

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F607340

DAN COLLINS, Employee

CLAIMANT

GUY GRAHAM TRUCKING, Uninsured Employer

RESPONDENT

OPINION FILED JANUARY 18, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by LARRY DOUGLAS, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

On December 13, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 11, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

There were no stipulations entered into between the parties.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant was an employee or independent contractor.
2. Compensability.
3. Related medical.
4. Temporary total disability benefits.
5. Attorney fee.
6. Compensation rates.

At the time of the hearing the respondent noted that in connection with the issue of whether claimant was an employee or an independent contractor, that it also is litigating the issue as to whether the respondent had the requisite number of employees to invoke the jurisdiction of the Commission.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was injured June 12, 2006. His back was injured when the tractor trailer he was driving rolled over."

The respondent's contentions as set out in its pre-hearing questionnaire are as follows: "Independent contractor, not covered by workman's compensation statute, alcohol involved in the accident, pre-existing condition."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The claimant has proven by a preponderance of the evidence that he was an employee of the respondent.
2. Respondent had three employees; therefore, respondent is subject to the Arkansas Workers' Compensation Act and the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on June 12, 2006.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.
5. Claimant is entitled to temporary total disability benefits beginning June 13, 2006 and continuing through December 5, 2006.
6. Claimant earned an average weekly wage of \$782.00 which would entitle him to a compensation rate of \$488.00 for temporary total disability benefits, the maximum rate

in effect for the calendar year 2006.

7. Respondent has controverted claimant's entitlement to all indemnity benefits. Claimant's attorney is entitled to the maximum attorney fee.

FACTUAL BACKGROUND

The claimant is a 56-year-old man who testified that he began working for the respondent approximately two and one-half years ago. At that time the claimant was drawing social security disability benefits because of a bipolar condition. However, claimant testified that under a program approved by the Social Security Administration he was permitted to earn wages. The claimant had a CDL license and entered into an agreement with Guy Graham, the owner of the respondent, to perform long haul trucking.

Guy Graham had developed a relationship with Cargill to haul product. Graham testified that he would receive a call from Cargill in Wichita, Kansas, and was offered a load. Graham was notified of the origination point and the drop locations. Graham would then telephone claimant and inform him of the load. Claimant would then go to the respondent's place of business, pick up a truck, and proceed to Cargill to hook up the trailer. Claimant would then drive the load to its particular drop location. After the load was dropped claimant would contact Graham or another individual about a return load. According to Graham there was always a back load. Once the back load was delivered claimant would take the truck back to the respondent and be given a check for payment. Claimant was paid 25 percent of the gross payment for delivery of the product.

On June 12, 2006, the claimant was involved in an accident while he was in the process of swerving to avoid a car that veered into his driving lane. Claimant testified that the last thing he remembers was his truck rolling over before he lost consciousness and woke up in the emergency room. Upon his release from the hospital the claimant returned to Arkansas where he received additional medical treatment from his physicians at the VA

hospital.

Claimant has not worked for the respondent or any other employment since the date of the accident. Claimant has filed this claim contending that he suffered a compensable injury while employed by the respondent. He seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Before a determination can be made as to whether respondent had the requisite number of employees to be liable for workers' compensation benefits, one must first determine whether the claimant himself was an employee or an independent contractor. Whether an individual is an employee or an independent contractor is a question of fact to be determined after consideration of various factors set forth in *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W. 2d 286 (1982). Those factors include the following:

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

These are examples of factors which may be considered in a particular case and

it is not necessary for the Commission to consider all of the factors in some cases. The relative weight to be given to the various factors is to be determined by the Commission. *Franklin, supra*.

In this particular case, there are some factors which would indicate that claimant was an independent contractor and there are other factors which indicate that claimant was an employee of the respondent. After my review of all the relevant factors, I find that the claimant was an employee of the respondent, not an independent contractor.

As previously noted, the claimant had a CDL license which allowed him to work as a truck driver. While claimant was given specific drop locations, he was not directed by the respondent to follow any specific route in reaching the drop location. No taxes were withheld by the respondent, and either party could terminate the agreement at any time.

On the other hand, the claimant did not have any of the materials necessary to perform his job. Instead, the respondent provided a truck and all maintenance. In addition, it was respondent that obtained the load which claimant delivered. Most importantly, the work claimant was performing was a regular and integral part of the business of the respondent. The respondent is a trucking company and the job performed by claimant was clearly a part of its regular business. In fact, the driving performed by claimant and one other individual under the exact same agreement was the only business of the respondent. Therefore, respondent's business would not have functioned without the job performed by the claimant. In my opinion, this is the most important factor in this case.

In reaching this decision I note the claimant did sign an "INDEPENDENT CONTRACTOR AGREEMENT" stating that he would be considered an independent contractor, not an employee. However, A.C.A. §11-9-108(a) states that employees may not waive their right to workers' compensation. Thus, if the facts indicate that an individual was an employee, not an independent contractor, an agreement to the contrary is invalid.

Accordingly, for the foregoing reasons, I find that the claimant was an employee of the respondent, not an independent contractor.

I also find that the respondent had the requisite number of employees to invoke jurisdiction of the Workers' Compensation Commission. A.C.A. §11-9-102(11)(A) states that employment includes every employment in the state in which three or more employees are regularly employed by the same employer in the course of business. In this particular case, the claimant would constitute one employee. Guy Graham, the owner of the respondent, also testified that in 2006 he had another individual named Rick Coleman working under the same arrangement as the claimant. This arrangement has been determined to be that of an employee, not an independent contractor; therefore, Coleman would qualify as the second employee of the respondent.

Finally, Guy Graham, as the owner and sole proprietor of the respondent, would qualify as employee number three. A.C.A. §11-9-102(9)(B) states:

The term "employee" shall also include a sole proprietor, partner, or member who devotes full time to the proprietorship, partnership, or limited liability company.

As a sole proprietor, Graham would constitute the third employee. Furthermore, even if Graham had chosen not to cover himself as an employee for workers' compensation purposes, it would not affect the rights of the remaining employees with respect to workers' compensation coverage. See A.C.A. §11-9-102(9)(E) and A.C.A. §11-9-108(b)(2).

Accordingly, I find that the respondent did have three employees so as to invoke the jurisdiction of the Commission and entitle claimant to payment of compensation benefits for any compensable injury.

Having found that claimant was an employee of the respondent and that the Arkansas Workers' Compensation Commission has jurisdiction, I now find that claimant

has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while involved in a motor vehicle accident on June 12, 2006. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

Claimant testified that on June 12, 2006, he was involved in an accident while attempting to swerve to avoid a car which veered into his lane. As a result of this accident claimant's truck rolled over, he lost consciousness, and he was taken to the emergency room. The emergency room records from Crawfordsville, Indiana indicate that claimant was admitted following an accident and diagnosed as suffering from back pain. Subsequent medical records from the VA Hospital also indicate that claimant's back pain resulted from this accident.

Based upon the claimant's testimony which I find to be credible, the accident report which was admitted into evidence, as well as the history contained in the medical records, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment with respondent and that the

injury was caused by a specific incident, identifiable by time and place of occurrence.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that he has offered medical evidence supported by objective findings establishing an injury.

There is no question that claimant suffered from back pain prior to his accident. In fact, as a result of that back pain claimant was taking Tylenol #4. However, under Arkansas Workers' Compensation law, an employer takes an employee as he finds him, and employment circumstances which aggravate a pre-existing condition are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. 460, 120 S.W. 3d 150 (2003).

In this particular case, x-rays were taken of the claimant's lumbar spine at the emergency room in Crawfordsville, Indiana on June 12, 2006. The medical reports indicate that claimant was diagnosed as suffering from a compression fracture at L1 on that date. Notations in some of the hospital records indicate that this compression fracture was pre-existing. If the compression fracture were pre-existing, then claimant would not be able to prove a new injury. However, the radiology report does not state that the compression fracture was pre-existing. To the contrary, the radiology report states that the age of the compression fracture could not be determined and that further testing would be necessary.

More importantly, when claimant returned to Arkansas he sought medical treatment from his physicians at the VA Hospital. Based upon claimant's prior complaints of back pain, x-rays of claimant's lumbar spine had been taken on September 30, 2005, before claimant's accident. After claimant's accident x-rays were again taken and compared to the x-rays of September 30, 2005. A report from the VA Hospital dated July 10, 2006 states the following with respect to that comparison: "During the interim, there has been a compression fracture of the L1 vertebral body with estimated volume loss of 65 percent."

Furthermore, claimant has undergone an evaluation at the VA Hospital by Dr. Runnels, a neurosurgeon. In a report dated December 5, 2006, Dr. Runnels noted that previous x-rays did not show a problem with the claimant's L1 level. Now, according to Dr. Runnels, there is a compression fracture with some bone in claimant's spinal canal.

In summary, while claimant did have some complaints of low back pain prior to the accident on June 12, 2006, there is insufficient credible evidence indicating that the claimant had a compression fracture at the L1 level. A compression fracture was not present when x-rays were performed on claimant's lumbar spine on September 30, 2005. This compression fracture did not appear until after claimant's accident of June 12, 2006. Accordingly, based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury caused an internal physical harm to his body which required medical services and resulted in disability. I also find that claimant has offered medical evidence supported by objective findings establishing an injury. Claimant's injury was a compression fracture to the L1 level which resulted in medical services and disability.

For the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of a compression fracture to the L1 level as a result of the motor vehicle accident on June 12, 2006.

During the course of the hearing there was some testimony from claimant with regard to his drinking of alcohol on the day of the injury. Claimant acknowledged that he was cited for having alcohol in his cab, but not for intoxication. Claimant testified that he had drunk one beer the night before his accident. With respect to this issue, I note that the medical records indicate that a blood alcohol test was given and that the alcohol level was below a detectable limit. Therefore, I do not find that the provisions of A.C.A. §11-9-102(4)(B)(IV)(a) would apply.

Having found that claimant suffered a compensable injury in the form of an L1 compression fracture, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with the claimant's compression fracture.

I also find that claimant is entitled to temporary total disability benefits beginning June 13, 2006, the day after his compensable injury, and continuing until December 5, 2006, the day he received a permanent physical impairment rating from Dr. Runnels. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, claimant was advised by his treating physicians at the emergency room on June 12, 2006 to receive follow up care from his normal family physician. When claimant returned to Arkansas he sought medical treatment from his physicians at the VA Hospital. The medical records from the VA Hospital indicate that claimant was provided medication and underwent additional testing, including an MRI scan and x-rays. Claimant was also provided physical therapy. At the VA Hospital claimant came under the care of Dr. Runnels, neurosurgeon. Dr. Runnels in a report dated September 5, 2006, provided claimant with medication and ordered additional testing. In addition, Dr. Runnels referred claimant to an interventional radiologist to determine whether a vertebroplasty should be performed. Dr. Runnels also provided the claimant with a back supporter and a cane.

Dr. Runnels' follow up report dated December 5, 2006 indicates that claimant has undergone the previously requested evaluation and the vertebroplasty was not recommended due to the bone in the claimant's spinal canal. As a result, Dr. Runnels released claimant with a 12 percent rating to the body as a whole. He also indicated that he did not believe the claimant would be capable of returning to driving.

I also note that when claimant was treated by the physicians at the VA Hospital he was given various medications including Hydrocodone for pain. The medical reports indicate that the medication may cause drowsiness and also state, "DO NOT TAKE & DRIVE."

Based upon the foregoing evidence, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning June 13, 2006 and continuing through December 5, 2006. Throughout this period of time claimant continued to remain under the care of his treating physicians at the VA Hospital and was prescribed medication, physical therapy, additional testing, and an evaluation for a possible vertebroplasty. Only after all these evaluations were performed did Dr. Runnels opine in his report of December 5, 2006 that claimant could not return to driving and assigned a permanent physical impairment rating of 12 percent to the body as a whole. Furthermore, claimant was not capable of working since he was prohibited from driving while taking medication.

The final issue for consideration involves claimant's average weekly wage. As previously noted, claimant was to be paid 25% of the gross for hauling a particular load. The only evidence presented with regard to the amount of money claimant earned under this agreement is contained in claimant's income tax return for the year 2005. Claimant testified that his only income during the year 2005 was his work for the respondent. The tax return indicates that claimant had a total income, excluding his social security disability benefits, of \$40,710.00. Dividing this amount by 52 weeks would result in an average weekly wage of \$783.00. This would entitle claimant to the maximum compensation rate in effect for 2006 of \$488.00 for temporary total disability benefits.

Finally, although I have noted that Dr. Runnels assigned the claimant a permanent physical impairment rating in an amount equal to 12 percent to the body as a whole, claimant's entitlement to permanent partial disability benefits based upon that rating was

not listed as an issue at the hearing; therefore, it will not be considered at this time.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he was an employee of the respondent and that he suffered a compensable injury on June 12, 2006 in the form of a compression fracture to his lumbar spine. Claimant is entitled to payment of all reasonable and necessary medical treatment provided in connection with his compensable injury. Claimant is also entitled to payment of temporary total disability benefits beginning June 13, 2006 and continuing through December 5, 2006. Claimant is to be paid temporary total disability benefits at the rate of \$488.00 per week. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE