

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. 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 JULY 14, 2008

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

Claimant represented by the HONORABLE NEAL CHAMBERLAIN,
Attorney at Law, Little Rock, Arkansas.

Respondent #1 represented by the HONORABLE SARAH
GREENWOOD, Attorney at Law, Little Rock, Arkansas.

Respondent #2 & #3 were represented by the HONORABLE
MATTHEW R. HOUSE, Attorney at Law, Little Rock,
Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed November 30, 2007. In
said order, the Administrative Law Judge made the
following 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. (sic)

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant states on appeal that Ark. Code Ann. §11-9-105(a) is unconstitutional and void. Statutes are presumed constitutional and the burden of proving otherwise is placed on the party challenging the legislative enactment. *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). All doubts are resolved in favor of a statute's constitutionality. *Foster v. Jefferson County Bd. of Electon Comm'rs*, 328 Ark. 223, 944 S.W.2d 93 (1997). The claimant has not shown in the

present matter that Ark. Code Ann. §11-9-105(a) is unconstitutional.

Therefore we affirm and adopt the November 30, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority's determination that Mr. Robert Harris and Erin, Inc. are protected by the "exclusive remedy" of the Arkansas Workers' Compensation Act is contrary to the evidence of record. After a de novo review of the record, I find that although Mr. Harris owns both Arkansas Steel Erectors and Erin, Inc., as there was no employment relationship between Erin, Inc. and Mr. Tim Johnson at the time of the accident, Erin, Inc., and Mr. Harris as sole owner of Erin, Inc., are

not protected by the "exclusive remedy" of the Workers' Compensation Act.

The preponderance of the evidence of record shows that Mr. Tim Johnson was working for Arkansas Steel Erectors when he was crushed by a crane owned by Erin, Inc.. Mr. Johnson was not an employee of Erin, Inc., nor was Erin Inc. Mr. Johnson's employer. However, the sole owner of Erin, Inc., Mr. Robert Harris, is also the majority owner of Arkansas Steel Erectors. Mr. Harris and has asserted that he, and Erin, Inc., are protected by the "exclusive remedy" of the Arkansas Workers' Compensation Act, under a "persona" theory based on Ark. Code Ann. §11-9-105(a). However, there is no evidence of record to support a finding that there was any employment relationship between Mr. Johnson and Erin, Inc., when Erin, Inc.'s crane crushed Mr. Johnson. Pursuant to Article 5, Section 32, of the Arkansas Constitution, the Worker's Compensation Commission has jurisdiction only when there is an employment relationship between the litigants. Stapleton v. M.D. Limbaugh Constr. Co., 333 Ark. 381, 969 S.W. 2d 648 (1998). While the Workers' Compensation Commission properly has jurisdiction over Mr. Johnson's workers' compensation claim against his employer, Arkansas Steel

Erectors, the instant cause of action is a tort action between Mr. Johnson and Erin, Inc., represented by its sole owner, Mr. Harris. Therefore, I find that the majority has erred in determining that the Workers' Compensation Commission has jurisdiction over this tort claim.

As for the "persona" theory, apparently accepted by the majority, while the preponderance of the evidence shows that Mr. Harris was "acting in his capacity as an employer" for Arkansas Steel Erectors at the time of the accident, which protects his "persona" as majority owner of Arkansas Steel Erectors under the "exclusive remedy" provisions of the Arkansas Workers' Compensation Act, there is no evidence of record to indicate that Mr. Harris was "acting in his capacity as an employer" for Erin, Inc., at the time of the accident. There is no evidence of record to indicate that Erin Inc., is an "employer" under the Arkansas Workers' Compensation Act. Erin Inc. has no employees. There is no evidence of record to support a determination that Arkansas Steel Erectors and Erin, Inc. are the same entity. There is no evidence of record to support the majority's conclusion that Mr. Harris' "persona" as majority owner of Arkansas Steel Erectors

is the same as his "persona" as sole owner of Erin, Inc.. Mr. Harris' "persona" as majority owner of Arkansas Steel Erectors makes him an employer under the Arkansas Workers' Compensation Act. Mr. Harris' "persona" as the sole owner of Erin, Inc., does not make him an employer under the Arkansas Workers' Compensation Act. The fact that Mr. Harris owns both entities does not somehow create an employment relationship between Erin, Inc. and Mr. Johnson, which did not, in fact, exist.

In conclusion, Mr. Johnson was performing employment services for his employer, Arkansas Steel Erectors, when he was crushed by a crane owned by Erin, Inc.. Mr. Johnson has a workers' compensation claim against Arkansas Steel Erectors. Mr. Johnson has a tort claim against Erin, Inc.. Therefore, I must dissent from the majority's determination that the Workers' Compensation Commission has jurisdiction over this tort claim. I must also dissent from the majority's finding that Erin, Inc. and Mr. Harris are protected by the "exclusive remedy" of the Workers' Compensation Act.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner