

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H303124

DAVID OTWELL, EMPLOYEE

CLAIMANT

JERRY LYNN ROBERSON

RESPONDENT

**EMPLOYERS REFERRED INSURANCE CO.,
CARRIER/TPA**

RESPONDENT

OPINION ON REMAND FILED JULY 29, 2025

The original Hearing before Administrative Law Judge, James D. Kennedy, was held on the 18TH day of September, 2024, in Mountain Home, Arkansas, and an opinion was issued on November 1, 2024. After an appeal to the Full Commission, the matter was remanded on May 22, 2025, to the ALJ to enter additional findings of fact and conclusions of law in accordance with Ark. Code Ann. 11-1-204 and to adjudicate and review the Empower Independent Contractors Act and its twenty factors.

Claimant is represented by Rick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents are represented by James A. Arnold, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was originally conducted on the 18th day of September 18, 2024, in Mountain Home, Arkansas, to determine the issue of the existence of an employee/employer carrier relation and if the relationship existed, the compensability for injuries to the claimant's back, both hands and wrists, along with reasonable and necessary medical care. The issues of TTD, an impairment rating, and attorney fees were reserved at the time of the hearing.

A copy of the Pre-hearing Order dated June 4, 2024, as well as the response to the Prehearing Questionnaire by both the Claimant and the Respondent were made part of the record without objection. The Order provided that the Arkansas Workers' Compensation Commission had jurisdiction of the claim, and the matter was controverted in its entirety. The claimant contended at the time of the injuries to his back, both hands, and wrists, that he was in the course and scope of his employment with Jerry Roberson. He further contended that Mr. Roberson directed the work in regard to the house that he wanted completed, provided tools, and paid the Claimant wages for the work completed. As a result of his injury, the Claimant contended that he was entitled to reasonable and necessary medical treatment, past due TTD benefits (dates to be determined) and an impairment rating including PTD benefits. The Respondents contended that the Claimant did not meet the statutory definition of an employee.

From a review of the record as a whole, to include medical reports and other matters properly before the Commission plus having had an opportunity to observe the testimony and demeanor of the witnesses, and in addition review and reach a determination of the findings of fact and conclusions of law in accordance with Ark. Code Ann 11-1-204 and also review the twenty factors of the Empower Independent Contractors Act, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. 11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. That the claimant has failed to satisfy the required burden of proof to show that an employer/employee carrier relationship existed between the claimant and the respondent on June 25th, 2022, the date of the injury.
3. That all other issues are found to be moot.
4. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The claimant was the initial witness to testify. He worked almost 30 years in construction as a journeyman and testified that he was working for Jerry Roberson, the respondent, on June 25th, 2022, on a house he had been told was going to be used as rental property. This was the property where he was working when the injury occurred. This property was going to be the respondent's first rental property per the testimony of the claimant. The respondent operated a cell phone repair facility. The claimant also worked for M&A/CNS Contracting (Construction), Monday through Thursday. On Fridays, Saturdays, and some Sundays, he worked on the house owned by the respondent. (Tr. 8, 9) The claimant stated that he had previously worked on a house owned by the respondent, where the respondent resided, back in 2021 and 2022, while working for M&A /CNS Contracting (Construction), and that they did some odds and ends on the house and redid a bathroom. "After he saw what me and Tom could do, he approached us both and asked us if we could build a house for him was - - or build a rental property for him." He had the property and plans picked out. The respondent bought all the materials, unless there was something that we might have forgotten, and he then reimbursed us for it. In regard to the tools, the respondent furnished generators, air

compressors, miscellaneous hand and power tools, and some scaffolding with the scaffold boards. (Tr. 10, 11) The respondent had the right to hire and fire, he paid us in cash, paying around \$30.00 an hour, and we only worked on the rental property. “If there was something that we needed, he would get it for us.” He went on to state that he had worked on the rental property from roughly January through his fall which occurred in June. (Tr. 12, 13)

In regard to the fall, he testified he was painting the two-story house located down by the river. While on a ladder painting the second story, the ladder somehow slipped and the claimant fell 25 feet, landing on his chest. He knew something was really - wrong and stated he had broken his L1 and shattered his L2. They eventually loaded him in an ambulance and placed him on a med flight. In regard to workers’ compensation insurance, the claimant testified that the second week out there, the respondent told him and the other workers that he had coverage. (Tr. 14, 15)

The claimant was then questioned about a series of text messages between the claimant and the respondent. The claimant went on to state that he could no longer work like he was doing, and at the time of the hearing, he pointed out that he was in a wheelchair, and he had been in it since his fall. He admitted that he could walk some with crutches and that he could move both legs, but he had control of one leg more than the other. He went on to state that he really did not have any real control of one leg. He also testified that he had no bladder sensation, so he was required to wear a catheter and had issues with his bowel movements. He worked for M & A/CNS for over 20 years. (Tr. 16 – 18) He didn’t know if the respondent ever used the term employee with him, but he was

sure that he had asked him to quit M & A/CNS to take on a full-time responsibility for the construction he wanted.

Under cross examination, the following questioning occurred:

Q: Okay. And on page 45 of the deposition, we talked about the insurance and your - - it says my question. "Did Jerry have a conversation with all three of you about getting insurance?" And you said, "The first week we were out there, there was no talk. The second week we were there, Jerry came back and said I've got insurance on you guys, but did not specify the kind of insurance." You just said that he told you that he had workers' comp. He didn't tell you that he had workers' comp, did he?

A: I didn't say that. I didn't say it was workers' comp. I said he had insurance on us.

Q: Do you know what builder's risk is?

A: Kind of. Sort of.

Q: Okay. Do you know that Tom Moore asked him to get builder's risk so you could lock the M & A tools up inside the cabin?

A: We didn't leave M & A tools on the job site.

Q: Because you never got the locks installed, correct?

A: No, we had locks on the doors.

Q: Okay. You've been in construction all your life?

A: Yes, sir.

Q: You have a full-time 40-hour week job with M & A Construction, now CNS, but the same bunch, they just changed on them.

A: Yes.

Q: And you have been doing that for 22 or 24 years?

A: Yes, sir.

Q: Your entire life has been in the construction carpentry business, correct?

A: Yes, sir.

Q. Okay. And that's what you were doing on this property that Jerry Roberson had?

A: Yes, sir.

Q: The same thing you've done all your life?

A: Yes, sir.

Q: Okay. Now, the first time you ever worked for Jerry was on the house that he and Sandy were living in, correct?

A: Correct.

Q: And your testimony here today and in your deposition was that Jerry asked Tom to come do some work on his house and Tom asked Jerry, I need some help. I know a guy at work. Is it okay if we bring him? Is that how that happened, right?

A: That's how that happened on his house, yes.

(Tr. 22, 23)

The claimant went on to state that he had worked probably eight or ten days maybe, on Jerry and Sandy's home. He also stated he was aware that the respondent had a cell phone business, knew he did not have a construction company, and knew he didn't hold himself out as a construction company. He also agreed he was never paid a dime by the cell phone company. (Tr. 24, 25) After about eight or ten days, where he helped remodel Jerry and Sandy's house, he didn't do anything for the respondent for four months or so and during that time-period, he continued working for M & A. He also thought he had other side jobs during that time, where he would be paid cash just like the

respondent did, and he was not aware of any of them having workers' compensation insurance that covered him. Tom and the claimant continued to be crew leaders with M & A during that time-period while performing the side job for the Respondent on Friday and Saturdays. He also admitted to having one other side job during that time-period where he worked for someone else doing carpentry. He admitted he didn't write any of the invoices, but that Tom Moore was the one who filled them out. (Tr. 27 – 29) The claimant also admitted that the invoices that Tom filled out and gave to the respondent and which are before the Commission, had labor for three men, for two days, and that was how the respondent paid him. (Tr. 31) The claimant also agreed that they supplied some of the ladders and the respondent supplied some of them and they also used a ladder off the M & A truck. Some of the tools came off the M & A truck, including a laser. (Tr. 32) The respondent was paying for two M & A Jones trucks to be on site, in case somebody needed to go into town to get something. The claimant admitted that on occasion, they would use some of the M & A Construction tools, but they tended to use their own personal tools stored in the trucks. (Tr. 33)

In regard to the directions given by the respondent, the claimant admitted that the respondent ran a full-time cell company in Batesville and that he was not on site ten hours a day like they were. He also admitted that in regard to the texts, some consisted of asking if the claimant or his partner needed the respondent to pick up something in town. The items the respondent picked up were to assist the claimant and his partners and keep them on the job site. The respondent would sometimes ask if they could do this or that and they would do it and sometimes they would tell him that it did not make any sense. The claimant admitted that the respondent did not instruct them on how to paint, how to

hang trusses, or how to roof, due to the fact they were in the construction business. The claimant also admitted that Tom, Jim, and he were all hired because they were carpenters, and he wasn't. (Tr. 34 – 37) The claimant was allowed to go work for someone else if he was not working for the claimant on those days. (Tr. 38) He also admitted that he was able to walk about 200 feet with forearm crutches and was working as a superintendent for M & A Construction.

On redirect, the claimant stated that the respondent told them where to work and paid them. (Tr. 39)

At this point, the claimant rested, and the respondents called the respondent, Jerry Roberson, who stated that he used to own Cell Phone Central back in 2021 and 2022, and that he had owned the business since 2010, before selling it. The business fixed "cell phones, I-Pads, computers, anything electronic." He sold the business to his manager sometime around January of 2023. The business did not do anything that wasn't related to technological devices. The business did not own any real estate, nor did it have anything to do with construction. Prior to the cell phone business, the respondent stated that he was a landscaper. He was at one time an electrician's helper and worked as an equipment operator in the past. He had no carpentry skills or skills of any kind that translated into the construction of a home or residence. He owned no rental property in 2022.

The respondent admitted meeting Thomas Moore when he was getting his hair cut by Thomas Moore's wife and he mentioned a project where they were attempting to fix a floor in the home he lived in with his wife. Thomas Moore's wife pointed to a picture of her husband and stated that he did work like that. (Tr. 42 - 44) Thomas Moore ultimately

performed the work on the house where they were living, which they sold at the end of 2022. The respondent went on to state that Moore and the claimant performed renovations to the house which included filling gaps in the sheet rock, working in the bathroom, and just general stuff around the house so they could sell it. The respondent stated that he assumed Tom brought the claimant along to have extra help. (Tr. 45, 46)

In regard to the property by the river where the accident occurred, the respondent stated he had owned the property since 2009, and after they sold their other property, the only property left was the river property where the accident occurred and where they were going to live. The respondent testified that he had contacted Thomas in regard to building on the property and was told to bring the plans over, which he did. (Tr. 47, 48) The respondent was questioned about the invoices in regard to the project and he stated that Thomas would provide the invoices on Saturday, and he would then pay them. He would give Thomas the money and he had no idea how much the others were paid or how much he kept for himself. He went on to state that the M & A Construction trucks were brought out every Friday and Saturday and they were full of tools. He also stated he had no workers' compensation insurance but admitted there was in fact a discussion about insurance. He was looking into purchasing builders' risk for the property. The respondent admitted to supplying the air compressor and the generator which were already on site and hooked up to his camper. He went on to explain that the solar panels that were present would not power a coffee pot. He also admitted to providing scaffolding that he had bought at a yard sale, but stated they were never used. (Tr. 49 - 52) In regard to supplies, the respondent stated that Thomas would call and the supplies would be dropped off, and he "would go into town six days a week to check on the phone store so

I had a jeep and trailer and so a lot of times I would be called and told to pick up or texted.” He went on to state that a lot of the texts were in regard to picking up supplies. He was relying on Thomas and his crew to build a serviceable building, but did admit to picking out paint colors, tile, and things of that nature. The respondent denied that Thomas, the claimant, or Jim Halstead, had anything to do with the cell phone business. The respondent denied supervising the claimant’s work on the day of the accident or any other day. (Tr. 53, 54)

Under cross examination, the respondent denied ever filing a 1099 with the IRS. (Tr. 55) He did admit that when he resided at 90 Moore Avenue, he did say that he might build a house on it to rent but “I never said for sure we were going to build anything until the other two houses sold.” He denied there being a possibility of rentals for income purposes at that point. (Tr. 56) The respondent also denied making house calls in the cell phone business and further stated that his employees never went to homes or businesses to assist in installation and getting things to work right. “They come to us.” We are not a “go to you” business. (Tr. 58) The respondent was also asked did you not sometimes direct them to do something other than what they wanted to do, and he responded “No. They didn’t listen to a word I said.” (Tr. 59)

On redirect, the respondent confirmed he was not on the building site when the accident happened but was down on the river a couple of hundred yards away. (Tr. 60)

The claimant was then recalled, and he stated he had been told multiple times that the property was a rental house and had even been told that a purchased vehicle charger would allow an extra \$20.00 rental charge. In regard to the skills of the respondent, the claimant replied, “He said he wasn’t an expert and that’s why he hired us.” (Tr. 63) The

claimant also testified that he was sure the respondent sometimes got things for the project although he couldn't recall 100% but that "He was in charge." The claimant was also asked about workers' compensation insurance and was he ever told that it was in place, and he responded "No, sir. He did not." (Tr. 64)

Claimant submitted a medical exhibit which was admitted without objection. The exhibit provided that the claimant was taken to UAMS by med flight on June 25, 2022, with a closed, unstable burst fracture of the second lumbar vertebra, with multiple fractures of ribs, bilaterally which were confirmed by an MRI, and which also showed compression fractures of the L1 and L4 vertebral bodies, and severe canal compression with increased T2 hypersensitivity. There was no evidence of traumatic injury to the thoracic spine. Surgery was performed on June 26, 2022, and the postoperative diagnoses provided for vertebral fractures of the L1, 2, 3 and 4 with a T12 spinous and laminar fracture. A burst fracture and a three-column injury at L2 resulted in a neurologic deficit. Additionally, two large traumatic dural tears with exposed nerve roots required a neural patch. Left ankle imaging provided for no fracture or dislocation. Imaging of the right wrist provided for a well corticated bone fragment along the dorsum of the wrist, which could have been secondary to a triquetral fracture. (Cl. Ex. 1, P. 1 – 9)

The claimant also submitted 25 pages of text messages without objection. The texts consisted of the respondent requesting guidance on items to pick up, such as how long "a piece of rigid" should he get or asking where an item was going to be obtained, along with questions about doors and windows with the respondent requesting a picture and responding upon receipt of a photo, that it "looks good." One text asked the claimant whether he would suggest an indoor or outdoor tankless water heater and he responded

that an outdoor model would save on venting. A text was sent in regard to breakers and who should purchase them. Another text requested the respondent stop and obtain nails and the respondent requested a picture so he would know which ones to pick up. At one point, the respondent discovered a Dewalt nail gun and asked the claimant if he needed it. The respondent was asked if he had contacted Batesville Glass at one point and he responded they would be out on Friday or Saturday. The respondent was also asked about picking out can-lights and providing a layout for them, along with the speakers and ceiling fan. Additionally, he was asked about a light or vanity light above a sink and about caulking the siding. There were also texts about paying for items and a picture of a cotton mouth or a copper head snake in a hole. (CL. Ex. 2, P. 1 – 25)

The respondents also submitted 21 pages of non-medical exhibits without objection. The items consisted of the Contracting license for Thomas Moore. (Resp. Ex. 1, P. 1) In addition, invoices directed to the respondent Jerry Roberson for the labor of three men, the cost of two trucks, and a variety of materials and other items were introduced. (Resp. Ex. 1, P. 2 -17) A photo of the M & A Jones truck was also introduced as well as a photo of the house under construction. (Resp. Ex. 1, P. 18, 19) A list of the Cellphone Central Employees was also introduced, which did not include the name of the claimant. (Resp. Ex. 1, P. 20, 21)

The respondents also submitted the deposition of the claimant dated July 12, 2023, which was admitted without objection. The claimant testified under direct in the deposition that he had learned in his apprentice program back in the 90's how to basically do anything as far as construction for a commercial job. He stated that as a general contractor, "we could take it from the ground up" and that he had been in the construction

field ever since, after starting in 94. He also stated that he had never been a general contractor. (Resp. Ex. 3, P. 6) He admitted that he was still working for M & A Jones Construction, and that he had been with them for 22 years. (Resp. Ex. 3, P. 9) While working for M & A Jones, the claimant stated that he answered to Kyle Johnson, the senior project manager, and to Arch Jones, the owner of the company until the end of 2021. At that time, C & S Contracting took over the ownership. This company only performed commercial work. (Resp. Ex. 3, P. 12 -13)

The claimant testified that the first house that he worked on for the respondent was a home where he was living, and Thomas Moore was working on the house and needed help and asked the claimant to assist him. He went on to explain that the house where the injury occurred was a rental house. They started building that house with the help of Jim Halstead, who was also an employee of M & A Construction. He affirmed that he had never worked for the respondent's business in Batesville and the project where he fell was a residence and not a commercial building and that M & A was not doing this job. (Resp. Ex. 3, P. 15 – 20)

The claimant went on to state he worked four tens for M & A Construction and then would work Friday and Saturday on the residence. They had agreed to a rate to be paid by the respondent, and were paid in cash, and he and Tom were paid the same, \$30.00 an hour. He thought Jim was also paid the same. He did not see the respondent pay any of the tradesmen, but he was aware that the respondent did hire someone to put on the roof and finish the sheetrock. (Resp. Ex. 3, P. 21, 22) No one from the respondent's company came around and gave instructions, only the respondent. He would come and tell us what he wanted. He did not tell us how to apply the paint or the Sheetrock or how

to put up the trusses. The claimant admitted that he was not told when to start and end work but did state the respondent wanted the house built as fast as possible. The respondent also supplied the materials and air compressors, table saws, generators, scaffolds, and scaffold boards. (Resp. Ex. 3, P. 23, 24) The claimant also thought that they might have used some tools owned by M & A Construction. “For the most part, we used our personal tools or his tools.” “Well, a carpenter always uses his personal tools.” (Resp. Ex. 3, P. 25)

In regard to payment, Thomas would prepare one invoice and give it the respondent. The claimant could not remember if he was ever paid separately by the respondent, but did remember that the respondent would give them money to pay Jim. (Resp. Ex 3, P. 28) The claimant stated it was his understanding that the house where the accident occurred was going to be used for something like an Airbnb or a Vrbo rental. He further stated that the respondent never indicated that he was going to use it. However, it was his understanding he was building it for himself. (Resp. Ex. 3, P. 42, 43)

Under direct examination by the claimant’s attorney, the claimant stated that the respondent approached both of them at the same time to go to work and build the house. The claimant also stated he was part of the process preparing the invoices, although Thomas always gave the invoice to the respondent. The claimant also testified that they would be told by the respondent when he wanted something finished by a certain time. (Resp. Ex. 3, P. 44 – 46)

DISCUSSION AND ADJUDICATION OF ISSUES

In determining whether the claimant has sustained his required burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the

doubt to either party. Ark. Code Ann 11-9-704. Wade v. Mr. Cavanaugh's, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. Dalton v. Allen Engineering Co., 66 Ark. App. 201, 635 S.W. 2d 823 (1982). Preponderance of the evidence means the evidence having greater weight or convincing force. Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark App. 263, 101 S.W.3d 252 (2003). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. Powers v. City of Fayetteville, 97 Ark. App. 251, 248 S.W.3d 516 (2007). Where there are contradictions in the evidence, it is within the Commissions' province to reconcile conflicting evidence and to determine the true facts. Cedar Chem. Co. v. Knight, 99 Ark. App. 162, 258 S.W.3d 394 (2007). However, the Commission may not arbitrarily disregard the testimony of any witness. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004).

In the present matter, all parties agreed the claimant suffered serious injuries when he fell from a ladder while painting on the second floor of a construction project owned by the respondent. The primary question before the Commission is to determine if an employee/employer carrier relationship existed at the time of the injury. The testimony provided that the claimant had worked in the construction carpentry business his entire life and had worked for M & A Construction (now called CNS Contracting due

to a change in ownership) for over 20 years. He would work four ten-hour days, Monday through Thursday for M & A Construction, and then was allowed to find side jobs to work, during his personal time. He was allowed to use the construction trucks of M & A Construction along with the company tools on the truck, plus additional tools of the company such as a laser, on the side jobs. The claimant testified that “a carpenter always uses his personal tools” but additionally used a generator, an air compressor, and a table saw which were stored on the construction site and owned by the respondent.

The claimant became acquainted with the respondent on a previous job repairing a home where the respondent lived with his wife, and at the time of the accident he was working with two other M & A Construction employees on the house which they were constructing on the river for the respondent. The claimant stated he understood that the property was going to be rental property, but the respondent testified that since he had sold all his other property, he intended for the construction to become his residence.

The claimant testified there had been some discussion with all the parties that the respondent was going to obtain insurance but admitted that workers’ compensation insurance was not specifically mentioned. The claimant also testified that he had worked on other side projects where no workers’ compensation insurance covered them. The respondent testified he had mentioned insurance and had looked into a builder’s risk policy.

In regard to the actual construction project, the invoices were always submitted by Thomas Moore, who was also an employee of M & A Construction, and who recruited the claimant to work on the project. The invoices provided for the number of men working (usually two or three), two trucks, and materials purchased. The claimant testified he

assisted in preparing the invoices and thought that the third worker, Jim, was paid the same as Thomas and he were. The invoices were always paid in cash by the respondent on a Saturday. The respondent paid for most of the supplies.

In regard to supervision of the project, a number of text messages were entered into the record with the majority of them involving instructing the respondent to pick up additional supplies in town at the instruction of the claimant and his co-workers. The respondent admitted he was in town every day due to his computer business, that he had a Jeep and trailer, and that he would pick up items for the construction, attempting to keep the claimant and his partners on the job site. A few of the text messages asked about how an item would appear such as windows. One text discussed the discovery of snakes in a hole near the construction. The claimant stated in his deposition in regard to the respondent's skills, "He wasn't an expert and that's why he hired us." The claimant also admitted the respondent never instructed them on how to paint, how to hang trusses, or how to roof, due to the fact they were in the construction business. The respondent admitted to picking out paint colors and tile and things of that nature.

In regard to the respondents' business, Cell Phone Central, the claimant admitted he was never paid by the company and the evidence provided he was not listed as an employee. The company owned no property and made no house calls. The respondent testified his customers for the cell phone business came to the business and that it was not a "go to you business." The business, which was sold in January of 2023, repaired cell phones, I-Pads, computers, and everything electronic. The business owned no real estate nor had anything to do with construction.

The applicable version of Ark. Code. Ann 11-1-204 at the time of the accident in question adopted a 20-factor test, to be weighed in determining whether an individual is an employee or an independent contractor. The case of Franklin v. Arkansas Kraft, Inc. 5 Ark. App. 264, 635 S.W.2d 286 (1982), which was cited in Riddell Flying Serv. V. Callahan, 90 Ark. App. 388, 206 S.W. 3d 284 (2005), applied the previous nine factor common law test applicable at the time of that decision to make the factual determination of whether an individual was an employee or an independent contractor. This is still found to be applicable in regard to the current 20 factor test of Ark. Code Ann 11-1-204. Franklin provided as follows:

“There are numerous factors which may be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage. Obviously, the relative weight to be given the various factors must be determined by the Commission.” Some of the factors which might be considered, depending on the facts of a given case, are [referring to the previous nine factors that are omitted here]. “These are not all the factors which may be considered in a given case, and it may not be necessary in some cases for the Commission to consider all of these factors. Traditionally, the “right to control” test has been sufficient to decide most cases, although many variations of “control have probably been squeezed into the test.”

It appears that the Arkansas legislature looked to IRS regulations for the language of Ark. Code Ann 11-1-204 that was applicable at the time of the accident to provide guidance to determine if someone was in fact an employee or an independent contractor:

People such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession, in which they offer their services to the general public, are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. See <https://www.irs.gov/business/small-business-self-employed/independent-contractor-defined>.

Based upon the above, the application of the applicable 20 factor test will be reviewed:

(1) *A person for whom a service is performed has the right to require compliance with instructions, including without limitation, when, where, and how a worker is to work:*

The claimant testified in his deposition introduced into the record that in regard to the respondent, “He wasn’t an expert and that’s why he hired us.” The claimant also admitted that the respondent never instructed them on how to paint, hang trusses, or how to roof, due to the fact they were in the construction business. The respondent admitted to picking out paint colors, tiles, and things of that nature. Here, it is found that the respondent was not instructing the claimant how to perform the building services. The testimony provided that the respondent was in the business of repairing cell phones, I-Pads, computers, and anything electronic, and prior to his computer and electronics business, was a landscaper. He admitted to working one time as an electrician’s helper but contended that he had no carpentry skills or skills of any kind that translated into the construction of a home or residence and this testimony is found to be believable. The claimant admitted that he was not told when to start or stop work.

(2) *A worker is required to receive training, including without limitation through:*

(A) *Working with an experienced employee;*

(B) *Corresponding with the person for whom a service is performed;*

(C) *Attending meetings; or*

(D) *Other training methods:*

In the present matter, there was no evidence as to training of any type by the respondent or of the claimant working with an experienced employee of the respondent, just testimony that the claimant was aware that the respondent was very limited in regard to the construction skills which he possessed and consequently, this was the reason the claimant was hired in regard to the construction. In addition, the claimant admitted to being in the construction business since the 90's and that he started his carpentry training as an apprentice.

(3) *A workers' services are integrated into the business of the person for whom a service is performed and provided in a way that shows the workers' services are subject to the direction and control of the person for whom a service is performed:*

Here it is clear that the respondent was in the business of computer and electronics repair and not in the construction business. Although the respondent at times did in fact pick up items for the construction project, it is found he was already in town and was attempting to keep the claimant on the job site. The claimant had been trained as a carpenter, starting his training and work in the carpentry trade or profession back in the 90's.

(4) *A worker's services are required to be performed personally, indicating an interest in the methods used and the results:*

Here, there's no evidence that claimant was required to perform specific services personally as directed by the respondent. The claimant did work personally with Thomas Moore and another worker from the construction company as they determined what was appropriate in regard to the construction project. The claimant and the other workers from M & A Construction were carpenters or builders with years of experience.

(5) *A person for whom a service is performed hires, supervises, or pays assistants:*

Here, the claimant admitted to having other side jobs, working for another person performing carpentry, and working as a crew leader for M & A Construction, now named CNS, 40 hours a week. He admitted that he was never paid a dime by the cell phone company and there was no evidence of a direct payment from the respondent to the claimant. In regard to payments involving the construction project on the property, the respondent stated he paid Thomas Moore (the partner or supervisor of the claimant) on Saturday and he had no idea how much the others were paid or how much Thomas Moore kept for himself. Thomas Moore asked if he could hire the claimant. These facts are found to be believable.

(6) *A continuing relationship exists between a worker performing services and a person for whom a service is performed:*

Here there is nothing to show that there was in fact a continuing relationship between the claimant and the respondent except for this specific job and an earlier remodel job that had been completed. The claimant worked for M & A Construction forty hours a week for years and was still working there at the time of the accident and the hearing. There appears to be no agreement involving a continuing payment from the respondent to the claimant.

(7) *A worker performing a service has hours set by the person for whom the service is performed:*

The claimant admitted that he was not told when to start or stop work. It could be argued that the evidence appeared to show that the supervisor of the project was in fact Thomas Moore, although Moore could also be considered a co-worker. It is also clear the

respondent was not a carpenter or contractor and did not provide instructions on how to perform the work.

(8) *A worker is required to devote substantially full time to the business of the person for whom a service is performed, indicating the person for whom a service is performed has control over the amount of time the worker spends working and by implication restricts the worker from obtaining other gainful work:*

Here the claimant admitted that he worked a full-time 40-hour week for M & A Construction, now named CNS. He also admitted to at least one additional side job. He clearly did not work full time for the respondent and even admitted that he was aware that the respondent did not own a construction company.

(9) *(A) The work is performed on the premises of the person for whom a service is performed, or the person for whom a service is performed has control over where the work takes place. (B) A person for whom a service is performed has control over where the work takes place if the person has the right to (i) Compel the worker to travel a designated route, (ii) Compel the worker to canvass a territory within a certain time; or (iii) Require that the work be done at a specific place, especially if the work could be performed elsewhere:*

Here, it is clear the work had to be performed at a set location, because the work involved constructing a building or house and it would be impossible to build it at another location, unless the construction was going to involve building a modular building, which was clearly not the case in the present matter. It is also clear that the claimant was not told when to start or stop work, was never instructed to canvass a territory within a certain time and was never instructed to travel a designated route.

(10) *A worker is required to perform services in the order or sequence set by the person for whom a service is performed or the person for whom a service is performed retains the right to set the order or sequence:*

Here, it is found that there is no convincing proof the respondent instructed the claimant as to the order or sequence to build the residence or house.

(11) *A worker is required to submit regular or written reports to the person for whom a service is performed:* There is no evidence that any regular reports were submitted, with the exception of invoices submitted by Thomas Moore, the carpenter who possessed a contractor's license and who arguably was in charge of the project and who recruited the claimant.

(12) *A worker is paid by the hour, work, or month except when he or she is paid by the hour, week, or month, only as a convenient way of paying a lump sum agreed upon as the cost of the job.* Here, Thomas Moore would submit an invoice on Saturday, and the respondent would pay the invoice. The claimant testified that he thought they were all paid the same amount, and the respondent testified that he did not know how the payments regarding the invoice were divided up. Payments were made based on the submitted invoices.

(13) *A person for whom a service is performed pays the worker's business or traveling expenses:*

The testimony provided that the individual Thomas Moore, who initially was contacted about the building project and who recruited the claimant, would submit an invoice on Saturday. The respondent would then pay the invoice, but as stated multiple times above, the respondent was never aware of how the money from the invoice was distributed and

this is found to be believable. There was absolutely no evidence that travel expenses were ever paid.

(14) *A person for whom a service is performed provides significant tools and materials to the worker performing services:* The testimony provided that the claimant and Thomas Moore, the man who submitted the invoices, would on occasion use M & A Construction tools and they kept a M & A vehicle on site, but they tended to primarily use their own personal tools. The claimant and his co-workers used ladders from M & A Construction, the respondent, and their own ladders. The respondent's generator and air compressor, which were on site prior to the construction, were used by both the claimant and his coworkers. The respondent did have some scaffolding purchased at a garage sale which was available but was never used by the claimant. The respondent admitted that he would pick up supplies in town when texted or called. Here, it is found that the respondent only provided a limited number of tools, and that he primarily only picked up items as instructed by the claimant or Tom Moore. Primarily, the claimant used his personal tools.

(15) *A worker invests in the facilities used in performing the services:* Here the facilities consisted of a private residence or building, and this section is found to not be applicable. There is absolutely no evidence the claimant or his co-workers invested in the building project except working and getting paid for their construction work.

(16) *A worker realizes a profit or suffers a loss as a result of the services performed that is in addition to the profit or loss ordinarily realized by an employee:*

Here, it is found that the claimant was directly paid by Thomas Moore, who could be considered the claimant's partner or supervisor on the construction job, involving the home or the building of the respondent's project. Thomsas Moore would submit an

invoice, the respondent would pay it on a Saturday, and then the money would be divided up, based upon the actual work performed and the invoice submitted.

(17) A worker performs more than de minimis services for more than one (1) person at the same time, unless the persons or firms are part of the same service agreement:

The claimant clearly worked for other entities in the same general time frame, which included working a forty-hour week for the construction company.

(18) A worker makes his or her services available to the general public on a regular and consistent basis:

Here, the claimant worked a forty-hour week for M & A Construction and was still working for them at the time of the hearing and even drove the construction company's trucks to the job site. The claimant was also working on another side job at or near the time of the accident. The claimant is found to have regular side jobs in the carpentry trade, after putting in a 40 week with M & A Construction.

(19) A person for whom a service is performed retains the right to discharge the worker, and (20) A worker has the right to terminate the relationship with the person for whom a service is performed at any time he or she wishes without incurring liability: The final two factors will be considered jointly. Here it is found that the available evidence does not make clear what the result would be in regard to liability, if the claimant terminated his work for the respondent or if the respondent terminated the work of the claimant. The claimant was paid based on submitted invoices and ultimately the result of the determination or the discharge of the worker would be based upon the determination of whether the claimant was found to be an employee or an independent contractor.

After evaluating all twenty factors of Ark. Code Ann 11-1-204, and reviewing the applicable case law, it is found that the degree of control is still a key determination, and in the present matter, it is determined that the evidence overwhelmingly supports the finding that the claimant was in fact not an employee of the respondent or his electronic repair company, but was an independent contractor or possibly even an employee of Thomas Moore, who submitted the invoices and divided up the proceeds. It is clear the respondent's business, computer and electronic repairs, had no connection to the construction business and that construction was clearly not part of the regular business of the respondent, who worked in a distinct profession or trade which required a totally separate skill set. The claimant admitted in his deposition that they were hired due to the fact, in referring to the respondent, "He wasn't an expert and that's why he hired us." The text messages showed the respondent was contacted to pick up supplies for the project in town but often had to ask questions as to what to pick up. Further, although some of the respondent's tools were used, the claimant also admitted using some of the construction company's tools, and went on to state that as a carpenter, they primarily used their own tools. The respondent had input as to the result, but clearly did not direct how the work was to be done.

Based upon the above evidence and the applicable law, and after weighing the evidence impartially, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof as spelled out by the 20 factors of the Empower Independent Contractors Act and Ark. Code Ann. 11- 1- 204, and has failed to prove by a preponderance of the evidence that an employee/employer carrier relationship existed at the time of the claimant's accident.

Consequently, all other issues are moot. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge