

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No.: 2023223

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SC Court of Appeals

Pablo Lopez,)
)
Claimant,)
)
vs.)
)
Alan F. McNeal, LLC,)
)
Employer,)
)
and)
)
South Carolina Uninsured Employers' Fund,))
)
Defendant.)

ORDER

HEARING: The Hearing was held on April 19, 2022, via remote video teleconference

PURPOSE OF HEARING: To determine issues set forth in Appellant's Form 30 appeal application of Commissioner Gene McCaskill's Decision and Order.

APPEARANCES: The Appellant/Claimant was represented by William G. Jenkins, Esquire of Jenkins Law Firm in Hilton Head, South Carolina

The Respondent/Employer was represented by O. Edworth Liipfert, III, Esquire, of Griffith Freeman, & Liipfert, LLC in Beaufort, South Carolina

The Respondent/South Carolina Uninsured Employers' Fund was represented by Jared C. Williams, Esquire of Law Office of Jared C. Williams, LLC in Charleston, South Carolina

FILED: June 15, 2022

DECISION AND ORDER OF THE FULL COMMISSION PANEL B

STATEMENT OF CASE

This matter came before the Full Commission Panel B on via Zoom on April 19, 2022, to determine those issues set forth on the Claimant's Form 30 appeal of the single commissioner Gene McCaskill's order dated January 24, 2022. The Single Commissioner entered the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

After due consideration of the claim and defenses, and after reviewing all of the evidence contained in the record, the following Findings of Fact as required under S.C. Code Ann. § 42-17-40, are set forth as follows:

1. The Claimant sustained an injury by accident to his left eye on 05/08/2020.
2. Claimant seeks compensability for the injury to his left eye.
3. He also seeks medical care and treatment for the injury to his left eye.
4. Claimant also asserts that, as a result of the injury to his left eye, he is now experiencing problems with his right eye.
5. There is no dispute among the parties as to the injury to Claimant's left eye.
6. Claimant asserts that he was an employee of the Employer and, as such, is entitled to benefits under the Act.
7. The Employer asserts that the Claimant is a subcontractor and not his employee.
8. The UEF concurs with the Employer that the Claimant is a subcontractor and not an employee. As such, Claimant is not entitled to benefits under the Act.
9. When the evidence is viewed as a whole, I am not persuaded that the Claimant is an employee as defined in the Act. The burden rests with him and I find that he has not met that burden.

10. Claimant and three others worked for the Employer on a house that was being built as a spec house to be sold upon completion of construction. Claimant suffered the injury to his eye while working on this job site. This fact is not in dispute.

11. Prior to working on this job site, the Claimant and the other three workers were working for a man identified at the hearing as Keith. There was a work stoppage on Keith's construction project which is why these men came to work on the Employer's spec house. This fact is not in dispute.

12. These men were to be paid \$3,200 for their work for the Employer. The money was to be divided among the four men with the Claimant keeping a greater portion of the money than the other three. This fact is not in dispute.

13. The is contradicting testimony for the Claimant and the Employer as to whether the Claimant was an employee.

14. As stated above, I cannot find that the Claimant was an employee.

15. The Claimant provided the other three workers who worked with him on this job site.

16. I find the Claimant's construction services were secured only for this one project.

17. I find that the Claimant and the other workers were to be paid in a lump sum for this project.

18. I find that the Claimant provided his own tools with the exception on a nail gun.

19. I find that the Employer did have the right to terminate the Claimant, but that would be the case whether he was an employee or an independent contractor.

20. I find that the Employer did not provide workers' compensation insurance to the Claimant.

21. When the evidence is viewed as a whole, the Claimant has failed to meet his burden that an employer / employee relationship had been established. As such, I find the Claimant was an independent contractor.

22. Therefore, the Claimant is not entitled to coverage under the Act.

23. The claim is dismissed with prejudice.

CONCLUSIONS OF LAW

Accordingly, pursuant to S.C Code § 42-17-40, it is the determination of the undersigned Commissioner as follows:

1. Pursuant to S.C. Code Ann. § 42-15-10 and 42-17-20, the South Carolina Workers' Compensation Commission has jurisdiction and venue is appropriate.

2. Pursuant to S.C. Code Ann. § 1-23-320, and South Carolina Reg. § 67-607, the parties received proper notice of the hearing and the issues to be addressed.

3. Pursuant to S.C. Code Ann. § 42-1-130, Claimant is not a covered "employee" under the Act. The supporting case law and evidence presented by all parties does not establish Claimant to be an "employee" under the Act, but rather, concludes Claimant to be an independent contractor of Defendant. See *Wilkinson ex rel. Wilkinson, v Palmetto State Transp. Co.*, 382, S.C. 295, 676 S.E.2d 702 (2009) (setting forth the four factors to determine whether Claimant is an employee or independent contractor).

4. Pursuant to S.C. Code Ann. § 42-1-400, Claimant – as an independent contractor – cannot be the statutory employee of Defendant who is an upstream general contractor. See, e.g., *Marlow v. E.L. Jones & Son, Inc.*, 248 S.C. 568, 151 S.E.2d 747 (1966); *McDowell v. Stilley Plywood*, 210 S.C. 173, 41 S.E.2d 876 91947).

QUESTIONS PRESENTED

1. Whether the Hearing Commissioner erred in finding as matters of fact and law that the Claimant was not an employee of the Defendant, but an independent contractor.

2. Whether the Hearing Commissioner erred in finding as a matter of law that because Claimant is an independent contractor, he cannot, therefore be a statutory employee.

3. Whether the Hearing Commissioner erred in failing to make findings of fact and law as to whether the Claimant was a subcontractor under 42-1-400 with respect to his relationship with the other three (3) workers who began work with him on Employer's construction site and whether Claimant occupied a position of authority with respect to those workers.

APPELLATE PANEL DECISION AND ORDER

In an Appellate Review, the Panel, pursuant to S.C. Code § 42-17-50, reviews the Decision and Order, weighs the evidence presented to the Single Commissioner, and, if good grounds are shown, makes its own Findings of Fact and reaches its own Conclusions of Law, consistent with or inconsistent with those of the Single Commissioner.

After careful review in the instant case, the Appellate Panel of the South Carolina Workers' Compensation Commission, by majority vote, has determined the Order of the Single Commissioner is hereby **AFFIRMED WITH AMENDMENTS** as follows:

APPELLATE PANEL FINDINGS OF FACT

WE, THE APPELLATE PANEL FIND THE FOLLOWING AS FACT:

follows:

1. The Claimant sustained an injury by accident to his left eye on 05/08/2020.
2. Claimant seeks compensability for the injury to his left eye.
3. He also seeks medical care and treatment for the injury to his left eye.
4. Claimant also asserts that, as a result of the injury to his left eye, he is now experiencing problems with his right eye.
5. There is no dispute among the parties as to the injury to Claimant's left eye.

6. Claimant asserts that he was an employee of the Employer and, as such, is entitled to benefits under the Act.

7. The Employer asserts that the Claimant is a subcontractor and not his employee.

8. The UEF concurs with the Employer that the Claimant is a subcontractor and not an employee. As such, Claimant is not entitled to benefits under the Act.

9. When the evidence is viewed as a whole, we are not persuaded that the Claimant is an employee as defined in the Act. The burden rests with him and we find that he has not met that burden.

10. Claimant and three others worked for the Employer on a house that was being built as a spec house to be sold upon completion of construction. Claimant suffered the injury to his eye while working on this job site. This fact is not in dispute.

11. Prior to working on this job site, the Claimant and the other three workers were working for a man identified at the hearing as Keith. There was a work stoppage on Keith's construction project which is why these men came to work on the Employer's spec house. This fact is not in dispute.

12. These men were to be paid \$3,200 for their work for the Employer. The money was to be divided among the four men with the Claimant keeping a greater portion of the money than the other three. This fact is not in dispute.

13. There is contradicting testimony for the Claimant and the Employer as to whether the Claimant was an employee.

14. As stated above, we cannot find that the Claimant was an employee.

15. The Claimant provided the other three workers who worked with him on this job site.

16. We find the Claimant's construction services were secured only for this one project.

17. We find that the Claimant and the other workers were to be paid in a lump sum for this project.

18. We find that the Claimant provided his own tools with the exception on a nail gun.

19. We find that the Employer did have the right to terminate the Claimant, but that would be the case whether he was an employee or an independent contractor.

20. We find that the Employer did not provide workers' compensation insurance to the Claimant.

21. Even considering the fact that inclusion under the Act is favored, when the evidence is viewed as a whole, the Claimant has failed to meet his burden that an employer / employee relationship had been established. As such, we find the Claimant was an independent contractor.

22. Therefore, the Claimant is not entitled to benefits under the Act.

23. The claim is dismissed with prejudice.

APPELLATE PANEL CONCLUSIONS OF LAW

Accordingly, pursuant to S.C Code § 42-17-40, it is the determination of the undersigned Commissioner as follows:

1. Pursuant to S.C. Code Ann. § 42-15-10 and 42-17-20, the South Carolina Workers' Compensation Commission has jurisdiction and venue is appropriate.

2. Pursuant to S.C. Code Ann. § 1-23-320, and South Carolina Reg. § 67-607, the parties received proper notice of the hearing and the issues to be addressed.

3. Pursuant to S.C. Code Ann. § 42-1-130, Claimant is not a covered "employee" under the Act. The supporting case law and evidence presented by all parties does not establish Claimant to be an "employee" under the Act, but rather, concludes Claimant to be an independent contractor of Defendant. See *Wilkinson ex rel. Wilkinson, v Palmetto State Transp. Co.*, 382, S.C. 295, 676

S.E.2d 702 (2009) (setting forth the four factors to determine whether Claimant is an employee or independent contractor).

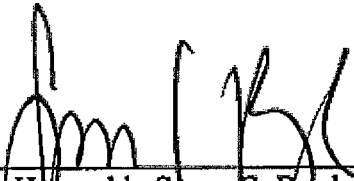
4. Pursuant to S.C. Code Ann. § 42-1-400, Claimant – as an independent contractor – cannot be the statutory employee of Defendant who is an upstream general contractor. See, e.g., Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966); McDowell v. Stilley Plywood, 210 S.C. 173, 41 S.E.2d 876 91947).

ORDER AND AWARD

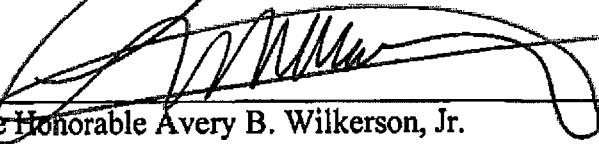
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Claimant is not an “employee” pursuant to S.C. Code Ann. § 42-1-130, but rather an independent contractor, and therefore, is not entitled to benefits under the Act.

IT IS FURTHER ORDERED THAT THE DECISION OF THE SINGLE COMMISSIONER IS AFFIRMED AS AMENDED ABOVE.


AND IT IS SO ORDERED!



The Honorable Susan S. Barden
Commissioner of the South Carolina Workers'
Compensation Commission



The Honorable Avery B. Wilkerson, Jr.
Commissioner of the South Carolina Workers'
Compensation Commission



The Honorable Aisha Taylor
Commissioner of the South Carolina Workers'
Compensation Commission

Order Served via E-Mail:

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O. Edward Liipfert, III Griffith Freeman & Liipfert, LLC worth@griffithfreeman.com	

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on June 15, 2022