

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F303473

TIM JOHNSON, EMPLOYEE	CLAIMANT
ARKANSAS STEEL ERECTORS, EMPLOYER COMMERCE & INDUSTRY INSURANCE/ AIG CLAIMS SERVICE, CARRIER/TPA	RESPONDENT #1
ERIN, INC., EMPLOYER	RESPONDENT #2
ROBERT S. HARRIS, JR., EMPLOYER	RESPONDENT #3

OPINION FILED NOVEMBER 30, 2007

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on September 17, 2007, in Searcy, White County, Arkansas.

The claimant was represented by THE HONORABLE NEAL CHAMBERLAIN, Attorney at Law, Little Rock, Arkansas.

Respondent #1 was represented by THE HONORABLE SARAH GREENWOOD Attorney at Law, Little Rock, Arkansas. Ms. Greenwood was excused from participating in the hearing.

Respondent #2& #3 were represented by THE HONORABLE DAVID JOHNSON, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 17, 2007, in Searcy, Arkansas. A Prehearing Telephone Conference was conducted on July 23, 2007, and a Prehearing Order was filed on that same date. A copy of the Prehearing Order has been marked Commission's Exhibit No. 1, and made part of the record without objection.

Stipulations

At the prehearing conference the parties agreed to the following stipulation:

The claimant sustained a compensable injury on March 27, 2003.

Issue

By agreement of the parties, the following issue was presented at the hearing:

Whether the White County Circuit Court or the Arkansas Workers' Compensation Commission has jurisdiction of the claimant's negligence claim against Erin, Inc. and Robert S. Harris, Jr.

Contentions

Claimant contends that the White County Circuit Court has jurisdiction of the claimant's suit against Erin, Inc. and Robert S. Harris, Jr.

Respondents #2 and #3 contend that the Arkansas Workers' Compensation Commission has exclusive jurisdiction of the matter.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of July 23, 2007, which has been marked as Commission's Exhibit No. 1. Tim Johnson's Response to the Prehearing Questionnaire, Tim Johnson's First Supplemental Response to the Prehearing Questionnaire, and Tim Johnson's Second Supplemental Response to the Prehearing Questionnaire, were marked as Commission's Exhibit No. 2. Attorney Sarah Greenwood's letter

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of September 11, 2007, and the Commission's letter of September 13, 2007, were marked as Commission's Exhibit No. 3. Tim Johnson's Motion to Bifurcate Proceedings was marked as Commission's Exhibit No. 4. Tim Johnson's Hearing Exhibits were marked as Claimant's Exhibit No. 1. Respondents' #2 & #3 Response to the Prehearing Questionnaire was marked as Respondents' #2 and #3 Exhibit No. 1. Respondents' #2 & #3 First Supplemental Response to the Prehearing Questionnaire was marked as Respondents' #2 & #3 Exhibit No. 2.

Tim Johnson's supplemental brief in support of his Motion to Bifurcate Proceedings, Tim Johnson's Post-Hearing Brief, Respondents' #2 & #3 Post-Hearing Brief, the Commission's Order of November 7, 2007, Attorney David Johnson's letter of November 6, 2007, and Motion to Withdraw as Counsel and to Substitute New Counsel, are hereby incorporated by reference, as these have been blue-backed and marked as Commission's Exhibit No. 5.

Although Respondent #1's attorney, Ms. Sarah Greenwood was excused from attending the hearing, she was present during the hearing, but did participate in the proceeding.

The following witnesses testified at the hearing: the claimant and Bob Harris (Robert S. Harris, Jr.).

DISCUSSION

The claimant sustained an admittedly compensable work-related injury on March 27, 2003, while working for Arkansas Steel

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Erectors. A review of the record shows that the claimant filed a claim against Arkansas Steel Erectors and Commerce & Industry Insurance Company and AIG, Carrier/TPA, for workers' compensation benefits for his March 27, 2003 work-related injury. The Form AR-C demonstrates that the claimant was injured when a cable broke on a crane and a boom fell on him, resulting in multiple injuries. The claim was accepted as compensable and the claimant began receiving associated workers' compensation benefits. This claim remains before the Commission under the same above-referenced claim number.

Subsequently, the claimant filed a third-party tort claim in White County Circuit Court against Erin, Inc. and Robert S. Harris, Jr. (Respondents #2 and #3) alleging that their negligence resulted in injuries to him with respect to his March 27, 2003, compensable work injury. Erin and Harris filed motions requesting that the tort claim against them be transferred to the Arkansas Workers' Compensation Commission for consideration of the issue of jurisdiction. In two separate orders, both of which were dated August 7, 2006, the White County Circuit Judge denied these motions.

Erin and Harris, petitioned the Arkansas Supreme Court, for a writ of prohibition in response to the order entered by White County Circuit Court denying their motion to transfer the tort case to the Arkansas Workers' Compensation Commission. Erin and Harris

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filed their petition for writ of prohibition on the basis that the circuit court lacked jurisdiction over the tort claim brought against them by the claimant, and that such claims are subject to the exclusive jurisdiction of the Commission under Ark. Code Ann. § 11-9-105(a) (Repl. 2002). In an opinion delivered March 15, 2007, the Arkansas Supreme Court granted the petition for writ of prohibition. Pursuant to mandate from the Arkansas Supreme Court, on April 16, 2007, the White County Circuit Court entered an Order of Transfer, wherein it transferred the claimant's third-party tort action to the Arkansas Workers' Compensation Commission for a determination on jurisdiction.

During the hearing before the Commission, the claimant testified he was hired to perform work at a construction project at the White County Medical Center, in Searcy, around late 2002 or 2003. According to the claimant, he was hired by Randy Stewart, a superintendent over the job, who worked for Arkansas Steel Erectors. The claimant admitted to completing a job application. He testified that to the best of his knowledge, the application had Arkansas Steel Erectors written across the top of it.

He testified that one of his paychecks was from Turnage, and the other one had Arkansas Steel on it. The claimant denied having ever received a paycheck from a company by the name of, Erin, Inc.

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The claimant further testified that as a result of his work-related injury of March 27, 2003, his hospital bills were over \$800,000.00, and that he received additional payments in the amount of \$111,000.00, all of which were paid by the comp carrier. He denied having heard of Erin, Inc., prior to the date of his injury. According to the claimant, it was his understanding that he worked for Arkansas Steel Erectors.

Robert Samuel Harris, Jr., also gave testimony during the hearing. He admitted to having formed, Erin, Inc., a domestic for profit corporation, which was organized under the laws of the state of Arkansas, in December of 1983. Mr. Harris admitted that since this time, Erin has owned equipment used for the construction of steel frames in commercial building projects. He further admitted that such equipment includes the crane, which was involved in the claimant's accident of 2003. According to Mr. Harris, from 1983 until 1996, Erin, employed numerous workers for its construction jobs. Mr. Harris testified that since Erin's formation, he has been the sole shareholder, at all relevant times, including the date of the claimant's injury, March 27, 2003. He testified he has served as Erin's president, and in other offices as well as its registered agent and chief job site manager of operations.

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Mr. Harris agreed that Erin, Inc., purchased the crane that fell on the claimant. He agreed that Arkansas Steel Erectors was not a buyer for the crane.

He also agreed to having formed Arkansas Steel Erectors, Inc., (ASE), a domestic for profit corporation organized under the laws of the state of Arkansas, on or about April 29, 1996. Mr. Harris admitted that both Arkansas Steel Erectors and Erin, both still exist as separate corporations, and are in good standing with the Arkansas Secretary of State.

Mr. Harris testified that ASE assumed many of Erin's administrative and job management responsibilities, although Erin retained ownership of equipment, including a truck crane, which was used in various construction jobs, for which the companies were employed. According to Mr. Harris, the above referenced crane truck, was involved in the claimant's accident.

He admitted he was the sole shareholder of ASE until approximately 2003. Since this time, he admitted to having remained ASE's majority shareholder, along with a partner. Mr. Harris admitted that at all relevant times to the immediate case, including March 27, 2003, he has served as ASE's president and in other offices as well as its registered agent and chief job site manager of operations.

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According to Mr. Harris, a master contract was entered into between Nabholz Construction Corporation and ASE, on March 11, 2002, and that Erin, Inc., is not a party to the contract. He further admitted that this contract was entered into prior to the hiring of the claimant and that it was for the White County Medical Center additions and renovations, the project on which the claimant was injured.

He essentially testified that for the federal tax year ending in June of 2003 (the 2002 income tax return), ASE and Erin, Inc. have separate employer identification numbers and filed separate returns. He admitted that on its 2002 tax return, Erin, Inc. did not pay any labor costs for the claimant, nor did it have any reported cost of labor whatsoever. However, he testified that ASE paid cost of labor for the claimant and others on its 2002 tax return.

Mr. Harris also gave a brief explanation of the claimant's injury. He admitted that ASE employed the claimant and Erin, Inc., owned the crane that fell on the claimant.

On cross examination, Mr. Harris admitted he is the sole shareholder in Erin, Inc. He also admitted he holds the position of president, secretary and treasurer. According to Mr. Harris, from 1983 until 1996, the course of business for Erin would have been construction, structural steel machinery, equipment erection

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and fabrication. Mr. Harris testified that Erin's mission changed, in 1996, when he formed ASE, as it became more the operating company, employing the workers that constructed the steel girders and things. He testified that Erin leases equipment to ASE. According to Mr. Harris, since being formed, Erin has paid its own taxes, made timely payment of its franchise license tax, and is in good standing with the state, as far as he knows. Mr. Harris testified that Erin owns cranes, welding machines, forklifts, rough terrain forklifts, air compressors, tool trailers, and heavy trucks for moving things.

He testified that Mike Bradley owns shares in ASE, and is vice-president, as he supervises some of the field operations for Arkansas Steel Erectors. According to Mr. Harris, ASE has the authority to issue 1,300 shares, as Mr. Bradley owns 250 shares, and he holds the remaining shares. He admitted he holds the position of president, secretary and treasurer in ASE. He admitted he held these positions from 1996 through 2003, and that he currently holds these positions. According to Mr. Harris, ASE's course of business is construction, steel machinery equipment, erection and fabrication. He testified that ASE regularly employs anywhere from five or six employees to 50 to 60. Mr. Harris testified that throughout the project in 2002 and 2003, at Searcy for White County Regional Medical Center, ASE averaged about 20 to

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24 employees, but denied that the number of employees were ever less than three. He admitted that ASE had workers' compensation coverage in 2003 and that AIG (TPA) was its insurer, as the policy period included March 27, 2003. Mr. Harris admitted that AIG paid significant benefits for the claimant's injury.

On redirect examination, Mr. Harris admitted that Erin leased the crane to Arkansas Steel Erectors.

ADJUDICATION

A. Motion to Bifurcate Proceedings

Prior to and at the time of the hearing, the claimant made a Motion to Bifurcate this proceeding and his work-related claim against Arkansas Steel Erectors and its workers' compensation insurance carrier, Commerce & Industry Insurance Company. While I recognize this motion is unopposed, it is a well established policy within the Commission to assign a single claim number and not bifurcate proceedings for any cause of action arising out of a single incident. Therefore, the claimant's Motion to Bifurcate Proceedings must be, and is hereby, respectfully denied.

B. Jurisdiction

The crucial question before the Commission is whether Harris and Erin are third parties under Ark. Code Ann. §11-9-410(a), or a "persona" under Ark. Code Ann. §11-9-105(a).

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Specifically, Ark. Code Ann. § 11-9-410 (a) preserves the right of the claimant to file an action or pursue a claim against a third-party without losing his rights to receive the benefits provided under the Arkansas Workers' Compensation law.

Ark. Code Ann. §11-9-105(a) provides:

The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his or her capacity as an employer, or prime contractor of the employer, on account of the injury or death, and the negligent acts of a co-employee shall not be inputted to the employer. No role, capacity, or persona of any employer, principal, officer, or director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

With respect to the aforementioned issue, the Arkansas Court of Appeals, in Zenith Insurance Company v. VNE, Inc., 61 Ark. App. 165, 965 S.W. 2d 805 (1998), has provided rather explicit guidance and is the controlling case in this matter.

In Zenith, Jerry D. Gardner, with his wife owned, both VNE and Sierra Hotel Corporation. Michael Coats was employed by VNE. Mr. Gardner was piloting an airplane owned by Sierra, and occupied by Mr. Coats, when the airplane crashed. Mr. Coats sustained

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injuries in the crash. Zenith Insurance Company (VNE's workers' compensation carrier), investigated the accident and paid Mr. Coats temporary total disability compensation and medical benefits.

However, Zenith subsequently filed an action in Sebastian County Circuit Court against Gardner, VNE, and Sierra, for recovery of the workers' compensation benefits paid to Mr. Coats. The circuit court granted the employer's motion to dismiss. Zenith appealed to the Arkansas Court of Appeals.

On appeal, the Arkansas Court of Appeals, found that Mr. Gardner was not a third party in the case because he was the sole owner and an officer, (and therefore a "persona") of VNE, who was protected by the exclusive remedy provisions of Ark. Code Ann §11-9-105(a). The Court Appeals further found that Sierra was a persona of Gardner under Ark. Code Ann §11-9-105(a), and pursuant to that statutory provision, jurisdiction was properly placed before the Commission. The Court of Appeals also held that the Arkansas Workers' Compensation had exclusive jurisdiction over the suit.

In the present matter, it is undisputed that the claimant, was an employee of ASE, when he sustained admittedly compensable injuries on March 27, 2003, when a line on a crane boom collapsed, and fell on him. Erin purchased and owned the crane that resulted in the claimant's injuries. At the time of the claimant's injury, ASE had workers' compensation coverage. The claimant filed for

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workers' compensation benefits against ASE and its workers' comp carrier (respondent #1). This claim was accepted as compensable and substantial associated benefits have been paid.

The claimant has now filed a third-party tort action against Mr. Harris and Erin, in White County Circuit Court, wherein he essentially alleges that they negligently caused his injuries.

The record is replete with evidence demonstrating that since the formation of Erin in 1983, Mr. Harris has been its sole shareholder, at all relevant times, including the date of the claimant's compensable injury. Mr. Harris has served as Erin's president, and in other offices, as well as its registered agent and chief-job site manager of operations. In April of 1996, Mr. Harris formed ASE and it assumed many of Erin's administrative and job management responsibilities. He has served as ASE's president, in other offices as well as its registered agent and chief-job site manager of operations. Mr. Harris was the sole shareholder of ASE from its formation in 1996 until approximately 2003. At which points, he issued 250 shares to Mr. Bradley. Since this time, and at all relevant times, including the date of the claimant's compensable injury, Mr. Harris has remained the majority shareholder and president of ASE.

Under these circumstances and pursuant to the Arkansas Court of Appeals holding in Zenith, I find that Mr. Harris is not a third party, because at the time of the claimant's compensable injury, he was majority shareholder, president, secretary, and treasurer or

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"persona" of ASE and protected by the exclusive-remedy provisions of Ark. Code Ann. §11-9-105(a). With respect to Erin, which owned the crane at the time of the claimant's injury. I find that because Mr. Harris was the sole owner and operator of Erin, Erin is a "persona" of Mr. Harris, and protected by the exclusive-remedy provisions of Ark. Code Ann. §11-9-105(a).

Therefore, pursuant to the holding in Zenith, I am constrained to find that jurisdiction in this matter is properly placed before the Arkansas Workers' Compensation Commission rather than White County Circuit Court. As a result, the exclusive remedy provisions of the Act precludes the claimant from seeking a third-party tort against Erin and Harris in White County Circuit Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant sustained a compensable injury on March 27, 2003.
3. The claimant's Motion to Bifurcate the Proceedings is respectfully denied.
4. Erin and Harris are a "persona" and protected by the exclusive-remedy provisions of Ark. Code Ann. §11-9-105 (a). Therefore, jurisdiction is properly placed before the Arkansas Workers' Commission.

ORDER

Based upon my foregoing Findings of Fact and Conclusions of Law, jurisdiction is found to be properly placed before the Arkansas Workers' Commission.

IT IS SO ORDERED.

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CHANDRA HICKS
Administrative Law Judge