

2007-CC-01778

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IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY

APPELLANT

VS.

CAUSE NO. 2007-CC-01778

KEVIN HARBIN D/B/A  
H & H ELECTRONICS

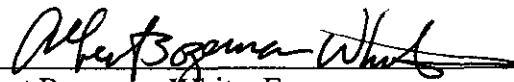
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, Appellant
2. Honorable Albert Bozeman White, Esq., Attorney for Appellant
3. A. E. (Gene) Harlow, Sr., Attorney for Appellee
4. Kevin Harbin, Appellee
5. Mr. Franklin Glasper, Claimant
4. Honorable W. Swan Yerger, Circuit Court Judge – Hinds County, Mississippi

This the 23<sup>rd</sup> day of April, 2008.

  
Albert Bozeman White, Esq.

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**APPELLEE**

**BRIEF OF APPELLANT  
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

**STATEMENT OF ISSUES**

1. Whether the July 11, 2003 decision of the Mississippi Department of Employment Security [hereinafter "MDES"] finding that Franklin Glasper was an employee of Kevin Harbin d/b/a H & H Electronics [hereinafter "Harbin" or "H & H Electronics"] under M.C.A. Section 71-5-11 I (14)(1972, as amended) was supported by substantial evidence; and thus, should have been affirmed by the Circuit Court?
2. Whether the Circuit Court erred by failing to affirm that the MDES' decision finding that Franklin Glasper was an employee of Harbin, pursuant to M.C.A. Section 71-5-11 I(14)(Rev. 1995); and should be reversed?
3. Whether pursuant to M.C.A. Section 71-5-11 I (14) (Rev. 1995), Harbin failed to meet its burden of proving that Franklin Glasper was an independent contractor?

4. Whether the Circuit Court acted arbitrarily and capriciously, and substituted its opinion for that of MDES, by reversing the MDES' decision finding that Franklin Glasper was an employee of Harbin, pursuant to M.C.A. Section 71-5-11 I(14)(Rev. 1995)?

### **STATEMENT OF THE CASE**

On July 30, 2002, Franklin Glasper filed an unemployment benefits claim with the Mississippi Employment Security Commission, now Mississippi Department of Employment Security. (R. Vol. 3, p. 1). The question of Mr. Glasper's eligibility to receive unemployment benefits proceeded pursuant to the provisions of M.C.A. Section 71-5-511 *et seq* (1972, as amended). During this investigation, Mr. Glasper's base period wages were investigated, since having sufficient base period wages is necessary to qualify for benefits. (R. Vol. 3, p. 2). In addition to other wages, Mr. Glasper reported wages with H & H Electronics, also known as New Age Electronics. (R. Vol. 3, p. 2-12, 16-17). However, H & H Electronics had not reported any wages for Mr. Glasper; or paid any employment taxes applicable to him.

As a result of Mr. Glasper's claim that he earned wages with, and was an employee of, H & H Electronics or New Age Electronics, the MDES Contributions & Status Department [hereinafter "Tax Department"] investigated whether an employer/employee relationship existed. (R. Vol. 3, p. 13, 16-17). A Field Tax Representative investigated by contacting a Kevin Harbin representative and Mr. Glasper. (R. Vol. 3, p. 20-28). Based upon this investigation, on October 21, 2002, the MDES Tax Department determined that Mr. Glasper was an employee of Kevin Harbin d/b/a H & H Electronics, pursuant to the provisions of M.C.A. Section 71-5-11 I (14) (1972, as amended). (R. Vol. 3, p. 30-31). The decision by the Tax Department was in pertinent part as follows, to-wit:

The information provided shows the claimant operated under the company's name while performing services for the company. The place of work was provided for claimant. Claimant had to adhere to a dress code while performing services for the company. The claimant had no investment in the company and did not stand to make a profit or suffer a loss. Either party could terminate services without liability. There existed an employer/employee relationship and the wages of claimant and all others in this class should be reported and taxes paid.

Kevin Harbin appealed this determination, pursuant to M.C.A. Section 71-5-355 (2)(b)(ix) (1972, as amended). (R. Vol. 3, p. 32-33).

A telephonic Hearing was noticed, re-noticed and subsequently conducted by Hearing Officer Timothy Rush on January 6, 2003. (R. Vol. 3, p. 54-68). Mr. Kevin Harbin, owner, testified and tendered exhibits into evidence; and was represented by Attorney Gene Harlow. The Department was represented by Jimmy Taylor, Field Tax Representative, who testified and tendered exhibits into evidence. Kevin Harbin also had one witness, Shane Brister, who did not testify. Franklin Glasper also participated, but his telephone connection was lost during the hearing; and he did not testify. (R. Vol. 3, p. 69-124).

After the hearing, on April 29, 2003, Mr. Rush, the Hearing Officer, held that Mr. Glasper and all others persons similarly situated were employees of Kevin Harbin. (R. Vol. 3, p. 125-128). The Hearing Officer's Fact Findings and Opinion were in pertinent part, as follows, to-wit:

FINDINGS OF FACT:

H & H Electronics is a television installation company owned and operated by Kevin Harbin since November 1, 2001. The employer installs tv satellite equipment for residential customers. The employer has a contract with other companies to install satellite systems purchased by a customer from the other company. The employer receives work orders from the companies concerning the installations. The work

orders contain information such as the customer's name, address, phone number, kind of system to be installed, and a time frame in which the customer prefers the installation. The employer considers all of the workers that install the satellite equipment to be independent contractors and not employees. There is one secretary that the employer considers an employee. The owner estimates he has five to six installers working for him at any given time. The workers provide their own basic tools to install the satellite equipment, which includes screwdrivers, drill, ladder, etc. The workers have no investment in the company and the company provides the materials, and supplies to be installed. The claimant was employed with this company from April 15, 2002, to June 12, 2002. The claimant was paid by the job depending on the number of satellite boxes installed for the customer at an average of \$50 per box and \$70 for two boxes. The customers do not pay the installers for installation. The employer requires that the installers follow guidelines established by the National Electrical Code to insure that the satellite systems are properly installed before the installers are paid. The company provides the work orders to the installers. The installers are only paid after the systems have been properly installed and verified by the work order bearing the installer's signature and a confirmation from the satellite system provider. If there is work that is not completed to the company's satisfaction, the installer is required to complete the work at the same cost agreed by the company before they are to be paid. The company did not provide training to the claimant but understood he had performed this type of work for another company prior to being employed with this business. The employer believed that the claimant was capable and competent to perform the work satisfactorily. The job duties that the claimant performed were an integral part of the employer's on going operation. The claimant and the employer could terminate services without liability to either party. The owner alleges the claimant completed and signed an independent contractual agreement but did not have a copy of the agreement. The claimant could not by-pass the company to receive his pay directly from the business that was paying the employer or directly from the customer. In order to do so, the claimant would have to complete an application of independent contractual agreement with the company that was selling the satellite equipment to the residents. The employer required that the installers have a million dollar liability insurance coverage in case they damaged the customer's property. However, the claimant was not required by the owner to provide proof of such coverage because he did not have the money to pay such a premium and the employer was going to work with him until he provided such coverage. The claimant never obtained this insurance because the claimant's job ended due to lack of work. The claimant is expected to be issued a 1099 for tax purposes . . . (emphasis added).

#### OPINION:

The hearing officer is of the opinion that the services provided by the claimant for H & H Electronics is that of an employee. The mere fact that the claimant might have



signed an independent contractual agreement does not in any way negate the direction and control that the employer had over the claimant in assigning him his work task and requiring that he adhere to strict guidelines in completing his work before he was compensated. The claimant did not have the freedom to go directly to the source from which the employer was receiving their work orders. The employer, not the residential customer, was paying the claimant a portion of the money that the employer received for installing the satellite equipment. The employer did provide the materials and supplies needed for to install the system. The claimant was subject to the control and direction of the employer in the way that the equipment was to be installed and the standards to which he was to adhere to. The claimant could not deviate from these standards without being liable to the employer. It is without dispute that the duties performed by the claimant were an integral part of the employer's dialer operations and services. The mere fact that the claimant may be issued a Form 1099 for tax purposes does not mean the claimant was not subject to this employer or under the conditions of master/servant relationship. The employer reserved the right to exercise control over the end result of the claimant's job performance by holding the claimant to standards accepted and used by the employer to install the satellite systems. The claimant could not deviate from these standards without recourse from this employer. Therefore, the Hearing Officer is of the opinion that there is a master/servant relationship between the company and the claimant and all other similar situated workers. The decision of the Chief of the Contributions and Status Department will be affirmed. (emphasis added).

#### DECISION:

Affirmed. The Hearing Officer finds and so holds that there existed an employer/employee relationship between the employer and the claimant and all other similar situated employees. Wages earned with this employer are covered wages and should be reported and taxes paid.

From that decision, Attorney Harlow timely appealed to the Full Commission, pursuant to 71-5-355(2) (b) (ix) (1972, as amended).<sup>1</sup> (R. Vol. 3, p. 129). This matter came on for hearing before the Commissioners on July 11, 2003. (R. Vol. 3, p. 131). Attorney Harlow submitted a Brief. (R. Vol. 3, p. 134-156). On July 11, 2003, the Full Commission found that an employer/employee relationship existed; and affirmed the Hearing Officer's decision. (R. Vol. 3, p. 159).

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<sup>1</sup> Prior to this agency, MDES, becoming a department of the executive branch of government, the MDES was a commission, *i.e.* the Mississippi Employment Security Commission, governed by three commissioners appointed by the governor. The Board of Review now performs the function of the former Full Commission in status appeals.

On or about August 20, 2003, Attorney Gene Harlow appealed this matter on behalf of Harbin to the Hinds County Circuit Court. (R. Vol 1 p. 2-5). After that time, this matter apparently inadvertently was overlooked by the Court, until Honorable Swan Yerger noticed a Special Civil Docket Call for May 2, 2007. After discussing this matter with Judge Yerger's Law Clerk, Attorney Harlow and counsel for the MDES submitted proposed Orders to Judge Yerger. Thereafter, on July 6, 2007, Judge Yerger signed the Order submitted by Attorney Harlow, finding that Franklin Glasper was not an employee of Harbin, and the decision of the MDES was not supported by substantial evidence, and was arbitrary and capricious, and was reversed. (R. Vol 2 p. 143-163).

The MDES appealed from that Order to this Honorable Court on August 3, 2007. (R. Vol 2 p. 164).

### **SUMMARY OF THE ARGUMENT**

Based upon these facts, the nature of the services performed by Glasper was that of an employee, similar to the workers in Mississippi Employment Security Commission v. Plumbing Wholesale Co., 69 So.2d 814 (Miss. 1954). Harbin exercised sufficient control over Glasper in various ways; and reserved actual control over, or the right to control Glasper, both in the Independent Contractor Agreement, and in fact. Harbin assigned the work, and required that it be completed to the customer's satisfaction before Glasper was paid. Harbin also withheld payment for two weeks; and required that Glasper redress customer complaints. Harbin paid Glasper, not the customer; and Glasper had no right to payment by, or contract directly with, the satellite company. Although Glasper provided hand tools, Harbin provided cable and the materials used in installation. Glasper only provided hand tools, drills, or a ladder. Glasper also apparently held himself out to the customer to work for H & H Electronics, or New Age Electronics, *i.e.* Harbin.

Glasper was required to be an experienced installer; and perform up to the standards of Harbin, *i.e.* installation according to the National Electrical Code. Glasper also was essentially an at-will employee. Harbin did not produce an Independent Contractors Agreement signed by Glasper. Even so, the Agreement was terminable by Harbin at his discretion without liability.

The fact that Harbin Electronics required that installers sign an Independent Contracting Agreement, is not binding upon a determination by the MDES, but one factor to be considered. First National Bank of Oxford v. Mississippi Unemployment Compensation Commission, 199 Miss. 97, 23 So.2d 534 (1945). Further, the Agreement provisions are actually indicative of an employment contract. According to the Agreement, Harbin determines the rate of pay, requires that the installer perform the services, provides for a termination date, and gives Harbin the right to terminate the Agreement at its discretion without liability by either party.

Although Harbin did not directly supervise the installation, he exercised control over Glasper's performance of the installation, by withholding payment to Glasper for two weeks after the job was completed, and only upon Glasper submitting a work order signed by the customer acknowledging proper installation, along with a photograph of the installed satellite. Harbin reserved oversight over Glasper's satisfactory job performance both in the Agreement, and in fact. In the event of a customer complaint, Harbin exercised oversight by requiring that Glasper correct the issue or his next pay check would be docked.

The work performed by Glasper was an integral part of the business of Harbin. Glasper essentially was one of several persons hired by Harbin to perform the services provided by the business to the public on an on-going basis, although Glasper's employment was perhaps part-time or periodic employment.

Franklin Glasper was an employee of Kevin Harbin in the common-law meaning; *i.e.* right to control. As set out in the Hearing Officer's Fact Findings, and discussed above, there are several factors demonstrating Kevin Harbin's right to control, or actual control of, Franklin Glasper. These factors bear upon the most important employer/employee relationship consideration, *i.e.* **the right to control**. Thus, the Department's decision should be affirmed by the Board of Review. Mississippi Employment Security Commission v. PDN, Inc., 586 So.2d 838 (Miss. 1991); Mississippi Employment Security Commission v. Total Care, Inc., 586 So.2d 834 (Miss. 1990); *Unemployment Insurance Regulation* TR 11. Further, since the Kevin Harbin, failed to meet its burden of proving that Mr. Glasper was free from the actual control, or right to control, him as to the details of his work, this Honorable Court should reverse the Circuit Court, and reinstate the decision of the MDES in this matter.

## **ARGUMENT**

### **Standard of Review**

Whether an employer is liable for unemployment taxes under the Mississippi Employment Security Law is dependent upon whether the work done for wages is "employment" within the meaning of M.C.A. Section 71-5-11 I (8) & (14) (Rev. 1995). The applicable statute is worded such that the **employer/employee relationship is presumed** to exist, until the putative employer proves otherwise. M.C.A. Section 71-5-11(I)(14) (Rev. 1995). That section states that **services performed by an individual for wages shall be deemed employment subject to the law, unless and until it is shown to the satisfaction of the Commission that such individual has been and will continue to be free from control and direction over the performance of such services.** (emphasis added). *Id.*

Thus, the burden of proof is upon the party seeking to show that the worker is not an employee, *i.e.* the potential employer. Kevin Harbin bears the burden of showing that Mr. Glasper was not its employee, but independent contractor. Mississippi Employment Security Commission v. PDN, Inc., 586 So.2d 838 (Miss. 1991); Estate of Dulaney v. Mississippi Employment Security Commission, 805 So.2d 643 (Miss. COA 2002). Further, there is a rebuttable presumption in favor of the MDES's decision; and where the MDES decision is supported by substantial evidence, it should be followed by the courts. *Id.*

### **Applicable Law**

The factors necessary to determine employer, or independent contractor, status were set out and discussed by the Supreme Court in PDN, Inc. supra. These factors include: (1) extent of control over details of the work; (2) nature of work as a distinct occupation; (3) skill required by the worker; (4) whether supplies and work place were furnished; (5) length of time employed by the putative employer; (6) whether payment was by the job or by the time; and (7) whether the work was an integral part of the employer's business. *Id.* at 842. Cumulatively, these bear upon the applicability of the primary consideration, i.e.: **the right to and the degree of control the master has over the one whose physical conduct, time, and activities are subject to the employment situation.**

Further, in Mississippi Employment Security Commission v. Total Care, Inc., 586 So.2d 834, 837 (Miss. 1991) the Court expounded upon the “**control test**” stating:

**One may be under slight supervision or control, but still be an employee where the right to control exists, and the service is part of the regular business of the employer.** (Emphasis added).

*Id.* Essentially these same considerations for determining employer/employee status as enumerated in PDN, Inc., supra, are also set out in *Unemployment Insurance Regulation* TR 11.

### **Record Evidence**

Jimmy Taylor, Field Representative, testified first. (R. Vol 3 p. 73-79). Mr. Taylor stated that this investigation was assigned to him. During Mr. Taylor's testimony three (3) Exhibits were admitted into evidence for the Agency, as follows, to-wit:

<u>Agency Exhibit No.</u>	<u>Document Title</u>
1	UIFD-23      Glasper Questionnaire
2	UIFD-24      Harbin Questionnaire
3	Blank Independent Contractor Agreement

Mr. Taylor met with Kevin Harbin and obtained the UIFD-24 Questionnaire. The Worker's Independent Questionnaire was forwarded to Field Representative, Ricky Copeland, in the Senatobia Claims Office. Mr. Copeland contacted Mr. Glasper and obtained the UIFD-23 Questionnaire from him. (R. Vol. 3, p. 74-76).

Mr. Taylor was also questioned regarding the factors he found important to the determination that Franklin Glasper was an employee of H & H Electronics. He stated that H & H Electronics was in the business of satellite television installation; and had been operating since November 1, 2001. (R. Vol. 3, p. 76). Mr. Taylor stated that Mr. Glasper was hired by Kevin Harbin to perform installations for H & H Electronics. On direct examination, Mr. Taylor stated that Mr. Harbin provided a workplace for Mr. Glasper, meaning a place of business at which Mr. Glasper would report to receive instructions about satellite installations. On cross-examination, he clarified that there was no shop at the place of business for Mr. Glasper to work. (R. Vol. 3, p. 78, 81). In that regard, a shop was not necessary, since the installations occurred at the customer's homes.

Regarding tools or equipment provided by Harbin to Mr. Glasper, Mr. Taylor stated that Harbin would provide the satellite itself, along with a work order, instructions to call the customer, and coaxial cables. Mr. Glasper was required to provide hand tools. (R. Vol. 3, p. 79).

Regarding Mr. Glasper's dates of employment, Mr. Taylor found that he was employed from April 15, 2002, through June 12, 2002. The reason for his separation was unknown.

Franklin Glasper also participated in the hearing. (R. Vol. 3, p. 69, 83-84). Mr. Glasper was asked whether he had any questions for Mr. Taylor. He had no questions, but stated that the reason for his job separation was that Mr. Harbin stopped sending him work. Mr. Glasper stated that he did not receive work for almost a month, presumably prior to filing his claim for unemployment benefits. (R. Vol. 3, p. 83-84). In particular, Mr. Glasper stated that he had to find another job, because Mr. Harbin stopped sending him work. He also stated that Mr. Harbin canceled one of his checks. (R. Vol. 3, p. 84).

Mr. Harbin testified next. Mr. Harbin stated that his business was a sole proprietorship and he had been in business for two years. (R. Vol. 3, p. 85). Mr. Harbin's business was known as H & H Electronics and was a satellite installation company. The business of the company was to install television systems for multiple companies with whom he held contracts. (R. Vol. 3, p. 86-87). He explained that the companies would ship the satellites directly to the customer's homes; and send him a work order with the customer's information. The satellite sales companies represented by Harbin included Apex, Radio Shack, and Installs, Inc. After receiving a work order with the customer information, he would contact Mr. Glasper, or another installer, to contact the customer and arrange a time to work out the installation. (R. Vol. 3, p. 87-88). Mr. Glasper was an installer for H & H Electronics. (R. Vol. 3, p. 89).

At that point, the record reflected that the telephone connection with Mr. Glasper had been lost. The Hearing Officer attempted to get Mr. Glasper back on the line, but was unable to do so. Thus, the testimony of Mr. Glasper was not obtained. (R. Vol. 3, p. 89-90).

The testimony of Kevin Harbin then proceeded.

Mr. Harbin explained further regarding his interaction with the installers. He stated that the installers call him at the end of the day to determine whether there are any installations for the next day. (R. Vol. 3, p. 91). Mr. Harbin explained that he had five or six installers on a regular basis. With regard to whether any training was provided to Mr. Glasper, Mr. Harbin explained that Mr. Glasper had worked for a company called Apex, which was a much larger company than his. Thus, Mr. Glasper did not need any training. (R. Vol. 3, p. 92).

Mr. Harbin also stated that his paperwork indicated that he contracted with Mr. Glasper on April 15, 2002. His last day of work was June 12, 2002. He did not have the amount that Mr. Glasper had been paid. (R. Vol. 3, p. 93). However, with regard to payments, computer records for New Age Electronics are contained in Vol. 3 of the record, pages 3 through 12. Checks made payable to Mr. Glasper by H & H Electronics are also found at Vol. 3, pages 5 and 7, of the record.

Mr. Harbin was questioned as to whether he had a copy of the Independent Contractor Agreement with Mr. Glasper. He did not, but had a blank contract. Mr. Taylor stated that he did not have a signed contract by Mr. Glasper. A copy of the blank contract was tendered into evidence as Employer Exhibit 1. (R. Vol. 3, p. 94). At this point, Form UIFD-24 signed by Kevin Harbin was also tendered into evidence as Agency Exhibit 1; and UIFD-23 obtained from Franklin Glasper was tendered into evidence as Agency Exhibit 2. (R. Vol. 3, p. 96-97). Mr. Harbin was then questioned as to the method of payment of Mr. Glasper. He stated that Mr. Glasper was paid by the job; and he



was paid \$50.00 for installation of one box. A two receiver installation would be paid at the rate of \$70.00 per job. Mr. Harbin was questioned as to whether the customer paid the installer. He replied that the customer gets free installation when buying their equipment, so the company such as Apex or Radio Shack would pay H & H Electronics; and then H & H Electronics would pay the installer. (R. Vol. 3, p. 98-99).

Mr. Harbin was also asked whether the installer was paid the entire sum paid by the satellite sales company. Mr. Harbin stated that the installer was not paid the full amount, implying that Mr. Harbin received a portion of the money paid to H & H Electronics by the satellite sales company. Mr. Harbin also stated that the installer would not have the option of contracting directly with the satellite sales company for payment. (R. Vol. 3, p. 99). He explained that the reason was that the work orders came to him to fulfill. (R. Vol. 3, p. 99).

Regarding the work schedule of the installer, there were no set hours, such that it appeared the employment was part-time. (R. Vol. 3, p. 100). As to whether the installers had any investment in the company, Mr. Harbin stated that the installer's investment would be gas, cell phone, and tools used on the job. (R. Vol. 3, p. 100).

Regarding whether the installer was required to provide insurance coverage, Mr. Harbin stated that the installer was required to provide insurance, but Mr. Glasper was not. (R. Vol. 3, p. 100 - 101).

Regarding standards or guidelines to be followed by the installer, Mr. Harbin explained that the installer was expected to follow the National Electrical Code. (R. Vol. 3, p. 102-103). However, he did not train installers, because he solicited people who had experience, and who know the nature of the satellite installation business. (R. Vol. 3, p. 103). Mr. Harbin also stated that he questioned a

prospective installer on the extent of their knowledge; and if they passed the questionnaire, then he would put them to work. (R. Vol. 3, p. 104).

After the installation was completed, Mr. Harbin stated that before the installer was paid, there was a process of quality control for verification that the installation had been completed. (R. Vol. 3, p. 105). He explained that at the bottom of the work order, there was a place in which the particular satellite was identified; and a place for the customer's signature. The customer signs off at the bottom of the work order acknowledging that the satellite was installed and the location, more or less requested; and that the customer is happy with the installation. (R. Vol. 3, p. 105). The installer would then return the work order to H & H Electronics. H & H Electronics then would hold back payment for two weeks. (R. Vol. 3, p. 106).

Mr. Harbin was questioned regarding work that was not performed properly or satisfactorily. He stated that in that event the installer was called and given the opportunity to go back and remedy the problem. He explained that the installers were expected to take digital pictures of the installation; and sometimes the equipment would not be installed or grounded properly. If the installer failed to return and remedy the problem, he would send another installer, and then charge back the original installer on their next paycheck. (R. Vol. 3, p. 107-108).

Mr. Harlow had no questions for Mr. Harbin. (R. Vol. 3, p. 108-109).

The Hearing Officer questioned Mr. Harlow as to expected testimony of Mr. Brister. Mr. Harlow stated that he was expected to testify to essentially the same things as Mr. Harbin. The Hearing Officer stated that since Mr. Glasper was not available to testify, and since the testimony of Mr. Harbin was essentially not in question, the testimony of Mr. Brister to corroborate that testimony

would not be necessary. (R. Vol.3, p. 109-110). At that point, closing arguments were allowed, and the hearing was ended. (R. Vol. 3, p. 110-115).

In First National Bank of Oxford v. Mississippi Unemployment Compensation Commission, 199 Miss. 97, 23 So.2d 534 (1945), the Supreme Court was asked to decide whether an employment relationship existed between the bank and a janitor with whom it had a Contract. The Court ruled that there was an employer-employee relationship, even though there was a written Contract in which the janitor was designated to be an independent contractor. The Court rejected the bank's argument that the Contract specified the business relationship stating, **"(i)f the real relationship . . . could be changed by a contract device, employers could write themselves out from under nearly every workmen's compensation law or unemployment compensation statute in existence today."** See also Estate of Dulaney, supra, at 647 (the manner in which the parties designate the employment relationship is of no legal consequence).

As to Kevin Harbin's position, the Court's reasoning in Mississippi Employment Sec. Comm'n v. Plumbing Wholesale Co., 69 So.2d 814 (Miss. 1954) should also be considered as instructive.

In this case, Plumbing Wholesale periodically hired workers when need to unload box cars. Plumbing Wholesale had no regular employees for that purpose. The Court held that the extra workers were regular employees, **because the jobs performed were part of the company's regular business, and it obviously had the right to control the performance of the job.** Similarly, even though it is unclear what other services are provided by Harbin to the public, satellite installation was part of the services provided by Harbin. Thus, analogously to the workers in Plumbing Wholesale,

Harbin's workers performed a necessary part of his business, and were at least part-time employees. Glasper did not hold himself out to run a business of satellite installation subcontractors.

Another analogous case is Senior Partners, Inc. v. Mississippi Employment Security Comm'n, 2006 Miss. App. LEXIS 888 (November 6, 2006). In this case, Senior Partners is a company providing certified nurse assistants and sitters [hereinafter "CNA's"] to the public. The Court held that the CNA's were employees of Senior Partners. Factors important to the Court include a finding that Senior Partners contracted directly with the patients or individuals, paid the CNA's, and had the right to at least partially supervise the CNA's in certain ways, under the Independent Contractor Agreement, and in practice. Remediating customer complaints, or removing a CNA from a client's care, were two ways in which Senior Partners supervised or reserved control over the CNA's.

Analogously, Harbin should be viewed as providing services in a fashion similarly to Senior Partners. Further, Glasper's employment with Harbin should be viewed similarly to the CNA's in Senior Partners.

### **CONCLUSION**

Harbin has contracts with satellite television antenna companies to provide installation at customer's homes. These contracts undoubtedly establish Harbin's obligation to install the satellite equipment. (R. Vol. 3 p. 86-88). Harbin receives work orders from the company with instructions as to the satellite equipment to be installed and customer contact information. (R. Vol. 3 p. 86-88). Thus, Harbin is in the business of providing installers to install satellite equipment sold to a customer.

Harbin had five or six installers that work for him on an on-going basis at any given time.

Mr. Glasper was paid by, and worked for, Harbin on an on-going, practically daily, basis from April 15, 2002 until June 10, 2002. (R. Vol. 3 p. 5-12). The customers did not pay the installer; and the installer had no right to contract directly with the company. Harbin was entitled to terminate the employment at any time at his discretion or for unsatisfactory job performance.

Glasper was required to provide his own hand tools, but Harbin provided the cable and other materials used in the installation. Harbin hired only experienced installers; and expected the installers to know how to install equipment according to the National Electrical Code guidelines. Harbin required that Glasper and other installers submit the work order signed by the customer acknowledging proper installation, along with a photograph of the installed satellite, before being paid.

In the event of a customer complaint, Glasper must satisfactory complete the work; or Harbin would send another installer. If so, Glasper's future pay would be docked.

The key consideration for determining employment status is actual control, or right to control, the employee's work. Total Care, Inc., supra. Kevin Harbin unpersuasively attempts to down-play its right to, and actual, control of Mr. Glasper's work. Mr. Glasper's tasks are **the essential part** of Kevin Harbin regular business; and do not require any particular specialized skill, trade or independent business. Further, based upon the Independent Contractor Agreement, and facts, Kevin Harbin does not relinquish complete or unfettered control of Mr. Glasper in the performance of his job. Thus, this case represents the another example of employment alluded to by Justice Robinson in Total Care, supra, when the Court held ... **"one may be under slight supervision or control, but still be an employee where the right of control exists, and the service is part of the regular business of the employer."** Id. at 837.

When the factors or considerations for determining a worker's status as an employee, or independent contractor, are applied to the relationship between Kevin Harbin and Mr. Glasper, there are sufficient factors, and case authorities, supporting a relationship of employer-employee to affirm the MDES's decision. Thus, the Circuit Court's decision should be reversed. Further, the Hearing Officer's decision finding that Kevin Harbin fails to meet its burden of proof, and finding that an employer/employee relationship existed, is supported by substantial evidence; and should be affirmed by the Board of Review.

Respectfully submitted this, the 23<sup>rd</sup> day of April, 2008.

MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY

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**CERTIFICATE OF SERVICE**

I, ALBERT BOZEMAN WHITE, Counsel for Mississippi Department of Employment Security, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to:

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Mr. Franklin Glasper  
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Honorable W. Swan Yerger  
Circuit Court Judge  
Post Office Box 327  
Jackson, MS 39205-0327

This, the 23<sup>rd</sup> day of April, 2008.

  
ALBERT BOZEMAN WHITE