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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2026-000131

John Littleton……Appellant,

v.

B&K Services, Inc., Employer,

and Accident Fund National Ins. Co.,…….Carrier/Respondents.

INITIAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

Did the South Carolina Workers' Compensation Commission ("the Commission") err when it determined Claimant was an independent contractor and not an employee of B&K Services, Inc.?

STATEMENT OF THE CASE

This matter involves a jurisdictional question of whether Appellant was a direct employee of B&K Services, Inc. (hereafter "B&K) at the time of his workplace injury. On December 10, 2020, Littleton suffered a severe cut to his left hand and arm while working as a gas pipe fitter for B&K, a company he had worked with for more than 10 years.

Upon being told he was not an employee of B&K, Littleton hired the undersigned law firm to pursue a workers' compensation claim. Littleton filed his first Form 50, Request for Hearing, on January 11, 2021, alleging, inter alia, he was an employee of B&K on the date of injury and, as such, is entitled to all appropriate benefits under the South Carolina Workers' Compensation Act. B&K and its carrier, Accident Fund National Ins. Co. denies that an employer/employee relationship exists and contends that Littleton was an independent subcontractor, excluding him from coverage under The Act.

An extensive hearing in this matter was held in Columbia, SC, on May 24, 2023. After the hearing, the Single Commissioner ordered that Littleton failed to establish by a greater weight of the evidence that he was an employee of Defendant at the time of his December 10, 2020 accident, pursuant to S.C. Code § 42-1-130.

On October 17, 2025, Littleton appealed the Single Commissioner's ruling. A hearing before the Full Commission was held on November 18, 2025. The Full Commission ordered that

Littleton failed to establish by a greater weight of the evidence that he was an employee of B&K at the time of his December 10, 2020, workplace injury.

Appellant timely filed its appeal to the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

On December 10, 2020, Littleton suffered a severe cut to his left hand and arm while working as a gas pipe fitter for B&K, a company he had worked with for more than 10 years. Littleton has been a pipe fitter for upwards of twenty years before the subject 2020 workplace injury. Over the ten-plus years Littleton worked for B&K, he considered himself its direct employee. (Hr. Tr. 24: 22-25). If DeArmond told Littleton to be there, Littleton complied. (Hr. Tr. 39: 15-22).

A B&K supervisor was generally present on every job Littleton performed the company. (Hr. Tr. 48: 13-18). Littleton testified that he had to ask Kerry DeArmond's permission to acquire a helper on a job (Hr. Tr. 52: 11-21). Littleton did not bid for any of the work he did for B&K. (Hr. Tr. 124: 8-10). Kerry DeArmond would give Littleton a job assignment and dictate what the job would pay. (Hr. Tr. 39: 15-17). While DeArmond testified that B&K worked with other subcontractors similar to Littleton, no testimony was offered that Littleton ever competitively bid against any other subcontractors for jobs. (Hr. Tr. 118-119: 24-6).

In his work for B&K, Littleton was required to send progress photos to Respondent for his review by and through a phone application furnished by Respondent. (Hr. Tr. 48: 1-6). Littleton would report to B&K's office in the morning, and Kerry DeArmond would direct Littleton as to the work to be performed and where that day. (Hr. Tr. 38: 1-15). Kerry DeArmond sent Littleton to heating and air classes. (Hr. Tr. 20: 8-9). When Littleton was assigned jobs out of state, B&K

booked and paid for hotel rooms without Littleton having any involvement B&K. (Hr. Tr. 33: 8-20).

When B&K did work for its client Walmart, B&K required Littleton to complete an I-9 "Employment Eligibility Verification" documenting that he was a direct employee of B&K and not an independent subcontractor. (Hr. Tr. 36: 1-4). At the hearing, such an I-9 dated March 9, 2020, completed by Littleton and signed by Martha Lanham as accountant for B&K, was submitted into evidence. Under penalty of perjury, by signing the I-9, Lanham asserted that Littleton was a direct employee of B&K. (Hr. Tr. 152:3-8).

Also at the Single Commissioner hearing, a yellow t-shirt bearing a B&K logo was entered into evidence. This particular t-shirt was one actually worn by Littleton during his employment with B&K. (Hr. Tr. 26-27: 4- 5). Littleton believed he was required to wear the shirts provided by B&K. (Hr. Tr. 108: 8-11). Witnesses for B&K testified that the shirts were simply meant to satisfy OSHA safety coloring requirements and that employees were not specifically required to wear shirts with a B&K logo. (126: 4-14). Even if not an express requirement, there is no doubt that B&K derived a marketing benefit from the shirts, and such was admitted by Kerry DeArmond at the hearing. (Hr. Tr. 154: 8-25).

Testimony in the record shows that over the years, B&K approached Littleton about obtaining coverage. Littleton repeatedly advised B&K that he could not afford such insurance. (Hr. Tr. 49:10--15). The record reflects that, because B&K considered Littleton to be one of the best pipe fitters in the area, it made a conscious decision to continue doing business with him despite his not having Workers' Compensation insurance coverage. (Hr. Tr. 144: 12-22). At this point, B&K could have parted ways with Littleton. Instead, B&K began the practice of reducing Littleton's pay to cover any additional insurance premiums it was required to pay after its annual

WC insurance policy audit. (Hr. Tr. 144:23-147:25). Littleton described that by having his pay reduced for "workers' comp", he therefore believed he was a covered employee. Littleton argues that by collecting what was, in effect, a premium, he became a covered employee under B&K's insurance policy. (Hr. Tr. 50:12-25). B&K made the calculated decision that continuing to work with Littleton, an exceptional pipe fitter, was worth the risk of him later having an injury. Even after collecting funds from him to pay increased insurance costs, they now seek to deny him coverage under their Workers' Compensation. (Hr. Tr. 144: 12-22).

Further evidence of B&K's control over Littleton is Kerry DeArmond's testimony that, throughout the 10-12 years of his relationship with B&K, he only remembers two other HVAC companies where Littleton may have worked. (Hr. Tr. 163:25-164:1). While Littleton acknowledges working for Collins Heating & Air and Bentley's Heating & Air in the past, he testified his employment with Bentley's was for only an approximate 6-month period of time. (Hr. Tr. 97 8-14). Maurice DeArmond even acknowledged that over the ten-plus years of their relationship, Littleton did much of his work for B&K. Littleton testified he did not work for other companies because of DeArmond's strict policy that B&K employees were not to "moonlight" for other HVAC companies. (Hr. Tr. 53:21-23). Littleton did not work concurrently for any other HVAC companies while employed with B&K. (Hr. Tr. 66:17-20).

Respondent supplied Littleton with software called "Company Cam." (Hr. Tr. 47-48: 21-6). Littleton drove B&K-owned vehicles for 4 years. (Hr. Tr. 27-28: 18-8). Littleton wore Hi-Vis shirts with a B&K logo on them at the jobsite supplied by Respondent. (Hr. Tr. 27: 1-6). Respondent supplied Littleton with scissor lifts, pipe threaders, extension ladders, and Kerry DeArmond's personal hammer drill. (Hr. Tr. 51: 1-14). Littleton was not required to pay out of his

own pocket for materials and supplies necessary for daily jobs. He was permitted to charge materials and supplies at B&K supply houses. (Hr. Tr. 47: 10-15).

At the Single Commissioner hearing, a photograph of Littleton's hand, one he sent via text to the B&K bookkeeper (Martha Lanham) on the day of the accident, showed a "Moon & Freeman" van in the background. (Hr. Tr. 29:2-4).[1] Littleton was driving this van on the day of his accident. Littleton acknowledges that early on in his relationship with B&K, he did drive his personal truck to and from work sites from time to time. Littleton contends, however, a time came when he began regularly driving a B&K van (or a Moon & Freeman van) every day and would also drive a company van when required to work out of town. (Hr. Tr. 28:2-5). Littleton was rear-ended in 2019 while driving a B&K company van. (Hr. Tr. 158:4-8).

Littleton was paid both on an hourly basis and a lump sum per project basis. (Hr. 105: 1-18). Many times, when he was not paid on a completed project basis, Littleton would submit his time via text message to Martha Lanham, the company's accountant, who would then issue him a direct deposit payment based on the hours submitted. (Hr. Tr. 43:3-25-44:1-10). On these occasions, Littleton would be paid $20/hour for his work. (Hr. Tr. 38:18-19).

Littleton believed he was DeArmond's employee and operated on the assumption that Kerry DeArmond could fire him at a moment's notice. (Hr. Tr. 41:12-14). B&K never had any discussion with Littleton about his right to complete work should their relationship end.

[1] Moon & Freeman was another HVAC company acquired by B&K Services. As part of the acquisition, B&K took ownership of its work vans.

Witnesses Rand Webb, Kerry DeArmond, Martha Lanham, Jeff Haraway, and Maurice DeArmond testified for B&K, and the portions of their testimony supporting Littleton's positions are conveyed below.

Testimony of Randy Webb

Randy Webb is the Comptroller for B&K. He oversees payroll, addresses company expenses, and purchases Workers' Compensation coverage. Randy Webb's deposition was submitted into the record at the Single Commissioner Hearing on May 24, 2023.

Randy Webb testified in his deposition:

> "We reduced the pay that he received by roughly ten percent for two reasons; one, as to incentivize him to get coverage that we requested and, two because when our Workers' Comp audit was performed we would show John as an uninsured subcontractor and the amount of money that we paid him would essentially generate an additional charge to us because those were payroll dollars that we did not include in our base estimate for our policy at renewal. So, we had to pay an additional amount for those payroll dollars to uninsured subcontractors, and we passed that cost along."

(Webb Dep. 23:1-15, June 10, 2022).

Webb testified that for a couple of years, every time Littleton was given a paycheck from B&K, his pay was reduced to cover the penalty asserted by its Workers' Compensation carrier. (Webb Dep. 24:1-22, June 10, 2022).

Kerry DeArmond knowingly continued to employee Littleton even though Littleton did not have his own workers' compensation insurance policy. Kerry DeArmond continued to reduce his pay by ten percent. (Webb Dep. 22:13-23, June 10, 2022). Webb testified there was no written agreement apprising Littleton of their pay reduction arrangement to penalize him. (Webb Dep. 59:18-25, June 10, 2022).

Testimony of Kerry DeArmond

Kerry DeArmond is the owner of B&K and has known Littleton for the majority of his career. Kerry DeArmond operates and manages B&K and is actively involved in the company's day-to-day operations. Kerry DeArmond's deposition was submitted into the record at the Single Commissioner Hearing on May 24, 2023.

Kerry DeArmond testified his residential employees and subcontractors wear t-shirts with a B&K logo so customers relate to them as part of the company. (DeArmond Dep. 18:1-12, March 30, 2021). DeArmond stated Littleton does both residential and commercial work for B&K. (DeArmond Dep. 18:18-19, March 30, 2021). DeArmond supplied Littleton with B&K's pipe threader and other equipment. (DeArmond Dep. 22:5-11, March 30, 2021). If Littleton had to change the original plans, he would contact B&K to get instructions. (DeArmond Dep. 26:8-15, March 30, 2021).

Littleton would be paid by B&K upon his work passing inspection. In the event it did not pass inspection, Littleton would have to fix the issues at B&K's directive. (DeArmond Dep. 27:23-25, 28:1-4, March 30, 2021). Project managers for B&K oversaw Littleton's daily work. (DeArmond Dep. 30:1-5, March 30, 2021). Kerry DeArmond refers to workers who worked with Littleton as "helpers" and verified Littleton was paid $35 an hour for his work and his "helpers". (DeArmond Dep. 40:3-9, March 30, 2021). Kerry DeArmond stated he "always tried to help John and always tried to take care of him". (DeArmond Dep. 43:8-9, March 30, 2021).

B&K supplied Littleton with a work van. DeArmond told Littleton, "you'd better not let us catch us doing work for someone else in this van." (DeArmond Dep. 78:6-7, March 30, 2021).

Testimony of Martha Lanham

Martha Lanham is an office manager for B&K. Lanham is in charge of getting payment requests and other inner office tasks. Lanham's deposition was submitted into the record at the Single Commissioner Hearing on May 24, 2023.

Lanham would fill out the subcontractor's paysheet for Littleton. (Lanham Dep. 18:21-25, March 30, 2021). According to Lanham, employees wore the B&K t-shirts. (Lanham Dep. 30:1-5, March 30, 2021). Lanham does not have knowledge of a specific employer or time frame in which Littleton ever worked anywhere other than B&K. (Lanham 50:11-13, March 30, 2021).

Testimony of Jeff Haraway

Jeff Haraway was an employee of B&K for 14 years before the subject injury. Haraway is a salesman and project manager/supervisor for B&K's commercial HVAC department. He bids on jobs for B&K and supervises their completion. Haraway's deposition was submitted into the record at the Single Commissioner Hearing on May 24, 2023.

Haraway testified Littleton did, at some point, work for Bentley Heating and Air in Greer for approximately six months. (Haraway Dep. 18:16-18, June 23, 2022). Haraway stated "he did not know when Littleton worked at Bentley Heating and Air, but believed it was for six months." (Haraway Dep. 19: 2-4, June 23, 2022). Haraway testified that Littleton did a fair amount of work for him. (Haraway Dep. 21:1, June 23, 2022). Haraway testified in his deposition as follows:

> "If Littleton wasn't working for me, then I think he did work on projects for Kerry. He may have worked on some residential, but I really don't know. You know, if it's not in my neck of the woods, I'm really not concerned with it."

(Haraway Dep. 21:1-12, June 23, 2022).

Haraway testified Littleton did not negotiate payment for jobs. (Haraway Dep. 9-16, June 23, 2022).

Haraway testified B&K supplied Littleton with the material to complete the jobs. (Haraway Dep. 28:24-25, 29:1-2, June 23, 2022). Haraway would have Littleton pick up materials for jobsites from Ferguson Plumbing and AAA Supply, and other similar places. (Haraway Dep. 38:14-23, June 23, 2022).

In Haraway's deposition, he was asked about the relationship differences between "B&K employees" and "subcontractors" and stated:

> Q. Is there anything else, in your mind, that is handled differently with subcontractors of B&K versus employees?
> A. Not that I can think of, I mean no.
> Q. With the employees, do you tell them on the front end how many hours they have to get a job done?
> A. No.
> Q. -- tell them what to do?
> A. "No. I just tell them what's got to happen."

(Haraway Dep. 66:16-25, June 23, 2022).

Testimony of Maurice DeArmond

Maurice DeArmond is the son of Kerry DeArmond and is the President of B&K. Maurice DeArmond also operates and manages the business B&K. Maurice DeArmond was employed by B&K for up to ten years before Littleton began working for B&K.

At the Single Commissioner Hearing, Maurice DeArmond was asked:

> Q. -- You, as B&K, could make a decision not to bring them on jobs if they did not produce Workers' Compensation insurance; correct?
> A. Yes, sir.
> Q. You didn't do that with John?
> A. No, sir.
> Q. Because he was a good pipe fitter?
> A. Yes, sir.
> Q. And then you charged him some sort of fee, penalty, premium, whatever you want to call it?
> A.Yeah. We call it a fee.

(Hr. Tr. 185: 12-22).

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for our review of Commission decisions. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court may reverse or modify the decision of the Commission when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2016). Because the existence of an employer-employee relationship is a jurisdictional question, "the [c]ourt may take its own view of the preponderance of the evidence." Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)).

ARGUMENTS

I. Employment Test Pursuant to Shatto

The question to be answered is whether Littleton was, at the time of his injury, an employee of B&K, rather than an independent contractor. “An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the results of his work.” Chavis v. Watkins, 256 S.C. 30, 32 (1971) (quoting Bates v. Legette, 239, S.C. 25, 34-35 (1961). An employer/employee relationship must exist at the time of the alleged injury to justify an award under South Carolina Workers’ Compensation law. Most importantly, “South Carolina’s policy is to resolve jurisdictional doubts in favor of inclusion of employers and employees under the

Workers' Compensation Act. Spivey v. D.G. Constr. Co.. 321, S.C. 19, 21-22 (Ct. App. 1996) (emphasis added).

"Under South Carolina law, the primary consideration in determining whether an employer/employee relationship exists is whether the alleged employee has the right to control the employee in the performance of the work and the natter in which it is done." Paschal v. Price, 392 S.C. 128, 133 (2011). The test is not the actual control exercise, but whether there exist the right and authority to control and direct the particular work or undertaking." Id. (quoting Kilgore Grp., Inc. v. S.C Emp't Sec. Comm'n, 313 S.C. 65, 68 (1993). The four employment-test factors regarding the right of control include: "(1) direct evidence of the right or exercise of control: (2) furnishing of equipment; (3) the method of payment; and (4) the right to fire." Shatto v. McCloud Reg'l Med. Ctr., 406 S.C. 470, 475 (2013) (quoting Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299 (2009).

A. Direct Evidence of the Right or Exercise of Control

B&K contends Littleton was free to come and go as he pleased relative to reporting for work. (Hr. Tr. 121: 8-15). B&K argues Littleton had the right to refuse jobs offered to him. (Hr. Tr. 122-123: 18-6). That alone does not determine the employment relationship between Littleton and B&K.

The Respondent takes the position Littleton had his own "employees," and thus, cannot be considered an employee of B&K. B&K relies heavily on this argument and believes that it outweighs all other factors to be considered. However, in Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (Ct. App. 2021), an appeal involving an independent contractor/employee dispute between Ramirez (Claimant) and his employer, the South Carolina Court of Appeals found in favor of an employee-employer relationship even though Ramirez set

his own schedule, did not punch a time clock, and was free to negotiate for additional payment or even choose to decline the job altogether. Ramirez was also free to enlist others if the job was too big for him to handle. He had the discretion to hire people to assist with his work and did not need approval from the employer. Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680, 685 (Ct. App. 2021).

"The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services." Shatto, 406 S.C at 477 (quoting Nelson v. Yellow Cab Co., 343 S.C. 102 (Ct. App. 2000), *overruled on other grounds by* Wilkinson, 382 S.C. at 300 n. 3). In Ramirez, the Court looked at other factors to determine the employee-employer relationship, specifically the exclusivity of Ramirez's relationship with the employer, and the fact that the employer required Ramirez to wear a shirt adorned with the company's logo. Ramirez, 433 S.C. 519, 860 S.E.2d 680 (Ct. App. 2021).

Similar to Ramirez, at the Single Commissioner hearing in this case, a yellow t-shirt bearing a B&K logo was entered into evidence. This particular t-shirt was actually worn by Littleton during his employment with B&K. (Hr. Tr. 26: 4- 27: 5). Littleton believed he was required to wear the shirts provided by B&K Services, Inc. (Hr. Tr. 108: 8-11). Witnesses for B&K testified the shirts were simply meant to satisfy OSHA safety coloring requirements and the employees were not specifically required to wear shirts with a B&K logo. (126: 4-14). Even if not an express requirement, there is no doubt that B&K derived a marketing benefit from the shirts, and such was admitted by Maurice DeArmond at the hearing. (Hr. Tr. 154: 8-21). If Littleton were, in fact, his own independent contractor, it would make more sense for him to have his own shirts with his own logo, or no logo at all.

Similar to the Claimant in Ramirez, Littleton only worked for B&K at the time of his injury. Further evidence of B&K's control over Littleton is Kerry DeArmond's testimony that, throughout the 10-12 years of his relationship with B&K, he only remembers two other HVAC companies where Littleton possibly worked. (Hr. Tr. 163:25-164:1). While Littleton admits he worked for Collins Heating & Air and Bentley's Heating & Air in the past, Littleton testified his employment with Bentley's was during an approximately 6-month period of time. (Hr. Tr. 97 8-14). Maurice DeArmond even acknowledged that over the ten-plus years of their relationship, Littleton did most of his work for B&K. Littleton further described he did not work for other companies because of Kerry DeArmond's strict policy that B&K Services, Inc. employees were not to "moonlight" for other HVAC companies. (Hr. Tr. 53:21-23). Kerry DeArmond told Littleton, "[y]ou'd better not let us catch us doing work for someone else in this van." (DeArmond Dep. 78:6-7, March 30, 2021). While Littleton does not dispute he worked for possibly two other HVAC companies over his long relationship with B&K, he did not work concurrently for anyone else while employed with B&K. (Hr. Tr. 66:17-20). When he did go to work for Bentley's Heating & Air, for example, he did so as their direct employee. (Hr. Tr. 97: 14-17).

While working for B&K, Littleton would have to send progress photos to Respondent for its review through a phone application furnished by Respondent. (Hr. Tr. 48: 1-6). Littleton would report to B&K's office every morning, and Kerry DeArmond would direct the work Littleton was to perform at each jobsite. (Hr. Tr. 38: 1-15). Kerry DeArmond even sent Littleton to heating and air classes. (Hr. Tr. 20: 8-9). When Littleton was assigned jobs out of state, B&K booked and paid for hotel rooms without Littleton's involvement (Hr. Tr. 33: 8-20). Over the ten-plus years Littleton worked for B&K, he considered himself its direct employee. (Hr. Tr. 24: 18-21). If Kerry DeArmond told Littleton to be there, Littleton complied. (Hr. Tr. 39: 15-22). Littleton testified he

had to ask Kerry DeArmond's permission to acquire a helper on a job (Hr. Tr. 52: 11-21). Littleton did not bid for any work he did for B&K, including the job on which he was working at the time he was injured. (Hr. Tr. 124: 8-10). Kerry DeArmond would give Littleton a job assignment and dictate what the job would pay. (Hr. Tr. 39: 15-17). While Kerry DeArmond testified, "B&K worked with other subcontractors similar to Littleton," no testimony was offered that Littleton ever competitively bid against any other subcontractors for jobs. (Hr. Tr. 118-119: 24-6).

Littleton acknowledges there is some documentation in the record supporting a contractor relationship, such as Littleton's Form 1099s and the "Subcontractor Payment Request" Forms. However, there was never any written independent contractor agreement between Littleton and B&K. For that reason, close scrutiny of the 10-plus-year relationship, in its totality, is of paramount importance.

Perhaps the most telling evidence B&K had the right to control Littleton was their practice of docking Littleton's pay to account for his lack of Workers' Compensation coverage. Testimony in the record shows that over the years, B&K approached Littleton about obtaining coverage. Littleton repeatedly advised B&K that he could not afford such insurance. (Hr. Tr. 49:10-15). The record reflects that, because B&K considered Littleton to be one of the best pipe fitters in the area, it made a conscious decision to continue doing business with him despite his not having workers' Compensation insurance coverage. (Hr. Tr. 144: 12-22). At this point, B&K could have parted ways with Littleton. Instead, B&K began the practice of reducing Littleton's pay to cover any additional insurance premiums it was required to pay after its annual WC insurance policy audit. (Hr. Tr. 144:23-147:25). Littleton described that by having his pay reduced for "workers' comp", he therefore believed he was a covered employee. Littleton argues that by collecting what was, in effect, a premium, he became a covered employee under B&K's insurance policy. (Hr. Tr. 50:12-

25). B&K made the calculated decision that continuing to work with Littleton, an exceptional pipe fitter, was worth the risk of him later having an injury. Even after collecting funds from him to pay increased insurance costs, they now seek to deny him coverage under their Workers' Compensation. (Hr. Tr. 144: 12-22). Such practice is patently unfair.

B. Furnishing of Equipment

In Ramirez, the employer supplied the claimant with all of the building materials he used for roofing jobs. The Court found, "complete assumption of the material costs suggests the employer retained the right to direct how the materials were used and is direct evidence of control over Claimant." Ramirez, 433 S.C. 519, 860 S.E.2d 680 (Ct. App. 2021). Jeff Haraway testified that B&K supplied Littleton with the material to complete its jobs. (Haraway Dep. 28:24-25, 29:1-2, June 23, 2022). Evidence presented at the hearing also demonstrated that Littleton did not use his own funds to purchase materials and supplies necessary for the daily jobs. (Hr. Tr. 47: 10-15). Littleton would pick up materials for jobsites from places like Ferguson Plumbing and AAA Supply. (Haraway Dep. 38:14-23, June 23, 2022).

Additionally, Littleton regularly drove a B&K owned van and was not required to pay for taxes or insurance for the van. Littleton was even driving a B&K owned van on the date of injury. At the hearing, a photograph of Littleton's hand, one he sent via text to the B&K bookkeeper (Martha Lanham) on the day of the accident, showed a "Moon & Freeman" van in the background. (Hr. Tr. 29:2-4).[2] While Littleton acknowledges early on in his relationship with B&K, he did drive his personal truck to and from work sites, there came a time when he began regularly driving a B&K van (or a Moon & Freeman van). He also drove a company van when required to work out

[2] Moon and Freeman was another HVAC company acquired by B&K Services, Inc. As part of the acquisition, B&K Services, Inc. took ownership of its work vans.

of town. (Hr. Tr. 28:2-5). Interestingly, Littleton was rear-ended in 2019 while driving a B&K company van. (Hr. Tr. 158:4-7). This fact alone demonstrates he would have been driving a company van regularly for at least a year before this subject work injury.

C. Method of Payment

"When considering this prong, typically a court looks to whether the claimant was paid by the job or by the hour and how the claimant filed taxes." Lewis v. L.B. Dynasty, 411 S.C. 637 (2015). "Payment on a time basis is a strong indication of the status of employment, while payment on a completed project basis is indicative of independent contractor status." Shatto, 406 S.C. at 480 (quoting 3 Larson's Workers' Compensation Law §61.06).

In this case, the evidence shows Littleton was paid both on an hourly basis and a lump sum per project basis. (Hr. 105: 1-18). Many times, when he was not paid on a completed project basis, Littleton would submit his time via text message to Martha Lanham, the company's accountant, who would then issue him a direct deposit payment based on the hours submitted. (Hr. Tr. 43:3-25-44:1-10). On these occasions, Littleton would be paid $20/hour for his work. Id. Make no mistake; B&K determined both the method and the amount Littleton was paid. While Littleton was issued a Form 1099 for tax purposes, the issuance of a Form 1099 is not dispositive of an independent contractor relationship. Sellers v. Tech Services, 421 S.C. 30 (Ct. App. 2017).

Because there is evidence that B&K Services, Inc. paid Littleton both by the hour and by the job, Littleton contends this factor weighs neutral in the overall analysis.

D. Right to Fire

"The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under

which the contractor should have the legal right to complete the project." Shatto, 406 S.C. at 481 (quoting 3 Larson's Workers' Compensation Law § 61.08[1]).

Littleton believed he was DeArmond's employee and operated on the assumption that DeArmond could fire him at a moment's notice. (Hr. Tr. 41:12-14). Littleton would get paid upon his work passing inspection; In the event the work did not pass inspection, Littleton was required to fix the issues at B&K's directive. (DeArmond Dep. 27:23-25, 28:1-4, March 30, 2021). B&K never had any discussion with Littleton about his right to complete work should their relationship end.

II. Other Important Information

Several other factors weigh in favor of finding an employer/employee relationship existed between B&K's and Littleton. First, Littleton was not licensed as an HVAC contractor, and any work he did for B&K was by and through B&K's contractor's license. (Hr. Tr. 22: 15-17). For this reason, B&K had a responsibility to the State of South Carolina to supervise its work. Without his own license, Littleton could not operate as an independent HVAC contractor. He relied on B&K's contractor's license.

Furthermore, B&K held Littleton out as its employee. Testimony at the hearing showed B&K did considerable work for Walmart over the years. Per Walmart's policy, its contractors are not allowed to hire subcontractors to work on their projects. (Hr. Tr. 36: 1-4). As such, B&K required Littleton to complete an I-9 "Employment Eligibility Verification" documenting he was a direct employee of B&K and not an independent subcontractor. At the hearing, an I-9 dated March 9, 2020, completed by Littleton and signed by Martha Lanham as accountant for B&K, was submitted into evidence. Under penalty of perjury, by signing the I-9, Lanham asserted that Littleton was a direct employee of B&K. (Hr. Tr. 152:3-8).

CONCLUSION

"South Carolina's policy is to resolve jurisdictional doubts in favor of inclusion of employers and employees under the Workers' Compensation Act. Spivey v. D.G. Constr. Co. 321, S.C. 19, 21-22 (Ct. App. 1996) (emphasis added). "We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and restrictions are strictly construed." Lewis v. L.B. Dynasty, 411 S.C. 637, 641 (2015), citing James v. Anne's Inc., 390 S.C. 188, 198 (2010).

Based upon the foregoing, Appellant respectfully requests this Court do the following:

1. Reverse the Commission's ruling that Appellant was not a direct employee of B&K Services, Inc. pursuant to the four-factor right of control test and thereby covered by Accident Fund Insurance Company's workers' compensation insurance policy, entitling Appellant to full protection on the South Carolina Workers' Compensation Act; and
2. Remand the case to the Commission for consideration and determination of the Appellant's average weekly wage and compensation rate..

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