

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F900381

CESAR VELASQUEZ,  
EMPLOYEE

CLAIMANT

CONTROLLED ENVIRONMENTAL  
SOLUTIONS, INC.,  
EMPLOYER

RESPONDENT

UNION INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 31, 2010

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed December 8, 2009. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on November 13, 2008.
3. The claimant's average weekly wage was \$504.00, resulting in an applicable temporary total disability rate of \$337.00, if awarded,

and a permanent partial disability rate of \$252.00.

4. Claimant has proven by a preponderance of the evidence that he suffered a compensable neck injury on November 12, 2008.
5. Respondents have controverted this claim in its entirety.
6. Claimant has proven by a preponderance of the evidence that he is entitled to medical treatment and temporary total disability benefits from November 14, 2008, until January 21, 2009.
7. Claimant has proven by a preponderance of the evidence that the medical treatment provided to him by UAMS was reasonable, necessary, and related to his compensable neck injury.
8. The claimant reserved all other issues, including permanency, wage loss, and vocational rehabilitation.
9. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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 December 8, 2009 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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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant was an employee and not an independent contractor. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that he was an employee of Controlled Environmental Solutions, Inc. at the time of his injury.

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 Homes v. Aetna Life & Cas., 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature

of the work test. On the issue of control, the Court has stated:

The governing distinction is that if 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 necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.

Massey v. Poteau Trucking Co., 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953). The ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be based on the particular facts of each case. Ark. Transit Homes, supra. Although no one factor of the relationship is determinative, see Wright, supra, the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. See, Aloha Pools & Spas v. Employer's Ins. of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). The resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the employer's right to control and of factors related to the relationship of the work to the asserted employer's business. In making a determination, the Commission must look at the factors outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999) citing §220 of the Restatement (Second) of Agency:

- A. the extent of control which, by the agreement, the master may exercise over the details of the work;
- B. whether or not the one employed is engaged in a distinct occupation or business;
- C. the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- D. the skill required in the particular occupation; whether the employer or the workman supplies the instrumentalities, tools, and the

- place of work for the person doing the work;
- E. the length of time for which the person is employed;
  - G. the method of payment, whether by the time or by the job;
  - H. whether or not the work is a part of the regular business of the employer;
  - I. whether or not the parties believe they are creating the relation of master and servant; and
  - J. whether the principal is or is not in business.

See also, Aloha, supra.

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to the various factors must be determined by the Commission. Franklin, supra. However, as previously discussed, the Supreme Court has stated that the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. Wright, supra; Sanders, supra; Aloha, supra. The factors pertaining to the nature of the worker's occupation and whether it is a part of the regular

business of the employer comprise the "relative nature of the work" test. Ark. Transit Homes, supra.

Moreover, in Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976), our Supreme Court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the employer. This test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. Id. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. Id.

In my opinion the Administrative Law Judge, and now the majority have misconstrued the facts to find that the claimant was an employee and that the respondents controlled or had a right of control over the claimant's work. I cannot reach this same conclusion. First, it is clear that the claimant was not hired to be an employee of respondents. Mr. Sutterfield, the owner of respondent-employer testified that the claimant "...was recommended to us through Miguel Hernandez that Mr. Velasquez had a crew that could come to work." Thus, Mr. Sutterfield acknowledged

that he was hiring a crew to perform work, not an employee. This testimony is confirmed by the claimant when he testified that Miguel Hernandez, his wife's cousin, would tell him if there was any work to do for respondents and whether or not to show up for work. Second, there is no evidence that the claimant was ever instructed on how to perform his duties by anyone with respondent-employer. The claimant even testified that he did not have a relationship with Steve Lawson, the project manager, and that he only knew that Mr. Lawson was the "supervisor" because Mr. Hernandez told him. The claimant did not require supervision or instruction as to how to remove the asbestos. The claimant knew how to prepare a site and how to remove the asbestos. Third, the pay was not that of employer-employee, but rather was a negotiated pay more commonly utilized by prime-sub contractors. According to the claimant, Mr. Hernandez negotiated the pay structure for the asbestos removal jobs. Fourth, Mr. Hernandez determined what jobs the claimant would work, not anyone with the respondent-employer. Fifth, the evidence revealed that the claimant only performed work for the respondent-employer when it was available and that he worked other jobs for other contractors on the weekends or whenever

he was available and Mr. Hernandez had a job to do. Finally, while respondent-employer provided the plastic sheeting for the work, this is only logical as the respondent-employer was responsible for the entire project, not just the individual asbestos removal. The claimant provided his own respirator, which is the only essential piece of equipment required in the work of asbestos removal.

When all this evidence is considered as a whole, I can reach no other conclusion than to find a total lack of control by the respondent-employer over the work performed by the claimant. The claimant was an independent contractor who knew how to perform his work as an asbestos remover, and the means to carry out his job was left solely to his discretion. There is absolutely no evidence that the claimant needed or required any supervision in performing the job he was hired to perform. Moreover, as with an independent contractor relationship, the claimant was not hired as an employee to perform the work of an employee, rather the claimant was hired to provide an entire crew to complete a specific job. In my opinion, the only conclusion that can be reached from the facts in this

case is that the claimant was an independent contractor of respondents.

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KAREN H. MCKINNEY, COMMISSIONER