

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201663

RICKY WALLACE, EMPLOYEE	CLAIMANT
WEST FRASER SOUTH, INC., EMPLOYER	RESPONDENT
AMERICAN MANUFACTURERS MUTUAL INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 4, 2003

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE BILLY J. HUBBELL, Attorney at Law, Crossett, Arkansas.

Respondent represented by HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 22, 2002.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on July 1, 2002, and contained in the Prehearing Order filed July 3, 2002, are hereby accepted as fact.
2. Claimant earned sufficient wages to be entitled to the maximum compensation rate, should his claim be compensable.

3. Claimant has failed to prove by a preponderance of the evidence that he was within the course and scope of his employment, performing employment services at the time of his fall.
4. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

JOE E. YATES, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion, which affirms and adopts the decision of the Administrative Law Judge that claimant failed to prove a compensable injury.

The facts as to the manner in which the claimant was injured are not in dispute -- he fell and injured his knee by stepping on a board covered in mud. Rather, the dispute in this case centers upon what claimant was doing at the time he fell.

The claimant, a forklift operator, testified at hearing that on February 5, 2002, he was picking up lumber in the "yard" and setting it on a chain for the "green stacker" to stack. *T. at 9.* He testified that the "green stacker" broke down, and he stepped off his forklift to see how long it was going to be down. *Id., page 12.* He indicated that after checking on the stacker, he was in the process of returning to his forklift when he fell. *Id., page 13.*

The claimant testified that he checked on the "green stacker" because if the machine was going to be down for some period of time, he could use that time to re-fuel his forklift, so that the night shift operator would not have to do so. *Id.* However, the claimant testified that he discovered, upon talking to the operator of the "green stacker," that they had fixed the problem and were about to start it back up. *Id., pp. 13-14.*

The claimant testified that after he fell, he noted the time on his watch to be 3:05. *Id.*, page 11. He testified that he noted the time because he knew that anytime there is an accident, he had to record the time when the accident report was completed. *Id.* Claimant further testified that, without exception, his daily break occurs from 2:30 to 2:45. *Id.* He further stated that he would get "wrote up" if he ever failed to return to his work by 2:45. *Id.*, p. 16.

On February 13, 2002, the claimant gave a recorded statement to Donna French, claims adjuster for the respondent carrier. Ms. French testified in deposition that she called the claimant and took his statement at "about 8:50 or 8:55 in the morning." *RX2*, p. 9. She testified that her normal procedure for taking recorded statements over the phone was to call the claimant, make sure that it was a good time to obtain the statement, and then if the claimant consents, to proceed with recording the claimant's statement. *Id.*, pp. 9-10.

The relevant portions of the recorded statement, regarding what the claimant was doing at the time he fell, were as follows:

Q: Okay, can you tell me what happened that day and what you were doing?

A: I stepped on a board and the board buried in the mud and I fell sideways and twisted my knee.

Q: And was this board ...I don't know exactly what do you do. What's your job title?

A: I'm forklift operator.

Q: Okay. Were you on a break or were you going to get on the forklift?

A: I was fixing...I was walking back over to get back on the forklift.

Q: And coming from where?

A: I went over there to talk to another guy that...I was on...coming off a break and I was walking back across and I stepped off of some concrete....

Q: Okay were you coming off of a break or the other guy was coming off a break?

A: I was coming off a break.

---

Q: So you actually hadn't got back to your site to work? Correct?

A: No I hadn't. I was within ten feet of my site of work.

---

Q: Okay. Okay, now let me see. You were on break, coming back from break, ah, about ten feet from your work site which is the forklift, stepped on a board that buried down in the mud that caused you to fall over onto your right side.

A: Yes ma'am.

*See Exhibit One to Respondents' Number Two.*

In reaching her decision that the claimant was not performing employment services at the time he fell, the Administrative Law Judge concluded that the claimant fell as he was returning from his break to his forklift. The Administrative Law Judge concluded (1) that the recorded statement indicated that the claimant was returning to his forklift from his break at the time he fell, (2) that the

recorded statement was thus inconsistent with the claimant's testimony that he was returning to his forklift after checking on the "green stacker" when he fell, and (3) that the recorded statement was "at least as persuasive, if not more" persuasive than the claimant's hearing testimony.

For the reasons stated below, I must respectfully disagree with these three conclusions. Moreover, even if it is concluded that the claimant was in fact returning from a break to his forklift at the time he was injured, my review of current case law interpreting the "employment services" provision leads me to conclude that the claimant's injury was in any event incurred at a time when "employment services" were being performed.

As noted above, the Administrative Law Judge concluded that the recorded statement indicates that the claimant was in the process of returning to his forklift after his break at the time he fell. My analysis of the recorded statement leads me to conclude that the statement is susceptible to more than one interpretation, one of which is consistent with the claimant's hearing testimony. Therefore, I find the statement to be ineffective both in impeaching claimant's hearing testimony, and in serving as substantive evidence that the claimant fell as he was returning from break.

When initially asked by the claims adjuster whether he was "on a break" or "going to get on the forklift," the claimant responded that he was "walking back

over to get on the forklift." The adjuster then asked the claimant where he was coming from when he fell. To this question, the claimant responded, "I went over there to talk to another guy that...I was on...coming off a break and I was walking back across and I stepped off of some concrete...." Later, the adjuster summarized her understanding of the accident as follows:

You were on break, coming back from break, ah, about ten feet from your work site which is the forklift, stepped on a board that buried down in the mud that caused you to fall over onto your right side.

To this summary, the claimant replied, "yes, ma'am."

It should first be noted that when claimant was initially asked where he was coming from at the time he fell, the claimant responded that he "went over there to talk to another guy." This statement is entirely consistent with the claimant's hearing testimony that he had gone to talk to the "green stacker" operator about how long the machine would be down. Furthermore, I do not find the claimant's statement that he was "coming off a break" to necessarily be a statement by claimant that he was in the process of returning to work from a break. It could also have been used by the claimant to simply mean that he had recently finished his break. This interpretation would be consistent with the claimant's hearing testimony. Third, the summary statement of the claims adjuster, to which the claimant replied, "yes, ma'am," is far from competent evidence that the claimant was in fact returning from break

at the time he fell. The adjuster summarized the accident in very general terms as to which the claimant would not have, unless he was being particularly diligent, objected.

In light of these observations, I cannot conclude that the recorded statement of the claimant indicates that he fell as he was returning from his break to his forklift, and thus that it is inconsistent with the claimant's hearing testimony that he fell as he was returning to his forklift from checking on the status of the "green stacker." On this issue of what claimant was doing at the precise time he fell, the recorded statement is ambiguous at best. Therefore, I find the statement to be ineffective both to impeach the claimant's hearing testimony or to prove that the claimant was returning from break when he fell.

Furthermore, even if it is conceded solely for purpose of argument that the recorded statement clearly indicates a statement by the claimant that he fell while in the process of returning from break, I cannot find that the recorded statement should be given more weight than the claimant's hearing testimony. While the statement was taken earlier in time than the claimant's hearing testimony, there are other factors which would tend to make the recorded statement less credible than the claimant's hearing testimony. First, the circumstances under which the recorded statement were made must be considered. The claims adjuster testified that she called up the claimant at 8:55 in the morning and asked him if she could get a recorded

statement from him over the phone. The claimant testified at hearing that the phone call woke him up. *T. at 14.* Second, the very generalized nature of the adjuster's questions and the brevity of the interview (approximately ten minutes according to the adjuster, *see RX2, p. 11*) make it unlikely that the recorded statement is in any event a more accurate account of what happened than the claimant's hearing testimony. For these reasons, I cannot conclude that the recorded statement can under any circumstance be credited instead of the claimant's hearing testimony.

Furthermore, even if it is concluded that claimant was returning from a break at the time he was injured, my review of current case law on the "employment services" requirement leads me to conclude that the claimant was performing "employment services" at the time he fell. Even if the claimant was returning from break, I find the fact that the claimant was in the process of returning to his work station, *after* his strictly timed break had ended, to be very significant.

In the cases of *Pifer v. Single Source Transportation*, 347 Ark. 851, \_\_\_\_ S.W.3d \_\_\_\_ (2002), and *Collins v. Excel Specialty Products and Crawford & Co.*, 347 Ark. 811, \_\_\_\_ S.W.3d \_\_\_\_ (2002), the Arkansas Supreme Court set forth a definitive test to determine whether an injury is incurred at a time when employment services were being performed. In these cases, the court stated that the same test applies to determine whether an injury arose while

the Claimant was performing "employment services" as applies to determine whether the injury arose "in the course of employment." See *Pifer*, 347 Ark. at 857; *Collins*, 347 Ark. at 816-17. That test is as follows:

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.* (emphasis added).

It is indisputable that the claimant's injury occurred within the time and space boundaries of his employment. The accident occurred during the work day, on the employer's premises. Rather, the key question here is whether the claimant was carrying out the employer's purpose at the time he was injured.

In support of my view that indeed the claimant was carrying out the employer's purpose at the time he was injured, even if returning from break, I offer the following: (1) the claimant was in the process of returning to his work station *after his break had ended* when his accident occurred, and (2) in any event, the nature of the claimant's break was such that it advanced the employer's interest directly.

First, and foremost, if it is concluded that the claimant was returning from break, I believe it to be significant that at the time the claimant was injured, his break had in fact ended, and he was returning to his forklift to begin working. Therefore, it would seem that

analyzing this case in terms of whether the claimant was performing employment services while he was on his break would be inappropriate. Rather, the pertinent issue is whether the claimant's returning to his forklift *after his break had ended* advanced his employer's interest.

In answering the latter issue in the affirmative, I observe that certainly the respondent employer required employees to report back to their work stations after their breaks had ended. It would seem obvious that an employee is advancing the employer's interest by returning to his or her work station after a company-sanctioned break. As the claimant testified, detrimental consequences to the claimant would have ensued had the claimant not returned to his work station after his break. The claimant had to return to his forklift to carry on the purpose for which he was hired by the respondent employer.

While arguably distinguishable from the facts of this case in that it involved a restroom break by the employee rather than a general "rest" break, I believe the *Pifer* case to be instructive in the present case. In that case, the claimant was injured as he was returning to his truck after using the restroom. While the Supreme Court apparently found it significant that the claimant had just taken a restroom break, the opinion also indicated that the fact that the claimant was returning to his truck *after* the break was significant. The relevant portion reads as follows:

...Mr. Pifer had gone to a restroom provided by his employer and was returning to resume the employer's work when the accident occurred that resulted in his injuries. *His conduct in returning to his truck was entirely consistent with the employer's interest in advancing the work.*

*See Pifer*, 347 Ark. at 858. I interpret this language to state that the employee's act of *returning* from a break is consistent with the employer's interest in advancing the work.

Second, even if the current case is analyzed in terms of whether the claimant was advancing the employer's interest while taking a general "rest" break, I find that pursuant to the test set forth in *Pifer* and *Collins* that indeed he was. Employers provide rest breaks to employees in order to give them a period of rest and refreshment, so that they will be better prepared to perform the remainder of their work duties for the day. I find that pursuant to the test set forth in *Pifer* and *Collins*, a general rest break of the type involved in the current case meets the requirement that the employee be either directly or indirectly advancing the employer's interest at the time he or she is injured. The evidence indicated that the claimant's break periods were rigidly structured as part of the work day. They occurred at the same time each day and were of the same duration each day. Such rigid structure indicates that the breaks were an integral part of the claimant's work day. It is apparent that this particular employer believed that it was important to incorporate

precise break periods into a regimented work day in order to optimize its employees' work performance. Arguably a different result might ensue if the employee had without explicit employer approval taken a rest break of some sort, or if the employee habitually took such breaks but did so without the express approval of the employer. However, when the break periods are so defined and incorporated into the day by the employer as they were in the present case, the implication is that the employer believes that such break activity is of benefit to the employer's ultimate interest - optimization of worker productivity.

For these reasons, it is my opinion that, pursuant to the holding of the Arkansas Supreme Court in the *Pifer* and *Collins* cases, even if the claimant's injury occurred as he was returning from break, the claimant's injury was one incurred at a time when employment services were being performed, and thus is not precluded from being a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(B)(iii).

For these reasons, I respectfully dissent.

---

SHELBY W. TURNER, Commissioner