IN THE COURT OF APPEALS

STATE OF NEW MEXICO

JACKSON CONSTRUCTION, INC.,
a New Mexico corporation, and
PAUL JACKSON, Qualifying Party
For Jackson Construction, Inc.,

Petitioners-Appellees,

v.

COA No. A-0001-CA-2010-30454
District Court No. CV 2009-361, Div. I

GLENN R. SMITH, in his capacity of
Director, STATE OF NEW MEXICO
WORKERS' COMPENSATION
ADMINISTRATION,

Respondent-Appellant.

APPELLANT'S BRIEF IN CHIEF

Workers' Compensation Administration
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In accordance with NMRA 12-213(A)(1)(a), references to the recorded transcript are by elapsed time from the start of the recording. All references by Appellant to the Transcript Proper were made from the CD made from the WCA hearing held on February 19, 2009, track 2.

II. TABLE OF AUTHORITIES

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New Mexico Case Law:

Statutes:

Administrative law:

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III. SUMMARY OF PROCEEDINGS

A. Nature of the Case:

This case involves the application of the mandatory insurance provisions of the Workers' Compensation Act to a construction corporation with one corporate officer.

B. Course of Proceedings:

Jackson Construction, Inc., is a New Mexico corporation (T.P. at 21:49) with one executive employee, Paul Jackson. T.P. at 15:11. Jackson Construction, Inc., has a GB-98 license issued by the Construction Industries Division ("CID"). T.P. at 15:40. NMSA 1978, §52-1-6 provides that the Workers' Compensation Act ("Act") shall apply to "all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act regardless of the number of employees." NMSA 1978, §52-1-4 requires that all employers subject to the Act obtain workers' compensation insurance. The New Mexico Workers' Compensation Administration ("WCA") is an administrative agency tasked with administering the Act.

C. Disposition Below:

An administrative hearing before the WCA was held on February 19, 2009, on the applicability of §52-1-6, *id.*, to Jackson Construction, Inc. In her April 16, 2009, Order, the WCA Director's designee found that Jackson

Construction, Inc., is subject to the Act and is required to obtain workers' compensation insurance coverage. This order was appealed by Jackson Construction, Inc. to District Court on May 5, 2009. In his April 27, 2010, Memorandum Opinion and Order, the district court judge ruled that Jackson Construction, Inc., was not subject to the mandatory insurance provisions of the Act. Appellant filed for certiorari to this Court on May 26, 2010, and Certiorari was granted on June 30, 2010. A continuance for filing briefs was granted until September 7, 2010, and Appellant herewith timely submits his brief.

D. Summary of Facts:

The WCA is a regulatory agency tasked with administering the Act. Its Director is Glenn R. Smith. NMSA 1978, §52-1-6, *supra.*, provides that the mandatory insurance provisions of the Act apply "to all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] regardless of the number of employees."

Jackson Construction, Inc., is licensed by the CID as a general contractor. T.P. at 16: 30. Paul Jackson is employed by Jackson Construction, Inc., as its president. T.P. at 16:01. Jackson Construction, Inc., has no other employees. T.P. at 17:09, 22:00. Paul Jackson testified at the WCA administrative hearing that he hires subcontractors. T.P. at 22:05.

IV. STANDARD OF REVIEW

The New Mexico Supreme Court has long held that an "appellate court is not bound by a trial court's erroneous conclusion of law." *Ledbetter v. Webb*, 103 N.M. 597, 711 P.2d 874 (1985). "When parties challenge legal conclusion, standard of review is whether law was correctly applied to the facts." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 117 N.M. 373, 872 P.2d 346 (N.M. 1994). An "appellate court reviews de novo the application of the law to the facts." *Wagner v. AGW Consultants*, 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050. Further, the Supreme Court has held that "appellate courts review matters of law de novo." *Tom Growney Equipment Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

When a statute is truly clear-not vague, uncertain, ambiguous, or otherwise doubtful-the judiciary is to apply the statute as written and not to second-guess the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 871 P.2d 1352 (1994). "A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.... Courts must take the act as they find it and construe it according to the plain

meaning of the language employed." *Perea v. Baca,* 94 N.M. at 627, 614 P.2d at 544 (quoting *Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 202 (1957) (alteration in original).

V. ARGUMENT

The district court erred in its application of NMSA 1978, Section 52-1-7 to Appellees's CID corporation because the legislature intended for the district court to apply NMSA 1978, Section 52-1-6 to all CID businesses regardless of the number of employees.

Jackson Construction, Inc., is a corporation incorporated under the laws of the State of New Mexico. T.P. at 15:40, 21:49. Paul Jackson is the president of Jackson Construction, Inc. T.P. at 16:01. Jackson Construction, Inc., is licensed as a GB-98 general contractor by CID. T.P. at 16:30. Paul Jackson is the qualifying party for Jackson Construction, Inc., for purposes of CID licensure. T.P. at 16:15.

Jackson Construction, Inc., builds "single family residences, maybe two homes a year." T.P. at 17:00. Paul Jackson described his job as a general contractor as doing "light commercial work." T.P. at 17:00. Jackson Construction, Inc., has no other employees. T.P. at 17:09, 22:00. Jackson Construction, Inc., hires subcontractors for its projects. T.P. at 22:05. Jackson Construction, Inc., does not execute contracts with its subcontractors. T.P. at 22:20. Paul Jackson testified that he does not check whether the subcontractors have workers'

compensation insurance coverage. T.P. at 22:45. Mr. Jackson testified that he understands that Jackson Construction, Inc., would be liable to a subcontractor's employee if any injury occurred. T.P. at 23:03.

The District Court's Memorandum Opinion, which erroneously held that Jackson Construction, Inc., is not an employer subject to the Workers' Compensation Act, involves an issue of substantial public interest. The Memorandum Opinion presents a conflicting interpretation between the application of Sections 52-1-6 and 7, *supra.,* as they pertain to CID businesses.

The ruling in this case will have a far reaching impact on the application of the mandatory insurance provision of the Workers' Compensation Act. Employment in the construction industry is inherently dangerous. Workers' compensation insurance coverage for CID licensed enterprises ensures that construction workers will have a safety net if they are injured, providing medical and indemnity benefits in a timely fashion. It shields a general contractor from tort lawsuits that can be costly and time consuming. Workers' compensation insurance also protects other social programs, such as welfare and social security, from absorbing the cost of sustaining an injured worker during the duration of their disability. Because of the frequency and severity of construction accidents, the legislature decided that every CID licensed business needs workers' compensation insurance coverage. If the District Court's decision is allowed to stand, it will

undermine the legislative intent to have workers in the construction industries adequately protected in the event of a work place accident.

Section 52-1-6, *supra.*, requires coverage for all CID businesses "regardless of the number of employees." Section 52-1-7 (A), *supra.*, permits a corporate officer, who qualifies as an executive employee, to opt out of the corporate employer's workers' compensation insurance coverage but Section 52-1-7 (E), *supra.*, requires that such executive employees, who have opted out of coverage, to nevertheless be counted in the headcount as workers for purposes of the applicability of the Act to the corporation itself. Because here Jackson Construction Inc. is comprised solely of one employee, Paul Jackson, the District Court mistakenly concluded that Section 52-1-6, *supra.*, was inapplicable.

Paul Jackson, individually, is not the employer for purposes of the Act. Paul Jackson is separate and distinct from his closely held corporation, Jackson Construction, Inc. It is the corporation that is the employer and Paul Jackson is an employee of the corporation.

A corporation is separate and distinct from its officers and shareholders. Black, Henry Campbell, M.A., Black's Law Dictionary (9th Ed. 2009) defines a corporation as follows:

> An artificial person or legal entity created by or under the authority of the laws of a state. The law treats the corporation itself as a person which can sue and be sued.

> The corporation is distinct from the individuals who comprise it (shareholders).

An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets. *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003).

Corporations are formed because of acknowledged and legitimate advantages that flow from that form of business entity. *Shillinglaw v. Owen Shillinglaw Fuel Co.*, 70 N.M. 65, 70, 370 P.2d 502, 505 (1962) There is a clear distinction between a corporation that is separate and apart from its officers and a sole proprietor, who owns all the business assets and is solely liable for his debts. "The corporation is liable for all of the company's debts and holds harmless the officers and shareholders from any personal liability." *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67, 17 P.3d 440, *certiorari denied*, 20 P.3d 810, 130 N.M. 153.

Here, the District Court completely eschewed the distinction simply because Paul Jackson is the sole employee of Jackson Construction, Inc. In doing so, the District Court ignored well-established precedent regarding corporations. Moreover, the District Court used language in Section 52-1-7, *supra.*, regarding the ability of executive employees to opt out of insurance coverage as a means to reduce premiums and employed it to contravene the unambiguous mandate of NMSA 1978, 52-1-6, *supra.*, which provides that "the act shall apply to **all** employers engaged in activities required to be licensed under the provision of the

Construction Industries Licensing Act **regardless of the number of employees.**" [Emphasis added]

An "executive employee" is an employee of a corporation and forming a corporation affords the "executive employees" tax benefits and a shield from personal liability and other benefits. This Court in *Marchman v. NCNB Texas Nat. Bank*, 120 N.M. 74, 898 P.2d 709 (1995) ruled that a "corporation and a shareholder-even a sole shareholder-are separate entities, and a shareholder of a corporation does not have an individual right of action against a third person for damages that result because of an injury to the corporation." A "[c]orporation is a legal entity, separate from its shareholders, directors, and officers, who are not personally liable for acts and obligations of the corporation." *Stinson v. Berry,* 1997-NMCA-076, 123 N.M. 482, 943 P.2d 129, *certiorari granted,* 123 N.M. 446, 942 P.2d 189, *certiorari quashed,* 125 N.M. 148, 958 P.2d 106 (N.M. App. 1997). There are, however, other responsibilities a corporation has to its "executive employees", including providing workers' compensation insurance coverage for the corporate entity.

If Mr. Jackson is considered the "owner" of all the business assets and not an employee of the corporation by virtue of being the sole shareholder, he would actually be a sole proprietor. Sole proprietors, however, are completely distinguishable from the matter at hand. Sole proprietors are not afforded the same

protections as a corporation. The Act defines a sole proprietor at NMSA 1978, §52-1-7(F)(2), which states: "'sole proprietor' means a single individual who owns all the assets of a business, is solely liable for its debts and employs in the business no person other than himself." This is not the case in this matter. Mr. Jackson's personal assets are not at risk. It is Jackson Construction, Inc., that is responsible for the debts and the liabilities of the corporation. Jackson Construction, Inc., is an entity separate from its only corporate officer, Paul Jackson.

"Executive employees" utilize the Affirmative Election Form pursuant to Section 52-1-7, *supra.*, to opt out of insurance coverage so that their compensation is not included in premium calculation. If a corporate officer owns ten percent or more of the corporation's stock, the officer can "opt out" of the policy. That does not mean, however, that the corporation can exclude those "executive employees" in the headcount to determine the number of workers for purposes of the application of the Act. NMSA 1978, §52-1-7 (E), states:

> "In determining the number of workers of an employer to determine who comes within the Workers' Compensation Act [52-1-1 NMSA 1978], an executive employee who has filed an affirmative election not to be subject to the Workers' Compensation Act **shall be counted** for determining the number of workers employed by such employer." [Emphasis added]

Paul Jackson did utilize the Affirmative Election Form, which acknowledges Paul Jackson is employed by Jackson Construction, Inc. However, the district court erroneously relies on an exemption in NMSA 1978, §52-1-7 (A) permitting:

> Notwithstanding any provisions to the contrary in the Workers' Compensation Act. [52-1-1 NMSA 1978], an executive employee of a professional or business corporation or limited liability company, employed by the professional or business corporation or limited liability company as a worker as defined in the Workers' Compensation Act, or a sole proprietor may affirmatively elect not to accept the provision of the Workers' Compensation Act.

This exemption has no application to corporations as employers that operate under a license issued by CID. NMSA 1978, §52-1-6 (A) specifically enumerates those occupations that are exempt from the provisions of the Act:

> A. The provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] shall apply to employers of three or more workers; provided that act shall apply to all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] regardless of the number of employees. The provisions of the Workers' Compensation Act shall not apply to employers of private domestic servants and farm and ranch laborers.

See, also, NMSA 1978, §52-1-16. Not only are construction industry corporations not exempt, the legislature expressly singled out such businesses as having to obtain workers' compensation insurance "regardless of the number of employees."

With respect to CID licensees, the significant factor is the activity, not the size of the workforce.

Under the Construction Industries Administrative rules, NMAC 14.6.6.9 (1)(f), a GB 98 license is required in order to: "erect, alter, repair or demolish residential or commercial buildings, and certain structures...." Jackson Construction, Inc., is required to have a CID license for the activities in which it holds itself out as legally capable of performing. Under Section 52-1-6, *supra.*, Jackson Construction, Inc. as the employer incorporated under the laws of the State of New Mexico, is required to maintain a workers' compensation insurance policy.

The Legislature gave executive employees the option not to cover themselves but it is mandatory that an employer subject to the Act maintain workers' compensation insurance. If accidents were to occur and the subcontractor was not in compliance with the Act, the general contractor, in the present case, Jackson Construction, Inc., would be liable to that sub-contracted worker for their injuries. Mr. Jackson acknowledged that he is aware of that. T.P. at 23:03. Without a workers' compensation policy, the worker would not be able to receive quickly the medical benefits and indemnity payments in the manner in which the Legislature intended for them to be delivered under the law. The Act was created to provide prompt benefits to injured workers while limiting the liability of employers.

Paul Jackson testified that sometimes he would accept a verbal or a written letter from a sub-contractor that they had a policy of workers' compensation coverage but he did not verify that the coverage was in full force and effect. T.P. at 22:45. The corporation has the option of purchasing a minimum premium policy, which provides coverage only to the corporate entity. This policy is readily available to CID corporations and is also put in place for a corporation to protect against a determination it is a statutory employer, as discussed in *Harger v. Structural Services, Inc., 121 N.M. 657, 916 P.2d 1324 (1996)*. There, the Court ruled that a general contractor may be the "statutory employer" for a subcontractor's injured employee, and subsequently liable for workers' compensation benefits.

The court of appeals in *Romero v. Shumate Constructors, Inc., 119 N.M. 58, at 66, 888 P.2d 940 (N.M. App. 1994)* stated, "the legislature intended a narrower class of employers to escape workers' compensation liability than can escape vicarious tort liability under the common law." In Romero the court determined that a subcontractor would not be an independent contractor for purposes of NMSA 1978, §52-1-22 unless the subcontractor's relationship to the general contractor survived both a "right-to-control" test and a "relative-nature-of-the-work" test." *Id.* at 67.

Harger, id., goes on to state that:

> "Under section 52-1-23, when the work so procured is casual employment as to the contractor's employer the "contractor shall become the employer" However, under section 52-1-22, if the work so procured "is a part or process in the trade or business or undertaking of such employer," and the contractor involved is not an independent contractor, then the employer shall be treated as the employer under the Act, regardless of whether the work so procured is casual."

Moreover, NMSA 1978, §52-1-22 sets forth casual employment as:

> "...where an employer procures any work to be done wholly or in part for him by a contractor other than an independent contractor and the work so procured to be done is a part or process in the trade or business or undertaking of such employer, then such employer shall be liable to pay all compensation under the Workers' Compensation Act to the same extent as if the work were done without the intervention of such contractor."

Further, NMSA 1978, §52-1-23 sets forth the basis for a contractor becoming the employer in casual employment.

> "...where any employer procures any work to be done wholly or in part for him by a contractor where the work so procured to be done is casual employment as to such employer, then such contractor shall become the employer."

The Act provides the framework for the operation of the WCA. When an administrative agency makes a decision based upon interpretation of a particular statute implicating their own expertise, the courts afford deference to those interpretations. *Morningstar Water Users Ass'n. v. New Mexico Public Utility Com'n, 120 N.M. 579, 904 P.2d 28 (1995).* The potential for accidents in the

construction industry merits the imposition of a different requirement for such activity. The Legislature recognized the inherent risks when it mandated that the Act apply to all employers requiring a CID license. The statute should be read literally and the provisions of the Act applied to all CID licensees including corporations that are comprised of one employee like Jackson Construction, Inc. The Legislature recognized that the building trades are, by their very nature, inherently dangerous, and subject to a greater extent to on-the-job injuries. Again, this specific requirement is tied to the nature of the activity, not the size of the workforce.

In the present case Jackson Construction, Inc., operates as a general contractor licensed by the Construction Industries Division and is required to maintain a workers' compensation insurance policy under §52-1-4, *supra.*

VI. CONCLUSION

For the reasons stated above, the Court should reverse the district court's decision. All CID corporations, regardless of the number of employees, are required to obtain workers' compensation insurance coverage. Furthermore, NMSA 1978, §52-1-7, *supra.*, expressly provides that corporate officers who opt out of insurance coverage as executive employees are nevertheless in the headcount for purposes of the mandatory insurance provisions of the Act.

Respectfully submitted,

WORKERS' COMPENSATION ADMIN.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing pleading was sent via facsimile on the 3rd day of September 2010 to:

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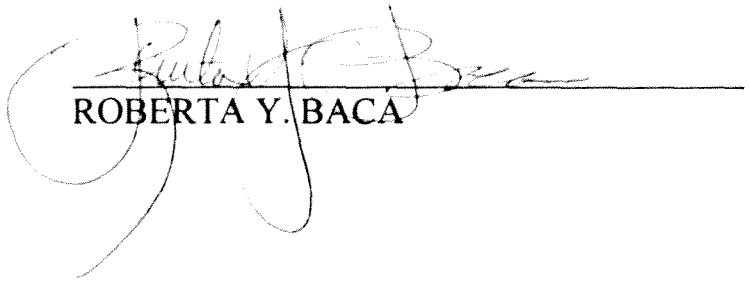
ROBERTA Y. BACA

STATEMENT OF COMPLIANCE WITH RULE 12-502(E)

This Petition complies with the type-volume limitation imposed by NMRA 2010, Rule 12-505(E). The word count feature of the word processing system (Microsoft Word, Version 2003) used to prepare the Petition indicates a word count of 3,777 for the body of the Petition, excluding the cover page, signature clock, certificate of service and this certificate of compliance.



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