

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 2, 2015

CLAIM NO. 201279781

PRAETORIAN INSURANCE COMPANY

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

LUIE WHITAKER FREIGHT AGENCY
HOUSTON WHITAKER, DECEASED
BRITTANY WATKINS, WIDOW
GUARDIAN OF HOUSTON B. WHITAKER
AND CAROLINE P. WHITAKER
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Praetorian Insurance Company ("Praetorian") appeals from the March 27, 2015, Opinion, Award, and Order and the May 30, 2015, Order on Petition for Reconsideration of Hon. R. Roland Case, Administrative Law Judge ("ALJ"). In the March 27, 2015, Opinion, Award,

and Order, the ALJ determined Houston Whitaker's ("Houston") death is work-related and entered the following Award:

1. The Plaintiff shall recover from the Defendant, Luie Whitaker Freight Agency, and/or its insurance carrier, death benefits which shall be payable to the estate of Houston Whitaker in a lump sum of \$72,313.24.

2. The Plaintiff shall recover from the Defendant, Luie Whitaker Freight Agency, and/or its insurance carrier, death benefits which shall be payable to Brittany Watkins, the sum of \$552.14 per week from June 29, 2012 to January 5, 2013.

3. The Plaintiff shall recover from the Defendant, Luie Whitaker Freight Agency, and/or its insurance carrier, two (2) years indemnity benefits upon her remarriage on January 5, 2013, in a lump sum amount of \$34,454.16, which shall be payable to Brittany Watkins.

4. The Plaintiff shall recover from the Defendant, Luie Whitaker Freight Agency, and/or its insurance carrier, death benefits commencing on January 5, 2013 which shall be payable to the children, Houston B. Whitaker and Caroline P. Whitaker, the sum of \$478.52 per week as long as both children remain dependent and when one child ceases to be dependent the sum of \$368.10 per week until that remaining child ceases to be dependent. These benefits will cease as provided in KRS 342.750(1)(e).

On appeal, Praetorian asserts the ALJ erred in his application of W.R. Grace & Co. v. Payne, 501 S.W.2d 252 (Ky. 1973) to the facts in the case *sub judice* and by ultimately finding Houston's death is work-related.

The Form 101 alleges Houston sustained head trauma resulting in death within the scope and course of his employment with Luie Whitaker Freight Agency on June 29, 2012, in the following manner: "Houston Whitaker was working under a truck, when it slipped off its supports and landed on Mr. Whitaker, resulting in Mr. Whitaker's death."

On June 16, 2014, Brittany Watkins, Houston's widow, filed a Motion to Amend Form 101 to add herself, as Administratrix of the Estate of Houston Whitaker, as a party. By order dated July 1, 2014, Watkins' motion was sustained.

Debbie Whitaker ("Debbie"), Houston's mother, was deposed on April 28, 2014. At the time of Houston's fatal injury, Debbie was part-owner and secretary-treasurer of Luie Whitaker Freight Agency, a freight broker that worked on trucks, semis, and trailers. She testified as follows:

[W]e would get freight from shippers and give them- and find a truck and then we would get paid a percentage. And then as far as the working on trucks, we had a per hour charge that we charged for working on people's

equipment. Luie Whitaker Freight did not own any equipment.

Debbie also did payroll for R & W Logistics ("R & W). She explained:

My role was to do the payroll, the billing, and R and W Development is a warehouse. We warehouse for different companies and we bring their product in, keep up with the inventory, and ship it out as they needed it.

Houston worked for both companies. Debbie described his duties as follows:

Q: Tell us, first of all, with Luie Whitaker Freight, what were his job duties.

A: Well, a typical day would be he would come in. We came in at 7:00 and we would go through the freight and line out trucks, and when we would get through the busy part of it, he would go out into the shop and if there was a truck in the shop, he would work on that to, you know, fix it.

Q: He would do the dispatching as well as the mechanic work on trucks and trailers?

A: Yes, he did.

Q: Would those be the two main duties with-

A: Luie Whitaker Freight.

Q: - Luie Whitaker Freight?

A: Yes.

Q: And, now, separate and apart from that, was his other work with your other company- tell us about R and W Logistics. Tell us what he did with that company.

A: Okay. So I can tell you this, the warehouse has three sections in it. The first is the office section, which Luie Whitaker Freight was in. The second part was the shop where they worked on the trucks, Luie Whitaker Freight, and then you had a different section that was attached to it that was the warehouse, and Houston would receive faxes from our customers and he would go and put the loads together, scan them in, and when a truck would show up, he would- they would put it on the truck. It was strictly warehousing.

On the day of Houston's fatal injury, he was repairing a Mack truck, truck #5914, owned by T & M Trucking ("T & M"). While viewing a picture of the Mack truck implicated in Houston's fatal injury, Debbie testified:

Q: Is this the truck?

A: Yes, it is. It is, and as you can see, it says Mack and it was owned by T and M Trucking. 5914 signifies that it was a T and M truck. That's the way it was kept up.

...

A: Can I say one more thing?

Q: Yes.

A: This was taken by one of the sheriff's deputies at the time of the accident. This is the truck that was setting there when the accident happened.¹

Regarding the certificate of title for the Mack truck involved in Houston's fatal injury, Exhibit #4 to her deposition, Debbie testified as follows:

Q: Now, is this the title to the truck, picture of the truck that I just introduced?

A: Yes, sir, it is.

Q: All right, and this is T and M Trucking, 410 Highway 136 East, Calhoun, Kentucky. Is that correct?

A: '86 Mack.

Q: '86 Mack. Where did you obtain this? Who did you obtain this title from?

A: T and M, I had them.

Q: You had it before the accident?

A: Yes.

Luie Whitaker Freight Agency regularly did business with T & M. Debbie testified as follows:

Q: Were they one of your more prominent customers?

A: Yes, one of our main customers.

Q: One of your main customers?

¹ The picture of the Mack truck was made Exhibit 3 to Debbie's deposition.

A: Yes.

Debbie provided the following testimony regarding the day of Houston's fatal injury:

Q: Okay, let's back up and go back to June 29th. I know this may be somewhat painful for you, but we need to go into detail as far as what happened on that date and what you knew and where you were. First of all, typically what time did Houston go to work?

A: 7:00 a.m.

Q: Was that-

A: Every day.

Q: Every day that was his regular routine?

A: Yes. We all went to work at 7:00, yes.

Q: And you testified earlier that he was working on the T and M truck that we've previously identified.

A: Yes.

Q: And the time of the accident was? The approximate time, what was that?

A: Around nine o'clock.

Q: Nine o'clock, okay. And he wore several hats but at the time of the accident he was working as a mechanic.

A: Right. He had come in at 7:00. He and I had gone through the loads for Luie Whitaker Freight, assigned trucks and then he went into the shop and was working on a truck that was a T and M truck.

Debbie responded to the allegation that Houston, at the time of his fatal injury, was working on a truck owned by SKH Transportation, Inc. ("SKH") testifying as follows:

SKH owns two trucks. One was in Corydon, Indiana, which I sent Mr. Houston a copy of the log that he asked for from the driver. The other truck, the engine was blown, was setting out on the lot. We could not have started the truck to even move it in had we wanted, and Luie Whitaker Freight, if and when they worked on a SKH truck, they billed for the labor and Houston was paid under Luie Whitaker Freight. The truck numbers for the SKH trucks started with 58. All lease trucks start with 58. All T and M start with 59.

Debbie testified Houston was the vice-president of SKH. Regarding the two trucks SKH owned, she testified as follows:

Q: I take it that Luie Whitaker regularly deals with SKH Transport; is that correct?

A: Yes.

Q: And-

A: They worked on their trucks.

...

Q: How, Houston was an officer of SKH, wasn't he?

A: Yes.

Q: Did SKH have any employees?

A: No.

Q: Was there anybody else that worked for SKH other than Houston?

A: No.

Q: Who drove SKH's trucks?

A: They were leased to- the trucks were leased to R and W- well, I'm sorry, T and M Trucking and the- let me back up. Let me start over. SKH had no employees. They had two trucks and they were leased to R and W which paid them and did everything to them, and then they were leased over-the-road to T and M Trucking for authority. R and W used them for shuttling product back and forth from the customer to the warehouse also.

Q: And would SKH's trucks also have shown T and M, Incorporated on the side-

A: Yes.

Q: - since they're operating under T and M's authority?

A: Under the authority, yes.

Q: Okay. And the one truck that you said had the blown out engine that was on the lot, how long had it been there; do you know?

A: Not very long. As a matter of fact, we had to have a wrecker pick it up and take it to a facility to have it fixed after Houston was killed.

Q: When was it taken off the lot; do you know?

A: Probably- the SKH truck?

Q: Yes, ma'am.

A: Probably, and this is a guess, a month.

Q: About a month after Houston's accident?

A: Yes. It was setting on the lot during the accident out in the big lot.

Debbie provided the following testimony concerning the agricultural business known as H.B. Whitaker Farms:

Q: Did H.B. Whitaker Farms own pieces of equipment which might have been operated, or excuse me, which might have been repaired from time to time in the shop?

A: That was after hours. H.B. Whitaker Farms has a, I guess you call it, a toolshed, would that be the correct word, where the equipment was stored and then there was- there was actually two buildings owned by the farm that they- that's where the equipment stayed out on the Nally Farm and out on the, you know, local people call them local names, and then the one at ours, at our home, had a toolshed, and if he did- normally, when he worked on a piece of equipment is when you're out in the middle of a field and it broke down, but yes, I mean, he could have brought- he would bring them in like at night maybe or a friend, but it was on his time not while he was under our time.

Q: And when you say 'our time,' you're referring to-

A: Luie Whitaker Freight and R and W.

Q: Was the 5914 Mack truck used for agricultural reasons, for farming reasons?

A: I don't know. I know it was used some to shuttle loads back and forth from Owensboro to the warehouse. It could have. I don't know. I mean, where I sat in my office I really don't see, I couldn't even see the trucks coming in and out and it could have hauled, you know, something. The only thing it would have hauled- I don't know what it would have hauled, but anyway, yes, it could have.

Q: Do you have any written communication either from T and M Trucking, Inc. or to T and M Trucking, Inc. which stated the ownership of the truck involved in the accident on June 29 of 2012?

A: The only thing I had was the title that you have.

The November 14, 2014, sworn statement from Tom Ruppel ("Ruppel"), who owns T & M, was filed in the record. After Houston's fatal injury, he visited Luie Whitaker Freight Agency. His statement contains the following:

Q: What was your reason?

A: To see what truck it was and also I went down to visit, to see Luie and Debbie. I went down there, not mainly, but to see what truck did fall on him, and I was told it was that International that Houston had and was still there.

Q: So you were told that an International truck fell on Houston?

A: Yes, I was.

Q: What International truck are we talking about?

A: It's the only one they had leased to us.

Q: So it was [sic] truck owned by...?

A: SKH.

Q: SKH, Houston Whitaker?

A: That's correct.

Q: They had leased that vehicle to you?

A: Yes.

Q: That was the truck that had fallen on him, the one that they had leased to you?

A: That's what I was told.

Q: So this was not a T & M truck?

A: Absolutely not.

Q: This was Houston Whitaker's own truck?

A: That's correct.

...

Q: So they showed you the truck that fell on him?

A: Yes.

Q: And it was an International truck?

A: That's correct.

Q: And it was Houston's own truck?

A: Yes.

Q: And when you say they showed it to you, who showed it to you?

A: The men working there in the garage.

Q: Do you remember their names?

A: I'm trying to think. It's been so long since I thought of his name.

Q: There were two witnesses to the accident, James Mauzy?

A: Yes, he was one of them.

Q: Did you speak with James Mauzy?

A: Yes, he was one of them.

Q: He was one of the people you spoke with?

A: Yes.

Q: He advised you that it was the international truck that fell?

A: He told me, yes.

Regarding the Mack truck that T & M Trucking owned, Ruppel stated:

Q: There's been some reference made to this Mack truck, the black Mack truck, plate number 219648, that had T & M Trucking on the side, whose truck was that?

A: Well, it was actually owned by T & M Trucking, but Houston wanted to use it

down there, and he wanted to buy it, and I wouldn't sell it to him because my grandson Brad, he wanted to keep it because he had built that truck up, so I said, 'No, Houston, you take care of that truck, you keep the repairs up on it and everything and use it on your farm, if you need an extra truck to haul freight with, you can use that one.' That's the way we left it.

Q: So Houston had in his possession a black Mack truck that he was using on his farm?

A: Yes, he did.

Q: Do you know what his farm's name was?

A: HB Whitaker Farms, LLC.

Q: Was the truck being used to haul freight for you?

A: Just as a spare when he needed it.

Q: Was it ever used, to your knowledge?

A: Sometimes it was. Just when they had a short run from Corydon to Calhoun, and that's where they used it at, or from Owensboro down, that's the only place it went.

Q: So that black Mack truck was in Houston's possession and under Houston's control?

A: That's right, completely.

Q: But that's not the truck that fell on him?

A: That's not the one I was showed [sic], no, or told. The International that Houston owned was the one that I

was told, that's the one I was showed.
[sic]

As to whether he or T & M was responsible for paying for repairs on the Mack truck, Ruppel stated:

Q: Were you responsible for paying for repairs for the Mack truck?

A: No, I was not.

Q: Why is that?

A: Houston agreed to be completely responsible for it.

Q: So Houston would have paid for any repairs himself?

A: Absolutely.

...

Q: Did they send you purchase orders or invoices for repairs to this Mack truck?

A: No. In fact, that truck didn't need very many repairs. All it done [sic] was just run around the farm down there.

Christopher Roush ("Roush"), employed by McLean County Sheriff's Department on the date of Houston's fatal injury, was deposed on November 13, 2014. Roush was questioned about several photographs he took of the accident scene on the morning of Houston's fatal injury. Exhibit 2 is a picture of the black Mack truck with "5914"

on it as well as "T & M Trucking." Houston's body is shown covered and on the floor of the garage.

Luie Whitaker ("Luie"), Houston's father, and Debbie testified at the November 21, 2014, hearing. Luie is President of Luie Whitaker Freight and of R & W Warehouse. Luie testified that on the morning of Houston's fatal injury, Houston was working on truck #5914 which has "T and M Trucking" on the side. He testified as follows:

Q: Okay. The defendant is denying this claim. They're arguing that the accident did not occur in the course of employment because Houston was working on a truck not owned by T & M, among other reasons, and/or the truck was not used in Luie Whitaker Freight Operations. First of all, I want to show you a picture here. And this was attached as exhibit to Tom Ruppel's testimony. Is this the T & M Truck-

A: Yes.

Q: - that your son was working on at the time of his death?

A: Yes.

Q: 5914?

A: Yes.

...

Q: And you also introduced at Debbie Whitaker's deposition the Certificate of Title and it's got T & M Trucking. Did T & M Trucking-

A: Uh-huh.

Q: - own the Mack Truck that Houston was working on at the time of his death?

A: Yes.

Q: Have you at any time ever owned that truck?

A: No, sir.

Ruppel is fifty percent owner of R & W Warehouse.

Luie testified that he used the Mack truck at the warehouse "as it was needed" to haul rock with a dump trailer. He testified as follows:

Q: All right. I know you didn't keep any careful records, but as far as overall use of the Mack truck for the commercial side, as opposed to using it on the farm, would you use it more for the commercial side or the farm side?

A: It was used more for the commercial side. We used it from January to usually September strictly for the commercial side. And then when we started harvesting in September, we would use it on the farm then usually to haul grain up through November.

...

Q: Okay. Now, the Mack truck was licensed as a farm truck. And you testified that it was used really in more commercial operations than farm operations. Why was it licensed as a farm truck?

A: Well, it was a whole lot cheaper. You could license it under a limited tag on the farm for like \$800 a year to

where if we licensed it commercial, it was like \$1800. And it didn't run far enough to really get yourself in trouble with the law, if we got caught.

Q: Well, isn't it true that you probably should have licensed it as a commercial truck?

A: Yeah.

Luie testified that Houston had a farming operation encompassing 1,200 acres. Regarding Houston's use of the Mack truck for farming purposes, he testified as follows:

Q: You heard Tom Ruppel testify he gave possession of the black Mack truck to your son, Houston, for his use in farming operations. Do you agree with his statement?

A: No.

Q: Was Mr. Tom Ruppel not truthful that day?

A: No, I think he was just confused.

Q: Well, Mr. Whitaker, I didn't hear any confusion from Tom Ruppel when he testified that Houston Whitaker wanted the truck, the black Mack, for his farm. That was true, wasn't it?

A: That part was true, yes.

Q: And Mr. Tom Ruppel was very clear when he testified that T & M Trucking was not responsible for repairs to the black Mack truck; that was true as well?

A: That is true.

Q: Also, Mr. Tom Ruppel testified Houston Whitaker had full control of the black Mack truck. Do you agree with that as well?

A: No.

Q: Your son did not have full control of the truck?

A: No.

Luie testified that he was the one that licensed the Mack truck as "Farm Limited." Luie further testified that his company, Luie Whitaker Freight Agency, never sent an invoice or bill to T & M Trucking for repairs to the Mack truck.

At the hearing, Houston's wage records were introduced through Debbie who confirmed the records show Houston was paid for work at the Luie Whitaker Freight Agency from June 16 through June 29, 2012, "[w]hen he was working on that truck, he was under Luie Whitaker Freight Agency."

The June 11, 2014, Benefit Review Conference ("BRC") order listed the following contested issues: "coverage of pf for this injury" [handwritten]; work-relatedness/causation; "course & scope" [handwritten]. Under "other" is the following: "DF Proof through July 27,

2014. Telephonic Conf. July 28, 2014 at 10:00 AM EST." Under stipulations, the parties stipulated that an employment relationship existed between the plaintiff and defendant-employer at all times. Handwritten by the third stipulation ("Plaintiff sustained a work-related injury or injuries on"), the following is written: "Deny work-related death on 6-29-2012."

In the March 27, 2015, Opinion, Award, and Order, the ALJ provided the following analysis and conclusions:

1. Contested Issues: Entitlement to Benefits Pursuant to KRS 342.750?

The essential issue in this claim is whether Houston Whitaker's death was work-related and/or occurring in the course and scope of his employment. Houston Whitaker died on June 29, 2012, when he was performing repairs and maintenance on a truck when the truck fell resulting in his death. The facts are largely not in dispute.

Houston Whitaker was an employee of Luie Whitaker Freight Agency. He performed various services for the employer but on the date of his death was doing mechanic work. He was working on a truck owned by T & M. He was on the operating premises of Luie Whitaker Freight Agency and was performing the work during normal work hours. There is some issue as to whether the truck was used primarily for the benefit of Houston Whitaker, although it was owned by T & M. The vehicle had been licensed as a farm truck and was used regularly by Houston Whitaker on his farming operation.

Evidence also shows the truck was used at times as a backup truck for the defendant for short hauls.

There is not a scintilla of evidence that the work being done on the date of death was without the permission of the employer or without the acquiescence of the employer. Luie Whitaker and Debbie Whitaker, the primary owners of Luie Whitaker Freight Agency, both testified and significantly neither questioned the fact Houston Whitaker was working on the truck in question with their permission and acquiescence. While the Administrative Law Judge is cognizant of the fact the insurance carrier was somewhat handicapped in this case by the relationship of the insured to the decedent, the fact remains no evidence whatsoever was presented refuting that Houston Whitaker was working on the operating premises of the employer, during normal work hours and with either the expressed or implied permission of the owners of the employer. At the very least, the work was being performed with the knowledge and acquiescence of the employer.

In *Jackson v. Cowden Manufacturing Company*, 578 S.W.2d 259 (Ky. App. 1978), the court cited *Larson Workmen's Compensation Law, Section 22*. The Court stated:

"A. Larson, Workmen's Compensation Law s 22.00 (1978).

We find this rule to be helpful and in harmony with the general principles of Kentucky workmen's compensation law.

According to Larson, the first inquiry must be whether the injury occurred on the employer's premises and during

working hours. The presence of either or both of these factors will frequently be a sufficient basis for finding that the recreational activity was work-related. As stated by Larson:

When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment, and even further when one has associated the time of the activity somehow with the employment. This done, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection, and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might. Conversely, if the recreational activity takes place on some distant vacant lot, several hours after the day's work has ceased, some independently convincing association with the employment must be built up to overcome the initial presumption of disassociation with the employment established by the time and place factors.

Id s 22.11, p. 5-72. When the injury-causing activity occurs on the employer's premises during working hours, Kentucky courts have deemed the injury work-related even though the activity was in no way connected with the employee's work-duties and was strictly for personal purposes. In *W.R. Grace & Co. v. Payne, Ky.*, 501 S.W.2d 252 (1973), the court affirmed an award of compensation benefits to an employee who was injured while using a power saw to make a birdhouse for his own personal purpose. The court emphasized that the injury-causing activity

occurred on the employer's premises during work hours, was a common practice in which the employer acquiesced, and filled a slack time period. See also *Ratliff v. Epling, Ky.*, 401 S.W.2d 43 (1966), involving the 'operating premises exception' to the going and coming rule."

In *W.R. Grace & Co. v. Payne, Ky.*, 501 S.W.2d 252 (1973), the worker suffered a severed thumb while using the employer's power saw to construct a birdhouse for the worker's personal benefit. The court found coverage since "the activity occurs on the employer's premises, during work hours, is a common practice in which the employer acquiesces, and fills a slack-time period. We believe an accident occurring in such circumstances has sufficient employment connection to be considered to arise out of the employment."

Applying the facts of the case before the Administrative Law Judge, it is clear the activity occurred on the employer's premises, during normal work hours, was a common practice in which the employer acquiesced since the accident occurred on the operating premises of the employer during normal work hours and doing an activity with the expressed or implied permission or at least the acquiescence of the employer, the Administrative Law Judge finds the death to be work-related occurring in the course and scope of employment, and hence, there was coverage for this injury.

The Administrative Law Judge has calculated the decedent's weekly wage as \$833.52 based on the records attached to the deposition of Debbie Whitaker.

The appropriate award of death benefits will be made to the Estate of Houston Whitaker, his widow and children.

Pursuant to KRS 342.750(3) the average weekly wage of the employee shall be taken as not more than the average weekly wage of the state as determined by KRS 342.740. Hence, since the calculated AWW of Houston Whitaker is more than the AWW of the state of \$736.19, same will be used in calculating benefits.

Pursuant to KRS 342.750(6), a lump sum payment of \$72,313.24 shall be payable to the decedent's estate. Pursuant to KRS 342.750(1)(b) there will be payable to Brittany Watkins (Whitaker), widow of Houston Whitaker, forty-five percent (45%) of the AWW plus fifteen percent (15%) for each child for a total of seventy-five percent (75%) for the sum of \$552.14 per week from the date of death, June 29, 2012 until January 5, 2013, when Brittany Watkins (Whitaker) remarried. at that time, pursuant to KRS 342.750(1)(d) the children will be entitled to sixty-five percent (65%) of the AWW until the benefits cease pursuant to KRS 342.750(1)(e). Additionally, pursuant to KRS 342.750(1)(c) upon remarriage, the widow, Brittany Watkins (Whitaker), is entitled to a two year indemnity benefit in a lump sum amount of \$34,454.16.

Praetorian filed a petition for reconsideration on April 9, 2015. It conceded the truck which fell upon Houston was a 1986 black Mack truck. Praetorian alleged several errors, including but not limited to the following:

- "The opinion must be reconsidered to include the Administrative Law Judge's determination as to the relationship, if any, of Houston Whitaker's work on the black Mack "FARM LIMITED" truck to the business of Luie Whitaker Freight Agency."
- "The Administrative Law Judge did not make a finding whether Houston Whitaker's work, regardless of whether it occurred on the employer's operating premises, was a substantial deviation from his employment with Luie Whitaker Freight Agency."
- "The ALJ did not review the evidence and decide whether Houston Whitaker's work on the 1986 black Mack truck was for his farming operations (H.G. Whitaker Farms, LLC), or whether the work was for the benefit of Luie Whitaker Freight Agency."
- "The ALJ should reconsider the March 27, 2015 Opinion to determine whether work performed on the black Mack "FARM LIMITED" truck, for farming operations of H.B. Whitaker Farms, LLC, was a substantial deviation from Houston Whitaker's employment with Luie Whitaker Freight Agency."

In the May 30, 2015, Order on Petition for Reconsideration, the ALJ determined as follows:

. . .

1. The Petition [sic] is correct that Luie Whitaker only testified at the final hearing on November 21, 2014. The reference to testimony by deposition was a dictation and/or proof reading mistake. Paragraph 1 of the

Petition for Reconsideration is hereby **CONSIDERED AND ORDERED** to be **SUSTAINED** to the extent paragraph 2 on page 2 of the Opinion is amended to read, "Luie Whitaker testified at the final hearing held on November 21, 2014.

2. Paragraph 2 of the Petition for Reconsideration states Tom Ruppel did not testify by deposition on June 10, 2014, but by deposition on November 14, 2014. The Administrative Law Judge has carefully reviewed his file as well as the electronic file of the Department of Workers' Claims and the deposition of Tom Ruppel has never been filed in the record. The Administrative Law Judge's summary of the evidence of Tom Ruppel was taken from the sworn statement given on June 10, 2014 and filed of record. The Administrative Law Judge has again carefully reviewed the sworn statement of Tom Ruppel and page 3 of the Brief for Praetorian Insurance Company wherein the testimony of Mr. Ruppel is discussed. The Administrative Law Judge's summary of the statement of Mr. Ruppel is accurate and the references made in the brief to the deposition do not conflict in a material way with the sworn statement. In fact, his testimony cited by counsel to the effect, "And the only thing I asked him to do when they needed help picking up Owensboro to the warehouse to take care of that if it needed an extra truck." This statement is consistent with the Administrative Law Judge's finding the truck was used primarily on his farming operation but at times was used as a back-up truck. The Administrative Law Judge speculates the deposition of Tom Ruppel was taken out of state and the court reporter furnished copies to the parties but did not file the original with the Department of Workers' Claims. It is

therefore **CONSIDERED AND ORDERED** that numerical paragraph 4 on page 7 of the Opinion is amended to read, "Tom Ruppel gave a sworn statement on June 10, 2014". The Petition for Reconsideration is **SUSTAINED** to the extent that paragraph 4 is amended.

3. The Administrative Law Judge has carefully reviewed the record concerning the issue raised in paragraph 3 of the Petition for Reconsideration. It is hereby **CONSIDERED AND ORDERED** the Petition for Reconsideration is **OVERRULED** as to all issues raised in paragraph 3 of the Petition. The sworn statement of Tom Ruppel on page 8 indicates the defendant could use the truck as an extra to haul freight with and further indicated the truck was just used as a spare when the defendant needed it. Additionally, on page 9, Mr. Ruppel indicated the truck was used on short runs. The Administrative Law Judge's findings are consistent with the evidence of record from Luie Whitaker and Tom Ruppel.

4. The Petition for Reconsideration requests the Administrative Law Judge to make a finding whether Houston Whitaker's work was a substantial deviation from his employment with Luie Whitaker Freight Agency. The Administrative Law Judge at least by implication made the finding it was not a substantial deviation. As the Administrative Law Judge previously found there is not a scintilla of evidence that the accident did not occur on the operating premises of Luie Whitaker Freight Agency, the accident occurred during normal work hours, and the work was performed with the expressed or implied permission of the defendant or at least with the

knowledge and acquiescence of the defendant. In view of those factors, there was not a substantial deviation and the injury was work-related. See *W. R. Grace & Co. v. Payne*, 501 S.W.2d 252 (1973). It is therefore **CONSIDERED AND ORDERED** paragraph 4 of the Petition for Reconsideration is hereby **OVERRULED**.

IT IS THEREFORE CONSIDERED AND ORDERED the defendant's Petition for Reconsideration is **OVERRULED** except numerical paragraphs 2 and 4 are amended as indicated above. In all other aspects the Petition for Reconsideration is **OVERRULED**.

On appeal, Praetorian argues that the facts surrounding the death of Houston "do not fit the guidelines recognized and relied upon by the ALJ, as provided by *W.R. Grace & Co.*" It asserts as follows:

On June 29, 2012, Houston Whitaker did not step away from the employ of LWFA, during a brief lull or during slack time, to attend to personal activity. Instead, Houston Whitaker's activity on the morning of June 29, 2012 was focused on a truck licensed as "FARM LIMITED" used for Houston Whitaker's farming operations. In *W.R. Grace & Co.*, the employee (Payne) injured on premises, during normal work hours, had performed some work for the employer on the date of the accident. The injury to Payne occurred after he appeared at W.R. Grace and Co. to perform work for the benefit of that company, and during a slack time period at W.R. Grace & Co. In contrast, there was no evidence Houston Whitaker appeared at his parents' shop to perform work for the

benefit of LWFA, with [sic] ability to 'break away' from LWFA work activity and work on the 1986 black Mack truck during a lull in activity or during slack time. The four-pronged test of work-relatedness established in *W.R. Grace & Co.* is not applicable to the facts of the case at hand.

We affirm.

We acknowledge there is an abundance of superfluous language in both the March 27, 2015, Opinion, Award, and Order and the May 30, 2015, Order on Petition for Reconsideration that suggests the ALJ was carrying out an analysis pursuant to W.R. Grace & Co. v. Payne, 501 S.W.2d 252 (1973). In the case of W.R. Grace & Co. v. Payne, the claimant was injured while on the job and during working hours while using a power saw during slack time for personal reasons. The Court of Appeals stated as follows:

Appellant's supervisor was aware that appellee was using the saw and made no objection; in fact appellant seems to have approved of the practice generally, since use of such tools by employes [sic] for personal purposes had occurred many times in the past with appellant's knowledge and appellant had made no attempt to stop the practice. Although appellee had used this saw several other times, its use was in no way connected with his duties; and appellant derived no direct benefit from its use by appellee.

Id. at 252.

The Court then set forth a distinct four-factor test that must be met in order for this type of injury to be compensable stating as follows:

We are persuaded by the reasoning of those decisions which allow coverage under facts such as are presented here, i.e., the activity occurs on the employer's premises, during work hours, is a common practice in which the employer acquiesces, and fills a slack-time period. We believe an accident occurring in such circumstances has sufficient employment connection to be considered to arise out of the employment.

Id. at 253. (emphasis added).

The language used by the ALJ in the March 27, 2015, Opinion, Award, and Order which implies an analysis pursuant to W.R. Grace & Co. v. Payne, includes the following:

- "There is not a scintilla of evidence that the work being done on the date of death was without the permission of the employer or without the acquiescence of the employer."
- "Luie Whitaker and Debbie Whitaker, the primary owners of Luie Whitaker Freight Agency, both testified, significantly, neither questioned the fact Houston Whitaker was working on the truck in question with their permission and acquiescence."
- "While the Administrative Law Judge is cognizant of the fact the insurance

carrier was somewhat handicapped in this case by the relationship of the insured to the decedent, the fact remains no evidence whatsoever was presented refuting that Houston Whitaker was working on the operating premises of the employer, during normal work hours and with either the expressed or implied permission of the owners of the employer."

- "At the very least, the work was being performed with the knowledge and acquiescence of the employer."
- "Applying the facts of the case before the Administrative Law Judge, it is clear the activity occurred on the employer's premises, during normal work hours, was a common practice in which the employer acquiesced since the accident occurred on the operating premises of the employer during normal work hours and doing an activity with the expressed or implied permission or at least the acquiescence of the employer."

In the May 30, 2015, Order on Petition for Reconsideration, the ALJ continued to utilize language implicating W.R. Grace & Co. v. Payne, by stating as follows:

As the Administrative Law Judge previously found there is not a scintilla of evidence that the accident did not occur on the operating premises of Luie Whitaker Freight Agency, the accident occurred during normal work hours, and the work was performed with the expressed or implied permission of the defendant or at least with the knowledge and acquiescence of the defendant.

Indeed, this language is so abundant throughout both the March 27, 2015, Opinion, Award, and Order and the May 30, 2015, Order on Petition for Reconsideration that it appears as though the ALJ has clearly analyzed this case pursuant to the case of W.R. Grace & Co. v. Payne. Out of an abundance of caution, we note that if the ALJ had intended to analyze the case at hand under W.R. Grace & Co. v. Payne, he failed to set forth findings regarding the fourth factor - i.e. whether the activity Houston was engaged in at the time of his fatal injury filled "a slack-time period." Id. We also note that if the ALJ did not intend to perform an analysis pursuant to W.R. Grace & Co. v. Payne, language regarding express or implied permission or acquiescence of the employer is not standard language used in workers' compensation cases in which the ALJ is analyzing whether an injury, as defined by the Act, occurred during the scope and course of one's employment.

However, the ALJ made several key findings of fact in the March 27, 2015, Opinion, Award, and Order which ultimately persuades this Board he believes Houston's fatal injury falls within standard workers' compensation cases and not within the exception articulated in W.R. Grace & Co. v. Payne, supra. Those key findings include the following:

- "Houston Whitaker was an employee of Luie Whitaker Freight Agency."
- "He performed various services for the employer but on the date of his death was doing mechanic work."
- "He was working on a truck owned by T & M."
- "He was on the operating premises of Luie Whitaker Freight Agency and was performing the work during normal work hours."

These findings are supported by substantial evidence in the record.

The ALJ also made the following conclusions of law in the March 27, 2015, Opinion, Award, and Order:

- "Therefore, the Administrative Law Judge finds the death to be work-related as occurring in the course and scope of employment. As a result, there was coverage for this injury."

Significantly, in the June 11, 2014, BRC order, the parties stipulated that an employment relationship existed between the plaintiff and defendant-employer at all times.

What is unclear is why the ALJ used language consistent with an analysis pursuant to W.R. Grace & Co. v. Payne, supra, while simultaneously using language

consistent with Houston's fatal injury being a standard work-related injury occurring within the scope and course of his employment with Luie Whitaker Freight Agency. However, we must assume the extraneous language is "in the alternative" dicta that partially analyzed the case at hand pursuant to W.R. Grace & Co. v. Payne, supra. The ALJ determined Houston, on the morning of his fatal injury, was performing mechanic work on a truck owned by T & M. He was performing work on the operating premises of Luie Whitaker Freight Agency during normal working hours. The parties further stipulated at the BRC that at all times, there was an employment relationship established between Houston and Luie Whitaker Freight Agency. Stated another way, the ALJ concluded the fatal injury of June 29, 2012, occurred within the scope and course of his employment with Luie Whitaker Freight Agency, and is, consequently, work-related and compensable. This determination by the ALJ will not be disturbed.

Regarding Praetorian's assertion the Mack truck upon which Houston was working on the morning of his fatal injury was "used for Houston Whitaker's farming operations," we note that the testimony in the record indicates the Mack truck was also used by Luie Whitaker Freight Agency. It was not a truck used exclusively by

Houston and for Houston's benefit. Rather, the evidence firmly establishes the Mack truck was also used by Luie Whitaker Freight Agency, Houston's employer. Notably, the ALJ made a finding to the effect that it was used as a back-up by the defendant for short hauls. Consequently, any work on the Mack truck would also be for the benefit of Houston's employer.

Accordingly, the March 27, 2015, Opinion, Award, and Order and the May 30, 2015, Order on Petition for Reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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