NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304475

GEORGE C. LAMBERT, EMPLOYEE	CLAIMANT
FIRST UNITED METHODIST CHURCH, EMPLOYER	RESPONDENT
CINCINNATI CASUALTY CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 14, 2004

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

Claimant represented by HONORABLE A. WATSON BELL, Attorney at Law, Searcy, Arkansas.

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

Decision of the Administrative Law Judge: Affirmed and adopted.

OPINION AND ORDER

The respondents appeal from a decision of the Administrative Law Judge filed January 21, 2004. The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed on April 6, 2003, and at all pertinent times hereto.

3. The date the claimant's alleged injury was April 6, 2003.

4. The compensation rate is $473.88 per week.

5. The claim has been controverted in its entirety.

6. The claimant was engaged in employment services when he became injured on April 6, 2003.

7. The medical treatment documented in the record was reasonably necessary for treatment of the claimant's work-related injury.

8. The claimant's attorney is entitled to a controverted attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of his April 6, 2003 injury.

9. The claimant has missed only five days from work as a result of his injury.

10. The claimant has not missed sufficient time from work to be entitled to temporary disability compensation.

11. Any finding regarding when, if ever, the claimant's healing period ended would be an advisory opinion with no legal bearing on the benefits currently at issue in this claim.

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. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant was performing employment services at the time of his injury on April 6, 2001. Based upon my de novo review of the entire record, I find that the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury, as I find that the claimant was not performing employment services. Accordingly, I would reverse the decision of the Administrative Law Judge.

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(5)(B)(iii) states:

> An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Act 796 further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996) In Pifer v. 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 v. 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 a 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 v. Arkansas Sch. 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 v. Olsten Kimberly Quality Care, Full Commission Opinion Sept. 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 v. Universal Antenna, Full Commission Opinion Dec. 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 withing “the course of employment” is to be used to determine whether the employee was performing "employment services." Collins v. Excel Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (Mar. 7, 2002); Pifer v. Single Source Transp., 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 previous stated as whether the employee is "engaged in the primary activity that [s]he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Quality Care v. 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.

In Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491),the Full Commission found that the claimant "was not engaged in

any activity that carried out the employer's purpose or advanced the employer's interest when the claimant deviated from her duties to go outside and smoke before she got "real busy." Likewise, in Carla Ann Cole v. Prince Gardner, Inc., Full Commission Opinion filed August 26, 1996 (E408046), the Full Commission found that when a claimant has finished work and is injured while walking across the employer parking lot, the injury was not compensable since employment services were not being performed. See also, Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case. In the present claim, the claimant was in the process of crossing the gymnasium floor to turn off the kitchen lights when he unexpectedly received the rebound from an ongoing basketball game involving the claimant’s son, another youth, and Mr. Ayers. Rather than turning the ball over to the foursome on the floor, the claimant temporarily joined the game by faking out his son, who ran towards the claimant to block a shot, and jumped to shoot the ball. In the process of landing, the claimant injured his back. The game was not a planned church event

where the claimant would have been expected to play as part of his job description. Rather the game was obviously a pick up game between the claimant's son, another youth, and Mr. Ayers, who where waiting on the claimant to finish cleaning up and turning off the equipment and lights. Through the claimant's own testimony, it is likewise clear that the claimant did not join the game as part of his job of interacting with the youth, but rather as a response to his own son's playfulness in charging him to defend the ball.

I must respectfully disagree with the Administrative Law Judge's and hence the majority's reasoning that the claimant's effort to get rid of the ball by temporarily joining in the game was not a deviation *per se.* While the claimant's actions may have, arguably, been reactionary, I find that they were nonetheless a deviation. The claimant clearly diverted from his intended task of turning off the kitchen lights by deciding to shoot the ball. What is to say that had the claimant missed the shot and not been injured that he would have continued with his intended task of turning off the lights and not defended his shot by chasing the rebound for a second effort. In this regard, isn't it just as much a reactionary response to hustle for one's own rebound as it is to shoot the

basketball when it falls into one’s hands? I find that neither is a given, and both are, in fact, choices made on the spur of the moment. The claimant joined the game whether by choice or by chance; and thus he stopped performing employment services at that moment. I, therefore, find the majority’s reasoning is flawed, as I find that the claimant was not performing employment services when he decided to deviate from his intended task of turning off the lights, and temporarily join into the basketball game.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. McKINNEY