

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F40065**

<b>KIMBERLY A. KEITH, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>STREETER LOGGING, EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>SOUTHEASTERN CLAIMS SERVICES, CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>C &amp; S TRUCKING, UNINSURED EMPLOYER</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED FEBRUARY 4, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on November 8, 2004, at Warren, Bradley County, Arkansas.

Claimant represented by the HONORABLE KENNETH A. HARPER, Attorney at Law, Monticello, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROLL. WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 did not appear at the hearing.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is the employment relationship and compensability of the claim as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the claimant was not an employee of Streeter Logging, and Respondent No. 1 has no liability in this case. Additionally, I find the claimant has failed to prove she sustained a compensable injury.

## STATEMENT OF THE CASE

The parties stipulated to a compensation rate of \$243.00/\$182.00, in the event the claim is found to be compensable.

The claimant contends she injured her back on December 15, 2003. She seeks payment of medical expenses, temporary total disability benefits from December 16, 2003 to a date yet to be determined and attorney's fees.

Respondent No. 1, Streeter Logging contends the claimant was an independent contractor and not an employee of Streeter and therefore they are not liable for this claim. Alternatively, if the claimant is found to be their employee, she did not sustain an injury arising out of and in the course of her employment. Her need for medical treatment is associated with a preexisting condition, and there are no objective medical findings to substantiate a specific injury. Alternatively, in the event of an award, the respondents are not liable for any expenses or benefits prior to the date they received notice of this claim on December 24, 2003.

Respondent No. 2 did not participate in the prehearing conference or attend the hearing.

The following witnesses testified at the hearing: the claimant and David Streeter. Respondents' objection to the claimant's other witnesses (Jackie Keith, Frances, Doyle and Clarence Kelly) was sustained as they were not identified in a timely manner.

The claimant, age 46 (D.O.B. July 10, 1958), has been a truck driver since the age of eighteen. She began work for C & S Trucking in July, 2003 and passed a DOT physical with Dr. Rankin in November, one month before the accident. The claimant received a paycheck (\$100.00 per day) from C & S Trucking and a list of customers. The claimant picked up loads from various

customers and hauled them to the mill. Streeter Logging was her primary customer but she did haul for others as well. C & S Trucking is owned by Clint and Shana Weatherly.

On December 15, 2003, the claimant injured her back and right leg securing a load on the truck, (Tr. p. 12-13). She reported the incident to Clint and Shana Weatherly the same day. They were aware the claimant was seeking medical care.

The claimant has been treated conservatively by Drs. Burt, Go, and Hicks, with physical therapy and medication. The claimant has not worked since December 17, 2003 and remains under Dr. Hicks' care for sleep disturbances and radiating leg pain and numbness.

On cross-examination, Attorney Worley pointed out that the claimant sought medical care for her back in 2002 prior to any incident at work. She has been diagnosed with degenerative changes.

David Streeter verbally contracted with C & S Trucking to haul wood. Mr. Streeter paid the Weatherlys on the amount of the tonnage hauled. In December, the claimant didn't show up to collect the load and he called Mr. Weatherly who told him that the claimant was working closer to home because of an injury.

### **MEDICAL EVIDENCE**

The claimant was treated in October, 2002, for back and radiating left hip and leg pain. She was prescribed medication for this condition through September 2003.

After the incident at work, the claimant returned to her physician on December 17, 2003 with complaints of back and right hip and leg pain. As I interpret the radiology report, the doctor found abnormalities caused by congenital and degenerative factors. An x-ray and MRI scan showed "transitional L5 vertebra with accompanying L4-5 degenerative involvement including left posterior

facet synovitis,” and “transitional L5 vertebra with the right-sided sacralization,” and “transitional L5 vertebra with left-sided L4-5 posterior facet degenerative arthritic involvement,” (emphasis added). These findings do not confirm a recent acute injury.

Dr. Go, did note some objective findings of swelling in the lower extremities improved by medication in his report of April 15, 2004. Dr. Go does not attribute the swelling to either a specific incident or preexisting medical condition. Dr. Go’s reports also refer to a disc herniation which is inconsistent with the radiology reports. No curriculum vitae was provided for Dr. Go but according to his letterhead, he is an orthopedic surgeon.

Dr. Go’s Report of 3-11-04:

...MRI shows she has small disc on L4/L5. However, official findings show tenderness at the greater trochanteric region. MRI also shows possible calcium deposit of the greater trochanteric region on the right hip area.

Dr. Go’s use of the phrase “official findings” is unclear. “Tenderness” is not considered an objective medical finding, Kimbrell v. Arkansas Department of Health, 66 Ark. App. 245, 989 S.W.2d 570 (1999).

Dr. Go’s Report of 5-17-04:

...She already has had an MRI performed that showed small disc on L4 and L5. However, she also has tenderness at the greater trochanteric region highly suspicious of calcium deposit.

...She has not reached maximum medical improvement. She is still temporarily totally disabled from the date of the injury up to the present time. I don’t feel like she sustained any permanent injury, but she may need surgical intervention for removal of the disc to see if this improves her condition or not. Her impairment rating at the present time is about 10%. Vocation/limitation is most probably heavy lifting, bending, stooping, and reaching over the shoulder. It depends on her surgical outcome for removal of the disc and if it is completely recovered, and then she will have no residual and no limitation of activity. Further medical treatment will be laminectomy on the L4 and L5 area.

The objective finding is more a combination of subjective. The objective finding on this patient is that the MRI shows more discs on L4 and L5, otherwise most of the findings are subjective.

I find Dr. Go's report to be confusing. Until June 3, 2004 he was under the impression the claimant was involved in a motor vehicle accident, (compare Dr. Go's reports of May 17, 2004 with June 3, 2004). Also his report indicates she has no "permanent injury" and yet he assigned a permanent impairment rating. He described a surgical procedure for her but then referred her to a neurosurgeon or a pain clinic saying he had nothing further to offer her (compare Dr. Go's reports of May 17, 2004 with June 3, 2004). His use of the phrase "more discs on L4 and L5" and "the objective finding is more a combination of subjective" is unclear. Nor does he seem to be aware of the claimant's treatment in 2002. Accordingly, I find Dr. Go's opinion unpersuasive and not stated within a reasonable degree of medical certainty. There is no objective medical evidence of a recent acute injury.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

The employment relationship can be analyzed under two separate tests:

- (1) the control test  
Silviculture, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983), Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982)

and

- (2) the relative nature of the work test  
Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976)

Under the control test, the Commission may consider the following factors:

- 1) the right to control the means and the method by which the work is done;
- 2) the right to terminate the employment without liability;
- 3) the method of payment;
- 4) the furnishing of tools, equipment and materials;
- 5) whether the person employed is engaged in a distinct occupation or business;
- 6) the skill required in the occupation;
- 7) whether the employer is in business;
- 8) whether the work is an integral part of the regular business of the employer; and
- 9) the length of time for which the person is employed.

Under the relative nature of the work test, the Commission considers the relationship between the claimant's occupation and the regular business of the asserted employer. Factors include:

- 1A) how much of a separate calling or profession is the claimant's occupation?
- B) how skilled is it?
- C) to what extent may it be expected to carry its own workers' compensation coverage?
- 2A) what relationship does the claimant's work bear to the regular business of the asserted employer?

- B) is there a continuous connection or only an intermittent one?
- C) or is there no connection at all?

In summary, the claimant hauled logs for different clients using trucks owned by C & S Trucking. One of those clients was Streeter. The claimant was paid \$100.00 per day by C & S Trucking and she regarded Clint and Shana Weatherly, the owners of C & S Trucking, as her supervisors and employer. She worked for them approximately five months on a continuous basis prior to the accident. Her job duties were not highly skilled.

Streeter did not own or service the trucks; he did not hire the claimant; he did not pay the claimant; and he did not have the authority to hire or fire her. The only instructions he provided the drivers was the location of the timber and where to haul it.

After considering the lay testimony, I find the claimant was not employed by Streeter.

Another issue is the compensability of this claim: The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

- or
- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements.

Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The evidence shows the claimant is complaining of back and leg symptoms that stem from congenital or degenerative problems that were symptomatic prior to any incident at work. Therefore, I find the claimant cannot meet her burden of proving a compensable injury by a preponderance of the evidence.

1. The Workers' Compensation Commission has jurisdiction of this claim, in which the employer-employee relationship existed between the claimant and respondent No. 2, C & S Trucking.
2. Streeter Logging has no liability in this case.
3. The claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This case is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge