

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F404310**

**LESLIE TOIJA, EMPLOYEE**

**CLAIMANT**

**HTI LOGISTICS, UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED JUNE 29, 2006**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 5, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE RICHARD WHIFFEN, Attorney at Law, Sikeston, Missouri.

Respondent represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claim to determine the claimant's entitlement to workers' compensation benefits.

On March 28, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing and the parties' contentions relative to same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. The testimony of Leslie Toija, the claimant, and Jodie Israel, comprise the record in this claim. The parties have stipulated that the claimant was injured on May 9, 2002. The dispute centers on whether the claimant was an employee or independent contractor,

and whether he was performing employment services at the time of the injury.

### DISCUSSION

Leslie Rahiri Toemoko Toija, the claimant, with a date of birth of April 15, 1960, is a native of New Zealand, who currently resides in Billings, Montana. At the time of his July 6, 2005, deposition claimant was awaiting a work permit in order to apply for a green card. Claimant completed the equivalent or what is comparable to a high school education in his native country.

Claimant commenced his employment history after completing school at the age of seventeen. Claimant did a three-year apprenticeship in French polishing, high-glass timber finish to furniture; and overseeing the operation of a farm. Thereafter claimant went to Australia for three years where he drove a road train, a 18-wheeler with three 53-foot trailers joined together. Claimant then moved to Singapore where he drove a tour bus for four to five years. Claimant then returned to New Zealand where he lived on the family farm until 1999 at which time he came to the United States. Claimant maintains that prior to coming to the United States he had never suffered a serious injury to his back or one requiring hospitalization.

Regarding the circumstances surrounding his employment by respondent claimant testified:

Basically, it's - - I came across to America. I started driving for Rising Phoenix; stayed with them for a year and a half; met my wife; went on holiday for six months.

And then went to Hogland Logisticians.

\* \* \*

A lot of it's wort of - - word of mouth from other New Zealandes

that they've got driving for them. (RX. #1, p. 16).

In 2000 while working for Rising Phoenix Trucking Co., which was located in Mount Vernon, Missouri claimant sustained a twisted knee injury, however did not file a workers' compensation claim, receive medical treatment or miss any time from work. Claimant noted that the symptoms relative to the knee injury were of three days duration. The testimony of the claimant reflects that after meeting his wife he took off work for a period of six (6) months. Thereafter, claimant testified that he learned of the job with respondent.

Claimant testified that he began working for respondent in November 2001, as a driver. Claimant acknowledged receiving a 1099 Form from TCH Transport, Inc., located in Jonesboro, Arkansas in 2003 reflecting earnings of \$6,831.00. Claimant maintains that TCH is also HTI. Claimant also received a 1099 Form from HTI reflecting earnings \$14,807.00, and a W-2 from L&P Services, Inc., (aka G&H Transport) in 2003. Claimant also received a 1099 Form reflecting earnings of \$47,696.00, from Hornback Trucking Co., out of Des Moines, Iowa, in 2003. Claimant worked for Merritt Transportation out of Omaha, Neb., for a short period of time in 2004.

Regarding the specific mechanics of his employment by respondent, the testimony of the claimant reflects:

It was over the phone. I was given a phone number. I told them I wanted to be a driver. I was asked did I have any outstanding tickets. I said yes, I had one in 2000 for an illegal turn. It wasn't showing up on my license. I was told to come down to the office in Billings, Montana. I caught a bus leaving out of Albuquerque and I caught up with one of the drivers here.

Yes, I think I did [fill out forms for employment] because I arrived on a Saturday. I was given papers for that and keys to the tractor. (T. 9).

The vehicle operated by the claimant in his employment with respondent was owned by respondent and the trailers were either respondent-owned or leased. Claimant was not responsible for maintaining any liability insurance on either the trailer or the truck he operated in the discharge of his employment duties. Neither was the claimant responsible for the vehicle tags or maintenance on the vehicle and equipment.

Claimant testified that he did not have independent authority of his own to have repairs done on the truck. Claimant testified that he hauled dry goods as an over-the-road semi-tractor trailer driver doing contract out of Memphis, Tennessee. At the time the claimant's route took him to Atlanta, Georgia, Texas, Columbus, Ohio and back. The testimony of the claimant reflects with respect to his job duties in addition to driving the truck:

It was basically to keep up with the D.O.T. statements. We weren't expected to - - we were guaranteed that we were supposed to make sure the trucks got the standard pass.

It means literally doing your checks, checking brakes, if they were down too far, we'd have to get a brake line but in order to do that you had to ring the office, get an okay to go somewhere to get it done and ring up and they [HTI Logistics] would pay it. (T. 11-12).

From a security standpoint, the testimony of the claimant reflects that when the truck was in his care he automatically had a duty to look out for it which included making sure that it was not broken into or damaged. Claimant maintains that he was informed by appropriated supervisory personnel of respondent that as a driver he was in charge of the tractor as long as he was with it and under load.

Claimant maintains that from the time he commenced his employment with respondent in November 2001 until his injury in May 2002, he did not work for anyone else. Claimant

concedes that he would do back loads to get him back as close as he could to Memphis. The testimony of the claimant reflects that he was required to report in to the company twice a day. Claimant noted the back loads were arranged either by Tim Hogan or Mike, who instructed him where to get the loads and where to take them. Claimant's testimony reflects that he had no control over back loads at all. The testimony of the claimant reflects that some of the road trips would require him to stay overnight. There were facilities in the truck to sleep, which he used. With regard to staying over in a motel, claimant testified:

No. Very rarely we would. If we're on a two-day layover and we needed to get a motel room we would tell them but we had to have the truck (inaudible) and we would get up and walk around the truck to make sure it was still secure. (T. 13).

Claimant testified that whether permission was required from respondent to get a motel room depended on what sort of load was on board:

A lot of it is insurance-wise. I mean a lot of times you would have - - especially out at Columbus, Ohio we'd pull a lot of computer parts and we stayed with the trucks whenever we could. We stayed and didn't go anywhere without our trucks. (T. 13).

Claimant's testimony reflects, with respect to the need to be vigilant and staying with his truck:

Because if anything's going to happen to your trailer, you can feel it rocking. I mean, as soon as you open the door, actually physically lift the handles and pull it open and when you feel the doors open you can actually feel the vibration right through the whole truck. (T. 16).

Regarding the events of May 2002, which serves as the basis for the present claim, claimant testified that he was delivering a load of rolls of newsprint which he had picked up in Texas. Burlington, Vermont was the claimant's last stop. Claimant noted that the load had been arranged by Tim Hogan. Claimant had been furnished a delivery date by Tim Hogan. Claimant

denied that he had authority to change or alter the delivery date.

Claimant's testimony reflects regarding the events surrounding his injury of May 2002:

I go to Billings, Vermont. There's no truck stops there. The nearest one was 20 miles away. I was delivering at 7:30 the next morning. I arrived there at 4:30 in the afternoon, previous, the day before. I found an empty lot where I could park my truck and there was a restaurant across the road from it. I sat there and at about 6:00 I decided to go have a meal. I went across the road, had a stake and half a dozen eggs. I went back to my truck. Made sure that my seal was still okay on the trailer. Walked around it once and then I opened the door and hopped up on the bottom step, went to hop on the second step and I reached my left arm up to grab the steering wheel. I missed that and I fell backwards.

I injured my back. I went in the truck, laid down and at 12:30 the pain was so excruciating I went to the hospital. (T. 18).

Claimant acknowledged that he had three (3) bottles of beer with his meal. Claimant testified that he does not normally have that much beer with a meal, however on that occasion it was more to unwind. Claimant denies that he drink beer or wine on a daily basis. Further, claimant denies that the alcohol he consumed affected his judgment in any way or him physically. Claimant asserts that it was approximately a half hour after falling that he climbed back into the truck.

The testimony of the claimant reflects that the weather was down to six degrees when he returned to the truck following his meal, and that it was his intention to start the truck up and then go to the back and go to bed at the time of his fall. The testimony of the claimant reflects that the medical treatment he received at the hospital consisted of Ibuprofen, and pain killers.

With respect to further medical treatment following the initial hospital visit, claimant testified:

Yes, I did. I rang up the next morning and told Tim Hogan what happened. He told me to deliver my load. I delivered it. I had to go all the way across to New York to reload again. I said - - I needed

to get that to Billings, Montana. I need to see a doctor. I think it was in Buffalo, New York I fueled up. I couldn't drive anymore. I booked myself into a motel and I had my truck parked right beside my door. I had to get the lady from the office to call the motel to walk down to meet me to get the key. I stayed in there for two days or a day and a half. Another company driver come down. He helped me strip some of the gear out of my truck. I threw in with him. He actually took me to the hospital in Buffalo and that's where we had x-rays. They actually wanted to operate on me straightaway then. (T. 21-22).

Claimant later underwent back surgery in Billings, Montana.

During cross-examination claimant was questioned regarding the conflicts between his July 6, 2005, deposition testimony and his testimony on direct examination during the hearing. Specifically, during his July 6, 2005, deposition claimant testified that he pulled into parking lot mall in Burlington, Vermont on May 9, 2002, at 11:30 a.m. central time/12:30 p.m. eastern time. Claimant explained:

Yes. My log stated I arrived at 4:30 - - (T. 30).

Claimant maintains that the actual time he arrived at the parking lot of the mall was in fact 12:30 p.m. eastern time. (T. 31). During the July 6, 2005, deposition, claimant testified that he had started driving at about 6:30 or 7:00 on the morning of May 9, 2002. Claimant's testimony reflects that the afore was recorded in his log.

On cross-examination claimant acknowledged that the deposition testimony was not truthful with respect to the time he started driving on May 9, 2002. Claimant maintains that he actually starting driving 5:15 or 5:30 a.m. on May 9, 2002. Claimant was questioned further on cross-examination regarding his arrival time in Burlington, Vermont:

Q. Okay. All right. Then what time did you actually get into, I don't care what the logs say, what time did you actually get into Burlington, Vermont on May 9<sup>th</sup> ?

- A. I got there at, it would have been two in the afternoon.
- Q. Two in the afternoon?
- A. Yes.
- Q. Now, I'm really confused. You told me in the deposition you got there at about 12:20 in the afternoon.
- A. Yes.
- Q. And you told your attorney here a little while ago you got in town about 4:30 in the afternoon.
- A. Yes.
- Q. There's three different times with significant time lapses in between. Can you explain why you've given us three different times?
- A. The first one was, I was going with my log book. We had a lot of trouble with drivers getting citations for the logs. We would straighten - - they didn't care what we had to do, we had to make our logs look straight. My logs looked straight. While I was employed with the Company I was reprimanded about 10 times for logs that had been out for half an hour. So, I was stating what my logs had said. (T. 33)

Claimant acknowledged that during the July 6, 2005, deposition, he testified that he had gone and bought some supper - something to eat and was going back to the truck to eat it.

Claimant maintains that the afore occurred at approximately 4:30 p.m. on May 9, 2002, when he bought a couple of burritos and went back to the truck to eat. The testimony of the claimant further reflects:

It would have been 4:30 when I pulled into the shopping mall.

Yes. Because at 2:30 I pulled in to get unloaded but they wouldn't take me. They asked me to stand by and they might get me in. I sat there from 4:30, the receiver come back and told me, no, you have to come back in the morning. I hadn't eaten anything since about a quarter past five. (T. 35).

Claimant denies that he was in the mall parking lot at 12:30 p.m. eastern time. Claimant estimates that he was still driving at 12:30 p.m. eastern time, on May 9, 2002, approximate 60 miles out from Burlington, Vermont. The testimony of the claimant reflects that the reasons he gave the time that he did in the deposition was because he was trying to reconcile the recorded time in his log. (T. 38). Claimant asserts that approximately 4:45 p.m., on May 9, 2002, he put some laundry away and decided to go walking around looking at the shops.

During further questioning claimant acknowledged that he testified during his July 6, 2005, deposition that while walking around the shops at the mall he purchased something to eat and took it back to the truck. Further, he testified that, "I think I got hurt about 4:30". In that regard, the hearing transcript reflects:

Q. And you had gone back to the truck with your food?

A. Yes.

Q. Okay. So, now I'm a little confused again. Did you go back to the truck with your food or did you eat your food, did you sit down in a restaurant and drink the three beers and eat your food in a restaurant?

A. I took that lunch, I had a couple of burritos, I didn't like them very much and I threw them out. I got out of the truck, I went to the restaurant ordered a steak and eggs, had three beers with the meal and then I went back to the truck. (T. 39-40).

Claimant testified that he took some ice cream back to the truck with him following his meal at the restaurant. Claimant included the time that he waited at the receiver/customer in the total five (5) hours that he had been in Burlington, Vermont.

Claimant asserts that the meal that he ate at the restaurant during which he drank three beers was finished within twenty to thirty minutes, by 6:30 p.m. on May 9, 2002, at which time he returned to his truck and sustained his injury. Claimant acknowledged that during the July 6, 2005, deposition he testified that he was injured at 4:30 p.m., however he does not have an explanation for the discrepancy. Claimant does maintain that following his fall he remained on the ground approximately 45 minutes. Claimant explained that when he testified during his July 6, 2005, deposition that “everything was just screaming”, he did not mean that he himself was screaming, “but everything in my body was” in pain.

Claimant acknowledged that while he suffered his injury on May 9, 2002, he did not file his claim for workers’ compensation benefits until May 2004, and, further, that at some point following his back surgery he returned to the employment of respondent. Claimant estimates that he returned to work approximately a month and a half after his back surgery.

Claimant denied that he considered himself an independent contractor relative to his employment relationship with respondent. Claimant maintains, with respect to the route he took to deliver a load, he was directed to take the shortest way possible. Claimant was paid weekly, by the mile. With respect to his earnings during his employment with respondent, claimant concedes that taxes were not withheld from his paycheck.

Ms. Jodie Israel testified that she was employed by respondent for approximately a year. Ms. Israel left the employment of respondent in January 2003. In describing her employment position with respondent Ms. Israel testified:

I was - - I took care of the payroll and their personnel files, made sure all their paperwork was together. And I audited their logs. (T. 52).

Ms. Israel's testimony reflects that at the time she commenced her employment with respondent claimant was already employed by same as a driver.

Ms. Israel noted that the employee files of respondent was one aspect of her job duties, and, as such she was familiar with them. Ms. Israel's testimony reflects that respondent had categories or classes of employees:

Well, we had two different sets of drivers. We had drivers that were taxable and drivers that were not. We did not withhold taxes out of their payroll. (T. 52).

Ms. Israel testified that the respondent did not withhold taxes from the claimant's pay. When questioned regarding why taxes were not withheld from the claimant's paycheck, Ms. Israel testified:

Well, because they were not - - something to do with they couldn't pay taxes, they didn't withhold taxes because of immigration or whatever - - (T. 53).

Ms. Israel noted that there were other drivers of respondent for which taxes were not withheld.

Ms. Israel's testimony reflects that in terms of job duties and responsibilities, there was no difference between those drivers for which taxes were withheld and those that taxes were not withheld.

Regarding independent contractors that may have been working for respondent, Ms. Israel testified:

At that time, we had Mark and Elizabeth - - it was Mark's brother. He had his own trucks that were leased with HTI. (T. 52).

All the other drivers were paid by the mile. The testimony of Ms. Israel reflects that the drivers could not refuse a load. Ms. Israel explained, regard the afore:

There was - - no. The only person that could refuse a load was the brother-in-law or the brother, who would be Elizabeth's brother-in-law, that was because he owned his own truck. (T. 53-54).

The testimony of Ms. Israel reflects that loads were arranged by the dispatcher of respondent.

Respondent had three (3) dispatchers, Mark Hogan, Tim Hogan, and Keith Hogan.

Ms. Israel's testimony reflects that the claimant drove a truck owned by respondent. The testimony of Ms. Israel reflects that the drivers keep their own log books, however since part of her job duties included auditing the drivers' logs, she proved instructions relative to same. With respect to the claimant, Ms. Israel testified:

And instruct him on where he was - - where he had marked them to be illegal or where - - they had to be made to look legal. (T. 55).

During cross-examination, Ms. Israel elaborated with respect to the logs maintained by the drivers:

All of our drivers did. All of our drivers did. It wasn't just Mr. Toija. But if for some reason Mr. Toija went for a week, through a D.O.T. inspection and didn't write the exact time down, I had to call him and he had to fix it. (T. 59).

Ms. Israel testified that the driver, to include the claimant, when out on the truck had to perform the duties of a pre-trip/ post-trip inspection and be on time for loads. If the drivers of respondent, to include the claimant, violated any company rule, to include not being on time for a load, they were subject to being disciplined. The drivers, to include the claimant, had to report in twice a day, by 10:00 a.m. and 4:00 p.m. Drivers did not have control over their delivery schedule or date.

Ms. Israel's testimony reflects that in her employment capacity with respondent, she occasionally gave drivers direction relative to the route to take:

Yeah, they would call on occasions and get directions because we were PC Miler and they would have to go whatever PC Miler would say.

It's [PC Miler] how the guys were paid by their miles. You can like type in Jonesboro, Arkansas to Little Rock, Arkansas and it will give you directions and how many miles. And that's what they got paid by was how many miles was on PC Miler.

The truck driver got paid for what was on PC Miler. If they went 10 miles longer they didn't get paid for the extra 9 miles. They got paid for whatever was on PC Miler.

That was company policy when I came to work there. (T. 57-58).

Ms. Israel's testimony reflects, with respects to the responsibilities of a driver arriving early to a delivery location:

Just, if he could deliver early then he was to deliver early and then Mark would, or somebody else would dispatch him on another load, if they had one.(T. 58).

If the driver arrived at a delivery location early and had to lay over, Ms. Israel testified regarding the driver's responsibilities:

Just making sure that the load and the truck and the trailer is safe. They were required to keep an eye on it to make sure it didn't get stolen or broken into or what not. (T. 58).

Ms. Israel testified that while the claimant did not discuss his injury with her, he did relay when he called in that "morning or the day" that he had fallen and gotten hurt. (T. 59). Ms. Israel's testimony reflects that the duration of her telephone conversation with the claimant was of three to four minutes before she directed him to Clark. Ms. Israel testified that the claimant told her that he had fallen and needed to go to the hospital. (T. 60).

The testimony in the record reflects that the log book is a form that the driver fill out regarding their daily activities; it goes from 12:00 a.m. to midnight; includes driving time and off

time, to include time in the sleeper; and has to be turned in by the driver to appropriate personnel of respondent, who was Ms. Israel during her employment with respondent. Regarding the appropriate designation in the log when a driver arrived at a delivery destination early, Ms. Israel testified the driver would log it as off duty. Ms. Israel's testimony further reflects:

Well, he would - - it really depended on what time he got there. He would either log it as off duty or in the sleeper berth. If he went into the sleeper berth and - - (T. 62).

Ms. Israel further responded during cross-examination:

- Q. When a driver would get to the destination on a day early, what was his job with respect to the log itself?
- A. Again, it depends on what time he got there, whether he logged off duty or whether he logged in the sleeper berth.
- Q. Okay. If he wasn't in the sleeper berth, he was off duty?
- A. Depends on if he's doing stuff with the truck or what not then he's still on duty but he's not driving.
- Q. If he's drinking beer and eating, is he on duty or off duty?
- A. Well, they were allowed an off duty paper, where they could go off duty for meal breaks, so yeah. (T. 63).

The July 6, 2005, deposition of the claimant reflects that he picked up his freight, rolls of newsprint for printing machines, at Pine Bluff, Arkansas for delivery in Burlington, Vermont, possibly on Thursday for deliver on Monday or Tuesday. (RX. #1, p. 30). Claimant maintains that there were no truck stops in Burlington. While the July 6, 2005, deposition of the claimant covers the breath of his accident, efforts at obtaining medical treatment while in the northeast (Vermont and New York), following the accident, and his eventual return to Billings, Montana where he had his surgery, it also covers the period of his return to the employment of respondent

following surgery. Claimant's testimony reflects, regarding his return to the Jonesboro office of respondent to resume work, following his surgery:

The next morning I was called into the office. Then the office assistant, Jodie, informed me that we all have to sign a waiver claim for workers' comp; that Elizabeth was gonna to talk to me about contracting, contract driver, and that when she finished talking to me I was to go and see Jodie and sign back up again as a contract driver. (RX. #1, p. 43-44).

Claimant testified that he complied with the afore and drove for respondent for a period of four to five months before quitting after getting a better job offer with Hornback Trucking.

Claimant also testified during the July 6, 2005, deposition that he used a fuel card of respondent to purchase fuel while driving for same. Claimant was driving a respondent-owned vehicle. Further, the original driver's log, to include that encompassing the May 9, 2002, trip to Burlington, Vermont, were turned in to the office of respondent, and that he destroyed his copy since he was not told to hold onto them. (RX. #1, p. 46). Regarding his job duties in the employment of respondent, claimant testified:

Yes. We were allocated a truck. We'd basically be told where to pick the load up, what time, which broker we were using, when we had to deliver it, what time we had to deliver. The odd occasion we'd be paid bonuses if we could run certain loads overnight for them. (RX. #1, p. 49).

The July 6, 2005, deposition also reflects the medical bills from the various providers were discussed and that the claimant had paid some toward the bills. (RX. #1, p. 53-55).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, application of the appropriate statutory provisions and case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 9, 2002, and at all times pertinent thereto respondent employed the requisite number of employees to bring its operation within the purview of the Arkansas Workers' Compensation Act, however did not have in place a policy of workers' compensation insurance nor was it an authorized self-insured employer.
3. On May 9, 2002, the relationship of employee-employer existed between the claimant and the respondent.
4. On May 9, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00/\$319.00, for temporary total and permanent partial disability.
5. On May 9, 2002, the claimant sustained an injury to his back arising out of and in the course of his employment with respondent, which rendered him temporarily totally disabled for the period beginning May 10, 2002, and continuing through the end of his healing period, or until such time as he was released to return to gainful employment.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 9, 2002.
7. The respondent has controverted this claim in its entirety.

### **CONCLUSIONS**

It is undisputed that the Arkansas Workers' Compensation Commission has jurisdiction of the present claim. Respondent has its principle place of business in Jonesboro, Arkansas, and employed in excess of the required number of employees, excluding the claimant, to bring its operations within the jurisdiction of the Arkansas Workers' Compensation Commission. Ark. Code Ann. §11-9-102 (11) (A). The parties acknowledge that on May 9, 2002, the claimant

sustained an injury to his back which required medical treatment, to include surgery, and resulted in a period of total incapacitation from engaging in gainful employment for a period of time. Claimant maintains that the injury arose out of and in the course of his employment with respondent and that he is entitled to the payment of workers' compensation relative to same. Respondent takes the position that the claimant was not an employee but rather an independent contractor. Further, respondent disputes that the claimant was performing employment services at the time of his injury, made a timely filing of his claim, or properly received authorization for treatment, and intoxication as defenses to the claim.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Claimant asserts a specific incident, a fall from his truck, as the basis for his claim.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (A) (4) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

While respondent contends that the claimant was not an employee of same but rather an independent contractor, the evidence in the record is to the contrary. Claimant operated a vehicle owned by respondent in the discharge of his duties as a long-haul truck driver. Claimant used a fuel card of respondent to purchase fuel for the truck that he drove in the discharge of his duties as a long-haul truck driver. Claimant was paid a specific amount per mile and the distance driven in delivering a load was in accordance with PC Miler, the system utilized by respondent. Claimant's loads were arranged by respondent. Claimant could not decline a load, nor could he haul a load for other customers than those arranged by respondent. Claimant was required to contact respondent twice a day, morning and afternoon/evening. Claimant maintained a driver's log, which was audited by respondent and turned in to same. Claimant was paid weekly by respondent. While federal income taxes were not withheld from the claimant's earnings by respondent, state taxes were. Claimant paid his own federal taxes and filed tax returns for the years 2002 and 2003. The evidence preponderates that not only did respondent have the right to control the claimant in the discharged of his employment activities, it exercised that control. The claimant was an employee of respondent on May 9, 2002, and not an independent contractor. *Garcia v. A&M Roofing*, CA 04-530 (Ark. App. 2-2-2005); *Christian v. Arkansas Crane & Crawler*, 55 Ark. App. 306, 935 S.W.2d 1 (1996); *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1992).

Claimant's loads were arranged by respondent. While the claimant could arrive at a delivery destination earlier than the delivery date, he could not change the delivery date of the dispatched load that he was hauling. If the customer consented to accept the load when the claimant arrived early, respondent would arrange another load for the claimant. Both the

claimant and the respondent benefitted by the afore. If the customer declined to take the load earlier than the delivery date, claimant had to wait and deliver the load as scheduled. The evidence preponderates that the afore was the case with respect to the claimant delivery to the Burlington Evening Post, in Burlington, Vermont, on May 9, 2002.

Claimant's delivery date was May 10, 2002. Claimant arrived in Burlington, Vermont on May 9, 2002, and attempted to make delivery at the Burlington Evening Post, at approximately 2:30 p.m. He was informed that delivery could not be had until 8:00 a.m. on May 10, 2002. The claimant had responsibilities with respect to the truck and load in addition to transporting and delivering it. The afore included insuring that the vehicle was not damaged or the load stolen. Towards that end, claimant was required to inspect the vehicle, trailer, and seals to deter theft and damage. Claimant usually slept in the sleeper berth, or if he was in a motel room, had to insure that the vehicle and load was in close proximity and within view.

After the claimant was unable to deliver his load early, he located a shopping mall with sufficient space that he could park his truck in the parking lot. The claimant was required to maintain driver's log, pursuant to the D. O. T. regulations, which detailed his activities, whether driving, off-duty, delivering a load, in the sleeper berth. There is credible testimony in the record to reflect that the log books of respondent's drivers were audited by appropriate designated personnel of respondent to insure compliance with D.O. T. regulations, and not necessary accuracy. Claimant, in the regular and usual course of driving discarded his copy of the driver's log which covered the May 2002, delivery of rolls of print to the Burlington Evening Post. The original driver's log covering the afore period and delivery was turned in by the claimant to respondent.

Claimant had not been admonished to retain the log regarding the May 9-10, 2002, delivery in Burlington, Vermont. While the credible evidence in the record reflects that the claimant notified appropriated personnel of respondent of his May 9, 2002, fall while climbing into his truck and injuring his back, as well as his efforts to secure medical treatment both in Vermont and New York, as well as his actions in returning to Billings, Montana to obtain surgery for his low, he did not appreciate that his injury was one covered by workers' compensation. Claimant did not learn that he could file a workers' compensation claim until he had a discussion with his wife and later consulted an attorney in Billings, Montana, who suggested he find a lawyer in Arkansas. (RX. #1, p. 45). As a consequence of the afore, by the claimant's May 2004, filing of his workers' compensation claim relative to the May 9, 2002, low back injury he no longer had his driver's log which cover the pertinent date and trip.

The claimant's job duties and responsibilities with respect to security of the truck and load in his employment with respondent is not disputed. In addition to pre-trip and post-trip inspections, claimant had a duty to deter damage to the equipment and theft of the load. At the time claimant sustained his fall, he had completed his evening meal at a restaurant, returned to the location of his truck in the parking lot of the shopping mall, conducted an inspection of the vehicle and the seals on the trailer, and was in the process of climbing into the truck. Respondent asserts that employment services were not being performed at the time of the claimant's injury.

Ark. Code Ann. § 11-9-102 (4) (B) (iii), provides that a compensable injury does not include an injury which is inflicted upon the employee at a time when employment services are not being performed. An employee is performing employment services when he is doing something that is generally required by his employer. The test for determining whether an

employee was injured while performing employment services is the same as the test for determining whether an injury occurred out of and in the course of employment: whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. Accordingly, the critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Arkansas Methodist Hospital v. Hampton*, CA04-988 (Ark. App. 3-23-2005); *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

The claimant was required to inspect his vehicle for damage and to safeguard the load. The credible evidence reflects that claimant just completed the afore and was in the process of climbing into the truck at the time he suffered his injury. In addition to being required to perform the afore tasks, the same directly advanced the interest of the respondent. As in *Wallace v. West Fraser South, Inc.*, 05-254 (Ark. 1-26-2006), respondent offers no testimony or evidence to controvert the afore aspects of the claimant's testimony.

While respondent appears to place great stock on the claimant's activities after arriving in Burlington, Vermont, when he was unable to deliver his load early, as well as his possible plans between 6:30 p.m. on May 9, 2002, and 8:00 a.m. on May 10, 2002. In this regard, it is undisputed that the claimant had consumed his evening meal, which consisted of a steak, eggs, and three bottles of beer, at a restaurant. Claimant's future planned activities, after inspecting and securing the truck and load, prior to his injury are of no moment. The uncontroverted testimony in the record is that the claimant had run an inspection of the vehicle and seals on the

load and was proceeding to climb into his truck when he sustained his injury. These activities advanced the interest of respondent. It is the activity occurring at the time of the injury, not the activity proceeding or subsequent, that is relevant to the question of whether a claimant was performing employment services. *Wal-Mart Stores, Inc. v Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). In *Hampton*, supra, the appellate noted, “whatever activity preceded the injury, or could have preceded the injury, is also irrelevant”. Accordingly, the evidence preponderates that the claimant was performing employment services at the time of his May 9, 2002, compensable back injury.

Respondent asserts that because the claimant testified that he consumed three (3) beers with his evening meal on the day of the May 9, 2002, accident, create a rebuttal presumption that the injury or accident was substantially occasioned by the use of alcohol. As such, respondent takes the position that the claimant’s injury is not compensable and that he is not entitled to the payment of workers’ compensation benefits as a result of same.

Ark. Code Ann. § 11-9-102 (4)(B)(iv)(a-c), provides, in pertinent part:

(B) “Compensable injury” does not include:

. . . .

(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 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.

A statutory presumption is defined as “a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut that presumption. *ERC Constr. Yard & Sales v. Robertson*, 335 Ark. App. 63, 69, 977 S.W.2d 212, 215 (1998). Alcohol is present whenever any amount of alcohol is revealed, no matter how small. *Id.* The Arkansas statutory provision appears to be the only one that raises a presumption that an accident was substantially caused by drugs or alcohol by merely establishing the presence of drugs or alcohol with requiring that the same be confirmed by medical testing. The end result is that Arkansas standard for noncompensability due to drug or alcohol consumption is broad and far reaching. *Flowers v. Norman Oaks Construction Co.*, 341 Ark. 474, 17 S.W.3d 472, (2000).

Claimant acknowledged drinking three (3) beers as he consumed his evening meal on May 9, 2000, prior to his accident. Claimant did not immediately seek medical treatment following his accident, as such there are no observations noted or documenting the presence of alcohol by medical providers, co-workers, or witnesses to the accident. There are no test results (urine, blood, or breath) in the record reflecting the presence of alcohol, only the claimant's uncontroverted testimony.

Claimant denies that his accident and injury was substantially occasioned by the presence of alcohol. In rebutting the statutory presumption, the evidence reflects that the claimant drank three (3) beers during the course of a full meal consisting of steak and eggs over a half hour period. In explaining the mechanism of his May 9, 2002, accident and resulting injury, claimant

testified:

I put mu right leg on the bottom step, put my left leg, grabbing that side rail and with my left hand I reached up for the steering wheel.

I reached out for the steering wheel and with that I transferred the weight from my right leg to my left leg. My hand grabbed the steering wheel and my foot slipped on the step itself and that threw me backwards. (T. 50).

The claimant has rebutted the statutory presumption that the May 9, 2002, accident was substantially occasioned by the presence of the alcohol in the three (3) beers he drank during his thirty-minute meal preceding the accident.

While respondent assert that the claimant failed to file a timely claim, it does not assert that the claimant's claim is barred by the statute of limitation. The evidence reflects that the claimant suffered in injury on May 9, 2002. A claim for workers' compensation benefits was filed on behalf of the clamant with the Arkansas Workers' Compensation Commission on May 5, 2004. It is undisputed that at the time of the May 5, 2004, filing, the claimant had undergone low back surgery and returned to gainful employment.

Ark. Code Ann. § 11-9-701, Notice of Injury or death, provides:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at the place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

. . .

(b)(1) Failure to give the notice shall not bar any claim:  
(A) If the employer had knowledge of the injury or death;  
(B) If the employee had no knowledge that the condition or disease

arose out of and in the course of the employment; or  
(C) If the commission excused the failure on the grounds that  
for some satisfactory reason the notice could not be given.

The uncontroverted evidence in the record reflects that respondent had notice of the claimant's May 9, 2002, injury shortly after its occurrence, and prior to the time claimant sought and obtained medical treatment relative to same. Claimant filed his claim for workers' compensation benefits prior to the expiration of the time limitation period, two years from the date of injury. Ark. Code Ann. § 11-9-702 (a)(1). Respondent had notice of the claimant's injury, receipt of medical treatment, period of total incapacitation as a result of same, as well as when that incapacitation ended - - August 1, 2002, when claimant returned to the employment of same. As a consequence of the afore, respondent is responsible for the payment of workers' compensation benefits from the dated the same inured. Respondent has controverted this claim in its entirety.

### **AWARD**

Respondent is herein ordered and directed to pay to the claimant temporary total disability benefits as the weekly compensation benefit rate of \$425.00, for the period commencing on or about May 10, 2002, and continuing through the end of the claimant's healing period, on or about August 1, 2002, as a result of his compensable injury of May 9, 2002. Said sums accrued shall be paid in lump without discount.

Respondent is further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel growing out of the May 9, 2002, compensable injury.

Maximum attorney fees are herein awarded to the claimant's attorney on all the

controverted indemnity benefits growing out of this claim, pursuant to Ark. Code Ann. § 11-9-715.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

---

**Andrew L. Blood, Administrative Law Judge**