

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306569

STEPHEN LLOYD,  
EMPLOYEE

CLAIMANT

KING REFRIGERATED TRUCKING,  
EMPLOYER

RESPONDENT

AMERICAN HOME INSURANCE COMPANY/  
AIG CLAIM SERVICES,  
TPA/INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 22, 2004

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

Claimant represented by HONORABLE NEAL L. HART, Attorney at  
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE CAROL L. WORLEY,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
adopted.

OPINION AND ORDER

The respondents appeal and claimant cross-appeals from  
a decision of the Administrative Law Judge filed January 9,  
2004. The Administrative Law Judge entered the following  
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.

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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_ I concur with the principal opinion, except for the finding that claimant's average weekly wage is only \$543.

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant's average weekly wage is \$543.00 per week. However, I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Specifically, I find that the claimant was not performing employment services at the time he sustained his injuries.

In my opinion, a review of the evidence demonstrates that the claimant was not performing employment services at the time the toothpick broke off in his foot. The evidence demonstrate that the claimant was getting up out of his bunk in the truck. The claimant was not preparing his truck or doing prep work at the time of the injury. He was waking up and putting his pants on. This is an activity that is personal in nature. Putting his pants on first thing in the morning was certainly not furthering the employer's interest.

Arkansas 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.

Although the statute does not define the term "employment services," this Commission has 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. Cheri Pettey v. Olsten Kimberly Quality Care, FC Opinion Sept. 13, 1995 (E405037) 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, FC 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 Commission has previously held that when an employee leaves work five minutes early to go to the bathroom and wash her face and clean her glasses after being sprayed with catfish intestines, that employee was engaged in incidental activities which were inherently necessary for the performance of her job as a catfish gut sucker. Joan Jones v. FF Services, Inc., FC Opinion April 23, 1996

(E409045). If the claimant in Jones were not a gut sucker, she would not accumulate blood and guts on her glasses necessitating the need to clean her glasses.

However, in Patricia McCool v. Disabled American Veterans, FC Opinion filed June 3, 1996 (E410491), we 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., FC Opinion filed August 26, 1996 (E408046), we 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.

In Kinabrew v. Little John's Truck, 66 Ark. App. 9099, S.W.2d 541 (1999), the court found that the claimant was not performing employment services. Specifically, the court found that showering was not inherently necessary for the performance of the claimant's job, even if the employee was acting within the scope of his employment under the traveling salesman exception. The court found that showering was not something that was necessary for the performance of the job the claimant was hired to do.

In my opinion, this case is very much akin to Kinabrew. The claimant putting on his pants is not necessary for the performance of the job the claimant was hired to do, which was drive a truck. Therefore, I must dissent from the majority's opinion finding that the claimant was performing employment services at the time of his injuries.

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KAREN H. MCKINNEY, Commissioner