

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

IN THE MATTER OF

FILE NO. UE-2006-04-10

**LaTONYA BRADLEY and
L & M TRUCKING, LLC**

OPINION AND ORDER FILED SEPTEMBER 15, 2006

Hearing before Administrative Law Judge Barbara W. Webb on June 14, 2006, at Little Rock, Pulaski County, Arkansas.

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

Employer appeared by and through its attorney, Mr. David Price, Attorney at Law, Magnolia, Arkansas. Also present was Mr. Michael Bradley and Ms. LaTonya Bradley.

STATEMENT OF THE CASE

_____A hearing was conducted on June 14, 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 April 10, 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 May 25, 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 April 10, 2006 Order and Notice of Hearing was sent both certified mail and first-class mail. Both the certified mail and first class mail were returned as undeliverable, and subsequently re-mailed to a new address. A written request for hearing was submitted by Mr. David Price, Attorney for L & M Trucking, LLC, and the case was rescheduled to May 31, 2006, and was rescheduled again to June 14, 2006.

On June 14, 2006, a hearing was held in connection with this case. Testimony was offered on behalf of the Compliance Division by Ms. Frankie Brand.

Mr. Michael Bradley testified on behalf of the Employer. The record consists of the transcript of the June 14, 2006 hearing containing 14 exhibits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1) The Arkansas Workers' Compensation Commission has jurisdiction in this matter.
- 2) L & M Trucking, LLC., an Arkansas corporation, failed to secure the payment of compensation for its employees as required by Arkansas Law.
- 3) L & M Trucking, LLC is currently in the primary business of contracting with third parties to haul goods.
- 4) L & M Trucking, LLC 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:

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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, LaTonya Bradley was the sole owner of a business known as L & M Trucking, LLC located in Hope, Arkansas. L & M Trucking, LLC is a company whose primary business consists of leasing trucks to haul goods. Employer contends that it did not carry workers' compensation coverage because it had no employees and did business through independent contractors. 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 Bruce Harris, a person claiming to be an employee of L & M Trucking, LLC, alleging a work-related injury near Hope, Arkansas, on February 10, 2005. Frankie Brand, an investigator with the Compliance Division, testified that she was initially assigned the claim investigation on February 23, 2005. Upon referral of the claim, she could find no record of any workers' compensation coverage for L & M Trucking, LLC. She contacted L & M Trucking and talked with Michael Bradley, the husband of the owner. He advised her that the company leased trucks for a percentage of the haul. She then forwarded a Questionnaire and received a letter from the attorney advising that L & M Trucking only had one full-time employee, and that the person injured was a part-time independent contractor. Following her investigation, a letter was sent to L & M Trucking, LLC, requiring L & M Trucking to provide proof of workers' compensation coverage on the basis that L & M Trucking, LLC was an independent contractor who contracted to do business with one employee, Bruce Harris. Ms. Brand did a site visit at 135 Hempstead in Hope and left a copy of the workers' compensation laws and a Questionnaire for the employer to fill out. She testified that she received a reply that all drivers were independent contractors. She put her investigation in abeyance until a determination was made in connection with the Bruce Harris case. She was

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subsequently notified that Mr. Harris had been found to be an employee of L & M Trucking.

Mr. Bradley testified that L & M Trucking, LLC was a company owned and operated by his wife, LaTonya. He testified that the primary business of the company was to lease trucks on to run under their authority. He testified he was not an employee of the company, although he did perform work for the company on a part-time basis. He testified that LaTonya was the sole member of the LLC. He testified that L & M Trucking, LLC had written lease arrangements with several drivers. He testified that drivers would contact L & M Trucking if they needed to find a load and L & M Trucking would find a load in exchange for a percentage of the haul. He testified that the truck drivers all had Certificates of Non-Coverage and were considered independent contractors.

In connection with the claim filed by Bruce Harris, he testified that on the first day that Harris pulled a load, Bradley was notified that there had been an accident at the 33 mile marker in Hope. He testified that it totaled the truck and that they lost the load of lumber that Harris was hauling. Harris then filed a workers' compensation claim. He testified that he had agreed to settle the claim with Harris for the amount of \$5,000 plus a \$1,500 attorney's fee. He testified that there was no admission of liability and that it was a disputed claim. He testified that L & M Trucking has their own authority, and that by leasing

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someone on your authority, you can charge them 15 percent (15%) for running under the authority. He testified the truck drivers were all buying trucks and that L & M Trucking helped locate loads for these truck drivers. He testified that the truck drivers decided which load they would haul, and that he exercised no control over the hauls. He testified that the truck drivers contracted with other people to haul loads and there was no exclusive working agreement between the truck drivers and L & M Trucking. He testified that the truck drivers decide their own routes and that L & M Trucking does not direct their work or provide any specific training on how to drive the trucks or properly carry a load. He testified that he issues 1099s for monies paid and there are no taxes withheld. He testified that there are written agreements between L & M Trucking, LLC and the respective truck drivers which clearly set out that it is a independent contractor relationship. Copies of the lease agreements were made exhibits to this proceeding.

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

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Workers' Compensation Commission Opinion filed March 16, 1995, (Employer #00089148).

Based on the evidence, I find that, for all relevant times herein, LaTonya Bradley and L & M Trucking, LLC was a contractor who employed one or more employees and was therefore required to maintain workers' compensation coverage.

The issue of whether one is an employer 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, the Arkansas Supreme Court has held that 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 v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The following factors are to be considered in determining whether one is an employer or an 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 employee 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

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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 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 principle is or is not in business. *Aloha Pools and Spas, Inc. v. Employers Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000).

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. *Arkansas Transit Homes, Inc. v. Aetna Life & Casualty*, 341 Ark. 317, 16 S.W.3d 545 (2000). In *Sandy v. Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976), the Arkansas 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.

In the instant case, while the employer maintains that the drivers were not employees, the evidence indicates that the employer did furnish trucks to some of its drivers, including Harris, and located the loads to be hauled. Certainly, the

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job of driving a truck was an integral part of the business of L & M Trucking, LLC.

In this case, I find that the Employer failed to maintain workers' compensation coverage as required by applicable law. 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 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 ensure 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, L & M Trucking, LLC paid compensation to Harris in a settlement agreement approved by this Commission. Moreover, the employer has taken steps to bring the company in compliance with the workers' compensation laws.

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 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, if any. The Compliance

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Division will continue to monitor the Employer to ensure that it provides coverage for its employees, if any.

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.
3. Employer promptly pays all costs incurred in connection with this proceeding, including the sum of \$336.95 for the costs of preparation of the transcript and other expenses incurred in connection with the June 14, 2006 hearing.

Conditioned on the compliance of all the aforementioned provisions, the Ten Thousand (\$10,000.00) penalty for non-compliance will be set aside and held in abeyance. 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), L & M Trucking, LLC is hereby directed and ordered to procure and continue at all times to provide workers' compensation coverage for its employees, if any.

The employer is further directed and ordered to pay all costs of this litigation; specifically, the sum of \$336.95, representing the cost of the preparation of the transcript in this proceeding. Said payment should be remitted

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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, if any. 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

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.

HONORABLE BARBARA WEBB
Administrative Law Judge