

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310833

ROBERT INGRAM,  
EMPLOYEE

CLAIMANT

DEVORE CONSTRUCTION,  
EMPLOYER

RESPONDENT NO. 1

RASMUSSEN CONSTRUCTION, INC.  
EMPLOYER

RESPONDENT NO. 2

TRAVELERS INSURANCE COMPANY

RESPONDENT NO. 3

OPINION FILED AUGUST 18, 2005

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

Claimant represented by the HONORABLE JAY TOLLEY ,  
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE MARY-  
MARSHA HARDIN, Attorney at Law, Rogers, Arkansas.

Respondent No. 2 represented by the HONORABLE J. DAVID  
WALL, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 3 represented by the HONORABLE GUY ALTON  
WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed September 16, 2004. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The parties' stipulation that the claimant earned an average weekly wage of \$428.00 which would entitle him to compensation at the rate of \$283.00 per week for temporary total disability benefits is hereby accepted as fact.
2. On September 22, 2003, claimant was an employee of respondent #1, not an independent contractor.
3. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right knee while employed by respondent #1 on September 22, 2003.
4. Respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right knee injury.
5. Claimant is entitled to temporary total disability benefits beginning September 23, 2003, and continuing through March 26, 2004.
6. Respondent #2 was not the prime contractor at the time of claimant's compensable injury; therefore, respondent #2 is not liable for payment of compensation benefits pursuant to A.C.A. § 11-9-402(a).
7. At the time of claimant's injury on September 22, 2003, respondent #2's workers' compensation insurance had been canceled for non-payment of premium by respondent #3.
8. Respondent #1 does not have to post a bond pursuant to A.C.A. §11-9-808.
9. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 16, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding, in relevant part, that on September 22, 2003, the claimant was an employee of respondent #1, namely Devore Quality Construction (DQC), and that he was not an independent contractor; that the claimant has proven by a preponderance of the evidence that he sustained a compensable right knee injury while employed by respondent #1, DQC; that respondent #1 is liable for all reasonable and necessary medical treatment associated with the claimant's compensable injury; that the claimant is entitled to temporary total disability

benefits beginning September 23, 2003 and continuing through March 26, 2004; and that respondent #2, whose worker's compensation insurance had been canceled by respondent #3 at the time of the claimant's compensable injury due to non-payment of the premium, was not a prime contractor at the time of said injury.

A carefully conducted de novo review of this claim in its entirety reveals that the preponderance of the evidence supports a finding that the claimant sustained a work related right knee injury on September 22, 2003. Liability for this injury, however, rests with the claimant. Specifically, I find that the claimant has failed to prove by a preponderance of the evidence that he was an employee of respondent #1, DQC, on September 22, 2003. Rather, I find that the preponderance of the evidence reveals the claimant was a self-employed, independent contractor on that date.

On September 22, 2003, the claimant was working as a house framer when he reportedly fell off of a ladder and twisted his right knee. Subsequently, the claimant underwent conservative treatment by orthopaedic surgeon, Dr. Scott Cooper. When conservative measures failed to alleviate the claimant's symptoms, Dr. Cooper ordered an MRI which revealed an ACL tear and lateral meniscus tear. On October 28, 2003, Dr. Cooper

surgically repaired the claimant's right knee. The claimant was off of work from September 22, 2003, through March 26, 2004, at which time he became employed as a truck driver for Waste Management.

The objective medical evidence presented in this claim preponderates in favor of the claimant having sustained an injury to his right knee on the above stated date. The remaining issue, therefore, is whether or not the claimant was an employee or an independent contractor at the time of his injury.

At the time of the claimant's injury, he held a valid Certificate of Non-Coverage (CNC) from the Arkansas Worker's Compensation Commission. Pursuant to Ark. Code Ann. §11-9-402(c)(1)(B)(i):

a party who does not elect to be covered under the provisions of this particular chapter and be deemed an employee thereunder, and who executes and delivers to the prime contractor a current certificate of noncoverage, shall be conclusively presumed not to be covered by the law or to be an employee of the contractor during the term of the certification or any renewals thereof until he or she elects otherwise, whichever comes first.  
Ark. Code Ann. §11-9-401(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 Simpson v. Wayne Moore Construction Co., Full Commission Opinion filed February 24, 2004 (F207890), the majority upheld the law judge's finding that the claimant was an employee of the respondent rather than a subcontractor, a sole proprietor, or a partner of a partnership. In doing so, the majority reaffirmed its earlier decision in Golden v. Randy Wiggins Logging, Full Commission Opinion filed July 13, 1998 (E602244), thereby rejecting the respondent's argument 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." In addition, the majority rejected the respondent's argument that because the General Assembly did not include provisions for a rebuttable presumption in this section of the statute, as was done in the sections concerning the intoxication defense, evidence cannot be considered as to whether the claimant was actually an employee, a sole proprietor, or

a partner in a partnership. This particular line of reasoning, stated the majority, was "untenable at best." Id. In summary, the majority in Simpson found that CNC's are "intended to be issued only to sole proprietors or partners who were conducting independent businesses." Id. "We do not believe," stated the majority, "that it was intended to act as a 'waiver' for individuals who are employees." Id.

It is arguable, however, that the legislature was purposeful in failing to include language regarding a rebuttable presumption in Ark. Code Ann. §11-9-402. More specifically, the fact that the legislature included a rebuttable presumption in Ark. Code Ann. §11-9-102(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 rebuttable presumption in these sections. Moreover, the legislature has specifically directed the Commission and the Courts to strictly interpret the Worker's 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. Otherwise, to allow a claimant to rebut what is

conclusively presumed would totally disregard the whole purpose of the CNC sections within the Act. Therefore, by virtue of this reasoning, the only issue which should be addressed in these particular circumstances is whether or not a claimant was forced to sign the CNC, which would mean that the certificate was obtained under fraud.

By the claimant's own admission, he willingly and knowingly executed and delivered a CNC to DQC, thereby "electing" to be excluded from the provisions of Ark. Code Ann. §11-9-402(c)(1)(B)(i). The claimant admitted that he clearly understood the meaning of the term "sole proprietor" as it applies to worker's compensation, and that he understood that by checking the "sole proprietor" section of the certificate, he was declaring himself to be self-employed. The claimant also acknowledged that when he signed the Affidavit of Certificate of Non-Coverage he understood he had no benefits, i.e., worker's compensation insurance. Moreover, the claimant held out to others, such as his treating physicians, that he was self-employed at the time of his injury. Finally, the claimant admitted (after prompting by his attorney), that he had been given an opportunity to become an employee of DQC, but that he had declined such offer, opting instead, to

remain a sole proprietor. This is clearly not a situation wherein the claimant was forced or coerced to sign a CNC. Rather, the claimant deliberately chose to execute and deliver a CNC, thereby assuming liability for any and all risks of injury related to his occupation.

In a recent decision, the Arkansas Court of Appeals attempted to clarify the purpose of certain sections of Ark. Code Ann. §11-9-102(9)(B) (Repl. 2002). Garcia v. A&M Roofing, \_\_\_\_ Ark. App. \_\_\_\_, \_\_\_\_ S.W. \_\_\_\_, (February 2, 2005). For example, the Garcia Court stated:

It is clear that the purpose of subsection (B)(1) is to permit a sole proprietor or partner(s) to elect to exempt himself or herself from entitlement to the benefits of worker's compensation insurance while continuing to provide worker's compensation benefits to employees of the sole proprietorship or partnership; and to provide that when a sole proprietor or partner delivers his or her certificate of noncoverage to the prime contractor, such sole proprietor or partner is conclusively presumed not to be covered by worker's compensation or to be an employee of the prime contractor.

The Garcia Court made it clear that an employee could not waive his right to worker's compensation coverage via a CNC. More specifically, the

Court stated, "We cannot interpret section 11-9-402 to mean that employees can waive their right to compensation by obtaining certificates of noncoverage, or in a manner that enables a prime contractor to avoid its statutory obligation to provide worker's compensation coverage to employees of uninsured subcontractors. Garcia, supra. 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 liability created by this chapter, except as specifically provided elsewhere in this chapter. Ark. Code Ann. §11-9-108(a) (Repl. 2002). The Court in Garcia further stated that "We previously have interpreted the primary purpose of Ark. Stat. Ann. §81-1306 (Repl. 1976), the predecessor to the statute currently at issue, as being 'to protect the employees of subcontractors who are not financially responsible, and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees.'" Garcia, supra; citing Liggett Const. Co. v. Griffin, 4 Ark. App. 247, 629 S.W.2d 316(1982). Although in the Garcia case, the Court has clarified an employer's statutory obligation to its legitimate

employees, the Court failed to address those situations where, such as in this case, an individual would opt to reap the benefits of being an "independent contractor" up and until such time as he is injured on the job. Applying the Court's reasoning in Garcia, it would seem that an independent contractor who has a valid CNC would be prohibited from "relieving himself from liability" by doing through sub, prime, or general contractors what they would otherwise do directly. In this case, for example, as a sole proprietor the claimant could have obtained worker's compensation coverage on his own behalf. However, the claimant chose not to; thereby, assuming the risk should he be injured on the job. Now that the claimant has been injured and incurred medical expenses from that injury, he would have the Commission shift the burden of that risk to another party. In the absence of fraud, if the claimant was truly a sole proprietor at the time of his injury, he cannot now, after the fact, cry foul. Undisputed testimony in this case reveals that the claimant refused an offer by DQC to become an employee. Instead, the claimant preferred, even insisted, on remaining independent in order to continue to be his own boss, avoid payroll deductions, etc... . In other words, when given the opportunity to act otherwise, the claimant chose to continue to benefit

from all of the perks of being self-employed rather than work under the usual restraints imposed upon "employees". Moreover, the claimant knowingly and willingly executed a CNC, in which he categorized himself as a sole proprietor. The claimant made a deliberate decision to remain an independent contractor, thereby accepting the risks involved should he be injured. Yet, upon being injured, the claimant is now able to avoid the consequences of his deliberate choice. This scenario would seem to defeat the purpose of legislation which is intended to protect against fraud and collusion.

The claimant testified that DQC, under the direction of Terry DeVore, employed and supervised him on the Ball project. The claimant further testified that Terry DeVore had the right to hire him or fire him from the Ball job. The claimant later admitted, however, that he was free to report to work and leave at will; that he furnished his own transportation and tools; and, that he had no contractual agreement with DQC. Darrin DeVore denied that DeVore Construction had the right to fire the claimant. As previously mentioned, the claimant also admitted having turned down an offer by Darrin DeVore to become an "employee" of DQC prior to his injury. Darrin DeVore corroborated this testimony by his own testimony.

Mr. DeVore further testified that he explained to the claimant what being a sole proprietor meant prior to the claimant having signed the CNC. Specifically, Mr. DeVore testified as follows:

Q. (Ms. Hardin continued.) Did you explain to Mr. Ingram when he signed this document what it meant to be a sole proprietor?

A. Yes. Every - - everyone - - yes.

Q. Okay. What did you tell him it meant?

A. That he was self-employed, and that his actions or anything that happened to him were his responsibility.

Q. Okay. While Mr. Ingram was working with you, did you offer to make him an employee of DeVore Quality Construction?

A. Yes. ... It was the first of the year, and everybody who worked with us, I gave them the options of becoming employees; having taxes withheld, workman's comp, the works, you know.

Finally, the claimant indicated on forms that he filled out at the hospital after his injury that he was "self-employed." Whether DQC had the authority to "fire" the claimant from this project is questionable. Otherwise, the record reveals that the claimant had full autonomy regarding his work on this particular building project. The claimant came and went as he pleased, he

supplied his own tools, and although the claimant was paid "through" DQC for the work that he did on this project, it is evident that he was not paid "by" DQC. It was demonstrated throughout the testimony that this particular project was peculiar from most projects where there is a clear-cut chain of command. The claimant was a "cut man," which is someone who specializes in cutting boards. He was not given this task, but was brought in on this particular project because of his expertise in this area. As such, the record indicates that claimant was not considered to be part of the regular framing crew, but rather, someone who worked with the regular crew.

Based upon the above and foregoing, I find that the claimant has failed to prove that he was an employee of DQC at the time of his injury causing accident. Rather, the preponderance of the evidence shows that the claimant was an independent contractor. As such, liability for his compensable injury should rest with the claimant. Therefore, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner