

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E509478

SCIPPIO JOHNSON, EMPLOYEE	CLAIMANT
BONDS FERTILIZER, INC., EMPLOYER	RESPONDENT NO. 1
AGRI GROUP-COMP SI FUND, CARRIER	RESPONDENT NO. 1
BONDS BROTHERS, INC., EMPLOYER	RESPONDENT NO. 2
CNA INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2

OPINION AND ORDER FILED JANUARY 10, 2007

Hearing before Administrative Law Judge Barbara Webb on July 21, 2006, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Mr. Timothy S. Parker, Attorney at Law, Eureka Springs, Arkansas.

Respondents No. 1 were represented by Mr. Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 2 were represented by Mr. D. Keith Fortner, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case is on remand from the second appeal of the original case arising from a railroad crossing accident in which a train collided with a pick-up truck near Tamo, Arkansas, on June 28, 1995. Johnson was a passenger in the truck and sustained fractures to his femur, broken ribs, and multiple injuries including traumatic brain injury when he was thrown from the vehicle upon impact. The driver, Francis Birmingham, was also ejected and seriously injured. The other passenger, Alyson Luster, was also ejected and died as a result of the injuries he sustained.

While Johnson was in the hospital, a workers' compensation claim was filed on his behalf by Kenny Bonds, President of Bonds Fertilizer, Inc.¹ On August 14, 1998, Johnson and his wife filed suit in the Jefferson County Circuit Court against Union Pacific Railroad, Bonds Fertilizer, Inc., ("Bonds Fertilizer") and Bonds Brothers, Inc. ("Bonds Bros"), alleging negligence and a loss of consortium.² The circuit court granted summary judgment to Bonds Fertilizer and Bonds Bros. In addition, the circuit court granted partial summary judgment to Union Pacific on the issue of inadequate warning devices. Following a jury trial against the railroad on the remaining issue of negligence, the jury returned a verdict in favor of Union Pacific. Johnson appealed to the Arkansas Supreme Court, arguing that the circuit court erred in (1) finding that the claim against Bonds Fertilizer was barred based on the exclusive-remedy provision of the Workers' Compensation Act; and (2) refusing to find that Union Pacific was collaterally estopped from raising the defense of federal preemption on the claim of inadequate warning devices. See *Johnson v. Union Pacific R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003) (*Johnson I*).³ The Supreme Court affirmed the grant of partial summary judgment in favor of Union Pacific; however, reversed the grant of summary judgment to Bonds Fertilizer and remanded the matter to the circuit court with leave for Johnson to seek a

¹Bonds Fertilizer, Inc. was insured by AG Comp SIF for workers' compensation claims. The Farm was not covered by workers' compensation coverage pursuant to Ark. Code. Ann. §11-9-102 (11) (A) (iii) (Repl. 2005), which exempts "agricultural farm labor" from the definition of "employment".

²AG Comp SIF intervened in the civil suit seeking recoupment of workers' compensation benefits paid in the event of recovery against Bonds Fertilizer, Inc.

³Bonds Brothers, Inc. was not a party to the appeal.

determination from the Commission as to whether he was performing employment services for Bonds Fertilizer or Bonds Brothers Trust a/k/a "The Farm" on the date of the accident. *Id.*

Thereafter, Johnson sought a determination from the Commission. Bonds Fertilizer and the Farm argued that the Commission had no jurisdiction to make the determination because the two-year statute of limitations for claims under the Workers' Compensation Act had expired. The Administrative Law Judge (ALJ) concluded that since the statute of limitations had run, the Commission had no further jurisdiction in the matter and, additionally, that the Commission was without authority to issue an advisory opinion. The Commission affirmed the decision of the ALJ. On appeal, the Supreme Court held that the Commission erred in concluding that the statute of limitations for workers' compensation claims prohibit the Commission from determining whether Johnson was performing employment services for Bonds Fertilizer or the Farm on the date of the accident. *See Johnson v. Union Pacific R.R.*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 2, 2006) (*Johnson II*). The Court also rejected the argument that the Commission was being asked to issue an advisory opinion and held that the Commission has exclusive, original jurisdiction to determine whether an employee's injuries are covered by the Act. *Id.* The Court further noted that the additional arguments of waiver and election-of-remedies doctrine were not addressed by the Commission and therefore were not properly before the Court on appeal. *Id.*

In its opinion delivered February 2, 2006, the Court specifically stated:

. . . we reverse and remand this case to the Commission to make a determination as to whether Johnson was performing employment services for Bonds Fertilizer or the Farm on the date of the accident.

Id.

On remand, the Commission in their Opinion filed March 14, 2006, noted:

While it is undisputed that the claimant was injured while en route to pick up a tractor, the Supreme Court stated in its opinion reversing the granting of summary judgment in *Johnson v. Union Pacific Railroad*, 352 Ark. 534, 104 S.W.3d. 745 (2003), that the evidence was not “so one-sided to demonstrate, as a matter of law, which employer Johnson was working for at the time of the accident.” In the present matter before the Commission, the parties originally submitted the matter to the Administrative Law Judge on briefs. It is noted that the parties did not submit a set of stipulated facts, did not offer any sworn testimony although depositions had been taken in the Circuit Court matter (with the exception of the adjuster’s deposition attached to claimant’s brief), did not offer any evidence clarifying the relationship between Bonds Brothers Trust, Bonds Brothers, Inc., and Bonds Fertilizer, and did not offer any evidence corroborating the payments made by either Bonds Fertilizer or Bonds Brothers Trust to the claimant for the work he performed. Accordingly, we find that additional evidence is necessary to comply with the mandate from the Supreme Court. Therefore, this matter is hereby remanded to an Administrative Law Judge to conduct any and all necessary proceedings deemed appropriate to determine for whom the claimant was performing employment services at the time of his injury.

On March 14, 2006, Johnson filed a Motion to Invoke Doctrine of Law of the Case and to Strike Defenses of Election of Remedies and Dual Employment Doctrine And Brief in Support thereof. Bonds Fertilizer and Bonds Bros filed Responses to the Motion on March 21, 2006, and March 24, 2006, respectively. A pre-hearing telephone conference was held in the case on April 24, 2006. The Prehearing Order dated April 24, 2006, established a briefing schedule and set a hearing on July 21, 2006. A second pre-hearing was held on May 8, 2006. At that time, the parties agreed to present evidence by way of a stipulated record and to make oral arguments on the legal issues

pending before the Commission at the hearing scheduled for July 21, 2006. On July 7, 2006, Johnson filed a Motion to Dismiss Bonds Brothers, Inc. At the hearing held on July 21, 2006, the Motion to Dismiss Bonds Brothers, Inc. filed July 7, 2006 and the Motion to Invoke Doctrine of Law of the Case and to Strike Defenses of Election of Remedies and Dual Employment Doctrine were taken under advisement.

The record consists of the July 21, 2006 hearing transcript. In addition, I have blue-backed Commission's Exhibit No. 1 (Pre-hearing Order), Claimant's Exhibits 1-7 and Respondents' Exhibit No. 1; and the letter brief filed July 31, 2006 by Bonds Brothers, Inc., which are incorporated by reference and received into evidence in this proceeding without objection.

I. MOTION TO DISMISS BONDS BROTHERS, INC.

_____ Johnson has requested that Bonds Bros be dismissed from the case on the basis that he does not seek relief against Bonds Bros. Bonds Bros is a corporation formed under laws of Arkansas and incorporated by Kenny M. Bonds, Jr., for the purpose of engaging in farming or other related business in Arkansas. At the time of the accident, Bonds Fertilizer was a wholly owned subsidiary of Bonds Bros. At the time of the accident, Bonds Bros was a partner in the Farm. At the time of the accident, Bonds Bros owned the equipment and buildings used by the Farm pursuant to a lease between the two entities. Bonds Bros was made an original party to the lawsuit filed in Jefferson County, Arkansas, but was dismissed on summary judgment. Johnson contends that Bonds Bros should be dismissed from the instant claim in light of the fact he does not seek relief against Bonds Bros. Bonds Bros contends that they have been a party to this proceeding for nearly eight years, that claims were asserted against Bonds Bros., and

that Bonds Bros has a stake in the proceeding to see a final adjudication of Johnson's claims. Bonds Bros further contends that the request for dismissal was filed only after the filing of Bonds Bros brief and is designed to preclude consideration of any additional arguments raised by Bonds Bros. After consideration of the credible evidence and in order to insure a full adjudication of all issues properly before the Commission, I find that the Motion to Dismiss Bonds Brothers, Inc. should be denied at this time. I find that the Motion to Strike Bonds Brothers' Brief should be denied in light of the fact that Bonds Bros' counsel properly and timely submitted requests for extensions and was granted additional time based on good cause shown.

II. MOTION TO INVOKE LAW OF THE CASE AND TO STRIKE DEFENSES OF ELECTION OF REMEDIES AND DUAL EMPLOYMENT

Johnson requests this Commission to invoke law of the case and to strike defenses of election of remedies and dual employment. In *Johnson II*, the Supreme Court noted that the arguments of waiver and election-of-remedies doctrine were not properly before the Court on appeal. In its remand, the Commission does not address these arguments. Johnson requests this Commission to invoke law of the case and to strike defenses of election of remedies and dual employment. In its opinion, the Supreme Court noted that the arguments of waiver and election-of-remedies doctrine were not properly before the Court on appeal. In its remand, the Commission does not specifically address these arguments. Because the issues of waiver and election-of-remedies are relevant to the issues which are part of the mandate and remand, I respectfully deny the Motion. Moreover, I find the doctrine of dual employment is not an affirmative defense and is clearly relevant to the issue before me -- for whom was the

claimant performing employment services at the time of the accident. In addition, the Arkansas Supreme Court has not held that the doctrine of dual employment is not applicable in this case. Therefore, I find that the doctrine of dual employment is well within the scope of the remand from the Arkansas Supreme Court and the Commission. Therefore, the Motion to Strike as to the issue of dual employment is also denied.

III. DISCUSSION

The critical issue in this case is a determination of whether Johnson was performing employment services for Bonds Fertilizer or the Farm at the time of his injury. The basic facts of the employment relationship were summarized in by the Supreme Court in *Johnson I*, as follows:

The record reflects that, on the date of the accident, Johnson was an employee of both the Farm and Bonds Fertilizer. Both companies, along with Bonds Brothers, were either owned or controlled by Kenny Bonds and Brian Bonds. Kenny and Brian each owned fifty percent of Bonds Brothers. Bonds Brothers is the sole shareholder of Bonds Fertilizer. The Farm is a partnership comprised of Kenny Bonds Farms, Brian A. Bonds Trust, and Bonds Brothers. When Johnson performed work for either the Farm or Bonds Fertilizer, he reported to the same supervisor, Allan Maxey. Some weeks, Johnson would perform tasks for both employers, but he would receive only one paycheck, from the company that he did the most work for that week. The week before the accident and week of the accident, Johnson was paid by Bonds Fertilizer.

On the morning of the accident, Johnson was performing work for the Farm, because one of the Farm's employees was out sick. That afternoon, Johnson was supposed to deliver a load of fertilizer that was coming in at 3:00 p.m. for Bonds Fertilizer. In the meantime, around 1:00 p.m., Maxey instructed Johnson to pick up a tractor for the Farm and begin laying irrigation pipe. Maxey instructed Johnson to ride with Frances Birmingham, an employee of Bonds Fertilizer. Alyston Luster, an employee of the Farm, also rode with them. The truck they were riding in was owned by Bonds Brothers, and it had a 1,000-gallon water tank hooked to the back. . .

Following the accident, Kenny Bonds reported Johnson's accident to the insurance carrier for Bonds Fertilizer. The insurance carrier approved the claim and paid approximately \$61,000.00 in medical and temporary total disability benefits to or on behalf of Johnson. Johnson accepted these benefits for over nine months, from July 1995 to April 1996. Subsequently, in February 1998,

Johnson made a claim for additional benefits, listing as his employer: "Bonds Fertilizer, Inc, or Bonds Brothers Farms, Inc." That claim was later withdrawn by Johnson, in favor of the civil suit.

It is not disputed that Johnson was performing employment related services at the time of the accident. Johnson contends that he was working for the Farm at the time he was injured. Bonds Fertilizer and Bonds Brothers contend that Johnson was a dual employee of both Bonds' Fertilizer and the Farm and/or a loaned employee from the Farm to Bonds Fertilizer on June 28, 1995; that Johnson elected his remedy when he received workers' compensation benefits from Bonds Fertilizer after the accident; and that Johnson's exclusive remedy is under the Arkansas Workers' Compensation Act.

A. Relationship between Bonds Brothers Trust, Bonds Brothers, Inc., and Bonds Fertilizer

_____ In the deposition of Kenny Bonds, Jr., the relationship between the Bonds entities is explained. Bonds Brothers Trust is the operating partnership that runs the farm and was composed of Kenny Bonds, Kenny Bonds' Farm, Brian Bonds' Trust, and Bonds Brothers, Inc. It was commonly known as "The Farm". Bonds Brothers, Inc. is a corporation which is a partner in the Trust and owns the equipment and buildings leased and used by the Farm. Bonds Fertilizer, Inc. is a wholly owned subsidiary of Bonds Brothers, Inc. and operates a separate fertilizer business. Kenny Bonds, Jr. is the general partner of Bonds Brothers Trust, president of Bonds Brothers, Inc., and president of Bonds Fertilizer, Inc.

B. Payments made by either Bonds Fertilizer or Bonds Brothers Trust to Claimant for Work Performed

The preponderance of the evidence demonstrates that Johnson was paid by both Bonds Fertilizer and the Farm, although he would get a check from only one of them for any particular pay period. Johnson and Bonds both testified that Johnson received a pay check from either Bonds Fertilizer or Bonds Brothers Trust depending on which one he performed the most work for during the week. The evidence clearly demonstrates that at the time of the accident, both Johnson and Birmingham, the driver of the truck, were paid by Bonds Fertilizer.⁴ In addition, Johnson was paid by Bonds Fertilizer for the week before, as well as the week of, the accident.

As the Arkansas Supreme Court has noted, “if either the general employer or the special employer pays the employee and is not reimbursed – the fact of payment is strong evidence that the payor is the employer.” *Sharp County Sheriff’s Office v. Ozark Acres Improvement Dist.*, 349 Ark. 20, 27, 75 S.W.3d 690 (2002) (citation and emphasis omitted). Because Bonds Fertilizer paid Johnson and was not reimbursed, there is strong evidence that Bonds Fertilizer was Johnson’s employer at the time of the accident.

C. Dual Employment

In *Cook v. Recovery Corp.*, 322 Ark. 707, 911 S.W.3d 581 (1955), the Arkansas Supreme Court summarized the concept of joint employment as follows:

A definition of “joint employment” can be found in 1B Larson’s Workmen’s Compensation Law, § 48. 41 at 8-553(1995):

⁴ See Affidavit of Kenny M. Bonds, Jr. , Exhibit E, Stipulated Record; Johnson I.

Joint employment occurs when a single employee, under contract with two employers, and under simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or closely related to, that for the other.

If an employee is engaged in "joint employment," meaning performing for and under the control of two employers at the same time, the liability for workers' compensation benefits is joint. *Dillaha Fruit Co. v. LaTourrette*, 262 Ark. 434, 557 S.W.2d 397 (1977). See also *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983).

In the instant case, it is undisputed that Johnson was generally employed by both the Farm and Bonds Fertilizer. The credible evidence in this case demonstrates that Johnson was under the control of both employers at the same time when he was directed by his supervisor to ride with Birmingham to help retrieve a tractor on the Farm while waiting for the next load of fertilizer.

The dual employment doctrine was succinctly summarized in *Daniels v. Riley's Health & Fitness Ctrs.*, 310 Ark. 756, 840 S.W.2d 177 (1992), as follows:

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

- (a) The employee has made a contract for hire, express or implied, with the special employer;
 - (b) The work being done is essentially that of the special employer;
- and
- (c) The special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

Id. at 759 (citation and internal quotations omitted). *Accord Cash v. Carter*, 312 Ark. 41, 45-46, 847 S.W.2d 18 (1993) (quoting *Daniels*).

Where dual employment exists, the employee's exclusive remedy against either the general or special employer is a workers' compensation claim. See, e.g., *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 262, 914 S.W.2d 301 (1996) (receipt of workers' compensation benefits from a general employer was the exclusive remedy and barred a negligence action against the special employer); *Daniels*, 310 Ark. at 761 (where the court found dual employment, the only remedy available against either of the employers was workers' compensation.).

In the present case, all three factors for dual employment are plainly satisfied when the undisputed facts are examined:

(a) at the time of the accident, Johnson worked for both Bonds Fertilizer and "the Farm."

(b) the work being done on the day of the accident was essentially that of the Farm, although by his own testimony Johnson was also working for Bonds Fertilizer.

(c) both Bonds Fertilizer and the Farm had the right to control the details of Johnson's work, depending on what Johnson was doing.

D. Loaned Employee

Respondents contend that the same analysis applies, and the same result is reached, even if Johnson was an employee of the Farm at the time of his accident, because he was a "loaned employee" by Bonds Fertilizer to the Farm.

It is undisputed that on the day of the accident, Johnson was taking the place of a sick employee of the Farm. It is likewise undisputed that before the accident, Johnson had returned from lunch and was waiting to haul a load of fertilizer for Bonds

Fertilizer, when he was told by his supervisor that the load had been cancelled.

Johnson was told that he would not have any fertilizer to haul until 3 p.m., and directed to go pick up a tractor with poly-pipe on it to put out at the Farm. Under these undisputed facts, Johnson was a “loaned” or “temporary” employee of the Farm at the time of the accident, and the same analysis applies as under the “dual employment” doctrine. See *Cash v. Carter*, 312 Ark. 41, 45-46, 847 S.W.2d 18 (1993). The court in *Cash* noted that even though Cash (the employee) “was adamant that a material fact issue exists as to which business employed him when he was injured” (just as Johnson here), and that Cash may have made a fact question below as to which business controlled him at the time of his accident, “[t]he same doubts do not afflict us, though, as to whether Cash was a loaned employee to Carter Construction, and thus a temporary employee of that firm, at the time he was injured.” *Id.* At 44-45.

The *Cash* court then analyzed the issue of “loaned employee” under the dual employment doctrine as stated in *Daniels v. Riley’s Health & Fitness Ctrs.*, 310 Ark. 756, 840 S.W.2d 177 (1992). *Cash*, 312 Ark. at 45. Cash (just as Johnson here) had “presented nothing of substance to support a finding that he was not a loaned employee of Carter Construction or that he had not acquiesced in temporary employment with that firm at the time of the accident.” *Id.* At 47. As such, it was clear Cash’s exclusive remedy was a workers’ compensation claim against Carter Construction. *Id.* And as *Daniels* clearly holds, a workers’ compensation claim is “the only remedy available against either of the employers.” *Daniels*, 310 Ark. 761. In sum, even assuming Johnson was performing work for the Farm at the time of his accident,

there was no question but that he was loaned by Bonds Fertilizer to the Farm at that time.

To the contrary, claimant contends that the instant case is distinguishable from the *Cash* case in that he, unlike the claimant in *Cash*, was not performing employment duties for Bonds Fertilizer, Inc. at the time he was injured. Johnson further contends that the *Daniels* case is consistent with his contention that he worked solely for the Farm at the time of the accident, citing to the Supreme Court's statement that when a separate identification can be made with respect to activities to be performed on behalf of each employer, the particular employer whose work was being done at the time of the injury will be held exclusively liable for workmen's compensation. 840 S.W.2d at 178. Claimant concludes that Bonds Fertilizer is not liable for workers' compensation since Johnson was working for the Farm at the time he was injured and was not performing employment services for Bonds Fertilizer at the time of the collision. However, I find that claimant's reliance on the dicta in the *Daniels* case is misplaced. It is clear from the evidence that Johnson worked for both the fertilizer business and the farm on a regular basis and shifted from one to the other on an as-needed basis. This is not a case where Johnson worked for one employer during a particular period of the day and worked a second job for a different employer at a different period of time in the same day. The instant case is clearly distinguishable from the cases in which the court has found that the claimant was an employee of two employers, but the work was separable. See, *Hart's Exxon Service Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980); *Curtis v. Ermert Funeral Home*, 4 Ark. App. 274, 630 A.W.2d

57(1982). *But see, contra, Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985) (claimant's wages combined where employed under separate contract with same employer for two different jobs).

E. Simultaneous Employment

In *Dillaha Fruit Co.v. Latourrette*, 262 Ark. 434, 557 S.W.2d 397 (1977), the Arkansas Supreme Court affirmed the Commission's finding of joint liability against simultaneous employers of the same employee. The Court observed:

The relation of employer and employee may be simultaneously sustained between several employers and the same employee. Where this situation exists, the employers have, in several cases, been held jointly liable for compensation to an employee injured while on the property of, or doing work for, one of them, at least where there was a joint hiring or a joint employment, or where the employee was injured while performing a duty for the common benefit of all the employers, as where he was traveling from one employer's place of business to that of the other, as he was required to do in order to perform properly his duties for both, or where he was on his way to demonstrate or sell products of both employers, first the products of one at one city, then the products of the other at another city, or where he was returning from points where he had been instructed to go by both employers, citing 99 C.J.S., *Workmen's Compensation* 46 (1958).

The Court found further support for finding joint liability against simultaneous employers in 1A Larson's *Workmen's Compensation Law*, 48.40 at p. 8-254 (1973):

. . . Courts are showing an increasing tendency, however, to dispose of close cases, not by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee, but by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both.

In the instant case, I find that Johnson was performing a duty for the common benefit of both the Farm and Bonds Fertilizer. He was traveling from one place of business to that of the other, as he was required to do in order to perform properly his assigned

duties for the day – which included both fertilizer and farm work. Therefore, based on the credible evidence, I find that Johnson was the joint employee of both the Farm and Bonds Fertilizer and was performing employment services for the benefit of both employers at the time of the accident.

IV. WAIVER AND ELECTION OF REMEDIES

Respondents contend that claimant has elected his remedies and waived any direct claim against Bonds Fertilizer due to the fact he received \$61,000.00 in workers' compensation benefits from July of 1995 until April of 1996 and filed a claim for additional benefits listing "Bonds Fertilizer, Inc. or Bonds Brothers Farms, Inc." as his employer, citing *Coats v. Gardner*, 333 Ark. 581, 970 S.W.2d 802(1998). Claimant contends that the workers' compensation claim was filed by Bonds Fertilizer and/or its insurance carrier while the claimant was still in the hospital and that Johnson did not make the deliberate choice or election to file for compensation benefits, citing *Lee v. Doe*, 274 Ark. 467, 626 S.W.2d 353 (1981). In light of the fact that based on the credible evidence, I have found Bonds Fertilizer and the Farm to be simultaneous employers of the claimant and therefore jointly liable under Arkansas Workers' Compensation laws for the compensable injuries suffered by claimant, I find that it is not necessary for me to address the arguments of waiver and election of remedies.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The preponderance of the evidence demonstrates that claimant was simultaneously employed by Bonds Brothers Trust a/k/a The Farm and Bonds Fertilizer, Inc. on June 28, 1995.
3. The preponderance of the evidence demonstrates that claimant was performing employment related services for both employers at the time of the accident on June 28, 1995.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge