

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

IN THE MATTER OF

FILE NO. UE - 2007-11-06

**KAEDON STEINERT, D/B/A
HURRICANE EXPRESS, INC.,
HURRICANE EXPRESS LOGISTICS, INC.
HURRICANE EXPRESS LEASING, INC.
JONATHAN, LTD., NAEDOK, LLC,
PERFORMANCE WATERCRAFT & CYCLE, LTD.
SHANNON HOMES, LTD., A LIMITED LIABILITY CO.,
AND KAEDON STEINERT, INC.**

AMENDED
OPINION AND ORDER FILED AUGUST 25, 2008

Hearing before Administrative Law Judge Barbara W. Webb in Little Rock, Pulaski County, Arkansas.

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

Employer appeared by and through its attorney, Mr. Kenneth Hixson, Attorney at Law, Fayetteville, Arkansas. Also appearing was Mr. Kaedon Steinert.

STATEMENT OF THE CASE

Following an investigation by the Compliance Division of the Arkansas Workers' Compensation Commission, the employer was charged with violations of the Arkansas Workers' Compensation Law; specifically, failing and/or refusing to secure workers' compensation coverage for its employees. Following unsuccessful efforts by the Compliance Division to insure coverage for the employer's employees, and after communication advising the employer that it was in violation of the law, the

Hurricane Express, Inc, et.al.- UE-2007-11-06

matter was ultimately referred to this Administrative Law Judge for a review and determination concerning what action, if any, should be taken.

On November 21, 2007, the initial Order and Notice of Hearing was filed, charging Hurricane Express, Inc. with non-compliance of the law and assessing the maximum statutory penalty of Ten Thousand Dollars (\$10,000.00) pursuant to Ark. Code Ann. §11-9-406. (Commission Exhibit 1). The Order provided that it would become final twenty (20) days after the employer's receipt, unless a written request for a hearing was filed with the Commission. In addition, the employer was directed and ordered to obtain and show proof of workers' compensation insurance within the same twenty (20) days, unless a written request for a hearing was filed with the Commission. A copy of the November 21, 2007 Order and Notice of Hearing was sent both certified mail and first-class mail to Mr. Edward J. Steinert, Agent for Hurricane Express, Inc. and Mr. Kaedon Steinert, President, Hurricane Express, Inc. On November 28, 2007, Hurricane Express, Inc., by and through its attorney, Kenneth S. Hixson, submitted a written request for hearing. A Pre-hearing conference was held in the case on January 8, 2008. Pursuant to the Pre-hearing Order filed January 15, 2007, the additional companies in which Steinert holds an interest were joined as additional respondents. The case was scheduled for hearing on February 28, 2008, in Little Rock, Arkansas.

A hearing was conducted on February 28, 2008. Testimony was offered on behalf of the Compliance Division by Frankie Brand. Kaedon Steinert, Duane Meadows, William Smedley, and Glen R. Honeycutt testified on behalf of the Respondents. The record consists of the transcript of the February 28, 2008 hearing consisting of the testimony of the witnesses and Commission Exhibit No. 1 (Evidentiary Packet consisting of Commission Exhibit 1-6); Respondents Exhibit No. 1 (Evidentiary Packet), and Respondents Exhibit No. 2 (Company chart and company listing). In addition, I have blue-backed the following exhibits which will be included in the record:

- 1) Commission Exhibit No. 7: (November 21, 2007 Order and Notice of Hearing)
- 2) Commission Exhibit No. 8 (November 28, 2007 Request for Hearing)
- 3) Commission Exhibit No. 9 (January 15, 2008 Pre-hearing Order)
- 4) Respondents Exhibit No. 3: March 13, 2008 Letter and Packet of Lease Operator forms (46 pages)
- 5) April 25, 2008 Letter and Revised Commission Exhibit No. 5
- 6) May 7, 2008 Respondent's Post-hearing Brief

DISCUSSION

The Commission contends that Hurricane Express, Inc. (Hurricane Express) employs over-the-road truck drivers which should be covered by workers' compensation insurance. Respondent, Hurricane Express, contends that the over-

Hurricane Express, Inc, et.al.- UE-2007-11-06

the-road truck drivers are independent contractors -- not employees – and that each driver obtained a Certificate of Non-Coverage issued by the Arkansas Workers' Compensation Commission and therefore Hurricane is not required to obtain workers' compensation insurance for the drivers.

The Commission generally contends that the remaining Respondents (hereinafter referred to as "Steinert respondents") are separate corporations or entities owned by Kaedon Steinert which have employees and are required to maintain workers' compensation insurance policies. Steinert respondents contend that these employees are personally employed by Kaedon Steinert and are covered by a workers' compensation policy issued through Liberty Mutual Insurance Company even though the employees may perform work for the Steinert respondents.

The Parties

Kaedon Steinert ("Steinert") is an individual who employs eight to ten persons consisting of office workers and mechanics who work for Steinert and his related companies. Steinert owns the stock in the companies named herein and has other business interests including real estate and truck servicing. Steinert's office staff and mechanics are covered by a Liberty Mutual workers' compensation insurance policy.

Hurricane Express, Inc, et.al.- UE-2007-11-06

Hurricane Express, Inc. ("Hurricane Express") is a motor carrier duly authorized and licensed by the United States Department of Transportation ("DOT") and the Federal Motor Carrier Safety Administration ("FMCSA"). Hurricane Express is an Arkansas corporation and has been doing business in Arkansas since 1992. Steinert is the owner of 100% of the stock of Hurricane Express and serves as President of the corporation. The record reflects that approximately 35-40 trucks are operated for Hurricane Express.

Naedok, LLC ("Naedok") is a motor carrier duly authorized and licensed by the DOT and FMCSA. Naedok is an Arkansas limited liability corporation and has been authorized to do business in Arkansas since 1996. Steinert is the owner of 100% of the shares of Naedok and serves as President of the limited liability corporation. The record reflects that approximately 6-10 trucks are operated for Naedok.

Kaedon Steinert, Inc. ("KSI") is an equipment leasing company. KSI is an Arkansas corporation and has been authorized to do business in Arkansas since 1995. Steinert owns 100% of the stock of KSI. KSI purchases tractors and trailers. The trucks are leased to truck drivers on a Lease/Purchase Agreement. The trailers are leased to Hurricane Express.

Hurricane Express Logistics, Inc. ("Hurricane Logistics") is a brokerage corporation licensed by the DOT. Hurricane Logistics is an Arkansas corporation

Hurricane Express, Inc, et.al.- UE-2007-11-06

and has been authorized to do business in Arkansas since 2000. Steinert owns 100% of the stock of Hurricane Logistics.

Jonathan, Ltd. ("Jonathan") was a dormant leasing company but has obtained its DOT certification and authority to transport diesel fuel. Steinert owns 100% of the shares of Jonathan. Jonathan does not currently have employees or do business; however, Jonathan plans to transport fuel in the future.

Hurricane Express Leasing, Inc. is a corporation authorized to do business in Arkansas but has been dormant for approximately five years. Performance Watercraft and Cycle, Ltd. was a repair shop that has not been active for four or five years. Shannon Homes, Ltd, is a property holding company owned by Steinert's wife that owns rental houses and other property and does not have any employees.

Summary of Evidence

Kaedon Steinert ("Steinert") testified that he graduated Subiaco High School and attended Hendrix College for four years until 1991. He is the president and owns 100% of the stock of Hurricane Express.

He testified that Kaedon Steinert, Inc. ("KSI") is a leasing company. He explained that KSI purchases tractors and refrigerated semi-trailers and leases them to individual owner/operators. He estimated that KSI currently owns approximately 45 tractors. KSI uses a standard 60 month lease agreement with an option to purchase at the end of the lease agreement. The rental payment is shown

Hurricane Express, Inc, et.al.- UE-2007-11-06

as a daily rate which varies by agreement. KSI makes payments on the leased trucks through a financing company. KSI obtains the payments from the owner/operators through Hurricane Express Logistics. KSI is not a motor carrier.

Steinert explained that both Hurricane Express and Naedok are authorized motor carriers licensed by the DOT. He testified that the motor carriers do not own any trucks and do not have any truck-driving employees. He explained that the motor carriers operate via independent contractor agreements and leases with owner-operators. He testified that the motor carriers issue 1099's to the independent contractors at the end of the year and do not deduct payroll taxes.

Steinert testified that the DOT requires motor carriers to maintain a maintenance file on tractors operated by owner/operators. The motor carriers maintain maintenance logs on each of the tractors leased out to owner/operators. The owner/operators are also required to maintain daily logs which are sent to the motor carriers as required by the DOT. The DOT also requires the motor carriers to keep records concerning the controlled substance and alcohol testing of all drivers, including independent contractors. The motor carriers are also required to maintain an accident register involving any accidents involving independent contractors.

Steinert testified that the motor carriers do not tell the independent contractors where to purchase fuel or exercise any control over fuel purchases. The

Hurricane Express, Inc, et.al.- UE-2007-11-06

motor carriers do not tell independent contractors where or how to repair their trucks, but require a maintenance record. The motor carriers do not have mechanics on staff.

Steinert testified that he usually has two mechanics on his personal staff which are located at the Hurricane Express facility in Springdale. He explained that the mechanics are hired for the purpose of maintaining Steinert's trailers and not those of the independent contractors.

He testified that Logistics put shippers together with truckers. For example, the truck driver calls Logistics to obtain a new load. Logistics would contact the end customer to find an available load. The truck driver has the right to refuse the load. If the truck driver accepts the load, Logistics provides them with the load number and name and telephone number of the customer contact to obtain all of the load information. The customer tells the truck driver where to pick up the load and the destination for the load. There is routine contact between the shipper and the truck driver. When the truck driver unloads, he contacts Logistics for a new load. Hurricane Express and Naedok require the truck drivers to check in with their hours available on their seventy hour rule. Steinert testified that the motor carriers do not tell the truck driver the route to take or which fuel stop to make. The truck driver can call in and receive an advance for fuel costs. He testified that the motor carriers are required by the DOT to provide liability insurance for the independent

Hurricane Express, Inc, et.al.- UE-2007-11-06

contractors. He testified that the truck drivers receive a certificate of non-coverage from the Arkansas Workers' Compensation Commission. If a truck is abandoned, the motor carriers pass on any expenses, penalties, and lost revenues, to the truck driver.

Steinert testified that he individually employs ten employees, including office workers and mechanics. Steinert purchases workers' compensation for those employees through Liberty Mutual. The employees sometimes perform services for the other companies owned by Steinert, but are covered only by the policy purchased by Steinert individually.

The agreement between Hurricane Express and the various truck drivers states that the driver is considered an independent contractor and not an employee. Steinert testified that independent contractors are a distinct occupation and that insurance policies, such as a bobtail policy and occupational accident policies are designed for independent contractors.

Duane Meadows testified that he signed a lease-purchase agreement with KSI. He explained that the original term was four years which he completed. Meadows explained that he has not purchased the truck and is still making payments since he borrowed money from Steinert to make significant repairs to the truck. Meadows also signed a hauling agreement with Hurricane. Meadows testified that he was a sole proprietor. He explained that he was responsible for the

Hurricane Express, Inc, et.al.- UE-2007-11-06

maintenance of the truck and paid for all the fuel, oil and tires needed. He explained that he had refused to accept certain loads. He contacts the shipper for delivery instruction. He testified that Hurricane Express does not have any control over where he goes. He reports daily to the shipper and Hurricane. He provides Hurricane Express the number of hours operated, the number of hours available, their trailer number and his location. He has taken extended time off in the past year due to personal reasons and was not paid. He testified that Hurricane Express does not have the right to control where he goes between Point A and Point B of his route. He is paid by the mile. He considers his distinct occupation to be a professional truck driver. He receives a 1099 from Hurricane Express and Hurricane Express does not withhold taxes. He deducts expenses for fuel, oil, and maintenance to the truck on his tax return. He applied and received a certificate of non-coverage from the Arkansas Workers' Compensation Commission. He does not have any employees.

Meadows testified that he had previously been an employee-truck driver for Transtar, Inc. He explained that Transtar controlled his route, had designated fuel stops, and did not allow a driver to refuse a load. In contrast, he currently is able to work when he wants. He is not guaranteed a certain number of loads from Hurricane Express. He is required to turn in logs, maintenance records, and fuel receipts to Hurricane Express. Hurricane Express pays the tax due under the

Hurricane Express, Inc, et.al.- UE-2007-11-06

International Fuel Tax Agreement. His agreement with Hurricane Express provides that he is an independent contractor and not an employee. He explained that he did not want to be an employee because he could do what he wanted to within reason.

Meadows testified that he parked the truck and trailer at his house when he was off work for his extended leave. He did not take loads from other brokers or carriers other than Hurricane Logistics and Hurricane Express. He could not haul for others since he does not have his own operating authority or insurance. Hurricane Express provides insurance for the truck and cargo. Steinert provides him the trailer and insurance at no cost. The truck has "Hurricane Express" on the side of the truck. He does not wear an uniform.

William Smedley testified that he signed a lease-purchase agreement with Kaedon Steinert for a tractor. The agreement is for four years with an option to purchase for \$575.00. The truck is owned by KSI. He also signed a hauling agreement with Hurricane Express. His lease payments are deducted from his settlement and paid directly to KSI. He has had similar agreements with other lease companies. He pays for all expenses and repairs to the truck. He is a sole proprietor. He has a hauling agreement with Hurricane Express. He has worked previously as an employee/driver for another company. He left the previous employment because he wanted to work for himself. He is engaged in a distinct

Hurricane Express, Inc, et.al.- UE-2007-11-06

occupation and receives a 1099 from Hurricane Express. He has specialized job skills and has a CDL and drug certification. He does not have any employees. He has a certificate of non-coverage. His agreement with Hurricane Express reflects that he is not an employee nor is there a guarantee of the number of loads. He considers himself an owner/operator which is independent from Hurricane Express. He plans on purchasing the truck at the end of the lease. He has never gone to a different broker to haul a load. He does not want the headache of getting his own authority to operate. He does not want to be an employee. He explained that as an employee, he would be fired if he deviated from his route and wasted fuel. As an employee, he could be terminated for refusing a load and would have to dress as instructed. He testified that as an employee he would be paid forty-two cents per mile on the national average and as an owner/operator be paid thirty cents per mile.

Glen Honeycutt testified that he is founder and chairman of the board of Transafe, Inc. Transafe is a company that provides safety consulting to the trucking industry. He previously worked as a truck driver and has been in the trucking industry for over twenty-five years. He testified that he is familiar with the DOT and the Federal Motor Carrier Safety Regulations (FMCSR) promulgated by the DOT. He explained that the regulations are mandatory and a motor carrier cannot transfer compliance to an owner/operator. He has worked with over a thousand owner/operators and with lease equipment companies. He testified that the

transportation industry recognizes owner/operators as a distinct business. There are associations for owner/operators, a magazine, and special insurance policies. On cross-examination, Honeycutt testified that the DOT and regulations do not distinguish between employees and owner/operators, but rather treat them all as drivers or employees. He further agreed that the regulations provide that there must be a lease, but does not determine the nature of the relationship. He agreed that the leases used by Hurricane Express did not meet all the requirements of the regulation.

Frankie Brand, an investigator with the Compliance Division, testified on behalf of the Commission. She testified that Kaedon Steinert, individually, had current workers' compensation coverage from April of 2007 until April of 2008 covering office employees and mechanics. It does not cover truck drivers.

After receipt of an anonymous tip, she checked with NCCI, the National Council of Compensation Insurance, and learned that the database did not show coverage on Hurricane Express or Kaedon Steinert. She verified the corporate status with the Secretary of State's office. She sent a certified questionnaire to Hurricane Express on April 23, 2007. Kaedon Steinert contacted her by phone after receipt of the questionnaire. She did not get a written response but received an ACORD from Walker Brothers on April 4, 2007, which showed coverage had been bound for the office and mechanical employees. The policy of insurance was

Hurricane Express, Inc, et.al.- UE-2007-11-06

subsequently issued with the effective date of April 4, 2007. Her records show a break in coverage from June of 2006 until April of 2007. She agreed to supplement the record with any claims filed against any of the companies at issue. She explained that she performed a site visit on August 29, 2007, and spoke with Kaedon Steinert's brother. She was told that the drivers did not wear uniforms, that they act as broker, maintenance is paid by the owner/operator, they do not tell them where to buy gas or have the trucks repaired but do provide a list of service stations that provide gas the cheapest, that they do run under their DOT, they have a lease on all of the trucks, and they provide workers' compensation coverage for the people they pay taxes on.

DISCUSSION

Arkansas Code Ann. § 11-9-406(a) (Repl.2002) provides:

Any employer required to secure the payment of compensation under this chapter who fails to secure compensation shall be subject to a fine of up to Ten Thousand Dollar (\$10,000.00) as determined by the Workers' Compensation Commission, payable to the Death and Permanent Total disability Trust Fund, or be guilty of a Class D Felony. This sub-section shall not affect any other liability of the employer under this Act.

Arkansas Code Annotated § 11-9-102(11) (Repl. 2002) defines employment, in pertinent part, to include the following:

(1) Every employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business (with specified exceptions for employees employed to perform domestic service, maintenance, repair,

remodeling, or similar work in the private home or residence of the person employing the employee) A.C.A. § 11-9-102(11)(A).

An “employee” is defined, in pertinent part, as “any person, including a minor, whether lawfully employed or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied . . .”

Ark. Code Ann. § 11-9-102 (9)(A). The term “employee” also includes:

a sole proprietor, partner, or member who devotes full time to the proprietorship, partnership, or limited liability company. However, any sole proprietor, partner of a partnership, or member of a limited liability company who desires not to be included in the definition of “employee” may file for and receive a certification of non-coverage under this chapter from the commission.” Ark. Code Ann. § 11-9-102 (9)(B).

While any individual holding a current certification of non-coverage is conclusively presumed not to be an employee, the law is clear that no election by a sole proprietor, partnership, or limited liability company shall affect the rights or coverage of any employees of those sole proprietorships, partners, or members. Ark. Code Ann. § 11-9-102(9)(D) and (E). *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

Arkansas Code Annotated § 11-9-102(1) (Repl. 2002) defines the payment of compensation under this chapter. It states:

Every employer shall secure the payment of compensation under this chapter:

(1) By insuring and keeping insured the payment of the compensation with any carrier authorized to write Workers' Compensation Insurance;

(2) By furnishing satisfactory proof to the commission of his financial ability to pay compensation and receiving an authorization from the Commission to pay compensation directly.

Arkansas Code Annotated § 11-9-102(1) (Repl.2002) defines carrier as follows:

'Carrier' means any stock company, mutual company, or reciprocal or interinsurance exchange authorized to write or carry on the business of Workers' Compensation Insurance in this state; whether required by the context, the term 'carrier' shall deemed to include duly qualified self-insured or self-insured groups.

For all relevant time periods herein, Hurricane Express and the Steinert respondents did not maintain workers' compensation coverage for truck drivers under the belief that the drivers were not employees. Further, the workers' compensation insurance purchased by Kaedon Steinert, individually, covered only ten employees. Frankie Brand, an investigator with the Compliance Division, testified that she initially could not find record of any workers' compensation coverage for Hurricane Express or Kaedon Steinert, but later confirmed that Steinert had purchased coverage for his clerical workers and mechanics.

It has been previously held by this Commission that employers are subject to a One Thousand Dollar (\$1,000.00) a day penalty for failure to secure workers' compensation insurance. The Commission held that an employer can be subject to

Hurricane Express, Inc, et.al.- UE-2007-11-06

the maximum statutory penalty if it remains uninsured for more than ten (10) days. See, *In re Valu Line Company, Inc.*, 1995 AWCC 70, Full Workers' Compensation Commission Opinion filed March 16, 1995, (Employer #00089148).

In order to reach a determination of whether the Respondents were in compliance with the Arkansas Workers' Compensation Act, the threshold question of whether the truck drivers should be classified as employees or independent contractors must be addressed.

I. Employee v. Independent Contractor

The issue of whether one is an employee or independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, the Arkansas Supreme Court has held that the ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The following factors are to be considered in determining whether one is an employee or independent contractor: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employee 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)

Hurricane Express, Inc, et.al.- UE-2007-11-06

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 the 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 (10) whether the principal is or is not in business. *Aloha Pools and Spas, Inc. v. Employers Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000).

The factors pertaining to the nature of the worker's occupation and whether it is part of the regular business of the employer comprise the "relative nature of the work" test. *Arkansas Transit Homes, Inc. v. Aetna Life & Casualty*, 341 Ark. 317, 16 S.W.3d 545 (2000). In *Sandy v. Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976), the Arkansas Supreme Court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the employer. This test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. *Id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee.

In the instant case, Respondents contend that the truck-drivers are independent contractors with a separate lease agreement with KSI and that any

direction or control exercised by Hurricane Express is simply regulatory compliance with DOT regulations. Moreover, Respondents rely on the fact that all of the drivers are required to have a certificate of non-coverage from the Arkansas Workers' Compensation Commission.

In the present case, I find that the greater weight of the evidence establishes that the truck drivers are employees of Hurricane Express and Naedok, and not independent contractors. Notwithstanding the labels given by the parties, it is noteworthy that the actual conduct of the parties determines whether a party is an employee or independent contractor. The evidence revealed that Hurricane Express and Naedok are both long-haul motor carriers. The essence of their business is transporting refrigerated freight from one location to another for customers via trucks. The truck drivers all drive exclusively for Hurricane Express or Naedok. The trucks are owned by KSI and have the Hurricane Express logo on them. Paragraph 4 of the standard Rental Agreement between KSI and the truck driver provides, in pertinent part:

4. Renter shall operate the Truck under Owner's direction. Renter shall, at all times, operate the Truck under the operating authority of Hurricane Express, Inc. No person, other than Renter may use the truck without the express written consent of the Owner. Renter may not assign this Agreement or sublease the Truck.

The Rental Agreement further provides that the renter shall provide a person to drive the Truck ,” who must be approved by Owner before such person may operate

the Truck”. The renter has the duty to maintain the Truck and have it regularly serviced by a “qualified mechanic approved by Owner”. Any additions or repairs made to the Truck become the property of KSI and if the truck is damaged, the truck driver is still obligated to pay the rental amount. The Rental Agreement further provides that the truck driver does not have any property interest in the Truck, but has the option to purchase the truck for a set sum upon performance of all obligations under the Rental Agreement.

The truck drivers are paid based on a percentage of the haul based on dispatched mileage. The loads are dispatched by Hurricane Logistics. Although the testimony indicates that the drivers can choose their own routes and refuse loads at will, the reality is that the driver will choose the most direct route for economic reasons and must continue to haul for the motor carrier in order to pay for the truck.

The Steinert motor carriers further contend that the truck driver makes direct contact with the customer and reports their status to them. However, the record reflects that the truck drivers are required to report to the motor carrier and are required to abide by DOT limitations. Failure to follow the DOT regulations results in termination of their operating agreement with the motor carrier and the lease agreement with KSI. Respondents argue that upon termination, the lease operator would be owed the sums due for loads hauled prior to the termination as opposed to an employee where the parties could just “walk away”. Such argument ignores

Hurricane Express, Inc, et.al.- UE-2007-11-06

the requirement of the employer to pay the terminated employee for all time worked prior to termination under prevailing labor law.

A review of the credible evidence in this case supports the conclusion that Hurricane Express and Naedok exercise control over the truck driver's work and the job of driving a truck is an integral part of the motor carrier's business. Therefore, due to the lack of an "arms-length" relationship between Hurricane Express, KSI, and Hurricane Logistics, as well as the factors outlined above, I find that an employer/employee relationship exists between the truck drivers and Hurricane Express and Naedok and that the truck drivers should not be classified as independent contractors.

III. The Kaedon Steinert Policy

The Respondents contend that Kaedon Steinert purchased insurance from Travelers to cover his clerical workers and mechanics. Steinert testified that these employees performed work daily for some or all of the related entities and would be covered by the insurance regardless of the company that oversees the task being performed. The Commission contends that all of Steinert's companies must maintain coverage. The determination of whether the clerical workers and mechanics are also considered employees of Steinert's related companies must be decided on a fact by fact basis. As the Arkansas Supreme Court has noted, "if either the general employer or the special employer pays the employee and is not

Hurricane Express, Inc, et.al.- UE-2007-11-06

reimbursed – the fact of payment is strong evidence that the payor is the employer.”
Sharp County Sheriff's Office v. Ozark Acres Improvement Dist., 349 Ark. 20, 27,
75 S.W.3d 690 (2002) (citation and emphasis omitted). In *Cook v. Recovery Corp.*,
322 Ark. 707, 911 S.W.3d 581 (1955), the Arkansas Supreme Court summarized
the concept of joint employment as follows:

A definition of “joint employment” can be found in 1B Larson’s
Workmen’s Compensation Law, § 48. 41 at 8-553(1995):

Joint employment occurs when a single employee,
under contract with two employers, and under
simultaneous control of both, simultaneously performs
services for both employers, and when the service for
each employer is the same as, or closely related to, that
for the other.

If an employee is engaged in “joint employment,” meaning performing for and under
the control of two employers at the same time, the liability for workers’
compensation benefits is joint. *Dillaha Fruit Co. v. LaTourrette*, 262 Ark. 434, 557
S.W.2d 397 (1977). See also *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646
S.W.2d 711 (1983).

The dual employment doctrine was succinctly summarized in *Daniels v.*
Riley's Health & Fitness Ctrs., 310 Ark. 756, 840 S.W.2d 177 (1992), as follows:

When a general employer lends an employee to a special employer,
the special employer becomes liable for workmen’s compensation
only if

(a) The employee has made a contract for hire, express or
implied, with the special employer;

(b) The work being done is essentially that of the special employer; and

(c) The special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

Id. at 759 (citation and internal quotations omitted). *Accord Cash v. Carter*, 312 Ark. 41, 45-46, 847 S.W.2d 18 (1993) (quoting *Daniels*).

Where dual employment exists, the employee's exclusive remedy against either the general or special employer is a workers' compensation claim. See, e.g., *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 262, 914 S.W.2d 301 (1996) (receipt of workers' compensation benefits from a general employer was the exclusive remedy and barred a negligence action against the special employer); *Daniels*, 310 Ark. at 761 (where the court found dual employment, the only remedy available against either of the employers was workers' compensation.).

In *Cash v. Carter*, the Arkansas Supreme Court analyzed the issue of "loaned employee" under the dual employment doctrine. 312 Ark. 41, 45, 847 S.W.2d 18 (1993). When a separate identification can be made with respect to activities to be performed on behalf of each employer, the particular employer whose work was being done at the time of the injury will be held exclusively liable for workmen's compensation. *Daniels*, 840 S.W.2d at 178. See, *Hart's Exxon Service Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980); *Curtis v.*

Hurricane Express, Inc, et.al.- UE-2007-11-06

Ermert Funeral Home, 4 Ark. App. 274, 630 S.W.2d 57(1982). *But see, contra, Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985) (claimant's wages combined where employed under separate contract with same employer for two different jobs).

In *Dillaha Fruit Co. v. Latourrette*, 262 Ark. 434, 557 S.W.2d 397 (1977), the Arkansas Supreme Court affirmed the Commission's finding of joint liability against simultaneous employers of the same employee. The Court observed:

The relation of employer and employee may be simultaneously sustained between several employers and the same employee. Where this situation exists, the employers have, in several cases, been held jointly liable for compensation to an employee injured while on the property of, or doing work for, one of them, at least where there was a joint hiring or a joint employment, or where the employee was injured while performing a duty for the common benefit of all the employers, as where he was traveling from one employer's place of business to that of the other, as he was required to do in order to perform properly his duties for both, or where he was on his way to demonstrate or sell products of both employers, first the products of one at one city, then the products of the other at another city, or where he was returning from points where he had been instructed to go by both employers, citing 99 C.J.S., *Workmen's Compensation* 46 (1958).

The Court found further support for finding joint liability against simultaneous employers in 1A Larson's *Workmen's Compensation Law*, 48.40 at p. 8-254 (1973):

. . . Courts are showing an increasing tendency, however, to dispose of close cases, not by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee, but by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both.

In the instant case, the only evidence in the record regarding the mechanics and clerical workers is that they work at the Hurricane Express location and perform work for Steinert, individually, and for his related companies on a daily basis. Steinert further contends that his insurance carrier is aware of the situation and has not required him to carry additional coverage.

I find that the preponderance of the evidence has proven that to the extent the clerical workers and mechanics perform work for the other Steinert entities either as a joint employee or loaned employee, the Steinert respondents have failed to secure and provide workers' compensation coverage to those employees during the relevant times to this proceeding as required by Arkansas Workers' Compensation Act.

The primary focus of this compliance proceeding, even after seeking sanctions, has remained the same -- to ensure that all employers secure compensation for its workers. The Compliance Division does not normally seek civil or criminal sanctions without first requesting voluntary compliance with the law. The evidence shows that the Respondents failed to maintain workers' compensation on the truck drivers in reliance on their understanding that the truck drivers were not employees and that the insurance policy satisfied their obligation to provide insurance coverage to their acknowledged employees. After full consideration of the facts, issues, and the law, and acting within the sound discretion permitted for

Hurricane Express, Inc, et.al.- UE-2007-11-06

a hearing official, I have elected to impose the full statutory penalty of Ten Thousand Dollars (\$10,000.00) as to the Respondents, Hurricane Express and Naedok. I have elected to waive the statutory penalty as to the remaining Respondents, contingent upon the following:

1. The Respondents, Hurricane Express and Naedok, shall pay the sum of Ten Thousand Dollars (\$10,000.00) penalty to the Death and Permanent Total Disability Trust Fund for their failure to secure workers' compensation coverage.
2. The Respondents shall procure and continue at all times to provide workers' compensation coverage for their truck drivers and other employees, if any. The Compliance Division will continue to monitor the Respondents to ensure that they provide coverage for their employees.
3. The Respondents promptly pay any valid claims which may be filed against them during the period of non-coverage based upon any final determination and award, if any, to any of its employees.
4. The Respondents promptly pay the costs of preparation of the transcript in the amount of \$794.55 and other expenses incurred in connection with the February 28, 2008 hearing incurred in connection with this proceeding.

Conditioned on the compliance of all the aforementioned provisions, any penalties for non-compliance by the Steinert Respondents other than Hurricane

Hurricane Express, Inc, et.al.- UE-2007-11-06

Express and Naedok will be set aside and held in abeyance pending further rulings in this case. Failure to comply with all conditions may result in enforcement of the entire maximum statutory penalty as to each of the related companies.

ORDER

_____Pursuant to Arkansas Code Annotated § 11-9-406(a), the Respondents, Hurricane Express, Inc. and Naedok, LLC, are hereby directed and ordered to pay the sum of Ten Thousand Dollars (\$10,000.00), endorsed to the Death and Permanent Total Disability Trust Fund, c/o Arkansas Workers' Compensation Commission, Post Office Box 950, Little Rock, Arkansas 72203-0950. Said penalty shall be paid within forty-five days of the date of this Order unless a timely Petition for Review is filed with the Full Workers' Compensation Commission.

The Respondents are further directed and ordered to pay all costs of this litigation, including the costs of preparation of the transcript in the amount of \$794.55. Said payment should be remitted to the Arkansas Workers' Compensation Commission, Post Office Box 950, Little Rock, Arkansas, 72203-0950, within twenty (20) days of the date of this Order.

The Respondents are further directed and ordered to procure and continue at all times to provide workers' compensation coverage for its employees, if any. Further, the Compliance Division is directed to continue to monitor the employer to

Hurricane Express, Inc, et.al.- UE-2007-11-06

ensure that it continues to provide workers' compensation coverage for its employees. Any lapse of coverage will result in additional sanctions.

The Respondents are further directed to promptly pay any valid claims which may be filed against them during the period of their non-coverage based upon any final determination and award, if any, to any of their employees.

In the event that any of the Respondents fail to pay the penalties assessed herein, this Commission may petition the Circuit Court of Pulaski County, Arkansas, for an order enjoining the respective employer from engaging in further employment until such time as the employer makes full payment of all civil penalties as provided by Arkansas Code Annotated § 11-9-406(b)(6) (Repl.2002).

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge

September 17, 2008
NUNC PRO TUNC