

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F112204

THOMAS E. McLAURIN, EMPLOYEE

CLAIMANT

FREDDIE STEWARD TRUCKING,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 31, 2003

Hearing conducted before Administrative Law Judge David Greenbaum in Oceola, Mississippi County, Arkansas.

The claimant was represented by Joe M. Rogers, Attorney at Law, West Memphis, Arkansas.

The respondent was represented by Marc I. Baretz, Attorney at Law, of West Memphis, Arkansas

STATEMENT OF THE CASE

A hearing was conducted May 16, 2003 to determine various issues set out further below. A prehearing conference was conducted on March 19, 2003 and a prehearing order was filed on said date. A copy of the prehearing order was marked Commission's Exhibit 1 and made a part of the record without objection. The respondent was unrepresented at the prehearing conference. A hearing was scheduled for April 4, 2003; however, subsequent to the prehearing conference respondent retained the services of an attorney. By agreement of the parties the hearing was cancelled and rescheduled for May 16, 2003.

At the prehearing conference it was stipulated that the employee-employer

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relationship existed between the parties at all relevant times, including July 2, 2001; that the claimant sustained an admitted injury to his right ankle and right knee as a result of a specific incident which arose out of and during the course of his employment on July 2, 2002; and that the respondent had controverted the claim in its entirety. After the respondent retained the services of an attorney he withdrew the stipulation concerning the employment relationship maintaining that the claimant was at all times an independent contractor rather than an employee. The respondent acknowledged that the claimant sustained an injury on July 2, 2001 as a result of a specific incident which occurred while working on a truck owned by respondent.

The claimant contended in summary that he sustained a compensable injury as a result of a specific incident which occurred on July 2, 2001 while he was working as a truck driver for respondent; that he was entitled to temporary total disability beginning July 3, 2001 and continuing until he returned to work on February 1, 2002 for a different employer; that the respondent should be held responsible for all hospital, medical and related expenses; and that a controverted attorney's fee should attach on any benefits awarded. The claimant reserved the issue of permanent partial disability.

As previously pointed out respondent maintained that the claimant was an independent contractor rather than an employee. In addition, respondent contended that he did not have the requisite number of employees to require workers' compensation coverage. While the injury itself is undisputed respondent further maintained that the claimant was released by his treating physician on October 18, 2001 to return to driving a truck and that

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the healing period would have ended on that date.

The parties were unable to stipulate to the applicable compensation rate. The claimant contended that his average weekly wage was approximately \$500.00 per week. Respondent offered federal miscellaneous income tax 1099 forms for the years 2000 and 2001 as well as a weekly summary of checks paid together with settlement statements reflecting various payments. (Resp. Ex. A)

The following issues were presented for determination:

1. Whether the claimant was an employee or an independent contractor at the time of his admitted injury.
2. Whether respondent had the requisite number of employees to be required to carry workers' compensation insurance.
3. The applicable compensation rate.
4. The end of claimant's healing period as well as claimant's entitlement to temporary total disability.

In addition to the claimant, Joe Paul McLaurin and Pam Best were called as corroborating witnesses. Freddie Steward testified in his own behalf. The record is composed solely of the transcript of the May 16, 2003 hearing containing numerous exhibits. 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

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fact and conclusions of law are made in accordance with A. C. A. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer relationship existed between the parties at all relevant times, including, July 2, 2001 at which time claimant sustained an admitted injury to his right ankle and right knee as a result of a specific incident which arose out of and in the course of his employment.
3. Respondent had sufficient employees on July 2, 2001 to be required to carry workers' compensation insurance.
4. A preponderance of the credible evidence reflects that claimant's average weekly wage at the time of his injury was \$507.71, entitling him to a compensation rate of \$338.00 per week for temporary total disability.
5. The claimant's healing period ended on October 18, 2001.
6. The claimant is entitled to temporary total disability benefits at the rate of \$338.00 per week beginning July 3, 2001 and continuing through October 18, 2001.
7. The respondent is responsible for all hospital, medical and related expenses as a result of claimant's July 2, 2001 admitted injury and respondent remains responsible for continued reasonably necessary medical treatment. All medical shall be paid and or reimbursed to the appropriate medical providers pursuant to the provisions of Commission Rule 30.
8. The respondent is entitled to a credit in the amount of \$1400.00 for benefits voluntarily paid after July 2, 2001
9. The issue of permanent disability, if any, has been

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specifically reserved.

- 10 Respondent is responsible for the costs of taking and transcribing the within proceeding.
11. Respondent has controverted this claim in its entirety.

DISCUSSION

The facts in this case are basically undisputed. The respondent, Freddie Steward is the owner and sole proprietor of a trucking company, d/b/a Freddie Steward Trucking. At the time of the claimant's injury in July, 2001 Mr. Steward owned three or four trucks, together with several vehicles used as escort vehicles. Although, the number of truck drivers and escort drivers varied depending upon the number of loads that the trucking company had under contract to deliver, it is undisputed that at all relevant times at least three individuals worked for the company, specifically, Pam Best, the bookkeeper and dispatcher, the claimant, and Mr. Steward himself. Although, the principle issue is whether the various persons who worked for the respondent were employees or independent contractors which will be discussed further below, I feel compelled to point out that even if the claimant and Ms. Best were determined to be the only employees at the time claimant's admitted injury, which is not conceded herein, the respondent would still have the requisite number of employees required to carry workers' compensation insurance under the workers' compensation laws.

The claimant, Thomas Eugene McLaurin testified in his own behalf. The

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claimant is seventy-one (71) years old. He has a seventh grade education. At the time of the within hearing the claimant had returned to work as a truck driver for D. McCoy Trucking in Memphis, Tennessee. The claimant began driving for D. McCoy Trucking on or about February 1, 2002. He has worked continuously since that date. Prior to his current job the claimant stated that he drove regularly for respondent herein. The claimant related that he first began driving for Freddie Steward Trucking in 1997 on a periodic basis. He maintained that he began driving regularly for respondent only beginning in March, 2000 and continuing until the date of his admitted injury on July 2, 2001. The claimant testified that in addition to himself, Pam Best, the office manager, bookkeeper and dispatcher worked regularly as well as his nephew Joe Paul McLaurin who the claimant stated was a regular escort driver. At the time of claimant's injury both he and Mr. Steward were driving trucks. Joe Paul McLaurin was an escort driver for Mr. Steward. An unidentified driver was escorting the claimant. Again, the injury itself is undisputed. The following description of the cause of claimant's injury as well as the nature of the injury is set out below:

Q. Let's go ahead. I just wanted the Court to understand what you were talking about, we. So go ahead and tell me what happened.

A. It was a motorist pulled up beside me blowing his horn, and I rolled my glass down to see what was he blowing for. He said, "You've got something dragging. You've got chains dragging." I pulled off the road, stopped, got out of it, and went back to see what happened, and my chain had broke. I taken another chain out of the toolbox and put it on, for another binder and hooked it up. I thought I had everything checked out. I done yanked on it a couple of times, nothing happened, and I put all I had to tighten it back down.

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Something slipped or broke or something, but I wind up, instead of going to the truck like I was pulling, I wind up out in the street, on the side, on the shoulder between the highway and my truck, and my leg wouldn't follow me.

Q. Now which leg was that?

A. The right.

Q. Okay. Were you able to get somebody to assist you ?

A. Eventually. I laid there for some amount of time. Peoples that were going by acted just like I wasn't there, and, eventually a motorist coming from the other direction saw me and stopped and asked me why was I laying there. I said, "I can't get up." Said, "I don't know what happened. My leg won't go where I want it to go." It was laying off. I couldn't draw it up, I couldn't straighten it out, and I turned and eventually the foot would fall over. I turned back the other way and it would fall back that way, but I couldn't get it to do what I wanted it to do. So I had to lay there.

Q. In any event, did this motorist get some assistance for you? Did someone call an ambulance?

A. Yes, sir. He saw a police coming and he flagged him. The police stopped, and he called the ambulance.

Q. And we've got the records here, the hospital records from Crossroads Regional Hospital, Mr. McLaurin. Is that were (sic) you were taken?

A. Yes, sir.

Q. From a review of the records, it appears you had surgery on that day?

A. Yes, sir.

Q. July the 2nd, you had surgery to your guadriceps tendon in the right knee. Did they operate on your right knee?

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A. Yes, sir.

Q. And then we've also got the records, it appears that a few days thereafter that they also discovered you had a fracture in your ankle and they operated on your right ankle?

A. Yes, sir.

Q. And it appears from these records that you were discharged from the main part of the hospital on July the 7th; that you were put in a skilled nursing unit, and you remained there until July the 15th of 2001?

A. Yes, sir.

Q. All right. And did you - - let me back up. When you got to the hospital there, at some point in time were you able to report in to Freddie Steward Trucking that you had had this accident?

A. Yes, sir. I had a cell phone with me and I called the office and reported that I had had an accident.

Q. You called - - who did you speak with at the office?

A. Ms. Best. (TR 24-26)

_____ Although, the injury itself is not disputed various issues have been presented for determination. Although, in my opinion the only real factual dispute concerns the applicable compensation rate each issue will be addressed below.

EMPLOYEE V. INDEPENDENT CONTRACTOR

Our Supreme Court cited numerous factors used to determine whether a worker is an employee or an independent contractor. As cited in Dickens v. Farm Bureau Mut. Inc. Co., 315 Ark. 514, 868 S. W. 2d 476 (1994), the following factors were listed:

- (1) the extent of control which, by agreement, the

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master may exercise over the details of the work;

- (2) whether or not the one employed is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) the length of time for which the person is employed;
- (7) the method of payment, whether by the time or by the job;
- (8) whether or not the work is part of the regular business of the employer;
- (9) whether or not the parties believe they are creating the relationship of master servant; and
- (10) whether the principal is or is not in business.

_____ See also D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W. 2d

(1999). It is the right to control, not the actual control, that determines the relationship.

Taylor v. Gill, 326 Ark. 1040, 934 S. W. 2d 919 (1996).

In Arkansas Transit Homes v. Aetna Life & Cas. , 341Ark. 317, 16 S. W. 3d

545(2000), the court stated:

The factors pertaining to the nature of the worker's occupation and whether it is part of the regular business of the employer comprise the "relative nature of the work" test recognized in Sandy v. Salter, 260 Ark. 486, 541 S. W. 2d 929 (1976). There, this court adopted Professor Larson's test for examining the relationship between the workers' occupation and the regular business of the employer. This test requires consideration of two factors: (1) whether and

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how much the worker's occupation is a separate calling and profession, and, (2) what relationship it bears to the regular business of the employer. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee.

The Arkansas Supreme Court further stated:

An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work; the governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of performance, then the relationship of master and servant necessarily follows, but if the control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists; there is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be made based on the particular facts of each case.

Arkansas Transit Homes v. Aetna Life & Cas., 341 Ark. at 321, quoting Massey v. Poteau Trucking Co., 221 Ark. 589, 254 S. W. 2d 959 (1953). See also, Johnson Timber Corp. v. Sturdivant., 295 Ark. 622, 752 S. W. 2d 241 (1998).

In applying these standards to the instant case, it is clear that the claimant was an employee of Freddie Steward Trucking rather than an independent contractor. The record reflects that the claimant worked exclusively and regularly for Mr. Steward at all times beginning March, 2000.

Another related issue concerns whether the respondent had the requisite number of

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employees on July 2, 2001 so as to be required to carry workers' compensation insurance. The Act requires every employer with three or more employees to secure workers' compensation coverage for its employees. Rather than conduct an exhaustive analysis of the record in this cause, suffice it to say that the record reflects that Freddie Steward Trucking at all times had at least three employees, specifically, the claimant, Pam Best, and Mr. Steward himself.

Although, it can be argued that he also regularly employed escort drivers which would add to the total number of employees, clearly he employed at least three employees at the time of claimant's injury. In the event the respondent argues that he only had two regular employees, it must be noted that the term "employee" also includes a sole proprietor who devotes full time to his business. Although, a sole proprietor who desires not to be included in the definition of "employee" may file for and receive a certificate of non-coverage from the Commission, thereby reducing the costs of workers' compensation insurance, he is nevertheless counted toward the statutory number. Ark. Code Ann. §11-9-102 (9)(B-E) (Repl. 2002.)

Further, Ark. Code Ann. §11-9-108(b)(2) provides that if a self-employed employer reduces the number of employees of the business to less than three by electing to exclude himself from coverage the employer must continue to provide workers' compensation coverage for the remaining employees.

TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which the claimant suffers a total incapacity to earn wages. Arkansas State Highway & Transportation Department v. Breshears, 272 Ark. App. 244, 613 S. W. 2d 398 (1981); Johnson v. Rapid Die

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& Molding, 46 Ark. App. 244, 878 S. W. 2d 297 (1984).

“Disability” means incapacity because of the injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant’s physical capabilities and evaluate his ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within his healing period and, in addition, that he remains within his healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or any other employment. See, Palazzolo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S. W. 2d 938 (1994).

The claimant contends that he is entitled to temporary total disability beginning July 3, 2001 and continuing until he returned to work for a different employer on or about February, 2002. The claimant’s contention is simply not supported by the facts and the law.

The medical evidence reflects that the claimant was released by his primary treating physician, Dr. Guy J. L’Heureux on October 18, 2001 to return to driving a truck which was the claimant’s regular job. (Cl. Ex. A, P. 21)

The claimant never returned to Dr. L’Heureux following October 18, 2001. There is no competent evidence of record that his healing period extended beyond October 18, 2001. Accordingly, I find that the claimant’s healing period ended on October 18, 2001, and, that the claimant has proven by a preponderance of the evidence that he is entitled to total disability beginning July 3, 2001 and continuing through that date.

All temporary total disability having accrued, respondent is responsible to pay same in lump sum and without discount. However, it must be noted that during the hearing

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respondent pointed out that he had paid the claimant some benefits estimated at \$1300.00. The parties stipulated that if compensability was overcome respondent was entitled to a credit of \$1300.00 for benefits or payments previously paid. (TR. 43)

Actually, the record reflects that following the claimant's injury respondent paid two separate checks, one in the amount of \$300.00 and another in the amount of \$1100.00 which do not appear to be weekly wages. (Resp. Ex. A, P. 3)

COMPENSATION RATE.

The most confusing and difficult issue concerns the claimant's average weekly wage and the applicable compensation rate for temporary total disability.

The claimant testified that his average weekly wage was approximately \$500.00. Respondent failed and or refused to specifically state his contention concerning claimant's wages, but, rather, offered a fifty-six (56) page exhibit which included 1099 forms for the years 2000 and 2001 (Resp. Ex. A, P. 1), Employee Quick Report reflecting checks paid to the claimant during the year 2000 (Resp. Ex. A, P. 2), and an Employee Quick Report reflecting checks issued to the claimant for the year 2001. I have elected to exclude any wages or income paid during 2000. This is because the claimant did not work regularly until on or about March, 2000, and, also, because the claimant received an increase in the percentage of his compensation during that year. The record reflects that the claimant worked exclusively for respondent in the year 2001. His injury occurred on July 2, 2001 and therefore he worked twenty-six (26) weeks and two days during the year 2001. Based upon the earnings statement I have computed his average weekly wage at \$507.00, entitling him to a weekly compensation

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rate for temporary total disability of \$338.00, which is extremely close to the amount claimed.

The calculations are set out below:

\$14,730.55	Income in 2001
<u>- 1,400.00</u>	Advancement after injury
\$13,330.55	Wages earned 2001

Divided by 26 2/7 weeks equals:

\$507.00	Average weekly wage
\$338.00	Comp. rate for T.T.D.

AWARD

Respondent, Freddie Steward, d/b/a Freddie Steward Trucking is hereby directed and ordered to pay to the claimant temporary total disability at the rate of \$338.00 per week beginning July 3, 2001 and continuing through October 18, 2002.

All benefits having accrued, respondent is to pay same in lump sum and without discount. Respondent may claim credit for the advancement of \$1400.00 previously paid.

_____ Respondent is further directed and ordered to pay and or reimburse the appropriate medical providers for all hospital, medical, and related expenses as a result of claimant's July 2, 2001 injury.

Additionally, claimant's attorney, Joe M. Rogers, is hereby awarded the maximum statutory attorney's fee on this entire award to be paid in accordance with Ark. Code. Ann. §11-9-715.

Finally, respondent is directed and ordered to pay Gibson Reporting Agency all

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costs in taking and transcribing the within hearing.

This award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
CHIEF ADMINISTRATIVE LAW JUDGE