

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F301340**

**HENRY COULTER, EMPLOYEE**

**CLAIMANT**

**SPIDER TRUCKING,  
UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED NOVEMBER 6, 2003**

Hearing before Administrative Law Judge J. Mark White on October 16, 2003, in Hope, Hempstead County, Arkansas.

Claimant represented by Mr. Neal Hart, Attorney at Law, Little Rock, Arkansas.

Respondent represented by Mr. Gene Hale, Attorney at Law, Prescott, Arkansas.

**STATEMENT OF THE CASE**

On October 16, 2003, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on July 21, 2003, and a Prehearing Conference Order was entered on that same date. A copy of the July 21 Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. The parties confirmed that the stipulations, issues and respective contentions, as amended at the hearing, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the employee/employer relationship existed between the parties on or about August 23, 2002; that during the course and scope of his employment the claimant was involved in a motor vehicle accident on August

23, 2002, and sustained injuries to his back and shoulder; and that the respondent paid the claimant some wages and medical benefits from the date of the injury through January 27, 2003, when the claimant was released by his treating physician. At the hearing, the parties clarified their stipulations to agree that the respondent paid the claimant \$250 per week for three weeks, beginning two weeks after his injury; and that the respondent then paid the claimant \$300 per week until January 27, 2003.

The parties agreed that the issues to be presented were whether the Arkansas Workers' Compensation Commission has jurisdiction of this claim, i.e. whether the respondent had a sufficient number of employees to bring it within the Commission's jurisdiction; whether the claimant is entitled to additional indemnity and medical benefits over and above that which has voluntarily been paid; and attorney's fees. The claimant specifically reserved the issue of permanent disability.

The claimant contends that he suffered a compensable back and shoulder injury on August 23, 2002, and that he is entitled to payment of medical benefits, and payment of temporary total disability benefits from August 24, 2002, through a date yet to be determined; and that he is entitled to a statutory attorney's fee on all controverted benefits.

The respondent contends that the Commission does not have jurisdiction

over the respondent as he had fewer than three employees on August 26, 2002, and he currently has no employees; and that the claimant received payment of benefits from the date of injury through January 27, 2003, when the claimant was released by Dr. Howard Weems, as well as payment of medical expenses.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with ARK.

CODE ANN. § 11-9-704:

1. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
2. The claimant has proven by a preponderance of the evidence that the respondent had the right to control the means and the method by which the work of the respondent's three "contracted" drivers was done.
3. The claimant has proven by a preponderance of the evidence that the claimant, Eli Pettaway and Greg Moss were employees of the respondent and not independent contractors.

4. The respondent is therefore an employer as that term is defined by the Workers' Compensation Act, and the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
5. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury, to include an arthrogram as recommended by Dr. Weems.
6. The claimant has failed to prove by a preponderance of the evidence that his incapacity to earn wages extended beyond January 27, 2003, the date he was released by Dr. Weems.
7. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits through January 27, 2003.
8. Though the respondent has paid some benefits, the respondent has denied that it has any liability for this claim as a whole, and thus the respondent has controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant is 55 years of age. He has worked as a truck driver for most of his life, most recently as a flat-bed truck driver for the respondent. On August 23,

2002, the claimant was injured in a motor vehicle accident in the course and scope of his employment with the respondent. An x-ray of his back revealed a 10% to 15% anterior compression fracture at L-4, for which he was treated conservatively by Dr. Harold Weems. Though the claimant testified that he continued to have pain in his back as of the date of the hearing, Dr. Weems' notes indicate the compression fracture healed well, with Dr. Weems noting on November 6, "Good callus formation. No progressive collapse of the L4 vertebrae."

Within a week of the accident, the claimant began to complain of stiffness and pain in his left shoulder. An MRI of the shoulder performed September 27 revealed,

1. Degenerative change of the AC joint with hypertrophy of the cartilage and impingement upon the underlying supraspinatus muscle.
2. Possible pinhole tear in the distal aspect of the supraspinatus tendon at the insertion site with the greater tuberosity along with mild fluid signal intensity in the greater tuberosity as above.

On December 18, Dr. Weems noted, "The shoulder is doing well," and he released the claimant to full-duty work as of January 27, 2003. On February 25, Dr. Weems again restricted the claimant to light-duty work and recommended that an arthrogram be performed on the shoulder to determine if the claimant has a pinpoint tear of his supraspinatus. There is no evidence in the record that an arthrogram was ever performed.

The respondent, Spider Trucking, was a sole proprietorship owned by Eli Pettaway. Pettaway opened the business in February, 1999, and shut it down in December, 2002, due to high insurance premiums. Pettaway described Spider Trucking as a “one-man operation,” and testified that he worked as a driver and dispatcher for the respondent. He acknowledged that the claimant was an employee of respondent, and he testified that he had three other drivers working for the respondent under contract. No copy of a written contract or agreement with these other drivers was introduced into evidence.

Two weeks after the claimant was injured, Pettaway began paying him on a weekly basis – \$250 per week initially, and then \$300 per week. These payments continued until Dr. Weems released the claimant on January 27, 2003. Pettaway also paid for some of the medical bills – he indicated that he had paid all of the bills, but the claimant testified that the bill for his MRI had been only partially paid.

With the closing of Spider Trucking, Pettaway went to work for another trucking company in Hope. The claimant testified that he has not returned to work since his accident, and that he has not been back to Dr. Weems since February 25 because he cannot afford to do so. The claimant testified that he continues to have problems with his shoulder and back.

## II. Jurisdiction

The Workers' Compensation Act purports to apply to "every employer and every employee" in the state of Arkansas, as those terms are defined by the Act. ARK. CODE ANN. § 11-9-103 (a). An "employer" is defined to be, "any individual carrying on any employment." ARK. CODE ANN. § 11-9-102 (10). An "employment" is generally defined as, "every employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business." ARK. CODE ANN. § 11-9-102 (11)(A).

The Commission's jurisdiction of this case therefore depends on whether the respondent regularly employed three or more employees at the time of the claimant's injury. *Id.* That the respondent had at least two employees appears undisputed. The parties have stipulated that the claimant was an employee of the respondent, and in his testimony the respondent acknowledged that the claimant was an employee. Likewise, the evidence of record establishes that owner Eli Pettaway was an employee of the respondent.

Pettaway testified that he was the owner of the respondent, and that it had the legal form of a sole proprietorship. Pettaway acknowledged that he worked for respondent as a full-time driver and dispatcher, and the claimant likewise testified that Pettaway worked for the respondent. The Act defines the term "employee" to

include:

[A] sole proprietor ... who devotes full time to the proprietorship. However, any sole proprietor ... who desires not to be included in the definition of "employee" may file for and receive a certification of noncoverage under this chapter from the commission.

ARK. CODE ANN. § 11-9-102 (9)(B). Pettaway acknowledged that he has neither applied for nor received a certification of noncoverage from the Commission. Therefore, I find by a preponderance of the evidence that Eli Pettaway was both the sole proprietor of respondent and an employee, as that term is defined by the Act, at the time of the claimant's injury.

#### **Employment status of Greg Moss**

To assert the Commission's jurisdiction over the respondent and over this injury, it must be shown that the respondent had at least one other employee at the time of the injury (giving the respondent a total of three employees, including Pettaway and the claimant). Pettaway testified that the respondent contracted with three other drivers: Greg Moss, Willie Gill and Michael Wiggins. Pettaway described these drivers as independent contractors and not employees.

The determination as to whether one is an employee or an independent contractor is a question of fact. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The primary factor to consider is whether the employer has the

right to control the means and the method by which the work is done, but neither that factor nor any other feature of the relationship is alone determinative. *Id.* The courts have identified other factors that may be considered, including:

- (1) The right to terminate the employment without liability;
- (2) The method of payment, whether by time, job, piece or other unit of measurement;
- (3) The furnishing, or the obligation to furnish, the necessary tools, equipment and materials;
- (4) Whether the person employed is engaged in a distinct occupation or business;
- (5) The skill required in a particular occupation;
- (6) Whether the employer is in business;
- (7) Whether the work is an integral part of the regular business of the employer; and
- (8) The length of time for which the person is employed.

*Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982).

Pettaway testified that he kept in regular contact with each of these three drivers by phone, directing them as to where and when to pick up their loads, and the destinations for those loads. Pettaway testified that the drivers would check in with him following the delivery of each load. Although Pettaway testified that these drivers owned their own trucks, he also testified that all of the trucks had "Spider

Trucking” painted on their sides, and that none of the drivers worked for anyone other than the respondent. Given Pettaway’s close supervision of the drivers, the matching signage on each truck, and the drivers’ exclusive work for respondent, I must find by a preponderance of the evidence that the respondent had the right to control the means and the method by which the work of these three drivers was done, just as he had the right to control the work of the claimant.

As to the other factors: Pettaway testified that he could terminate the employment of these three drivers at any time without liability, and the drivers could likewise quit without liability. The three drivers were paid by a percentage of the load, as the claimant was.<sup>1</sup> Pettaway acknowledged that he was in business as a sole proprietorship, and that the work of these three drivers was integral to his business. Clearly, the three drivers were engaged in a distinct occupation for which a certain level of skill is required. Each of these three drivers had been working for the respondent for a year or more at the time of the claimant’s injury and continued working for respondent until Pettaway closed the business.

The only substantive difference between the claimant and these three drivers

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<sup>1</sup>Admittedly, the claimant’s testimony as to the method of his pay was contradictory. At one point he testified that he was paid 28% of each load, and at another point he testified that he was paid twenty-eight cents per mile. The claimant and Pettaway agreed, however, that the three “contracted” drivers were paid by the same method as the claimant.

was the ownership of the trucks which they operated. Two of the drivers owned their trucks outright, though they had bought them from the respondent. The third driver, Greg Moss, had purchased his truck from the respondent as well, but Pettaway testified that Moss was still paying for the truck. At one point Pettaway testified that he was still the owner of Moss's truck, but at another point he identified Moss as the owner. Neither party submitted any evidence as to the lease or purchase agreement, if any, between Moss and the respondent. Pettaway also testified that he furnished a calling card to Moss so that he could stay in contact with Moss to provide direction.

Whether the respondent possessed only a security interest in the truck or a full ownership interest is too minute a question on which to resolve this claim. Either way, the respondent furnished the truck in question to Moss, along with a calling card, and the respondent retained at least a partial interest in the truck at the time of the claimant's injury. These facts, combined with all of the other factors outlined above – including the right to control – lead me to find by a preponderance of the evidence that Moss was an employee of the respondent and not an independent contractor. Because Moss's status as an employee is sufficient to resolve this claim, I do not reach the question of whether Willie Gill and Michael Wiggins were employees of the respondent, nor do I reach the question of whether

their full ownership of their trucks is sufficient to make them independent contractors for purposes of the Workers' Compensation Act.

In making this finding, I note that the Arkansas Supreme Court has previously found an employment relationship to exist where the truck drivers in question drove exclusively for the employer and their trucks were painted with the employer's insignia. *Arkansas Transit Homes v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000); *see also RKO Bottlers of Forrest City, Inc. v. Halley*, 265 Ark. 129, 577 S.W.2d 409 (1979). The Court in *Arkansas Transit Homes* noted, "The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee." *Id.* The Court of Appeals has likewise found an employee/employer relationship to exist where an employer co-signed a note for the driver to purchase his truck and would have called the note if the driver had gone to work for a different company. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). Though none of these cases are factually identical to the claim at bar, they do provide persuasive authority to support the conclusion that Greg Moss was an employee of the respondent.

Because Moss, Pettaway and the claimant were employees of the respondent at the time of the claimant's injury, I find that the respondent was an employer as that term is defined by the Workers' Compensation Act, and that the Arkansas

Workers' Compensation Commission has jurisdiction of this claim. Respondent Spider Trucking is therefore liable for payment of all medical and indemnity benefits due the claimant for his compensable injury of August 23, 2002.

### **III. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The testimony and medical evidence establish that the claimant is in need of additional medical treatment for his shoulder. In opposition, the respondent relies on Dr. Weems' releasing the claimant to full-duty work on January 27, 2003. This ignores the fact that on February 25, Dr. Weems placed the claimant back on light duty and recommended an arthrogram to determine whether the claimant has a pinpoint tear of his supraspinatus. Dr. Weems has suggested that the claimant may require an arthroscopy with mini rotator cuff repair, should a pinpoint tear be found. There is nothing in the testimony or medical evidence to suggest that Dr. Weems' recommendation is flawed or unreasonable, and Dr. Weems'

recommendation is based on the objective findings contained within the claimant's MRI. Likewise, although Dr. Weems allowed the claimant to return to work, there is nothing in the testimony or medical evidence to conclude that Dr. Weems has released the claimant from care for his back. Indeed, Dr. Weems characterized his last visit with the claimant as "follow-up for his shoulder and back," and Dr. Weems said nothing of releasing the claimant from care for his back. The claimant has not returned to Dr. Weems, but only because the respondent has controverted additional treatment and the claimant cannot afford to pay for the treatment on his own.

I therefore find by a preponderance of the evidence that the claimant is entitled to additional medical treatment for his compensable injury, to include an arthrogram as recommended by Dr. Weems. Whether an arthroscopy is reasonably necessary will depend on the results of the arthrogram.

#### **IV. Additional Indemnity Benefits**

An injury to the shoulder is an unscheduled injury. *Taylor v. Pfeiffer Pblg. & Htg. Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total

incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Because further medical treatment for this claimant is reasonably necessary, he is by definition still within his healing period. His entitlement to TTD therefore rests on whether or not he remains totally incapacitated from earning wages.

The claimant testified that he has not returned to work since his injury. He testified that he is able to drive a truck and to work a full day, though he would have trouble with some of the ancillary responsibilities of driving a flat-bed truck – in particular, placing tarps on and securing the loads. Dr. Weems released the claimant to full-duty work on January 27, 2003, and the claimant testified this was done at his own request. He offered to return to work for the respondent, but by that time Pettaway had closed the business for reasons unrelated to this claim. Dr. Weems subsequently restricted the claimant to light-duty work as of February 25, with restrictions of no bending, no stooping, and no lifting over fifteen pounds.

By his own admission, the claimant is capable of driving a truck. He has substantially completed a high school education, and his restrictions are not such

that they would rule out any possibility of work. I therefore find by a preponderance of the evidence that the claimant's incapacity to earn wages, and thus his entitlement to temporary total disability benefits, ended with his release by Dr. Weems on January 27, 2003.

I note that the record suggests the claimant is entitled to additional temporary total disability benefits accrued prior to January 27, 2003. If the claimant's average weekly wage was in fact \$600, as he testified at the hearing, then the respondent significantly underpaid the claimant's weekly benefits prior to January 27. The respondent paid only half of that wage, \$300, yet a claimant is entitled by law to sixty-six and two-thirds percent of his average weekly wage in temporary disability benefits, subject to a maximum rate. ARK. CODE ANN. § 11-9-501. However, neither party has requested that the issue of the compensation rate or average weekly wage be considered in this proceeding, and I therefore make no finding on that issue.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that the Commission has jurisdiction of this claim, that he sustained a compensable injury, that additional medical treatment is reasonably necessary, and that he is entitled to

temporary total disability benefits through January 27, 2003.

The respondent, Eli Pettaway d/b/a Spider Trucking, is hereby directed and ordered to pay for all outstanding medical and related treatment, and respondent remains responsible for continued reasonably necessary medical treatment including, but not limited to, the proposed arthrogram. The respondent is further directed and ordered to pay for all outstanding temporary total disability benefits accrued and unpaid through January 27, 2003.

The claimant's attorney, Mr. Neal Hart, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to ARK. CODE ANN. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid per ARK. CODE ANN. § 11-9-809.

Because the respondent in this case is an uninsured employer, a copy of this opinion shall be forwarded to the Operations and Compliance Division of the Commission for further investigation.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge