

LIBC-471 (REV. 10-87)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 South Cameron Street, Room 103
Harrisburg, PA 17104-2501 (610)436-3595

CLAIM
CHESTER COUNTY

DATE OF CIRCULATION 03/26/97

CHARLES LAKE
RR1 BOX 173
EARLTON NY 12058

vs

M P C TRUCKING INC
PO BOX 700
1110 ROUNTE 113
KIMBERTON PA 19442

THE ATTACHED DECISION OF THE JUDGE
IS FINAL UNLESS AN APPEAL IS TAKEN TO
THE WORKERS' COMPENSATION APPEAL
BOARD AS PROVIDED BY LAW.

STATE WORKMEN'S INSURANCE
FUND
STATE OFFICE BLDG
100 LACKAWANNA AVE
SCRANTON PA 18503

IF YOU DO NOT AGREE WITH THIS DECISION
AN APPEAL MUST BE FILED WITH THE WORK-
ERS' COMPENSATION APPEAL BOARD WITHIN
20 DAYS OF THE DATE OF THIS NOTICE.

CHARLES J DIORIO, ESQ.
184 W LANCASTER AVENUE
MALVERN PA 19355

FORMS FOR AN APPEAL MAY BE OBTAINED
FROM THE WORKERS' COMPENSATION APPEAL
BOARD, 1171 SOUTH CAMERON STREET,
ROOM 305, HARRISBURG, PA 17104-2511

BERNADINE MUNLEY, ESQ.
THE WIDENER BLDG
1 SOUTH PENN SQUARE
PHILADELPHIA PA 19107



JUDGE LLOYD P NYCE
edt

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HEARINGS: April 20, 1995 Record made
July 13, 1995 Record made
October 26, 1995 Record made
January 23, 1996 Record made
April 11, 1996 Record made October 17, 1996 Record made

CLAIMANT'S WITNESSES & EXHIBITS:

Claimant
Dr. Eckardt Johanning, M.D.

- C-1 Title Transfer Agreement, Motor Vehicle Equipment Lease
- C-2 Truck Payment Record
- C-3 Memorandum dated January 7, 1991
- C-4 (Not Submitted)
- C-5 (Not Submitted)
- C-6 Freight Invoices
- C-7 Notice of Injury and Claim for Compensation -- State of Vermont
- C-8 (Not Admitted)
- C-9 (Not Admitted)
- C-10 (Not Admitted)
- C-11 Fee Agreement
- C-12 ICC Physical Examination
- C-13 Litigation Costs, Attorney Time Summary
- C-14 Medical Bills

DEFENDANT'S WITNESSES & EXHIBITS:

Claimant as on Cross-examination
Bernard Gallagher
Dr. Leonard Berkowitz

- D-1 Equipment Lease
- D-2 Title Transfer Agreement
- D-3 Motor Vehicle Equipment Lease
- D-4 Summons and Complaint -- State of New York
- D-5 (Not Admitted)
- D-6 Bills of Lading

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FINDINGS OF FACT

1. On or about January 18, 1995, Claimant filed a Claim Petition alleging that on April 6, 1992, he suffered a work-related injury to his skin, sinus membranes, and lungs due to exposure to an unknown substance.
2. Defendant filed a timely and responsive answer denying all material allegations, and asserting, among other things, that Claimant was an independant contractor, and not an employee of Defendant, at the time of the alleged injury.
3. MPC Trucking, Inc. is a subsidiary of Monsey Products, Inc., and operates out of seven different terminals in the United States including Kimberton, Pennsylvania and Waterford, New York.
4. At all times relevant hereto, Claimant lived in the state of New York and worked out of Waterford, New York terminal.
5. In or about March of 1990, Claimant began working as a truck driver for an owner/operator or independent contractor, Charles Effner, who received assignments from MPC Trucking, Inc.

6. Claimant testified that due to Mr. Effner's subsequent financial difficulties and his truck becoming inoperable, Bernard Gallagher, Assistant Vice President of MPC, asked Claimant to continue working for him.

7. On or about July 5, 1990, Claimant and MPC entered into a motor vehicle equipment lease and into another equipment lease where Claimant leased his equipment and his services back to MPC. The parties also entered into an agreement that upon completion of the equipment lease and in consideration for the maintenance performed on the listed tractor and the sum of \$100.00, clear title would be given to Claimant for the tractor. The motor vehicle equipment lease was subsequently renewed on or about March 24, 1992.

8. The motor vehicle equipment leased provided, among other things, that "(t)he relationship of the parties hereto during the entire term of this Agreement shall at all times be that of independant contractors;" that Claimant was not precluded from leasing his equipment to other carriers or shippers when not hauling freight or being despatched by MPC, that Claimant was responsible for paying all operating expenses including all expenses for maintenance, fuel, oil, repairs, fines, licenses, or any other levies or assessments; that Claimant was not precluded from

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hiring and paying wages for other drivers and helpers hired by Claimant to assist in the performance of his obligations; that Claimant shall determine his own routes of travel; that Claimant shall determine when to pick up the freight; that Claimant was not precluded from turning down any trips, loads, or other work offered by MPC; and that Claimant would be paid compensation at a certain rate per round trip mile based on invoices submitted by Claimant to MPC weekly for the work performed during the previous work week. (Exhibits C-1, D-1, D-2, D-3)

9. Claimant testified that the leases were made and the tractor was picked up in the Kimberton, Pennsylvania terminal.

10. Claimant testified that he understood he was working for MPC as an employee and could only perform work for MPC.

11. Claimant testified that MPC dispatchers told him when and where he would work, what routes to take, when to return to the terminal, and what freight he was responsible to unload.

12. Claimant testified that on April 6, 1992, while unloading cargo of Styrofoam trays packed in two layers of perforated plastic bags, at a warehouse in Battleboro, Vermont, he noticed that the trays contained black dust and what looked like grass in the holes of the perforated plastic bags that were against the product.

13. Claimant testified that the warehouse personnel refused to accept the contaminated packages, and Claimant reloaded the approximately 82 packages into the trailer.

14. Claimant called the MPC dispatcher and was told to return the contaminated packages to Waterford, New York terminal.

15. Claimant testified that after he left the warehouse, he went to a diner to wash up and eat and began itching severely.

16. Claimant testified that he called a hospital in Battleboro and was prescribed Benadryl over the telephone and told to bathe in baking soda.

17. Claimant testified that after returning to Waterford, he went home and experieced fatigue and nausea and had open, cracked, purple sores on his lips, eyes, knuckles, hands, and wrists.

18. Claimant testified that when he awoke the next day, he was very ill, and sought treatment at the Albany, New York Medical Center emergency room where his eyes were cleaned out and his skin was washed.

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19. Claimant testified that he informed the MPC dispatcher that he was itching severely.
20. Claimant testified that he subsequently returned to work on or about April 20, 1992, but had to stop working May 1, 1992 because his tractor broke down and he had no money to pay for repairs.
21. Claimant testified that in May 1992, he returned to work for a period of approximately seven days for a different employer, Quebec, Inc., but stopped working because of severe nose bleeds. Claimant subsequently returned to work for another employer, Ranger Transport, from approximately September 10, 1992 to December 31, 1992, at which he stopped working due to chest pain. Claimant next worked in June 1993 for BC Transport, and also worked in the Summer of 1993 up to November of 1993 for Path Transport, stopping work due to what he believed was a stroke.
22. Claimant testified that he has been unable to return to work for MPC since May of 1992 due to breathing difficulties, fatigue, sinusitis, and upper respiratory infection.
23. Claimant further testified that he filed workers' compensation claims in te stated of Vermont and New York but was denied benefits.
24. Claimant admitted to having had a previous history of allergies prior to April of 1992, and admitted to being allergic to hayseed, which turns him all red and rashy.
25. Claimant admitted that since his alleged injury, he has filed multiple lawsuits against MPC, and that in the Summons and Complaint filed on March 7, 1995 in the state of New York, he represented that at all times, he was an independent contractor delivering trailer of goods on behalf of MPC. (Exhibit D-4)
26. Claimant admitted that no taxes were taken out of his compensation from MPC, and that he received 1099 forms. Claimant also acknowledged that he did not work a set schedule for MPC and was free to work when he pleased.
27. As of April 6, 1992, Claimant average weekly wage was \$1,731.47.
28. Claimant presented testimony from Dr. Eckardt Johanning, board certified in family practice and occupational medicine, who first saw Claimant on August 4, 1994. Claimant was previously seen April to June of 1992 by Dr. Johanning's predecessor, Dr. Orgel. Dr. Johanning testified that Claimant related a history of developing a skin rash and breathing problems from exposure to a leaking product in a trailer at work.

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29. Claimant presented with complaints of fatigue, stomach pains, chest discomfort with exertion, skin discoloration and rash.
30. Dr. Johanning testified that Dr. Orgel performed a pulmonary function test on April 10, 1992 which was normal.
31. Dr. Johanning testified that his examination on August 4, 1994 showed that Claimant had normal blood pressure, good air movement whith no weezing or rales, and normal lungs.
32. Dr. Johanning diagnosed Claimant as suffering from hyperactive airway disease or asthma, a chronic skin condition or dermatitis, chronic sinusitis, hypertension and allergy.
33. Dr. Johanning opined that Claimant's condition was entirely the result of an incident of exposure to an unknown substance in

the truck trailer.

34. Dr. Johanning opined that Claimant was permanently disabled from driving a truck.

35. Dr. Johanning admitted that Dr. Orgel's office notes indicated that as of May 18, 1992, Claimant's upper respiratory irritation and contact dermatitis were resolved, and that his sinusitis was not related to his work activities.

36. Defendant presented medical testimony from Dr. Leonard Berkowitz, board certified in pulmonary medicine and critical care and internal medicine, who examined Claimant on July 13, 1995 and reviewed medical records.

37. Dr. Berkowitz testified that, by history, Claimant was a heavy smoker up to age 25, had a preexisting history of bronchitis, and had a family history of asthma, hayfever, and hypertension.

38. Dr. Berkowitz testified that his examination revealed that Claimant had a severely deviated nasal septum, mild nasal bogginess or flowing inside the nose, chronic postnasal dripping, with no evidence of asthma, bronchitis, rales, rhonchi or wheezing.

39. Dr. Berkowitz testified that he did a pulmonary function test which was normal, a pulse oximetry study which showed normal oxygen in the blood, and blood work which showed no significant allergies.

40. Dr. Berkowitz testified that the records of Dr. Orgel show that Claimant had a history prior to April of 1992 of allergies to a multitude of different agents, rashes, sneezing, nausea, and vomiting. Also noted in the records was the fact that Claimant's skin was reported normal as of August 13, 1992 and at that time, his treating physician released him to return to work.

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41. Dr. Berkowitz opined that as of July 13, 1995, there was no evidence of any residual pulmonary or skin damage from any exposure.

42. Dr. Berkowitz opined that Claimant's chronic nasal sinus disease and chronic postnasal dripping was not related to any exposure at work, but was due to his preexisting allergies and severely deviated septum.

43. Dr. Berkowitz also opined that if Claimant in fact had hyperactive, or reactive airway disease, as diagnosed by Dr. Johanning, he would have symptoms of wheezing and coughing and abnormal pulmonary function.

44. Defendant also presented testimony from Bernard Gallagher, Executive Vice President and General Manager of MPC, who testified that in July of 1990, Claimant, who had been driving for independant contractor Charles Effner, contacted Mr. Gallagher indicating that he waned to be an independant contractor and an owner/operator to receive assignments from MPC.

45. Mr. Gallagher testified that in accordance with the lease purchase agreements, Claimant began working as an independent contracto, would get assignments from the dispatcher, would bill MPC with invoices each week, and Claimant was provided with a 1099 Form at the end of each year.

46. Mr. Gallagher also testified that in accordance with the leases, Claimant did not work fixed hours, Claimant could refuse any work, could substitute another driver for himself, and was permitted to deliver cargo for other trucking companies.

47. Mr. Gallagher testified that Claimant was not provided any supervision on his driving trips and was given no instructions as to what routes to take.

48. Mr. Gallagher further testified that there were other truck drivers who were, in fact, employees of MPC. These employees were required to puch a time clock in and out, did not purchase fuel for the tractors, were not responsible for any repairs on the tractors, would not be able to hire someone else to perform their services, and received holiday and vacation time.

49. Mr. Gallagher testified that on April 6, 1992, Claimant called from Battleboro, Vermont and said that his hands were irritated and he wasn't feeling well and was going home. Claimant did not say he was sick to any exposure to any product.

50. Mr. Gallagher testified that the customer in Battleboro subsequently reported that some of the Styrofoam tray bundles were dirty because Claimant dragged the bundles, which weighed approximately seven pounds, over the wood trailer floor causing wood splinters and dirt to get in the bundles.

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51. Mr. Gallagher also testified that Claimant was often out ill, and that at one point in late 1991, he said that his problems were caused by drinking water from his contaminated well.

52. After careful review of the evidence, the Judge finds that the lease agreements signed by the parties clearly show that Claimant was an owner/operator, or independent contractor, and not an employee of MPC. Specifically, the agreements show that Claimant was compensated per trip, and not on a salary basis; that Claimant had the right to hire a qualified substitute driver; that Claimant could refuse any work; that Claimant could choose his own routes; and that the manner and method of performance was not directed in any respect by MPC.

53. The Judge accepts the testimony of Mr. Gallagher as credible as it is consistent with the lease agreements. The Judge also finds Mr. Gallagher's demeanor while testifying to be credible.

54. The Judge rejects the testimony of Claimant as not credible regarding his employment relationship with MPC to the extent it is inconsistent with the testimony of Mr. Gallagher and the lease agreements.

55. The Judge finds that although the lease agreements were executed in Pennsylvania, that as Claimant was an independent contractor, that the lease agreements did not constitute a contract of employment in Pennsylvania pursuant to the extraterritorial provisions of the Pennsylvania Workers' Compensation Act.

56. With respect to the medical issues, the Judge accepts the testimony of Dr. Johanning as credible and persuasive to the extent that Claimant suffered from a transient respiratory problem and a skin condition as a result of exposure to a work product on April 6, 1992, and as it is consistent with the findings of Claimant's initial treating physician, Dr. Orgel. In this regard, the Judge accepts the testimony of Claimant as credible regarding the incident on April 6, 1992 and his initial symptoms.

57. The judge finds that Claimant's exposure-related symptoms resolved no later than May 18, 1992 as reported by Dr. Orgel.

58. The Judge accepts the testimony of Dr. Berkowitz as credible to the extent that as of the date of his examination on July 13, 1995, Claimant had no residual symptoms related to any exposure in the workplace. The Judge rejects the contrary testimony of Dr. Johanning as not credible. In this regard, Dr. Berkowitz is a board certified pulmonary specialist with impressive credentials including a fellowship at Harvard University, as opposed to Dr. Johanning, who has no specialized expertise in pulmonary medicine.

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59. The Judge also finds significant that the pulmonary function tests performed by Dr. Orgel in April of 1992 and by Dr. Berkowitz in July of 1995 were normal.

60. The Judge finds that Claimant suffered an injury on April 6, 1992 and was temporarily disabled from April 6, 1992 through April 19, 1992.

61. The Judge finds that Claimant returned to work on April 20, 1992 without wage loss.
62. The Judge finds that Claimant's loss of wages on and after May 1, 1992 was not due to his injury, but resulted from mechanical failure of his truck.
63. The Judge finds that Claimant was fully recovered from the injury no later than May 18, 1992.

CONCLUSIONS OF LAW

1. The parties are bound by the provisions of the Pennsylvania Workers' Compensation Act, as amended.
 2. Claimant has failed to meet his burden to establish the requisite jurisdiction pursuant to the extraterritorial provisions of the Act.
 3. Claimant has failed to prove that he was an employee of MPC Trucking, Inc., within the meaning of the Act.
 4. Claimant's petition should be dismissed.
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ORDER

AND NOW, this 10th day of March, 1997, it is hereby ORDERED and DIRECTED that Claimant's Claim Petition is DISMISSED.

Lloyd P. Nyce, Judge

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