

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F600137**

**ESTATE OF JOHNATHAN M. HUGHES, JR.,  
DECEASED EMPLOYEE**

**CLAIMANT**

**GIT RID OF IT ARKANSAS (GRIA),  
EMPLOYER**

**RESPONDENT NO. 1**

**ZURICH AMERICAN INS. CO.,  
INSURANCE CARRIER/TPA**

**RESPONDENT NO. 2**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 3**

**OPINION FILED OCTOBER 15, 2007**

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Clark Mason, Mr. Paul Byrd, Attorneys at Law, Little Rock, Arkansas, and Mr. James J. Thompson, Jr., Attorney at Law, Birmingham, Alabama.

Respondent No. 1 was represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas, and Mr. Jack Pruniski, Attorney at Law, North Little Rock, Arkansas

Respondent No. 2 was represented by Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 is represented by Mr. Terry Pence, and did not appear at this hearing.

**STATEMENT OF THE CASE**

On July 18, 2007, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was held in this matter on April 18, 2007, and a Prehearing Order was filed on April 20, 2007. Subject to modifications

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made at the full hearing, the Prehearing Order was introduced into the record as “Commission Exhibit 2,” without objection. Subsequent to the full hearing conducted on July 18, 2007, the following were included as exhibits: Reply to Claimant’s Brief in Response to GRIA’s Brief regarding Exhibits 1(q),(h); Claimant’s Sur-Reply to GRIA’s Brief in Response to Exhibit and Brief filed by Claimant and Introduced Into Evidence; and Reply to GRIA’s Response to Claimant’s Exhibit 1(h).

At the full hearing, the parties agreed to the following stipulations:

- 1) On January 5, 2004, Zurich American Insurance Company was the workers’ compensation carrier for Git Rid of It of Arkansas.
- 2) On January 5, 2004, Johnathan Hughes died as a result of an airplane crash.
- 3) Zurich American Insurance Company has controverted this claim in its entirety.
- 4) All issues not outlined herein are reserved, including but not limited to the Statute of Limitations defense.
- 5) Carla Dixson was not an employee of Git Rid of It of Arkansas.
- 6) The order marked as Claimant’s Exhibit 1, item P, was subsequently overturned by the Arkansas Supreme Court.

As agreed to by the parties, the sole issue to be presented for determination at the full hearing was whether Johnathan Hughes, Jr., was an employee or independent contractor for Git Rid of It of Arkansas on January 5, 2004.

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At the full hearing, claimant contended that there are no benefits or wage loss that is being requested by the Johnathan Hughes' estate. Claimant contends that Mr. Hughes was never an employee of Git Rid of It of Arkansas.

Respondent No. 1, Git Rid of It of Arkansas, contended at the full hearing that the decedent, Johnathan Hughes, was an employee of Git Rid of It of Arkansas at the time of the compensable January 5, 2004, accident leading to his death. Respondent No. 1 contends the beneficiaries of the decedent are entitled to an award of appropriate benefits from Zurich American Insurance Company.

Respondent No. 2, Zurich American Insurance Company, contended at the full hearing that the decedent, Johnathan M. Hughes, Jr., was not an employee of Git Rid of It of Arkansas on the date of the incident of his death. Respondent No. 2 contends that they are not liable for any benefits; but in the alternative, if it is determined that the decedent was an employee of Git Rid of It of Arkansas on the date of the incident in question of his death, that the Statute of Limitations has expired and the claim is barred.

Respondent No. 3, Death & Permanent Disability Trust Fund, have elected to defer to the outcome of litigation.

**DISCUSSION**

**A. HISTORY**

The facts in this case are tragic. Respondent No. 1, Git Rid of It of Arkansas, operate a residential, commercial, and industrial trash hauling business that services approximately a hundred mile radius from the El Dorado, Arkansas, area. (T. p. 104, lines 6-8). In 2003, Git Rid of It of Arkansas was in the process of changing out their garbage trucks. The testimony at the July 18, 2007, hearing indicated that Git Rid of It of Arkansas elected to purchase their new garbage trucks from auctions in the State of New York. The testimony in the record indicates that Git Rid of It of Arkansas reached agreements with various entities and individuals to transport the newly purchased garbage trucks in New York back to El Dorado, Arkansas. The evidence shows that at times Git Rid of It of Arkansas would transport an existing truck in their El Dorado fleet to New York and come back with a newly purchased auctioned vehicle from the State of New York.

Sometime in June of 2003, the deceased, Johnathan Hughes, began transporting garbage trucks from New York to El Dorado and El Dorado to New York. The evidence shows that at times Mr. Hughes would also transport S10 pickup trucks and possibly a few other minor transportation tasks between June of 2003 and his death in January 2004. The exact nature and relationship between Johnathan Hughes, Jr., the

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deceased, and Git Rid of It of Arkansas is at issue, and will be discussed at great lengths in the adjudication section herein. There would also be times that Mr. Hughes would make a one-way trip either to or from the State of New York, and on those trips Mr. Hughes would be flown on the non-transporting leg of his endeavor. On January 6 of 2004, Mr. Hughes was scheduled to take a commercial airline flight from Memphis, Tennessee, to the State of New York and pick up a newly purchased garbage truck by Git Rid of It of Arkansas and drive it back to El Dorado, Arkansas. The day before Mr. Hughes' scheduled flight out of Memphis, Tennessee, the owner of Git Rid of It of Arkansas, Mr. Glenn Thweatt, attempted to fly Mr. Hughes in his personal aircraft from El Dorado, Arkansas, to Memphis, Tennessee. Since Mr. Hughes was scheduled to have an early flight on January 6, 2004, it was decided that Mr. Thweatt would fly Mr. Hughes to Memphis the night before so that he could spend the night and get up early the next morning and catch his flight. The record indicates that Mr. Thweatt's personal aircraft had mechanical problems of some sort that caused Mr. Thweatt to attempt an emergency landing while en route to Memphis, Tennessee. The emergency landing was unsuccessful, and resulted in the crash of the aircraft causing Mr. Hughes' death. Mr. Thweatt survived the crash with injuries. The sole issue now before the Commission is whether Mr. Hughes was an employee of Git Rid of It of Arkansas at the time of his death on January 5, 2004.

**B. Adjudication**

When determining whether Mr. Hughes was an employee or independent contractor of Git Rid of It of Arkansas on January 5, 2004, several factors must be addressed. As set forth in Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), the following factors are relevant to be considered when making such a determination:

- 1) the extent and control, by the agreement, the master may exercise over the details of the work;
- 2) whether or not the one employed is engaged in a distinct occupation, or business;
- 3) 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;
- 4) the skill required in the particular occupation;
- 5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- 6) the length of time for which the person is employed;
- 7) the method of payment, whether by time, or by the job;
- 8) whether or not the work is part of the regular business of the employer;
- 9) whether or not the parties believe they are creating the relation of master and servant, and whether the principal is or is not, in

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business.

The Commission in Callahan v. Riddell Flying Service, Inc., Full Commission Opinion filed March 12, 2004 (Claim No. E702846), the Commission stated “these are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to various factors must be determined by the Commission.” However, the Arkansas Supreme Court has stated that the “right of control” is the principle factor in determining whether the relationship is one of agency or independent contractor.

Even though all factors outlined in the Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), case may not be relevant in this case, since the Supreme Court has found “right of control” to be a principle factor, it must be analyzed. When reviewing the evidence contained in the record pertaining to the limited factor of control, it is a close call as to whether the claimant was an employee or independent contractor. Obviously when analyzing the tasks undertaken by Mr. Hughes in transporting these garbage trucks, the route in which he took and his ability to deviate is relevant when determining control. The deceased’s father, Johnny M. Hughes, Sr., was deposed and in his deposition stated that his son took different routes back from New York at different times. In that regard, Mr. Hughes, Sr., testified as

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follows:

Q. Do you know anything about the route that your son took when he was driving trucks?

A. I sure do. He and I sat down with a map and marked out two different routes. He didn't go by them all the way. He took my granddaughter on one trip. He took my grandson one trip with him – I mean, his wife one trip. He also took my grandson one trip and he called me and asked me said, "Which way would be better if we just wanted to see the countryside?"

Q. So you think he took different routes at different times?

A. I know he did.

(C. Ex. 2, Depo., p. 9, lines 15-25).

It must be noted that Johnny Hughes, Sr.'s deposition was a partial deposition due to a court reporter transcribing malfunction. However, it must also be noted that Mr. Hughes, Sr. was present at the full hearing of July 18, 2007, throughout the proceedings and was available to be called as a witness should cross-examination have been requested with regard to his deposition testimony. It must be noted all parties had the partial deposition well prior to the full hearing. Mr. Hughes, Sr. testified that his son would take various routes to see different parts of the countryside and nothing

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in the testimony contained in the record indicates that Mr. Hughes, Jr. was not allowed to deviate routes at his own desire. Mr. Yancy Leach was the safety and personnel director of Git Rid of It of Arkansas from May of 2003 until May of 2004. Mr. Leach testified under oath at the full hearing as follows with regard to Johnathan Hughes, Jr.'s travel habits:

A So it was . . . He didn't have a set time schedule. He took his own pace.

Q Would he make those decisions as opposed to somebody here in Arkansas with Git Rid of It making them for him?

A Yes.

Q All right. That would include the route, whether he stopped, whether he got a hotel room, whether he continued to drive or things of that nature?

A Yes.

(T. p. 78, lines 1-11).

With regard to the decedent's ability to pick and choose his routes and stops in his journeys to and from El Dorado and New York, the controller for Git Rid of It of Arkansas, Mr. Scott Hafer, testified under oath at the full hearing as follows:

Q. Right. My question was you didn't tell him you take this road,

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you take that road, you stop at this motel, you stop at this hotel,  
you stop at this gas station?

A. You don't know if the truck is going to break down or not. You don't know if he's going to make it that far during the course of the day.

Q. Y'all have asked this twenty times and you've answered it. If the Judge will let me, did you or did you not tell . . .

A. No, no. No.

(T. p. 164, lines 2-12).

Mr. Yancy Leach also testified that Johnathan Hughes, Jr., was not the type of worker that would come in at seven o'clock in the morning and work an eight hour day, six days a week, and Mr. Leach testified that Mr. Hughes was treated differently than every other employee, as follows:

Q. Six days a week? All right, sir. Did you ever know of Johnathan Hughes coming in at 7:00 working eight hours a day six days a week and being treated like every other employee?

A. No, sir.

Q. Would I be correct in saying, Mr. Leach, that Johnathan Hughes was treated differently than every other employee?

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A. Yes, sir.

(T. p. 82, lines 3-11).

Even Scott Hafer, the controller/CPA for Git Rid of It of Arkansas, who I found to be a less than credible witness for reasons I will set forth herein, admitted that Mr. Hughes Jr. had the ability to deviate his routes. (C. Ex. 1, Sec. D, p. 26, line 5).

On the other hand there are facts contained in the record that show that Git Rid of It of Arkansas had some control over the deceased's transportation duties. For example, Git Rid of It of Arkansas supplied the deceased with a cell phone, the trucks to drive and insurance on the vehicles. However, one must look at the "by the agreement" part of factor number one set forth in Aloha Pools & Spas, Inc. v. Wausau. The evidence shows the parties i.e. Johnathan Hughes, Jr., and Git Rid of It of Arkansas had no clear agreement over the details of his work. Luckily, control is not the only factor to be addressed in determining whether Mr. Hughes Jr. was an employee or independent contractor. Another factor to consider is whether or not the work that Mr. Hughes, Jr., was conducting was part of the regular business of Git Rid of It of Arkansas. Clearly, the evidence shows that Git Rid of It of Arkansas was not in the regular business of transporting trucks from New York to El Dorado. The evidence shows that Git Rid of It of Arkansas is in the garbage/waste disposal

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business within a hundred mile radius of El Dorado, Arkansas. Mr. Thweatt testified that 2003 happened to be the time that Git Rid of It of Arkansas was changing out their fleet of garbage trucks. When specifically asked about transporting trucks from New York to Arkansas in the years 2005 and 2006, Mr. Thweatt testified that there was a dramatic difference:

THE COURT: All right. Between . . . well, let's just say in 2005 and 2006, were you transporting as many trucks from New York to Arkansas as you were . . .

A. No, not at all.

THE COURT: What was different about your business in the last quarter of 2003?

A. We completely switched over to a different type of truck. We had the type of truck that had the arm that used to reach out there, grab the can and one man would stay in the truck and never got out of the truck. We had a bunch of those types of trucks, and they didn't work. They cost too much money to run, so we had to sell off that whole fleet of trucks, and we had to buy a complete, another fleet of trucks.

(T. p. 195, lines 8-22).

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Mr. Thweatt testified that the duties of Mr. Johnathan Hughes, Jr., was a temporary situation:

THE COURT: . . . a temporary situation?

- A. It was temporary and then, of course, Mr. Hughes wanted a full time job, you know, with a route, with a set amount of days, five days a week. He wanted a job like that after that and, of course, we were working towards . . . And that's why we were training him on different trucks so that he would . . . Whatever was available at that time, just a route that he would be offered.

(T. p. 196, lines 3-11).

Factor number nine recited herein from the Aloha Pools case recognizes that the intent of the parties is somewhat determinative of whether the employee-employer relationship exists. The evidence is clear that Mr. Johnny Hughes, Jr., did not believe that he was an employee of Git Rid of It of Arkansas. The record is clear that when Mr. Hughes sustained a personal injury while driving a truck back from New York in October of 2003, he never filed a claim with the Workers' Compensation Commission for workers' compensation benefits. The record is also clear that Mr. Hughes Jr. sustained injuries and medical bills as a result of this incident. It is clear that Mr. Hughes Jr. was driving a garbage truck for Git Rid of It of Arkansas back from New

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York in October of 2003, and was rear-ended due to no fault of his own by an 18-wheel truck. The record is also clear that Git Rid of It of Arkansas never filed a report of injury. The testimony from Mr. Thweatt and Hafer are dramatically different from the testimony of the deceased's widow and Mr. Charles Lytle with regard to the October 2003 incident. Mr. Lytle was the dispatcher for Git Rid of It of Arkansas from around March 1999 through June 15 of 2005. Mr. Lytle testified that after Mr. Johnathan Hughes Jr.'s accident of October 21, 2003, Mr. Johnathan Hughes Jr. contacted Git Rid of It of Arkansas and discussed the injuries with Mr. Lytle and others in the office. Mr. Lytle testified that he was aware of Mr. Hughes' shoulder injury but that no workers' compensation claim was filed. (C. Ex. 1, Sec. B). Even the owner of the company, Mr. Thweatt, admitted that he knew of Mr. Hughes being injured in October of 2003 while coming back from New York in a Git Rid of It of Arkansas truck and that no report of injury was filed. Mr. Thweatt gave conflicting testimony regarding his recollection of that event but ultimately testified as follows:

Q. Did you know that he had been injured once before in an accident while doing the business of your company?

A. Yes.

Q. Do you have any explanation of why he did not get workers' comp insurance?

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A. He tried to leave the company out of the situation, the accident.

Q. Did you know about the accident?

A. Yes.

(T. p. 15, lines 7-16).

Later Mr. Thweatt testified that he did not know of any injuries which contradicted his testimony and gives further credibility to that of Shari Hughes and Charles Lytle. The evidence shows that when Mr. Hughes Jr. did go to the emergency room after the October 2003 wreck, he identified himself as being self-employed on the medical records.

The evidence shows that Mr. Hughes was pursuing other endeavors at the time of his death. Contained in Claimant's Exhibit 1, Section A, is an affidavit from the claimant's widow wherein she states that during the time period that the deceased transported trucks for Git Rid of It of Arkansas he also worked as a handyman and had a business on the side known as Water Baby. Contained at Claimant's Exhibit 1, Section I, is a advertisement for Water Baby stating that Mr. Johnny Hughes was attempting to start a commercial power washing type business.

Factor number seven outlined in Aloha Pools & Spas v. Wausau talks about the method of payment. The method of payment issue was in great controversy at the full hearing of July 18, 2007. Mr. Scott Hafer, the controller/CPA, tried desperately to

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convince all parties that the deceased, Mr. Johnny Hughes, Jr., was paid by the hour for his duties. Mr. Hafer was not a convincing witness. First, Mr. Hafer testified under oath that the method in which Mr. Johnny Hughes, Jr., was paid did not violate the law:

Q. No, sir. I didn't ask you why. I'm asking you . . . You know this company violated the law every time you gave him a check, didn't it?

A. No.

(T. p. 139, lines 4-7).

However, within seconds of stating that he did not know that his company was breaking the laws, Mr. Hafer did a 180 degree turn in his testimony:

Q. Did you or did you not obey the law in this case?

A. Taxes should have been taken out, yes.

Q. So you did break the law then, sir. Right?

A. There was reasons for it, but, I guess, yes.

(T. p. 140, lines 3-7).

Mr. Hafer held himself out to this Commission to be a certified public accountant. (T. p. 136, lines 21-25). However, Mr. Hafer acknowledged that the method in which Git Rid of It of Arkansas paid Johnathan Hughes, Jr., was in

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violation of the law. The testimony and evidence is crystal clear that Mr. Johnathan Hughes, Jr., was paid differently than every other employee of Git Rid of It of Arkansas. Mr. Johnathan Hughes, Jr., was at times paid cash and was never paid out of the payroll account in which every other employee was paid. At no time did Git Rid of It of Arkansas ever withhold or match any Social Security, unemployment, Medicare, or other withholdings from Mr. Johnathan Hughes, Jr.'s wages. Further, Mr. Johnathan Hughes, Jr., was never given a 1099 form for any of his wages. Although payroll withholdings are not a factor outlined in the Aloha case, I do find it to be a conceivably relevant factor in this case. Once again, it goes towards the intent of the parties and my review of the evidence shows that Git Rid of It of Arkansas never wanted Mr. Johnathan Hughes, Jr., to be considered an employee and additionally never treated Johnathan Hughes, Jr., as an employee.

Although Mr. Hafer attempted to make an argument over and over that the claimant was paid by the hour even the CPA ultimately had to concede that Johnathan Hughes, Jr., was paid on a per job basis:

Q. But y'all averaged it out and agreed that it was five hundred dollars up and five hundred dollars back?

A. For simplicity sake down the road, he was issued five hundred dollars.

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(T. p. 158, lines 16-20).

The evidence shows that Mr. Johnathan Hughes, Jr., also was paid cash at times for his duties:

Q. You did pay him cash?

A. He did receive cash, yes. That is correct.

(T. p. 138, lines 8-9).

However the source of the cash also casts doubt in this examiner's mind as to whom Mr. Johnathan Hughes, Jr., was even performing services. Mr. Scott Hafer testified that if cash was received by Mr. Johnathan Hughes, Jr., it was from the New York operation and not the El Dorado Git Rid of It of Arkansas:

A. We did. If he received cash, it was from the New York operation, not here.

(T. p. 137, lines 23-24).

This testimony in evidence of a Git Rid of It of New York being a totally separate entity from Git Rid of It of Arkansas with payments being made from both places casts even more question on the employee-employer relationship. Respondents want to argue that Mr. Johnathan Hughes, Jr., was solely and exclusively an employee of Git Rid of It of Arkansas at the time of his death. However, by their own testimony, they admit that Git Rid of It of New York, a separate legal entity, was also paying Mr.

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Hughes cash for this transportation.

Git Rid of It of Arkansas attempts to make the very weak argument that Mr. Johnathan Hughes, Jr., was treated differently because they felt sorry for his financial situation. I do not find this argument to be convincing. Git Rid of It of Arkansas through their employees and officers testified that they paid and treated Mr. Hughes differently because: 1) Mr. Hughes requested to be paid up front and 2) Mr. Hughes' financial situation of living week to week demanded that he be paid up front and without any withholdings being made from his wages. I highly doubt that Git Rid of It of Arkansas asked their forty-plus other employees whether they too would like to be paid up front in cash and not have any withholdings withheld. It would seem logical that every employee in the State of Arkansas would like to be paid cash up front for jobs they have not yet completed but I highly doubt the other employees of Git Rid of It of Arkansas were given the option of being paid up front without any withholdings. It seems more logical that Git Rid of It of Arkansas did not withhold taxes from Mr. Johnathan Hughes, Jr.'s check because they wanted to save money, in violation of the law per Mr. Hafer. Mr. Hafer, a CPA, would have this Commission believe that the tax laws can be violated for mere convenience.

As stated, if one were considering the "control" factor alone this would be a close call; however, when considering all relevant factors, it is clear the employee-

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employer relationship did not exist.

In analyzing all the factors outlined in Aloha Pools v. Wausau and taking into consideration other conceivably relevant factors, I find that the deceased was not an employee of Git Rid of It of Arkansas on January 5, 2004.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction to determine whether the deceased was an employee or independent contractor on January 5, 2004.
- 2) The parties' stipulations are reasonable and hereby accepted as fact.
- 3) I find that the deceased, Mr. Johnathan Hughes, Jr., was not an employee of Git Rid of It of Arkansas on January 5, 2004.

**ORDER**

After careful consideration, and giving the appropriate weight to the various factors to be considered when determining employment status, I find that the deceased

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was not an employee of Git Rid of It of Arkansas on June 5, 2004; as such, this claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

SDD/pjb

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**S. DALE DOUTHIT**  
**Administrative Law Judge**