that the employment relationship existed at all relevant times, including January 9, 2004; that claimant earned sufficient wages to entitle him to a compensation rate of \$215.00 per week for temporary total disability; and that the claim had been controverted in its entirety.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be determined.

Claimant contended, in summary, that he sustained a compensable injury to his right ankle as the result of a specific incident identifiable in time and place of occurrence on January 9, 2004; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning January 10, 2004, and continuing through an undetermined date, maintaining that his healing period had not ended; and that a controverted attorney's fee should attach to any benefits awarded. The claimant reserved the issue of permanent disability, if applicable. At the hearing, the claimant amended his contentions to request temporary total disability through April 28, 2004, the date claimant returned to work for another employer.

The respondents contended that the claimant did not sustain a

compensable injury while maintaining that, at the time of claimant's injury, he was not performing employment services, and, further, that the claimant's injury was the result of an idiopathic fall.

In addition to the claimant, his wife, Michelle Flores, testified in his behalf. Deanna Bennett was called as a witness for the respondents. The record is composed solely of the transcript of the June 4, 2004, hearing.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that he sustained a compensable injury to his right ankle as the result of a specific incident identifiable in time and place of occurrence on January 9, 2004, entitling him to appropriate workers' compensation benefits.
4. The claimant's injury was not the result of an idiopathic fall.
5. The claimant is entitled to temporary total disability benefits for the

period beginning January 10, 2004, and continuing through April 28, 2004, at which time he returned to gainful employment.

6. Respondents are responsible for all outstanding hospital, medical and related expenses as the result of claimant's January 9, 2004, compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.
7. Respondents have controverted this claim in its entirety.
8. Claimant's entitlement to permanent impairment benefits, if any, has been specifically reserved.

DISCUSSION

The basic facts in this case are not controverted. It is undisputed that the claimant sustained a fracture to his right ankle at the workplace on January 9, 2004. On and before that day, the claimant was employed to perform landscaping work for the respondent. The record reflects that the claimant had completed his job assignments for January 9, 2004. After completing his landscaping duties at the job-site assigned, the claimant returned the company truck to the employer's nursery. Upon learning that there was no further work to be performed for the day, the claimant was walking to the company office to both sign out and receive his pay check when he slipped on some pea gravel, twisting his right ankle and falling. The claimant sustained a fracture to the right ankle. Employees are required to sign in and out so that their hours of

work can be documented. Employees are also required to pick up their check at the end of each work week on Fridays. Again, it is undisputed that the claimant was in route to the office to clock out and pick up his check when the accident occurred.

COMPENSABILITY

Respondents do not deny that the claimant's injury occurred on the employer's premises. Respondents controvert the claim maintaining that the claimant was not performing employment services at the time of the injury, and, further, that the injury was the result of an idiopathic fall.

EMPLOYMENT SERVICES

The claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. §11-9-102(4)(B)(iii) (Repl. 2002) states:

An injury is not compensable if it 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.

The Act further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. §11-9-704(c)(3)(Repl. 2002)

In *Pifer vs. 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 vs. 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 the 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 vs. Arkansas School 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 vs. Olsten Kimberly Quality Care*, Full Commission Opinion September 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 vs. Universal Antenna*, Full Commission Opinion December 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 vs. Excel Spec. Prod.*, 347 Ark. 811, 69 S.W.3d 14 (March 7, 2002); *Pifer vs. Single Source Transportation, 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

previously stated as whether the employee is “engaged in the primary activity that [s]he was hired to perform or incidental activities that are inherently necessary for the performance of the primary activity.” *Olsten Kimberly Quality Care vs. 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.

Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case. There have been numerous cases over the years addressing whether a particular activity involved employment services. In a recent decision, *Caffey vs. Sanyo Manufacturing Corp.*, CA03-943, Opinion filed March 10, 2004, the Court of Appeals affirmed a Commission decision that a claimant was performing “employment services” when she slipped and fell on her way to clock in for the morning shift. Clearly, clocking out at the end of the day, as well as picking up a pay check which is an activity required by the employer would constitute employment services.

Alternatively, respondents maintain that the claimant’s injury was the result of an idiopathic fall. In *Moore vs. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W. 2d 496 (1987), the Court of Appeals offered the following analysis with regard to whether an on-the-job fall will give rise to compensation:

When one suffers an injury at work, the cause is, obviously, either known or unknown. Larson’s treatise on workers’ compensation law states that the most common example of a situation in which the cause of the harm is unknown is

the unexplained fall in the course of employment and that most courts confronted with that situation have seen fit to award compensation. 1 Larson, The Law of Workmen's Compensation, §10.31, at 3-87 (1985). However, injuries from idiopathic falls do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of the fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Larson §12.11.

The word "idiopathic" is defined in Webster's Third New International Dictionary, Unabridged (1976), as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Although the two concepts are frequently confused, Larson says "unexplained-fall cases begin with a completely neutral origin of the mishap, while idiopathic-fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the *prima facie* showing of personal origin." Larson §12.11, at 3-314.

The claimant's credible testimony, as well as the history contained in the medical reports, reflects that the claimant was at work when he twisted his ankle and fell. (Tr.10-11)(Jt. Ex. A, pp.1, 8)

There is no credible evidence whatsoever that the claimant's injury was the result of a personal weakness. The claimant's injury was the result of either a slip and fall or an unexplained fall. In either case, the claim is compensable.

It does not appear that there is a genuine dispute concerning the claimant's entitlement to temporary total disability, if compensability is overcome. The claimant sustained a scheduled injury. With a scheduled injury, the claimant need not demonstrate that he is actually incapacitated from earning wages to receive temporary total disability. Rather, for a scheduled

injury, the claimant must be within his healing period and unemployed to qualify for temporary total disability. *Farmers Cooperative vs. Biles*, 77 Ark. App. 1, ___ S.W.3d ___ (2002).

The record reflects that the claimant returned to gainful employment for a different employer on April 28, 2004. Accordingly, he is entitled to temporary total disability through that date. Entitlement to permanent disability benefits, if any, has been reserved.

AWARD

Respondent, FirstComp Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$215.00 per week beginning January 10, 2004, and continuing through April 28, 2004.

All benefits having accrued, respondents are to pay same in lump sum, and without discount.

Respondents are further directed and ordered to pay all outstanding hospital, medical and related expenses as the result of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Kristofer E. Richardson, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid pursuant to Ark. Code Ann. §11-9-715.

This entire Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge