

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
EMPLOYER NO. UE-2006-01-23**

FTI TRUCKING, INC.

EMPLOYER

OPINION AND ORDER FILED JUNE 16, 2006

Hearing before Administrative Law Judge Barbara W. Webb on March 15, 2006, at Little Rock, Pulaski County, Arkansas.

Commission's Compliance Division appeared by and through Frankie Brand, Compliance Division investigator.

Employer appeared pro se. Mr. Gary Foley appeared on behalf of Employer.

STATEMENT OF THE CASE

_____A hearing was conducted on March 15, 2006, in this case to determine whether the employer should be assessed a penalty for violation of the Ark. Code Ann. §11-9-406 (a).

Following an investigation by the Compliance Division of the Arkansas Workers' Compensation Commission, the employer was charged with violations of the Arkansas Workers Compensation Law; specifically, failing and/or refusing to secure workers' compensation coverage for its employees. Following unsuccessful efforts by the Compliance Division to insure coverage for the employer's employees, and after communication advising the employer that it was in violation of the law, the matter was ultimately referred to this Administrative Law Judge for a review and determination concerning what action, if any, should be taken.

On January 26, 2006, the initial Order and Notice of Hearing was filed, charging the employer with non-compliance of the law and assessing the maximum statutory penalty of Ten Thousand Dollars (\$10,000.00) pursuant to Ark. Code Ann. §11-9-406. (Commission Exhibit 1). The Order provided that it would become final twenty (20) days after the employer's receipt, unless a written request for a hearing was filed with the Commission. In addition, the employer was directed and ordered to obtain and show proof of workers' compensation insurance within the same twenty (20) days, unless a written request for a hearing was filed, at which time the employer would be permitted to appear on March 15, 2006, and show cause, if any there be, why the employer should not be required to obtain workers' compensation insurance and/or pay the penalty assessed. A copy of the January 26, 2006 Order and Notice of Hearing was sent both certified mail and first-class mail. The return receipt for the certified mail was returned unclaimed. The first-class mail was not returned. Mr. Gary Foley contacted the Commission and requested that a hearing be held.

On March 15, 2006, a hearing was held in connection with this case. Testimony was offered on behalf of the Compliance Division by Ms. Frankie Brand. Mr. Gary Foley testified on behalf of the Employer. The record consists of the transcript of the September 8, 2005, hearing containing seven exhibits. In addition, the record was left open for purposes of receiving a sample copy of a contract. A copy of the contract used by Employer was submitted on March 21, 2006, and has been marked as Commission

Exhibit 8 and will be received into evidence. The exhibit will be blue-backed and incorporated into the record of this proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1) The Arkansas Workers' Compensation Commission has jurisdiction in this matter.
- 2) FTI Trucking, Inc., an Arkansas corporation, formerly doing business as Gary Foley d/b/a Foley Transport, failed to secure the payment of compensation for its employees as required by Arkansas Law.
- 3) FTI Trucking, Inc. is currently in the primary business of contracting with third parties to haul goods.
- 4) FTI Trucking, Inc. has a sufficient number of employees to require the Employer to maintain worker's compensation insurance coverage pursuant to Ark. Code Ann. §11-9-404.
- 5) The aforementioned employer was in violation of the law for sufficient time to warrant a statutory penalty pursuant to Ark. Code Ann. §11-9-406(b)(1)-(b)(5).

DISCUSSION

Arkansas Code Ann. §11-9-406(a) (Repl.2002) provides:

Any employer required to secured the payment of compensation under this chapter who fails to secure compensation shall be subject to a fine of up to Ten Thousand Dollar (\$10,000.00) as determined by the Workers' Compensation Commission, payable to the Death and Permanent Total disability Trust Fund, or be guilty of a Class D Felony. This sub-section shall not affect any other liability of the employer under this Act.

Arkansas Code Annotated §11-9-102(11) (Repl. 2002) defines employment, in

pertinent part, to include the following:

- (1) Every employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business (with specified exceptions for employees employed to perform domestic service, maintenance, repair, remodeling, or similar work in the private home or residence of the person employing the employee) A.C.A. §11-9-102(11)(A); and
- (2) Every employment in which one or more employees are employed by a contractor who subcontracts any part of his or her contract, A.C.A. §11-9-102 (11)(C); and
- (3) Every employment in which one or more employees are employed by a subcontractor. A.C.A. §11-9-102 (11)(D).

An “employee” is defined, in pertinent part, as “any person, including a minor, whether lawfully employed or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied . . .” Ark. Code Ann. §11-9-102 (9)(A). The term “employee” also includes:

a sole proprietor, partner, or member who devotes full time to the proprietorship, partnership, or limited liability company. However, any sole proprietor, partner of a partnership, or member of a limited liability company who desires not to be included in the definition of “employee” may file for and receive a certification of non-coverage under this chapter from the commission.” Ark. Code Ann. § 11-9-102 (9)(B).

While any individual holding a current certification of non-coverage is conclusively presumed not to be an employee, the law is clear that no election by a sole proprietor, partnership, or limited liability company shall affect the rights or coverage of any employees of those sole proprietorships, partners, or members. Ark. Code Ann. § 11-9-102(9)(D) and (E).

Arkansas Code Annotated §11-9-102(1) (Repl. 2002) defines the payment of compensation under this chapter. It states:

Every employer shall secure the payment of compensation under this chapter:

(1) By insuring and keeping insured the payment of the compensation with any carrier authorized to write Workers' Compensation Insurance;

(2) By furnishing satisfactory proof to the commission of his financial ability to pay compensation and receiving an authorization from the Commission to pay compensation directly.

Arkansas Code Annotated §11-9-102(1) (Repl.2002) defines carrier as follows:

'Carrier' means any stock company, mutual company, or reciprocal or interinsurance exchange authorized to write or carry on the business of Workers' Compensation Insurance in this state; whether required by the context, the term 'carrier' shall deemed to include duly qualified self-insured or self-insured groups.

For all relevant time periods herein, Gary Foley was the sole owner of a business known as FTI Trucking, Inc. located in Batesville, Arkansas. Prior to incorporation, Gary Foley did business as a sole proprietor. FTI Trucking, Inc is a company whose primary business consists of leasing trucks to haul goods. Employer contends that he did not carry workers' compensation coverage because he contracted with All Staff to provide worker's compensation coverage during the periods of time that he had more than five employees and at all other relevant times was not aware of the state law requiring him to maintain coverage if he had fewer than five employees. The Compliance Division of the Commission contends that the employer had sufficient number of employees to require workers' compensation coverage for its employees at all relevant times hereto.

The employer's failure to maintain coverage was discovered by the filing of a workers' compensation claim by Lonnie K. Cavaness, a person claiming to be an employee of FTI, Inc., alleging a work-related injury in Independence, Missouri, on March 7, 2003. Frankie Brand, an investigator with the Compliance Division, testified that she was initially assigned the claim investigation in March of 2003. Upon referral of the claim, she contacted Gary Foley, the sole owner and operator of FTI Trucking Company, Inc. He advised her that he leased his employees from All Staff. She talked with All Staff and was told that Foley was behind on his payments to All Staff and learned that All Staff was not authorized to provide worker's compensation insurance in Arkansas. She referred the company to the Insurance Commission and closed the file. On May 19, 2005, an Opinion was filed by the Administrative Law Judge in Claim No. F302829 finding that the claimant, Lonnie K. Cavaness, sustained a compensable injury on March 7, 2003, arising out of and in the course of his employment with FTI Trucking, Inc. and awarding temporary total disability, medical benefits, and attorneys fees. (Commission's Exhibit No. 2). The investigation was reopened and revealed that the employer had maintained coverage from March 31, 2004 until May 28, 2004, at which time coverage ceased for non-payment of premiums. On August 25, 2005, Brand contacted Foley and he stated that he had no employees and that he contracted to haul goods.

Gary Foley testified that he began doing business under the name of Foley Transport as a sole proprietor. (Tr. 13). Foley Transport owned nine trucks and leased employees from All Staff. Under the contract with All Staff, Foley sent a weekly check to All Staff who in turn was to issue paychecks, pay taxes, and provide worker's compensation coverage. (Tr. 16). The relationship with All Staff ceased after Cavaness filed his claim. (Tr. 17 - 18). At that time, Foley learned that All Staff had never procured workers' compensation insurance coverage. (Tr. 24). He testified that he cut out all of his employees and worked the company by himself for the next four months. (Tr. 24). In 2003, the company was incorporated under the name of FTI Trucking, Inc. He explained that FTI Trucking, Inc. contracts to haul goods with eight to ten different companies. Foley arranges and dispatches loads to others who own the trucks under written lease agreements in which FTI Trucking, Inc. is paid a percentage of each haul. (Tr. 24). Foley drives a truck that belongs to his son. (Tr. 27).

Foley testified that prior to the Order, he did not receive prior notice from the Compliance Division of the need to obtain coverage. Claimant has not appealed the Opinion of the Administrative Law Judge in which it was determined that FTI Trucking, Inc. was the employer of Cavaness.

It has been previously held by this Commission that employers are subject to a One Thousand Dollar (\$1,000.00) a day penalty for failure to secure workers' compensation insurance. The Commission held that an employer can be subject to the maximum

statutory penalty if it remains uninsured for more than ten (10) days. See, *In re Valu Line Company, Inc.*, 1995 AWCC 70, Full Workers' Compensation Commission Opinion filed March 16, 1995, (Employer #00089148).

This employer has been uninsured for a period in excess of ten days, from May 24, 2004 until present. Based on the evidence, I find that, for all relevant times herein, Gary Foley d/b/a Foley Transport and its successor, FTI Trucking, Inc. was a contractor who employed one or more employees and was therefore required to maintain workers' compensation coverage.

In this case, I find that the Employer failed to maintain worker's compensation coverage as required by applicable law. However, I find that the preponderance of the evidence demonstrates that Foley's reliance on his contractual agreement with All Staff to provide the requisite coverage was reasonable and in good faith for the time period prior to April of 2003. Although FTI Trucking, Inc. secured coverage in 2004, the coverage lapsed for nonpayment of premiums and was never reinstated. For these reasons, it is my opinion that under the facts and circumstances established by the preponderance of the evidence herein, the actions of the employer subsequent to May 24, 2004, merit a statutory penalty which can be assessed pursuant to Arkansas law. However the primary focus, even after seeking sanctions, has remained the same – to insure that all employers secure compensation for its workers. The Compliance Division does not normally seek civil or criminal sanctions without first requesting voluntary

compliance with the law. In the instant case, the compliance action was commenced after a final determination that FTI Trucking, Inc. was the employer of an injured worker. Although Foley contends that he took immediate steps to bring the company into compliance by cutting out employees, there is evidence that he misunderstood the requirements of the law.

After full consideration of the facts, issues, and the law, and acting within the sound discretion permitted for a hearing official, I have elected to set aside and hold in abeyance the imposition a portion of the full statutory penalty, contingent upon the following:

- 1) The employer procures and continues at all times to provide workers' compensation coverage for its employees. The Compliance Division will continue to monitor the Employer to ensure that it provides coverage for its employees.
- 2) Employer promptly pays any valid claims which may be filed against it during the period of its non-compliance based upon any final determination and award, if any, to any of its employees, including the claim of Lonnie K. Cavaness, as set forth in Order dated May 19, 2005, in Claim No. F302829, including the sum of \$522.53 for the costs of preparation of the transcript and other expenses incurred in connection with the April 8, 2005 hearing.
- 3) Employer promptly pays all costs incurred in connection with this proceeding.

Conditioned on the payment and compliance of all the aforementioned provisions, the Ten Thousand Dollar (\$10,000.00) penalty for non-compliance will be set aside. The penalty will be suspended, contingent on the employer also satisfying the remaining conditions. Failure to comply with all conditions may result in enforcement of the entire maximum statutory penalty.

ORDER

_____Pursuant to Arkansas Code Annotated §11-9-406(a), FTI Trucking is hereby directed and ordered to procure and continues at all times to provide workers' compensation coverage for its employees.

The employer is further directed and ordered to pay all costs of this litigation; specifically, the sum of \$338.95, representing the cost of the preparation of the transcript in this proceeding. Said payment should be remitted to the Arkansas Workers' Compensation Commission, Post Office Box 950, Little Rock, Arkansas, 72203-0950, within twenty (20) days of the date of this Order.

Further, the Compliance Division is directed to continue to monitor the employer to ensure that it continues to provide workers' compensation coverage for its employees. Any lapse of coverage will result in additional sanctions.

The Employer is further directed to promptly pay any valid claims which may be filed against it during the period of its non-compliance based upon any final determination and award, if any, to any of its employees, including the claim of Lonnie K.

Cavaness, as set forth in Order dated May 19, 2005, in Claim No. F302829, including the sum of \$522.53 for the costs of preparation of the transcript and other expenses incurred in connection with the April 8, 2005 hearing.

In the event that the employer fails to pay the penalties assessed herein, this Commission may petition the Circuit Court of Pulaski County, Arkansas, for an order enjoining the employer from engaging in further employment until such time as the employer makes full payment of all civil penalties as provided by Arkansas Code Annotated §11-9-406(b)(6) (Repl.2002)

IT IS SO ORDERED THIS 16th DAY OF JUNE, 2006.

**HONORABLE BARBARA W. WEBB
ADMINISTRATIVE LAW JUDGE**