

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608597

DAVID MCINTYRE		CLAIMANT
SMITH CYCLE or BRENT SMITH dba SMITH CYCLE CENTER UNINSURED	NO. 1	RESPONDENT
TRAFFIC SAFETY COMPANY	NO. 2	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER	NO. 2	RESPONDENT

OPINION FILED DECEMBER 7, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

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

Respondents No. 1 represented by TIM PARKER, Attorney, Eureka Springs, Arkansas.

Respondents No. 2 represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 8, 2007, in Springdale, Arkansas. A pre-hearing order was entered in this case on March 13, 2007. There were no stipulations. The pre-hearing order set out the various issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, certain clerical errors were corrected in this pre-hearing order. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing. The deposition of Latisha Harp was taken on July 10, 2007, and has been admitted as Respondent No. 1 Exhibit No. 2.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the relationship of employee-employer existed between the claimant, Traffic Safety, Smith Cycle Center, and/or Brent Smith.
2. whether any employment relationship constitutes an employment covered by the Act.
3. whether the respondent Commerce and Industry Insurance Company provided workers' compensation coverage for Traffic Safety on August 15, 2004.
4. whether the respondent Commerce and Industry Insurance Company provided workers' compensation coverage for Smith Cycle and/or Brent Smith.
5. whether the claimant sustained compensable injuries to his ribs, right leg, knee, collarbone, and various contusions and abrasions on August 15, 2004.
6. The claimant's entitlement to medical services.
7. whether the claim is barred by the statute of limitations against any or all respondents.
8. whether the claim is barred by the provisions of Ark. Code Ann. §11-9-102(B)(iv).
9. whether the claimant was performing employment services at the time of the accident

In regard to these issues, the claimant contends:

"Claimant was injured on August 15, 2004. His leg, ribs, arm, collarbone, scapula, and lung were injured when he was on a motorcycle test ride with a customer and a deer came out of woods, causing an accident."

In regard to these issues, Brent Smith dba Smith Cycle Center (Respondent No. 1) contends:

“Claimant David McIntyre did not notify Respondent No. 1 that he was making a claim for workers’ compensation or claiming that his injury was work related until July 2006. He told Brent Smith in July 2006 that he was suing him but did not elaborate that it was in the form of a workers’ compensation related scenario. Claimant’s injuries did not arise out of and in the course of employment. In fact, the claimant was an independent contractor. The accident at issue occurred on a Sunday afternoon when claimant was joyriding with a friend. Claimant had just left a local bar where he had ordered and consumed alcoholic beverages.”

In regard to these issues, Traffic Safety Company and Commerce & Industry Insurance Company (Respondents’ No. 2) contend:

“Respondents maintain that claimant’s claim is barred by the statute of limitations. Claimant’s alleged date of injury was 8/15/04, but a Form C was not filed until 11/6/06. Alternatively, respondents assert that claimant was not an employee of Traffic Safety Co. at the time of his alleged accident. Additionally, claimant was not performing any work related duties at the time of his alleged accident. Respondents reserve the right to assert an intoxication defense pending review of the medical records associated with claimant’s hospital admission on 8/15/04.”

DISCUSSION

I. STATUTE OF LIMITATIONS

The first issue is whether this claim is barred by the expiration of the statute of limitations. The respondents have timely raised this defense. The present claim is an initial claim for benefits in a totally controverted case. Therefore, the applicable statute of limitations is found in Ark. Code Ann. §11-9-

702(a)(1). This subdivision provides that a claim is barred, unless it is filed with this Commission within two years from the date of the alleged compensable injury.

In the present claim, the alleged compensable injury occurred on August 15, 2004. Claimant's Exhibit No. 4 is a copy of a form AR-C, which is signed by the claimant and dated August 1, 2006. This claim form bears the date stamp of the Commission's Operation and Compliance Division and shows that it was received on August 4, 2006. This claim requested benefits for temporary total disability, permanent partial disability, and medical expenses.

Respondents' No. 2 Exhibit No. 2, is a copy of this same form with the addition of the name and address of the claimant's attorney, a stamped signature of the claimant's attorney, and additional check marks on the portion of the form identifying the particular benefits sought. This form requests temporary partial disability, permanent total disability benefits, attorney's fees, "other" benefits, additional temporary total disability benefits, additional temporary partial disability, additional permanent partial disability benefits, additional attorney's fees, and additional "other" benefits. This form bears the Commission's stamp indicating that it was received on November 6, 2006.

Obviously, the first claim made in this case was the initial claim for benefits filed by the claimant with this Commission on August 4, 2006. This claim would have been filed two years from the date of the claimant's alleged compensable injuries on August

15, 2004. Therefore, the current claim for benefits is not barred by the provisions of Ark. Code Ann. §11-9-702(a)(1).

The second claim form (Respondents' No. 2 Exhibit No. 2) appears to have been filed on the claimant's behalf of the claimant's attorney at a later date. However, the statute was already being tolled by the timely filing made by the claimant.

II. EMPLOYMENT RELATIONSHIP

The next issue is whether the claimant was an "employee" of Brent Smith dba Smith Cycle Center and/or Traffic Safety Company, Inc. Brent Smith dba Smith Cycle Center is purportedly uninsured for workers' compensation purposes. Traffic Safety Company, Inc. is insured for workers' compensation purposes by Commerce & Industry Insurance Company. There is no presumption of employment, and the burden rests upon the claimant to prove the existence of an employee-employer relationship.

As a preliminary matter, I find that the evidence establishes that Brent Smith dba Smith Cycle Center and Traffic Safety Company, Inc. are two separate and distinct entities. The evidence shows that Smith Cycle Center is a sole proprietorship that is owned entirely by Brent Smith. On the other hand, Traffic Safety Company is a licensed Arkansas corporation. Although Brent Smith is named as the president of the corporation, there is no indication that he is the sole owner or even majority stockholder or has exclusive control of this corporation. Therefore, there is no commonality ownership or control between these two businesses. The evidence presented further shows that these two entities are engaged in two

separate and distinct types of business, and each had its own separate and distinct business location. There is absolutely no evidence of commingling of funds or assets between these two businesses. Although the claimant testified that some of the employees of Smith Cycle were also employed by Traffic Safety Company, the evidence shows that these were separate and distinct employments, rather than joint or dual employments. There is no evidence that these employees were paid by one business for services performed for the other business, or that employees' time was intermingled between the two businesses.

Thus, the employees of one of these businesses cannot be considered as an employee of the other business. Nor can workers' compensation insurance on one business be extended, as a matter of law, to the other business.

There is no evidence, whatsoever, of the existence of an employee-employer relationship between the claimant and Traffic Safety Company, Inc. There is no evidence of the existence of any employment relationship between the claimant and Traffic Safety Company, Inc. There is no evidence that the claimant even performed any services for the benefit of Traffic Safety Company, Inc. Finally, there is no evidence that the claimant ever received any compensation from Traffic Safety Company, Inc.

Thus, Traffic Safety Company, Inc. and its workers' compensation carrier, Commerce & Industry Insurance Company, cannot be held liable under the Arkansas Workers' Compensation Act for any benefits payable to or on behalf of the claimant for any injuries

that he sustained on August 15, 2004. Any claims for benefits under the Act, herein made against Traffic Safety Company, Inc. and Commerce & Industry Insurance Company, must be denied and dismissed in their entirety.

_____The relationship between the claimant and Brent Smith dba Smith Cycle is a different matter. Both the claimant and Brent Smith testified that there was an oral agreement between the claimant and Brent Smith concerning services by the claimant for Smith Cycle. The claimant testified that he was hired by Brent Smith to be the "general manager" of Smith Cycle. Mr. Smith initially testified that the claimant was to be a "non compensated consultant". This particular description is clearly inaccurate, as the claimant was obviously "compensated" for his services. Mr. Smith subsequently conceded in his testimony that the claimant had the title of "general manager".

Concerning his compensation, the claimant testified that in exchange for his services, he was to receive the sum of \$500.00 per week. In his testimony, Mr. Smith never gave a specific amount that the claimant was to receive in exchange for his services to Smith's Cycle. He testified that the claimant was to be compensated, somehow, on the basis of the additional revenues or income that his services brought into Smith Cycle. However, he gives no indication of the method as to how the claimant's compensation was to be calculated upon this supposed increased income.

Any determination of the amount of the claimant's agreed upon compensation is complicated by the fact that both the claimant and

Mr. Smith had agreed that the claimant would be compensated in cash for his services. It was also mutually agreed that no federal or state taxes, FICA payments, or any other amounts would be withheld from the payments made to the claimant. It would also appear that by mutual agreement, no records were kept by either party, in regard to these payments. It was clearly the intent of both parties to evade their respective potential liability for these payments.

Even though it is difficult, if not impossible, to determine the exact amount of the claimant's compensation by Brent Smith dba Smith Cycle, it is clear that some amount of monetary compensation was to be provided the claimant by Brent Smith dba Smith Cycle Center for his services to this business. It is further apparent that this compensation was paid on a regular periodic basis for an indefinite period of time, rather than a set amount based on a particular job.

It appears that the services required of the claimant involved the overseeing and management of all of the other employees of Smith Cycle, the promotion and actual sale of the merchandise and services offered by Smith Cycle, and the completion of the necessary paperwork to affect these sales. However, it is clear that in the performance of these various activities, the claimant was under the direct supervision and control of Brent Smith and that all of the claimant's actions must be approved by Mr. Smith.

It is also apparent from the evidence presented that Mr. Smith retained the ultimate right of control, in that he had the

authority to terminate the claimant's employment, with or without cause, at any time, and without incurring any liability for his actions. It is further apparent that the claimant could also terminate this relationship, with or without cause, at any time, and without incurring any liability to Mr. Smith or Smith Cycle.

After consideration of all the evidence presented, it is my opinion that the greater weight of the evidence establishes that the relationship between the claimant and Brent Smith dba Smith Cycle Center, on or about August 15, 2004, was an employee-employer relationship, as those terms are defined by the Act.

It is my further opinion that this employment relationship also represented an employment covered by the Act. Both the claimant and Mr. Smith identified in their testimony, more than three regular employees of Brent Smith dba Smith Cycle Center, on or about August 15, 2004. These would include Mr. Smith, the claimant, a sales manager, a parts manager, and a service technician.

III. COMPENSABILITY

Clearly, the claimant was involved in a motorcycle accident at approximately 5:00 p.m. on Sunday, August 15, 2004. It is further clear that he sustained various physical injuries in this motorcycle accident to his right leg (tibia, fibula, and meniscus), his right shoulder (scapula and clavicle), and right chest (third, fourth, fifth, and sixth ribs and sternum). He also had numerous contusions and abrasions.

The existence of all of the foregoing injuries are clearly established by medical evidence and supported by “objective findings”. These injuries were also caused by a specific accident are identifiable in time and place of occurrence, caused external and internal harm to the claimant’s body, required medical services, and resulted in disability.

The real dispute arises over whether such injuries “arose out of and occurred in the course of the claimant’s employment” with Brent Smith dba Smith Cycle Center. This issue would also include the question of whether the claimant was “performing employment services” at the time of his accident.

However, the question of whether these injuries are specifically excluded from the category of “compensable injuries” by the provisions of Ark. Code Ann. §11-9-102(B)(iv) must first be addressed. The initial burden rests upon the respondents to prove the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician’s orders in the claimant’s system at the time of the accident giving rise to the alleged “compensable” injuries.

All of the evidence presented shows that the claimant had alcohol present in his system at the time of the motorcycle accident, on August 15, 2004.

Therefore, it is my opinion that the respondents have met their burden of establishing the presence of alcohol at the time of the claimant’s motorcycle accident and resulting injuries. The burden would then shift to the claimant to prove by a greater

weight of the credible evidence that his accident and injuries were not substantially occasioned by the "presence of alcohol".

There is a conflict in the amount of alcohol the claimant consumed shortly prior to his motorcycle accident. The claimant testified that he had drunk "a few sips" from a single beer. Tracy Bell, the claimant's witness, testified that the claimant had drunk one beer. Latisha Harp, the bartender who had served the claimant and a witness for the respondent, testified that she served the claimant one and maybe two beers, shortly prior to the accident. The ambulance records would indicate that the claimant had consumed sufficient alcohol, prior to his accident, that the presence of ethyl alcohol was noted on his breath, at the time he was evaluated by the ambulance personnel. Karen McCaffery, the claimant's girlfriend and roommate at that time, testified that she went to the scene of the accident and also smelled alcohol on the claimant. It cannot be ascertained from the medical evidence whether a blood alcohol test was performed upon the claimant at the time of his admission to the Northwest Medical Center. If such a testimony were, in fact performed, the results of the test have not been tendered into the record.

Latisha Harp testified that when the claimant left the Pied Piper restaurant and bar, he did not appear to be "intoxicated" or "impaired". She further testified that by this, she meant that the claimant did not exhibit slurring of speech, bloodshot eyes, abnormal manner of walking, or a different "attitude".

_____The claimant testified that he did not personally know how the accident occurred. It was his testimony that he only remembered cresting a hill. The next thing he knew, he was on the ground in severe pain. Curiously, the histories recorded by the ambulance personnel specifically note that the claimant experienced no loss of consciousness following the accident.

Tracy Bell testified that, at the time of the accident, he was following behind the claimant. He stated that he observed three deer run across the road in front of the claimant and that the claimant struck the third deer, lost control of his motorcycle, and wrecked.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his motorcycle accident and subsequent injuries were not substantially occasioned by the presence of alcohol in his system. There is an obvious distinction between being "intoxicated" or significantly "impaired" (as described by Ms. Harp) and the degree of impairment necessary to slow reflexes and response time and interfere with concentration. Assuming that the testimony of Mr. Bell is accurate, there is no satisfactory explanation for the claimant's failure to react to the deer and maintain control of his motorcycle. The claimant's testimony clearly does not rebut the presumption that his accident was caused by the presence of alcohol in his system, but in fact supports this presumption. From the claimant's testimony, it

appears that he was unaware that he struck a deer or why his motorcycle crashed.

The claimant's failure to adequately rebut the presumption that his accident and resulting injuries were substantially occasioned by the presence of alcohol in his system prevents a finding that the injuries sustained in this accident represent "compensable injuries", as that term is defined by the Act. Therefore, the claimant would not be entitled to any benefits for these injuries.

Even if the claimant had rebutted the foregoing presumption, he would still have the burden of proving that his accidental injuries arose out of and were in the course of his employment with the respondent, Brent Smith dba Smith Cycle Center, i.e. that these injuries occurred while he was performing employment services for this employer and were a natural and probable risk of performing such services.

The claimant's accident and injuries unquestionably occurred off the employer's premises and outside of the claimant's regular working hours. However, the claimant contends that, at the time of his accident and resulting injuries, he was engaged in the performance of his assigned employment duties to sell motorcycles belonging to Smith Cycle Center.

The claimant testified that he became aware that Tracy Bell, a friend or acquaintance of his, wanted a particular model of used Harley-Davidson motorcycle. He was also aware that Mr. Bell wanted to obtain this motorcycle by trading in a 1970 Chevrolet Chevelle,

which he valued at \$20,000.00. The claimant further testified that he had “checked around” and already had some buyers lined up for the car, who would pay more than the selling price for the used Harley-Davidson that was owned by Smith Cycle Center. The claimant was aware that the used Harley-Davidson that was owned by Smith Cycle Center was not the exact type and model that Mr. Bell wanted. He testified that in an attempt to convince Mr. Bell to purchase this different type of Harley-Davidson motorcycle, he borrowed the motorcycle from Smith Cycle Center and took it home. He indicated that that weekend he invited Mr. Bell over to his house to “test drive” this different model of Harley-Davidson motorcycle. While Mr. Bell was “test driving” this motorcycle, the claimant accompanied him on another motorcycle. The claimant testified that the motorcycle on which he was riding also belonged to Smith Cycle Center.

Tracy Bell testified that, in August of 2004, he was considering the purchase of a particular model of Harley-Davidson motorcycle. He acknowledged that he wanted to obtain this particular motorcycle by trading in a 1970 Chevrolet Chevelle, which he valued at \$20,000.00. He stated that on August 15, 2004, a Sunday, he went to the claimant’s house, where the claimant had a different model of Harley-Davidson motorcycle. He testified that he rode around on this motorcycle, accompanied by the claimant, for a substantial period of time that afternoon. However, he made no attempt to buy this motorcycle, because it was not the model that he wanted.

The testimony of the claimant and Mr. Bell reveal that they “rode around town” for awhile. They then went to Mr. Bell’s house “to look at a oriental rug”. While they were there, Mr. Bell’s wife gave the claimant “a big baggy of tea”. They then stopped by the Pied Piper restaurant and bar, where they had a hamburger and some beer. They then drove to a store and purchased some cigarettes for the bartender at the bar, Latisha Harp. Finally, they departed the bar and were proceeding back to the claimant’s house, when the accident occurred.

The claimant conceded, in his deposition, that this was the first time he had conducted a “test drive” from his house. He also conceded that at the time he participated in this “test drive” he did not have a valid Arkansas operator’s license.

Brent Smith testified that the claimant only asked to borrow the motorcycle so that he and a friend could go for a ride. He stated that the claimant did not advise him that this was a “test drive”. Mr. Smith further testified that Smith Cycle employee’s are not allowed to drink on the job, and that long distance “test drives” are not permitted.

Both Mr. Smith and Ms. McCaffery testified that the motorcycle on which the claimant was riding at the time of his accident belonged to Ms. McCaffery and not Smith Cycle. Ms. McCaffery further testified that the claimant never told her that he and Mr. Bell were going on a “test drive”.

The only evidence presented to prove that the claimant’s accident and injuries “arose out of and occurred in the course of

his employment” or occurred while he was “performing employment services”, is the claimant’s testimony and to some extent the testimony of Mr. Bell. However, I do not find this testimony to be credible. It is my opinion that the greater weight of the credible evidence establishes that the claimant simply borrowed a motorcycle from Smith Cycle Center merely in order for he and a friend to ride around on a summer Sunday afternoon.

This conclusion is supported by the fact that neither Mr. Smith nor any one else, other than the claimant and possibly Mr. Bell, were made aware that this excursion by the claimant and Mr. Bell was a “test drive”. The evidence shows that no similar test drives had been conducted prior to this time and apparently there were no similar test drives thereafter. It is also difficult to believe that the claimant was attempting to sell a motorcycle on behalf of Smith Cycle Center by trading it for a 1970 model car, without clearing this trade with the owner, Mr. Smith. It is also difficult to conceive that the claimant would wait almost two years to seek workers’ compensation benefits, if he believed that he was engaged in employment activities, at the time of his accident and injuries. Even more importantly, the conduct and activities described by Mr. Bell and the claimant are not those that would be reasonably associated with a business related “test drive”. Rather, their conduct and activities would be more logically associated with a mere recreational outing.

Therefore, even had the claimant rebutted the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv), the claimant would still have

failed to prove that his injuries, on August 15, 2004, would represent “compensable injuries”, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). The claimant’s failure to prove these facts would also bar him from receiving any benefits provided by the Act and would require a dismissal of his claim.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On August 15, 2004, the relationship of employee-employer existed between the claimant and Brent Smith dba Smith Cycle Center, an uninsured employer.

3. The evidence presented fails to prove the existence of an employment relationship between the claimant and Traffic Safety Company.

4. The evidence presented establishes that Commerce & Industry Insurance Company provided workers' compensation coverage to Traffic Safety Company on August 15, 2004. However, the evidence presented fails to establish that such coverage would extend to Brent Smith dba Smith Cycle Center.

5. The present initial claim for benefits was filed with this Commission within two years from the date of the alleged compensable injury. Therefore, this claim is not barred by the expiration of the statute of limitations that is contained in Ark. Code Ann. §11-9-702(a).

6. The claimant has failed to prove by the greater weight of the credible evidence that he sustained “compensable injuries” to

his ribs, right leg, knee, collarbone, and various other part of his body, on August 15, 2004. Specifically, these injuries are expressly excluded from the definition of "compensable injuries" by Ark. Code Ann. §11-9-102(4)(B)(iv). In that, the respondents have proven the presence of alcohol in the claimant's system at the time of the accident giving rise to these injuries, which raises the rebuttable presumption that the injuries were substantially occasioned by the presence of alcohol in the claimant's system, and the claimant has failed to present sufficient evidence to rebut this presumption. Further, the claimant has failed to prove by the greater weight of the credible evidence presented that these injuries arose out of and occurred in the course of his employment with Brent Smith dba Smith Cycle Center or that these injuries occurred while he was performing employment services for this respondent.

7. All respondents have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE