

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411291

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| MARTY CARTER, EMPLOYEE | CLAIMANT |
| TRANSPLACE STUTTGART, INC., EMPLOYER | RESPONDENT NO. 1 |
| HARTFORD UNDERWRITERS INSURANCE COMPANY, INSURANCE CARRIER | RESPONDENT NO. 1 |
| C-CLAW, INC., UNINSURED EMPLOYER | RESPONDENT NO. 2 |

OPINION FILED MARCH 15, 2006

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE GARY RODGERS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed September 21, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. All stipulations agreed to by the parties herein are accepted as fact;
2. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on September 3, 2004;
3. Claimant was an employee of C-Claw, Inc., at the time of his injury;
4. C-Claw, Inc., did not have workers' compensation coverage as of September 3, 2004, the date of the incident;
5. C-Claw, Inc. was an uninsured subcontractor of Transplace Stuttgart, Inc.;
6. Transplace Stuttgart is the statutory employer of claimant and is liable to claimant for benefits including past and future medical benefits and temporary total disability benefits for his compensable injury.
7. The issue of permanency is held in abeyance;
8. Pursuant to Ark. Code Ann. §11-9-402(b)(1), and the indemnity agreement entered into between the parties, C-Claw, Inc., is hereby ordered to pay Transplace Stuttgart, Inc., the full amount of any compensation paid or payable to or on behalf of the claimant.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the

findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 21, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding in relevant part that the claimant was an employee of respondent No. 2 at the time of his injury, and that respondent No. 2 was an uninsured subcontractor of respondent No. 1. In addition, the Administrative Law Judge found that respondent No. 1 is the statutory employer of the claimant and is liable for any benefits to which he is entitled, including past and future medical benefits and temporary total disability benefits.

A carefully conducted de novo review of this claim in its entirety reveals that the Administrative Law Judge erred in finding that respondent No. 1 is the statutory employer of the claimant, and, therefore, liable for workers' compensation benefits paid or payable on his behalf. The preponderance of the evidence reveals that respondent No. 1 was acting strictly as a broker, not a prime contractor, on the date of the

claimant's injury. Therefore, respondent No. 1 has no liability under Ark. Code Ann. §11-9-402(b)(1), and decisions interpreting this statute. Further, the preponderance of the evidence shows that the claimant was an employee of respondent No. 2, which was uninsured at the time of the claimant's compensable injury in contravention to the provisions set forth in Ark. Code Ann. §11-9-102(9)(A) & (E) and §11-9-102(11)(A).

Therefore, the decision of the Administrative Law Judge should be reversed and respondent No. 2 should be held singularly and solely liable for benefits paid or payable to the claimant as a result of his compensable injury.

It is undisputed that the claimant, a driver for respondent No. 2, fell off of a company owned truck on September 3, 2004, injuring his right leg. It is also undisputed that respondent No. 2 was uninsured at the time of the claimant's compensable injury. Further, the record shows that respondent No. 2 had entered into an indemnity agreement with respondent No. 1, which served to "indemnify and hold harmless" respondent No. 1 from any liability in the event that an employee of respondent No. 2 was ever involved in a work related injury. This Indemnity Agreement further stated:

As a requirement to do business with Transplace, all Service Providers must abide by the Workmen's Compensation ("EC") laws as governed by their applicable state.

In the event a service provider was not required to carry workers' compensation coverage, that provider was required to sign the Indemnity Agreement. The record shows that respondent No. 2 president, Meredith Clawitter, signed said agreement on October 25, 2002.

It is readily apparent that the claimant was an employee of respondent No. 2 at the time of his compensable accident. As such, the claimant's work activities were in no way governed by respondent No. 1. The claimant testified that he received a weekly paycheck from respondent No. 2, from which taxes were withheld. In addition, respondent No. 2 provided the claimant with a W-2. Further, the claimant testified that he understood that he was an employee of respondent No. 2 and not of respondent No. 1. The claimant stated that he was furnished a truck by respondent No. 2 in which to haul loads, and that he received instructions about these loads from respondent No. 2's president, Mr. Clawitter. The real issue, therefore, is whether respondent No. 1 was a "prime contractor" with

respondent No. 2 being a "subcontractor" pursuant to Ark. Code Ann. §11-9-402(b)(1) which states:

Any contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account of injury or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred.

Recent decisions by the Court of Appeals which have helped define a statutory employer pursuant to Ark. Code Ann. §11-9-402(b)(1) include Garcia v. A&M Roofing, ___ Ark. App. ___, ___ S.W.3d ___ (2005), and Riddell Flying Service v. Callahan, ___ Ark. App. ___, ___ S.W.3d ___ (2005). In Garcia, the claimant, a roofer, was seriously injured when he fell from a rooftop of a residential roofing job. The claimant was working for his brother, Pablo Garcia, who had been given the job by Jesse Garcia. The owner of A&M, Harold Mills, contended that he, in essence, acted as "a broker for home owners whose sole purpose is to locate an independent contractor to perform roofing work." It was undisputed that Mr. Mills was in the business of selling roofing materials, contracting roofing jobs, and paying for the services of roofers to perform those contracts. With regard to his role, Mr. Mills testified that he would contract roofing jobs to independent contractors, who were

required to sign an "Agreement of Independent Labor Contract" (Agreement), with him. Whereas this Agreement required A&M to pay independent contractors a set amount per roofing layer, it likewise required independent contractors to provide their own tools, remove and clean all debris from the jobsite, pay all tax and social security contributions for their employees, carry workers' compensation insurance coverage or sign a waiver, carry liability insurance, and be responsible for damage to a customer's property. Mr. Mills further testified that he had been unaware that Jesse Garcia, who roofed for Mr. Mills on a regular basis, had "turned the job over" to Pablo Garcia, nor was he aware that the claimant was working for Pablo Garcia. Id.

Jesse Garcia testified that he had contracted with Mills (A&M) to do the residential job on which the claimant was injured. Jesse Garcia further testified that he had signed the above described Agreement with Mr. Mills "a long time ago". Id. Jesse Garcia testified that Mr. Mills normally did not give him specific instructions concerning roofing jobs, nor what hours to work. Instead, Mr. Mills would tell Jesse Garcia where the jobs were located, and he would then go and do the job. Mr. Mills paid Jesse Garcia every Saturday by the square for jobs performed during the week.

The Commission found that the claimant's employer, Pueblo Garcia, was not a subcontractor of A&M Roofing, but was in fact an independent contractor, and that A&M was therefore not liable for benefits. The court reversed this decision, finding that the claimant was an employee of an uninsured subcontractor of A&M, who was ultimately liable for benefits as the prime contractor. In its Opinion, the court rejected A&M's argument that under the Agreement, Jesse Garcia was an independent contractor who, once he had purchased a contract, exercised complete control and was completely responsible for that job until such time as the job was finished or assigned to someone else. In rendering its opinion, the court looked first to Hale v. Mansfield Lbr. Co., 237 Ark. 854, 376 S.W.2d 670 (1964). In that case, Mr. Hale was injured while removing timber from government land in performance of Mansfield's contract with the government. There, the supreme court stated, "Even if it can be said that Hale was an independent contractor, he was an independent subcontractor, and Mansfield would be liable to his employees under the workers' compensation laws." Garcia, supra; citing, Hale, supra. Looking then to Bailey v. Simmons, 6 Ark. App. 193, 639 S.W.2d 526 (1982), the court stated that before an independent contractor could be found to be a subcontractor, it must first be established that the one sought to be held liable as prime contractor was

contractually obligated to a third person for the work being performed by the independent contractor. Garcia, supra; citing, Bailey, supra. The Garcia court quoted the Bailey court's definition of a subcontractor as follows:

A subcontractor is one who enters into a contract with a person for the performance of work which another has already contracted to perform. In other words, subcontracting is merely "farming out" to others all or part of work contracted to be performed by the original contractor.

Garcia, supra; citing, Bailey, supra.

The Garcia court found that by Mr. Mills having "secured" the job on which the claimant was injured, contracting the job to Jesse Garcia, and paying Jesse Garcia for the work performed established, A&M was contractually obligated to a third person (the homeowner) for the work performed. Therefore, the court found that Jesse Garcia was a subcontractor of A&M, who was the prime contractor.

That Jesse and Pablo may have been independent contractors for A&M did not preclude their also being subcontractors of A&M for purposes of Ark. Code Ann. §11-9-402.

The court ultimately found A&M statutorily liable pursuant to Ark. Code Ann. §11-9-402(a), which states:

Where a subcontractor fails to secure compensation required by the Workers' Compensation Act, the prime contractor shall be liable for compensation of the

employees of the subcontractor. Ark.
Code Ann. §11-9-402(a) (Repl. 2002).

To rely solely on the court's decision in Garcia, supra, in making a determination in the present claim is to ignore the court's holding in Riddell Flying Service, supra. In that case, the sole dispute was over the party responsible for Mr. Callahan's injuries. The appellant employer, Riddell, was in the business of providing crop dusting services and selling new and used airplanes. Riddell successfully bid a contract with the Arkansas Forestry Commission (AFC), which was partially funded by FEMA. Under the provisions of that contract, Riddell was to provide three planes and three pilots to render forest fire preventative services. One of the pilots, Mr. Callahan, crashed his plan while performing said services, causing him serious bodily injury. The Commission ultimately found that Mr. Callahan was an employee of Riddell, rather than an independent contractor. In addition, the Commission found that the AFC was not a prime contractor, such that only Riddell was liable for workers' compensation benefits. Riddell was uninsured at the time of Mr. Callahan's injury.

The court affirmed the Commission's ruling, finding that the AFC was not the prime contractor over Riddell pursuant to Ark. Code Ann. §11-9-402, primarily because the AFC was not obligated to a third party for

Riddell's proper completion of the state contract. With regard thereto, the Riddell court stated "The Commission found that Riddell was a contractor to AFC, but AFC was a contractor to no one." Upon reciting the definition of a subcontractor as set forth in Bailey, supra, the Riddell court concluded as follows:

In the present appeal, the Commission reviewed the status of the relationship between Riddell and AFC. The Commission agreed that there was some control exerted by AFC over Riddell, which was expected given the state contract between the two. In examining the relationship between AFC and the federal government, the Commission noted that AFC was awarded federal grant monies to reduce the increased fire hazard created by the ice storms of 1994. The federal plan, supported by the grant funds required cooperation between the state and federal governments to meet the objective of abating wildfires. This is borne out in the plan's stated goal[s] However, there was no evidence that a contractual obligation existed in the manner of how AFC met those goals, and AFC was thus found to be a contractor to no one. The status of a prime contractor presupposes work to be done for third party. Nucor Holding Corp. v. Rinkines, 326 Ark. 217, 931 S.W.2d 426 (1996).

Respondent No. 1 currently contends that a prime contractor/subcontractor relationship did not exist between itself and respondent No. 2, and that respondent No. 1 is not liable for payment of benefits under Ark. Code Ann. §11-9-402(b)(1). The record reveals that respondent No. 1 is

licensed by the United States Department of Transportation, Federal Motor Carrier Safety Administration, as a "broker, arranging for transportation of freight (except household goods) by motor vehicle". According to 49 USCS §13102(2) (2005), a broker is defined as follows:

Broker. The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier (emphasis added), that as a principal or agent, sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

Pursuant to 49 USCS §13904, a broker may provide transportation itself only if it has also been registered to provide transportation as a motor carrier. Further, a "carrier" is defined under 49 USCS §13102(3) as a "motor carrier, water carrier, and a freight forwarder", with a "motor carrier" being more specifically defined under 131.12 as "a person providing motor vehicle transportation for compensation".

Pamela Johnston, director of legal and risk services for Transplace Texas, LP, testified at the hearing. Ms. Johnston explained that Transplace Stuttgart is owned by a general partnership that is, in turn, owned by Transplace Texas, LP. Ms. Johnston stated that her time is billed out to Transplace Stuttgart and to others. She further stated

that Transplace Stuttgart was not at the time of the claimant's accident, nor has it ever been, licensed or authorized by the Department of Transportation as a carrier. Ms. Johnston further testified that respondent No. 1 acts as a broker for over 3,000 carriers nationwide. Ms. Johnston's testimony was corroborated by Curtis Siems, who is a dispatcher for Transplace Stuttgart.

Mr. Clawitter, who is the president of respondent No. 2, testified that respondent No. 2 is registered as a Sub Chapter-S corporation with the Arkansas Secretary of State. He further testified that respondent No. 2, is licensed by the Department of Transportation as a carrier. Mr. Clawitter agreed that he is, and at all relevant times has been, the primary decision maker for respondent No. 2. As such, Mr. Clawitter determines how many trucks to purchase, who is hired, how much employees are paid, which load agreements are accepted, and the order in which loads are hauled. In addition, Mr. Clawitter testified that respondent No. 2 pays for the tags, titles, fuel, and maintenance of each company owned truck. Mr. Clawitter stated that at the time of the claimant's compensable injury, he was under the sincere belief that he was not required to have workers' compensation coverage, in that he did not consider himself to be an employee of the corporation. With regard to this, Mr. Clawitter testified:

Q. Are you thinking that since you were the owner of the corporation, that doesn't make you an employee?

A. Yes, sir.

Q. You were a sub-chapter S corporation, weren't you?

A. Yes, sir.

Q. So even though you didn't draw a salary, any money that the company made was taxed to you individually, wasn't it?

A. Not to me, it's to the corporation, because it was an individual.

Q. Who owns the stock in the corporation?

A. I do.

Q. All of it?

A. Yes, sir.

The determinative factor in ascertaining the requisite number of employees is whether three persons are regularly employed in the same business. Stewart v. Cosby-Parsons Quarter Horse Ranch, 269 Ark. 866, S.W.2d 590 (Ct. App. 1980). The question of whether the employer has the minimum number of employees in order to subject that employer to the requirements of this chapter is a factual determination for the Commission. Mountain Valley Superette, Inc. v. Bottorff, 4 Ark. App. 251, 629 S.W.2d 320 (1982). Moreover, the word employment does not have reference alone

to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. Elm Springs Canning Co. v. Sullins, 207 Ark. 257, 180 S.W.2d 113 (1994) (decision under prior law); Williams v. Gifford-Hill & Co., 227 Ark. 330, 298 S.W.2d 323 (1957). Finally, shareholders have been held to be employees. Mountain Valley Superette, supra.

Although Mr. Clawitter did not consider himself an employee of the corporation, he admitted that he, his son, and the claimant hauled loads for the company. Mr. Clawitter further testified that he generally assigned loads first to his son, then to the claimant, and that he would take any loads that were called in while his son and the claimant were out on other loads. Mr. Clawitter stated that he was physically unable to drive at the time of the claimant's injury due to recent shoulder surgery. However, the record, more particularly bills of lading, indicate that Mr. Clawitter hauled numerous loads from July 1 through September 3, 2004, which was the time during which he claimed to be incapacitated. Although Mr. Clawitter testified that respondent No. 1 was free to, and that it actually had on occasion, contacted his employees directly regarding loads to be hauled, these same records reflect that Mr. Clawitter was the point of contact for every load

that was hauled during the above stated time. Therefore, the facts reveal that Mr. Clawitter was under a statutory obligation to provide workers' compensation coverage for the employees of respondent No. 2 at the time of the claimant's compensable injury. Because, however, this issue is currently not before the Full Commission, Mr. Clawitter's mistaken belief concerning his obligation to provide such coverage is mentioned only for the sake of clarification at this time.

With regard to his contractual arrangement with respondent No. 1, Mr. Clawitter admitted that respondent No. 2 was under no contractual obligation to haul exclusively for respondent No. 1. Rather, respondent No. 2 was free to deal with other brokers. However, Mr. Clawitter admitted that he preferred an exclusive relationship with respondent No. 1 because he believed he would receive "better treatment" by dealing with just one broker. Mr. Clawitter's testimony in this regard was later corroborated by Mr. Siems.

With regard to compensation, Mr. Clawitter stated that respondent No. 2 was paid directly by respondent No. 1 for each load hauled. Mr. Clawitter explained the payment arrangement in more detail as follows:

They [Transplace] get paid from, I believe, from whoever they get the product or whoever the customer is

that's buying the product, and then they pay me for whatever the freight rate is for the destination, and then they take eight percent (8%) of that fee or that rate.

The testimony of Mr. Siems corroborated that of Mr. Clawitter regarding rates and payment. Mr. Siems clarified that the freight rates were calculated on tonnage, with 8% being the standard brokerage fee charged by respondent No. 1. This 8% brokerage fee is taken off of the top of the billed amount, with the balance being sent to the carrier. During the hearing there was a great deal of discussion about fuel surcharges. Mr. Clawitter testified that fuel surcharges were paid to him by respondent No. 1. Later, Mr. Siems explained that these surcharges were set and paid by the customer for the sole benefit of the carriers. Respondent No. 1 takes no percentage of these fuel surcharges.

Mr. Siems clarified that his role as a dispatcher is strictly to act as a liaison between the customers and carriers. Upon being contacted by a customer, Mr. Siems contacts one of his various carriers to ascertain whether they will take the load. Thereafter, it is the carrier's responsibility to follow through with transporting the load to its designated destination. Mr. Siems stated that respondent No. 1 is prohibited from acting as a carrier and

entering into arrangements with customers to transport loads. As far as the load in question, which happened to be a load of rice bran, Mr. Siems confirmed that respondent No. 1 was under no contractual obligation with the customer to provide transportation for that load from Stuttgart to Dumas on the day of the claimant's accident. Moreover, Mr. Siems agreed that nothing prohibits customers from contacting carriers directly to transport a load, or visa versa. Finally, Mr. Siems agreed that respondent No. 2 is not prohibited from using other brokers.

In reviewing the status of the relationship between respondent No. 1 and respondent No. 2, there is no evidence that respondent No. 1 exercised control over any part of respondent No. 2's operation at the time of the claimant's compensable injury, or over the method in which respondent No. 2 transported the particular load in question. By definition, license, and conduct, respondent No. 1 was acting strictly as a broker whose primary purpose was to act as a liaison or "middleman" between customer and carrier on the date of the claimant's injury. In this case, respondent No. 2 clearly had not entered into a contract with respondent No. 1 for the performance of work which respondent No. 1 had already contracted to *perform*. Garcia, supra. In fact, respondent No. 1 was prohibited by law from transporting loads for customers. Therefore respondent No. 1

was prohibited from "performing" that which respondent No. 2 was obligated to do. Id. Even if it could legally transport loads, respondent No. 1 did not own the necessary equipment or have employees to transport loads for customers. As Mr. Siems stated, "I don't move the goods. ... All I do is broker."

Furthermore, the preponderance of the evidence fails to demonstrate that a contractual obligation existed in the manner of how respondent No. 1 met the goal of moving goods for its customers. In other words, the evidence fails to support a finding that respondent No. 1 was contractually obligated to a third-party, specifically Cereal By-Products, to transport the load in question. As brought out in the testimony of both Ms. Johnston and Mr. Siems, and even to some extent by the testimony of Mr. Clawitter, respondent No. 1 simply arranges for, or brokers the movement of goods for its customers. When a customer contacts respondent No. 1 wanting to buy a load of grain, respondent No. 1, by and through its dispatchers such as Mr. Siems, contacts one of the various carriers with which it routinely does business in order to give that carrier an opportunity to accept the load. If that particular carrier turns down the load, then the dispatcher contacts other carriers until it finds one to move the load. In this way, respondent No. 1 acts as a middleman between customers and carriers. However, as

Mr. Siems testified, customers are under no contractual obligation to use respondent No. 1 for this brokering service, nor are carriers. Either can contract directly with the other for the movement of goods. Respondent No. 1 does require, however, that carriers enter into certain contractual agreements with them. Said contracts are not, however, contracts of exclusivity. Nor do these contracts state particularities concerning the methods to be used by the carriers in transporting goods for customers. A review of the "Truckload Motor Carriage Agreement", entered into between respondent No. 1 and respondent No. 2, demonstrates that this Agreement was constructed in compliance with DOT regulations primarily for the protection of the customers, especially in the event that a load is somehow damaged or destroyed. For example, Article I, sections 1.2 and 1.3 of this Agreement state:

1.2. Engagement of Services. BROKER, from time to time in its sole discretion, may tender cargo to CONTRACTOR and arrange for the transportation of shipments by CONTRACTOR during the term of this Agreement. CONTRACTOR will utilize CONTRACTOR'S motor vehicles, equipment, labor, drivers and other facilities for the transportation of cargo tendered by BROKER and accepted by CONTRACTOR. CONTRACTOR shall not have any lien, and hereby waives its right to any lien, upon any cargo transported or stored by CONTRACTOR pursuant to this agreement.

1.3. BROKER Acting as Agent of Customer. BROKER has entered into this Agreement for itself and is authorized to act as an agent on the Customer's behalf in connection with obtaining services from CONTRACTOR hereunder until CONTRACTOR is notified in writing by BROKER to the contrary. The Customers are third party beneficiaries of CONTRACTOR'S representations, covenants and obligations contained in this Agreement. However, the Customers shall not be responsible or liable for the representations, covenants and obligations of BROKER stated in this Agreement.

As opposed to Mr. Mills actions in Garcia, supra, respondent No. 1 was apparently not purposely trying to circumvent our workers' compensation laws by entering into this Agreement, and thus avoid liability. Rather, this Agreement seems to support respondent No. 1's proposition that it acts as a broker only, and as such, it is a "contractor to no one". Riddell, supra; citing Nucor Holding Corp., supra. This is not to say, of course, that respondent No. 1 should not require such contracts between itself and those entities with which it does business. This simply demonstrates none other than good business practices on respondent No. 1's part.

Based upon the above and foregoing, I find that the preponderance of the evidence demonstrates that respondent No. 1 was not acting as a prime contractor for respondent No. 2 at the time of the claimant's compensable

injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner