

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409838

MICHAEL J. HILL, EMPLOYEE

CLAIMANT

BBG TRUCK BROKERAGE, INC.,
UNINSURED EMPLOYER

RESPONDENT #1

DIRK ARGO TRANSPORTATION, INC.,
UNINSURED EMPLOYER

RESPONDENT #2

OPINION FILED AUGUST 31, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on July 8, 2005,
at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Michael A. LeBoeuf, Attorney-at-Law, Little Rock,
Arkansas.

Respondents represented by Mr. Jim Dunlap, Attorney-at-Law, Marked Tree,
Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 8, 2005, to determine various issues set out
further below.

This claim has been the subject of multiple prehearing conferences, the most
recent conducted on May 25, 2005. A Prehearing Order was filed on May 26, 2005.
At the hearing, the parties announced that the stipulations, issues, as well as their
respective contentions were properly set out in the Prehearing Order. In addition,
at the hearing, the parties agreed that both party respondents were corporations in
good standing with the Secretary of State's Office and that the claim was against
the corporations rather than against Leonard Argo, d/b/a B B G Truck Brokerage
and Gavin Dirk Argo, d/b/a Dirk Argo Transportation which will be explained more

fully in the discussion which follows.

It was stipulated that the Arkansas Workers' Compensation Commission had jurisdiction over this claim; that the claimant was involved in an accident resulting in injuries on September 9, 2004; and that both party respondents had controverted this claim in its entirety.

By agreement of the parties, the issues to be presented for determination include:

- 1) Whether the claimant was an employee of either respondent on September 9, 2004, or whether the claimant was an independent contractor.
- 2) Compensability of the admitted injury. A corollary issue concerning the issue of compensability was whether the claimant's injury was substantially occasioned by the use of illegal drugs.

Claimant contended, in summary, that he was an employee of one of the respondents at all relevant times, including September 9, 2004; that he sustained multiple injuries as the result of a specific event identifiable in time and place of occurrence which arose out of and during the course of his employment; that one of the respondents should be held responsible for all hospital, medical, and related expenses, together with continued, reasonably necessary medical treatment; that he is entitled to temporary total disability benefits through the present, maintaining that his healing period had not ended; and that a controverted attorney's fee should attach to any benefits awarded. The issue of permanent disability was reserved.

Both respondents maintained that the claimant was never an employee, but, rather, at all times, an independent contractor. Respondents further asserted that

based upon information received, the accident may have been substantially occasioned by the use of illegal drugs.

The record in this case is composed solely of the transcript of the hearing conducted July 8, 2005, 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 fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On September 9, 2004, the claimant was employed as a truck driver by respondent #2, Dirk Argo Transportation, Inc., hauling loads brokered by respondent #1.
3. The claimant has proven, by a preponderance of the credible evidence, that he was temporarily totally disabled beginning September 10, 2004, and continuing through at least January 17, 2005.
4. At the time of claimant's compensable injury, his average weekly wage was \$599.77 per week, entitling him to compensation rates of \$400.00 per week for temporary total disability and \$300.00 per week for permanent partial

disability.

5. The end of the claimant's healing period, as well as claimant's entitlement to additional temporary total disability, if any, requires further development of the medical evidence and is, by necessity, specifically reserved. In addition, claimant's entitlement to permanent disability benefits, if any, has been specifically reserved.
6. Respondent #1 is responsible for all hospital, medical, and related expenses through at least January 17, 2005, and remains responsible for continued, reasonably necessary medical treatment.
7. Both respondents have controverted this claim in its entirety.

DISCUSSION

Leonard A. Argo is the owner and president of B B G Truck Brokerage, respondent #1. The primary business of respondent #1 is to broker, or connect, truck drivers with customers that have loads of cargo that need hauling. The drivers, most of which own their own equipment, pay respondent #1 an 8.5% fee for brokering the load. In addition, Leonard Argo is the vice-president and secretary of Dirk Argo Transportation, respondent #2, a trucking company allegedly under the sole ownership of Dirk Argo, the teenage son of Leonard Argo. It is apparent from the record, that Leonard Argo runs both corporations. On September 9, 2004, respondent #2 owned two (2) trucks. Respondent #2 employed two (2) drivers, specifically, to haul grain and fertilizer from either the Anheuser Busch plant in

Lepanto and Crawfordsville, Arkansas to Fountain Run, Kentucky. Respondent #1 received 8.5% for brokering the load. The drivers were paid 25% of the income generated from the hauling and the balance was retained by respondent #2. Respondent #2 paid for the fuel and any incidental costs in hauling the loads from Arkansas to Kentucky.

The first issue presented for determination was whether the claimant was an employee of either respondent on September 9, 2004, or whether the claimant was an independent contractor.

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. *Arkansas Transit Homes, Inc. vs. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, our Supreme Court stated:

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 the performance, then the relation of master and servant necessarily follows. But if 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. *Massey vs. Poteau Trucking Co.*, 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953).

The ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. *Wright vs. Tyson*

Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be based on the particular facts of each case. *Arkansas Transit Homes, supra*. Although no one factor of the relationship is determinative, *see, Wright, supra*, the “right of control” is the principal factor in determining whether the relationship is one of agency or independent contractor. *Aloha Pools & Spas, Inc. vs. Employer’s Insurance of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000).

The following factors are to be considered in determining whether one is an employee or independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) 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;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed/
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and

servant; and

(j) whether the principal is or is not in business.

Aloha, supra. The factors pertaining to the nature of the worker's occupation and whether it is a part of the regular business of the employer comprise the "relative nature of the work" test. *Arkansas Transit Homes, supra*. In *Sandy vs. Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976), our Supreme Court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the employer. This test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. *Id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. *Id.*

Dirk Argo Transportation is in the business of hauling grain. The claimant worked as a truck driver for Dirk Argo Transportation and drove one of its two (2) company-owned trucks. It is undisputed that the claimant was involved in a singular vehicle accident when the truck he was driving left the road and landed in a ditch. Although several theories concerning the cause of the accident were suggested, including brake failure, driving too fast for the conditions, and caused by drug use, the contributory negligence of the claimant is irrelevant because workers' compensation coverage is a no-fault system. Clearly, the claim would be disallowed if the accident was substantially occasioned by the use of alcohol or illegal drugs;

however, as will be set out further below, there is no credible evidence to support respondents' drug defense.

The record clearly reflects that, at the time of the accident, the claimant was an employee and not an independent contractor. Although the claimant actually worked for respondent #2, he was hired by Leonard Argo who owned the brokerage company and provided the claimant with all of his loads. The equipment was owned by respondent #2. Respondent #2 paid all necessary costs associated with hauling the loads. Respondent #2 exercised control over the truck and its destination. The claimant was not in the transportation business. Respondent #2 was in the transportation business. The claimant was employed to drive the truck. The claimant was paid a percentage of the job by respondent #2. Rather than conduct a further analysis of the record in this cause, suffice it to say that I find that the claimant was, at all times, an employee of respondent #2.

I do feel compelled to point out that the relationship of respondent #1 and respondent #2 appears inter-related. Respondent #2 uses employees of respondent #1, including dispatchers, as well as Leonard Argo, the owner of respondent #1, to keep books and run the business of respondent #2. At the time of the within hearing, Leonard Argo testified that while both companies were uninsured on September 9, 2004, that he had since obtained a policy of workers' compensation insurance to cover the employees of respondent #1 and that both he and Dirk Argo required certificates of non-coverage on some of its drivers. By copy

of this Opinion to the Commission's Compliance Department, it is requested that it investigate the two (2) respondents to determine whether they are currently in compliance with the workers' compensation laws.

Employment has been established. The accident and resulting injury on September 9, 2004, is undisputed. Accordingly, this claim is compensable unless the injury was caused by one of several activities excluded from being compensable under Ark. Code Ann. §11-9-102(4)(B)(iv) which provides:

(B) "Compensable injury" does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility of animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries;

(ii) Injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure;

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated; or

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the

aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved, by a preponderance of the evidence, that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

In the instant claim, no credible evidence was presented reflecting the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order which is necessary to create the rebuttable presumption. Admittedly, the claimant candidly acknowledged that he was a recreational user of marijuana. In fact, he admitted that he smoked marijuana the weekend before his accident while denying use at any time contemporaneous with the accident. The claimant's accident occurred four (4) days after the admitted use of illegal drugs. It should be noted that the employer required the claimant to undergo a pre-employment drug screen which the claimant passed. The exact cause of the claimant's accident is undetermined. The claimant maintained that the accident was caused because the brakes on the truck failed. Respondents attributed the accident to either going too fast for the conditions or the result of the claimant smoking marijuana. Again, the claimant's contributory negligence, if any, does not affect this decision. There is no credible evidence that drug use substantially occasioned this accident. The "possibility" or "suspicion" that drugs caused the accident is not sufficient. Accordingly, I find that the claimant has proven, by a preponderance of the credible evidence, that he sustained an injury arising out of and during the course of his employment with Dirk Argo Transportation, entitling him

to appropriate workers' compensation benefits.

Another issue developed at the hearing concerned the applicable compensation rates. The claimant maintained that he worked for respondents four (4) or five (5) weeks. Respondents introduced pay checks reflecting three (3) weeks of employment, including the week of the accident. (Resp. Ex. B)(Resp. Ex. D)

Excluding the week of the accident, and averaging the two (2) full-week checks submitted by respondents, I find that the claimant's average weekly wage was \$599.77, entitling him to compensation rates of \$400.00 per week for temporary total disability and \$300.00 per week for permanent partial disability pursuant to Ark. Code Ann. §11-9-518(c) (Supp. 2003)

The only remaining issue concerns the dates which the claimant is entitled to temporary total disability. Unfortunately, this determination has been complicated by the fact that both respondents have controverted the claim in its entirety, thus frustrating the claimant's effort to obtain reasonably necessary medical treatment.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department vs. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson vs. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of 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 her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant's primary injury involved his left shoulder. The claimant admitted having significant pre-existing physical problems, specifically, cirrhosis of the liver, as well as cervical problems, back problems, and other unrelated ailments which caused significant disability. In fact, the claimant had applied for social security disability prior to going to work for the respondent. The claimant has been treated by several physicians for his left shoulder injury; however, maintained that because of the passage of time, none of his medical providers were recommending surgery to correct the shoulder injury. At the time of the within hearing, the only treatment the claimant was receiving was personal, physical therapy at his home. (Tr.16-20)

The record reflects that the claimant's initial treating physician, Dr. Trent R. Lamb, terminated medical treatment on January 17, 2005, because the claimant had been non-compliant with recommended treatment, and Dr. Lamb refused to prescribe narcotic medications. (Resp. Ex. A, p.5)

The record reflects that the claimant was hospitalized for several days in intensive care, after which he was first seen by Dr. Trent Lamb, and subsequently

referred to Dr. Calin A. Savu who, in turn, referred him to Dr. Hasan. Dr. Savu also, subsequently released the claimant from his care on May 12, 2005, indicating that the only treatment the claimant needed was pain medication and physical rehabilitation which he suggested be provided by a primary care physician. (Cl. Ex. A, p.19)

Again, because respondents controverted the claim in its entirety, the medical evidence has been poorly developed. In view of the foregoing, I find that the claimant is entitled to temporary total disability benefits through January 17, 2005, at which time he was released by his primary care physician. By necessity, additional issues, including the end of claimant's healing period, claimant's entitlement to additional temporary total disability, if any, as well as claimant's entitlement to permanent partial disability must be specifically reserved.

AWARD

Respondent, Dirk Argo Transportation, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$400.00 per week, beginning September 10, 2004, and continuing through January 17, 2005.

All temporary total disability benefits having accrued, respondent is to pay same in lump sum and without discount.

Respondent is further directed and ordered to pay all hospital, medical, and related expenses as the result of claimant's compensable injury, and respondent remains responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Michael A. LeBoeuf, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid pursuant to Ark. Code Ann. §11-9-715.

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

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge