

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F312284**

<b>LONNIE COKER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>DAIRY FARMERS OF AMERICA, INC., EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>LIBERTY MUTUAL INSURANCE, CARRIER</b>	<b>RESPONDENT #1</b>
<b>BUD DUNCAN TRUCKING, UN-INSURED EMPLOYER</b>	<b>RESPONDENT #2</b>

**OPINION FILED AUGUST 25, 2005**

A hearing was not conducted in this case. This case is submitted on the existing record before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III.

Claimant is represented by Lamar Porter, Attorney at Law, Little Rock, Arkansas.

Respondent #1 is represented by David C. Jones, Attorney at Law, Little Rock, Arkansas.

Respondent #2 is not represented by counsel.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held in this claim on June 6, 2005; a Prehearing Order was filed on that same date. By agreement of the parties, the Prehearing Order contains the following stipulations, which are hereby accepted.

1. Claimant's compensation rate for temporary total disability benefits is \$440.00; the rate for permanent partial disability benefits is \$330.00.

2. If it is found that Respondent #1 is liable for temporary total disability benefits, those benefits would be due for the period starting on September 18, 2003 and ending on April 13, 2004.

3. Respondent #1 has controverted this claim in its entirety.

\_\_\_\_\_The Prehearing Order also lists those issues that the parties agree are to be litigated and resolved:

1. What was the relationship between Claimant, Respondent #1, and Respondent #2?
2. Did Claimant sustain a compensable injury on September 17, 2003?
3. Is Claimant entitled to medical benefits?
4. Is Claimant entitled to temporary total disability benefits?
5. Is Claimant entitled to an attorney's fee?

Claimant contends that he is an employee of Respondent #2, an uninsured employer; that Respondent #2 is a subcontractor to Respondent #1, the prime contractor; and that under these circumstances, Respondent #1 must provide benefits to Claimant pursuant to Ark. Code Ann. § 11-9-402. Claimant seeks benefits from Respondent #1; Claimant does not seek benefits from Respondent #2. Otherwise, Claimant contends that he suffered a compensable injury on September 17, 2003, when he was run over by a truck owned by Respondent #2. Claimant requests medical benefits, temporary total disability benefits, and an attorney's fee.

Respondent #1 denies liability for benefits to Claimant under Ark. Code Ann. § 11-9-402. It argues that Claimant was an independent contractor; that it had no obligation to a third party, because it is a cooperative association; and that § 11-9-402 is intended to apply solely to the construction industry.

### **THE RECORD**

A hearing was previously held in this matter on September 2, 2004, resulting in an Opinion filed on November 29, 2004. An appeal was taken from that opinion. On May 4,

2005, the Full Commission granted the parties' Joint Motion to Remand to the Administrative Law Judge; the Commission noted that the parties' "purpose in requesting a remand is to allow the Administrative Law Judge an opportunity to reconsider his decision based on the Court of Appeals' holding in Garcia [v. A & M Roofing], \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W. 3d \_\_\_ (February 2, 1005)]." Thus, this entire claim has been remanded for adjudication.

Based upon the foregoing, the Prehearing Order contains the parties' agreement that this case can be submitted for an opinion on the existing record, including the transcripts of the September 2, 2004 hearing; the Opinion filed November 29, 2004; and the deposition transcript of Mr. Lonnie Coker. In addition, the Prehearing Order filed June 6, 2005 will be considered a part of the record. The foregoing items will be "blue backed," or otherwise designated as the record in this matter, as may be necessary.

## **DISCUSSION**

### **A. PARTIES' RELATIONSHIP**

\_\_\_\_\_ Claimant sustained physical harm on September 17, 2003, when a truck owned by Respondent #2 ran over him. Claimant explained: "I was underneath the truck, and the brake system failed and run [sic] over me with both sets - both duals on the rear of the truck." Respondent #2 supplied the truck to Claimant for his use in delivering milk for Respondent #1's members.

Respondent #1 is a cooperative that markets milk produced by its members; it enters into contracts with its members to perform this service. Two such contracts are attached to the May 19, 2004 deposition of Elbert Qualls as Deposition Exhibits #1 and #2;

both contain the following provision:

[Respondent #1] is authorized to perform all services in connection with the hauling, handling and all other aspects of marketing Member's milk....

Qualls, a field representative for Respondent #1, testified that Respondent #1 engages independent contractors to haul milk for its members.

At the hearing, Qualls addressed the relationship between Respondent #1 and its members.

Q. Mr. Qualls, does DFA have a board of directors?

A. Yes, sir.

Q. Does that board of directors govern or operate DFA?

A. Yes, sir.

Q. So you said, essentially -- well, I'm not sure exactly sure how you phrased it, but let me ask you this. Can anybody who's a member of DFA sign a contract for DFA? In other words, if you're a member and you're not part of the governing board, can you just go out and enter into contracts on behalf of the association?

A. To my knowledge, no, sir. I don't think so. But I -- you know, I don't know that for a fact, either. So I'm really -- you know, that's not my job, I guess. It's not part of my job.

Q. And attached to your deposition is -- in fact, there are contracts that DFA enters into with its members that allows DFA to pick up milk from its members. Is that correct?

A. Well, actually, the membership allows DFA to -- you know, to negotiate, or whatever they have to do, as far as expense or whatever, for picking up the milk. But it's the membership -- it's their milk. They actually own the milk. DFA does not buy milk. They market that milk, so the membership actually -- it's their milk, until it gets to a facility or something, and those people buy it or pay for the milk.

Q. And the member has the option to enter into a contract with DFA, whereby DFA will pick up the milk and deliver it to market and market it.

A. Well, there again, yes, sir, it is DFA. But who is DFA is dairy farmers. You know, they're doing it in a group, as a group, instead of one dairy farmer trying to market his milk. You know, it's a group of dairy farmers is what it is, and they come together and just -- and they all, really, you know, get their milk picked up together and take it to the plant. Yes, sir.

Q. And they enter -- the individual members enter into a contract with DFA, the cooperative.

A. They give DFA permission to do that, yes, sir.

Q. And there's a signed contract that's --

A. Right. It states in the membership that they allow DFA to use the money from the milk to pay for whatever expenses need to be paid.

Turning to the relationship between the Respondents, Qualls asserted that Respondent #2 is an independent contractor, "so he can do whatever he needs to, yes." In his deposition, Qualls affirmed his understanding that Claimant was an employee of Respondent #2, and that Claimant had no contract with Respondent #1. Qualls explained that Respondent #2 was given a list of members to haul milk from; it was Respondent #2's responsibility to arrange a route and schedule delivery. Qualls further explained that contractors such as Respondent #2 laid out their own daily plans; hired and fired their own drivers; set up their own actual driving route; furnished the vehicles for transporting the milk; and were responsible for repairs to their own equipment.

The deposition of Steve Davis was also taken on May 19, 2004; Davis is an area manager for Respondent #1, whose duties include negotiating hauling contracts with parties such as Respondent #2. To his knowledge, Respondent #1 does not use its own employees, trucks, and trailers to haul milk; rather, it engages the services of others to haul milk. Davis identified Deposition Exhibit #3, attached to the deposition of Qualls and entitled "Milk Hauler's Contract," as the agreement between Respondent #1 and

Respondent #2 in force at the time of Claimant's incident. Among other things, the contract states:

[Respondent #1] is engaged in the collective marketing of the milk produced by its member dairy farmers.... [Respondent #2] is an independent contractor engaged in the business of transporting unprocessed milk in bulk from dairy farms to locations designated by [Respondent #1]. [Respondent #1] desires to engage [Respondent #2] to perform certain transportation services for designated Members and other milk producers.

Another provision of the contract specifically states the parties' intent to create "an independent contractor-employer relationship," with Respondent #2 controlling the work.

At the hearing, Davis also testified concerning the relationship between Respondent #1 and its members.

Q. And is it or it is not correct that DFA is composed of its members?

A. Yes.

Q. It's a co-op.

A. Yes, sir.

Q. And I believe you testified, in your deposition, that these were, essentially, internal agreements between members and their own co-op. Is that correct?

A. Yes, sir.

Q. So there's no actual third party involved?

A. No, sir.

Bud Duncan testified on behalf of Respondent #2. He understood himself to be an independent contractor, with the freedom to contract with whomever he wanted. Duncan hired Respondent #2's drivers; if Respondent #1 had a problem with one of those drivers, it discussed that problem with Duncan, not the driver. Duncan testified that he controlled

Claimant's daily activities. Duncan confirmed that he withheld taxes from Claimant's pay and that he provided the truck that ran over Claimant. Duncan also confirmed that Respondent #2 did not carry workers' compensation coverage at this time.

Claimant considered himself to be an employee of Respondent #2; it supplied the truck he used, paid his salary, withheld taxes from his paycheck, and supplied Claimant with a W-2 form at the end of the year. Claimant was not working for anyone else at the time of his injury. At the hearing, Claimant's counsel "put on the record that we're not making the claim that there was sufficient control over [Claimant], where [Respondent #1] should be the employer. Our sole claim is based on the general contractor/sub-contractor relationship between [Respondent #1] and [Respondent #2], and [Claimant] being an employee of [Respondent #2]."

The workers' compensation law provides that "[w]here a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor." Ark. Code Ann. § 11-9-402(a). The elements of this statute will be discussed in turn.

**1. Respondent #1 is a prime contractor.**

Claimant alleges that Respondent #1 is a prime contractor. There cannot be a prime contractor without a contract to do the work for a third party; the status of a prime contractor presupposes work to be done for a third party. Riddell Flying Serv. v. Callahan, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (April 6, 2005) (citations omitted). Thus, it must be demonstrated that Respondent #1 contracted to haul milk for a third party.

I find that Respondent #1 is a prime contractor, because it contracted to haul milk for several "third parties," its members. Deposition Exhibits #1 and #2, attached to the May

19, 2004 deposition of Elbert Qualls, specifically provide that Respondent #1 “is authorized to perform all services in connection with the hauling, handling and all other aspects of marketing Member’s milk....” Qualls’ testimony corroborates this contractual term. The preponderance of the evidence demonstrates that Respondent #1 contracted to haul milk produced by its members.

Respondent argues that Claimant is an independent contractor. As noted below, I find that Claimant is an employee of Respondent #2. Respondent also argues that section 11-9-402 is intended to apply solely to the construction industry, and not in this context. However, the language of section 11-9-402 does not limit the statute solely to parties involved in construction; nor does section 11-9-402(a) appear dependent on the definition found in Ark. Code Ann. § 17-25-401(a). Just as I cannot broaden section 11-9-402's language, I am not permitted to narrow its scope. See Ark. Code Ann. § 11-9-1001. I also note that the Arkansas Court of Appeals recently applied the statute in the context of forest firefighting, not construction. See Riddell Flying Serv., \_\_\_ Ark. App. at \_\_\_, \_\_\_ S.W.3d at \_\_\_ (April 6, 2005) (finding the statute inapplicable on other grounds).

For its final argument, Respondent #1 contends that it had no obligation to a third party, because it is a cooperative association; stated another way, Respondent #1 contends that it is indistinguishable from its membership. Deposition Exhibits #1, #2, and #3, attached to Qualls’ deposition, all refer to Respondent #1 as a corporation. “A cooperative is a unique form of corporation generally characterized by voting on the basis of membership rather than on the number of shares held, and by participation in the returns of the enterprise on the basis of business done with it.” Mary Elizabeth Matthews, Corporate Statutes - Which One Applies?, 13 U. Ark. Little Rock L.J. 69, 83 (1990). In one

case involving an incorporated cooperative association, the Arkansas Supreme Court relied on this statement of the law: “Cases from other jurisdictions hold that in absence of anything to the contrary in the association charter or by-laws or in the contract between the association and its members, a cooperative association is free to deal with its members on any reasonable basis.” Milk Producers, Inc. v. Campbell, 249 Ark. 354, 358, 459 S.W.2d 114, \_\_\_ (1970). Based upon Deposition Exhibits #1 and 2 attached to Qualls’ deposition, and the foregoing authorities, it appears that Respondent #1 is an entity distinct from its membership, with full power to contract with those members. Here the record demonstrates that the members did contract with Respondent #1, granting Respondent #1 authority to haul the milk produced and owned by the members.

**2. Respondent #2 is a subcontractor.**

Claimant contends that Respondent #2 is a subcontractor to Respondent #1. The Arkansas Court of Appeals has defined a subcontractor as follows:

A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely “farming out” to others all or part of work contracted to be performed by the original contractor.

Bailey v. Simmons, 6 Ark. App. 193, 196, 639 S.W.2d 526, \_\_\_ (1982) (citation omitted); see Garcia, \_\_\_ Ark. App. at \_\_\_, \_\_\_ S.W.3d at \_\_\_ (February 2, 2005) (citation omitted).

I find that Respondent #2 subcontracted to haul milk for Respondent #1; Respondent #1 “farmed out” its obligation to haul milk for its members to Respondent #2. Qualls testified that Respondent #1 engages independent contractors to haul milk for its members. Davis testified that Respondent #1 does not use its own employees, trucks, and trailers to haul milk; rather, it engages the services of others to haul milk. Deposition Exhibit #3, attached

to the deposition of Qualls, specifies that Respondent #1 “desires to engage [Respondent #2] to perform certain transportation services for designated Members and other milk producers.” Thus, Respondent #2 contracted to haul milk for Respondent #1, an activity which Respondent #1 had already contracted to perform for its members.

### **3. Claimant is an employee of Respondent #2.**

Claimant argues that he is an employee of Respondent #2; Respondent #1 argues that Claimant is an independent contractor. There are several factors to consider in determining whether an injured person is an employee or an independent contractor; the Arkansas Court of Appeals has noted some of these factors:

- (1) the right to control the means and the method by which the work is done;
- (2) the right to terminate the employment without liability;
- (3) the method of payment, whether by time, job, piece, or other unit of measurement;
- (4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
- (5) whether the person employed is engaged in a distinct occupation or business;
- (6) the skill required in a particular occupation;
- (7) whether the employer is in business;
- (8) whether the work is an integral part of the regular business of the employer; and
- (9) the length of time for which the person is employed.

Riddell Flying Serv., \_\_\_ Ark. App. at \_\_\_, \_\_\_ S.W.3d at \_\_\_ (April 6, 2005) (citation omitted). It may not be necessary in some cases for the Commission to consider all of these factors. Id. Traditionally, the “right to control” test has been sufficient to decide most

of the cases. Id.

I find that Claimant was an employee of Respondent #2. Duncan, Respondent #2's principal, testified that he controlled Claimant's daily activities; Claimant considered himself to be an employee of Respondent #2. Respondent #2 supplied the truck Claimant used, paid his salary, withheld taxes from his paycheck, and supplied him with a W-2 form at the end of the year. Respondent #2 is clearly in the hauling business; Claimant's work as a truck driver was an integral part of that business. Thus, Claimant is an employee of Respondent #2.

**4. Respondent #2 failed to secure workers' compensation as required by law.**

I find that Respondent #2, a subcontractor to Respondent #1, failed to secure compensation as required by the workers' compensation law. Duncan testified to such failure; there is absolutely no proof in the record to the contrary.

**5. Respondent #1 shall be liable for compensation to Claimant.**

Based upon the foregoing findings, I find that Respondent #1 shall be liable for compensation to Claimant, an employee of Respondent #2, under Ark. Code Ann. § 11-9-402(a).

**6. Respondent #1 is entitled to a lien against Respondent #2.**

Respondent #1 requests the lien provided by Ark. Code Ann. § 11-9-402(b)(2) against Respondent #2, for any benefits Respondent #1 may have to pay on this claim. Under the terms of the statute, if Respondent #1 or its carrier elects to recover from Respondent #2 benefits paid to Claimant, its claim "shall constitute a lien against any moneys due or to become due" from Respondent #1 to Respondent #2. Based upon the

foregoing findings and the language of section 11-9-402(b), Respondent #1 is entitled to such a lien.

## **B. COMPENSABILITY**

Respondent #2 hired Claimant to pick up and deliver raw milk from certain farms and deliver it to be processed. The milk was produced by Respondent #1's members. Respondent #2 supplied the truck that Claimant used to pick up and deliver the milk. This was the truck that ran over Claimant on September 17, 2003, resulting in this claim.

With the agreement and consent of Respondent #2, Claimant kept the truck at his home every night. Claimant picked up some milk on his assigned route the previous day, returned to his home to rest, and was in the process of beginning the next part of his route that morning, when the injury occurred. Claimant testified as follows:

Q. Okay. And so what were you -- what were you doing, again, at the time you were injured?

A. I was releasing a push rod on the brake chamber, which hung up everyday. We had to knock it up before we'd build air in the truck, at all, before the brakes would release.

Q. Uh-huh.

A. And then it would be all right the rest of the day. But it was a ritual, every morning.

Q. Okay.

A. And this particular morning -- we'd been roll-starting the truck, because the starter had been out, and I got under it to do the ritual hitting of that, and it let go. We'd done it every morning, several times, but it just let go that morning. I don't know why.

Q. And what happened?

A. I was underneath the front duals -- or the rear duals, the front rear dual. And, when it released, I just -- I didn't have time to move. The front axle run

over my back, turned me over; the back axle run over my belly side. Got stuck under the truck and it tumbled me and drug me for several feet.

Q. What were you doing this repair or unfreezing the brake in anticipation -- in other words, what were you going to do after you got the brake fixed?

A. Roll-start the truck and proceed with my daily job.

Q. In other words, were you -- after you got the truck going, were you going to start on your route?

A. Yes, sir.

Q. Okay.

A. I was actually en route. The truck contained milk.

Claimant testified that this incident "collapsed my lung, collapsed my bladder, my spleen was leaking into my abdomen, crushed my pelvis, crushed my tail bone, cracked my ribs. And then just minor cuts, bruises, and other things, but that's the majority of it."

Duncan confirmed that Claimant was working on Respondent #2's truck at the time of his injury. He initially testified that he thought Claimant was on his way to the bank that morning; on cross-examination, he admitted that he really didn't know whether Claimant was going to deliver the milk first and then go to the bank or vice versa. He agreed that Claimant was working for Respondent #2 on the date of the injury and, with regard to Claimant's activity at the time of his injury, "that would be a part of his job, to check the truck before he left." At his May 19, 2004 deposition, Duncan confirmed that there was milk on the truck at the time of Claimant's injury. He knew Claimant took the truck home; Duncan testified that Respondent #2 really didn't have any other place convenient to park the truck.

The medical records indicate that Claimant was first transported to the North Arkansas Regional Medical Center, and then transferred to St. John's Regional Health

Center in Springfield, Missouri. Several studies were conducted at the first facility on the date of the accident, September 17, 2003. One x-ray of Claimant's pelvis produced the following impression: "Displaced diastatic fracture of the symphysis pubis with no other fracture demonstrated." Another x-ray left an impression of "[m]ultiple left rib fractures with subcutaneous emphysema."

A consultation note dated September 17, 2003, produced by Dr. Shane Palmer at the North Arkansas Regional Medical Center, gives Claimant's history of "being run over by a large truck." Among other findings, the note reports chest abrasions, a puncture wound in Claimant's left lower abdomen, abrasion and tenderness over his right inferior hip, and abrasions on the lower extremities. The decision to transfer Claimant was made "because of the complicated pelvic fracture."

Claimant must prove that he sustained a compensable injury.

"Compensable injury" means: ... an accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (September 8, 2004). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

The employee must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean

preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he suffered a compensable injury on September 17, 2003. The elements of such a claim will be discussed in turn.

Claimant's injury was accidental, caused by a specific incident and identifiable by time and place of occurrence. Claimant testified to a specific incident, being run over by his truck in the course of effecting repairs. This incident occurred on the morning of September 17, 2003; the place of occurrence was on the road adjacent to Claimant's home.

Claimant's accidental injury caused internal and external harm to his body. Claimant testified to the injuries that he suffered. His testimony is corroborated by the medical records, including the consultation report and studies cited above.

Claimant's injury arose out of and in the course of his employment. He was injured while repairing Respondent #2's truck; Duncan conceded that checking the truck prior to driving the route would be a part of Claimant's job. Respondent #2 knew that Claimant kept the truck at his home; indeed, Respondent #2 did not have another convenient place to keep the truck. Claimant testified that he was beginning his route and that the truck was loaded with some milk.

Claimant's injury required medical services. Again, the medical records demonstrate that Claimant's injuries were serious, and that he required immediate medical treatment at an out-of-state facility. There are objective findings that support this medical evidence. Specifically, in his consultation report, Dr. Palmer noted abrasions and wounds. Further, the studies taken on September 17, 2003 note a fractured pelvis and broken ribs. These

are objective findings which cannot come under the voluntary control of Claimant.

### **C. MEDICAL BENEFITS**

Claimant testified that he was in the hospital about two weeks. He had surgery: "They put a steel plate in my pelvis, reattached my tail bone, and put some metal back there, I believe. Gave me a lung tube, repaired my bladder." He confirmed that he was released from Dr. Jonathan Crites' care on April 13, 2004, but that he is to see the doctor "every month, once a month."

A consultation report dated September 24, 2003, prepared at the St. John's Regional Health Center, provides some details concerning Claimant's treatment immediately after his accident.

Work-up revealed a left superior and inferior rami fracture, right sacral fracture with lateral shearing, left rib fracture secondary to blunt chest trauma, a left pneumothorax, a left lower quadrant laceration avulsion, multiple single thickness abrasions and an extra-peritoneal bladder disruption. The patient went to the operating room on 09/22/03 for an open reduction, internal fixation of the pubic symphysis and closed reduction and percutaneous pinning of the right sacral fracture with a sacral screw. He also had a bladder repair... with a Hemovac drain placed in the abdomen. He has really done quite well postoperatively, getting up into the chair for the first time today. He complains of quite a lot of continuing pelvic pain, tail bone pain and left rib pain.

A CAT scan report dated September 17, 2003 provides objective evidence of the findings noted in the foregoing report.

A discharge summary prepared in connection with Claimant's October 1, 2003 discharge notes that "[r]ehab evaluation was requested, however, given insurance reasons and Workmen's Comp issues, it was felt that rehabilitation at our hospital was not an option." Claimant was instructed to follow up with Dr. Crites and Dr. Gregory Angier.

The medical records document several follow-up visits that Claimant had with Dr.

Crites. On April 13, 2004, Claimant returned “for the last check on his pelvis.” Claimant reported that “he has been doing great. He has occasional soreness in the left thigh but overall he is quite pleased. He is back to work, jumping, and other things.” Dr. Crites told Claimant that he was released, but instructed Claimant to contact him if he had any further problems.

On May 20, 2004, Claimant returned to Dr. Crites. Claimant reported that “he has only been unable [sic] to work a full week because of pain. He has some numbness which goes down the left side and no numbness on the right. He has pain if he sits ... for too long.” Dr. Crites advised Claimant that it was not uncommon, after a serious pelvic fracture such as Claimant sustained, “to have some permanent impairments and disability and persistent pain.” Dr. Crites agreed to see Claimant “back as needed.”

Dr. Crites addressed a letter to the law firm representing Claimant on July 21, 2004. Dr. Crites believed that Claimant’s “activity level was progressing and as it progressed he began experiencing more difficulties.” He opined:

[T]he pain and numbness he has on his left side, I believe, is directly related to the time when he sustained his injury. His fracture of the sacrum is on the right side but when he was rolled over by the truck, it is quite possible that he injured neurologic structures on the left side to cause his pain and numbness. Once again, a very high percentage of patients with a pelvic injury such as [Claimant] sustained, can have long term disabling type of pain.

Dr. Crites believed that Claimant’s pain could be intermittent and that it might cause him to miss some work. His preference was for Claimant to manage his discomfort on non-narcotic analgesics.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee.

Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 16, 2005).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to medical benefits. The medical records demonstrate that his treatment was reasonably necessary: his examinations and studies have been necessary to accurately diagnose the extent of his injury; his surgeries were necessary to reduce or alleviate his symptoms. Claimant reported to Dr. Crites on April 13, 2004 that “he has been doing great ... overall he is quite pleased”; this indicates that Claimant’s treatment has been somewhat successful in treating his injury, which is further confirmed by the fact that Dr. Crites released Claimant on that same date. Further, Claimant’s treatment is connected with the injury that he received. Claimant did not need this treatment prior to his September 17, 2003 injury; the medical records document that his treatment is connected to this injury. Dr. Crites confirmed this connection in his September 21, 2004 letter.

**D. TEMPORARY TOTAL DISABILITY BENEFITS**

As noted above, Claimant was hospitalized for two weeks after his compensable injury. A surgical discharge record dated October 1, 2003 is not checked or marked to

indicate that Claimant could return to work. Claimant reported to Dr. Crites on April 13, 2004 that he was back at work; Dr. Crites released Claimant on that date. The parties stipulated that if Respondent #1 is found liable for temporary total disability benefits, those benefits would be due for the period starting on September 18, 2003 (the day after Claimant's compensable injury) and ending on April 13, 2004.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 31, 2005). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The "healing period" is that period for healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, \_\_\_ (2002). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits starting on September 18, 2003 and ending on April 13, 2004. Claimant's compensable injury obviously incapacitated him from earning the wages which he was receiving at the time of that injury. Claimant was not allowed to return to work after his hospitalization. Indeed, the medical records indicate

that Claimant was not allowed to return to weight bearing activity for several weeks. Although Dr. Crites' July 21, 2004 letter indicates that Claimant will continue to experience pain "which may cause him to miss some work," Claimant was nonetheless released by Dr. Crites on April 13, 2004. On this record, Claimant has proven his entitlement to temporary total disability benefits for the period stipulated by the parties.

**E. CREDIT UNDER SECTION 11-9-807**

At the hearing, without objection from the other parties, Respondent #1 claimed a credit or off-set under Ark. Code Ann. § 11-9-807. Concerning this credit, Claimant testified as follows:

Q. Did you receive any monies from Bud Duncan Trucking, after you were injured?

A. Yes, I did. He gave me two \$800 checks in the two pay periods which I -- the first two weeks I was hurt. The first months, rather. He paid me bi-weekly. Yes, he gave me two \$800 checks.

Q. Any other payments?

A. No.

Q. You've not received any type of Workers' Compensation benefits?

A. Nothing except that right there.

Claimant confirmed these payments upon cross-examination. At his May 19, 2004 deposition, Claimant elaborated on these payments.

A. ... Bud did give me \$1600.00 after the injury and that's the only income I've had. Two \$800 checks when I got back home.

Q. Is that money he already owed you or is that just to help out?

A. He didn't owe me nothing.

Q. So he was just trying to help you out?

A. Apparently.

Duncan did not testify about these payments, either in his deposition or at the hearing.

If an employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. Ark. Code Ann. § 11-9-807(a).

Arkansas's appellate courts have strictly interpreted the language of this statute, and an employer is entitled to a credit only where the employer clearly establishes that sums paid to the injured employee were advance payments of compensation. Consequently, the employer bears the burden of proving that both parties intended and understood that the payment was the payment of compensation in advance. The employer fails to meet this burden of proof in the absence of "viable evidence showing that both parties clearly intended that the payments were compensation in advance."

Lee v. Burlington Indus., Full Workers' Compensation Commission Opinion filed July 10, 1995 (E111026) (citations omitted); see Varnell v. Union Carbide, 29 Ark. App. 185, 779 S.W.2d 543 (1989).

I find that Respondent #1 did not sustain its burden of proving that it is entitled to a credit under Ark. Code Ann. § 11-9-807(a). Claimant's testimony could perhaps be read to indicate his understanding that these two \$800.00 payments were compensation. Assuming that is so, there is no evidence concerning Respondent #2's understanding, apart from Claimant's speculation as to Respondent #2's intent. Under the authorities cited, this failure of proof is fatal to Respondent #1's request.

#### **F. ATTORNEY'S FEE**

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This Opinion awards Claimant temporary total disability benefits; the parties stipulated that Respondent

#1 has controverted this claim in its entirety. Thus, Claimant is entitled to an award of attorney's fees pursuant to the statute.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. Claimant's compensation rate for temporary total disability benefits is \$440.00; the rate for permanent partial disability benefits is \$330.00.
3. If it is found that Respondent #1 is liable for temporary total disability benefits, those benefits would be due for the period starting on September 18, 2003 and ending on April 13, 2004.
4. Respondent #1 has controverted this claim in its entirety.
5. I find that Respondent #1 is a prime contractor. Respondent #1 contracted with third parties, its members, to haul the milk they produced and owned.
6. I find that Respondent #2 is a subcontractor. Respondent #2 contracted to haul milk for Respondent #1, an activity which Respondent #1 had already contracted to perform for its members.
7. I find that Claimant is an employee of Respondent #2. Respondent #2 controlled the means and method by which Claimant worked; Respondent #2 supplied Claimant's truck; Respondent #2 paid Claimant's salary, withheld taxes from his paycheck, and supplied him with a W-2 form at the end of the year. Respondent #2 is in the hauling business; Claimant's work as a truck driver was an integral part of that business.
8. I find that Respondent #2 failed to secure workers' compensation as required by law. Respondent #2's principal, Duncan, testified to such failure.
9. Based upon Findings 5, 6, 7, and 8, and pursuant to Ark. Code Ann. § 11-9-

402(a), I find that Respondent #1 shall be liable to Claimant for compensation as required by the workers' compensation law.

10. I find that Respondent #1 is entitled to a lien against Respondent #2 under Ark. Code Ann. § 11-9-402(b), to recover the amount of compensation paid or for which liability is incurred.

11. Claimant sustained his burden of proving by a preponderance of the evidence that his September 17, 2003 injury is compensable. Claimant was run over by a truck owned by Respondent #2, which constitutes a specific incident; this incident occurred on the morning of September 17, 2003 somewhere adjacent to Claimant's home. Claimant's testimony, as corroborated by the medical records, demonstrates that the injury caused internal and external harm to his body. The injury arose out of and in the course of his employment with Respondent #2, in that Claimant was working on Respondent #2's truck in preparation for running his route. The medical records demonstrate that the Claimant's injuries were serious and required medical services. Finally, objective findings are present in the form of studies dated September 17, 2003 noting a fractured pelvis and broken ribs, as well as the observations of Dr. Palmer.

12. Claimant sustained his burden of proving that he was entitled to reasonably necessary medical services in connection with his injury. Treatment provided to Claimant has been necessary to diagnose the extent of his injury and to reduce or alleviate his symptoms. Claimant experienced some relief from this treatment. Further, Claimant's treatment is connected to his injury; he did not need this treatment prior to September 17, 2003, but the medical records document his need for this treatment afterwards.

13. Claimant sustained his burden of proving by a preponderance of the evidence

that he is entitled to temporary total disability benefits starting on September 18, 2003 and ending on April 13, 2004. These injuries incapacitated Claimant; he was not allowed to return to work after his two-week hospitalization; he was not released from Dr. Crites' care until April 13, 2004.

14. Respondent #1 did not sustain its burden of proving entitlement to a credit under Ark. Code Ann. § 11-9-807(a). There is no proof that Respondent #2 intended and understood that his two \$800.00 payments constituted the payment of compensation in advance.

15. Claimant is entitled to an award of an attorney's fee under Ark. Code Ann. § 11-9-715 because his claim has been controverted and this Opinion awards him temporary total disability benefits.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

**IT IS SO ORDERED.**

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DFA/ml

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D. FRANKLIN AREY, III,  
Administrative Law Judge