

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Rene Valdez,
Employee/Claimant,

OJCC Case No. 12-006304FTJ

vs.

Accident date: 9/15/2011

Soil Tech,
Employer,

Judge: Stephen L. Rosen

None,
Carrier/Servicing Agent.

_____ /

FINAL ORDER

This Cause came on for hearing before the undersigned Judge of Compensation Claims on July 10, 2015. The Claimant, René Valdez, was represented by Monica D. Cooper, Esquire. The Employer, Soil Tech Distributors, Inc., was represented by Andrew R. Borah, Esquire.

For purposes of this order, the employee will be referred to as "employee" or "claimant". The employer/carrier will be referred to as "employer" or "carrier" or "employer/carrier".

This Final Order resolves the Petitions for Benefits filed November 24, 2014.

All evidence was received and the record was closed on July 10, 2015.

Claim was made for the following:

1. By stipulation and order approving the process, this claim was bifurcated and the only issue before the undersigned was determination of compensability of the accident. If a ruling is made for the claimant on this issue, a subsequent hearing will be held to determine entitlement and amount of benefits with jurisdiction reserved to determine entitlement and amount of attorney's fees as well as reimbursement of costs after the subsequent hearing. If ruling is made for the employer on the issue of compensability, the order will then be a final order.

The claim was defended on the following grounds:

1. Claimant was not employed as an employee of the employer on the date of accident.
2. Claimant was an owner/operator or an independent contractor.
3. Claimant is not entitled to medical or indemnity benefits from this employer under the Florida workers' compensation law, nor is the claimant entitled to reimbursement of costs of litigation or attorney's fees at the expense of the employer.

The parties entered in the following stipulations:

1. I have jurisdiction of the parties and the subject matter of this claim.
2. Venue lies in the Fort Myers District through error and the parties stipulate that the action happened in Pinellas County. Because there is no JCC currently assigned in the Fort Myers District to hear this case, the undersigned was assigned to hear the case through the video teleconferencing process with the parties in Miami and the undersigned in St. Petersburg. Therefore, the undersigned is the correct JCC to preside over this case.
3. An incident occurred on September 15, 2011 but no benefits have been paid to the claimant under the Florida workers' compensation law.
4. On the date of accident, there was not a managed care arrangement in place.
5. The Petitions for Benefits were filed as noted elsewhere in this order.
6. If applicable, attorney's fees will be determined by hearing before a Judge of Compensation Claims.

The following documents were offered into evidence:

Judge's Exhibits:

1. Petition for Benefits, filed November 24, 2014.
2. Mediation conference report, filed March 24, 2015.
3. Pretrial Stipulation form in order approving Pretrial Stipulation form, filed April 29, 2015.
4. Claimant's trial memorandum (for argument only).

5. Employer's trial memorandum (for argument only).
6. Order on Unopposed Motion to Continue Final Hearing and Unopposed Motion to Bifurcate, filed July 8, 2015.

Employer/Carrier's Exhibits:

1. Owner operator contract/equipment lease contract/independent contractor certificate/release of liability composite exhibit. The Claimant objected to the admissibility of this document on several grounds, one of which was hearsay. However, the Claimant clearly identified his signature during the course of the hearing as well as in his deposition which was offered into evidence and the objection is overruled.
2. Deposition of the Claimant, René Valdez, taken May 6, 2015.

After reviewing all documentary evidence, hearing live testimony, and otherwise being fully apprised of the applicable case and statutory law, I find:

1. I have jurisdiction of the parties and the subject matter of this claim.
2. Actual venue lies in Pinellas County, Florida but because of prior stipulations and orders mistakenly made by the parties, venue actually lies in the Fort Myers District. However, sua sponte, I find it is immaterial as to the district which has jurisdiction. The parties have stipulated that the undersigned has jurisdiction of the parties and the subject matter.
3. The stipulations of the parties are adopted and shall become part of the findings of facts herein.
4. The documentary exhibits offered by the parties are admitted into evidence and shall become a part of the record herein.
5. The Claimant, René Valdez, is a native of Cuba. He has not worked since September 15, 2011, when he claims to have injured his back. Because the claim is bifurcated and the only issue to be determined by the undersigned is compensability, I will not go into detail regarding the incident of September 15, 2011 in this order.

6. The claimant testified through an interpreter. He began working as a driver for Soil Tech sometime in 2011. The business of Soil Tech is to transport aggregate material including sand, rock, and soil to areas around the State of Florida. In 2011, the company had depots in Miami and Tampa and also deposited materials in Orlando. The Tampa office had an extremely large gasoline tank.

7. The employer's composite exhibit clearly shows that the intent of the parties was entered into an agreement whereby the claimant was to become an owner/operator who transported materials from place to place on what appears to be a daily basis during the workweek. At the time of the signing of the contract, the claimant owned his own tractor and I accept the testimony of the employer representative that the claimant rented a trailer from the employer. I accept the testimony of the employer representative, Gadiel Cardona, that the claimant could have used this trailer to haul materials for other employers.

8. Claimant testified that he was not explained the contents of the document when he signed but I reject his testimony on this point. It is clear that the license of his tractor appears on the contract and I accept the testimony of the employer representative that the person who interviewed the claimant spoke Spanish. Additionally, the claimant's testimony shows that he had worked for at least one other employer under the same or similar circumstances as an owner/operator.

9. The claimant was paid by the ton of material he transported. The claimant would start from his home in Lehigh Acres, Florida and drive to Miami across the state. He would drop off a load that he had picked up the night before in Tampa and then get a new load to take to Orlando or Tampa. The testimony shows that at the end of the workday, the claimant would then head back to his home in Lehigh Acres. The next day he would start the process again.

10. I find that the terms of the contract were met by both the employer and the claimant. Deductions were made from the claimant's checks for fuel, trailer rental, and gasoline that the claimant purchased at the employer's premises in Tampa. I accept the testimony of the employer representative that the gasoline was sold to the owner/operators at a low cost and there was no

profit to the employer as a service. However, the testimony is clear that the claimant could have gassed up at any station he chose but he would still be responsible for payment. Any repairs to the claimant's tractor would be paid for by the claimant either directly or through deduction from his check by the employer. No taxes were deducted from the claimant's checks for any type of income tax.

11. Additionally, and of significance, it is undisputed that the employer would deduct \$42.00 per week from the claimant's check to pay for an occupational accidental insurance policy which would cover the claimant for medical and lost pay other than through Workers' Compensation. The testimony shows that the claimant availed himself of benefits of this after September 15, 2011 policy for medical and indemnity payments. It is unknown whether those payments continue or have been exhausted.

12. The employer attached a mileage counter to the claimant's tractor. Claimant was not paid by the mile. I accept the testimony of the employer representative that this mileage counter was used to keep track of owner operator's mileage so there would not be a misuse of the discounted gasoline purchased from the employer by these owner operators. I find that the attachment of this device is of no significance in determining whether or not there exists in an employer/employee relationship on September 15, 2011.

13. Claimant argues that regardless of the owner/operator contract, his activities with this employer work controlled with enough significance to establish an employee/employer relationship as opposed to the owner/operator status. However, I accept the testimony of the employer representative over that of the claimant which shows that the claimant could take whatever route he wanted to complete his daily tasks under the contract as long as the route was reasonably direct from place to place. The claimant was not required to work daily and could turn down jobs. The claimant could use the trailer that he rented from the employer to work for other employers. Claimant was not required to use the employer's gasoline. Because the claim was paid by the ton of material he hauled, it was in the best interest of the claimant to work as much as he could. The employer allowed him to do this. The claimant was not required to park his tractor/trailer at any particular place when he was not driving.

14. Based on the content of the contract signed by the claimant as well as a combination of the testimony the claimant and the employer representative, I accept the testimony of the employer representative and the 4 corners of the owner or operator contract and I find that the claimant was not an employee of this employer on September 15, 2011.

15. Because I find that the claimant was an owner/operator and not an employee of the employer on September 15, 2011, I further find that at least 3 of the criteria found in F. S. 440.02 (15) (d) (1) (b) have been met to satisfy attachment of the presumption that the claimant was an independent contractor on the date of incident. The claimant has failed to submit competent evidence to rebut this presumption. Therefore, I find that the claimant was also an independent contractor rather than an employee of the alleged employer on the date of incident.

WHEREFORE, I find that the claimant was an owner/operator as well as an independent contractor on September 15, 2011.

IT IS ORDERED that:

The Petition for Benefits filed November 24, 2014 for benefits under the Florida Workers' Compensation Law, including reimbursement of costs of litigation and attorney's fees at the expense of the employer, is **DENIED AND DISMISSED**, with prejudice.

DONE AND ORDERED this 13th day of July, 2015, in St. Petersburg, Pinellas County, Florida.



Stephen L
Rosen

Stephen L. Rosen
Judge of Compensation Claims
Division of Administrative Hearings

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