BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F306569

STEPHEN LLOYD, EMPLOYEE	**CLAIMANT**
KING REFRIGERATED TRUCKING, EMPLOYER	**RESPONDENT**
AMERICAN HOME ASSURANCE COMPANY/ AIG CLAIM SERVICES, TPA, CARRIER	**RESPONDENT**

OPINION FILED JANUARY 9, 2004

The hearing was conducted on December 3, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 3, 2003, in Little Rock, Arkansas. It was stipulated as follows:

1. On June 6, 2003, the employee-employer-carrier relationship existed.
2. There is no agreement regarding the average weekly wage.

Regarding that disagreement, the attorneys for claimant and respondents submitted proof as requested regarding the average weekly wage. The briefs and attached exhibits are made a part of the record herein as Commission Exhibits 1 and 2. Briefs regarding the issue of "employment services" are made part of the record as Commission Exhibits 3 and 4.

3. The claim is controverted in its entirety.

The issues to be litigated at the hearing were as follows:

1. Did claimant sustain a compensable injury to his right lower extremity on June 6, 2003?

2. Is claimant entitled to temporary total disability from June 7, 2003, through October 2, 2003, the date the claimant returned to work? Is claimant entitled to reasonably necessary medical expenses?

3. Is claimant entitled to an attorney's fee?

4. Was claimant performing "employment services" at the time of his injury on June 6, 2003?

5. The respondent claims that any benefits claimant received prior to June 13, 2003, are not respondent's responsibility because June 13, 2003, was the first day respondent/employer received notice.

The claimant, Stephen Lloyd, testified that he is 46 years of age and a high school graduate. He has a commercial driver's license and has driven trucks off and on since age 21. The claimant testified that he is a Type B diabetic, which requires no insulin treatment and is managed by claimant taking approximately four pills per day. He has had diabetes for ten years. The claimant testified that he had no foot problems prior to June, 2003, or problems with foot wounds not healing. At the time of the hearing in this case, the claimant was working as a truck driver, and employed by the respondent/employer.

The claimant began working with the respondent/employer in 2001. He successfully completed the Department of Transportation physical prior to being hired by respondent/employer. When claimant was injured on June 6, 2003, he was part of

two-man driving team in an over-the-road 18-wheel truck provided by the respondent/employer. The claimant testified he was paid 19 cents a mile for driving solo and 15 cents for team driving. The claimant was driving with Alvin Hayes that day, and the claimant was responsible for the paperwork on June 6, 2003, as the "first seat driver." The claimant explained that as the "first seat driver," he draws the advances to take care of the expenses of the truck, and if something happens to the truck, he would have to get in touch with the dispatcher for repairs. The claimant testified that he is responsible for the safety of the truck. The claimant testified regarding his injury:

> "A. We was in Columbus, Ohio at the truck stop waiting to pick up our load there in Columbus about three miles down the road from where we was sitting at.
>
> Q. Okay. How did you get - - what caused you to get to Columbus, by way of what?
>
> A. We had delivered a load in Pennsylvania, I don't know exactly where, the day before. We called **dispatch** and they sent us to pick up the load in Columbus, but they **told us it wouldn't be ready until the next day, the next morning; to go on down to - - and find a place for the night, wait until the next morning, and go down to load it up.**
>
> **Q. Who told you to go find a place and wait for the load?**
>
> **A. Our dispatcher, J.R..**
>
> Q. Okay. What time, do you remember, did you arrive in Columbus?
>
> A. It was around four or five o'clock in the evening.
>
> Q. Okay. And was that the day prior to your injury?
>
> A. Yes.
>
> Q. So that would be June 5, 2003?
>
> A. Yes.

Q. What did you do when you got there?

A. We got something to eat and took a shower, went back out to the truck.

Q. What did you do when you got back out to the truck?

A. Watched a little TV and went to sleep.

Q. Okay. And, specifically, you all were ordered to do what?

A. Well, we had to stay with out truck. I mean, we can't go, you know - - our truck - - we don't get paid to go to a motel room or anything like that. From my understanding is, D.O.T. regulations and stuff, that you are responsible for that truck from the time you leave until the time that truck gets back. You can't just up and leave that truck and go to a bar and mess around or anything because, you know, if somebody steals it or if the motor shuts off on you, if a reefer goes off and stuff, you are responsible for getting that thing started back up.

Q. I understand. So you all after eating and showering went back to the truck?

A. Right.

Q. You and Alvin?

A. (Nodding head up and down.)

Q. Is that true?

A. Yes, sir.

Q. I want to know - - what I want to know, Steve, is, **I want to know the exact instructions that you had from your dispatcher concerning that load you were to pick up the next day?**

A. Okay. He gave us instructions to go to Columbus, Ohio, bed down for the night, to be ready to go pick up the load first thing in the morning.

Q. Any idea - -

A. He told when it loaded and everything.

Q. Did you have any idea when it would be ready the next day?

A. It was supposed - - I think it was supposed to have been ready about eleven o'clock, (a.m.) but Alvin had had a death in the family, so he called them and asked them to load it earlier and they did.

Q. Now, I presume that you all went to sleep for the night?

A. Yes."
(T-17, 18. 19)
.....

"Q. **Were you, Stephen, sitting in that truck and sleeping in the truck and doing paperwork in the truck and getting dressed in the truck in that parking lot in the Flying J on that particular day because you wanted to be there, or did someone tell you to be there?**

A. He didn't tell us what truck stop to go to. He told us where the load was at. **He told us to go to the nearest truck stop and bed down for the night, like they do all of our times, to be ready to load the next day.**

Q. Who told you that?

A. J.R. did, but, I mean, that is hearsay and you can't say that."
(T-68)
.....

"JUDGE CURDIE: All right. Was the stopping and going to sleep, was that what you usually did, or was that something that was different?

THE WITNESS: A team truck runs twenty-four hours a day, unless you get early to your drop site or early to your pick up site. Sometimes, like this summer and stuff, we run across the top of there and by not stopping and eating, taking time out, taking an hour off to eat or something like that, but driving and just getting the food on the run and everything, you would get to your drop site early."
(T-20)

The claimant testified that the sequences of events were as follows:

Claimant and his partner delivered truck cargo in Pennsylvania at approximately noon on the 5th of June; the claimant drove to Columbus, Ohio in order to pick up a new load

of merchandise on the 6th of June. According to the claimant's testimony, he was supposed to pick up a load between noon and 4:00 p.m. on June 6th. However, his truck mate, Alvin Hayes, wanted to pick up the load earlier so that he could return in time to attend a funeral. (Apparently, the medical supply company accommodated the request to pick up the cargo earlier than planned.) According to the claimant, they drove to the closest truck stop to where they were supposed to pick up the next load on the sixth. They parked in the parking lot of the truck stop, took a shower in the truck stop, and cleaned up about 4:00 p.m. on the 5th of June. They ate at the truck stop. The claimant testified regarding the sequence of events:

"JUDGE CURDIE: Okay. All right. Why did you stop?

THE WITNESS: Because we had to wait until time to go down to load the load. This was a load of medical stuff, and you couldn't go down and park on their lot or anything. You had to wait at the truck stop until an hour or so before your time to go down and pick up the load.

JUDGE CURDIE: Okay.

THE WITNESS: The truck stop was three miles from where we was picking up at, or less.

JUDGE CURDIE: When was the last time that you had got any sleep before then?

THE WITNESS: We sleep five on and five off.

JUDGE CURDIE: Meaning?

THE WITNESS: You drive five; then you sleep for five.

JUDGE CURDIE: Okay.

THE WITNESS: So you run ti as five and five. We had left Spokane, Washington, but during that time, we had been running, I believe it was, two trips across from East/West.

JUDGE CURDIE: When was the last time prior to June 6 that you had actually stopped and both of you slept?

THE WITNESS: Well, we did sleep out in the Washington area because we was early for our appointment.

JUDGE CURDIE: Okay.

THE WITNESS: We got out there, like, on a Sunday evening, and we didn't deliver until Monday.

JUDGE CURDIE: As long as you worked for King Refrigeration, did you stop and use a hotel or any other sleeping arrangement?

THE WITNESS: No, sir. The truck was provided for sleeping arrangements, unless the truck was broke down, and then he would put us up in a motel if it had to have been.

....

MR. HART (CONTINUING)

q. Who instructed you to wait there?

A. J. R., our dispatcher."
(T-23, 24, 25)

The claimant testified regarding the specific instance of his injury:

"Q. Okay. Tell us how you were hurt, Steve?

A. I had got up that morning to get dressed, and when I went to put a step out of the bed to put my pants on, I stepped on a toothpick that was in the carpet. And the tip of it broke off in my foot.

Q. Okay.

A. But I didn't know that the tip of it broke off at that time.

Q. Okay. What time was it?

A. Five o'clock (a.m.)

Q. What time did you usually get up?

A. Running single, I always got up at five o'clock and started my run at that time.

Q. Okay. What were you planning doing, or what did you do after you got up and stepped on the toothpick?

A. I got up, got dressed, got up front, did my logbook up because you can't do a logbook up if you go - - if you get there - - we can mark what time we get to where we stop at, our last spot that we stop, like, eight o'clock or whenever it was, but you can't mark that logbook over until midnight if you are back there asleep. You had to do the logbook the next day or at midnight, whatever. Your last movement is where you show. So I got up and did my logbook up for the next - - for that day, on the 5th, and started it out for the 6th, and if did some paperwork, where we got fuel and stuff, and filled out my paperwork where I had got the fuel. We had to do it on an envelope and a piece of paper, a trip report. Get all my receipts together and do all that.

Q. Where did you fill out the paperwork?

A. At the truck stop that morning.

Q. Okay. Where were you, though, physically?

A. In the front seat of the truck.

Q. Okay. How long was it after you got out of bed that starting doing the paperwork?

A. Just right afterwards.

Q. Was that something you normally did, or something different?

A. Yes, sir. You had to do your paperwork before you can move the truck.

Q. Is that - - is the paperwork that you told us about required by the Department of Transportation, if you know?

A. Your log is required by the Department of Transportation, yes. And **our dispatcher, the lady that does the payroll thing, she wants - - she requires us to do our receipts and our log - - turn in our logs as we**

go.

Q. When you say the "payroll lady," who do you mean?

A. Toy.

Q. Toy? Does she work for King Trucking?

A. Yes, she does.

Q. Do they require you to do the paperwork that you told us about?

A. Yes. You have to have the paperwork done to get paid.

Q. Okay. Tell us, Steve, if you will, about - - let's go back to when you stepped on the toothpick, tell us what you felt?

A. I just felt something like it poked the skin. I got up and I turned the light on and I looked at my foot. I didn't see no spot. There wasn't no blood or nothing. It was like just a scratch across, just rubbed across a scratch, you know. There wasn't nothing there. And then, later on about noon, there was a red spot showed up and my foot had started swelling in my shoe where I couldn't wear my shoe at that time.

Q. Okay. How long did it take you to complete your paperwork?

A. Fifteen, twenty minutes.

Q. When you got up, what was Alvin doing?

A. He was asleep.

Q. Okay. What did you do - - what time did he gut up>

A. He got up about thirty minutes later.

Q. Okay.

A. Like I said, he had a death in the family. He had to make some phone calls.

Q. Did you tell anyone from King that morning that you had hurt yourself or you had stepped on a toothpick?

A. At that time, we didn't have QualCom. I had made a phone call off my cell phone and had talked to Toy and told her that I had stepped on a toothpick, but I didn't think I had did anything to my foot at that time.
(T-25 thru 28)

The claimant testified that this particular truck was one leased by the respondent/employer and had carpet on the floor. The claimant testified that he woke up approximately at 5 a.m. every morning when he was sleeping in the back of the truck. He testified: "I do my paperwork until like 5:15, do my pre-trip and everything; by 5:30 the truck was on the road and up and down the road at 5:00 or 5:30." (T-54). The claimant testified that he considered himself to be "off duty" from 4:00 p.m. on the 5th of June until the truck actually begins to move again on the way to pick up the next load. (T-63). The claimant is testified that he is paid only for time when the truck is moving.

According to the claimant, his foot began swelling at approximately noon on the 6th of June. The claimant and Mr. Hayes drove to Searcy, Arkansas, arriving at approximately 11:30 p.m.. The claimant testified that he was due to drive to Reno, Nevada the next morning, but by then his foot was swelling and he was limping. The claimant testified that he thought that Dan King, the owner of respondent/employer, was aware of the reason for his limp, but claimant found out later that Mr. King did not know about the work related injury. According to the claimant, Mr. King asked "What are you limping for?", and claimant told him he had hurt it on the truck. He didn't ask to go to the doctor at that time because "I figured I was going - I was going out on the truck. I was going to go to Reno. I thought I would go by the Wal-Mart and pick up some antibiotic cream and put it on the spot and go home and go out on the truck the next

day." (T-36).

According to the claimant, there was great swelling in his foot overnight, and he went to the hospital at approximately 5 in the morning. The claimant saw a doctor, who admitted him to the hospital. According to the claimant, he telephoned Dorothy King, part owner of the respondent/employer' business, and told her that he was in the hospital. He testified that he told her he had stepped on a toothpick. The claimant had surgery on or about June 7, and was in the hospital until June 20. He had an additional surgery to treat infection in the injured foot. The claimant returned home, but home health care was not provided because of controversion. When claimant was discharged from the hospital, he went to his brother's house until his foot could heal and he could ambulate. The claimant went to HealthSouth to receive medical treatment at a reduced rate for two to three weeks. He received free clinic treatment. He saw Dr. Green, a surgeon, who performed additional surgery requiring part of a bone to be removed from his foot. The claimant experienced staph infection. The claimant received hyperbaric treatment for 28 days and antibiotics. On October 1, 2003, the claimant was released to return to work, and on October 2, 2003, the claimant did return to work driving a truck for King Refrigerated Trucking. He testified that he needs a special shoe as part of his medical treatment and owes medical bills in neighborhood of $150,000.00 to $200,000.00.

The claimant called as a witness, Mr. Dan King, who owns Kings Refrigerating Trucking. He has owned the company for 17 or 18 years. Mr. King testified that he first knew of claimant's accident when Mrs. King told him that the claimant was in the hospital and had stuck a toothpick in his foot. Apparently, the

hospital called King Refrigerated Trucking and stated that the claimant was seeking services and alleging a workers' compensation injury. It is noted that page 2 of Respondent's Exhibit #2 is the First Report of Injury or Illness filed in this case. It alleges that the claimant notified the employer on June 7, 2003 that he had injured his foot when he stepped on a toothpick suffering a puncture to his right foot. It is noted on this form that the preparer of the form was Dorothy King, Mr. King's wife and part owner of the business.

Mr. King testified as follows:

> "Q. Does it benefit you, Mr. King, as the owner of a trucking company, to have your employers - - or your employees, rather, in close vicinity to your trucks? In other words, does it benefit you to have a guy like Mr. Lloyd around his truck at all times?
>
> A. Yes.
>
> Q. Why?
>
> A. **Well, he lives there, he makes his living there. There is less likely a problem with the truck getting run over in a parking lot if he is there, and, of course, if he is there, he can identify who ran over it."**
> (T-75, 76)
> **.....**
>
> Q. And you expect your employees when they are on the road, whether they are parked somewhere because they are awaiting orders from your company to go somewhere else, or whether they are going down the road, you expect them to be there to solve problems on the road that may arise. Is that true?
>
> A. Yes.
> (T-77, 78)

Mr. King testified that it is logical that someone from the respondent/employer told the claimant to sit at that particular truck stop and wait for

time to drive the short distance the claimant was planning on driving to get the load in Columbus, Ohio. (T-80). Mr. King testified as follows:

> "Q. So it certainly benefits you, either directly or indirectly, to have these employees do the proper paperwork that you need done. Is that true?
>
> A. That is true.
>
> Q. Is it not true, Mr. King, that your employees, your drivers, can do paperwork that they need to do at different times during the day?
>
> A. It is their prerogative.
>
> Q. Okay. They can do it morning, night, midnight, whenever they want?
>
> A. They can only be so far behind, though.
>
> Q. I got you. Is it unusual - -
>
> A. Unless they are asleep.
>
> Q. Okay. Is it unusual for an employee, in your experience, or a driver, in your experience, to do - - get up in the morning and immediately start doing the paperwork?
>
> A. Most of the time they do the paperwork that D.O.T. requires they have to be duty status, meaning when you change drivers or you get ready to go to work.
>
> Q. Okay.
>
> A. You generally don't get up in the middle of the night and do logs, and then go back to bed.
>
> Q. I mean, in the morning?
>
> A. In the morning, at night, whenever.
>
> Q. All right. So it is not unusual to do that in the morning. Is that right?
>
> A. It is not unusual for a driver to do it anytime he wants to.
>
> Q. All right. Do you consider your drivers, and if I have already asked this, I apologize, it is getting late, do you consider your drivers to be

responsible for their trucks or your trucks when they are on the road?

A. Yes.

Q. Okay. Anytime they are on the road?

A. Yes.
(T-82, 83)

On cross-examination, Mr. King testified as follows:

"Q. Okay. **And if they weren't going back to work until, as the testimony was today, the next evening, would they do anything on the logbook or any paperwork before the next evening when they got ready to pull out of the truck stop?**

A. I don't think it would be required, but that doesn't mean they wouldn't do it."
(T-85, 86)

Mr. King stated that he did not remember the claimant telling him on June 6 that he had injured himself on the truck or that he was injured at all. He did not know if the employment log showed whether the claimant was listed as "on duty, but not driving."

Mrs. Dorothy King, the co-owner of King Refrigerated Trucking, testified that she acts as a secretary for the trucking business. She stated that even though her name was on the First Report of Injury from the employer (Rx-2, page2) as the preparer of the report, she did not complete report. She testified that she only realized that the claimant was alleging a workers' compensation claim when she received a workers' compensation benefits inquiry from the hospital where claimant was receiving treatment. She stated that she learned about the toothpick incident from a secretary whose name is "Toy." (It is noted that claimant testified that he reported this incident to

"Toy.") Thereafter, Ms. King received the notice of the workers' compensation commission claim from the hospital, and then she called the representative from AIG Claims Services. According to Mrs. King, the claimant still is employed as a truck driver for King Refrigerated Trucking. She testified that she knew by Monday, June 9, that the claimant stepped on a toothpick while putting on his jeans after getting out of his bunk bed on the truck.

Claimant's Exhibit 1, page 2 is an emergency room record dated June 7, 2003. The record reflects that on June 6, claimant stepped out of his bed on his tractor trailer on to the floor board and poked a toothpick into his right foot. Claimant stated, according to the record, that the pain had increased over the past day and the foot became red, warm and swollen. The report states that the claimant used to be an insulin dependent diabetic, but the diabetes has been fairly well controlled recently on oral medication. An examination was made of the claimant's foot. An incision was made and significant infection was discovered. **A small remnant of a toothpick, approximately 2 to 3 millimeters in length, was found in claimant's right foot**. He was diagnosed with a right diabetic foot infection. The medical records reflect the medical treatment that claimant described at the hearing. Claimant's Exhibit 1, pages 32, 33, and 34 reflect the significance of claimant's injury and resulting wound and staph infection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On June 6, 2003, the employee-employer-carrier relationship existed.
2. There is no agreement regarding the average weekly wage.

Regarding that disagreement, the attorneys for claimant and respondents submitted proof as requested regarding the average weekly wage. The briefs and attached exhibits are made a part of the record herein as Commission Exhibits 1 and 2. Briefs regarding the issue of "employment services" are made part of the record as Commission Exhibits 3 and 4. The claimant's average weekly wage was $543.00.

3. The claim is controverted in its entirety.

4. The preponderance of the evidence reflects that the claimant sustained a compensable right lower extremity injury on June 6, 2003. Specifically, at the time of the compensable injury, the claimant was performing "employment services," according to the Arkansas Workers' Compensation law.

5. The preponderance of the evidence reflects that the claimant is entitled to temporary total disability from June 7, 2003 through October 2, 2003.

6. The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee for controversion.

DISCUSSION

1. CLAIMANT'S AVERAGE WEEKLY WAGE.

Commission Exhibit's 1 and 2 reflect the parties' arguments regarding the average weekly wage of the claimant. Respondent submitted the claimant's payroll records. The records reflect that through June 7, 2003, the claimant's earnings were $9,665.52. According to the per diem amounts paid to the claimant, that covered a total of 89 days. The daily rate of pay was $108.60. Multiplying that times a 5 day work week is $543.00, which respondent alleges to be the average weekly wage. The

claimant agrees that he worked and was paid a per diem for a total of 89 days and that the daily pay rate was $108.60. The claimant alleges that his work week should be 6.05 days per week during the period of time in question, and that the average weekly wage should be $657.03. The preponderance of the evidence reflects that the respondent's figures are accurate and that the claimant's average weekly wage is $543.00. A.C.A. § 11-9-518 (Repl. 2002).

2. DID CLAIMANT SUSTAIN A COMPENSABLE INJURY?

I find the claimant to be a credible witness in his description of the events prior to, during, and subsequent to the injury on June 6, 2003. It is noted that the respondent/employer continues to employ the claimant as a truck driver.

"For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Arkansas Code Ann. § 11-9-102(5)(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.

"Employment services" are performed when the employee does something that is **generally required by his or her employer**. Collins v. Excel Spec. Prods., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). Courts use the same test to determine whether an employee was performing "employment services" as they do when determining whether an employee was acting within "the course of employment." Collins, supra; Pifer, 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.**" Collins, supra; Pifer, supra. This test has also been previously stated as whether the employee was engaged in the primary activity that he was hired to perform or in **incidental activities which are inherently necessary for the performance of the primary activity**. Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997).

White v. Georgia-Pacific Corp, 339 Ark. 474, 6 S.W.3d 98 (1999) is instructive. The claimant's duties included loading some veneer dryers with lumber. Although he was supposed to have three scheduled work breaks per shift, he frequently was unable to take breaks because the employer failed to provide relief staff. Accordingly, the claimant would take a break in a cigarette-smoking area where he still could view his work station and immediately return if necessary. While returning from a

smoke break, he slipped and fell on some slick algae on the floor.

The Arkansas Supreme Court held that the claimant had sustained a compensable injury. The court stated the following rules for deciding when an employee is performing "employment services":

> We have held that the test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly.
>
> Related to the issue of whether an injury arose in the course of employment is the requirement that the employee be performing "employment services" at the time of the injury. **The court of appeals has held that when an employee is doing something that is generally required by his or her employer, the claimant is providing employment services.**
> Id. at 478, 6 S.W.3d at 100 (emphasis added).

In concluding that the claimant suffered a compensable injury, the court in White twice emphasized that the employer compelled the claimant to be in the circumstances in which he found himself at the time of the accident.

In Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (March 7, 2002), the claimant left the production line in a meat processing plant to go to the bathroom. On her way to the bathroom, she fell and broke her arm. The court relied on the same statutory principles and case law definitions set out above, citing White.

Significantly, the court reasoned:

> We note that the activity of seeking toilet activities, although personal in nature, has been generally recognized as a necessity such that

> accidents occurring while an employee is on the way to
> or from toilet facilities, or while he or she is
> engaged in relieving himself or herself, arise within
> the course of employment.

347 Ark. At 818 (emphasis added). The Court concluded that the claimant's taking a restroom break "was a necessary function and directly or indirectly advanced the interests of his employer." Id. at 819 (emphasis added).

Likewise, in Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1, the employee was injured after leaving a bathroom at his employer's facility. The Court's discussion in Pifer closely tracks that of the Collins opinion. This included the conclusion that claimant Pifer's restroom break "was a necessary function and directly or indirectly advanced the interests of his employer."

In Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997), a nurse's assistant whose job required her to care for patients in their homes was injured in an automobile accident while on route from her employer's offices to a patient's home. The claim was deemed to be compensable because "travel was a necessary part of her employment." 328 Ark. At 387, 944 S.W.2d at 527 (emphasis added).

___________First, it is noted that whether the employee is “on the clock” or on the employer’s premises when an injury occurs is not likely to have much bearing on whether a trucker’s injury is sustained at a time when employment services are being performed. In Ray v. Wayne Smith Trucking, 68 Ark. App. 115, 4, S.W.3rd 506 (1999), Ray drove a truck owned by Wayne Smith Trucking as an over-the-road truck driver across the country. He sustained an injury to his right shoulder while installing a CB

antenna on the trucking company's truck. On Ray's regular day off he went to the trucking company shop to move a number of items from his old truck to a new truck owned by the employer, so he would not have to do so early the next morning. He moved several items, including his personal CB radio and antenna, oil, antifreeze, bedding for the sleeper cab, and spring loaded bars among other items. Ray, like the claimant in the instant case, was paid according to his mileage. The Arkansas Court of Appeals concluded that Ray was performing an incidental activity which was inherently necessary for the performance of his primary employment activity. Ray was preparing his truck for a cross country drive by equipping it with items necessary for the effective administration of his job.

The preponderance of the evidence in this case reflects that sleeping in the bunk bed provided in the truck owned or leased by the respondent/employer was a required employment activity. The preponderance of the evidence in this case reflects that the claimant woke about 5:00 in the morning. He intended to put his pants on and go into the cab area, where he was usually the driver, and perform necessary paperwork in the form of accumulating receipts, and log records required by the Department of Transportation. He stepped on a toothpick that was in the carpet very near where he was sleeping and the tip of the toothpick broke off into his foot. He continued to dress, went the cab of the truck, completed his log book for the previous day, and began making his log book reflect activities for June 6. He also did some paperwork regarding where he obtained fuel and other figures for his "trip report." The claimant testified that when he stepped on the toothpick, he immediately felt something in his foot, so he turned on the light and looked at the foot. There was no blood and he

did not see anything except a small scratch. He testified that about noon that day (June 6) he noticed a red spot on his foot and swelling of his foot in his shoe. The swelling was so significant that he could not wear his shoe at that time. When claimant noticed he had stepped on the toothpick, he picked it up to look at only to see that the tip was broken off. (That tip was later found inside his foot by the doctor.)

The claimant testified that he completed his paperwork which took 15 or 20 minutes. He testified that he called a secretary at respondent/employer named Toy (last name unknown), and told her he had stepped on a toothpick, but it was not a "big deal."

His co-employee and truck driving mate woke up shortly after claimant did and made some phone calls. He called the business where they were to load merchandise to deliver and asked if they could load the cargo earlier so that he could get back home in time to go to a funeral. That accommodation was made.

I believe that the major issue is whether the claimant stepped on the toothpick when he was "carrying out the employer's purpose or advancing the employer's interest directly or indirectly" or when "he was engaged in the primary activity that he was hired to perform or incidental activities which are inherently necessary for the performance of the primary activity." The preponderance of the evidence in this case reflects that the claimant was required to sleep in his truck. The preponderance of the evidence reflects that the claimant was required to perform "paper work" as part of his job, and often did the paper work in the front cab seat of the truck. The preponderance of the evidence reflects that the claimant, after he awoke, stepped out of his bunk bed in order to dress and go to the cab of the truck to do

paperwork necessary in his employment. I believe that sleeping in the truck and dressing in the truck and walking to the cab of the truck was an inherent and necessary incident of claimant's required employment activities. Therefore, the preponderance of the evidence reflects that the claimant was performing employment services when he stepped out of his bunk in order to get dressed to go to the front cab of the truck in order to do his paperwork. Even though the claimant is not directly compensated until he is driving the truck, as stated earlier, the payment of compensation is not conclusive to the question of whether employment services are being performed. For example, many workers, such as salesmen, are paid on the basis of commissions, but it is abundantly clear that a salesman who is attempting to make a sale is performing an employment service without regard to whether his attempt is successful. It is abundantly clear that the claimant was required to sleep in that truck due to many legitimate reasons discussed by claimant and by the owner of the company, Mr. King. Claimant's stepping out of the bunk bed and onto the floor in order to get dressed and go to the front of the cab in order to perform paperwork duties, given the requirements of the employer that claimant sleep in the truck carried out the employer's purpose and advanced his interest directly or indirectly.

Having found that the claimant was performing employment services at the time of his injury, and that his injury is compensable, the respondent is responsible for reasonably necessary medical treatment relating to the claimant's compensable injury. I find that the medical treatment received by claimant from the date of his injury was reasonably necessary and respondents are responsible for the medical treatment provided to claimant and additional medical treatment, including the special shoe

described by claimant.

The preponderance of the evidence reflects that the claimant is entitled to temporary total disability benefits from June 7, 2003 through October 2, 2003. The preponderance of the evidence reflects that the claimant was in a healing period and totally incapacitated from earning wages.

The respondent claims that the claimant did not provide notice of his injury prior to June 13, 2003. However, I believe the claimant was credible in stating that he notified Toy, the employer's secretary, on June 6, 2003. Respondent's Exhibit 1, page 2, the First Report of Injury or Illness, reflects that the employer was notified on June 7, 2003, not June 13. However, I credit the claimant's testimony in this regard and find that the notice was given by on June 6, 2003. The claimant is additionally entitled to an attorney's fee for controversion.

AWARD

The claimant is awarded the benefits specifically described herein, along with a maximum attorney's fee for his attorney. This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DON N. CURDIE,
Administrative Law Judge

DC