

MISSISSIPPI WORKERS' COMPENSATION COMMISSION
MWCC NO. 0702122-J-6947-C

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SEP 15 2008

Franke & Salloum PLLC
CLAIMANT

LAMAR TATE

VS

ALL COAST INTERMODAL SERVICES, INC.

EMPLOYER

AND

LEXINGTON INSURANCE COMPANY, a subsidiary of AIG

CARRIER

REPRESENTING CLAIMANT:

Mark Davis, Esq., Gulfport, Mississippi

REPRESENTING EMPLOYER AND CARRIER:

Donald P. Moore, Esq., Gulfport, Mississippi
Susan F. E. Bruhnke, Esq., Gulfport, Mississippi

OPINION OF THE ADMINISTRATIVE JUDGE

On February 23, 2007, a Petition to Controvert was filed wherein the claimant alleged that on February 25, 2005, while working as a truck driver for All Coast Intermodal Services, Inc. ("ACIS"), he slipped and fell while getting into his truck resulting in injuries to his neck, right and left arms and right leg. While the employer and carrier admit the occurrence of an injury on this day, they deny that the relationship of employer/employee existed between the claimant and the ACIS at this time, deny that the claimant was performing services growing out of and in the course of employment and deny that notice of the injury was received.

On December 11, 2007, the employer/carrier filed a Motion to Dismiss this claim on the basis that on or about February 25, 2005, claimant was an employee of Charles Reeves and/or Charlie Reeves Trucking and that the claimant and ACIS had no contract of employment. It is this motion which was brought on for hearing and which is addressed in this Order.

EVALUATION OF EVIDENCE

LAY TESTIMONY

Mac A. Brown - Since May 28, 2004, Mr. Brown has been employed as the operations manager for ACIS and works out of Florida. Prior to May 28, 2004, Mr. Brown was a commissioned agent for ACIS and has also acted as an owner/operator. Mr. Brown testified that ACIS is a non asset based carrier and operates as an administrative entity. It has relationships with twenty-one (21) agents around the U.S. These agents recruit owners/ operators to operate for them and pay them. ACIS' relationship is solely with the agents, who are self- employed commissioned agents.

According to Mr. Brown, he met the claimant approximately six (6) to seven (7) years ago and at that time, Mr. Tate was a contract driver. Claimant was driving for Rodney Kilgore, an owner/operator and claimant contacted Mr. Brown asking if he could find a truck for him to drive. Mr. Brown told the claimant that he would buy a repossessed truck and pay the insurance. Mr. Brown paid the claimant 32% of the profits and this arrangement continued until May 2004 when Mr. Brown began his current job with ACIS. At that time, his truck had broken down and he decided not to repair it because his owner/operator status might create conflict with his employment at ACIS. As a result, he sold his agency. According to Mr. Brown, his relationship with the claimant was completely separate from his employment relationship with ACIS which he began in May 2004.

Subsequently, Mr. Tate began driving for Charlie Reeves who at that time was suffering with prostate cancer. In regard to Employer/Carrier Exhibit "5", Mr. Brown testified that the settlement sheet comes from the agent and lists a truck's earnings and expenses. The net total amount delineated

at the bottom of the Settlement Edits for those time periods noted in the top upper left hand corner are the amounts which are paid to the owner/operator, CMJ Transportation Services, which is referenced on the first page of Employer/Carrier Exhibit "5". In turn, Charlie Reeves was paid by the agent. He testified that payments from an owner/operator to a truck driver are negotiable and vary.

Mr. Brown testified that ACIS sells occupational insurance to the agent and in turn it is sold to the owner/agent. Drivers have a fuel card to buy fuel and money for food. He noted that ACIS did not place any money on Mr. Tate's Comdata card except upon Charlie Reeves' request and in accordance with his instructions. ACIS did not pay Mr. Tate and did not know how much he was to be paid. The operator determined the percentage of money that a driver would receive and relayed this to the agent.

Most agents have dispatchers and in turn they contact the owner/operator or the driver. Mr. Brown testified that ACIS does not dispatch and has no requirement as to minimum loads. Drivers are not forced to take a certain number of loads. The customer provides the dates and time of pick up and delivery. He noted that the driver controls the route and stated that ACIS has no reason to contact a driver.

During cross - examination, Mr. Brown reiterated that ACIS is a non-asset based carrier which owns no trucks or trailers. If a customer contacts ACIS in Florida then they are told to call an agent. However, applications for employment do not have the ACIS insignia on them. When he originally came to work he had to submit an application. He indicated that random drug testing is conducted and that DOT physicals are required. A criminal check and motor vehicle report are also conducted. Mr. Brown testified that most insurance companies require experienced drivers and

stated that any driver who drives for an owner/operator is a contract driver.

According to Mr. Brown, the claimant could have driven as little as he wanted. If claimant received a call to go somewhere then the dispatcher for the agent contacted the agent and the agent contacted the driver. ACIS never dispatches anyone directly. Mr. Brown stated that the claimant's salary could be disbursed via Comdata card or a check. Each agent has a separate Comdata account. According to his testimony, no one at ACIS has access to the Comdata account and the software provided to the agency is used by the agency. He also noted that a Form 1099 was sent by the agent to Lamar Tate. Mr. Brown testified that when the claimant worked for Kilgore, he received the 1099 Form from Kellogg and when he worked for Charlie Reeves he received the 1099 form from Mr. Reeves.

According to Mr. Brown, ACIS has no reason to care about the information included in Employer/Carrier Exhibit "5". Once ACIS sends money to the agency they can do as they please with the money. As a prior agent, Mr. Brown handled the employment application and drug testing process. He noted that medical and drug screening is a federal requirement and that all ACIS cares about are the trucks.

Mr. Lamar Tate - Mr. Tate testified that he took over driving Charlie Reeves' truck when Mr. Reeves became ill and he drove for him for three months. It was during this three month period that he was injured. Claimant had also driven for Rodney Kilgore and Mac Brown. He testified that when he moved to another company he had to meet the federal guidelines, including undergoing a physical and a drug test and maintaining driving logs and records. These are industry wide standards and he has to negotiate with owners concerning payment and each owner is different. With Mr. Kilgore, he received 32% of the gross amount the truck made plus health insurance and

bonuses. He testified that his truck was repossessed and when he worked for Mr. Brown, the truck broke down. It is noted that both set of circumstances are unrelated to ACIS.

Mr. Tate acknowledged that ACIS had no control over his arrangement with Charlie Reeves. He noted that expenses fall on the truck owner and that the driver must check with the owner before making repairs because it is the owner's money that is involved. Claimant acknowledged that Mr. Reeves could have obtained someone else to drive the truck if he had wanted. Further, he confirmed that ACIS did not tell him how to get from point "a" to point "b" and testified that ACIS exerted no control over him. You would have to talk with an agent if you wanted to take vacation; however, you did not have to ask permission. He knew that he could turn down a load but would go to the bottom of the list. There were no minimum number of hauls. He received a 1099 which was given by the owner/operators, in his case Charlie Reeves. He paid FICA and other taxes. In regard to the occupational accident policy, he received medical benefits and compensation for the time he missed work. He acknowledged that when compensation payments were coming to an end, he filed this law suit.

Mr. Tate testified that he submitted his application to Mac Brown and this was a standard application. Claimant stated that the drug test was federally required. Mr. Tate noted that he was required to be on time and stated that if there was a problem with the delivery of the load he would notify ACIS and if an accident occurred he reported it to ACIS. Claimant acknowledged that when he drove for other companies he had to comply with physicals and testing and stated that federal guidelines pertaining to the amount of hours a driver was permitted to drive were the reason he drove for no one other than Charlie Reeves during the three month time period. Further, although he thought dispatch was ACIS, he really does not know.

Findings of Fact and Conclusions of Law

This motion to dismiss addresses the issue of whether Mr. Tate is an employee under our Workers' Compensation Law, or an independent contractor as to ACIS. In determining whether a workers' compensation claimant is an employee or an independent contractor, our courts have used the control test and the relative nature of the work test. In Cooks v. Neely Lumber Co., 275 So. 2d 386 (Miss. 1973), the Mississippi Supreme Court discussed those tests:

In general, it is said that the right to control, not actual control of, the details of the work is the primary test of whether a person is an independent contractor or an employer . . . It is the ultimate right of control, not the overt exercise of that right, which is decisive. Probably the four principal factors under the control test, are (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire. . . .

[T]he relative nature of work test . . . contains these ingredients: the character of the claimant's work or business - how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on - and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

Id., at 388 (citations omitted).

After discussing these tests Dunn reached these conclusions:

It is said that the modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and where the worker, relative to the employer, does not furnish an independent business or professional service. The common-law test is retained but where the workman is performing a task which is an integral part of the regular business of the employer, the control element, necessary to establish employment status, may be found from the fact (1) that the contract or engagement is not for a definite time or a specific piece of work, (2) that the engagement is

terminable at will, and (3) that the service has continued exclusively for the same employer for a substantial period.

Dunn, Mississippi Workers' Compensation, Section 131 (3d ed. 1990).

With this foundation in mind, the facts in this case must be weighed under those tests, beginning with the four factors of the control test:

1. ACIS Had No Direct Control Over the Claimant

At the time of claimant's injury, claimant had no contract of employment with ACIS.¹ According to Mozelle Yawn, safety coordinator for ACIS, an agreement (Independent Contractor Operating Agreement) did exist between Charles Reeves and ACIS; however, the signed copy could not be located. A blank copy of the agreement entered into between ACIS and Charlie Reeves and/or Charlie Reeves Trucking ("Contractor") was attached to Yawn's Affidavit as Exhibit "1".² ACIS acknowledges that it is in the business of delivering or transporting materials to its clients. The Agreement provides that Intermodal Freight Agency Agreement (the "Agent") provided services including dispatching and compensating carriers and their drivers.

According to Ms. Mozelle's affidavit, ACIS had no voice in when the driver leaves to begin a trip, which route he takes, when he chooses to stop, take a break or buy fuel. As ACIS is in the business of delivering or transporting materials for its clients, it provides information as to where to pick up and deliver the freight and the time customers need same delivered. The giving of this type of necessary information does not constitute control such as to render the claimant an employee of

¹Employer/Carrier Exhibit "1", Employer and Carrier's Motion to Dismiss, exhibit "a" thereto, December 6, 2007, Affidavit of Mozelle Yawn.

²Employer/Carrier Exhibit "1", Employer and Carrier's Motion to Dismiss, exhibit "a" thereto, December 6, 2007, Affidavit of Mozelle Yawn.

ACIS. ACIS only required that the load be delivered on time and that the driver comply with DOT regulations.³ The information provided by ACIS was logical and necessary information but does not constitute control.

According to the Agreement, the Agent informed Mr. Tate of a loads' pick up and delivery time. ACIS did not track the claimant or check on where he was driving or the route he was taking.⁴ Mr. Tate testified in his deposition that ACIS had no control over him once he left the terminal or how he did his job just as long as he made the delivery on time.⁵

According to Mozelle Yawn, ACIS has no minimum haul requirements for their owners, including Charles Reeves and, therefore, Mr. Tate was not required by ACIS to meet a minimum haul requirement and could work when he wanted. The owner/operator or its driver could inquire with the dispatch office as to what loads were available and pick one they wanted or choose not to haul a load at all. According to Mozelle Yawn, as far as ACIS was concerned, the owners and/or drivers could drive as often or little as they wanted. Additionally, the drivers could drive for whomever they wanted as long as they did not drive a truck with ACIS placards on it.

As set for in the Agreement, Mr. Tate's hours and working conditions are subject to the control and direction of the Contractor (Mr. Reeves). Further, the Contractor bears the responsibility of selecting the routes and controlling and maintaining the activities of its drivers to insure dispatch instructions of the Agent are followed by the driver. Additionally, ACIS' customers are allowed two

³ February 7, 2008, Affidavit of Mozelle Yawn, Exhibit "C" to Employer/Carrier's Reply in Support of its Motion to Dismiss.

⁴ Employer/Carrier Exhibit "1", exhibit "b" thereto, page 66.

⁵ Employer/Carrier Exhibit "1", exhibit "b" thereto, page 50.

hours to load or unload a trailer while the driver sits and waits. If the loading or unloading process takes more than two hours, the customer is billed an hourly amount or a "detention time" cost which is paid to the truck to compensate it for lost time. ACIS does not pay this to the driver.⁶

According to Ms. Yawn, it is ACIS' policy, *in accordance with Federal DOT requirements*, that all new drivers fill out forms answering basic questions to allow for a proper background and driving record check. New drivers are also required to submit to a drug test and physical. It was noted by Mozelle Yawn that claimant had been driving for another truck leased to ACIS just before beginning to drive for Charlie Reeves Trucking and, therefore, did not have to fill out a new form or take a new drug test or physical.⁷ Mr. Tate was responsible for paying for his annual physical required for all truck drivers, obtaining his own commercial drivers license, obtaining his hazmat certification and paying for any speeding violations he received⁸. Claimant was responsible for maintaining his DOT hours and ACIS did not keep up with those hours. ACIS' requirements include those of the DOT. Any argument that ACIS had control over claimant through DOT regulations is without merit and does not constitute control by ACIS. *All* applicable drivers have to comply with these DOT regulations. This does not mean that all drivers who have to comply with these federal regulations are employees as opposed to independent contractors.

The Independent Contractor Agreement between ACIS and Charles Reeves specified that Mr. Reeves agreed and understood that he and his drivers, agents and employees is an independent contractor and that Mr. Reeves has the sole responsibility to determine the means and methods of

⁶Employer/Carrier Exhibit "3", exhibit "c" thereto.

⁷Employer/Carrier Exhibit "3", exhibit "c" thereto.

⁸Employer/Carrier Exhibit "1", exhibit "b" thereto, pages 52-54.

the performance of all transportation services undertaken by Mr. Reeves under the terms of the Independent Contractor Agreement.⁹

It is noted that the provision of destinations and times of delivery did not constitute controls. Webster v. ms publishers - destinations and times of delivery are not control. When and where is not enough. Agents paid owner operators and they paid drivers. No controls on the amount of driving. The only controls are those federally mandated - physicals, drug testing, driving logs. They had to do this to keep their licenses. This is industry wide over all drivers.

2. ACIS Had No Direct Control Over Payments Made to the Claimant

In his deposition, Mr. Tate testified that he was paid per arrangement with Mr. Reeves. ACIS requires "transportation documents" in order to do the billing and ensure that the owners are paid properly.¹⁰ In his deposition testimony, Mr. Tate testified that ACIS did not pay him and noted that at the end of each year ACIS sent a 1099 to the truck owners. Mr. Reeves' agreement with Mr. Tate was that he was to receive 25% of the truck's gross revenues before expenses.¹¹ ACIS had no control over the monetary arrangement between claimant and Mr. Reeves.¹²

Mr. Tate testified that when he was paid, taxes were not withheld.¹³ He acknowledged that when filing his taxes, he had to pay FICA, Social Security and Medicare.¹⁴ According to Mozelle

⁹ The Independent Contractor Operating Agreement was attached as an exhibit to the Employer and Carrier's Motion to Dismiss (E/C-1) as Exhibit "1".

¹⁰ Employer/Carrier Exhibit "3", exhibit "c" thereto.

¹¹ Employer/Carrier Exhibit "1", exhibit "b" thereto, page 36.

¹² Employer/Carrier Exhibit "1", exhibit "b" thereto, pages 55-56.

¹³ Employer/Carrier Exhibit "1", exhibit "b" thereto, page 39.

¹⁴ Employer/Carrier Exhibit "1", exhibit "b" thereto, page 51.

Yawn, ACIS only provides settlement sheets to its truck owners to reflect payments and deductions made to them. Further, claimant's settlement sheet had deductions for occupational accident coverage on claimant per the request of Mr. Reeves. Per Mozelle Yawn, ACIS is not aware of whether Mr. Reeves passed that cost on to the claimant.

3. ACIS Did Not Furnish Equipment to Claimant

Mr. Tate drove Mr. Reeves' truck, not a truck owned by ACIS. This fact was confirmed by the testimony of the claimant and that of Mozelle Yawn. Further, ACIS did not provide Mr. Tate with any equipment, gas or materials. Claimant testified that if there was something wrong with the truck he would contact Charlie Reeves who would provide instructions and reimburse him for any costs associated with the cost of repairs.¹⁵ According to Mozelle Yawn, ACIS may have put money on a Comdata card for the claimant to use for repairs and/or gas at Mr. Reeves' request; however, this would be an advance for Mr. Reeves made by ACIS. In her affidavit, Ms. Yawn stated that ACIS does this as a courtesy to the owners so that when trucks are on the road, they can be repaired and complete a trip.¹⁶ Additionally, Mr. Reeves might request that ACIS place a specified amount of Mr. Tate's earnings on his Comdata card if he was on the road at the time ACIS paid its owners.

4. ACIS Had No Right to Fire the Claimant

Charlie Reeves, and only Charlie Reeves, could terminate the Claimant and allow someone else to drive his truck.¹⁷

Turning now to the relative nature of the work test. As discussed above, this test involves the

¹⁵Employer/Carrier Exhibit "1", exhibit "b" thereto, pages 43 and 55.

¹⁶Employer/Carrier Exhibit "3", exhibit "c" thereto.

¹⁷Employer/Carrier Exhibit "1", exhibit "b" thereto, pages 43-44.

original question of whether the particular contractor is in fact independent in relation to the service which he/she is engaged to perform. These tests are methods to be utilized as an aid in determining whether there is a true independence. (Dunn, Miss. Workmen's Compensation, 2d Ed., s 131, p. 169 (1967).

1. The contract or engagement is not for a definite time or a specific piece of work

As stated, there was no agreement between ACIS and Mr. Tate, only an agreement between ACIS and Charlie Reeves which specifically detailed the independent contractual relationship between the parties. Additionally, this Agreement provided in Paragraph 13 that absent default, the term of the agreement was thirty-one (31) days and if neither party gave notice of intent to terminate, the Agreement would continue on a day to day basis subject to immediate cancellation at the option of either party.

2. The engagement is terminable at will

As discussed above, the term of the Agreement is set forth in Paragraph 13 of the Independent Contractor Operating Agreement.

3. The service has continued exclusively for the same employer for a substantial period

Again, Mr. Tate did not work "exclusively for the same employer for a substantial period". He testified that he had driven for Rodney Killgore and Mac Brown and confirmed that the only reason he drove for only one company/individual at a time is because federal regulations prohibit drivers from driving for more than one trucking company at a time.

As correctly argued by the employer/carrier, it is illogical that an employer/employee relationship can be forced upon ACIS who clearly had an independent contractor relationship with

Charlie Reeves who in turn hired and farmed out this task to claimant. Richardson v. APAC - Mississippi Inc., 631 So. 2d 143 (Miss. 1994), provides that a contract between two parties which creates an independent contractor relationship will be upheld as between those parties. The contract between Reeves and ACIS clearly reflects that these parties entered into an independent contractor relationship. Reeves contracting with the claimant does not change the relationship between ACIS and Reeves and cannot thereby create a binding relationship between the claimant and ACIS. This argument is circuitous and simply illogical because there is no connection between ACIS and Tate. Any claims which Mr. Tate might raise should be against Mr. Reeves, not ACIS.

Considering the factors in both tests and Dunn's discussion of same, it is the opinion of this Administrative Judge that on the date of the injury, Mr. Tate was not employee of ACIS as relates to Mississippi Workers' Compensation Law. For that reason, Employer and Carrier's Motion to Dismiss is granted and the claim of Mr. Lamar Tate for benefits is dismissed.

ORDER

IT IS, THEREFORE, ORDERED AND ADJUDGED that the claim of Lamar Tate is dismissed.

SO ORDERED on SEP 12 2008



ATTEST:

Phyllis C. Clark

Phyllis C. Clark, Commission Secretary
MWCC NO. 0702122-J-6947-C

Cindy P. Wilson
CINDY P. WILSON
ADMINISTRATIVE JUDGE