

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F709784

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| KEVIN PARVIN, Employee | CLAIMANT |
| DIXIE DEVELOPMENT, INC., Employer | RESPONDENT |
| CINCINNATI INDEMNITY COMPANY, Carrier | RESPONDENT |

OPINION FILED JUNE 3, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 7, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 19, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on April 2, 2007.
3. The claimant was earning an average weekly wage of \$600.94 which would entitle him to compensation at the weekly rate of \$401.00 for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability.
2. Medical.

3. Temporary total disability benefits from April 2, 2007 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing the claimant modified his requested period of temporary total disability benefits to include April 2, 2007 through November 7, 2007. In addition, the respondents request a credit for any unemployment compensation benefits the claimant was paid during this period of time.

The claimant contends that on April 2, 2007 he was employed by Dixie Excavation and was sent by Roy Wright of Dixie Excavation and Dixie Development to get a check signed, and that that requested was done for the benefit of the employer. The claimant was struck in the parking lot by a vehicle during the course of completing the task. Claimant contends that he is entitled to temporary total disability benefits from April 2, 2007 through November 7, 2007, medical benefits, and a controverted attorney fee.

The respondents contend that claimant did not suffer a compensable injury while employed by the respondent. Respondents contend that claimant was not performing employment services at the time of his injury.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 19, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable injury while employed by the respondent. Specifically, claimant was not performing employment services at the time of his injury on April 2, 2007.

FACTUAL BACKGROUND

_____The claimant is a 46-year-old high school graduate. The respondent operates several businesses including a real estate division, landscaping division, and an excavation division. The claimant worked for the respondent's excavation division as a supervisor/foreman. The respondent had offices in Springdale and also in Fayetteville.

Beginning in January 2007, most of the respondent's excavating crew was laid off on a temporary basis. Claimant and the other employees drew unemployment benefits and worked for the respondent eight hours, one day each week. The day of the week worked by the claimant and the other employees varied as did the work itself.

Claimant testified that on April 2, 2007, he showed up for work at the respondent's office in Springdale, but was told no work was available and he should go home. Claimant testified that he had a prior paycheck which he had accidentally washed in a washing machine. As a result, he informed his supervisor, Roy Wright, that he needed a new paycheck. According to claimant's testimony Wright informed him that claimant would have a better chance of getting a new check than he would and as a result he was referred to the respondent's office in Fayetteville. As claimant was walking through the parking lot to go to the office to get a check he was struck by a vehicle and was thrown several feet. Claimant continued into the office building where he was given a new check and he informed the human resources director, Jane Rich, that he had been struck in the parking lot.

Claimant testified that he stopped at a job site on the way home to see who was working. While at that job site he told a fellow supervisor that he had been struck by a car and thought he needed to go to the hospital. Claimant received his initial medical

treatment from Northwest Medical Center in Bentonville.

Claimant subsequently received medical treatment from various treating physicians for injuries to his low back, right shoulder, right hand, and wrist. Claimant's medical treatment included surgery for a rotator cuff tear in June 2007.

Claimant has filed this claim contending that he suffered a compensable injury while employed by the respondent. He requests payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

Act 796 of 1993 defines a compensable injury as an accidental injury which arises "out of and in the course of employment...". A.C.A. §11-9-102(4)(A)(i)(Supp. 2003). However, a compensable injury does not include an injury which occurred at a time when employment services were not being performed. A.C.A. §11-9-102(4)(B)(iii)(Supp. 2003). Although Act 796 did not define the phrase "in the course of employment" or the term "employment services", the definition of these phrases and the tests to be applied has been addressed by the Arkansas courts. The courts have held that an employee is performing employment services when they are "doing something that is generally required by his or her employer." *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W. 3d 361 (2006). The courts have indicated that the same test used when determining whether an employee was acting in the course of employment is the same test which is used to determine whether an employee is performing employment services. Specifically, 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. The critical inquiry is whether the employer's interests are being directly or indirectly advanced by the employee at the time of the injury. *Wallace, supra; Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002); *Collins*

v. ExCel Specialty Products, 347 Ark. 811, 69 S.W. 3d 14 (2002).

Thus, the critical issue in this case is whether the claimant was advancing the interest of the respondent either directly or indirectly at the time of his injury. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant was not advancing the interest of his employer either directly or indirectly; therefore, he was not performing employment services and did not suffer a compensable injury.

Claimant contends that he was scheduled to work for the respondent on April 2, 2007. Claimant testified that he showed up for work at the respondent's office in Springdale but was informed that no work was available and instructed to return home. Claimant further testified that he had accidentally washed his prior paycheck in the washing machine and needed a new check. When he informed his supervisor, Roy Wright, of the situation, Wright indicated that claimant would have a better chance of getting a new check if he went to the respondent's office in Fayetteville. Claimant went to the respondent's office in Fayetteville and was struck by a vehicle in the parking lot.

In contrast to the claimant's testimony is the testimony of Roy Wright, the claimant's supervisor in April 2007. Wright is no longer employed by the respondent and has not worked for the respondent since September 2007. According to Wright, employees were never informed to show up for work and then no work was available. Wright testified that the respondent knew the day before what work was to be done and employees were then scheduled. Wright testified that he does not believe the claimant was scheduled to work that day because there would not have been a situation where claimant would have been scheduled and then informed that no work was available. Instead, Wright testified that the claimant called him on the telephone and informed him that he had accidentally washed his check and needed a new check. Wright testified that he then contacted Jane Rich, the respondent's human resource officer, to make sure that someone would be in the

respondent's Fayetteville office to issue a new check. Wright testified that when he was informed that someone would be in the respondent's Fayetteville office he relayed that information to the claimant.

I do not believe the issue of whether claimant was scheduled to work on April 2, 2007 is dispositive of this issue. Even if claimant's testimony were accurate, he had been informed that no work was available and that he should go home. However, due to the claimant's having accidentally washed his paycheck, he needed another check. While claimant may have been informed by Wright that he should go to the respondent's office in Fayetteville to get a new check, he was not "ordered" to do so by Wright. This was not a situation where claimant was directed by Wright to go to the respondent's office to pick up his paycheck or the paychecks of other employees. Instead, it was a situation where claimant had accidentally washed his paycheck and needed a new one. Claimant's trip to the respondent's office in Fayetteville was for the purpose of getting a new paycheck. This was a benefit to the claimant, not a benefit to the respondent. The respondent had already paid the claimant and a second paycheck was necessary due to the accidental washing. In my opinion, the claimant's trip to the respondent's office in Fayetteville for the purpose of getting a new check was a benefit to the claimant and it did not benefit the respondent either directly or indirectly. While claimant may have been referred to the Fayetteville office by Wright, this referral was for the claimant's benefit, not the respondent's.

Based upon the foregoing evidence, I find that claimant was not performing employment services at the time of his injury. Claimant's visit to the respondent's office in Fayetteville for the purpose of obtaining a new check did not advance the respondent's interest, either directly or indirectly. Claimant's referral to the respondent's office by Wright was a benefit to the claimant, not the respondent. Therefore, claimant was not performing employment services and he has failed to prove by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent. Specifically, claimant was not performing employment services at the time of his injury on April 2, 2007. Therefore, his claim for compensation benefits is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$497.25.

_____ IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE