

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G906072**

JACEN GANN, EMPLOYEE

CLAIMANT/PLAINTIFF

CK ASPHALT, LLC, EMPLOYER

RESPONDENT #1

**FARMINGTON CASUALTY CO./
TRAVELERS INS. CO., CARRIER/TPA**

RESPONDENT #1

**BOBBY KENNEDY CONSTRUCTION CO.,
EMPLOYER**

RESPONDENT #2

**FARMINGTON CASUALTY CO./
TRAVELORS INS. CO., CARRIER/TPA**

RESPONDENT #2

OPINION FILED SEPTEMBER 9, 2021

Hearing before Administrative Law Judge James D. Kennedy on the 14th day of July, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant/plaintiff is represented by Laura Beth York and Jeremy McNabb, Attorneys at Law, of Little Rock, Arkansas.

Respondents #1/defendants are represented by Amy Markham, Attorney at Law, of Little Rock, Arkansas. CK Asphalt, LLC, and Farmington Casualty Co./Travelers Ins. Co., Carrier/TPA, have accepted the claimant/plaintiff's claim as compensable and are paying benefits at the time of the hearing.

Respondents #2/defendants Bobby Kennedy Construction, Inc., and Farmington Casualty Co./Travelers Ins. Casualty Co., Carrier/TPA, are represented by David Donovan, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 14th day of July, 2021, to determine the sole issue of the employment relationship between Jacen Gann, the claimant/plaintiff, and Bobby Kennedy Construction Company, Inc., the defendant/respondent #2. All other issues were reserved.

The claimant/plaintiff's position was that at the time of the accident, he was an employee of CK Asphalt, LLC, and the exclusive remedy doctrine under the Arkansas

Workers' Compensation law only applied to CK Asphalt, LLC, and not to Bobby Kennedy Construction Company, Inc., the company that owned the dump truck and employed the driver driving the dump truck, which was involved in the accident that injured the claimant/plaintiff Gann.

The respondent #2's, Bobby Kennedy Construction's Company Inc., position at the time of the hearing was that the claimant/plaintiff and the entire CK Asphalt crew were managed and controlled by Bobby Kennedy Construction Company, Inc., employees; that Bobby Kennedy Construction, Inc., had the right to hire and fire the employees; that Bobby Kennedy Construction, Inc., should be considered an employer of the claimant/plaintiff, based upon tests that Arkansas courts have outlined in regard to the ability to control a worker, and that, based upon Bobby Kennedy Construction Inc.'s argument, the tort claim filed in Van Buren County Circuit Court against Bobby Kennedy Construction Company, Inc., should be barred by the Exclusive Remedy Provisions of the Arkansas Workers' Compensation law, specifically Ark. Code Ann. § 11-9-105.

A motion to transfer this question to the Arkansas Workers Compensation Commission was filed in the Van Buren County Circuit Court by Michael Dorton, the defendant driver of the dump truck in question, and by Bobby Kennedy Construction Company, Inc., on June 22, 2020. The motion provided that the claimant/plaintiff Gann was injured while working on the job on September 12, 2019, when he was struck by a truck driven by Michael Dorton, who was working for Bobby Kennedy Construction Company, Inc., at the time. The motion further provided that the claimant/plaintiff filed a claim for workers' compensation benefits and had been receiving benefits from Travelers Ins. An order was entered by the Honorable Circuit Court granting the Motion. This Motion and Order were made part of the record without objection as "Commissions Exhibit

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A prehearing conference was conducted on the May 10, 2021, and a Prehearing Order was filed in this matter on May 11, 2021. A copy of the Prehearing Order was marked “Commissions Exhibit 1” and made part of the record without objection. It was stipulated that the Arkansas Workers’ Compensation Commission had exclusive jurisdiction to determine the employment relationship between the claimant/plaintiff, Jacen Gann, and Bobby Kennedy Construction Company, Inc., and that this matter was transferred to the Arkansas Workers’ Compensation Commission by an Order of the Circuit Court of Van Buren County Civil Division to determine the employment relationship between the parties. The parties further stipulated that the claimant/plaintiff was injured while working on the job on September 12, 2019. All other issues were reserved.

Additionally, the claimant/plaintiff’s response to the Prehearing Questionnaire was admitted as Commission Exhibit #2, and the respondents’ response to the Prehearing Questionnaire was admitted as Commission Exhibit #3.

The claimant/plaintiff’s Exhibit #1, which consisted of 175 pages, was also admitted into evidence without objection. Additionally, the parties were instructed to submit briefs simultaneously forty-five (45) days post-hearing. The briefs are blue-backed and made a part of this opinion. The Rule was requested at the time of testimony.

The witnesses were Bobby Kennedy and Cynthia Kennedy, husband and wife and fifty-fifty (50/50) owners of all of the companies in question. From a review of the record, to include the documentary evidence and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and observe their demeanor, the following findings of fact and conclusions of law are made in accordance

with Ark. Code Ann. § 11-9-704.

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.

REVIEW OF TESTIMONY AND EVIDENCE

The first person called as a witness was Bobby Kennedy, of Quitman, Arkansas, the husband of Cynthia Kennedy. He testified that the companies operate together

building roads and that the business began in 1985 as a sole proprietorship. They started with a dozer and grew the business from there. Originally, they were not incorporated. (Tr. 10) Bobby Kennedy Construction Company, Inc., was incorporated on March 13, 2003, as an Arkansas corporation and owned fifty-fifty (50/50) by Bobby and Cynthia Kennedy. Bobby Kennedy served as the president and Cynthia as the secretary. He went on to testify that at some point in 2017, they started operating BLK Quarry and were doing gravel, dirt, and asphalt work. (Tr. 11) Prior to 2017, they outsourced the asphalt part of the work to different companies or subcontractors. They work in about a sixty (60)-mile radius of Quitman, Arkansas, primarily providing services for White, Cleburne, Van Buren, and Faulkner Counties, as well as the Arkansas Highway Department. BLK Quarries, Inc., was a separate corporation that produced their crushed gravel. (Tr. 12, 13) BLK Quarries, Inc., was also owned fifty-fifty (50/50) by Bobby and Cynthia Kennedy. CK Asphalt, LLC, was formed with the Arkansas Secretary of State on December 28, 2017. It was formed because it often took too long to obtain asphalt from the sub-contractors, so it was decided to put in their own asphalt plant. (Tr. 14) Bobby and Cynthia Kennedy also owned CK Asphalt, LLC, fifty-fifty (50/50). These companies maintained separate payrolls with separate bookkeeping, and all three (3) of the companies' bookkeeping were performed by Bobby Kennedy's wife, Cynthia Kennedy. (Tr. 15)

On the date of the accident, they were overlaying a chip and seal road in White County with two (2) inches of asphalt. The claimant/plaintiff Gann was on the payroll of CK Asphalt, LLC. In regard to the operation or procedure, CK Asphalt, LLC, employees had a machine that the dump trucks would back up to and dump asphalt into, and the machine would then lay out the asphalt. Two (2) people would follow the asphalt

machine, rolling and smoothing the asphalt. The dump trucks were owned by Bobby Kennedy Construction Company, Inc., with Bobby Kennedy Construction Company, Inc., employees driving the trucks to the asphalt machine. The on-the-job supervisor for CK Asphalt, LLC, employees was Kenneth Silver, a son-in-law, who was employed by Bobby Kennedy Construction Company, Inc., and who stayed on the work site. (Tr. 16, 17)

Mr. Bobby Kennedy further testified that he would go to each project for an hour a day, most every day. On the day of the accident, he went to the White County project after the occurrence of the accident. In regard to other supervisors that might have been present, Wesley Weber, another son-in-law, who checked densities and “stays behind the operation,” could have also been there. (Tr. 18)

In regard to the hiring of the claimant/plaintiff, Mr. Bobby Kennedy testified he makes the hiring decisions with Kenneth Silver’s recommendations. He admitted he did not interview the claimant/plaintiff Gann, but the decision to hire him was made by Mr. Silver and himself. In regard to firing a CK Asphalt, LLC, employee, he stated that Mr. Silver or himself had authority to fire an employee. There was no one on the payroll of CK Asphalt, LLC, who had any authority to fire an employee. (Tr. 19) He also stated he rarely went to a CK Asphalt, LLC, project to direct the work, “unless I see something I don’t like that they’re doing, and then I’ll tell them to change it, but rarely I do it. Most of the time it’s Tooter, Kenneth Silver.” He generally let Mr. Silver take care of it. In regard to contracts, he testified that CK Asphalt, LLC, had a written contract with White County. (Tr. 20) There was no written contract between CK Asphalt, LLC, and Bobby Kennedy Construction Company, Inc., In regard to expenses, he stated that all of the fuel came from one (1) set of tanks, was purchased by Bobby Kennedy Construction Company, Inc., with Bobby Kennedy Construction Company, Inc., responsible for the trucking expense.

(Tr. 21) If CK Asphalt, LLC, needed a repair on their equipment, they would purchase the parts and Bobby Kennedy Construction Company, Inc., would install the parts. (Tr. 22) Prior to CK Asphalt, LLC, if Bobby Kennedy Construction Company, Inc., needed asphalt, a contract was entered into with an asphalt contractor. (Tr. 23) However, there was no contract with CK Asphalt, LLC. When CK Asphalt, LLC, was formed in December 2017, it was capitalized by money from Bobby Kennedy Construction Company, Inc., since CK Asphalt, LLC, did not have any money. CK Asphalt, LLC, has since become profitable and can now stand on its own. “We’ve tried to keep it separated, but the money had to come from the construction because you know, it was the baby you know.” (Tr. 24, 25)

Under cross examination, Mr. Bobby Kennedy testified that prior to the incorporation of Bobby Kennedy Construction Company, Inc., the business was owned by Bobbie and Cynthia Kennedy and was not incorporated from 1985 until 2003. It just operated as a sole proprietorship. They incorporated on the advice of their CPA. (Tr. 26) CK Asphalt, LLC, was incorporated in 2017, and has no ownership in Bobby Kennedy Construction, Inc. Mr. Bobby Kennedy also admitted that prior to 2017, when they performed any asphalt work, they would have to subcontract it out to different companies, because Bobby Kennedy Construction, Inc., never performed asphalt work up until CK Asphalt, LLC, opened. (Tr. 27) “Up until that point we only done the dirt work and the gravel.” (Tr. 28) He was questioned if he appreciated or understood that Bobby Kennedy was different than Bobby Kennedy Construction Company, Inc., and his response was, “It’s not to me [...] Without Bobby Kennedy Construction, CK Asphalt wouldn’t be here, because it got all of its money from Bobby Kennedy Construction Company.” In regard to employees, Bobby Kennedy testified there were employees for Bobby Kennedy

Construction Company, Inc., and different employees for CK Asphalt, LLC, and he was the president for both companies. He additionally testified that he was able to supervise, delegate, and provide instruction to both Bobby Kennedy Construction Company, Inc., and CK Asphalt, LLC. He also admitted that the claimant/plaintiff, Mr. Gann, was an employee of CK Asphalt, LLC, and not of Bobby Kennedy Construction Company, Inc. (Tr. 29-31) Some employees of Bobby Kennedy Construction Company, Inc., had changed to CK Asphalt, LLC, but he did not remember any employee changing from CK Asphalt, LLC, to Bobby Kennedy Construction Company, Inc. He also admitted he considered his two (2) sons-in-law, Wesley Weber and Kenneth Silver, as having dual “employeehip” at both companies. (Tr. 32) He also testified that Michel Dorton (the dump truck driver) was an employee of Bobby Kennedy Construction Company, Inc., and that the asphalt delivered for the White County job on September 12, 2019, was brought to the project by trucks owned by Bobby Kennedy Construction Company, Inc., with the truck involved in the accident driven by an employee of Bobby Kennedy Construction Company, Inc. He also admitted that BLK Quarries, Inc., was formed in the same method as CK Asphalt, LLC, using money from Bobby Kennedy Construction Company, Inc. (Tr. 33, 34)

Under redirect examination, Bobby Kennedy testified that CK Asphalt, LLC, paid Bobby Kennedy Construction Company, Inc., for the use of its trucks to haul the asphalt. He stated Kenneth Silver was on the payroll of Bobby Kennedy Construction, Inc., and had never been on the payroll of CK Asphalt, LLC. (Tr. 34)

Under recross examination, Bobby Kennedy testified he paid taxes as an individual and there was no difference between Bobby Kennedy and Bobby Kennedy Construction Company, Inc., to him. “There’s not a difference to me. I know there’s a difference in,

but there's not a difference to me." (Tr. 35)

Cynthia Kennedy, the wife of Booby Kennedy, was then called as a witness. She testified they had been married forty-two (42) years, she had a fifty percent (50%) ownership in all three (3) companies, and that she worked for all three (3) companies. She prepared the payroll for all three (3) companies, took care of the workers' compensation claims, and helped in the enrollment of employees in regard to the insurance. There was one (1) insurance policy that covered the employees of all three (3) companies. (Tr. 37) She also helped the CPA prepare the taxes and make the tax deposits for all three (3) companies. Additionally, she helped with EEO policies and kept up the bulletin boards that were set up in the offices. Her paycheck came from Bobby Kennedy Construction Company, Inc. Currently, there were seven (7) girls in the office for all three (3) companies, and they were all employed by Bobby Kennedy Construction, Inc., with one (1) exception who was employed by BLK Quarries, Inc. No office staff was employed by CK Asphalt, LLC. CK Asphalt, LLC, was formed at the recommendation of their CPA. The books were maintained separately for the three (3) companies but there were some overlapping of things. (Tr. 38, 39) She gave the following example:

We buy our fuel, and Bobby Kennedy Construction pays for all the fuel, and at the end of the year the CPA, we have maintenance records, and one person keeps all the maintenance records for all three companies, and we divide out the amount of fuel that each company has used for the year, and we reimburse Bobby Kennedy Construction for the fuel. So that's one of the things that we do.

We try to keep the parts separately, and most of the repairs are done by Bobby Kennedy Construction's mechanic staff, but there is one guy that works mainly with just that company.

Cynthia Kennedy also testified that three (3) separate payrolls were maintained and the claimant/plaintiff, Mr. Gann, was on the payroll of CK Asphalt, LLC, which was

where all the claimant/plaintiff's paychecks came from. (Tr. 40) Kenneth Silver was employed by Bobby Kennedy Construction Company, Inc., since around 2006 and had never been on the payroll of CK Asphalt, LLC. He was responsible for managing the employees of CK Asphalt, LLC. (Tr. 41) He made hiring and firing decisions in regard to CK Asphalt, LLC, employees. (Tr. 42) During the day, Mr. Silver would be on-site with the CK Asphalt, LLC, employees, supervising them. Mr. Weber, another son-in-law, was also on the payroll of Bobby Kennedy Construction Company, Inc., and managed the CK Asphalt, LLC, plant, its production, and its testing lab. He was also the CK Asphalt, LLC, dispatch person for their truck drivers and would tell them what job sites to go to and when. (Tr. 43) All of the payroll and administrative work for CK Asphalt, LLC, was performed by the employees of Bobby Kennedy Construction Company, Inc.. (Tr. 44)

In regard to the insurance coverage, CK Asphalt, LLC, had not purchased separate insurance coverage since its formation. (Tr. 45) There was one (1) policy for each type of separate coverage that covered all three (3) companies. (Tr. 46) They had an automobile liability policy, a commercial general liability policy, a workers' compensation policy, and an umbrella. Each company paid a portion of the premium. The amount paid was determined "by the number of employees that are on the payroll for each of the three companies." (Tr. 47) "The majority of the equipment and the automobiles are with Bobby Kennedy construction's policy, and then a few of the trucks, just the big trucks are on CK Asphalt." With respect to the workers' compensation coverage, it was determined based upon the number of employees. She further testified there were around 100 employees on the Bobby Kennedy Construction Company, Inc., payroll and around twenty (20) employees on that of CK Asphalt, LLC, and they paid a single premium to the carrier that was apportioned between the companies, as determined by the Cashion

Company, their insurance agency. (Tr. 48) Further, the claimant/plaintiff, Mr. Gann, had filed his workers compensation claim, and Travelers had been paying his workers' compensation check every week. (Tr. 49)

Under cross examination, Cynthia Kennedy admitted it was part of her job to maintain the separation and accountability for each of the three (3) companies. She also admitted she supervised, instructed, and gave orders to the individuals and employees of the three (3) companies, and Bobby Kennedy could also. When questioned about her two sons-in-law being employees of both Bobby Kennedy Construction Company, Inc., and CK Asphalt, LLC, she responded that, "I would say they have an overreaching on all three companies." Their authority was authorized by Bobby Kennedy. They accepted the responsibility and instructed the employees of the other two (2) companies, beside Bobby Kennedy Construction Company, Inc. (Tr. 50 -52) Ms. Cynthia Kennedy was asked about any other employees with dual employment, and she stated that her daughter, Kimberly Weber, also does billing for CK Asphalt, LLC, and that Laura Kennedy also keeps the maintenance records for CK Asphalt, LLC. Additionally, Brett Murray goes out and fuels the equipment for CK Asphalt, LLC, but was an employee of Bobby Kennedy Construction Company, Inc. "If we have somebody that's out and they need an employee, they pull from the Bobby Kennedy Construction pool to go to the CK Asphalt sites to take their place." (Tr. 53)

Ms. Kennedy also admitted there were some distinctions between the three (3) companies, such as that BLK Quarries, Inc., had to satisfy the Mine Health and Safety Rules. (Tr. 54) She also testified that at the end of the year, when Travelers performed the payroll audit in regard to the insurance, she had to submit written information about the employees, the property, and the equipment for each company. "We provide

information at the end of the year to determine if we paid the correct amount of insurance.”
(Tr. 55) “We receive one workers’ compensation audit for the three companies.” (Tr. 57)

The claimant/plaintiff submitted an exhibit which consisted of 175 pages of non-medical documents that were admitted into the record without objection. The respondents’ responses to the Claimant’s Supplemental Interrogatories and Request for Production of Documents provided that Bobby Kennedy Construction Co., Inc., and CK Asphalt, LLC, both had the same mailing address of P.O. Box 489, Quitman, Arkansas, 72131. BLK Quarries, Inc., used a different P.O. Box of 296 Quitman, Arkansas, 72131. Bobby Kennedy served as the president and Cynthia Kennedy served as secretary of all the companies. Bobby Kennedy Construction, Inc., was incorporated on March 13, 2003; BLK Quarries, Inc., was incorporated on November 17, 2006; and CK Asphalt, LLC, was incorporated on December 28, 2017. The responses further provided that the employees of Bobby Kennedy Construction Company, Inc., currently worked with the employees of CK Asphalt, LLC, at job sites. The claimant/plaintiff was an employee of CK Asphalt, LLC, and not of Bobby Kennedy Construction Company, Inc. (Cl. Ex. 1, P. 1-4) CK Asphalt, LLC, made a subchapter S election on February 23, 2018. (Cl. Ex. 1, P. 6,7)

The claimant/plaintiff received a W-2 issued by CK Asphalt, LLC. (Cl. Ex. 1, P. 13) However, the Workers’ Compensation First Report of Injury, filed with the Commission on September 17, 2019, listed the employer as Bobby Kennedy Construction Co. (Cl. Ex. 1, P. 16)

The deposition of Bobby Kennedy was also made part of the exhibit, and he testified in the deposition that the payrolls of Bobby Kennedy Construction, Inc., and CK Asphalt, LLC, as well as the tax deposits, were recorded separately. (Cl. Ex. 1, P. 111)

He also admitted that at times, the equipment would be shared between Bobby Kennedy Construction, Inc., and CK Asphalt, LLC. He provided an example that if CK Asphalt, LLC's broom went down, one would be borrowed from Bobby Kennedy Construction, Inc. They also might borrow a bobcat if one went down. (Cl. Ex. 1, P. 112) He also admitted that CK Asphalt, LLC, worked for other contractors. (Cl. Ex. 1, P. 113, 114) The job that the claimant/plaintiff Jacen Gann was injured on and which occurred on September 12, 2019, was a White County contract where White County bid directly with CK Asphalt, LLC. (Cl. Ex. 1, P. 120) The contract consisted of CK Asphalt, LLC's bid documents. (Cl. Ex. 1, P. 121) At the time of the claimant/plaintiff Gann's injury, Bobby Kennedy Construction, Inc., was not separately contracted with White County. (Cl. Ex. 1, P. 122) There was no written agreement between Bobby Kennedy Construction, Inc., and CK Asphalt, LLC. Michael Dorton, the driver of the truck involved in the accident, was employed by Bobby Kennedy Construction, Inc. (Cl. Ex. 1, P. 123)

The deposition of Cynthia Kennedy was also part of the exhibit and admitted without objection. She testified in regard to bookkeeping, separate payroll was maintained for the three (3) companies and we "do taxes for each of the three companies." She stated there was one (1) general liability policy for the three (3) companies. (Cl Ex. 1, P. 150, 151) At the time of the deposition, Ms. Kennedy testified that in regard to the office employees, there were six to eight (6-8), which come and go. They are all employed by Bobby Kennedy Construction, Inc. There were no office employees at the time for CK Asphalt, LLC, but there were some employees in the home office for the quarry company. (Cl. Ex. 1, P. 152) She also stated that sometimes CK Asphalt, LLC, was hired separately for a project and Bobby Kennedy Construction, Inc., was not hired. However, Bobby Kennedy Construction, Inc., dump trucks were used on CK Asphalt,

LLC, projects. The physical address for Bobby Kennedy Construction, Inc., was separate from the physical address for CK Asphalt, LLC. (Cl. Ex. 1, P. 155, 156) Equipment for the various companies and repairs on the equipment were paid out of separate accounts for each company. (Cl. Ex. 1, P. 158-160) She also testified that there was one (1) liability policy for all three (3) companies and also one (1) workers' compensation policy for all three (3) companies. (Cl. Ex. 1, P. 163, 164) The claimant/plaintiff had filed a workers' compensation claim and was receiving benefits at the time of the deposition through Travelers, under an insurance policy that covered all three (3) companies. (Cl. Ex. 1, P. 165)

DISCUSSION AND ADJUDICATION OF ISSUES

The sole issue before the Commission at the time of the hearing was whether the claimant/plaintiff, Jason Gann, was an employee of Bobby Kennedy Construction, Inc. The question of whether an employer-employee relationship exists between the parties is a factual issue solely within the jurisdiction of the Commission. Conrod v. Seay, 367 Ark. 437, 241 S.W.3d 252 (2006).

The Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704. Wade v Mr. Cavanaugh's, 298 Ark. 364, 768 S.W.2d 521 (1989). Additionally, the Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). The claimant/plaintiff Gann has been receiving workers' compensation benefits from Travelers Insurance, who insures both CK Asphalt, LLC,, and Bobby Kennedy Construction Inc., under a single policy. The claimant/plaintiff Gann is an employee of CK Asphalt, LLC, always receiving his W-2 and salary checks from CK Asphalt, LLC. The claimant/plaintiff Gann contends

that he is not employed by Bobby Kennedy Construction, Inc. Bobby Kennedy Construction, Inc., contends that claimant/plaintiff Gann is also one of its employees and consequently seeks the benefit of the workers' compensation exclusive remedy bar that is spelled out in Ark. Code Ann. § 11-9-105(a) to prevent the claimant/plaintiff from suing in tort in Van Buren County.

In the present matter, the facts are basically undisputed. The claimant/plaintiff Gann was injured when he was struck by a truck owned by Bobby Kennedy Construction Company, Inc., and driven by Michael Dorton, an employee of Bobby Kennedy Construction Company, Inc., while working on a job on September 12, 2019, and while on the payroll of CK Asphalt, LLC. The truck was hauling asphalt to a project in White County, where the CK Asphalt LLC equipment and its work crew were overlaying a chip and seal road with two inches of asphalt. White County had entered into a contractual agreement directly with CK Asphalt, LLC, with no separate contractual agreement between White County and Bobby Kennedy Construction Company, Inc. Additionally, there was no written contractual agreement in regard to the White County job between CK Asphalt, LLC, and Bobby Kennedy Construction Company, Inc. CK Asphalt, LLC, paid Bobby Kennedy Construction Company, Inc., for the use of its trucks on projects. Testimony provided the claimant/plaintiff Gann received his paychecks and W-2 from CK Asphalt, LLC, and since the accident had been receiving weekly payments from Travelers Insurance for his workers' compensation claim as a CK Asphalt, LLC, employee. The first report of injury was filed on September 17, 2019, which provided that the employer was Bobby Kennedy Construction Company, Inc.

Bobby Kennedy Construction Company, Inc., CK Asphalt, LLC, and BLK Quarries, Inc., were incorporated at separate times, and all are owned fifty-fifty (50/50) by Bobby

Kennedy and Cynthia Kennedy, husband and wife, who started the original business in the eighties as a sole proprietorship, with a minimal amount of equipment. Bobby Kennedy Construction Company, Inc., now employs approximately 100 employees, while CK Asphalt, LLC, employs approximately twenty (20) employees. All three (3) companies' books, payrolls, as well as bank accounts, are maintained separately by a single office staff, which is managed by Cynthia Kennedy, with the staff consisting of between six to eight (6-8) employees, with all the staff including Cynthia Kennedy employed by Bobby Kennedy Construction Company, Inc.

In regard to the various insurance policies, a single insurance policy such as a liability policy or workers' compensation policy is purchased with the cost apportioned between the three (3) companies. A single check for payment for the various policies would be issued to cover the cost of the insurance for the three (3) companies and would then be apportioned between the various companies. An example would be the workers' compensation policy that would be apportioned between the companies based upon a year-end audit and the number of employees working for each company. CK Asphalt, LLC, never purchased an insurance policy since its formation.

In regard to fuel, Bobby Kennedy Construction Company, Inc., would purchase all of the fuel for a single set of tanks, which would then be used for refueling by all of the companies, with records kept throughout the year. A CPA would then apportion the cost of the fuel between the companies at the end of the year. Most of the equipment was owned by Bobby Kennedy Construction Company, Inc., but CK Asphalt, LLC, also owned some large trucks and other equipment. Most of the repairs to the equipment were made by the mechanic staff employees of Bobby Kennedy Construction Company, Inc., with one (1) individual mainly working for CK Asphalt, LLC. The costs of the parts were

recorded and maintained separately.

In regard to the supervision of the employees of CK Asphalt LLC, testimony provided that Bobby and Cynthia Kennedy's two son in laws, who are employees of Bobby Kennedy Construction Company Inc. are the day-to-day supervisors of the employees of CK Asphalt, LLC, with the primary supervisor for the employees being Mr. Tooter Kenneth Silver, one of the two son in laws. Both men are authorized to make decisions by Bobby Kennedy and have authority, along with Bobby Kennedy, to hire and fire the employees of CK Asphalt, LLC. No one on the payroll of CK Asphalt LLC has the authority to fire an employee. The decision to hire the claimant/plaintiff Gann was made by Mr. Silver and Mr. Bobby Kennedy, who admitted he did not interview the claimant/plaintiff when he was hired. Both Bobby Kennedy and Cynthia Kennedy supervise the employees of all the three companies. As noted above, the office staff was entirely employed by Bobby Kennedy Construction Company Inc. and the payroll and administrative work for CK Asphalt LLC was performed by the employees of Bobby Kennedy Construction, LLC. In regard to a question about employees with dual employment, Cynthia Kennedy testified that one of her daughters prepared the billing for CK Asphalt LLC and another daughter maintained the maintenance records for CK Asphalt LLC, and both were paid by Bobby Kennedy Construction, LLC. Additionally, an employee by the name of Bret Murray fueled the equipment for CK Asphalt LLC, and he was also employed by Bobby Kennedy Construction Company, Inc.

In regard to equipment, it was admitted that on occasion, equipment would be shared between Bobby Kennedy Construction Company, Inc., and CK Asphalt, LLC. In addition, if one of the employees of CK Asphalt, LLC, was out, CK Asphalt, LLC, would pull employees from Bobby Kennedy Construction, Inc.

The purpose of the Arkansas workers' compensation statute is to protect the rights of both the employee and the compensation carrier. Simpson v. Liberty Mutual Insurance Co., 28 F.3d 763 (8th Cir. 1994) citing the case of Travelers Ins. Co. v. McCluskey, 252 Ark. 1045, 483 S.W. 2d 179 (1972). The Arkansas Supreme Court has held that "the General Assembly may limit tort liability only when there is an employment relationship between the parties." Therefore, in cases where an injured employee recovers workers' compensation benefits from his employer, a subcontractor, and the prime contractor are not the statutory employer, and the legislature cannot grant immunity to the prime contractor. Stapleton v. M.D. Limbaugh Construction Co., 333 Ark. 381, 969 S.W.2d 648 (1998). The court based its decision on Article 5, Section 32 of the Arkansas Constitution, which provides that other than for formulating the particulars of workers' compensation benefits within the employer-employee relationship "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." Arkansas Constitution Article 5, Section 32, as amended by Arkansas Constitution Amendment 26, (1938)

Here, although it is clear that the claimant/plaintiff was an employee of CK Asphalt, LLC, and is currently receiving workers' compensation benefits from the carrier as an employee of CK Asphalt, LLC, the issue of dual employment must be reviewed, due to the fact that Arkansas recognizes the dual employment doctrine. The doctrine holds that, where an employee is simultaneously employed by two (2) employers, as a matter of law, the exclusive remedy provision of the workers' compensation law precludes recovery in tort against either employer.

Arkansas courts have also discussed "special employees." In Sharp County Sheriff's Office v. Ozark Acres Improvement Dist., 349 Ark. 20, 75 S.W.3d 690 (2002),

the Arkansas Supreme Court referred to Daniels v. Riley's Health and Fitness Centers, 310 Ark. 756, 759, 840 S.W.2d 177,178 (1992), where the court quoted from **Larson's Law of Workers' Compensation**, and discussed the requirements that must be met in order for a special employer to become liable for workers' compensation when a general employer lends an employee to it. It provided that the three (3) requirements that must be established are:

1. The employee has made a contract for hire, express or implied with the special employer; and
2. The work being done is essentially that of the special employer; and
3. The special employer has the right to control the details of the work.

No matter the type of special employment involved, whether it be dual or joint, special, loaned or borrowed, the above test is the one employed. In Durham v. Prime Ind. Recruiters, 2014 Ark. App. 494, 442 S.W.3d 881 (2104), the Arkansas Court of Appeals provided as follows:

The solution of almost every such case depends upon the answer to the basic, fundamental, and bedrock question of whether, as to the special employee, the relationship of employer and employee existed at the time of the injury. Daniels v. Riley's Health and Fitness Ctrs., 310 Ark. 756, 840 S.W.2d 177 (1992) citing Charles v. Lincoln Construction Co., 235 Ark. 470, 361 S.W.2d 1 (1962). If the facts show such a relationship, the existence of a general employer should not change or be allowed to confuse the solution of the of the problem. *Id.*

Because both employers may each have some control there is nothing logically inconsistent, when using this test, in finding that a given worker is the servant of one employer for certain acts and the servant of another for other acts. (Citing Nepstad v. Lambert, 235 Minn.1, 50 N.W.2d 614. [Minn. 1951]) The crucial question is which employer had the right to control the particular act giving rise to the injury. *Id.* Because the question of liability is always raised in relation to some specific act done, the important question is not whether the employee remains the servant of the general employer as to matters generally, but whether to the act in question, he is acting in the business of and under the direction of one or the other. *Id.*

In the present matter, the testimony is un rebutted that the only supervisors of all employees of CK Asphalt, LLC, are two employees (2) of Bobby Kennedy Construction, Inc., and that they, along with Bobby Kennedy individually, the president and fifty percent (50%) owner of all three (3) companies, controlled the work of CK Asphalt, LLC. It is also clear that the work that was being performed at the time of the work-related accident is both the work of Bobby Kennedy Construction, Inc., as well as CK Asphalt, LLC, due to the fact the work is interrelated and the two (2) companies share and swap workers at times, share job locations, swap equipment when needed, with the companies having the same ownership. This is sufficient to satisfy two (2) of the above requirements: that the employees of Bobby Kennedy Construction, Inc., control the details of the work and the work being performed is the work of the special employer Bobby Kennedy Construction, Inc., as well as the work of CK Asphalt, LLC.

The issue that remains is whether or not the employee was made a contract for hire, express or implied with Bobby Kennedy Construction, Inc. The existence of an implied contract for hire is a fact question to be determined on the totality of the circumstances surrounding the relationship of claimant/plaintiff Gann and Bobby Kennedy Construction, Inc. Dixon v. Salvation Army, 86 Ark. App. 132, 160 S.W.3d 723 (2004). The Dixon court referred to Schneider v. Salvation Army, 217 Minn. 448, 14 N.W.2d 467 (Minn. 1955) and also Arkansas State Police v. Davis, 45 Ark. App. 40, 870 S.W.2d 408 (1994). The evidence is un rebutted that Bobby Kennedy Construction, Inc., through its employees, “Tooter” Kenneth Silver, Wesley Weber, and Bobby Kennedy, dictate the hiring and firing of the at-will employees and the review of their work performed. There would appear to be no greater indication of an implied employment contract than the ability to determine the hours worked, the discipline of individual employees along with

their hiring and firing, and the right to control the work performed, which would include claimant/plaintiff Gann. Consequently, there is no alternative but to find that an implied contract for hire has been created between claimant/plaintiff Gann and Bobby Kennedy Construction, Inc. Additionally, it is noted that one (1) workers' compensation policy covers all three (3) companies, and that the payroll of all three (3) companies is prepared by the same set of employees, who are all employed by Bobby Kennedy Construction, Inc., with at least three (3) of the employees also performing certain specific activities for CK Asphalt, LLC.

Although it seems unfair for individuals and entities to enjoy the various benefits of separate legal entities and not suffer the consequences in regard to the same arrangement, it is also clear that the Arkansas Workers' Compensation Act is required to be strictly construed. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, it is found that Bobby Kennedy Construction, Inc., has satisfied the required burden of proof to show that the claimant/plaintiff Gann was a special or dual employee of Bobby Kennedy Construction, Inc., and CK Asphalt, LLC, at the time of the work-related accident and that consequently, Bobby Kennedy Construction Company, Inc., is entitled to the exclusive remedy provisions of the Arkansas Workers' Compensation law, specifically Ark. Code Ann. § 11-9-105.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge