

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F406098

JEFFREY W. INGLE, EMPLOYEE

CLAIMANT

**PITONYAK MACHINERY CORPORATION,
EMPLOYER**

RESPONDENT

**AMERICAN FIRST INSURANCE COMPANY,
CUNNINGHAM LINDSEY CLAIMS MANAGEMENT
(TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 27, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on January 27, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

A hearing was held on January 27, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on June 1, 2004, when claimant was involved in an injurious event. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$227.00 for temporary total disability and \$170.00 for permanent partial disability benefits.

The parties further stipulated to the following: that claimant had knee surgery, performed by Dr. Scott Bowen, on July 26, 2004; that he was released to full duty on October 19, 2004; that he had previously been released to light duty by the doctor and had worked for another employer on a part-time light duty basis, during which time he earned a gross of \$1,049.00; that since his release to full duty, he has returned to work for another employer.

The parties also stipulated to a 9 percent impairment rating issued by Dr. Bowen to the lower extremity; however, respondents stipulated that if the rating should increase, they will stipulate to any rating Dr. Bowen gives.

Claimant contends that while on the job on June 1, 2004, he sustained a fall, injuring his knee, and was initially taken to the doctor by respondent-employer. Claimant seeks temporary total disability benefits from the date of injury to the date he returned to work on a light-duty basis for another employer. Claimant further seeks medical benefits and attorney's fees.

Respondents controvert the claim in its entirety, contending that the claimant was on a break at the time of his injury. In the alternative, if the claim is found to be compensable, respondents request a setoff for all medical benefits paid by the claimant's group health insurance carrier and for any and all short term disability benefits received by claimant. Respondents further assert, in the alternative, that if the claim is found to be compensable, the claimant is limited to the anatomical

impairment ratings assessed to him by his treating physicians, and that he is not entitled to any wage loss disability.

STATEMENT OF THE CASE

Claimant, Jeffrey Wade Ingle, who goes by “Wade,” is a nineteen-year-old highschool graduate who had been employed as a parts manager with respondent-employer for approximately nine months at the time of his injury on June 1, 2004. There is no dispute that claimant did sustain an injury on that date, requiring medical attention and subsequent surgery. What is disputed is whether claimant was engaged in employment services at the time of his injury.

Claimant testified that on June 1, 2004, he was working outside in the yard for respondent-employer when the afternoon break bell rang. Testimony revealed that the employees were allowed a ten-minute break in the morning, a thirty-minute break for lunch, and a ten-minute break in the afternoon. Claimant testified that as he started to go into the building to the break room, he had to climb over a forty to fifty foot long piece of machinery to get across the yard and, as he did, he fell off the machinery, injuring himself.

Claimant testified that it was a common practice for employees to climb over the piece of machinery because, otherwise, one would have to walk all the way around the end of it to get back to the door. Several co-workers who were working for respondent-employer at the time of claimant’s injury testified at the hearing. Jeremy

Putt, A. J. Whiting, and Albert Rogers each likewise testified that it was a common practice to walk across the long piece of machinery to get into the building.

Claimant further testified that regardless of when the employees had breaks, they were expected to be available to help work if called to do so by their supervisor, Gary Coco. Claimant testified, and Jeremy Putt and A. J. Whiting corroborated, that they were called out of a break to work or expected to work through a break at least one to three times per week. They each also testified that Mr. Coco had a temper and that they did not feel they had the option to not work during a break if asked to do so by Mr. Coco.

Albert Rogers, a co-worker who was called to testify on behalf of respondents, testified that Mr. Coco “sometimes” had a temper and that the only times he was ever asked to stay over and work during a break was if help was needed to unload a truck or if a customer had come in and needed something. He testified that he was never “forced” to work during a break.

Mr. Rogers testified that he was driving a forklift and handing claimant tools as he needed them on the date of claimant’s injury. He testified that although he did not actually see claimant fall, he knew claimant fell on his way into the building after the break bell rang and that he was the one who actually helped claimant up and into the office.

Mr. Coco, the shop foreman and claimant's supervisor at the time of claimant's injury, testified that he has worked for respondent-employer for fourteen years. He testified that he never *requires* anyone to work during a break; he testified that that is "their time." He testified that if a truck needs to be unloaded, it is "up to the individual" to help or not, during a break. When asked if he ever loses his temper with the young men who work for him, Mr. Coco answered, "I try not to."

Although the parties stipulated that claimant was at some point released to light duty and began working part-time for another employer, there was no testimony nor any evidence admitted regarding the date when that light-duty release was given. It is undisputed that claimant was released to full duty on October 19, 2004, and that claimant was issued an impairment rating of 4 percent to the whole person and 9 percent to the left lower extremity. However, these ratings were based on the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment. Respondents stipulated that should these ratings change when applied to the 4th Edition, they would stipulate to whatever ratings Dr. Bowen gives. Notably, although claimant was released to full duty on October 19, 2004, and was issued impairment ratings on November 5, 2004, Dr. Bowen's notes reflect on the date that the ratings were issued that claimant had "*not* reached MMI" (emphasis added).

FINDINGS OF FACT

1. All stipulations agreed to by the parties herein are accepted as fact;
2. Claimant was engaged in employment services at the time of his injury on June 1, 2004;
3. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury;
4. Claimant is entitled to temporary total disability indemnity benefits from the date of injury until the date he was released to light duty and began working for another employer;
5. Claimant is entitled to all medical benefits, both past and future;
6. Claimant is entitled to payment for the impairment rating issued by Dr. Scott Bowen;
7. Respondents are entitled to a setoff for all medical benefits paid by the claimant's group health insurance carrier and for any and all short term disability benefits received by claimant;
8. Respondents have controverted the case in its entirety.

DISCUSSION

Arkansas Code Annotated § 11-9-102(4)(A) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment." Section 11-9-102(4)(B)(iii) provides

that the term “compensable injury” does not include an injury that was inflicted upon the employee at a time when employment services were not being performed.

The statutes does not define the phrase “in the course of employment” or the term “employment services.” However, the Arkansas Supreme Court has held that we are to use the same test to determine whether an employee was performing “employment services” as is used when determining whether an employee was acting within “the course of employment.” See *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest, directly or indirectly. *Id.* See also *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). Further, the Court, in both *Collins* and *Pifer*, directed that the attention should be focused on what the claimant was doing at the time of the injury, rather than the activity that preceded or followed it.

In this case, testimony is clear that the break bell had sounded, and claimant was climbing over and crossing the machinery in order to get from the yard where he was working to the break room in the building. It is also clear that this was a common practice, and the machinery was obviously placed there for the convenience of the employees to not only get *to* the building for break, but to also get *from* the building back to the yard in a more time-efficient manner. This practice obviously advances

the employer's interests by getting the employees to and from breaks more quickly, thereby returning to their jobs more quickly.

In addition, credible testimony was adduced that the employees working for Mr. Coco believed that although they were given breaks, they were actually "on call" at all times and, if needed to work through or during a break, they simply did as they were told.

There is no dispute that at the time claimant was injured, he was crossing the machinery that was put in place for the purpose of helping the employees get to and from the building in a more efficient manner. Although he was "going on break" at the time of his injury, this fact does not determine compensability. *See Collins, supra; Pifer, supra; and Wallace v. West Fraser South, CA 03-1335 (Ark. App. 2-16-2005)*. It is this examiner's opinion that claimant's crossing the machinery in order to get to the break building was an activity that directly advanced his employer's interests and, therefore, constitutes employment services. Because claimant was performing employment services at the time of his injury, he is entitled to benefits.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are entitled to a setoff for all medical benefits paid by the claimant's group health insurance carrier and for any and all short term disability benefits received by claimant.

Respondents are further directed to pay the claimant's attorney, Mr. Philip M. Wilson, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge