

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F702813**

**GARY W. PETERS**

**CLAIMANT**

**TOBY DOYLE**

**RESPONDENT EMPLOYER**

**COMPANION PROPERTY & CASUALTY**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED MAY 28, 2008**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE CHIP LEIBOVICH, Attorney at Law,  
Benton, Arkansas.

Respondents represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law,  
Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on April 16, 2008. A prehearing conference was held on January 15, 2008 and a prehearing order was filed on the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an October 5, 2006, motor vehicle accident.
2. The end of the healing period is January 2, 2007.
3. The claim has been controverted in its entirety.

The claimant contends that he was an employee at the time of this accident and is not covered by the coming and going rule. He sustained an injury on or about October 4 or 5, 2006, in a motor vehicle accident. The claimant contends he is entitled

to medical benefits and temporary partial disability benefits from October 5, 2006 through January 2, 2007, and attorney's fees. The claimant contends his average weekly wage was \$375. All other issues are reserved.

Respondents contend the claimant was an independent contractor and not an employee. The claimant had a certificate of non-coverage. Respondents further contend that the claimant did not sustain an injury arising out of and in the course and scope of his employment, since he was not performing employment services at the time of the injury. Alternatively, respondents contend the claimant had pre-existing back problems and any need for treatment is causally related to the pre-existing condition as opposed to any acute condition. Respondents assert the notice defense contending notice was not provided until March 17, 2007. The claim has been controverted in its entirety.

### **ISSUES TO BE LITIGATED**

1. Employer/employee relationship; independent contractor versus employee.
2. Non-coverage certificate.
3. Compensability.
4. Employment services.
5. Notice.
6. Medical benefits.
7. Temporary partial disability benefits.
8. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to

hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this matter.
2. There was an October 5, 2006, motor vehicle accident.
3. The end of the healing period is January 2, 2007.
4. The claim has been controverted in its entirety.
5. The preponderance of the evidence provides that the filing of an application and issuance of a Certificate of Non-Coverage did not automatically bar the claimant from receiving benefits against his employer.
6. The preponderance of the evidence provides that the claimant was not an independent contractor but was an employee of the respondent employer.
7. The preponderance of the evidence provides the claimant was not performing employment services at the time of the minor motor vehicle accident.
8. The claim for benefits is respectfully denied and dismissed.

**DISCUSSION**

The claimant, 47 years old, began working for the respondent as a laborer in 2002, making \$75 per day; however, he advanced to \$125 per day and was working as a concrete finisher. The number of days per week and the hours varied but the

claimant testified he averaged three to four days per week. The claimant was paid by cash or check and no withholdings were held out. The claimant provided a float, a marking trowel and an edger for his job.

On October 5, 2006, the claimant was riding to work with the respondent employer and the truck was rear ended. According to the claimant, he hit his head on the hand grip on the glove box and his neck and back began hurting. The claimant testified he told Mr. Doyle that he was hurt. No tickets were issued to either driver and the employer's truck was not damaged. According to the claimant, he went on to work but had difficulty with the "bull float" duties. The claimant testified that Mr. Doyle told him he could not take him to the hospital that day, but the claimant sought medical treatment the next day. The claimant saw Dr. William Rutledge, a chiropractor, and received some physical therapy for his back, received a steroid shot and got medication. The claimant did not return to work for Mr. Doyle but did work two days for a friend and received either \$100 or \$150 per day.

The claimant currently takes 13 different medications and has a TENS unit and has applied for social security benefits.

Under cross examination, the claimant confirmed that he injured his back while in the military sometime between 1980 and 1983; had a car accident in 1991 with a back injury; had a back injury while working for Affiliated Foods; and had an automobile accident in 2000 with a back injury and a settlement. The claimant had pain radiating down both legs and in the back during the above time period.

The claimant confirmed that he may have only worked four or five times in 2006 for the respondent employer. The claimant confirmed that he received a Certificate of

Non-Coverage from the Workers' Compensation Commission. The claimant also confirmed that he had not talked to Toby Doyle, the respondent employer since the day of the accident. The claimant testified that Richard Doyle, the brother of the respondent employer, told him that he was fired and could not work for Toby Doyle anymore.

Toby Doyle, the respondent employer, testified that in his concrete finishing business that he hires independent contractors and that he has no employees. Mr. Doyle testified that he brought in people as his need arose and he had the claimant working for him less than ten times in 2006 and each time he was paid either by check or in cash. The claimant's pay started at \$80 per day and went to \$100 per day. Mr. Doyle testified the claimant presented a Certificate of Non-Coverage and he considered him to be an independent contractor.

Mr. Doyle testified that the claimant worked the day of the motor vehicle accident and the claimant indicated that his back hurt but no more than any other day. The claimant did "bull floating" on the day of the accident and Mr. Doyle attributed the claimant's back complaints to performing that type work. Mr. Doyle testified that he knew the claimant was pursuing some type of action once a law firm contacted him on behalf of the claimant about the motor vehicle accident. Mr. Doyle also testified that he asked the claimant after the motor vehicle incident if he was hurting or had an injury and the claimant stated "no more than average." T., p. 71.

Under cross examination, Mr. Doyle confirmed that the claimant was unskilled labor when he began working in the concrete business and confirmed he and the claimant had no written contract to work. Mr. Doyle confirmed that the claimant had no more complaints about his back on the day of the accident than any other day and after

the motor vehicle incident the claimant no longer worked for him. Mr. Doyle confirmed that he paid the claimant by the day and the claimant worked less than ten days in 2006.

## **ADJUDICATION**

The first issue to consider is whether the claimant is an employee or an independent contractor. Respondents contend that the claimant has a non-coverage certificate and, therefore, is conclusively presumed not to be an employee for purposes of workers' compensation. The Court of Appeals has provided some direction on these issues in *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005). As in *Fouts*, the central issue of the instant case is whether the claimant was an employee given that he had applied for and was issued a Certificate of Non-Coverage by the Commission. Ark. Code Ann. §11-9-402(c)(1)(B)(i) (2005) provides:

A sole proprietor or the partners of a partnership who do not elect to be covered by this chapter and be deemed employees thereunder and who deliver to the prime contractor a current certification of noncoverage issued by the Workers' Compensation Commission shall be conclusively presumed not to be covered by the law or to be employees of the prime contractor during the term of his or her certification or any renewals thereof.

In addition, Ark. Code Ann. §11-9-102(9)(C) (Supp. 2005) provides:

Any individual holding from the commission a current certification of noncoverage under this chapter shall be conclusively presumed not to be an employee for purposes of this chapter or otherwise during the term of his or her certification or any renewals thereof or until he or she elects otherwise, whichever time period is shorter.

The Court affirmed the Commission in *Fouts* where the Commission found that

when Ark. Code Ann. §11-9-102 was read in conjunction with Ark. Code Ann. §11-9-402, the use of the more general term “individual” in Ark. Code Ann. §11-9-102 referred only to a sole proprietor or a partner in a partnership as in Ark. Code Ann. §11-9-402.

Workers’ Compensation Law must be strictly and literally construed by the Commission and the courts, and a particular provision in a statute must be construed with reference to the statute as a whole. *Aloha Pools & Spas, Inc. v. Employer’s Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Ozark Gas Pipeline Corp. v. Ark. Pub. Serv. Commission*, 342 Ark. 591, 29 S.W.3d 730 (2000). Where the language of a statute is plain and unambiguous, the legislative intent is determined from the ordinary meaning of the language used. *Id.* The courts will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 20 S.W.3d 363 (2000).

The Court affirmed the Commission’s holding in *Fouts* that a certificate of non-coverage cannot act as a waiver for individuals who are employees and that certificates of non-coverage apply only to sole proprietors or partners who are conducting independent businesses. In reaching its conclusion, the Commission noted that another statute was at issue. Ark. Code Ann. §11-9-108(a) (Supp. 2005) provides:

No agreement by an employee to waive his or her right to compensation shall be valid, and no contract, regulation, or device whatsoever shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this chapter, except as specifically provided elsewhere in this chapter.

Certainly, the obvious intent of Ark. Code Ann. §11-9-108(a) is to protect

employees against practice of unscrupulous employers to avoid compensation liability by having employees sign a contract which waived all rights to compensation in consideration of being employed. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

Ark. Code Ann. §11-9-402(c)(1)(B)(i) allows subcontractors, who are functioning as an independent business, and who are not required to have workers' compensation insurance because they have no employees to avoid having a general contractor or prime contractor require them to purchase workers' compensation insurance by withholding the cost of the premium from what they were paid.

The Court of Appeals has affirmed the Commission's holding that Certificates of Non-Coverage are only effective for sole proprietors or partners in a partnership at the time the certificate is applied for. This result acts to permit those for whom the statute is intended to benefit, or obtain certificates unimpeded and would prevent the use of certificates as waivers to avoid an employer's statutory obligation to provide workers' compensation coverage to his employees. See, *Fouts, supra*.

In the instant case, the claimant did obtain a Certificate of Non-Coverage; however, he was neither a sole proprietor nor a partner in a partnership. He had no particular trade or expertise when he began working for the respondent employer. He worked on an as needed and part time basis for a set wage per day as a laborer. The claimant testified that he did not know what a sole proprietor was. T., p. 30. Therefore, I find the Certificate of Non-Coverage did not exclude the claimant from being an employee of the employer. I find the claimant was not a sole proprietor or a partner.

Respondents contend that if Ark. Code Ann. §11-9-102(9)(c) does not bar the

claim, the claimant was an independent contractor and not an employee. An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. In *Riddell Flying Service v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005), the Court set out numerous factors that may be considered in determining whether an injured person is an employee or an independent contractor for coverage purposes. Included in these factors are:

- (1) the right to control the means and the method by which the work is done;
- (2) the right to terminate the employment without liability;
- (3) the method of payment, whether by time, job, piece or other unit of measurement;
- (4) the furnishing, or the obligation to furnish the necessary tools, equipment, and materials;
- (5) whether the person employed is engaged in a distinct occupation or business;
- (6) the skill required in a particular occupation;
- (7) whether the employer is in business;
- (8) whether the work is an integral part of the regular business of the employer; and
- (9) the length of time for which the person is employed.

*Id.*, at 391-92, 206 S.W.3d at 287-88. The ultimate question in determining whether a

person or entity is an independent contractor is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control the work. See, Ark. 752, 170 *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989).

In the instant case, the claimant and the employer testified that the claimant began his employment with the respondent employer as an unskilled laborer. He did on- the-job training to learn the trade of handling concrete and worked on an as needed basis where he was paid by the day. The claimant furnished only some basic hand tools but none of the major tools and equipment used in the handling of concrete. Certainly, the employer was in control of the means and methods of completing a job. The facts in the instant case preponderate toward the claimant being an employee and not an independent contractor. The claimant did not possess the skills needed for independent concrete work nor did he have the tools. The claimant was not paid by the job but rather was paid simply by the day and the claimant maintained no control over how, when and other details of the work.

Respondents next contend the claimant was not performing employment services at the time when he contends he was injured. A compensable injury is defined as “[a]n accidental injury. . . arising out of and in the course of employment. . .” Ark. Code Ann. §11-9-102(4)(A)(i) (Supp. 2005). A compensable injury does not include an “[i]njury which was inflicted upon the employee at a time when employment services were not being performed. . . .” Ark. Code Ann. §11-9-102(4)(B)(iii) (Supp. 2005). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Dairy Farmers of America, Inc. v. Coker*, 98

Ark. App. 400, \_\_\_ S.W.3d \_\_\_ (2007). The courts use the same test to determine whether an employee is performing employment services as is used when determining whether an employee is acting within the course and scope of employment. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id.*

An employee traveling to and from the workplace is generally said not to be acting within the course of employment. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or coming from his place of employment. *Id.* The rationale behind this rule is that an employee is not within the course of employment while traveling to or from his job. *Id.* However, there are exceptions to this rule. *Id.* One such exception is where the employee must travel from job site to job site, whether or not he or she is paid for that travel time. The rationale behind this exception is that where the employee is required to travel from job site to job site, such travel is an integral part of the job itself. *Id.*

In *Olsten Kimberly Quality Care v. Pettey*, *supra*, the Court held that injuries sustained by a nurse while on her way to the home of a patient were compensable, even though she was not paid for the travel. The Court held that the travel was clearly for the benefit of the employer, whose business was to provide in-home nursing care.

In *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006), the

Court held that travel was a necessary part of the claimant's employment and it fits within the job site-to-job site exception to the "going and coming" rule. The claimant had no fixed place of employment and was obliged to travel from job site to job site as indicated by the employer.

In the instant case, the claimant merely worked by the day and had a specific site to appear for work. The claimant was given a ride to work by the employer, since he had no transportation and was simply going to the job site. This case can be distinguished from the *Moncus, supra*, case. In *Moncus*, the claimant and other employees were to meet the supervisor at a particular location and then follow him to the particular tract of land where the logging would be conducted that day. In this case, the claimant was doing something specifically required by the employer before he actually began performing his logging duties.

In the instant case, the claimant was simply riding to work with the supervisor and the supervisor's truck sustained a minor rear-end hit while en route. The facts and circumstances of the instant case are such that it is simply going to work and not furthering the interests of the employer. The "furnishing transportation" exception to the going-and-coming rule does not apply when the transportation is furnished solely as a gratuity. *Lepard v. West Memphis Machine & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995). In the instant case, the claimant's employment began when he started performing his job duties in handling the concrete. I find the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of the minor rear-end accident about October 5, 2006.

## **ORDER**

The preponderance of the evidence provides that the filing of an application and the issuance of a Certificate of Non-Coverage does not automatically bar the claimant from receiving benefits against his employer. The preponderance of the evidence provides that the claimant was not an independent contractor but was an employee of the respondent employer. The preponderance of the evidence provides that the claimant was not performing employment services at the time he was involved in a minor motor vehicle accident. The claim for benefits is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**