

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509936

ROGER D. JACKSON,
EMPLOYEE

CLAIMANT

BILL HARRIS D/B/A
BILLY HARRIS CONSTRUCTION,
UNINSURED EMPLOYER

RESPONDENT NO. 1

HOT SPRINGS BUILDING &
GRADING LLC, EMPLOYER

RESPONDENT NO. 2

FIRSTCOMP INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT NO. 3

OPINION FILED MAY 16, 2007

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

Claimant represented by the HONORABLE C. BURT NEWELL,
Attorney at Law, Hot Springs, Arkansas.

Respondent No. 1 not represented by counsel.

Respondents No. 2 and 3 represented by the HONORABLE WILLIAM
C. FRYE, Attorney at law, Little Rock, Arkansas.

Decision of the administrative law judge: Affirmed in part,
and reversed in part.

OPINION AND ORDER

Respondents No. 2 and 3 appeal from an administrative
law judge's opinion filed on August 1, 2006. The
administrative law judge found, in relevant part, "The
preponderance of the evidence shows that the claimant was an

employee of Hot Springs Building, LLC on or about September 9, 2005, when he suffered a compensable hernia arising out of and in the course of his employment. The preponderance of the evidence shows that the claimant received reasonably necessary medical care for his injury which is the responsibility of Respondents No. 2 and 3.”

After reviewing the entire record *de novo*, the Full Commission affirms in part, and reverses in part the opinion of the administrative law judge. We find that the preponderance of the evidence shows that the claimant was an employee of Mr. Billy Harris, Respondent No. 1, on or about September 9, 2005, when he suffered a compensable hernia arising out of and in the course of his employment. However, we find that the preponderance of the evidence shows that the claimant received reasonably necessary medical care for his injury which is the responsibility of Respondent No. 1.

I. History

On September 5, 2005, the claimant began working as a framing carpenter for the Blue Heron project. The claimant maintains that he sustained a hernia on September 9, 2005, around 8:30 a.m. or 8:45 a.m., while lifting some lumber, as

he felt a "pop" in his right side, in the groin area. According to the claimant, shortly thereafter, he reported the incident to George Burks, but he managed to complete the remainder of his shift, which ended around noon.

The claimant first sought treatment for right groin pain on September 10, 2005, at the emergency room of St. Joseph's Mercy Health Center, in Hot Springs, under the care of Dr. Joel Shane Hardin. His chief complaint was right groin pain. Dr. Hardin reported:

HISTORY OF PRESENT ILLNESS: This patient is a 51-year old gentleman who said that yesterday he was at work and he lifted several 2 by 4s at one time. The patient said he was lifting a load which was typical for the loads that he would normally lift. The patient said as soon as he lifted it he felt like he had this tearing pain in his right groin. The patient has had pain ever since then. The patient states he has never had any pain like this before and has never had a hernia in the past. The patient said he also felt a lump in his right groin.

DIAGNOSIS: Reducible right inguinal hernia.

DISPOSITION: The patient will be discharged to home. The patient's hernia is easily reduced at this time. The patient has no sign of obstruction. I spoke with Dr. Campbell, the surgeon on-call, Dr. Campbell said he would see the patient on Monday. I told the patient this. He will be discharged home with a prescription for Norco as well as Colace.

The claimant next received treatment for his injury on September 12, 2005, under the care of Dr. James Campbell, a surgeon. He reported the claimant had developed at work a symptomatic reducible right inguinal hernia, which was moderately large and certainly needed repair. However, since the claimant had a history of coronary artery disease with prior heart attacks, Dr. Campbell noted that prior to an elective right inguinal herniorrhaphy, he would need cardiac clearance. His assessment was, "initial reducible right inguinal hernia, Workman's [sic] comp related, needs repair; heartburn; heat intolerance; coronary artery disease with previous MI's; and tobacco addiction with continued heavy smoking."

On September 16, 2005, at the request of Dr. Campbell, the claimant underwent cardiac consultation evaluation with Dr. Michael Frais. He recommended that prior to hernia surgery, the claimant undergo further cardiac evaluation with a 2D echocardiogram to assess cardiac structure and function, and he also recommended an Adenosine Cardiolute stress test.

On January 17, 2006, Dr. Campbell noted the claimant had developed a hernia as a result of heavy lifting at work.

Therefore, until his hernia was successfully repaired, he restricted the claimant from returning to heavy lifting and physical activity, which might require straining thereby worsening his condition. Dr. Campbell also noted that since the claimant's last visit, he had been unable to have his hernia repaired because he had not had the funds or the ability to obtain preoperative cardiac clearance by a cardiologist or other physician.

A hearing was held in this matter on May 4, 2006. During the hearing, James Stovall gave testimony. He testified that he is self-employed, as he owns an excavating, grading and building business. According to Mr. Stovall, he has been self-employed off and on for approximately 12 years, as he is sole owner of Hot Springs Building and Grading, LLC. He maintains that the LLC has been in existence since July of 2005. Mr. Stovall testified the LLC was formed by his attorney and accountant in the early part of July (2005). Prior to this, he testified he did business under his own name, as James Stovall Excavating. According to Mr. Stovall, he was prompted to form the corporation because he wanted to have a more professional sounding company and due to tax purposes.

Mr. Stovall testified that at the time when he formed the Hot Springs Building and Grading, LLC, he was involved on a job, for Belvedere Country Club, and doing some work for Blue Heron Incorporated, both of which were in two different locations in Garland County. He agreed that Blue Heron is the name of the project he was involved with when the claimant claims to have been injured.

Mr. Stovall testified he probably had some equipment that he owned at the Belvedere job site in July of 2005. However, he testified that he definitely had equipment that he owned at the Blue Heron job site in July of 2005. At the time when he formed Hot Springs Building and Grading, LLC, Mr. Stovall testified his employees were, namely, Brandon and Justin Stovall (his sons), Michael Gaines, possibly Troy Ellis, Tony Edwards, and Drew Sexton. He agreed they were all working on the Blue Heron project when he set up the corporation, as they did grading for the roads and building sites. Mr. Stovall testified he started the project in April of 2005, but he did not have the LLC, as he was simply doing business as James Stovall. He testified he accounted for his employee's workers' compensation insurance (carrier was FirstComp Insurance) through payroll deductions, but not

from them. Mr. Stovall testified he actually started working on the Blue Heron project in April of 2005.

According to Mr. Stovall, he recalled seeing the claimant one day on the job, at which point, he walked up and introduced himself to him. He testified, "I told Billy Harris that if I was going to make his payroll for him, that I at least needed Social Security numbers." Mr. Stovall further testified that Mr. Harris brought him some tax forms for these people to fill out. He admitted to having these people sign a form giving their Social Security numbers. However, he denied having gotten a form from the claimant. According to Stovall, these people became part of his payroll records. Mr. Stovall maintains that he began paying these people to help Billy Harris out until he got his first draw. According to Mr. Stovall, he turned all of the names in to his accountant so that he could give these employees a 1099. He also maintains that he told Mr. Harris to advise them that he would be withholding taxes from their checks, but he came back to him and stated they all had refused to have taxes taken out. Mr. Stovall essentially testified that he told Mr. Harris he would help him out until he got his first draw, but after that, he could not do business in

this manner. However, he admitted that he went well past the first draw and paid them for four different pay periods, because Mr. Harris never got a draw, as the owner asked him to buy out Mr. Harris's contract because he was not doing a good job. According to Mr. Stovall, he took over the contract on September 25, 2005, and kept on three of Mr. Harris's people (including the claimant) for one week, and then he subcontracted out to a legitimate contractor who had worked for him before. He admitted when he began making payroll for Mr. Harris's people, he was aware that they did not have coverage for them and that they had signed waivers.

Mr. Stovall stated that George Burks was the foreman and would report what was going on to Mr. Harris, but he denied that Mr. Harris would report things to him, although he was making payroll for him. According to Mr. Stovall, every Friday morning Mr. Harris would come to him and give him the names of the people who needed to be paid. He testified:

Q. All right. If you knew that he didn't - that he wasn't providing coverage for these men and you felt like that they should have - you should be withholding taxes, why did you not do it? Why did you not withhold taxes? Why did you not tell him, "I can't do that"?

A. I'd already told him I would, when everything turned around.

Q. What do you mean?

A. I was already into it. I'd already promised him I'd help him.

Q. Right.

A. I was already into it before he told me that him or none of his employees were going for that.

Q. Okay.

A. And that's when we started negotiations of me buying him out and me getting this straightened up.

According to Mr. Stovall, he was made aware of the claimant having reported a hernia at the job site, and he personally contacted him two or three weeks later. He testified that he talked to George Burks about the claimant's injury after the claimant called him. Mr. Stovall testified that he did not know whether or not the claimant was ever paid for his work on the project, but he denied having ever personally paid the claimant cash.

On cross-examination, Mr. Stovall testified he has known Mr. Harris for approximately 10 years, and he has had prior problems as far as draws and using the money properly. According to Mr. Harris, his business was excavating and Mr. Harris's job was to do the framing work. However, he denied

being a framing company. He testified Mr. Harris (who was totally broke) came to him and asked if he could make his payroll and expenses on the job until he got a substantial draw, at which time he would return his money paid the eight employees, plus eight percent interest. Mr. Stovall denied that Mr. Harris was his subcontractor on this job. However, he admitted to going out and getting a subcontractor (Haycon Contractors) after taking over the job because he was not a framing contractor. He agreed that the document being shown to him was a copy of their contract, which was dated September 23, 2005 (a copy of this proposal was accepted into evidence, which is a proposal from Halcyon Contractors to Hot Springs Building and Grading). He was also shown a copy of a proposal and acceptance, which he submitted to Blue Heron, as it was signed on September 22, 2005 (a copy of this proposal was also admitted into evidence). Although Mr. Stovall denied having signed a contract for excavating work, he admitted to having contracted for this work, but it was pursuant to an unsigned agreement.

Mr. Stovall admitted to having read Mr. Harris's deposition wherein he stated Mr. Stovall had torn up a check, but he denied this had happened. He testified:

Q. Okay. Did you make any statements that you were tearing up any checks or doing anything just so there was no record of Mr. Jackson having been out there?

A. No, sir. I knew nothing of what was going on.

He denied that any of the individuals or George Burks worked for him on September 9, 2005. He again admitted that after the proposal was accepted by Blue Heron, he kept the individuals on for one more week and then terminated everybody, except for Mr. Burks. Mr. Stovall testified he kept Mr. Burks on because he was his "eyes and ears," his gofer on the job, as he took care of everything between him and his subcontractor and made sure they were doing good work and took care of any problems. He testified that Mr. Burks was one of the employees from Mr. Harris's crew. According to Mr. Stovall, he hired Mr. Burks as a subcontractor, and although he did not take taxes out on him, he did pay workers' compensation coverage on him and the other gentlemen. He testified the final buyout for Mr. Harris occurred on September 21, 2005, which was done at the request of Tim Hughes.

On re-cross examination, Mr. Stovall denied that Mr. Harris went to work for him as a superintendent on this job. He testified that although Mr. Harris denied having a

contract with Blue Heron, he in fact had a contract with them and he had to buy him out of it.

Upon being questioned by the Commission, Mr. Stovall essentially denied having a written contract with Blue Heron for all the clearing, the grading of lots, and excavating of the streets, but admitted he was responsible for all of this work. Mr. Stovall testified that on September 9, 2005, he did not have responsibility over how framing or concrete work was done, such as telling the claimant "to do the work this way" or "do it that way." According to Mr. Stovall, on September 9, 2005, he did not provide any of the tools for the claimant, as this was Mr. Harris's responsibility.

The claimant also gave testimony during the hearing. He testified that in September of 2005, he was working on the Blue Heron project doing framing work. According to the claimant, he began working on the project on Monday, September 5, 2005 (Labor Day). He testified he learned about the job through Phillip Dixon. According to the claimant, prior to going to work on the Blue Heron project, he did not know either Mr. Harris or Mr. Stovall. The claimant testified that he did not meet Mr. Harris until the second day. The claimant essentially testified that when he

showed up for work that day George (Burks) told him how much he would be getting an hour, and he went to work. He admitted to being part of the crew that was named off when the questioning was done of Mr. Stovall about checks that he had written. The claimant testified that he met Mr. Stovall on Tuesday, as he and Mr. Harris walked through the building. According to the claimant, he completed a W-2 or W-4 form, where he listed his Social Security number and returned it to George Burks. The claimant testified that Mr. Stovall was present at the job site on the week of his injury out on heavy equipment. However, he essentially admitted Mr. Stovall was not present at the building site, other than just walking up and kind of looking around. The claimant testified he took his instructions from George Burks. However, he admitted he did not have any discussions with Mr. Burks about his working relationship with either Mr. Harris or Mr. Stovall.

As to his injury, the claimant testified that around 8:30 or quarter of nine, he picked up some lumber and felt something "pop" on his right side, in the groin area. The claimant testified he kept working for about 30 or 45 minutes and then he went and told George. The claimant

testified that although he went back to work, he had trouble lifting some of the "stuff" because he could feel the pulling every time he would pick up something. The claimant denied having ever had a hernia before this incident. The claimant specifically testified, "I went from carrying seven, eight, nine 2 by 4, 8 foot, down to carrying four or five, because I couldn't pick them all up at once like I was."

According to the claimant, around noon, Mr. Burks handed out checks to everyone except for him. The claimant testified he was told that they forgot to write his check, so he was paid \$450 in cash, at which point he was fired. According to the claimant, Mr. Burks claimed he was laying off four people, himself and three more people, but he was the only one that got fired that day.

The claimant testified he sought treatment for his injury the next morning at St. Joseph's Emergency Room. At which point, he was advised he had a hernia, and Dr. Campbell was called in. The claimant agreed that he never received any treatment for his hernia because Dr. Campbell refused to do surgery until he got clearance from a heart specialist due to his age. The claimant denied having

worked since the date of injury, which was September 9, 2005. According to the claimant, he contacted Mr. Stovall by cell phone on Wednesday of the following week to advise of his injury. The claimant testified that Mr. Stovall stated he had no record of him having ever worked for him and hung up on him.

On cross-examination, the claimant admitted that he thought he was going to work for Mr. Harris, but he maintains that within three or four hours after he got there, he found out he was not working for Billy (Harris), instead he was working for Mr. Stovall. The claimant testified that Mr. Burks was his supervisor and Mr. Harris was George's supervisor. The claimant admitted that he saw Mr. Stovall out primarily on his excavating equipment doing this type of work along with a couple of other people.

On March 31, 2006, Billy Harris's deposition was taken. According to Mr. Harris, he is self-employed, as the majority of his work entails the framing of homes. As to the Blue Heron project, Mr. Harris testified:

Q. What was your involvement?

A. It started out I got it all together. The man who was over it that come to me, who was Tim Hughes, I assumed he was a contractor. I spent nine months getting this together for him. I

actually got the concrete poured on two buildings. When it come time for the actual building, I found out he did not have a licence. And they come in and they hired James Stovall of Hot Springs Building & Grading. At that time I went to work for James as a superintendent.

According to Mr. Harris, he started working on the project in late August, pouring the concrete. He testified he subbed out the concrete work to Rodney Hurst. **Mr. Harris essentially testified that around September 5, 2005, he called Tony or Philip Dixon and stated he needed a framing crew and asked him to get people together.** However, Mr. Harris maintains that at this point in time, he did not have an arrangement with Tim (Hughes), because he was working for James Stovall. He testified that Mr. Stovall took over the framing contract roughly two or three weeks before the framing started because he did not have a license for commercial work. Mr. Harris maintains he worked for James Stovall as the superintendent. He testified that a couple of weeks before September 5, 2005, Mr. Stovall became the framing contractor. Mr. Harris testified he knew Mr. Stovall had the contract to frame the Blue Heron project because they all sat down and talked about it. According to Mr. Harris, his expectations for getting paid and having the framing crew get paid was for James (Stovall) to write the

checks. He further testified that Mr. Stovall paid them (the crew) by the hour, as they filled out their paperwork and everything for him the first day on the jobsite. He further testified he gave the paperwork to George Burks, who was supposed to be the foreman on the job. In addition to Philip and George, Mr. Harris testified that there were five other framers. Although he did not recall who these men were, Mr. Harris testified that the claimant was there and one of the people he observed to be on the beginning crew. He testified he got an hourly rate of \$20 and a percentage at the end of the job. Mr. Harris denied having any employees working for him or as independent contractors on the job. He essentially testified George took over the project after about two weeks because he was willing to do the job cheaper. According to Mr. Harris, he got paid for the first two weeks' worth of work and a percentage check for \$4,300, which was roughly 40% of the profit that had been made in that period of time.

He testified, "And James just kind of - he said, "We're going to lose the contract if we don't do something." And I said, "I'll leave. I don't care. I bowed out." He testified that prior to getting his license, Mr. Stovall did

nothing but excavating work. Mr. Harris testified that after the Blue Heron job started, and people had worked a week, at payday, either George (Burks) or James (Stovall) delivered the checks. He admitted taxes were not taken out of his pay. Mr. Harris testified he learned of the claimant's injury when he called the next day asking for Mr. Stovall's phone number.

Mr. Harris testified that all of his framing pay came from James Stovall; he never received one penny for the framing work from Blue Heron. However, he admitted he was paid for the concrete work by Blue Heron. Mr. Harris denied having received any draws for framing work from Blue Heron. He testified the framing crew brought in by Philip stayed roughly one week after he left. According to Mr. Harris, Philip decided he was not going to stay after he left, and a couple of the others left when the hurricane hit to go to work in Louisiana for more money.

On cross-examination, Mr. Harris testified he did not see any of the checks handed out to the men. Mr. Harris testified that the week after the claimant left, his name was mentioned because he told George he had called him.

On redirect examination, Mr. Harris testified that none of the framers to his knowledge filled out waivers.

Documents entered into evidence show that Mr. Stovall issued the following checks to Mr. Harris; on September 9, 2005, he issued a check in the amount of \$1,500; on September 16, he paid him \$760; and on September 21, he was paid \$4,285.08. In addition, a proposal and acceptance was submitted on July 13, 2005 by Billy Harris to Tim Hughes to do framing work on the Blue Heron project (However, this document is not signed by either party). On September 22, 2005, Hot Springs Building and Grading, LLC submitted a proposal to Blue Heron to complete the framing work. This proposal appears to have been accepted by Tim Hughes on September 22, 2005. Next, on September 23, 2005, a proposal was submitted by Halcyon Contractors to Hot Springs Building & Grading LLC for it to do framing work on the Blue Heron project.

Prior to the hearing a prehearing conference was held, and as a result, a Prehearing Order was entered in this matter on March 29, 2006, but no stipulations were agreed upon at that point.

By agreement of the parties the issues to be litigated at the hearing were limited to the following.

1. Whether the employment relationship existed.
2. The compensability of the claimant's alleged hernia.
3. Reasonable medical treatment and related expenses.
4. An attorney's fee for controversion.

All other issues were reserved at the hearing.

The claimant contended that during employment with respondent No. 1 or No. 2, he suffered compensable injuries for which he should recover from Respondents No. 2 and 3, either because of his employment by Respondent No. 2 or because of his employment with Respondent No. 1, an uninsured subcontractor of Respondent No. 2. The claimant has requested benefits, including reasonably necessary medical and related expenses, as well as an attorney's fee for controversion. The claimant is ordered to plead with specificity the benefits requested.

Respondent No. 1, who was unavailable by telephone at the time of the prehearing conference, has previously asserted that the claimant was not his employee.

Respondents No. 2 and 3 contended that the claimant was not an employee of Respondent No. 1 or Respondent No. 2 and cannot recover as an employee of an uninsured subcontractor. They further contended that the claimant suffered a hernia which is not compensable under the provisions of Ark. Code Ann. §11-9-523.

After a hearing before the Commission, the administrative law judge found, "The preponderance of the evidence shows that the claimant was an employee of Hot Springs Building, LLC on or about September 9, 2005, when he suffered a compensable hernia arising out of and in the course of his employment. The preponderance of the evidence shows that the claimant received reasonably necessary medical care for his injury which is the responsibility of Respondents No. 2 and 3."

Respondent No. 2 and Respondent No. 3 appeal to the Full Commission.

II. Adjudication

The administrative law judge found, "The preponderance of the evidence shows that the claimant was an employee of Hot Springs Building, LLC on or about September 9, 2005, when he suffered a compensable hernia arising out of and in

the course of his employment.” The Full Commission affirms the administrative law judge’s finding that the claimant suffered a compensable hernia. However, we reverse his finding that the claimant was an employee of Hot Springs Building, LLC (Respondent No. 2 and Respondent No. 3) when his alleged incident occurred. Instead, the Full Commission finds that the claimant was employed by Billy Harris when his incident occurred on September 9, 2005. Here, we find that the evidence shows that at the time of the claimant’s injury, Mr. Harris was the employer for the claimant and others who had been hired by Tony or Philip Dixon to be part of the framing crew. Mr. Harris admitted he called and gave instructions for this person to put a framing crew together for the Blue Heron project. The evidence also shows that at the time of the claimant’s injury, Mr. Harris was directing the work activities for all of the framing work. While we recognize that Mr. Stovall paid the claimant and others for the framing work, we find that this transaction simply amounted to a loan arrangement of some type between Mr. Harris and Mr. Stovall. Specifically, we find that Mr. Stovall credibly testified that Mr. Harris told him he was having financial difficulties and asked him to start making

payroll for him until he could get a draw on his contract. The Full Commission further finds that Mr. Stovall's testimony is corroborated by the fact that he paid Mr. Harris for a percentage of the work that had been completed up to the time he was released from the contract. Although, Mr. Harris essentially maintains that at the time of the claimant's injury, he worked as a superintendent for Mr. Stovall; Mr. Stovall credibly denied this and the preponderance of the evidence supports his position. We find that the evidence clearly shows that Mr. Stovall, doing business as Hot Springs Building and Grading, LLC, did not contract for the framing work until on or about September 22, 2005. As a result, we find that Mr. Stovall did not assume the status as an employer for the framing work until, September 22, 2005, approximately two weeks after the alleged injury.

In the present matter, the administrative law judge also found that the claimant suffered a compensable hernia on or about September 9, 2005. The Full Commission affirms this finding.

Pursuant to Ark. Code Ann. § 11-9-523(a), a hernia is compensable when the following factors are shown to the Commission's satisfaction:

- (1) that the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
- (2) that there was severe pain in the hernial region;
- (3) that the pain caused the employee to cease work immediately;
- (4) that notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and,
- (5) that the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

We find that the claimant incurred a compensable hernia as a result of having lifted several two-by-fours on the morning of September 9, 2005, at around 8:30 or 8:45. The claimant credibly testified that he felt a "pop" and experienced an onset of severe pain in the "right groin area," which after approximately 30 or 45 minutes caused him to advise Mr. Burks of his pain and the possibility that he might need to see a doctor. Although the claimant managed to complete his shift, which ended around noon, the next day (September 10, 2005), the claimant sought emergency

treatment due to complaints of "right groin pain" from St. Joseph's Mercy Health Center. At that time, the claimant was diagnosed as having a "reducible right inguinal hernia," for which he was referred to a surgeon, Dr. Campbell. In sum, the Full Commission finds that the preponderance of the evidence supports the administrative law judge's finding that the claimant suffered a compensable hernia in the course and scope of his employment. As a result, we hereby affirm the administrative law judge's finding of a compensable hernia.

The administrative law judge found, "The medical services provided to the claimant for his compensable hernia was reasonably necessary medical services for his injury which is the responsibility of Respondent Nos. 2 and No. 3." The Full Commission affirms in part this finding. We find that the medical treatment rendered to the claimant to be reasonably necessary for the claimant's compensable hernia injury, as no evidence has been presented to support a finding to the contrary, and all the treatment rendered to the claimant was administered in an attempt to treat and diagnose the claimant's work-related hernia. However, we find that the medical care for his injury should be the

responsibility of Respondent No. 1, since the claimant was an employee of Mr. Harris. In reaching this finding we note that Ark. Code Ann. § 11-9-402(a) is not applicable as Respondent No. 2 is not and was not an intermediate subcontractor between Respondent No. 1 and the prime contractor on this project at any time during the claimant's employment by Respondent No. 1. Therefore, we hereby reverse the administrative law judge's finding concerning this issue.

Accordingly, for those reasons set forth herein, the decision of the Administrative Law Judge is hereby affirmed in part, and reversed in part.

The claimant's attorney is entitled to maximum fees for legal services as provided by Ark. Code § 11-9-715 (Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500.00), pursuant to Ark. Code Ann. § 11-9-715 (Rep. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

Concurring and Dissenting Opinion

The Majority found that the claimant sustained a compensable hernia injury and that his employer, at the time of the injury, was the uninsured Respondent No. 1. While I concur in the conclusion that the claimant sustained a compensable injury, I respectfully dissent from their finding that the claimant was an employee of the uninsured Respondent No. 1 and not the insured Respondent No. 2.

The employment relationship between the claimant and both respondents is confused, to say the least. The claimant sustained his compensable injury while working on a condominium development referred to as the Blue Herron project. Respondent No. 1, Billy Harris d/b/a Billy Harris Construction (Harris) testified that he was a framing contractor, but that on this particular project, he was working as a superintendent and, while the claimant may have been hired at his direction, he was not employed by him.

James Stovall, who was the owner of Respondent No. 2, Hot Springs Building and Grading LLC (Stovall),

testified that he was contracted to perform the "dirt work" on the Blue Herron project and did not ordinarily do framing work. While he admitted that he eventually undertook responsibility to complete the framing portion of the Blue Herron project, he did so because Harris was unable to fulfill the contract.

The confusion in this case arises because Stovall began paying the salary of the framers which it contends were the employees of Harris. This arrangement came about because Mr. Stovall testified that Mr. Harris was having financial difficulties and was not able to meet his payroll until he received a draw from the developer. Mr. Stovall characterized the payments by his company as a loan. Mr. Harris, on the other hand, testified that while he had originally become involved in the Blue Herron project as a potential subcontractor, by the time the framing had started, his role was as a superintendent or "consultant" and he was working under Mr. Stovall, who was the actual subcontractor. According to Mr. Harris, this is the reason Stovall was paying the salaries of the framers. He also testified that he was paid by Stovall and his wages were in the

form of a salary plus a percentage of the payments due under the subcontract between Mr. Stovall's company and the developer.

The claimant testified that he learned of a job at the Blue Herron site from Philip Dixon, who was already working there. At the time he began working, the claimant testified that he did not know either Mr. Harris or Mr. Stovall. He later met them when they were inspecting the job site. The claimant also testified that his direct supervisor on the job was George Burke, who was apparently the foreman of the framing crew. According to the claimant, he had advised Mr. Burke, the framing foreman, of his injury prior to payday. When the rest of the crew received checks from Stovall, the claimant was given an envelope with cash. He was told the reason for that arrangement was because an error had been made and no check had been prepared for him. Shortly thereafter, the claimant was terminated.

Few of the contractual arrangements testified to by the witnesses were documented by written agreements. While Mr. Stovall concedes that his company, at some point, became the framing contractor,

he insists it was not until after the claimant's injury. Stovall's position is that prior to his assumption of the framer's obligation, Harris was the contractor and the claimant was his employee.

In finding that the claimant was a Harris employee, the Majority has accepted the testimony of Mr. Stovall as credible. In my opinion, this reliance is misplaced. Payroll records from Stovall indicate that, at the time the claimant was injured, Stovall was paying the salary of the framing crew.

According to Mr. Stovall's testimony, the claimant was simply never employed by him and the paychecks his company paid to the framing crew were in the nature of a loan. In my opinion, this version of events simply does not make sense. I cannot fathom why Stovall would have begun paying the salary of Harris' employees without any reciprocal benefit whatsoever. There does not appear to be any reason as to why Stovall would have done this. A much more logical explanation would be Stovall had already assumed responsibility for the framing contracting and was paying the framing crew as part of that obligation. Mr. Stovall agrees that his

company soon took over the obligations of the framing contractor. The only real dispute is at what point he would have assumed that responsibility. The Majority has found that Stovall did not become the framing contractor until after the claimant's injury. However, since Stovall was paying the salary of the entire framing crew, including the claimant, I do not see how it can be said that the claimant was not Stovall's employee at the time of his injury.

For the reasons set out above, I respectfully dissent from the Majority's findings that the claimant was an employee of Harris' and not Stovall's at the time of his injury.

PHILIP A. HOOD, Commissioner