

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513399

JOHN H. CHEEK, EMPLOYEE	CLAIMANT
BOOKOUT, INC., EMPLOYER	RESPONDENT NO. 1
DONNIE BOOKOUT, EMPLOYER	RESPONDENT NO. 1
FIRSTCOMP INS. CO., CARRIER	RESPONDENT NO. 1
CHAD BOOKOUT, DBA CNS BOOKOUT FARMS, EMPLOYER	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 4, 2009

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

Claimant represented by HONORABLE FREDERICK SPENCER,
Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM C. FRYE,
Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID ETHREDGE,
Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed February 2, 2009.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he was an employee of Respondent Bookout, Inc.
4. Claimant has not proven by a preponderance of the evidence that he was an employee of Respondent Donnie Bookout.
5. Claimant has not proven by a preponderance of the evidence that Claimant was an employee of Respondent Chad Bookout, d/b/a CNS Bookout Farms.
6. Claimant was an independent contractor, as opposed to an employee, of Chad Bookout.
7. Because of the above findings, neither Donnie Bookout, Chad Bookout, nor Bookout, Inc., is liable under the Arkansas Workers' Compensation Act to Claimant for his alleged injury of November 1, 2005, and the issues of whether Claimant sustained a compensable injury and whether he is entitled to reasonable and necessary medical treatment are thus moot and will not be addressed.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

_____I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant was not an independent contractor, he was an employee of Respondent No. 2, Chad Bookout, D/B/A CNS Bookout Farms.

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). The resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the employer's right to control and of factors related to the relationship of the work to the asserted employer's business. In making a determination, the Commission must look at the factors outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999) citing §220 of the Restatement (Second) of Agency:

- A. the extent of control which, by the agreement, the master may exercise over the details of the work;
- B. whether or not the one employed is engaged in a distinct occupation or business;
- C. 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;
- D. the skill required in the particular occupation;
- E. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

- F. the length of time for which the person is employed;
- G. the method of payment, whether by the time or by the job;
- H. whether or not the work is a part of the regular business of the employer;
- I. whether or not the parties believe they are creating the relation of master and servant; and
- J. whether the principal is or is not in business.

See also Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to the various factors must be determined by the Commission. Franklin, supra. However, the Supreme Court has stated that the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. Sanders, supra.

The crucial question as to "right of control" in this case is: Who has control of the dump truck? The answer is the respondent is totally in control of the dump truck.

The claimant cannot drive the dump truck without the respondent giving him the keys. The respondent is in the dump truck business. The claimant is not. The only essential tool of the dump truck business is a dump truck. The respondent owns the dump truck. The respondent maintains the dump truck. The respondent (most likely but not specifically in evidence) carries liability insurance on the dump truck. Most importantly the claimant only drives the dump truck between locations specified by the respondent. The claimant does not have the choice to drive the dump truck anywhere other than the options given by the respondent. The fact that the claimant has a choice of options does not give the claimant control of the options. The respondent controls the dump truck and controls the options as to where the dump truck goes. As such, the claimant dump truck driver is completely in the control of the respondent.

If the claimant brought his own dump truck to the dump truck driving job, then he would be an independent contractor. Because he would be in control of the truck, and in control of where the truck goes. But here the claimant cannot perform dump truck driving work without a dump truck. He cannot take the respondent's dump truck anywhere other than where the respondent allows him to go. In fact, there

is simply no such thing as an independent contractor dump truck driver who doesn't have a dump truck. Respondent No. 2 is dodging paying workers' compensation premiums on his employees and the majority has fallen for it. (I would note that Respondent No. 1, who is in the same business as respondent No. 2, apparently carries workers' compensation on his dump truck drivers.) In D&M Constr. Co. v. Archer, 14 Ark. App. 198, 686 S.W. 2d 799 (1985) a dump truck driver who was paid under the same terms as in the instant claim (i.e. paid 25% of the loads delivered, no withholding) the Full Commission and the Court of Appeals held that the dump truck driver was an employee of the respondent. Following the precedent set in Archer, I find that the claimant was an employee of Respondent No. 2, Chad Bookout, D/B/A CNS Bookout Farms.

PHILIP A. HOOD, Commissioner