

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408999

GEORGE HICKOK, EMPLOYEE	CLAIMANT
STONE EXPRESS, UNINSURED	RESPONDENT NO. 1
P.A.M. TRANSPORT, INC.,	RESPONDENT NO. 2
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT NO. 3
CLARENDON AMERICAN INSURANCE, CARRIER	RESPONDENT NO. 4

OPINION FILED MAY 3, 2006

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

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1, Stone Express, is not represented by counsel and did not otherwise appear.

Respondent No. 2, P.A.M. Transport, Inc., represented by HONORABLE WAYNE HARRIS, Attorney at Law, Fort Smith Arkansas.

Respondent No. 3, Liberty Mutual Insurance Co., represented by HONORABLE JAMES A. ARNOLD, III, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 4, Clarendon America Insurance Co., represented by HONORABLE JAY WALLACE, Attorney at Law, Dallas, Texas.

Decision of Administrative Law Judge: Affirmed in part and reversed in part.

OPINION AND ORDER

For the purposes of this Opinion and to clarify any confusion when referring to the respondents by number, the respondent-parties to this action have been designated by reference as follows: Stone Express shall be Respondent no. 1; P.A.M. Transport, Inc., shall be Respondent No. 2; Liberty Mutual Insurance Company shall be Respondent no. 3; and Clarendon America Insurance Company shall be Respondent no. 4.

Respondent no. 2, P.A.M. Transport Inc. and respondent no. 3, Liberty Mutual Insurance Company appeal the decision of the Administrative Law Judge finding that Stone Express was an uninsured subcontractor of P.A.M. Transport; that P.A.M. Transport and Liberty Mutual Insurance Company are liable for the claimant's compensable injury pursuant to A.C.A. § 11-9-402(a); that the policies of insurance P.A.M. Transport had with Clarendon American Insurance Company did not satisfy Stone Express's obligation

to secure the payment of compensation; that the Clarendon American Insurance policies did not represent a policy of workers' compensation insurance pursuant to the provisions of A.C.A. § 11-9-408; that P.A.M. Transport and Liberty Mutual Insurance Company were not entitled to an offset in the amount of benefits the claimant received under the Clarendon American Insurance policies for the same medical services and period of disability awarded to the claimant by the Administrative Law Judge; and finding that the claimant was not a covered contractor driver under the insurance policy that existed between P.A.M. Transport and Clarendon American Insurance Company. Based upon our de novo review of the entire record, without giving the benefit of the doubt to any party, we find that the decision of the Administrative Law Judge must be affirmed in part and reversed in part. Specifically, we find that the Administrative Law Judge correctly found that Stone Express was an uninsured subcontractor of P.A.M. Transport and that P.A.M. Transport is liable for the claimant's compensable injury pursuant to A.C.A. § 11-9-402. We further find that

the Administrative Law Judge correctly found that the Clarendon American Insurance policies did not constitute workers' compensation insurance pursuant to A.C.A. § 11-9-408. However, we find that the Administrative Law Judge erred in finding that P.A.M. Transport is not entitled to offset pursuant to A.C.A. § 11-9-411, and in finding that the claimant was not a covered contractor driver within the terms of the insurance policy that existed between P.A.M. Transport and Clarendon American Insurance Company.

It is undisputed that the claimant was an employee of Stone Express and that he sustained a compensable injury on August 29, 2002, for which he is entitled to reasonable and necessary medical expenses as well as temporary total disability benefits from August 30, 2002, and continuing through, at least, January 25, 2005. It is further undisputed that Stone Express entered into a contractual relationship with P.A.M. Transport to provide P.A.M. Transport with a tractor and driver. Pursuant to this contract, Stone Express was required to maintain in force a proper policy of workers' compensation insurance. Stone

Express did not comply with this provision of the contract. Rather, Stone Express took advantage of an Occupational Accident policy and Contingent Liability policy which P.A.M. Transport made available to its owner/operators. Although the bill for the monthly premium was sent to P.A.M. Transport, the evidence is unclear as to whether P.A.M. Transport paid the bill directly or whether each individual owner/operator directly paid his or her portion of the premium. Whether the premium was paid directly by the owner/operator or whether P.A.M. Transport paid the premium, it is not disputed that the cost of these premiums was ultimately borne by the owner/operator.

The record reflects that Stone Express was an employer within the meaning of the Act as it was an individual, partnership, limited liability company, association or corporation carrying on employment in the state and that it regularly employed three or more employees. Although the claimant may have been paid as an independent contractor by Stone Express in that he received a 1099 at the end of the year instead of a W-2, it is

undisputed on appeal that the claimant was an employee of Stone Express for purposes of workers compensation.

Moreover, the claimant testified that Stone Express had a mechanic and four other drivers thus bringing Stone Express within the broadest definition of an employer within the Act. As an employer, Stone Express was required to secure the payment of compensation by insuring and keeping insured the payment of compensation with any carrier authorized to write workers' compensation insurance or by becoming a certified self-insured employer. A.C.A. § 11-9-404. Stone Express was not a certified self-insured employer. P.A.M. Transport contends that the Clarendon policies operate to satisfy Stone Express's obligation to secure the payment of compensation.

The only portions of the Occupational Accident policy introduced into evidence are the Schedule for Summary Benefits, Covered Activity Rider, State Amendatory Rider and the monthly census premium statements. After reviewing these portions of the policy, we find that P.A.M. Transport has failed to prove by a preponderance of the evidence that this

policy satisfies the requirements of the Act to secure the payment of compensation. A.C.A. § 11-9-408 requires that every policy or contract of insurance intended to secure the payment of compensation shall contain provisions that identify the insured employer and either identify the "covered employee(s)" or describes the "covered employee(s)" by class. While these documents arguably identify the covered employee(s) in the monthly census premium statements, they do not identify Stone Express as the insured employer. Rather, these documents clearly identify P.A.M. Transport as the insured subscriber. Neither Stone Express nor Ed Stone are listed as an insured employer under this policy. Rather, Ed Stone is merely listed as another covered "employee". Moreover, by the plain language of the Occupational Accident policy, the "contract driver" cannot be an employee, but "must be an Independent Contractor as defined by law." Accordingly, we find that this Occupational Accident policy does not satisfy Stone Express's obligation to secure the payment of compensation as required by A.C.A. § 11-9-404.

With regard to the Contingent Liability policy, the record reflects that P.A.M. Transport was the named insured and that the policy would "cause to be issued a policy of Statutory Workers' Compensation with respect to a "covered Contractor" or "Contractor Driver" who seeks to be deemed an employee of the Insured by a Workers' Compensation board..." As P.A.M. Transport is the insured under this policy, the Contingent Casualty Liability policy will only cause to be issued a workers' compensation policy and pay workers' compensation benefits only if a "covered contractor" or "contract driver" seeks workers' compensation benefits from P.A.M. Transport, not from Stone Express. As it is conceivable that an employee of Stone Express could sustain a compensable injury while working solely for Stone Express, and not while carrying out the provisions of the contract between P.A.M. Transport and Stone Express, we cannot find that this policy in any manner satisfies Stone Express's obligation to secure the payment of compensation under the Workers' Compensation Statutes. Moreover, this policy insures P.A.M. Transport not Stone Express.

After considering the policies issued by Clarendon American Insurance Company, we find that Stone Express was uninsured for the purposes of the Workers' Compensation statutes.

A.C.A. § 11-9-402(a) states:

Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor.

The parties stipulated that the contract between P.A.M. Transport and Stone Express created a prime or general contractor/subcontractor relationship. Having found that Stone Express did not comply with A.C.A. § 11-9-404 to secure the payment of compensation as required by the Arkansas Workers' Compensation statutes, we find that Stone Express was uninsured for the purposes of A.C.A. § 11-9-402. Therefore, pursuant to the provisions of A.C.A. § 11-9-402 P.A.M. Transport is liable for any and all workers' compensation benefits due for any compensable injuries the claimant sustained while performing employment services for

Stone Express which were in furtherance of its contract with P.A.M. Transport.

The issue then becomes whether the Contingent Casualty Liability policy issued by Clarendon American Insurance Company must issue a workers' compensation policy to P.A.M. Transport pursuant to the terms of its policy. This policy provides that it will issue or cause to be issued "a policy of Statutory Workers' Compensation" when a "covered contractor or contractor driver" seeks to be deemed an employee of the insured by a state's workers' compensation board. A "Contractor driver" under this policy is defined as one "who is retained by a Contractor to drive a power unit the Contractor owns and has leased to the Insured under this policy." The policy further defines a "covered a contractor or contractor driver" as one who:

...based on his state of domicile, is not required by the laws of his state of domicile, to be covered by statutory Workers' Compensation.

As this policy is specifically intended for independent contractors it is only logical to determine

whether the state in which the independent contractor is domiciled requires the independent contractor to be covered by statutory workers' compensation. The claimant is domiciled in the state of Oklahoma. However, the difficulty in the present case arises because the claimant is not an independent contractor in the state of Oklahoma, but rather a resident of the state of Oklahoma who is employed by an Arkansas employer. The laws of Oklahoma cannot reach into Arkansas to require an Arkansas company to provide workers' compensation for Oklahoma residents. Accordingly, since his state of domicile does not require that the claimant be covered by statutory Workers' Compensation in another state, the claimant in this case qualifies as a "covered contractor driver" under the Contingent Casualty Liability policy.

"Insurance contracts are to be construed strictly against the insurer, but where language is unambiguous, and only one reasonable interpretation is possible, it is the duty of the courts to give effect to the plain wording of the policy. The language of any insurance policy is to be construed in its plain, ordinary, and popular sense." Nichols v. Farmers

Ins. Co., 83 Ark. App. 324, 128 S.W.3d 1 (2003). The policy drafters must have presumed that the contractors or contractor drivers would be independent contractors not employees, or if they were employees, that they would be employed by an employer of their state of domicile. While the intent of the policy may have been to presume that the contractor driver is employed by an employer within his state of domicile, the policy is not written in such a manner. Accordingly, when the plain language of the policy is considered, we find that the claimant was not required by the laws of his state of domicile to be covered by statutory workers' compensation. Therefore, we find that the claimant is a "covered contractor driver" for the purposes of the Contingent Casualty Liability Insurance policy. We further find that when the claimant filed the present workers' compensation claim against P.A.M. Transport, a covered contingency occurred. Therefore, pursuant to the terms of the policy, Clarendon National Insurance Company is obligated to issue a policy of Statutory Workers' Compensation in the state of Arkansas with respect to the

claimant. As this policy will specifically identify the claimant as a covered employee, we further find that this insurance policy takes precedence over the Liberty Mutual policy that does not list the claimant as an employee.

We are not persuaded by Clarendon American Insurance's argument that because P.A.M. Transport is secondarily liable as the prime or general contractor of an uninsured subcontractor, the claimant is not a "covered contractor driver" under the Clarendon Policy. Pursuant to this argument, there would never be a "covered contractor" or "covered contractor driver" in Arkansas, since the prime contractor would always be liable when the subcontractor is uninsured. If this were the case, then Clarendon fraudulently collected premiums from residents of Arkansas as it would never have to pay out on these policies as there would never be a "covered contractor" or "covered contractor driver" under their argument. Furthermore, the policy does not predicate the definition of "covered contractor" or "covered contractor driver" upon whether a party will be liable for the compensable injuries of an uninsured

subcontractor, but rather upon whether the contractor or contractor driver is "required by the laws of his state of domicile, to be covered by statutory Workers' Compensation." Merely because the law operates to protect employees of an uninsured subcontractor, by extending liability to a third party, does not equate to the finding that the law requires the uninsured subcontractor's employees be covered by statutory workers' compensation. As previously noted, these policies are intended to offer coverage to independent contractors who are excluded from the requirement to purchase workers' compensation coverage. Under Arkansas law, an independent contractor may still be excluded from this requirement even if he has an employee. While this employee is not required to be covered by his employer, the law extends coverage to this employee by making the prime contractor liable for the uninsured's employees' compensable injuries.

The final issue for determination is whether P.A.M. Transport is entitled to an offset pursuant to A.C.A. § 11-9-411 for benefits the claimant has received for his

medical services and period of disability that have already been paid under the Clarendon Occupational Accident Insurance policy. A.C.A. § 11-9-411 provides:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health and welfare policy, plan, or group hospital or medical service contract.

A.C.A. § 11-9-411 clearly provides that any workers' compensation payable to an injured worker shall be offset by the amount of benefits the injured worker has already received for the same medical services or period of disability. The parties stipulated that Clarendon Insurance Company has paid to or on behalf of the claimant benefits for medical services totaling \$129,556.69, and disability benefits through August 29, 2004, totaling \$47,711.05. Thus,

the claimant has already received benefits for these medical services and his period of disability through August 29, 2004. To find that this provision of the Act does not apply, would amount to the claimant receiving a double recovery. This statute is specifically intended to prevent a double recovery for benefits which an injured worker has already received. The list of possible payors of those benefits does not operate to exclude those not specifically listed. This list is broad in that it classifies group health care service plans in "whatever form or nature." This very language indicates that the legislature intended that benefits paid by a broad range of group plans would qualify for an offset. The Occupational Accident policy falls within this broad array. This policy was a group policy with P.A.M. Transport as the policy sponsor for the group of contractors specifically listed in the covered subscribers in the monthly census premium statements. Thus, while this policy is not specifically named a group policy, it falls within the type of policies listed in A.C.A. § 11-9-411, for which an offset is entitled. The claimant received benefits for

the same medical services and temporary disability pursuant to the Clarendon American Insurance policies which was awarded by the Administrative Law Judge, and which are not contested on appeal. Accordingly, we find that the benefits payable to the claimant shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the claimant has previously received for the same medical services and period of disability from Clarendon American Insurance.

Accordingly, for those reasons set forth above, the decision of the Administrative Law Judge is hereby affirmed in part, and reversed in part.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

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KAREN H. MCKINNEY, Commissioner