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September 2, 2022

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**SC Court of Appeals**

**VIA EMAIL – [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**

The Honorable Jenny Abbott Kitchings  
Clerk, The South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

**Re: Zachary Brown, Claimant, Respondent,**  
**v.**  
**Southeastern Services, H.H.I., LLC, Employer, and Uninsured Employers' Fund, Carrier,**  
**Defendants, of which Uninsured Employers' Fund is the Appellant.**  
**Appellate Case No.: 2022-001153**

Dear Ms. Kitchings:

The transcript of the SC Workers' Compensation Commission Full Commission proceedings in this case was received via email from Creel Court Reporting on September 1, 2022, and a copy is enclosed.

Should you have any questions, please feel free to contact me.

Respectfully,

**HOLDER PADGETT LITTLEJOHN + PRICKETT, LLC**



Michelle A. Adams  
Paralegal to Timothy B. Killen

TBK/maa  
Enclosure

cc: Joshua Fester, Esquire (via email)  
Michael P. Bennett, Esquire (via email)  
Jarrid Alexander (via email)

STATE OF SOUTH CAROLINA  
BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC No. 1824344

Zachary Brown, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 Southeastern Services, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 South Carolina Unemployed Insurer's )  
 Fund, )  
 )  
 Carrier/Defendants. )  
----- )

**VIRTUAL FULL COMMISSION HEARING**

\*\*\*\*\*

**Monday, May 16, 2022**  
2:22 p.m. - 2:43 p.m.

The virtual Full Commission Hearing was heard before Commissioner T. Scott Beck, Commissioner Aisha Taylor and Commissioner Avery Wilkerson, Chair, and was taken via Zoom in South Carolina on the 16th day of March, 2022 before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.



**CREEL COURT REPORTING, INC.**  
1230 Richland Street / Columbia, SC 29201  
(803) 252-3445 / [contact@creelreporting.com](mailto:contact@creelreporting.com)

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Attorney for Defendant, SCUEF

**Michael Patrick Bennett, Esquire**

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Beaufort, South Carolina 29902  
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**EXHIBITS**

(There were no exhibits marked during the hearing.)



**STIPULATIONS**

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



1 **CALL TO ORDER:**

2 **CHAIR:** Madam court reporter, if you'll please call  
3 the case. I do apologize.

4 **COURT REPORTER:** Today is Monday, May 16th, 2022.  
5 This is South Carolina Workers' Compensation  
6 Case Number 184344. This is the case of  
7 Zachary Brown, Claimant, versus Southeastern  
8 Services, Employer, and South Carolina  
9 Uninsured Employer's Fund, Carrier. The  
10 appellant is the carrier, South Carolina  
11 Uninsured Employer's Fund, and is represented  
12 by Timothy B. Killen. The respondent,  
13 Southeastern Services, is represented by  
14 Michael Bennett, while the respondent, Zachary  
15 Brown is represented by Joshua R. Fester. The  
16 appellant is allowed ten minutes for oral  
17 argument, the respondents can split their ten  
18 minutes, and the appellant three minutes in  
19 reply. You are requested to argue the grounds  
20 of exception and stay within the record.

21 **CHAIR:** Mr. Killen.

22 **MR. KILLEN:** Yes, sir.

23 **CHAIR:** Please.

24 **APPELLANT'S POSITION**

25 **MR. KILLEN:** Thank you. May it please the



1 Commission. I am Tim Killen, representing  
2 South Carolina Workers' Compensation Uninsured  
3 Employer's Fund in this matter. This claim  
4 arises out of an incident which occurred on  
5 October 29th, 2018. A hearing was held before  
6 the single Commissioner on February 18th, 2021.  
7 The claimant sought a determination of whether  
8 the employer was subject to the Act, and if so,  
9 his entitlement to benefits. A year after the  
10 hearing on February 18th 2022, the single  
11 Commissioner issued his Order. He determined  
12 that the employer was subject to the Act for  
13 two reasons. One, the LLC sole member was an  
14 employee, and two, that Chance Jones, an  
15 employee who worked regularly after the  
16 claimant's tenure, also counted toward the  
17 jurisdictional number along with the sole  
18 member and the claimant. Notably, the single  
19 Commissioner rejected Claimant's argument to  
20 include purported subcontractors as statutory  
21 employees counting towards the jurisdictional  
22 number. Claimant did not appeal those  
23 findings. Claimant worked for a few weeks  
24 before his injury. There's no dispute that  
25 during that time the employer regularly



1 employed three employees, the claimant, Daniel  
2 Smith and Taylor Smith. The point of  
3 contention is whether there was a fourth  
4 employee. The single Commissioner found that  
5 on the date of the claimant's injury, Jamie  
6 Brown, the sole member of the LLC -- excuse me,  
7 Jamie Brown was the sole member of the LLC  
8 employer. The single Commissioner found that  
9 that LLC was taxed like a sole proprietorship  
10 rather than a corporation. This creates a  
11 unique scenario insofar as Workers'  
12 Compensation coverage is concerned in South  
13 Carolina. There's not a whole lot of law on  
14 this in South Carolina at this time. The Court  
15 of Appeals in Hartsville versus Palmetto  
16 Collision excluded the sole member of the  
17 employer LLC from the number because, quote,  
18 the record does not indicate that he elected to  
19 be included as an employee for Workers'  
20 Compensation purposes. So this may not be  
21 controlling because the case was reversed on  
22 other grounds, the reasoning from the Court of  
23 Appeals should be persuasive here where it's  
24 undisputed that Jamie Brown did not elect to be  
25 included as an employee for Workers'



1 Compensation purposes. Regarding Mr. Jamie  
2 Brown, the employer, the sole member in this  
3 case, it's uncontroverted that the LLC was  
4 taxed like a sole proprietorship. It's also  
5 uncontroverted that he engaged in work for the  
6 LLC and that he used the LLC's profits for his  
7 personal funds. However, he did not receive a  
8 paycheck, no taxes were taken out of a  
9 paycheck, and he did not receive a W-2 or a  
10 1099. This is a crucial point of  
11 distinguishment between these facts, and the  
12 facts in the Rish v. Berry's Tree Service Case,  
13 which was cited by the claimant in his brief.  
14 That's an Appellant Panel case from 2017. All  
15 three of you were involved in that case at one  
16 point or another. You may or may not remember.

17 **COMMISSIONER TAYLOR:** I remember.

18 **MR. KILLEN:** But the Panel, which included  
19 Commissioners Beck and Wilkerson, and the  
20 single Commissioner, which was Commissioner  
21 Taylor noted, the importance of these factors,  
22 the getting paid, paychecks, getting taxes  
23 taken out, getting a W-2, in that case the  
24 Panel and the single Commissioner both wrote,  
25 Mr. Berry received regular paychecks from which



1 federal and state taxes were withheld. We find  
2 these paychecks were paid to Mr. Berry for the  
3 work he performed as an employee of Berry's  
4 Custom Tree Service, LLC, and not pursuant to  
5 profit from the company as a member. The Panel  
6 determined that, quote, the LLC had the  
7 characteristics of a corporation rather than a  
8 sole proprietorship. Here, the opposite is  
9 true. The single Commissioner labeled Mr.  
10 Brown's failure to follow corporate formalities  
11 as just that, a failure to follow corporate  
12 formalities, but there's no corporation  
13 involved here. I would assert that him taking  
14 -- excuse me, him using the profits from the  
15 corporation is what a sole proprietor would do  
16 is taking profits from the LLC, not getting a  
17 paycheck. And also of course we look to North  
18 Carolina as being instructive in the  
19 application of Workers' Compensation laws here  
20 since our law was based on theirs. The  
21 Legislature up there has gone so far as to  
22 codify the status of LLC members, making them  
23 equivalent to sole proprietors and partners who  
24 aren't covered unless they opt in. The same  
25 reason the Court of Appeals used in the



1 Hartsville case. This of course should inform  
2 the Panel's decision here. We haven't codified  
3 it yet because we haven't had a Court of  
4 Appeals case or Supreme Court case that  
5 contravenes the intent of the Legislature.  
6 When and if that happens, you can bet that the  
7 Legislature will act. Another complicating  
8 fact here is that under the UEF section of the  
9 code 42-7-200, the Fund has all the rights to  
10 attachment and indemnification against  
11 uninsured employers for the benefits, cost and  
12 expenses it pays on their behalf. The Fund may  
13 file a judgement against the employer and seek  
14 recovery. And the Fund has all the rights of  
15 attachment of the Department of Revenue, which  
16 is critical. Because under Title 12, section  
17 12-2-25(b)(1), this is what it says, quote,  
18 that for South Carolina tax purposes a single  
19 member limited liability company which is not  
20 taxed for South Carolina income tax purposes as  
21 a corporation is not regarded as entity  
22 separate from its owner. Thus, single member  
23 LLC's taxed like sole proprietorships provide  
24 no shield for the personal assets of the  
25 member, at least so far as the Fund is



1 concerned and the DOR. Because the Fund has  
2 all the rights of attachment of the DOR, the  
3 Fund can attach the personal assets of single  
4 member LLCs taxed like a sole proprietorship.  
5 In this case, if the LLC is ultimately  
6 determined to be subject to the Act and the  
7 Fund must pay benefits, the Fund can and will  
8 attach Jamie Brown's personal assets. Nowhere  
9 in worker's case compensation act, nowhere else  
10 could an employee, would an employee be forced  
11 to pay for the benefits of another employee, a  
12 co-employee. The end result would turn the  
13 idea of Workers' Compensation on its head, and  
14 it's certainly not one intended by the  
15 Legislature. The second issue on appeal is  
16 whether Chance Jones was a regular employee  
17 when the record reveals that he essentially  
18 replaced the claimant. The employer conceded  
19 that he regularly employed two employees in  
20 2018 prior to hiring the claimant in October.  
21 This is clearly reflected in the payroll  
22 records, and the Commissioner agreed with this.  
23 However, the records also built -- excuse me,  
24 records show that there were four employees  
25 being paid at the same time for only two pay



1 periods in 2018, and those were the pay periods  
2 ending November 2nd, 2018 and November 9th,  
3 2018. The claimant was injured in late October  
4 2018. And we know from the claimant's  
5 testimony and the single Commissioner's  
6 findings that Chance Jones was not a regular  
7 employee during the time of claimant's  
8 employment, that's Order Page 12, Conclusion of  
9 Law 7. The single Commissioner wrote Chance  
10 Jones employment was perhaps irregular. The  
11 single Commissioner determined that the  
12 relevant time period to determine whether the  
13 employer was subject to the Act was the entire  
14 year of 2018. In finding that Chance Jones  
15 brought the employer under the terms of the  
16 Act, the single Commissioner cast aside 51  
17 weeks of the year where the employer had at  
18 most only three employees. Instead, the single  
19 Commissioner imputed Chance Jones employment  
20 after the accident, a time when the claimant  
21 was no longer employed, to a time period when  
22 the claimant was employed. Lastly, the  
23 Commissioner's finding that Jamie Brown didn't  
24 file a Form 5 is irrelevant to this analysis.  
25 That is a corporation's -- corporate officer's



1 notice to reject, and it's filed with an  
2 insurance carrier where the corporation has  
3 coverage. There is no corporation here.  
4 There's no corporate officer here, and there  
5 was no coverage here. A failure to file a Form  
6 5 is irrelevant to the determination in whether  
7 an employee regularly employed four or more  
8 employees at the relevant time. For these  
9 reasons and those that are set forth in more  
10 detail in my brief, I respectfully request that  
11 the support of the single Commissioner be  
12 reversed, and the claimant's claim for benefits  
13 be denied and dismissed.

14 **CHAIR:** Thank you, Mr. Killen.

15 **MR. KILLEN:** Thank you.

16 **CHAIR:** Who's gonna go second. Is Mr. Bennett or  
17 Mr. Feaster going?

18 **MR. BENNETT:** I don't mind jumping in Commissioner  
19 Wilkerson, very briefly.

20 **CHAIR:** Sure.

21 **DEFENDANT/RESPONDENT'S POSITION**

22 **MR. BENNETT:** I'm Michael Bennett, I represent the  
23 employer, Southeastern Services. I just want  
24 to put on the record that we fully concur with  
25 Mr. Killen's position, and the UEF's position



1           that the claim should have no bearing on the  
2           personal assets of Mr. Brown and Southeaster  
3           Services as he was not required to have  
4           coverage at the time the claimant was injured.

5           **CHAIR:** Okay. Thank you. Mr. Feaster.

6           **CLAIMANT/RESPONDENT'S POSITION**

7           **MR. FESTER:** Yes, I'm Josh Fester. May it please  
8           the Commission.

9           **CHAIR:** Fester, I'm sorry.

10          **MR. FESTER:** I represent the Claimant, Mr. Zachary  
11          Brown, in this. And I believe it was earlier  
12          stated that the defendants stipulated to both  
13          the accident and employment of my client with  
14          the employer at the time of his accident. The  
15          main issue here is whether the employer's  
16          subject to the jurisdiction of the -- this  
17          Commission, whether the employer was subject to  
18          the Act at the time of the accident. And our  
19          first major issue there is, is whether the  
20          Commissioner correctly found that the sole  
21          member of the LLC, Mr. Jamie Brown, was a -- an  
22          employee for purposes of finding jurisdiction  
23          of the accident. And of course it's our  
24          position that he did find correctly there. The  
25          term employee under the Act is, is pretty broad



1 and it's to be interpreted broadly. It only  
2 excludes casual employment, sole proprietors  
3 and general partners, who the latter of two can  
4 opt in. Sole members of an LLC are not  
5 specifically excluded, and, you know, as we  
6 know, exclusions to our Act, exemptions to our  
7 Act, are to be strictly construed. They, they  
8 weren't -- LLC members aren't specifically  
9 excluded as employees. So if they meet  
10 otherwise the definition of employee, then they  
11 should be included as employees. The plain  
12 language of the statute provides this, but even  
13 -- going beyond the plain language, or plain  
14 reading of the -- of 42-11-30 defining  
15 employee, you can look at legislative intent  
16 here. You know, we, we adopted, in 1996 an LLC  
17 Act. The -- well, I haven't been practicing --  
18 candidly, I haven't been practicing long enough  
19 to personally remember the 2007 Reform Act,  
20 that's ten years later. Our, our General  
21 Assembly had a full decade to, to really look  
22 at the ramifications of what creation of an  
23 LLC, that entity in our state would do. They  
24 chose not to ten plus years later to exclude an  
25 LLC member from the definition of employee.



1           They had every opportunity. And I think we  
2           need to look at that as, as clearly signaling  
3           the intention in keeping them included in that  
4           definition of employee. And in support of  
5           their argument, UEF and the Defendant argue  
6           that, you know, the dicta, what's been called  
7           by Commissioner Taylor and I believe also  
8           Commissioner Beck and Wilkerson is  
9           quintessentially dicta from that, that case.  
10          You know, that, that, the dicta -- the analysis  
11          that the Court used in that wasn't fully  
12          briefed by either party there. And of course  
13          that case has been vacated by the Supreme  
14          Court, there's no precedential value, and I, I  
15          would remind the Commission of the Rish Case as  
16          well. No -- there's no daylight between the  
17          facts of this case and that case. The only  
18          difference that Mr. Killen would point out is  
19          that in this case our sole member of the LLC  
20          decided to dispense with formalities of, you  
21          know, the corporate or LLC structure. Instead  
22          of getting a W-2 that is accountant produced  
23          like in the Rish case, he simply just was  
24          compensated through the use of the LLC's funds  
25          from the LLC's account. You know, and to argue



1 that dispensing with formalities and not paying  
2 more taxes somehow makes that a different  
3 situation and for purposes of the Act, I think  
4 is -- it goes beyond the pale and borders on  
5 absurdity. But Defendant's also point to North  
6 Carolina Law just for their position, which is  
7 completely unpersuasive because just like here  
8 in South Carolina, North Carolina enacted an  
9 LLC Act probably around a decade before they  
10 excluded LLC members from their definition of  
11 employee. Because the North Carolina State  
12 Legislature decided that has absolutely no  
13 bearing on our Legislature, our General  
14 Assembly's in town. The second point, even if  
15 we were to exclude Jamie Brown as, as an  
16 employee, the sole member of the LLC, the  
17 Single Commissioner correctly found that the  
18 employer LLC regularly employed four or more.  
19 We have an additional employee in Chance Jones.  
20 The record provides -- employer's own pay  
21 records show that he was paid for about 30 to  
22 40 hours the same week of my client's accident.  
23 And my client testified that even before that,  
24 Chance Jones had worked alongside him three to  
25 four times in the very, very short tenure that



1 he had with this employer. So, I think that  
2 the greater weight of the evidence here does  
3 support the Single Commissioner's findings.  
4 Chance Jones was also a regular employee. And  
5 while I don't think it's necessary to go there,  
6 the -- this Commission could also find the  
7 statutory number through statutory employees,  
8 through subcontractors. The greater weight of  
9 the evidence provides, I believe, that  
10 flooring, electrical, plumbing, painters, all  
11 of that work which the sole member of the LLC  
12 testified was integral to general contractors,  
13 general contracting business. Those, those  
14 subcontractor employees could be used to get to  
15 the jurisdictional number, and at the very  
16 least here, I think provides evidence and  
17 indicia of his mode of operations being more  
18 than four in South -- or four or more in South  
19 Carolina. Lastly, this Commission is not  
20 inclined to find Jamie Brown as an employee of  
21 the LLC. It is Claimant's position that  
22 essentially the LLC is a alter ego of the sole  
23 member, Jamie Brown, who never withdrew from  
24 the Act. He was a sole proprietor working as  
25 Southeastern Services, HHI prior to his



1 organization of this LLC a mere months before  
2 the beginning of my, my client's employment  
3 with the LLC, never withdrew from the Act. If  
4 this Commission were to hold that -- interpret  
5 the definition of employee to exclude LLC  
6 members in the way that the UEF is asking, not  
7 only would it contravene the other canons of  
8 statutory construction that I mentioned, it, it  
9 also works in absurdity in that in a situation  
10 like this, a sole proprietor could one day be  
11 a sole proprietor, organize an LLC the next  
12 day, open up a bank account, start paying those  
13 very same employees from that bank account  
14 without the knowledge of those employees, never  
15 withdraw from the Act, but somehow also skirt  
16 42-1-390 all of the requirements in withdrawing  
17 from the Act that protect those employees.  
18 Part of that is a 30 day waiting period, and  
19 informing by date certain set by the Commission  
20 that that employer's withdrawing from the Act.  
21 So again, there are -- there would be at least  
22 three different canons of statutory  
23 construction overridden by this interpretation  
24 of, of, you know, the definition of employee.  
25 And also as an aside, I'm sure that if Jamie



1 Brown were sued tomorrow for, say, construction  
2 defects, he'd point to the LLC as the liable  
3 party and move to dismiss himself as a party,  
4 I'm positive. So, he wants to be the LLC for  
5 purposes of the Workers' Comp Act. He's the  
6 same person, but for liability purposes, as  
7 evidenced by his application for organizing an  
8 LLC in the state, he's a, he's a separate  
9 person. He can't have his cake and eat it too.  
10 And ---

11 **COMMISSIONER TAYLOR:** Doesn't the law say you can  
12 choose between one or the other? Like that's  
13 the purpose of the LLC, you can choose whether  
14 you are the sole proprietor or, or corporation.

15 **MR. FESTER:** For purposes of how, how he's being  
16 taxed, sure, but that's, I, I, I don't think  
17 that the taxing -- how he's being taxed,  
18 whether he wants to pay himself or pay the  
19 government payroll taxes or not has any bearing  
20 on whether he's an employee or not. He is --  
21 he otherwise meets this definition of employee.  
22 He's working for this, this employer. He is  
23 being compensated for work performed for the  
24 employer.

25 **CHAIR:** I think your time has expired.



1 **MR. FESTER:** And I would just in concluding ask this  
2 -- respectfully ask this Commission affirm the  
3 findings of Single Commissioner and comport  
4 with and essentially holding the same findings,  
5 holdings, as what this Commission did in the  
6 Rish Case. Thank you.

7 **CHAIR:** Mr. Killen, three minutes in reply.

8 **APPELLANT'S REPLY**

9 **MR. KILLEN:** Thank you, Commissioner, very briefly.  
10 With all due respect to Mr. Fester, the  
11 statutory employment argument was rejected by  
12 the Single Commissioner and it was not  
13 appealed. The alter ego argument and the  
14 failure to withdraw from the Act theories were  
15 rejected by the Single Commissioner and not  
16 appealed. And I would ask you to reject the  
17 speculation as to what motions Mr. Brown may or  
18 may not file in a theoretical personal injury  
19 case. And regarding Chance Jones, the claimant  
20 was hurt on a Monday, the fact that Chance  
21 Jones worked 34 hours after that does not mean  
22 that they worked at the same time. In fact,  
23 the opposite is true. The claimant testified  
24 that Chance Jones was not there when he was  
25 injured on that Monday. And I would also ask



1           you to look to your Rish Case, your Rish versus  
2           Barry's Custom Tree Service case, where I think  
3           each of you look to whether or not the LLC  
4           operates more like a corporation or like a sole  
5           proprietorship and determine whether the  
6           members of the LLC are also employees. In this  
7           case, Jamie Brown acted like a sole proprietor.  
8           That's, that's how he operated. That's how the  
9           business was run. Thanks, that's all I have.  
10          I appreciate your time.

11       **CHAIR:** Thank y'all, appreciate your time. Thanks.

12           This concludes the hearing.

13       **(There being nothing further, the hearing concluded**  
14       **at 2:43 p.m.)**

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