

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-131294

Employee: Floyd Butler
Employer: LaPlant Transport, Inc.
Insurer: Continental Western Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 2, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Maureen T. Tilley, issued September 2, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of June 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Floyd Butler

Injury No. 06-131294

Dependents: N/A

Employer: LaPlant Transport, Inc.

Additional Party: N/A

Insurer: Continental Western Insurance Co.

Hearing Date: June 5, 2008

Checked by: MT/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease? N/A
5. State location where accident occurred or occupational disease contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident happened or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer: None
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A
21. Amount of compensation payable: N/A
22. Second Injury Fund liability: N/A
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

On June 5, 2008, Mr. Butler, the employee, appeared in person and by his attorney, Shawn Hanschen, for a hearing for a final award. The employer was represented at the hearing by its attorney, Michael Margherio. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed

facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- Employer was a covered employer under the Missouri Workers' Compensation Act. Liability was fully insured by Continental Western Insurance Co.
- On or about December 28, 2006, the employee sustained an accident or occupational disease.
- Employer had notice of employee's accident.
- Employee's claim was filed within the time allowed by law.
- Employee's injury was medically causally related to an accident.
- There was no medical aid furnished by Employer-Insurer
- There was no temporary disability paid by the employer insurer.
- Nature and extent of disability was not an issue because this was a temporary hearing.

ISSUES

- Whether the employee was a covered employee.
- The employee's average weekly wage and rate

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Picture of ladder and scaffolding (this is not the ladder and scaffolding used by Mr. Butler)
- B. Copy of a check to "Floyd Butler" from "Charles LaPlant" for \$2,500 dated January 20, 2007
- C. Copies of 4 checks to "Floyd Butler". The first check was for \$300. This check was written by Charles LaPlant and was dated December 16, 2006. The second check was for \$500. This check was written by Charles LaPlant and was dated December 19, 2006. The third check was for \$200. This check was written by L.F. LaPlant and was dated December 26, 2006. The fourth check was for \$125. This was written by Charles LaPlant on January 6, 2007. All of the checks have "LaPlant Transport, Inc." on the top of them.
- D. Copies of invoice rentals from Show Me Rentals billed to LaPlant Transport, Inc.
- E. Bill to LaPlant Transport that has "Butler Home Improvements" on the top of the bill. The bill also has the following on the upper right hand corner:
 - Floyd Butler
 - 317 W. Pecan St.
 - East Prairie, Mo63845
 - (573)649-9047
- F. Bill to Floyd Butler for LaPlant Office Job. The bill was addressed to 317 W. Pecan St. East Prairie, MO 63845
- G. Deposition of L.F. LaPlant
- H. Deposition of Billy Crowe

There was another exhibit that was sent to the administrative law judge on June 20, 2008. This was marked employee's exhibit A. This exhibit will not be considered because it was not submitted by the employee's attorney on the day of the hearing.

Employer-Insurer's Exhibits

1. Time Sheet that is used at LaPlant Transport, Inc. by the employee's
2. A bill from "Butler Home Improvements" from Rosa LaPlant and a handwritten lists of jobs performed by Floyd Butler
3. Five bills to Mississippi County Library from "Butler Home Improvements"

FINDINGS OF FACT

Mr. Butler's Testimony

- The alleged employee, Floyd Butler, testified that he first worked for Charles LaPlant's mom at Charles LaPlant's parent's house.
- Mr. Butler testified that Charles LaPlant hired him to work on a building at LaPlant Transport, Inc.
- Mr. Butler testified that originally he was going to scrape and repaint the building.
- Mr. Butler testified that he has been a member of the carpenter's union since 1999.
- Mr. Butler testified that he did not get the job through the union.
- Mr. Butler testified that the materials that he used were paid for by the LaPlant's and that Mr. Butler did not purchase any material. He also stated that the scissor lift was paid for by the LaPlant's. He also stated that the scaffolding equipment, including the ladder jacks, walk board and one ladder were provided by the LaPlant's. He further testified that he used his own tools.
- Mr. Butler testified that he worked for LaPlant Transport, Inc. for four weeks. He testified that he did not work on holidays or days that rained.
- Mr. Butler testified that he was paid \$25 dollars an hour and he testified that he worked 40 hours a week unless it was a holiday or a rainy day. Furthermore he stated that he worked for LaPlant Transport, Inc. for four weeks.
- Mr. Butler testified that Billy Crowe and Randy Crowe, employees of LaPlant Transport, Inc., helped him eight hours a day.
- Mr. Butler testified that Charles LaPlant instructed him on what to do. L.F. LaPlant, Charles La Plant's father, would look and see what was going on with Mr. Butler's work.
- Mr. Butler testified that LaPlant Transport, Inc. signed his checks.
- Mr. Butler testified that he thought that L.F. LaPlant was the owner of LaPlant Transport, Inc.
- Mr. Butler testified that he worked at LaPlant Transport, Inc. for the month of December until he was injured.
- Mr. Butler testified that when he came to work, he would work all day.
- Mr. Butler testified that he believed that he was an employee of LaPlant Transport, Inc.
- Mr. Butler testified that L.F. LaPlant gave him instruction from time to time.
- Mr. Butler testified that he was paid by the hour. He also testified that he had no written contract with LaPlant transport, Inc.
- When Mr. Butler was questioned about Employee's Exhibit E, an invoice that has "Butler Home Improvements" written on the top and dated December 19, 2008. Mr. Butler stated that if he was not furnished a timesheet, he wrote on what was handy.
- Mr. Butler testified that his pay checks were made out to "Floyd Butler" and not to a business.
- Mr. Butler testified that Charles LaPlant and L.F. LaPlant did not tell him how to do his job. They did not tell Mr. Butler how to do the painting. Mr. Butler stated that someone showed him what needed to be done for the wall repair but they did not tell him how to do the wall repair.
- Mr. Butler stated that he has been in the Carpenter's Union since 1999. He stated that when he was paid through the union there were tax deductions from his paycheck. He stated that when he worked at LaPlant transport, Inc. he did not fill out a W2 form. He also stated that he never filled out an application to work at LaPlant Transport, Inc.
- Mr. Butler testified that Randy Crowe and Billy Crowe worked at LaPlant Transport, and they were almost always with Mr. Butler. Mr. Butler stated that they were not with him when they would go to lube a truck. Furthermore, when Mr. Butler was working at LaPlant Transport, Inc. he only saw 1 or 2 trucks pull into the

- building. Mr. Butler also stated that Randy Crowe and Billy Crowe helped with siding by holding up siding, but they did not help with painting. Mr. Butler also stated that they were working on siding for two to three weeks.
- Mr. Butler testified that he did not work on the trucks.
 - Mr. Butler testified that the scaffold board and the ladder jacks were not in his truck when he returned from the hospital.
 - Mr. Butler testified that on December 28, 2006 he was working on some scaffolding and the boards he was working on collapsed. Mr. Butler set up the scaffolding. Mr. Butler was to set up fascia board while he was on the scaffolding.
 - Mr. Butler testified that he injured the left side of his body. Mr. Butler went to St. Francis Hospital. Mr. Butler remained in St. Francis Hospital for four or five days.
 - Mr. Butler testified that his left foot continued to get worse. Mr. Butler further testified that a bone graft was performed on his left ankle and screws were used to tie this all together. Mr. Butler also stated that three weeks before the hearing it was determined that the bone graph had failed and there needed to be another bone graph.
 - Mr. Butler testified that he did not have insurance to pay for this.
 - Mr. Butler stated that he talked to Charles LaPlant about Workers' Compensation. He stated that Charles LaPlant told him that he did not want to use Workers' Compensation because if he did not use Workers' Compensation by May, money would be returned.
 - Mr. Butler testified that after Mr. Butler's injury, Charles LaPlant gave him a \$2,500 loan in order to help Mr. Butler pay off bills.

Testimony of Charles LaPlant

- Charles LaPlant testified that he is self employed and he is the president of LaPlant Transport, Inc. He testified that he is the only owner of LaPlant Transport, Inc. and that his father, L.F. LaPlant has no interest in the company.
- Charles LaPlant testified that his company covers 48 states. He also stated that his company employs 18 drivers, 2 mechanics, and 2 secretaries.
- Charles LaPlant testified that the mechanics' duties included preventative maintenance, working on tires, and working on breaks.
- Charles LaPlant testified that in December of 2006 Billy Crowe had worked at LaPlant transport for 6 months and Randy Crowe had worked at LaPlant Transport for 2 ½ years.
- Charles LaPlant testified that he rents the building at LaPlant Transport, Inc. from his father for \$1000 per month.
- Charles LaPlant testified that in December of 2006 he did not hire Mr. Butler to do painting or wall repair.
- Charles LaPlant testified that when Mr. Butler was working on the property of LaPlant Transport, Mr. LaPlant's father was in Texas for part of this time because his father was taking his mother to get cancer treatment.
- Charles LaPlant testified that he received only one invoice that had "Butler Home Improvements" written on the top of it.
- Charles LaPlant testified that on 12/16 and 12/19 he wrote checks to Mr. Butler from LaPlant Transport, Inc. He stated that he wrote these checks because his father was out of State.
- Charles LaPlant testified that he thought that Mr. Butler was working on the property of LaPlant Transport. Mr. Butler was there for no more than five days.
- Charles LaPlant testified that he did not supervise Mr. Butler when he was working at the shop.
- Charles LaPlant testified that Mr. Butler did not start working until the scissor lift arrived. Furthermore, he stated that the mechanics helped Mr. Butler approximately one hour a day. He stated that the mechanics were needed and could not be spared most of the time. He also stated that he knew that Randy Crowe and Billy Crowe were helping Mr. Butler when they had slack time. He also stated that he did not give Randy Crowe or Billy Crowe any instructions on how to help Mr. Butler.
- Charles LaPlant testified that he paid for the rental of the scissors lift.
- Charles LaPlant testified that LaPlant Transport paid for the rental of the metal brake. Charles LaPlant stated that he paid this bill after Mr. Butler was repeatedly sent bills for the rental of the metal brake. He stated that the rental company told him that they had repeatedly billed Mr. Butler.
- Charles LaPlant testified that LaPlant Transport, Inc. did not pay for the ladder jacks, walk board, or ladders.
- Charles LaPlant testified that he was present the day of Mr. Butler's accident but he did not see Mr. Butler fall.

- Charles LaPlant testified that Mr. Butler did not work the week before the fall.
- Charles LaPlant testified that on January 20, 2007 he gave Mr. Butler an advance for future work on the roof of his home. Furthermore, Charles LaPlant stated that he did not have any further conversations with Mr. Butler after January 20, 2007.
- Charles LaPlant testified that all of the employees that worked for LaPlant Transport, Inc. were paid on Friday. He also stated that Mr. Butler was paid on December 26, 2006, which was a Saturday.
- Charles LaPlant testified that on the date of the accident he did not help Mr. Butler.
- Charles LaPlant stated that when Mr. Butler asked him if it would be possible for Mr. Butler to file a Workers' Compensation claim, Charles LaPlant told him that it was only possible to file a claim if you are a covered employee.
- Charles LaPlant testified that he paid Mr. Butler on January 20, 2007. Charles LaPlant explained that this was an advance in pay for work that needed to be done on Charles' roof at his house. (Employee's Exhibit B is a copy of this check.)
- Charles LaPlant testified that his father pays him \$1000 per month for rent of the building that LaPlant Transport, Inc. uses. Charles LaPlant testified that his father receives a 1099 at the end of the year because of the rent paid to his father. He further stated that if he paid a bill for his father he would be reimbursed by paying less rent.
- Charles LaPlant testified that he never instructed Mr. Butler on how to work for any specific project.
- Charles LaPlant testified that he did not have authority to fire Mr. Butler.
- Charles LaPlant testified that Mr. Butler worked beginning December 14, 2006 and he worked through December 19, 2006.
- Charles LaPlant testified that when he is absent his father can make decisions. He also stated that his father is authorized to sign checks in his absence.
- Charles LaPlant testified that he told Mr. Butler that he would receive money back if Mr. Butler did not file a claim.
- Charles LaPlant testified that Billy Crowe and Randy Crowe have built a room in his father's shop in the past.
- Charles LaPlant testified that he did not purchase a spray gun and walk board that Mr. Butler used.
- Charles LaPlant was asked if he knew whether Mr. Butler came and went as he pleased. Mr. LaPlant responded by stating that he did not check on Mr. Butler to see if he was there.

Deposition Testimony of L.F. LaPlant

- L.F. LaPlant stated that in October or November of 2006 he had paid Mr. Butler to work at his house. He also stated that he paid Mr. Butler \$25 dollars an hour to work on his house. Furthermore, there was no written contract. Mr. Butler worked on L.F. LaPlant's kitchen, Mr. Butler installed a cabinet and microwave, and Mr. Butler worked on Mr. LaPlant's ceiling.
- L.F. LaPlant stated that he owns the building at LaPlant Transport, Inc. He stated that he leases the building to his son, Charles LaPlant, for \$1000 per month. He also stated that he is not an employee of LaPlant Transport, Inc.
- L.F. LaPlant stated that the building that he rented to his son needed to be painted. When asked whether he was the one who contacted Mr. Butler to paint the building, L.F. LaPlant stated "I guess I contacted him and told him I had some painting to do". L.F. LaPlant also stated that he told Mr. Butler that he wanted siding fixed on the south end of the building and he wanted the building painted.
- L.F. LaPlant stated that Mr. Butler was supposed to fix a wall on the building and hang siding. He also stated that originally Mr. Butler was going to paint the building but then it was decided that the wall would not hold paint.
- L.F. LaPlant stated that he did not give Mr. Butler instructions about what time Mr. Butler needed to show up in the morning, what time Mr. Butler needed to take lunch, or what time Mr. Butler needed to stop working.
- L.F. LaPlant stated that there was no written contract with Mr. Butler. The agreement was for Mr. Butler to work for \$25 an hour.
- L.F. LaPlant stated that he paid Mr. Butler \$700 and he thinks his wife may have paid Mr. Butler \$780. He also stated that he thinks Charles may have paid Mr. Butler while L.F. LaPlant was in Texas.
- L.F. LaPlant stated that he rented the scissor lift that Mr. Butler used. He also stated that he did not rent any

scaffolding.

- L.F. LaPlant stated that he took the scaffolding that Mr. Butler was using and put it inside the shop. He stated that two or three days later he took the scaffolding to Mr. Butler's house. He stated that the scaffolding was inside Mr. Butler's pickup when he took it to

Deposition Testimony of Billy Crowe

- Randy Crowe stated that he is a certified auto mechanic. He works on a little bit of everything including welding and tires.
- Randy Crowe stated that Charles LaPlant is his boss. Charles LaPlant is the person who tells him what to do. He also stated that L.F. LaPlant told him that if Mr. Butler needed some help, it would be alright to help him.
- Randy Crowe stated that he helped Mr. Butler with a frame on a door. He also helped Mr. Butler with the siding by lifting up one end of the siding to work the siding in place.
- Randy Crowe stated that Mr. Butler had his own tools. He also stated that he used Mr. Butler's tools when he helped Mr. Butler.
- Randy Crowe stated that he has done some carpentry work for LaPlant Transport, Inc. in the past. He built a "race room". This is a room that was used to store a race car.
- Randy Crowe stated that he did not help Mr. Butler set up the scaffolding.
- Randy Crowe stated that he helped Mr. Butler for about two to three hours spread throughout the day. He stated that he did not help Mr. Butler every day that Mr. Butler worked at LaPlant Transport, Inc. He stated that he helped Mr. Butler for three of the days that Mr. Butler was there.
- Randy Crowe stated that he had never seen L.F. LaPlant meet with customers, make purchases, or write checks at LaPlant Transport.
- Randy Crowe stated that if he had questions he would usually ask Charles LaPlant. If Charles LaPlant was not there he would sometimes ask L.F. LaPlant questions because L.F. LaPlant had been in the trucking business for a long time.

Randy Crowe's Testimony

- Randy Crowe, an employee at LaPlant Transport, Inc., testified that he had worked at LaPlant Transport Since December of 2006.
- Randy Crowe testified that he would service about two or three trucks a day. Each truck would take about an hour and a half to service.
- Randy Crowe testified that he was paid \$9 an hour. He also testified that Medicare and taxes were deducted from his paycheck.
- Randy Crowe testified that Mr. Butler did not help him work on the trucks.
- Randy Crowe testified that his other duties were to get the tires ready before the trucks arrive and to clean up the shop after the trucks leave.
- Randy Crowe testified that he helped Mr. Butler hold up siding. He also testified that it took about ten minutes to help Mr. Butler with the vinyl. He would help Mr. Butler with the vinyl a couple of times a day. Furthermore, he testified that in total he helped Mr. Butler about an hour a day for five days.
- Randy Crowe testified that he is not a trained carpenter.
- Randy Crowe testified that he never went up on the scissor jack but his brother had gone up on the scissor jack.
- Randy Crowe testified that he did not do any painting with Mr. Butler.
- Randy Crowe testified that after Mr. Butler fell, he put the walk board and ladder jacks in Mr. Butler's truck and took the truck to Mr. Butler's house.
- Randy Crowe testified that when Charles LaPlant was not at work, L.F. LaPlant sometimes told him what to do.
- Randy Crowe testified that Charles LaPlant checked on Mr. Butler's work
- Randy Crowe testified that several years ago he helped build the "race room" at LaPlant Transport, Inc.
- Randy Crowe testified that that he was certain that Mr. Butler only worked at LaPlant Transport for 4 or 5 days.

APPLICABLE LAW

- Section RSMO 287.020.1 defines an employee as “every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations”.
- To determine whether an employment relationship exists, Missouri courts first apply a two factor test sometimes referred to as the “controllable services test.” *Lynn v. Lloyd A. Lynn, Inc.*, 493 S.W.2d 363 (Mo.App.1973).
- Under the controllable services test, the worker must first be found to have been “in the service of” the alleged employer, and second, the services of the worker must be controllable by the alleged employer. The employment relationship contemplated by the workers' compensation law is peculiarly characterized by the right vested in the employer to control the employee. To be considered an employee, a worker must be subject to the alleged employer's control with respect to the worker's physical conduct and their performance of the service in question. The right in question is the right to control the manner and means of the employee's service, as distinguished from the right to control the ultimate result of that service. *Howard v. Winebrenner*, 499 S.W. 2d, 389 (Mo.App.1973).
- Missouri courts typically apply the “right to control” test to determine whether a worker is an employee or independent contractor. The employer must have the right to control the means and the manner of the service, not just the ultimate result of the service. The courts consider eight factors when making the determination: (1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right to discharge, (5) the method of payment (6) the degree to which the alleged employer furnished equipment (7) the extent to which the alleged employment is the regular business of the employer, and (8) the employment contract”. *Nunn v. C.C. Midwest*, 151 S.W.3d 388, 400 (Mo. App. W.D. 2004).
- The actual exercise of control, the extent of control, the duration of employment, method of payment for services, the furnishing of equipment to the worker by the employer, the relationship of the services to the regular business of the employer, and the contract of employment are all relevant factors to be considered when attempting to ascertain the existence or the right of control. *Hutchison v. St. Louis Altenheim*, 858 S.W.2d 304 (Mo.App.1993).
- Even though each case must be decided on the basis of its particular facts, no singular finding is more conclusive of the existence of an employment relationship than the existence of the employer's unrestricted right to end the service of the worker whenever it chooses to do so, without regard to the final result of the work itself. *Maltz v. Jackoway – Katz Cap Company*, 82 S.W.2d 909 (Mo.App.1935).
- The right of an employer to fire an employee without incurring breach of contractual liability is an indication of the existence of an employment relationship. *Cope v. House of Maret*, 729 S.W.2d 641 (Mo.App.1987).
- If the application of the controllable services test fails to clearly indicate whether an employment relationship exists, Missouri courts can undertake a secondary consideration of the factors included in what is commonly referred to as the “relative nature of the work test.” In the “relative nature of the work test” the right to control needs only to be commensurate with the supervision appropriate to the kind of work to be done and the skill to do it. *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo.App.1979).
- The “relative nature of the work” test moves from the right to control to “the economic and functional relationship between the nature of the work and a business' operation. Factors considered are: “how much skill that a claimant's work requires, how much of a separate calling or enterprise it is, to that extent the job might be expected to carry its own accident burden.” The test also focuses on whether the job is being performed intermittently or continuously and whether the “duration amounts to the hiring of continuous services rather than a contract for completion of a particular job”. *Leach v. Board of Police Commissioners of Kansas City*, 118 S.W. 3d 646, 649 (Mo.App. W.D. 2003).
- Section 287.040.1 RSMO states that a statutory employee is “any person who has work done under contract on or about his premises which is an operation of the usual business which there carries on shall be deemed an employer and shall be liable under this chapter to such contractor...when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business”. Section 287.040.1 RSMO further states that this does not apply to “the owner of the premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor”.

RULINGS OF LAW:

Issue 1. Covered Employee

1. Controllable Service Test

In determining whether Mr. Butler was an employee, the controllable service test should be applied. Under the controllable service test, the worker must first be found to have been “in the service of” the alleged employer. Secondly, the services of the worker must be controllable by the alleged employer.

There was an appearance that Mr. Butler “in the service of” LaPlant Transport, Inc. Mr. Butler was paid by checks that had “LaPlant Transport, Inc.” on the top of them. Also, the building that Mr. Butler was working on was on LaPlant Transport, Inc. premises. Although L.F. LaPlant, the person who hired Mr. Butler for the job, was not an employee of LaPlant Transport, Inc., he was there often and could be mistaken for an employee.

In order to analyze the second part of the Controllable Service Test, many courts use the “right to control” test in order to determine whether the worker was an employee or an independent contract. Eight factors are considered when making this determination:

(1) The extent of control and (2) the actual exercise of control:

Mr. Butler testified that Charles LaPlant instructed him on what to do. L.F. LaPlant, Charles La Plant’s father, would look and see what was going on with Mr. Butler’s work. However, Mr. Butler testified that Charles LaPlant and L.F. LaPlant did not tell him how to do his job. They did not tell Mr. Butler how to do the painting. Mr. Butler stated that someone showed him what needed to be done for the wall repair but they did not tell him how to do the wall repair. Also, Charles LaPlant testified that he did not supervise Mr. Butler when he was working at the shop. The extent of control and the actual exercise of control are factors that are not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(3) The duration of employment:

Mr. Butler testified that he worked at LaPlant Transport, Inc. for four weeks. However, Randy Crowe testified that that he was certain that Mr. Butler only worked at LaPlant Transport, Inc. for four or five days. With such a wide discrepancy in the witness’s statements regarding the duration of Mr. Butler’s work at LaPlant Transport, Inc., it is important to look at objective evidence. Employee’s exhibit C, checks to Mr. Butler, provides objective evidence of dates of employment. Employee’s exhibit C consists of copies of four checks to “Floyd Butler”.

The first check was for \$300. This check was written by Charles LaPlant and was dated December 16, 2006. The second check was for \$500. This check was written by Charles LaPlant and was dated December 19, 2006. The third check was for \$200. This check was written by L.F. LaPlant and was dated December 26, 2006. The fourth check was for \$125. This was written by Charles LaPlant on 1-6-07. All of the checks had “La Plant Transport Inc.” on the top of them.

Mr. Butler was injured on December 28, 2006. Also, it appears that Mr. Butler was paid frequently. The first check was written on December 16, 2006. Therefore, even if Mr. Butler began working at LaPlant Transport, Inc. a week before he was first paid, he would have worked there less than 2 ½ weeks.

The duration of employment is a factor that is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(4) The right to discharge:

There was no written contract. Therefore it appears that Mr. Butler could be discharged at any time.

The right to discharge is a factor that is in favor of Mr. Butler being an employee of LaPlant Transport, Inc.

(5) The method of payment:

As stated previously, Mr. Butler was paid by checks. Some of the checks written by from Charles LaPlant and the other check was from L.F. LaPlant. L.F. LaPlant was in Texas with his wife who had cancer during part of the time Mr. Butler was working on the premises of LaPlant Transport. L.F. LaPlant testified that during this time period he had Charles LaPlant write the checks for him. The payment appeared to be sporadic. There was no set schedule for payment and each payment was for a different amount. Mr. Butler was paid \$25 per hour.

Although the checks were paid to Mr. Butler, there was an invoice (Exhibit E) that has “Butler Home Improvements” written on the top and dated December 19, 2008. When questioned about this invoice, Mr. Butler stated that if he was not furnished a timesheet, he wrote on what was handy. Mr. Butler stated that when he worked at LaPlant transport he did not fill out a W2 form.

The method of payment is a factor that is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(6) The degree to which the alleged employer furnished equipment:

Mr. Butler testified that the materials that he used were paid for by the LaPlant’s and that Mr. Butler did not purchase any material. He also stated that the scissor lift was paid for by the LaPlant’s. Mr. Butler further testified that he used his own tools. Mr. Butler also testified that he was provided with the scaffolding equipment.

Charles LaPlant testified that he paid for the rental of the scissors lift and the metal brake. However, Charles LaPlant testified that he did not provide Mr. Butler with the scaffolding equipment. Charles LaPlant testified that originally the metal brake was billed to Floyd Butler. Charles LaPlant stated that he paid the bill after Mr. Butler failed to pay the bill. Exhibit F is a copy of the bill for the metal brake. The bill has Floyd Butler’s name on it with the words “for LaPlant Office Job” is next to his name. However, “for LaPlant Office Job” appears to be written in handwriting that is nowhere else on the bill. In other words, “for LaPlant office job” appears to be added on to the bill. Furthermore, the address on the bill is to Mr. Butler’s home address, 317 West Pecan St. East Prairie, MO. This is the same address that is on Exhibit E, which is a bill from Butler Home Improvements.

The degree to which the alleged employer furnished equipment is a factor that is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(7) The extent in which the alleged employment is in the regular business of the employer:

Charles LaPlant testified that his company covers 48 states. He also stated that his company employs 18 drivers, 2 mechanics, and 2 secretaries. Charles LaPlant testified that the mechanics duties included preventative maintenance, working on tires, and working on breaks. Although the mechanics helped build a “race room”, they did not perform construction as part of their daily activities. Billy Crowe and Randy Crowe both stated that they helped Mr. Butler in between their mechanic work. Mr. Butler stated that Billy Crowe and Randy Crowe helped him eight hours a day. Mr. Butler’s statement appears to be unlikely because there were only two mechanics with 18 drivers. Mr. Butler was hired to repair the outside of a building. The job had nothing to do with the regular business of LaPlant Transport, Inc. The extent in which the alleged employment is in the regular business of the employer is a factor that is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(8) The employment contract:

L.F. LaPlant had hired Mr. Butler to do odd jobs in the past. L.F. LaPlant stated that in October or November of 2006 he had paid Mr. Butler to work at his house. He also stated that he paid Mr. Butler \$25 dollars an hour to work on his house. Furthermore, there was no written contract in any of these odd jobs. Mr. Butler worked on L.F. LaPlant’s kitchen, installed a cabinet and microwave, and worked on L.F. LaPlant’s ceiling. L.F. LaPlant stated that he hired Mr. Butler. Charles LaPlant stated that he was not the person who hired Mr. Butler. Mr. Butler stated that Charles LaPlant hired him. Although Floyd Butler and Charles LaPlant did not appear to be credible witnesses, L.F. LaPlant’s deposition testimony did appear to be credible.

Even if Mr. Butler believed that L.F. LaPlant was an employee for LaPlant Transport, Inc., Mr. Butler's past dealings with L.F. LaPlant are further evidence that Mr. Butler was not an employee of LaPlant Transport, Inc. Mr. Butler's past dealings with L.F. LaPlant were for specific jobs that were personal in nature. When L.F. LaPlant hired Mr. Butler to repair the building at LaPlant Transport, Inc., Mr. Butler did not fill out an application to work for LaPlant Transport, Inc. Although there was not a written contract between them, there was an oral agreement.

The employment contract is a factor that is not favorable to Mr. Butler being considered an employee at LaPlant Transport, Inc.

Conclusion

After reviewing the eight factors listed above, I find that Mr. Butler is not an employee under the controllable service test. Mr. Butler testified that Charles LapLant and L.F. LaPlant did not tell him how to do his job. Also, Mr. Butler worked on the premises of LaPlant Transport, Inc. for a brief period of time. Mr. Butler was paid sporadically which is further evidence that he was not an employee. Also, there was an oral agreement between Mr. Butler and L.F. LaPlant for Mr. Butler to be hired for a specific job. Although Mr. Butler was furnished some equipment, he used his own tools, which is evidence that he was an independent contractor.

Mr. Butler was paid by checks that had "LaPlant Transport, Inc." on top of them. Three of the checks were written by Charles LaPlant because L.F. LaPlant was in Texas with his wife who was seeking medical treatment. Even if it appeared that "LaPlant Transport" Inc. was the one paying Mr. Butler, it is apparent that he was not as an employee because Mr. Butler was hired to do a specific job that was entirely unrelated to the trucking business that was operated at LaPlant Transport, Inc.

2. Relative Nature of the work test:

The relative nature of the work test focuses on several factors in determining whether the worker is considered an employee.

(A) How much skill that a claimant's work requires:

Mr. Butler's skill as a carpenter requires knowledge that is not related to the trucking industry. The skill that Mr. Butler's work requires is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(B) How much of a separate calling or enterprise it is:

LaPlant Transport, Inc. was a trucking company. Mr. Butler's job of repairing the outside of the building at LaPlant Transport, Inc. was completely separate from the trucking business at LaPlant Transport, Inc.

Mr. Butler's job at LaPlant Transport, Inc. was a separate calling and enterprise, therefore this factor is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(C) The extent the job might be expected to carry its own accident burden:

Mr. Butler's job, repairing the outside of the building at LaPlant Transport, Inc., carried its own accident burden. Mr. Butler was working with tools and equipment that were not usually used at LaPlant Transport, Inc.

The extent the job might be expected to carry its own accident burden is a factor that is not in favor of Mr. Butler being considered an employee at LaPlant Transport, Inc.

(D) Whether the job is being performed intermittently or continuously:

Mr. Butler stated that he worked for four weeks at LaPlant Transport, Inc., except for holidays and rainy days. However, Employees Exhibit C, checks paid to Mr. Butler from LaPlant Transport, Inc., does not coincide with Mr. Butler's testimony. The checks appear to be written for various amounts of money and they are not written on a

weekly basis.

The factor of whether the job is being performed intermittently or continuously is not in favor of Mr. Butler being considered an employee of LaPlant Transport, Inc.

(E) Whether the duration amounts to the hiring of continuous services rather than a contract for completion of a particular job.

Although there was not a contract, Mr. Butler was hired to complete a specific job for a short period of time and Mr. Butler was not hired to perform a continuous service for LaPlant Transport, Inc. The factor of whether the duration amounts to the hiring of continuous services rather than a contract for completion of a particular job is not in favor of Mr. Butler being considered an employee.

Conclusion

After analyzing all of the factors under the relative nature of the work test, I find that Mr. Butler is not an employee of LaPlant Transport, Inc.

3. Statutory employee:

Mr. Butler is not a statutory employee because the job of fixing the building at LaPlant Transport, Inc. is not an operation of the usual course of business for LaPlant Transport, Inc.

Conclusion

I find that Mr. Butler was not an employee of LaPlant Transport, Inc. was not an employee under the controllable service test or the relative nature of the work test. I also find that Mr. Butler was not a statutory employee under RSMO 287.040.1. The employee's claim for compensation is therefore denied.

Based on this denial, the remaining issues are moot and shall not be ruled on.

Date: _____

Made by:

Maureen T. Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation