BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207890

JOHN SIMPSON, EMPLOYEE	CLAIMANT
WAYNE MOORE CONSTRUCTION COMPANY, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 23, 2004

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE ZAN DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondent appeals from the decision of the Administrative Law Judge finding that claimant was an employee of the respondent and that since claimant was not a sole proprietor or the partner of a partnership, the Certificate of Noncoverage issued by the Commission is neither binding nor valid. Based upon our *de novo* review of the entire record, the Full Commission finds that claimant is entitled to benefits and affirms the opinion of the Administrative Law Judge.

Respondent asks the Commission to reverse the unanimous opinion of the Commission in Patrick Golden v. Randy Wiggins Logging, Full Commission Opinion filed July 13, 1998 (E602244). The Commission declines this invitation to do so.

The employer is in the home building and remodeling business. Claimant's primary duties were those of a framing carpenter. Prior to receiving his first paycheck, the employer required claimant to sign an application for a Certificate of Noncoverage. A Certificate of Noncoverage was eventually issued by the Commission on February 1, 2001. On June 3, 2002, claimant sustained serious injuries to his left lower extremity when scaffolding broke and he fell. Physicians ultimately amputated claimant's left lower extremity below the knee.

The Administrative Law Judge found that claimant was an employee of the respondent rather than a subcontractor, a sole proprietor, or a partner of a partnership. The Administrative Law Judge also found that since claimant was an employee, the Certificate of Noncoverage issued by the Commission was neither valid nor binding.

The central issue in this case involves the statutory interpretation of Ark. Code Ann. § 11-9-402(c)(1)(B)(i)(Repl. 2002), which provides the following:

> (B)(i) 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. (Emphasis added.)

Respondent contends that a "party" who delivers a Certificate of Noncoverage to the prime contractor is conclusively presumed not to be covered by the Act or to be employees of the prime contractor. Respondent alleges that the only issue is whether the Certificate of Noncoverage was procured by fraud. Respondent criticizes the Administrative Law Judge for first determining whether claimant was an employee or a subcontractor. Further, since the General Assembly did not include provisions for a rebuttable presumption in this statute, as was done in the sections concerning the intoxication defense, evidence cannot be considered as to whether claimant is actually an employee,

or a sole proprietor, or a partner in a partnership. This interpretation of the Act is untenable at best.

Initially, it is interesting to note that respondent avoids use of the terms sole proprietor or partners of a partnership when discussing this issue. Respondent chooses instead to use the word "party." Respondent urges the Commission to comply with the Act's requirement of strict construction. However, strict construction compels a result different from the one advanced by respondent.

In Golden, supra, the Commission found that "Certificates of Non-coverage are only effective for sole proprietors or partners in a partnership at the time the certificate is applied for." Further, the Commission stated that "[t]he certificates were intended to be issued only to sole proprietors or partners who were conducting independent businesses." In other words, certificates of noncoverage are not effective or valid as to employees. The Commission specifically used strict construction to arrive at these findings. See also Aloha Pools & Spas, Inc. v. Employer's Insurance of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000). Thus, the conclusive presumption will only arise as a result of a valid Certificate of Noncoverage issued to a sole

proprietor or a partner of a partnership, but not to an employee who lacks the legal capacity to waive his or her right to compensation by agreement. Ark. Code Ann. § 11-9-108(a)(Repl. 2002). Accordingly, the first question that must be answered is whether claimant is an employee.

It is quite telling that respondent argues in the alternative that claimant was not an employee, but does not advance a serious argument to support its position. Respondents "concede that several of the factors would support the claimant's contention that he was an employee, but would request that those issues be addressed in the alternative."

Claimant has proven by a preponderance of the evidence that he was an employee rather than a subcontractor of the employer. The facts supporting this finding are that claimant was paid by the hour; that either party could terminate the employment relationship at any time without liability; that claimant did not work for anyone else during this period of time; that the employer provided the vast majority of the tools and equipment needed to perform the work; that the employer would direct claimant where he needed to go to work each day and essentially controlled all aspects of the work; that claimant has never owned his own

business; and that claimant believed he was an employee of the employer. It is important to remember that the employer did not present the testimony of any witnesses to contradict claimant’s testimony. Based on the above evidence, the Commission finds that claimant was an employee rather than an independent or subcontractor.

It appears that respondent is trying to circumvent the law and avoid its obligations to injured employees. The undisputed evidence is that this employer required claimant and others on the crew to apply for and obtain Certificates of Noncoverage in order to receive a paycheck. Admittedly, these individuals knew the employer was taking this tactic to avoid providing insurance coverage for injuries sustained on the job. As a condition of employment, this employer compelled these individuals to sign what is in effect a waiver of their right to compensation. This is clearly improper and against public policy. If the Commission were to accept respondent’s arguments in this case, every employer in the state could require its employees to obtain Certificates of Noncoverage and avoid its legal obligations to provide workers’ compensation coverage to its employees. While this scenario is quite absurd, the potential still exists. The plain and unambiguous language of the statute

requires the position announced by the Commission in Golden.

In Golden, the Commission stated the above in the following manner:

> The obvious intent of Ark. Code Ann. § 11-9-108 (A) is to prevent employees, as a result of coercion or persuasion, or because of a lack of information, from executing a waiver or other document that relieves their employer of the obligation to provide workers' compensation coverage. On the other hand, Ark. Code Ann. § 11-9-402 (c) (1) (B) (i) is designed to allow 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.
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> * * *
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> ...The certificates were intended to be issued only to sole proprietors or partners who were conducting independent businesses. We do not believe that it was intended to act as a "waiver" for individuals who are employees. If the latter were the case, then employers could avoid the Workers' Compensation Act simply by declaring that their employees were independent contractors and terminating any who would not obtain a Certificate of Non-Coverage. Obviously, such a situation is contrary

> to the purposes and objectives of the Workers' Compensation Act.
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> We also note that the legislature has directed the Commission and the Courts to strictly interpret the Workers' Compensation Act. Since the statute in question only permits sole proprietors or partners in a partnership to obtain a Certificate of Non-Coverage, we believe that it would be a significant expansion of the Workers' Compensation Act to interpret it in such a manner that employees were able to obtain Certificates of Non-Coverage so as to act as a waiver. Such a holding would constitute a significant expansion of the Workers' Compensation Act, something that is expressly prohibited by the Act. See Ark. Code Ann. § 11-9-1001.
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> For the reasons set out above, we hold that Certificates of Non-Coverage are only effective for sole proprietors or partners in a partnership at the time the certificate is applied for. Such a result would act to permit those for whom the statute is intended to benefit, to 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. (Original emphasis.)

Additionally, it really does not matter that claimant understood the purpose of the Certificate, that he was not "coerced" into obtaining the Certificate, or that he knew the employer in this case was not taking out workers' compensation coverage for any injury he might sustain on the

job. It also does not matter that claimant signed a document which appears to indicate that he is a contractor. This type of rigid adherence to the term used by the parties to describe their relationship has been rejected by the Commission. See e.g. Leroy Sanders v. Whitworth Trucking Company, Full Commission Opinion filed August 29, 1990 (D907180) and James A. Stokes v. ETA. Transportation, Inc., Full Commission Opinion filed June 23, 1999 (E715213).

Finally, respondent also warns of catastrophic consequences if the Commission continues to follow the holding in Golden. However, respondent has offered no evidence whatsoever to back up its prediction of dire consequences.

Accordingly, the Commission finds that claimant was an employee of the employer and that, therefore, the Certificate of Noncoverage issued by the Commission is neither binding nor valid. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge’s decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant’s injury occurred after July 1, 2001, the claimant’s attorney’s fee is governed by the

provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant was an employee of the respondent. In my opinion, the claimant has failed to meet his burden of proof. The respondents requested that the Full Commission reconsider its prior position in Patrick Golden v. Randy Wiggins Logging, Full Commission Opinion Filed July 13, 1998 (Claim No. E602244). A majority of this Commission found that Certificates of Non-coverage pursuant to Ark. Code Ann. § 11-9-402(c)(1)(B)(i) only applied to sole proprietors or partners. The majority has declined the

respondents' invitation, however, I would accept the invitation. The majority denotes that Golden was a unanimous decision. However, I take this opportunity to point out that the panel of Commissioners has changed since Golden was decided almost six years ago. Further, the facts of this case are significantly different than the facts of the case in Golden.

After conducting a de novo review of the record, I find that the claimant in this case was an uninsured subcontractor, or sole proprietor, pursuant to Ark. Code Ann. § 11-9-402 (Repl. 2002). As the subsections thereunder state, a party who does not elect to be covered by this particular "chapter and be deemed employees thereunder and who deliver to the prime contractor a current certificate 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." Ark. Code Ann. § 11-9-402(c)(1)(B)(i). The statute further states that a prime contractor's insurance carrier is not liable for injuries to parties who "have provided a current certification of noncoverage, and the carrier shall not include compensation paid by the prime contractor to the

sole proprietor or partners described above in computing the insurance premium for the prime contractor.” Ark. Code Ann. § 11-9-402(c)(2)(Repl. 2002).

In the definition section of the Act, the legislature specifically stated in Ark. Code Ann. § 11-9-102(9)(D)(Supp. 2003) that:

> Any individual holding from the [C]ommission 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 claimant testified at the hearing that he was aware he was being treated as a subcontractor, or sole proprietor, as were the other people on the job site for the insured. Furthermore, the claimant testified he knew when he started his employment that he would be requested to sign the certification and did so. Not only in his hearing testimony, but also in his deposition testimony, the claimant testified that there was no pressure to sign the Certificate of Non-Coverage. The following is enlightening:

> Q. [Respondent’s counsel] And you testified that there was no pressure to sign that document, is that correct?

A. [Claimant] No, there wasn’t [sic] no pressure... [T27]

The claimant admitted he was aware that the Certificate of Non-Coverage indicated he did not have workers’ compensation coverage for himself and he understood the ramification of the form. Not only did the claimant admit his understanding, he also indicated that no one had forced him to sign the documents. In that regard, the claimant testified as follows:

Q. [Respondents’ counsel] Did they force you to fill out this form?

A. [Claimant] No.

Q. And you knew what you were filling out?

A. ....I knew what the purpose of it was for, yes...

Q. And what did you think it was for?

A. To show that I was -- that he had no coverage on me, and stuff like that, is basically what my understanding when I signed it...He’s not going to be withholding taxes or have any coverage on me, insurance, or things like that.

Q. So you knew when you signed it, he didn’t have workers’ comp coverage for you?

A. Yes.

The claimant not only signed the Certificate of Non-Coverage in this case, but he also signed another document indicating that he was a contractor. The claimant executed a document on Wayne Moore Construction’s Company’s form indicating he was a contractor. The claimant testified in his deposition that he had indeed signed the line indicating he was a contractor, and confirmed on the record that Mr. Moore, the insured, never informed him he was an actual employee. Furthermore, the claimant also filled out tax forms indicating that he was a “non-employee.” The claimant testified that he realized the insured was paying him as a “non-employee” and once again confirmed on the record that he understood he was being treated as a “non-employee.” The insured must be able to rely upon documents signed by a claimant showing he was aware of the intent of the parties’ relationship issues, but the carrier must also be able to rely upon these documents when accounting for premiums for coverage on a particular insured.

The insurance carriers do not include any compensation paid by the prime contractors to subcontractors in computing the insurance premiums for the prime contractors. See Ark. Code Ann. § 11-9-402(c)(2). It is clear the majority does not understand the ramifications of

the miscalculations of premiums. The prime contractors must be able to rely on the representations made by the subcontractors/sole proprietors when the subcontractors fill out the Certificates of Non-Coverage. In order to allow an alleged "employee" to come in and argue after the fact that they are an actual employee would defeat the purpose and intent of the Act by allowing them to attempt to rebut what is "conclusively presumed." While the prior case law on these particular issues states that the Commission must first determine whether or not the claimant was an actual employee or subcontractor, to allow an actual determination of those issues would create a "rebuttable presumption," rather than conclusive presumption as specifically set forth in the statute.

In my opinion, Ark. Code Ann. § 11-9-108(a) is not in conflict with other sections as that particular subsection addressees "employees," rather than subcontractor/contractor relationships. The basic rule for statutory construction is to give the full effect to the intent of the legislature. The basic rule for statutory construction is to give effect to the intent of legislature. Ford v. Keith, 338 Ark. 487, 996 S.W.2d 20 (1999). If the language of the statute is plain and unambiguous, the

analysis need go no further. Burcham v. City of Van Buren, 330 Ark. 451, 954 S.W.2d 266 (1997).

In the Arkansas Workers Compensation Act, the legislature has included a particular section in the Act which specifically allows for a rebuttal presumption. In that regard, Ark. Code Ann. § 11-9-102(4)(B)(iv)(a)-(b) states "Compensable injury: does not include:

> (iv)(a) [An][i]njury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
>
> (iv)(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

The fact that the legislature included a rebuttable presumption in Ark. Code Ann. § 11-9-012(4)(B)(iv)(b), but failed to include any such language in either Ark. Code Ann. § 11-9-402(c)(1)(B)(I), or in Ark. Code Ann. § 11-9-102(9)(D) demonstrates that the legislature was aware they could include a rebuttal presumption in the sections for the

claimant to attempt to prove he was an actual employee, rather than a subcontractor. However, the legislature did not to include the rebuttable presumption possibly in order to eliminate the problems with employers and carriers being held liable for injuries of employees for which they had not accounted in their premiums for coverage. The legislature has specifically directed the Commission and the Courts to strictly interpret the Workers' Compensation Act. Therefore, there is no conflict between the sections as provided, as the legislature could have incorporated a rebuttal presumption in these sections if they so desired. See Ark. Code Ann. § 11-9-1001.

To allow a claimant to rebut what is conclusively presumed would totally disregard the whole purpose of the Certificate of Non-Coverage sections within the Act. Carriers and contractors rely upon the Certificates of Non-Coverage when determining the premium and coverage issues, and holding them liable for claims on which no premiums are received could lead to catastrophic consequences for the insurance industry. Unlike the prior cases, the claimant in this case was aware of what he was signing. The claimant in this case specifically admitted several times during the hearing that he was aware he signed documents indicating he

was a contractor, that he filled out tax forms indicating he was a "non-employee," and that he was aware he did not have workers' compensation coverage. Furthermore, those prior cases fail to address the potential ramifications for employers and insurance carriers who must be able to rely upon certified documentation on record with state agencies which are "conclusively presumed" to be valid. The only issue which should be addressed in these particular circumstances are whether or not a claimant was forced to sign the Certificate of Non-Coverage, which would mean that the Certificate was not obtained under fraud. This would allow the exclusion of the documentation without analyzing the rebuttable presumption issues in contradiction of the statutory interpretations. Therefore, I find that Certificates of Non-coverage should not be limited to sole proprietors and partners.

Even though I am of the opinion that Certificates of Non-coverage are not limited to sole proprietors and partners and that the claimant in the present case obtained a valid Certificate of Non-coverage, in light of the majority's findings, further analysis of this claim is necessary. The determination of whether, at the time of an injury, an individual was an independent contractor or an

employee depends on the facts of the case. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). The resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the employer's right to control and of factors related to the relationship of the work to the asserted employer's business. In making a determination, the Commission must look at the factors outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999) citing §220 of the Restatement (Second) of Agency:

1. the extent of control which, by the agreement, the master may exercise over the details of the work;

2. whether or not the one employed is engaged in a distinct occupation or business;

3. the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

4. the skill required in the particular occupation;

5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

6. the length of time for which the person is employed;

7. the method of payment, whether by the time or by the job;

8. whether or not the work is a part of the regular business of the employer;

9. whether or not the parties believe they are creating the relation of master and servant; and

10. whether the principal is or is not in business.

11.

See also <u>Aloha Pools & Spas, Inc. v. Wausau</u>, 342 Ark. 398, 39 S.W.3d 440 (2000).

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to the various factors must be determined by the Commission. <u>Franklin</u>, <u>supra</u>. However, the Supreme Court has stated that the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. <u>Sanders</u>, <u>supra</u>.

Unlike the claimant in <u>Golden</u>, the claimant in the claim presently before us knew exactly what he was signing. He knew that he was signing a Certificate of Non-Coverage

and he also signed another document indicating that he was a contractor. Furthermore, the record demonstrates that the claimant was never informed by the respondent-employer that he was an actual employee. The claimant filled out tax forms indicating that he was a non-employee. The claimant testified that he realized the respondent-employer was paying him as a non-employee and that he was being treated as a non-employee. When you consider all of the factors set forth in the Franklin case, I can not find that the claimant was an employee of the respondent-employer.

In the Golden case, the insurance agent was the one who was charged a $100 fee to "process" the application from the claimant for the Certificate of Non-Coverage. The claimant was delivered to the insurance agent to fill out the appropriate paperwork and was mislead with respect to what he was completing. The claimant thought that he was completing paperwork to obtain workers' compensation insurance. In the case presently before us, the claimant was not mislead, but in fact knew what he was signing. In short, I cannot find that the claimant proved by a preponderance of the evidence that he was an employee of the respondent-employer. Therefore, the Certificate of Non-Coverage is controlling. Even if I were to find that the claimant was an

employee of the respondent-employer, I can not find that the Full Commission's previous interpretation of the statutory provisions set forth in § 11-9-402(C)(1)(B)(i) is correct. I do not agree that Certificate of Non-Coverage are limited solely to sole proprietors and partners.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner