

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G906072

JACEN GANN, EMPLOYEE	CLAIMANT
CK ASPHALT, LLC, EMPLOYER	RESPONDENT NO 1
FARMINGTON CASUALTY CO./TRAVELERS INSURANCE CARRIER/TPA	RESPONDENT NO. 1
BOBBY KENNEDY CONSTRUCTION CO., EMPLOYER	RESPONDENT NO. 2
FARMINGTON CASUALTY CO./ TRVELORS INS. CO. CARRIER/TPA	RESPONDENT NO. 2

OPINION FILED FEBRUARY 1, 2022

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

Claimant represented by the HONORABLE LAURA BETH YORK and the HONORABLE JEREMY McNABB, Attorneys at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE AMY MARKHAM, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID DONOVAN, 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 September 9, 2021. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has exclusive jurisdiction to determine the employment relation between claimant/plaintiff Gann and Bobby Kennedy Construction, Inc.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant/plaintiff has been receiving workers' compensation benefits from Travelers Insurance, the carrier that provides workers' compensation insurance for both Bobby Kennedy Construction Company, Inc., and CK Asphalt, LLC.
4. That claimant/plaintiff Gann received his W-2 from CK Asphalt, LLC, and was an employee of CK Asphalt, LLC, at the time of the work-related accident.
5. That the Workers' Compensation First Report of Injury that was filed with the Commission on September 17, listed the employer as Bobby Kennedy Construction Co.
6. That the only supervisors of the employees of CK Asphalt, LLC, were employed by Bobby Kennedy Construction, Inc.
7. That Bobby Kennedy Construction, Inc., CK Asphalt, LLC, and BLK Quarry, LLC, were owned fifty-fifty (50/50) by Bobby Kennedy and Cynthia Kennedy, husband and wife.
8. That a single workers' compensation insurance policy was issued and apportioned at the end of the year between CK Asphalt, LLC, Bobby Kennedy Construction, Inc., and BLK Quarry, LLC.
9. That Bobby Kennedy Construction Company, Inc., satisfied the burden of proof to provide that claimant/plaintiff Gann was a dual or special employee of Bobby Kennedy Construction Company, Inc., as well as CK Asphalt, LLC, at the time of the work-related

accident. Consequently, Bobby Kennedy Construction, Inc., is entitled to the exclusive remedy provisions of the Arkansas Workers' Compensation law, specifically Ark. Code Ann. § 11-9-105.

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.

Therefore, we affirm and adopt the September 9, 2021 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.

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SCOTTY DALE DOUTHIT, Chairman

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CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my *de novo* review of the record in this claim, I dissent from the majority opinion finding that Bobby Kennedy Construction

Company, Inc., satisfied the burden of proof to provide that claimant/plaintiff Gann was a dual or special employee of Bobby Kennedy Construction Company, Inc., as well as CK Asphalt, LLC, at the time of the work-related accident; and that consequently, Bobby Kennedy Construction, Inc., is entitled to the exclusive remedy provisions of the Arkansas Workers' Compensation law, specifically Ark. Code Ann. §11-9-105.

The claimant was sustained compensable injuries to his pelvis on September 12, 2019. The claimant was hit by a truck owned by Bobby Kennedy Construction Co. (hereinafter referred to as "BKC"). At the time of this accident, the claimant was an employee of CK Asphalt. The claimant filed a workers' compensation claim against CK Asphalt which was accepted and paid.

The claimant filed an action in tort against BKC in Van Buren County Circuit Court for negligence. BKC asserted that at the time of the accident, the claimant was a special employee of the company; therefore, it is entitled to the exclusive remedy protection provided in Ark. Code Ann. §11-9-105(a).

BKC and CK Asphalt are separate companies that are both owned by Bobby and Cynthia Kennedy. The companies maintain separate payroll, bookkeeping, expenses, and employees. Only the sons-in-law of

the Kennedys are considered employees of the three<sup>1</sup> companies owned by the Kennedys. In addition, the three companies were all covered under the same workers' compensation insurance policy.

Arkansas Code Annotated section 11-9-105(a) provides:

11-9-105. Remedies exclusive – Exception.

(a) The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his or her capacity as an employer, or prime contractor of the employer, on account of the injury or death, and negligent acts of a co-employee shall not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personae the employer may be deemed to have.

Ark. Code Ann. §11-9-410(a)(1)(A) reads:

(a) Liability Unaffected (1)(A) the making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his

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<sup>1</sup> The Kennedys also owned the company, BLK Quarries. BLK Quarries is not involved in this dispute.

or her dependents, to make a claim or maintain an action in court against any third party for the injury, but the employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.

In *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 254 S.W.2d

959 (1953), the Court of Appeals stated:

... if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows.

In *Johnson v. Bonds Fertilizer, Inc.*, 375 Ark. 224, 289 S.W.3d

431 (2008), the Arkansas Supreme Court determined that a claimant was a dual employee when the evidence demonstrated that the claimant was employed by both companies and completed work for both companies on the day of the accident and both companies had the right to control the claimant's work.

The respondents argued that because Kenneth "Tooter" Silver, who was employed by BKC, was acting as supervisor on September 12, 2019, BKC controlled the claimant's work. The respondents argued further that since BKC controlled the claimant's work, the claimant was a dual employee of BKC and CK Asphalt. I disagree.

It appears that Silver was acting under the authority of Mr. Kennedy individually, instead of as co-owner or an agent of BKC. I believe

that it is more likely that Silver was allowed to supervise at the jobsite where the claimant was injured because of his familial relationship with the Kennedys.

The present case is analogous to *Johnson v. Ark. Steel Erectors*, 2009 Ark. App. 755. In this case, Tim Johnson was working for Arkansas Steel Erectors when he was injured. Johnson filed a third-party tort claim against Erin, Inc. and Robert Harris. Erin, Inc. owned the crane that caused the claimant's injuries. Harris owned both Arkansas Steel Erectors and Erin, Inc. The Full Commission affirmed and adopted the Administrative Law Judge's finding that Harris was not a third party "because at the time of the claimant's compensable injury, he was majority shareholder, president, secretary, and treasurer or 'persona' of ASE and protected by the exclusive-remedy provisions of Ark. Code Ann. Section 11-9-105(a)."

In reversing this decision, the Court in *Johnson v. Ark. Steel, Id.*, emphasized the importance of the employment relationship in limiting tort liability. The Court reiterated the findings in *Baldwin v. Maner*, 224 Ark. 348, 273 S.W.2d 28 (1954) and *Brothers v. Dierks Lumber & Coal Co.*, 217 Ark. 632, 232 S.W.2d 646 (1950) that the General Assembly may limit tort liability only when there is an employment relationship between the parties.

Additionally, the Court stated, "the fact that Harris owns both

ASE and Erin, Inc. cannot create an employment relationship between appellant [Tim Johnson] and Erin, Inc. that did not, in fact, exist.”

Here, as in *Johnson, supra*, the fact that Bobby and Cynthia Kennedy owned both Bobby Kennedy Construction and CK Asphalt does not create an employment relationship between the claimant and BKC. In fact, it is clear from the testimony that the companies were completely separate entities.

Therefore, for the aforementioned reasons, I find that the respondent, Bobby Kennedy Construction Co., failed to establish that it is entitled to the protections of the exclusive remedy provisions found in Ark. Code Ann. §11-9-105(a).

For the foregoing reason, I dissent from the majority opinion.

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M. Scott Willhite, Commissioner