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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
South Carolina Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2024-000294

John G. Littleton, ... Claimant/Appellant,

vs.

B & K Services, Inc., Employer,
and Accident Fund Insurance Company of America, Carrier.......................... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

I. Did the South Carolina Workers' Compensation Commission correctly hold the claimant was not a covered employee at the time of his accident and was, therefore, excluded from coverage under the South Carolina Workers' Compensation Act?

STATEMENT OF THE CASE

Appellant John Littleton ("Claimant") filed this workers' compensation case following an injury he sustained on December 10, 2020, which he alleged arose out of and occurred in the course and scope of his employment with B&K Services, Inc. ("B&K"). On January 11, 2021, he filed a Request for Hearing alleging he "sliced hand on gas piping" and seeking medical treatment, as well as temporary disability benefits. On February 9, 2021, Respondents filed an Employer's Answer to Request for Hearing, denying Claimant was a covered employee at the time of his accident as there was no employer-employee relationship and disputing he was entitled to any benefits under the South Carolina Workers' Compensation Act ("Act") due to his status as an excluded independent contractor. A hearing was set before the South Carolina Workers' Compensation Commission but the parties agreed to cancel the pending hearing pursuant to a mutual Consent Order to allow time for additional discovery.

The case proceeded to a hearing on the merits on May 24, 2023, where Claimant contended he viewed himself as a direct employee of B&K at the time of the accident and for the entire 12 years he had performed services for them. (McCaskill Order, pp. 4-6). Claimant argued he was an employee based on B&K's exercise of control over the manner and details of his work, their furnishing of tools and equipment including the B&K t-shirt he was wearing at the time of his accident, his occasional payment on a time versus completed project basis, and his belief he could be fired by B&K. (*Id.*).

Respondents countered under the four-factor test prescribed by *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 686 S.E.2d 700 (2009), B&K did not exercise or have the right to exercise sufficient control over Claimant in the performance of his work to establish an employer-employee relationship. (McCaskill Order, pp. 6-10). Respondents argued the totality of the conduct of the parties clearly evidenced an intent for Claimant to operate as an independent subcontractor for B&K as the undisputed evidence established Claimant hired, fired and paid his own employees, one of whom was working for him on the date of accident; he acknowledged and admitted he was a subcontractor; he was paid based on a contractual amount consistent with the contract B&K had with their customers pursuant to a 1099; he had obtained workers' compensation insurance for himself previously; and B&K did not have the right to fire him. Given Claimant was himself an employer at the time of his accident, Respondents argued it was inconceivable that he could have believed he was an employee of B&K, as he claimed. (*Id.*).

Based on the evidence presented at the hearing, the Hearing Commissioner issued his Decision and Order on May 5, 2025, finding Claimant was a sole proprietor at the time of the accident who was automatically excluded from coverage pursuant to S.C. Code Ann. § 42-1-130. (McCaskill Order, p. 34, ¶¶ 22-23). The Hearing Commissioner analyzed the four-part test for determining whether Claimant was a statutory employee of B&K and having weighed the totality of the evidence, held all four factors weighed in favor of an independent contractor status. (McCaskill Order, pp. 30-36, ¶¶ 7-24). The Hearing Commissioner reasoned that, after weighing the totality of the evidence, including testimony of the claimant and multiple witnesses, Claimant was treated as an independent contractor of B&K based on his hiring/firing of his own employees, freedom to choose and dictate his own schedule, B&K's lack of control over details and manner of claimant's work, claimant's signature on Subcontractor Payment Requests to secure payment from B&K, and evidence that multiple managers and owners at B&K testified they had discussed with Claimant multiple times over the years the nature of his agreement with B&K to operate as a subcontractor. (*Id.*). The Hearing Commissioner found the parties conduct comported with that of an independent contractor, Claimant consented to and acknowledged he was an independent contractor, he worked for other businesses and dictated his own schedule, was paid based on completion of project basis primarily and on a 1099, and B&K had no right to fire the claimant. (*Id.*).

Moreover, the Hearing Commissioner found Claimant was a sole proprietor, who is automatically excluded from coverage pursuant to S.C. Code Ann. § 42-1-130, and there was no evidence he elected to opt in to coverage as required under this section of the statute. (McCaskill Order, pp. 35-36, ¶¶ 22-26). Accordingly, the Hearing Commissioner held the Commission does not have jurisdiction over the claim and Claimant is not entitled to any benefits under the Act. (*Id.*).

Thereafter, Claimant filed his Request for Commission Review challenging the Hearing Commissioner's finding that Claimant had not met his burden of proving he was a covered employee of B&K at the time of his accident. (Form 30). After the parties submitted their appellate briefs to the Full Commission, a hearing on Claimant's appeal proceeded on November 18, 2025. The Appellate Panel of the South Carolina Workers' Compensation Commission filed its Appellate Panel Decision and Order on December 22, 2025, affirming the Hearing Commissioner's Decision and Order nearly verbatim as to the factual findings and legal conclusions. (Appellate Panel Order, pp. 18-27). Claimant then timely filed his Notice of Appeal on January 16, 2026. (Notice of Appeal).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); *see Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under this scope of review, "[t]he final determination of witness credibility and the weight assigned to the evidence is reserved to the [A]ppellate [P]anel." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008); *see also Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (recognizing the Appellate Panel finds facts, evaluates the credibility of witnesses, and assigns weight to the evidence). However, when reviewing jurisdictional issues, an appellate court evaluates the record as a whole and "resolves the issue by determining whether the preponderance of evidence supports inclusion under the Act." *Harding v. Plumley*, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998) (citing *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45 443 S.E.2d 803, 804 (1994). While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. *Hernandez -Zuniga v. Tickle*, 374 S.C. 235, 243-44, 647 S.E. 2d 691, 695 (Ct. App. 2007). Our supreme court has confirmed the broader scope of appellate review in cases involving jurisdictional issues "does not require [the] [c]ourt to ignore the findings of the Commission, which was in a superior position to evaluate witness credibility." *Sellers v. Tech Service, Inc.*, 421 S.C. 30, 36, 803 S.E.2d 731, 734 (2017) (citing *Paschal v. Price*, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011).

STATEMENT OF THE FACTS

B&K Services is a family-owned residential and commercial provider of HVAC services, located in Greenville, South Carolina. (Hearing Tr. 114:17-25). They had approximately 35-40 employees at the time of the claimant's accident, and they also utilized multiple subcontractors to meet contractual obligations to their customers, including Claimant. (Hearing Tr. 118:21-119:4).

Claimant disputes he was a subcontractor and alleges he was an employee of B&K Services for the entirety of his 10+ year relationship with them. However, the record establishes the claimant did not operate under the control or authority of B&K and that he repeatedly acknowledged his status as a subcontractor. Although Claimant testified under oath he never procured a workers' compensation policy while working with B&K, he in fact secured a policy for 2014 and 2015 and submitted a Certificate of Insurance to B&K listing them as the certificate holder. (Hearing Tr. 73:8-16; Claimant's 2014/2015 Certificate of Insurance). According to the Certificate of Insurance produced to B&K, Claimant excluded himself from coverage. (*Id.*).

Over the years Claimant had conversations with project manager Jeff Harraway ("Jeff"), comptroller Randy Webb ("Randy"), president Maurice DeArmond ("Maurice"), and owner Kerry DeArmond ("Kerry") regarding his status as a subcontractor. For example, he told Jeff on multiple occasions he was a subcontractor and it did not matter what time he reported to a jobsite or how long it took him to complete a project. (Harraway Dep. Tr. 22:21-23:12, 56:1-57:23). Additionally, Randy testified he had multiple conversations with Claimant regarding the need to procure workers' compensation coverage for himself and his employees, consistently reminding Claimant he had no coverage under B&K's policy as a subcontractor, after he let his prior policy lapse. (Webb Dep. Tr. 49:18-50:7).

While Claimant claims he never viewed himself as a subcontractor, Respondents impeached this testimony with a recorded statement from Geico wherein he stated he was working for three (3) different HVAC companies as a "self-employed" contractor. (Hearing Tr. 78:22-25, 80:2-5). He went on to state, "I've been a subcontractor for about 20 years." (Geico Statement). Claimant also admitted at the hearing he and Kerry discussed specifically that he was an independent contractor. (Hearing Tr. 65:14-15).

Additionally, the record confirms the claimant was not working exclusively for B&K and he was free to work for other businesses, which was not allowed for employees of B&K. (Hearing Tr. p. 118: 1-3). While B&K had a strict policy against employees "moonlighting" as it presents a conflict of interest with the company, Kerry testified they did not exercise this control over their subcontractors as they were free to work when they wanted. (Hearing Tr. 117:10-25). Importantly, Jeff, Randy, Martha, Maurice and Kerry all testified the claimant performed HVAC outside of B&K and concurrently with his work at B&K. (Webb Dep. Tr. 11:18-13:1; Harraway Dep. Tr. 18:11-15; Lanham Dep. 48:15-20,50:3-24).

At the time of this accident, B&K had subcontracted with Claimant to provide gas piping for a residential home being built by McCreight Builders, B&K's customer. (Hearing Tr. 57:2; McCreight Subcontractor Payment Request and Detail). The total contract between B&K and Claimant was $2,000.00, for which he was paid various draws based on the percentage of completion throughout the job. (McCreight Subcontractor Payment Request and Detail). Claimant quit working with B&K in December 2020, a couple weeks after his accident to finish up the McCreight project, but the record shows B&K paid him the final draw for the McCreight project on January 7, 2021, pursuant to the terms of their agreed upon contract. (McCreight Subcontractor Payment Request and Detail).

Claimant was not working with any B&K employees at the time of his accident. (Littleton Dep. Tr. 38:22-39:7). The only other person working with him was his employee, Michael Harrison. (*Id.*). Claimant acknowledged he hired and fired his own employees who performed services with him for B&K but under the complete direction of Claimant himself. (Hearing Tr. 67:11-23). In fact, he fired one of his employees prior to his December 2020 accident, due to "personal issues" he had with his employee. (Claimant's Depo. Tr. 41:5-18). Claimant also admitted he did not seek prior approval from anyone at B&K when he fired his employees. (Hearing Tr. 101:19-22). The employees he hired worked for him on a full-time basis and he admitted that he paid them directly himself – not B&K. (Hearing Tr. 68:18-69:5, 71:24-72:9). In fact, during the claimant's deposition, he specifically testified he personally "paid everyone that has ever worked for me." (Claimant's Depo. Tr. 40:2-5).

Kerry testified at the hearing and confirmed he, nor anyone at B&K provided approval for or had any oversight over any of the employees hired Claimant, as Claimant was responsible for hiring, supervising/managing, and firing his own employees. (Hearing Tr. 125:4-18). This was also confirmed by various other witnesses, who confirmed B&K had no oversight over Claimant's employees or their pay structure. (Webb Dep. Tr. 51:24-

52:12; Harraway Dep. Tr. 56:1-18; Lanham Dep. 43:1-10). Importantly, unlike Claimant, B&K's employees did not have the ability to hire their own helpers to assist with completing their work. (Hearing Tr. 125:19-21). Kerry went on to testify that if any B&K employee were to hire someone else to work with them, they would be fired as that is not allowed. (Hearing Tr. 168:6-12).

While Claimant asserted he was subject to the control of B&K and had no control over the work he did for B&K, the overwhelming evidence establishes he had complete autonomy to accept or deny any offered work, he set his own schedule, he worked without oversight, negotiated pay rates, and dictated and supervised his own crew without oversight from B&K. (Hearing Tr. 121:4-123:8; Littleton Dep. Tr. 56:2-3; Harraway Dep. Tr. 22:21-23:12, 56:1-57:23; Webb Depo. Tr., 53:3-4). Multiple witnesses confirmed that unlike B&K employees who reported to the shop at 8:00 AM each day, Claimant did not report to work every day and which he came to the shop to review drawings or discuss jobs, he did so of his own accord on his own schedule. (Hearing Tr. 116:15-25; Harraway Dep. Tr. 16:2-18:15, 58:5-59:21; Webb Depo. Tr. 53:3-4). The claimant was not only free to choose to accept or decline jobs with B&K, but he also exercised that right. (Harraway Dep. Tr. 25:16-23).

Claimant was not required to wear B&K uniforms or apparel, despite his testimony to the contrary. Rather, he was required by OSHA to wear either a high visibility vest or shirt. (Hearing Tr. 127:8-13, 173:13-174:4). Claimant was free to choose what he wanted to wear as long as he satisfied OSHA's requirements. (*Id.*). According to the claimant's testimony, at times he wore a high visibility shirt with a B&K logo on it but at other times he wore a regular shirt with no logo on it. (Hearing Tr. 26:8-27:1). Whereas B&K

employees were obligated to wear a B&K uniform to work. (Hearing Tr. 126:21-127:7, 174:5-16).

Claimant alleges he was required to use a phone application called Company Cam furnished by B&K to monitor and supervise his work; however, this was contradicted by testimony of Jeff Harraway ("Jeff") and Martha Lanham ("Martha"), who confirmed Claimant was not required to use Company Cam. (Harraway Dep. Tr. 49:1-50:7; Lanham Dep. 41:16-19).

Method of pay: Claimant was paid on a completed project basis and confirmed that if he did not complete the project, he would not get paid. (Littleton Dep. Tr. 57:8-23). On March 12, 2020, Claimant completed and signed a 1099. (1099).

ARGUMENT

I. The South Carolina Workers' Compensation Commission correctly held Claimant was an independent contractor at the time of his accident and was excluded from coverage under the South Carolina Workers' Compensation Act.

The appellant bears the burden of showing the Commission's holding that he was an excluded independent contractor at the time of the accident is against the preponderance of the evidence. *See Hernandez -Zuniga*, 374 S.C. at 244, 647 S.E.2d at 696. While workers' compensation laws are to be construed liberally in favor of coverage, our courts have consistently held "[t]hat principle, however, does not go so far as to justify an analytical framework that preordains the result." *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300-01, 676 S.E.2d 700, 702 (2009). In this case, Claimant has failed to establish that the parties' conduct established an employer-employee relationship, as the preponderance of the evidence shows he had significant autonomy in the method and manner of his work with B&K and they did not have the right or exercise of control over him sufficient to create an employment relationship as contemplated under the Act.

Under well settled law, "the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work." *Id.* at 299, 676 S.E.2d at 702. In evaluating the common law rubric of the right of control, "the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 481, 753 S.E.2d 416, 422 (2013) (citing *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702). Based on the totality of the evidence, Respondents assert the Hearing Commissioner and Appellate Panel correctly found Claimant was excluded from coverage, and Claimant has failed to meet his burden of proving the Appellate Panel's decision is against the preponderance of the evidence. However, Claimant's arguments appear to be supported almost exclusively by his own self-serving testimony, which is contradicted by multiple other witnesses. Respondents contend this falls short of his evidentiary burden, particularly in light of Claimant's testimony being impeached multiple times.

A. Direct Evidence of the Right or Exercise of Control

B&K did not control or have the authority to control and direct the particular work being done by Claimant. To satisfy the first factor, Claimant must establish by a preponderance of the evidence B&K "had the right and authority to control and direct the particular work" he was performing on their behalf. *See Sellers v. Tech Services, Inc.*, 421 S.C. 30, 39, 803 S.E.2d 731, 735 (2017). At the time of this accident, B&K had subcontracted with Claimant to provide gas piping for a residential home being built by McCreight Builders, B&K's customer. (Hearing Tr. 57:2). It is undisputed that Claimant was working with an employee he had hired when he was injured, whom he admitted he was employing on a full-time basis. He exclusively supervised and managed his employees and made the sole determination as to their pay.

Despite this, Claimant contends he was an employee of B&K, relying solely on *Ramirez v. May River Roofing, Inc.*, 433 S.C. 519, 860 S.E.2d 680 (Ct. App. 2021) to support their positions. However, *Ramirez* is distinguishable from the facts of this case for multiple reasons. While the claimant in *Ramirez* apparently had discretion to "enlist others if the job he was doing [for May River] was too big for him to handle," without any approval of May River, there is no indication the claimant in *Ramirez* consistently hired his own employees to work on a full-time basis for 40 hours a week like Claimant in this case. *Id*. at 527, 860 S.E.2d at 684. Moreover, the court relied on other factors which they held showed the employer directly controlled the claimant, including their requirement that the claimant wore branded shirts and display a magnet on the side of his truck with their log. *Id*. at 528, 860 S.E.2d at 684. The employer required all "subcontractors" to wear their shirts while on jobsites. *Id*. Additionally, the court found compelling the exclusivity of Ramirez's relationship with May River to be particularly compelling, noting the claimant worked for them "continuously for roughly three years," and May River "ceaselessly provided Ramirez with all of his work throughout their relationship." *Id*. May River also admitted they preferred subcontractors such as the claimant to only accept jobs from them. *Id*.

Unlike *Ramirez*, the uncontroverted evidence in this case establishes Claimant was not required to wear a B&K shirt at all and he in fact admitted he wore his own regular shirt while performing services for them. Even though B&K offered high visibility shirts with their logo to subcontractors, this was distinctly different than uniforms their employees wore and, more importantly, Claimant was free to wear any high visibility shirt or vest he wanted, so long as it complied with OSHA's requirements. As confirmed in *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 302, 676 S.E.2d 700, 704 (2009), "requiring a worker to comply with the law is not evidence of control by the putative employer."

Additionally, while Claimant portrays his relationship with B&K as exclusive, multiple credible witnesses contradicted his testimony and confirmed Claimant performed work outside of B&K while concurrently working for B&K, and that he had the right to and did decline work if it conflicted with other work he had. The evidence showed Claimant worked for multiple other companies while also doing subcontract work for B&K. (Hearing Tr. pp. 123:23-124:5). Importantly, multiple witnesses confirmed B&K was aware Claimant performed work for others but continued to use him if Claimant found the terms of the project acceptable with his schedule and pay requirements. (Hearing Tr. pp. 122:18-123:6). There is absolutely no credible evidence in the record whatsoever that B&K forbade Claimant from working for other business or individuals. (Harraway Tr. p. 51). The evidence in this case also establishes B&K did not oversee the claimant in the manner or method of his work and the claimant would remind them of that if they asked too many details concerning timeline of completion of a project – the project manager had no recourse in those situations since Claimant was not an employee subject to their control and authority.

Claimant also alludes to the lack of evidence in the record that he ever "competitively bid against any other subcontractors for jobs," to support their contention that he was merely an employee disguised as a subcontractor. (Appellant's Initial Brief, p. 24). However, Respondents would be remiss if they failed to point out Claimant has the burden of proving the facts of his case and there is no direct evidence in the record suggesting he did or did not competitively bid against other subcontractors, so this argument is not supported by the evidence.

Claimant also relies heavily on B&K's decision to offer Claimant lower contract prices due to his failure to secure workers' compensation coverage for himself and his employees, suggesting this is the most telling evidence of B&K's control. Respondents contend, however, this is simply a business decision made based entirely on increased cost of services provided by Claimant as an uninsured subcontractor, which is supported by the testimonial evidence, as well as documentation submitted to B&K's workers' compensation carrier. (Webb Dep. Tr. 22, 24-25, 49, 57; Lanham Dep. Tr. 26-27; B&K's Insurance Audit Documentation). There was no set percentage deducted from Claimant's pay and every witness was clear this penalty was in no way related to workers' compensation premiums. Randy Webb testified he spoke with Claimant many times trying to convince him to secure workers' compensation coverage and he "made it clear to John that he didn't – that the reduction in his pay did not represent any kind of payment for insurance. . . . [and] [h]e had no coverage through [B&K]." (Webb Dep. Tr. 49:18-50:6). Randy encouraged the claimant to secure coverage so he and his employees would be covered. (*Id.*). The only evidence in the record on this issue is that this was a penalty imposed by B&K's workers' compensation carrier for utilizing an uninsured subcontractor, which was passed on to Claimant as the cost of doing business with the uninsured subcontractor was higher than those subcontractors who were insured. (Hearing Tr. p. 50:2-17; Webb Dep. Tr. 24:11-25:3). There is absolutely no evidence to suggest B&K ever gave the impression to Claimant he was covered under their workers' compensation policy and multiple witnesses confirmed they discussed with him the need to secure a policy, which is consistent with his status as an independent contractor.

The parties conduct over the course of their 10+ year working relationship, clearly evidences an intent for Claimant to operate as an independent subcontractor for B&K. Claimant suggests B&K held him out as an employee but the only evidence they point to for support of this position is B&K's completion of an I-9 Verification in March 2020. They erroneously assert multiple times B&K held Claimant out as an employee and under penalty of perjury asserted Claimant was a direct employee of B&K, simply by completing an I-9 Verification Form. (Appellant's Initial Brief, p. 17). However, multiple witnesses, including Martha, Jeff, and Kerry, testified this was required pursuant to their contract with Wal-Mart's general contractor for any employees or subcontractors working on their projects, regardless of status, or for any subcontractor being paid with their own personal social security number rather than a business EIN. (Hearing Tr. p.133:17-134:5; Lanham Dep. Tr. 19; Harraway Dep. Tr. 45). The I-9 itself certainly does not reference "direct employees" or that by signing the document the employer is asserting the individual is a direct employee. (I-9 Verification). Rather, the document states the signer, in this case Martha Lanham, certifies under penalty of perjury that she personally reviewed the referenced identification information, believed it to be genuine and belonging to the named employee, and to her knowledge Claimant was legally able to work in the United States. (*Id.*). B&K provided consistent testimony as to the purpose of them completing an I-9 Verification for Claimant, which was based on their contractual obligations to the General Contractor for the Wal-Mart projects on which they were working and Claimant was a subcontractor. (Hearing Tr. p.133:17-134:5). To insinuate anything further from this form is pure speculation.

The totality of the evidence on the first factor concerning control weighs in favor of an independent contractor status, particularly in light of the lack of exclusivity or control over Claimant's appearance while working, and the fact he consented to and conducted himself in a manner consistent with a true independent contractor.

B. Furnishing of Equipment

The preponderance of the evidence concerning furnishing of equipment also weighs in favor of an independent contractor status. While working with B&K, Claimant admitted he furnished his own basic hand tools inclusive of "drills and snips," as well as his own small tools. (Hearing Tr. 51:1-20). Kerry also confirmed Claimant provided his own hand tools and equipment, such as ladders (Hearing Tr. 129-130:18-9). However, as is customary in the HVAC industry, B&K provided larger machinery for all of their subcontractors to use, such as expensive commercial equipment like a pipe threading machine and scissor lifts. *Id.* There is no evidence in the record to refute B&K's position that contractors provide large equipment to subcontractors as a customary practice in the HVAC industry and, therefore, it should be considered to weigh in favor of an independent contractor status.

Regarding the van Claimant was using at the time of his accident, there is conflicting evidence as to the extent Claimant was allowed to use a B&K owned vehicle. However, what is not in dispute, is that the vehicle he was using on the date of accident did not bear a B&K logo, but rather a Moon & Freeman logo. (Hearing Tr. 94:25-95:3). Kerry testified he allowed Claimant to borrow the van on a short-term basis when the frame broke on Claimant's personal vehicle three months prior, which left him without any means of transportation. (Hearing Tr. 127:14-22). Other witnesses confirmed Claimant only utilized B&K's vehicles on a short term basis and both Harraway and Kerry testified he most often used his own vehicle, which Harraway described as a green truck. (Harraway Dep. Tr. 41). When Claimant's vehicle was inoperable, Kerry let him borrow a van with the Moon & Freeman logo on it with the understanding Claimant would be responsible for gas, tires, and vehicle maintenance while using the van. (Hearing Tr. 127:22-128:2). B&K employees, however, did not have to pay for tires, fuel or maintenance on the B&K trucks/vans they used to complete their work. (Hearing Tr. 129:3-10). Kerry acknowledged he allowed Claimant to borrow a truck or van out of his own benevolence so he could continue to work, as finding good subcontractors was difficult. (Hearing Tr. p. 157:8-21).

Claimant relies on *Ramirez* to suggest that anytime a business supplies materials for a project, they have retained the right to direct how the materials are used and control the work. However, what *Ramirez* did not address was how the material costs were paid and in this particular instance, the materials being provided to Claimant were being paid by B&K's customers as part of their contract – these were pass through costs that are customarily included in an HVAC contractor's contract with their clients. Jeff, Maurice, Lanham, Kerry and Randy all testified that materials needed for a project were provided as part of a Purchase Order which was billed to the particular job as bid within the contract. (Webb Dep. Tr. 55). If Claimant purchased tools for his use, his pay would be deducted to reimburse B&K for the same. (Lanham Dep. Tr. 20:10-23). Importantly, B&K employees were given access to charge tools and materials to their company issued credit cards but Claimant was never provided a card – he was required to obtain pre-approved purchase orders instead.

Further, unlike in *Ramirez*, B&K did not mandate Claimant's attire or marketing materials, and only supplied materials which were already bid as part of B&K's contract with their clients, as is customary within the HVAC industry. Considering Claimant was responsible for maintaining any company vehicles he borrowed on a short-term basis from B&K, he was not required to wear B&K uniforms, and he supplied all customary tools needed to perform his work, the Hearing Commissioner correctly found the preponderance of the evidence weighed in favor of independent contractor status.

C. Method of Payment

The parties all agree and acknowledge the claimant was paid on a 1099 basis at all times for work performed by B&K and while not dispositive, this payment arrangement is indicative of an independent contractor status. *See Sellers v. Tech Service, Inc.*, 421 S.C. 30, 42, 803 S.E.2d 731,737). Additionally, the evidence confirms Claimant completed a W-9 on March 12, 2020, which is the Form used for payment to independent subcontractors. (W9). Claimant was never paid for any work with B&K pursuant to a W2 and his SCDEW records show there was no employment income reported for him from any employers in the years leading up to his accident. (SCDEW Records). Accordingly, while Claimant testified he worked for several other HVAC companies as an employee, there is simply no evidence whatsoever to corroborate this testimony. (Hearing Tr. 97:8-98:5). Rather, all evidence suggests Claimant has always been paid consistent with an independent contractor with B&K and any other work he has performed.

Our courts have held that "payment on a time basis is a strong indication of the status of employment," while "[p]ayment on a completed project basis is indicative of independent contractor status." *Sellers* at 42, S.E.2d at 738. At the time of this accident, B&K had subcontracted with the claimant to provide gas piping for a residential home being built by McCreight Builders, B&K's customer. (Hearing Tr. 57:2; McCreight Subcontractor Payment Request and Detail). The total contract between B&K and Claimant was $2,000.00, for which he was paid various draws based on the percentage of completion throughout the job. (McCreight Subcontractor Payment Request and Detail). Following termination of his agreement with B&K two weeks after his accident in December 2020, Claimant was paid the remaining draws on his contract for the McCreight Project by B&K, following completion of the same. (*Id.*). This clearly evidences B&K's compliance with the terms of their contract with Claimant. If Claimant were an employee, as he claims, B&K would have no ongoing liability under the contract once their relationship terminated around December 24, 2020.

With regard to Claimant's pay arrangement compared to that of B&K's employees, Kerry testified Claimant was paid a contract amount for each job, while employees were paid by the hour with benefits. (Hearing Tr. p. 119:15-20). Accordingly, pursuant to the framework outlined by *Sellers*, this is an indication of an independent contractor status. The majority of work Claimant performed was done on a completed project basis, and

Claimant would submit draw requests pursuant to Subcontractor Payment Requests forms depending upon the percentage of the contract he had completed. (Hearing Tr. pp. 138:9-139:21; Subcontract Payment Request Forms). Claimant negotiated his pay on the front end of the project and was free to decline work, and did at times, if the pay was not sufficient. (Lanham Dep. Tr. 48). When B&K was awarded a contract, the project manager would contact Claimant and/or other subcontractors to discuss the scope of work they had to subcontract out, including the pay based upon B&K's contract with their customers, to see if the subcontractor wanted to accept or decline the work based on the contract amount. (Harraway Dep. Tr. 54:14-55:5).

At times, B&K contracted with customers on a time and material basis and there were instances where Claimant contracted with B&K to be paid similarly. Kerry noted he worked with Claimant to come up with a fixed rate for when he was working on a project on a time and materials basis when B&K's contract with their customers was also on a time and materials basis. (Hearing Tr. 119:15-120:11). Claimant and B&K both acknowledge performing some HVAC contract work on a time and materials basis is an industry standard based on the specifics of a particular job. (*Id.*, 95:19-96:2). For those jobs, Claimant and B&K agreed upon $35.00 per hour, regardless of how many employees the claimant had hired to perform the work with him, out of which he would pay all his expenses and salaries. (Hearing Tr. 119:21-120:11).

Regardless of how Claimant was paid, either completed job basis or time and materials basis, he was responsible for his expenses, including fuel and lodging when working out of town, compensation for his employees, vehicle maintenance, and gas for his vehicles. (Hearing Tr. 142:15-143:3). Given the evidence establishing Claimant's payments were made pursuant to his submission to B&K of Subcontractor pay requests, he was paid pursuant to a 1099, he was responsible for all work-related expenses out of his pay, he negotiated his pay for various contracts, and there is no evidence he was ever a W2 employee for any business, Respondents contend this factor weighs heavily in favor of an independent contractor status.

D. Right to Fire

The right to unilaterally and immediately end the relationship without recourse is the hallmark of an employment relationship. *Ramirez v. May River Roofing, Inc.*, 433 S.C. 519, 530, 860 S.E.2d 680, 686 (Ct. App. 2021). However, an independent contractor typically "has the right to complete the job unless the parties' agreement provides otherwise." *Id.* In *Ramirez*, nothing in the record pointed decisively either way, but that is not true of the case at hand.

The facts in this case clearly show B&K did not have the right to fire Claimant. While Claimant alleges he could have been fired by B&K, there is no evidence he was ever in fact fired.[1] When asked directly at the hearing whether he was ever fired from B&K, Claimant testified he was never fired. (Hearing Tr. 41:15-018). Beyond that, the overwhelming evidence establishes B&K only had the right to choose not to engage with the claimant for future projects, as they could not "fire" him from a job he had already begun to undertake as a subcontractor for B&K. At the hearing, Kerry confirmed he did not have the right to fire the claimant since he was a subcontractor; rather, he had the ability to stop contracting with him. (Hearing Tr. p. 130:10-15). This was reiterated by Randy

[1] The claimant testified he did not have the autonomy to accept or deny work offered to him by B&K and asserted that Kerry informed him "several times" he would be fired if he denied work. (Hearing Tr. p. 88:9-21).

Webb, who testified they never fired Claimant, as they could not since he was a subcontractor. (Webb Dep. Tr. 38:6-15). He also confirmed there was never an instance where Kerry fired Claimant, which was confirmed by Jeff Harraway. (Harraway Dep. Tr. 46).

B&K's inability to fire the claimant which is clearly corroborated by the McCreight Subcontractor Payment Request and Detail evidence which shows B&K paid the claimant the remaining contractual payments for the McCreight Project, the project on which he was injured and continued to work and complete following his accident before stopping work with B&K around December 24, 2020. The evidence in this case shows that on January 7, 2021, which was approximately two weeks after he stopped doing work for B&K, he was paid the remainder of his $2,000.00 contract. Accordingly, Respondents contend the Hearing Commissioner correctly found this factor supports a finding of independent contractor status.

E. Commission's Determination of Credibility

While Respondents acknowledge the court may take its own view of the preponderance of the evidence when reviewing jurisdictional issues, as stated by the supreme court in *Sellers*, the Commission was in a superior position to evaluate witness credibility, having had the opportunity to personally observe and evaluate multiple witnesses at the time of the hearing. *See Sellers v. Tech Service, Inc.*, 421 S.C. 30, 36, 803 S.E.2d 731, 734 (2017). That is of particular importance in this case as there are significant inconsistencies between Claimant's testimony when compared to the predominantly consistent testimony of multiple other witnesses both at the hearing and pursuant to depositions. Beyond that, Claimant's testimony at the hearing was contradicted by his own earlier deposition testimony, as well as other extrinsic evidence in the record, on multiple occasions.[2] The Hearing Commissioner was best positioned to assess witness credibility and made factual findings to support their conclusion based on that assessment in view of the evidence as a whole.[3] Accordingly, Respondents respectfully request the court give deference to the findings of the Commission on issues pertaining to weight of testimonial evidence. *See Sellers v. Tech Service, Inc.*, 421 S.C. 30, 36, 803 S.E.2d 731, 734 (2017) (citing *Paschal v. Price*, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011).

II. The South Carolina Workers' Compensation Commission correctly held Claimant was a sole proprietor excluded under S.C. Code Ann. § 42-1-130 and he had not elected to be covered under the Act.

As a general rule, independent contractors or subcontractors are not included under the Workers' Compensation Act. *Marlow v. E.L. Jones & Son, Inc.,* 248 S.C. 568, 151 S.E.2d 747 (1966) (working partners are not employees and therefore not statutory employees); *McDowell v. Stilley Plywood,* 210 S.C. 173, 41 S.E.2d 872 (1947) (the Legislature did not intend to include independent contractors or subcontractors in the Workers' Compensation Act). However, our courts have recognized that S.C. Code Ann. § 42-1-130 creates a narrow exception by allowing an otherwise excluded independent contractor or sole proprietor to become an employee by opting into coverage. *Smith v.*

[2] Importantly, when asked directly by the Hearing Commissioner if he ever fired any of his own employees, Claimant testified, "I guess I could. I never fired nobody. But I guess I could." (Hearing Tr. p. 67:24-68:3). Claimant confirmed again, under oath, he had never fired anyone. (Hearing Tr. p. 68:14-17). However, during his earlier deposition, Claimant testified he hired and fired his own employees. (Littleton Dep. Tr. p. 40:2-18). At the hearing, Claimant denied ever having worked as a subcontractor for multiple businesses concurrently at any point in his career, claiming Kerry forbade him from working for anyone else while he was working for B&K. (Hearing Tr. pp. 53:19-25; 66:12-20). However, Claimant's testimony was impeached when a voice recording was played establishing that in 2012, when he allegedly believed himself to be an employee of B&K, he directly told a Geico adjuster that at the time he was working for three (3) different HVAC companies as a "self-employed" contractor. (Hearing Tr. pp. 78:22-25, 80:2-5).

[3] As outlined in Findings of Fact ¶¶ 10, 13, 14, 15, and 18, the Hearing Commissioner weighed the testimonial evidence and found the greater weight of the evidence favored findings consistent with an independent contractor status.

Squires Timber Co., 311 S.C. 321, 325, 428 S.E.2d 878, 880 (1993). In this case, however, the claimant's conduct is consistent with that of a sole proprietor but since there is no evidence he opted into coverage and, in fact, expressly opted out when he secured workers' compensation coverage in 2014 and 2015, the Hearing Commissioner correctly held the claimant was excluded from the Act under section 42-1-130.

III. Appellant's Brief improperly relies upon facts and evidence outside the Record on Appeal and any such references should be stricken from the record.

In their initial brief, Appellant's referenced deposition testimony of Kerry DeArmond, which was not submitted into evidence before the Commission. (Appellant's Initial Brief pp. 7, 13). Additionally, on page 5 of their brief in Statement of Facts, Appellant asserts B&K never had any discussions with Claimant about his right to complete work should their relationship end; however, Respondents are unable to locate any such evidence in the Record on Appeal. Accordingly, Respondents respectfully request all reference to evidence or facts outside the Record on Appeal be stricken and disregarded by the court pursuant to Rule 208(b)(1)(E).

CONCLUSION

For all the foregoing reasons, the Hearing Commissioner and Appellate Panel reached the correct conclusion in finding Claimant was excluded from coverage under S.C. Code Ann. § 42-1-130, and was not an employee of B&K at the time of his accident. Respondents therefore respectfully ask this Court to affirm the Commission.

Respectfully submitted,

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