

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303156

JOHN SORRELS, EMPLOYEE CLAIMANT

SCOTT BOONE, EMPLOYER RESPONDENT NO. 1

TRAVELERS INSURANCE  
COMPANY, INSURANCE CARRIER RESPONDENT NO. 2

OPINION FILED JUNE 28, 2006

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

Claimant represented by the HONORABLE LAURA MCKINNON,  
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL  
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JOHN  
CHERRY, JR., Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondent No. 2 appeals an opinion and order  
of the Administrative Law Judge filed October 13, 2005.  
In said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The claimant sustained an injury on or  
about 3/18/2003.
2. This case has been controverted by  
Travelers Insurance Company in its entirety.
3. The claimant's current primary treating  
physician is Dr. Honghiran.
4. The jurisdiction of the Commission.

5. There was a Certificate of Non-Coverage for Mr. Sorrels that had not expired on the date of the injury.

6. A preponderance of the evidence establishes that John Sorrels was an employee of Scott Boone, and not an independent contractor or subcontractor, when Mr. Sorrels became injured at work on March 18, 2003.

7. Because I find that Mr. Sorrels was an employee of Scott Boone when he became injured in this case, I find that any issue of estoppel regarding Travelers Insurance Company denying liability for a worker's injury at Scott Boone's construction site is moot.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 13, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the

lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding, in relevant part, that the claimant was an employee of the respondent employer, as opposed to an

independent contractor or subcontractor, when he was injured at work on or about March 18, 2003.

The central issue on appeal is whether the claimant was an employee of the respondent employer or an independent contractor. There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be made based on the particular facts of each case.

Arkansas Transit Homes v. Aetna Life and Casualty, 341 Ark. 317, 16 S.W.3d 545 (2000) (citing, Massey v. Poteau Trucking Co., 221 Ark. 589, 254 S.W.2d 959 (1953)).

Moreover, 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. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1992).

These factors include the following:

1. the right to control the means and methods by which the work is done;
2. the right to terminate the employment without liability;
3. the method of payment, whether by time, job, piece or unit of measurement;
4. the furnishing, or the obligation to furnish, the necessary tools, equipment and materials;

5. whether the person employed is engaged in a distinct occupation to business;

6. the skill required in a particular occupation;

7. whether the employer is in business;

8. whether the work is an integral part of the regular business of the employer; and

9. the length of time for which the person is employed.

Franklin, supra; (see also, Arkansas Transit, supra; citing, Dickens v. Farm Bureau Mut. Ins. Co., 315 Ark. 514, 868 S.W.2d 476 (1994); Blankenship v. Overholt, 301 Ark. 476, 786 S.W.2d 814 (1990); Restatement (Second) of Agency § 220).

These are not all the factors which may conceivably be considered in a given case, and it may be necessary in some cases for the Commission to consider all of these factors. Franklin, supra. Other factors, such as whether the parties believe they are creating the relation of master and servant, may also be taken into consideration when determining whether one is an employee or an independent contractor. Arkansas Transit, supra. However, it is well established that the right to control is the principle factor in making this determination. See, id. Moreover, it is the right to

control, not the actual control, that determines the relationship. See, *id.* (citing, Taylor v. Gill, 326 Ark. 1040, 934 S.W.2d 919 (1996)).

In making the distinction between an employee and independent contractor, the court has long held that an independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. Arkansas Transit, supra; (citing, Johnson Timber Corp. v. Sturdivant, 295 Ark. 622, 752 S.W.2d 241 (1988)). If control of the means is lacking, and the employer does not undertake to direct the manner in which the employee discharges his work duties, then the relationship of independent contractor exists. See, *id.* (citing, Masse, supra). If, on the other hand, control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant (employee) necessarily follows. See, *id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. Sanders v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976).

The factors pertaining to the nature of the worker's occupation and whether it is part of the

regular business of the employer comprise the "relative nature of the work" test, as recognized by the court in Sanders, supra. As demonstrated in Arkansas Transit, supra, this test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling of profession; and (2) what relationship it bears to the regular business of the employer. See, id.

The determination as to whether an individual is an employee or an independent contractor has been addressed by the courts and the commission on several occasions. One such example in which the claimant was found to be an employee was Gray v. Kipper Construction Co, Inc., Full Commission Opinion filed April 21, 2003 (Claim No. F010523). In Gray, the claimant ultimately died from injuries he sustained during the construction of a private residence for the Taylor family. The respondent argued that the claimant was an independent contractor based primarily on the fact that the respondent did not control the means and method by which the claimant worked. For an undetermined reason, the respondent contractor had abdicated his daily duties as building contractor at the Taylor construction site. Thus, the respondent "only occasionally made suggestions for the purpose of ensuring the correctness and quality

of the final product." See, id. In addition, the claimant was an experienced carpenter, he was paid directly by the Taylors, he furnished his own tools, and his position was temporary. Upon applying the "right to control" test, the Full Commission found that "while Skipper [the respondent] apparently abdicated his day-to-day duties as building contractor at the Taylor construction site, the evidence nevertheless establishes that he was, in fact, the contractor of record ... .". The present claim is distinguishable from Gray, supra, in that there is no "contractor of record" involved here. Rather, the homeowner, Mr. Boone, contracted individually for various phases of the project.

In contrast to Gray, supra, in Fittin v. Travis Lumbar Company, Full Commission Opinion filed August 29, 1996 (Claim No. E314170), the claimant was found to be an independent contractor rather than an employee. In Fittin, the claimant was injured while doing an odd job for the respondent. More specifically, the claimant, who had been a regular hourly employee of the respondent in his lumbar company some time earlier, worked occasionally for the respondent doing odd construction jobs. On August 10, 1993, the claimant was constructing a guard rail around a kiln when he allegedly injured his back while lifting sacks of

concrete mix. Upon applying the "nature of the work" test, as well as the other factors to be considered when making such a determination, the Full Commission found that the claimant was not an employee at the time of his alleged back injury. To this end, the Commission stated:

The evidence shows that the claimant, though paid by the hour, had no taxes or other withholding taken from his check. Also, at the end of the year, his income was reported on a form 1099 rather than a W-2. Additionally, the evidence indicates the claimant was not eligible for employee benefits, such as health insurance which employees of the respondent employer received. We also note that the claimant's job was temporary and not an integral part of the employer's business. The respondent operates a lumbar mill in which raw wood is processed into finished lumbar for use in construction. However, the respondent employer is not in the construction business; instead it is a supplier of construction materials.

Finally, the Commission noted that none of the construction jobs that the claimant performed for the respondent was essential to the ongoing operations of the respondent, and that these jobs were project-by-project, with no guarantee of additional work once a project was completed. Finally, the respondent exercised no control over the means and method by which the claimant accomplished his tasks. Therefore, the claimant

was found to be an independent contractor rather than an employee.

In the present claim, the application of the facts to the factors set forth for consideration in Arkansas Transit, supra, shows that the claimant was not an employee of Scott Boone at the time of his injury. Rather, the preponderance of the evidence demonstrates that the claimant was an independent contractor at the time of his injury in March of 2003.

First, and foremost, the record reveals that Mr. Boone's control of the claimant's "means" was lacking, in that he did not undertake to direct the manner in which the claimant discharged his work duties. See, Arkansas Transit, supra. In fact, an examination of the process by which Mr. Boone's residential building project was conducted reveals that he had little control of the means and method by which the work on his new home was done with regard to any of the contractors involved in that undertaking. Rather, as with anyone investing in the construction of a new home, Mr. Boone was primarily concerned with the end result of the project.

As far as the actual building process was concerned, Mr. Boone testified that once a site was selected, an architect customized a home plan that he

had chosen from the internet. Next, Mr. Boone contracted with various individuals to undertake different phases of the building project, beginning, of course, with site preparation. Mr. Boone stated that he used some of the same contractors who had worked on his first residence, and others were recommended to him by various individuals, including the claimant. Once the footing and foundation phases were complete, Mr. Boone contacted the claimant to begin framing his home. Mr. Boone explained that he had sought to use the claimant in the construction of his first residence, but the claimant was unavailable at that time. Therefore, when he learned that the claimant was available to assist him with the construction of his new residence, the two met on more than one occasion to discuss the terms of their business arrangement. These meetings culminated in an agreement between the two men that included an hourly wage and a "cost-plus", or end-of-job bonus. Mr. Boone testified about the details of this agreement as follows:

Q. Did you come to an agreement at that time?

A. I believe we did. I don't believe there was more than one, maybe two meetings when we - - when we discussed the possibility of him working on this home for me.

Q. Okay. Now, what was it that you wanted Mr. Sorrels to do?

A. I wanted Mr. Sorreles to pretty much oversee the construction of my home.

Q. Did he indicate to you that he had the knowledge and expertise to oversee this job?

A. Yes.

Q. Now, when did you come to an agreement about how he was going to be paid?

A. I believe it was one of our initial meetings, how he would be paid.

Q. And we've talked about this bonus at the end of the completion of the project. What was your understanding of the bonus situation?

A. My understanding of that, it was a cost-plus basis. With the amount at the end being a gross percentage of the total cost that it took to -  
- to construct the home.

Explaining that another contractor eventually took the bonus after the claimant was unable to complete the project, Mr. Boone continued ...

Q. Okay. Now, what did that amount of money represent? Why was Mr. Sorreles to get this bonus?

A. It was always my impression that that amount - - that money - - those funds were for the building of the home, the overseeing of construction of the home.

Mr. Boone's testimony corroborates the claimant's testimony with regard to any guidance or instruction he may have offered the claimant in the actual construction of his new home. Essentially, other than having expressed personal preferences in colors, etc., Mr. Boone never guided or instructed the claimant in his work activities. The claimant agreed that Mr. Boone only observed the construction of his new home and made decisions concerning certain personal preferences. Moreover, the claimant's testimony shows that he was of the opinion that Mr. Boone, who is a pharmaceutical sales representative, was not qualified to instruct or supervise him in the discharge of his duties as a carpenter. To this end, the claimant stated that he is a "trained carpenter" who needs no instruction in the completion of a construction related task. Further, the claimant agreed that Mr. Boone did not direct the activities of any of the contractors working on his house, including him. For example, the claimant's testimony corroborated Mr. Boone's statements that the instructions for laying out the room sizes, constructing and installing roof trusses, determining the height of the crawl space, framing the walls, and installing the windows were set out in the blueprints furnished by his architect. Mr. Boone stated that any substantial changes

to room dimensions, etc., were done to the blueprints prior to the actual construction phase of the home. "By the time we had the final plans, that was what we went with, I believe; if I remember correctly," stated Mr. Boone. Mr. Boone could not recall that substantial changes were made to the home after the blueprints were drawn up.

Q. So the plans that were handed to Mr. Sorrels would have been in effect the plans that you wanted accomplished?

A. I believe they were, yes.

The claimant admitted that he relied on these blueprints for direction. Further, Mr. Boone admitted that he asked the claimant to make some minor changes to the dimensions of some windows in the breakfast area, but he denied giving the claimant technical instructions on these changes. This was the same scenario with any deviations to the original plan that were made during the construction of the home. In sum, Mr. Boone's testimony reflects that he did not control the means and method by which the claimant completed his carpentry tasks. This conclusion is supported by the following testimony:

Q. The whole thing here is, did you ever tell Mr. Sorrels how he was supposed to go about accomplishing

the carpentry subcontracting work on this job?

A. No, I did not.

Q. Did you ever tell him anything about how he was perform the details of his work?

A. The actual details, the actual function of framing a house, carpentry work, carpentry skills, no, I did not.

As far as daily supervision, Mr. Boone admitted that he made approximately 2 to 4 visits per week to the jobsite during the construction of his home. Mr. Boone stated that these visits were to check progress and make notes of anything that he needed to do, i.e., pick out carpet and fixtures. Mr. Boone admitted that he was "the boss" in the sense that he was the one "writing the checks". However, he denied having control over the daily activities and tasks of the contractors he employed to build his home. Concerning his supervision of the claimant's daily work activities, Mr. Boone testified, "No. I - when we entered into our agreement, our relationship, it was understood that John knew the technical aspects of this. And so, he didn't really need my input other than personal preference; the size of a window or the height of a wall, things of that nature." Finally, Mr. Boone testified that he relied

heavily on the claimant's input, and that the claimant was often instrumental in helping him secure other contractors.

In addition to the above, the claimant's testimony reveals that he furnished his own tools, set his own hours, and established his own comings and goings with regard to the Boone construction project. And, although the claimant was paid an hourly wage, Mr. Boone did not withhold income taxes and FICA from those wages. Further, the record demonstrates that Mr. Boone is, and was at all relevant times, a full-time pharmaceutical sales representative with no background or experience as a building contractor. With regard to his occupation, Mr. Boone testified that he was required to travel frequently. Thus, it was impossible for him to be at the jobsite on a regular basis. Furthermore, Mr. Boone had limited knowledge of the building industry. Therefore, consistent with Mr. Boone's testimony regarding their agreement, reasonable minds would conclude that Mr. Boone depended on the claimant's carpentry expertise and background to oversee the construction of his home, especially during those times when he was unavailable. Furthermore, the entire project was expected to take 6 months to complete. Therefore, the claimant's position with Mr. Boone was temporary,

and he had no expectation of working for Mr. Boone again once the project was completed. The claimant had been on the job approximately 3 months at the time of his injury.

Next, as previously discussed, the respondent correctly asserts that the claimant and Mr. Boone entered into an enforceable oral agreement concerning the construction of Mr. Boone's home. Each party testified that they agreed the claimant would oversee construction of the Boone residence, as he had the requisite knowledge and expertise to do so. Per this agreement, the claimant was paid an hourly wage with a "cost-plus" bonus at the end of the project. According to the claimant, this arrangement did not make him a supervisor, in that he could not hire or fire other contractors or even tell them what to do. However, per this agreement the claimant had the authority to oversee certain aspects of the project, and he was to receive a flat sum bonus upon completion of the project. And, although both parties agreed that either had the right to terminate their arrangement at any time, such an act could have conceivably resulted in liability. Therefore, the preponderance of the evidence demonstrates that Mr. Boone did not have the right to terminate the claimant's employment without facing potential liability.

Finally, although it was stipulated that the claimant had a certificate of non-coverage one at the time of his accident, Mr. Boone testified that he never presented him with this certificate. Therefore, Mr. Boone's expectation was that the claimant was covered by his workers' compensation liability policy. Concerning this policy, Mr. Boone testified as follows. First, Mr. Boone could not recall who initiated the conversation concerning workers' compensation, but he remembered that it was the claimant who "mentioned it would be a good idea to take out a policy such as this, and so I did." Mr. Boone stated that his primary purpose in taking out this policy was to protect himself against liability in the event there was an accident on the jobsite.

In sum, the preponderance of the evidence shows that the claimant was an independent contractor, and that he held a current certificate of non-coverage at the time of his injury in March of 2003. Thus, the claimant was not Mr. Boone's "employee" at the time of his work related injury, and consequently, he was not covered under Mr. Boone's workers' compensation policy. This conclusion is supported by the fact that the claimant contracted to do the Boone job according to his own method and without being subject to the control of Mr. Boone. Further, control of the means is lacking

here, in that Mr. Boone did not undertake to direct the manner in which the claimant discharged his work duties. In addition, the claimant's testimony shows that he viewed Mr. Boone as unqualified to instruct or supervise him in the discharge of his duties as a carpenter. Further, there was no meeting of the minds between the parties that their relationship was one of employer/employee. Clearly, the claimant's occupation as a carpenter was a "separate calling of profession" from Mr. Boone's career as a pharmaceutical representative. Thus, the claimant's profession bore no relationship to Boone's regular business. Based thereupon, the "nature of the work" test has not been satisfied in this claim. Sanders, supra. Finally, the claimant furnished his own tools and he set his own schedule. And, although Mr. Boone had the right to terminate Mr. Sorrell, he would have faced potential liability in doing so due to the parties' oral agreement. Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner