NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G403930

SACRAMENTO ROSALES, EMPLOYEE	CLAIMANT
ELITE MASONRY, LLC, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY/ MARKEL SERVICE, INC., CARRIER/TPA	RESPONDENT

OPINION FILED JULY 22, 2015

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

Claimant represented by the HONORABLE JASON M. HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge filed January 21, 2015.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The parties' stipulation that claimant earned an average weekly wage of $513.00 which would entitle him to compensation at the rates of $342.00 for total disability benefits and $257.00 for permanent partial disability benefits is hereby accepted as fact.

2. Respondent had the requisite number of employees to invoke the jurisdiction of the

Arkansas Workers' Compensation Commission pursuant to Ark. Code Ann. § 11-9-102(11).

3. On May 7, 2014, claimant was an employee of the respondent, not an independent contractor.

4. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right hand while working for respondent on May 7, 2014.

5. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right hand injury.

6. Claimant is entitled to temporary total disability benefits beginning May 7, 2014, and continuing through a date yet to be determined.

7. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

8. Respondent is not liable for the cost of the deposition of Chris Pullin. The deposition was taken at the request of claimant for evidentiary purposes; therefore, claimant is liable for the cost of that deposition.

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.

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

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

S. DALE DOUTHIT, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney Dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion affirming and adopting the opinion of the administrative law judge finding that the claimant

proved that he was an employee of the respondent-employer at the time of his industrial accident. Although at the time of the hearing before the commission, the claimant claimed to speak or understand very little English, the preponderance of the evidence in this claim shows that he clearly understood what he was doing when he obtained a Certificate of Non-Coverage declaring himself an independent contractor. The preponderance of the evidence further shows that the claimant's primary motivation for obtaining a Certificate of Non-Coverage was for financial gain. In addition, the preponderance of the evidence shows that the claimant wanted the freedom associated with being an independent contractor versus an employee. In the words of witness Dale Harvey, the claimant wanted the "right and ability to be able to do whatever they want to and freelance work, which is to work for whoever they choose to or help wherever they choose." Yet, as a result of his industrial accident, the claimant now seeks to avail himself of the benefits of being an employee of the respondent-employer's versus an independent contractor. It is clear that the claimant's primary purpose for desiring to change his status following his industrial

accident is once again for financial gain.

The record reflects that the respondent-employer had a workers' compensation policy in effect at the time of the claimant's industrial accident, and that he had offered to count the claimant as an employee prior to his accident. The credible testimony of company owner, Chris Pullin, shows that the claimant had a clear understanding of their working relationship prior to his accident, and that the claimant had deliberately chosen to work under the status of an independent contractor. Pullin's testimony further shows that the only real control he had over the claimant's work was ensuring that deadlines were met. And, while the nature of their business was similar, in that both the respondent-employer and the claimant contracted to perform masonry work, the claimant's employment history demonstrates that he had contracted with several such companies and individuals over the years to perform this type of work as an independent contractor, and that the only time he claimed a different status was after he was injured on a job.

Whereas the administrative law judge, and now the majority, place considerable importance on the

"relative nature of the work test" in this claim, I do not. The evidence in this claim demonstrates that 1) the claimant knowingly and intentionally signed a Certificate of Non-Coverage declaring himself to be a independent contractor; 2) the claimant was free to work on other jobs and was not limited to work with the respondent-employer; 3) the claimant provided his own tools; 4) the claimant controlled his own work activities and was not subject to the control of the respondent-employer in any way; and perhaps most importantly, 4) the claimant willingly and knowingly opted out of workers' compensation coverage for purposes of financial gain; coverage which was freely offered by the respondent-employer at the onset of the job. Considering these factors, the claimant should not be allowed to now claim status as an employee of the respondent-employer merely to avail himself of the benefits of that coverage after an injury has occurred, when he knowingly, willingly, and deliberately chose not avail himself of that coverage prior to the accident.

Therefore, I dissent from the majority opinion finding that the claimant was an employee of the respondent-employer.

KAREN H. McKINNEY, Commissioner