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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO. 1824344

APPELLATE CASE NO. 2022-001153

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.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This claim arises out of an incident which occurred on October 29, 2018. A hearing on the issues as set forth in the Forms 50 and 51 was held before R. Michael Campbell on February 18, 2021, in Walterboro, South Carolina. The Claimant sought a determination of whether the Employer was subject to the terms and provision of the South Carolina Workers' Compensation Act (the Act) and, if so, his entitlement to benefits. The Single Commissioner issued his Order exactly one (1) year later, on February 18, 2022. The Single Commissioner determined that Jamie Brown, the sole member of the Employer LLC, was an employee of Employer, so as to count towards the jurisdictional number of employees and subjecting Employer to the terms and conditions of the Act. ROA ; Order of Single Commissioner, pp. 10 – 11. The Single Commissioner further determined that Chance Jones was regularly employed by Employer at all relevant times, counting towards the jurisdictional number. ROA ; Order of Single Commissioner, pp. 11 – 12. Because Employer did not have workers' compensation coverage, The South Carolina Workers' Compensation Uninsured Employers' Fund (Fund) was determined to be secondarily liable for the payment of benefits under S.C. Code Ann. § 42-7-200. ROA ; Order of Single Commissioner, p. 17.

Fund timely appealed. ROA ; Form 30.

Appellate Panel Review was held on May 16, 2022. The Appellate Panel issued a majority

affirmation (Commissioners T. Scott Beck and Avery B. Wilkerson, Jr. voting to affirm with Commissioner Aisha Taylor dissenting) on July 20, 2022. ROA ; Order of Appellate Panel. Fund timely appealed to this Honorable Court.

At the hearing before the Single Commissioner, Claimant asserted that Jamie Brown (sole member of Employer Limited Liability Company) conceded that Employer regularly employed three (3) employees. Claimant asserted that, in addition to that number, Jamie Brown himself should be considered the fourth employee, thereby reaching the jurisdictional number and subjecting the Employer to the Act. ROA ; Tr. p. 6, l. 4 – p. 7, l. 9. Claimant also asserted that even if Jamie Brown were to be excluded for the number, there was another employee, Chance Jones, who could bring the Employer under the Act. ROA ; Tr. p. 7, l. 9 – p. 8, l. 1.

Claimant also asserted that Employer's subcontractors could be counted towards that number. Lastly, Claimant asserted that the LLC could be determined subject to the Act by failing to file a Form 38 because Jamie Brown, the sole proprietor, formerly had coverage. Defendants and the Single Commissioner disagreed with Claimant, and neither of these issues was appealed.

At the hearing, UEF asserted that Jamie Brown is not an employee of his LLC, because he is the only member of a single member LLC, and that LLC is taxed like a sole proprietorship. ROA ; Tr. p. 11, ll. 1 – 4. UEF further asserted that Chance Jones was not regularly employed by Employer until after the date of accident. ROA ; Tr. p. 11, l. 19 – p. 12, l. 1. UEF asserted that the relevant time period to consider whether employees are regularly employed is prior to the date of accident. ROA ; Tr. p. 12, ll. 1 – 6.

The Single Commissioner issued his Decision and Order on February 18, 2022. ROA ; Order of Single Commissioner. In that Order, the Single Commissioner made Findings of Fact that, *inter alia*, the Claimant worked for the Employer approximately three (3) weeks prior to the

accident[1] and Chance Jones became a regular employee of Employer during the pay period ending on November 2, 2018 (a date which is subsequent to Claimant's date of accident)[2]. ROA ; Order of Single Commissioner, pp. 4, 7. The Single Commissioner also made numerous Conclusions of Law, though many of which appear to operate as Findings of Fact. *See* Order of Single Commissioner, pp. 9 – 17. The Commissioner concluded that the Commission has jurisdiction over the parties because Employer regularly employed four (4) "or more employees at the time of the accident." ROA ; Order of Single Commissioner, p. 9, Conclusion of Law 3. The Commissioner concluded that the relevant time period to determine whether Employer regularly employed the jurisdictional number was the entire year of 2018. ROA ; Order of Single Commissioner, p. 10, Conclusion of Law 5. It was undisputed that Employer regularly employed at least three (3) employees, including Claimant, during this time. The Commissioner concluded that the Employer LLC's sole member, Jamie Brown, was also an employee of Employer. *Id*.

The Single Commissioner made this Conclusion based on Mr. Brown's status as being what he wrote was "akin to that of a corporate officer." *Id*. The Commissioner cited S.C. Code Ann. § 33-44-1205 as the legal basis for making the novel and draconian conclusion that *"members of an LLC are treated as corporate officers for purpose of the Workers' Compensation Act."* ROA ; Order of Single Commissioner, p. 10, Conclusion of Law 5, Footnote 3 (emphasis added). Section 33-44-1205 reads, in whole, as follows:

> Except (1) as otherwise required by context, (2) as inconsistent with provisions of this chapter, and (3) Chapters 41 and 42 of Title 33, and Title 12, the term 'partnership' or 'general partnership', when used in any other statute or in any regulation, includes and also means 'limited liability company.'

The Commission's reasoning appears to have been that because the term "sole proprietor" is not

[1] Finding of Fact 6.
[2] Findings of Fact 21 and 23.

included in § 33-44-1205, the single member of a single member LLC must *always* be considered an employee of the LLC. However, apparently, without any explanation from the Commission, members of an LLC taxed like a partnership would not be counted as employees.

The Commissioner found Jamie Brown to his own employee even while concluding that Mr. Brown used the LLC's finances interchangeably with his own. ROA ; Order of Single Commissioner, pp. 10 – 11 (Conclusion of Law 5). Despite being an LLC, the Commissioner found that Mr. Brown "disregard[ed] *corporate* formalities . . . ." ROA ; Order of Single Commissioner, p. 11 (Conclusion of Law 5) (emphasis added). The Commissioner concluded that Mr. Brown's "status as a sole proprietor for tax purposes has no bearing on his status as an employee under the Workers' Compensation Act." *Id.* Further, despite never having voluntarily seeking coverage, the Commissioner found that Mr. Brown was required to file a Form 5 ("*Corporate* Officer Notice to Reject") to exclude himself from coverage (rather than just not acquiring coverage). *Id*. (emphasis added). The Commissioner concluded that "Defendant LLC because subject to the Act the day it hired Claimant in October 2018 as its 4th full-time employee." *Id*.

In Conclusion of Law Six (6), the Commissioner found that Chance Jones was a regular employee of Employer during 2018. ROA ; Order of Single Commissioner, p. 11, Conclusion of Law 6. He made this finding/conclusion based primarily on payroll records which showed that Chance Jones worked regularly *after* Claimant's injury, a time when Claimant was no longer working for Employer. ROA ; Order of Single Commissioner p. 12, Conclusion of Law 7. He also determined that Chance Jones worked "intermittently" prior to Claimant's accident. *Id*. That Conclusion was not appealed.

The Commissioner found that the payroll records show Chance Jones was paid for thirty-

four (34) hours on November 2, 2018. However, for reasons not entirely clear, the Single Commissioner further concluded that "it would be physically impossible [for Chance Jones] to work 34 hours in 1 day." *Id*. This was apparently an attempt to show that Chance Jones worked regularly alongside Claimant. However, this ignores the fact that Claimant was injured on a Monday (October 29, 2018) and the pay period used as a reference ends on a Friday (November 2, 2018). Therefore, there were four (4) days of that pay period when Claimant was no longer working for Employer, giving Chance Jones the opportunity to work four (4) eight and a half (8.5) hour days.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc*., 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co*., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp*., 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004). "The determination of whether a worker is a[n] [] employee is jurisdictional and, therefore, the question on appeal is one of law." *Collins v. Seko Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015) (citing *Fortner v. Thomas M. Evans Constr. & Dev., L.L.C.*, 402 S.C. 421, 429, 741 S.E.2d 538, 543 (Ct. App. 2013). On issues of law, "this court has the power and duty to review the entire

record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 399 (Ct. App. 2008).

STATEMENT OF FACTS

This claim arises out of an incident which occurred on October 29, 2018. Claimant fell from a ladder and suffered a left leg injury. ROA ; Tr. p. 5, ll. 17 – 19. The incident was undisputed. ROA ; Tr. p. 14, ll. 17 – 25. Employer and Fund denied that Employer regularly employed four (4) or more employees within South Carolina; therefore, Employer was not subject to the Act and benefits should be denied to Claimant. ROA ; Tr. pp. 10 – 14.

Claimant was injured when he was twenty-three (23) years old. ROA ; Tr. p. 19, ll. 17 – 20. At the time of his accident, he was working for Employer, Southeastern Services H.H.I., LLC. ROA ; Tr. p. 19, ll. 21 – 23. Employer is in the general contracting and remodeling business. ROA ; Tr. p. 20, ll. 6 – 8; ROA ; Tr. p. 54, ll. 8 – 11. Claimant had been working for Employer for "[a]bout two or three weeks" before he was hurt. ROA ; Tr. p. 26, l. 13. Employer did not build any houses in 2018. ROA ; Tr. p. 55, ll. 4 – 9.

Claimant went to work for Crossroads Construction on April 15, 2019. ROA ; Tr. p. 29, ll. 1 – 13. At the time of the hearing, Claimant was back to work for another company, where he was pressure washing houses. ROA ; Tr. p. 23, l. 22 – p. 24, l. 2.

On the date of his incident, Claimant was working with two (2) other employees, Daniel Smith and Taylor Smith. ROA ; Tr. p. 29, ll. 14 – 21. When asked by his attorney if there were other employees, Claimant testified that Jamie Brown "would have Chance [Jones] come in a do side work like either getting material or stuff like that instead of having to pull people off jobs." ROA ; Tr. p. 29, l. 25 – p. 30, l. 3. Claimant testified that, during his time working for Employer,

he saw Chance Jones "probably about a couple hours." ROA ; Tr. p. 30, l. 17. Although he and the Smiths all worked forty (40) hours per week, he only saw Chance Jones work for "a couple hours" during his tenure with Employer. ROA ; Tr. p. 40, ll. 9 – 20. Claimant testified that Chance Jones went to work more often after Claimant's employment, and that Chance Jones filled his spot. ROA ; Tr. p. 41, ll. 2 – 8. Claimant also testified that, during Claimant's tenure with Employer, Chance Jones "wasn't permanently employed by" Employer. ROA ; Tr. p. 41, ll. 14 – 19.

Claimant also testified that Jamie Brown "sometimes" worked with him. ROA ; Tr. p. 30, ll. 20 – 22. Claimant testified that Jamie Brown directed the work and contracted the jobs. ROA ; Tr. p. 30, l. 23 – p. 31, l. 3. Claimant testified that Jamie Brown was "the boss". ROA ; Tr. p. 31, ll. 7 – 12. Claimant was always paid by a check from Employer. ROA ; Tr. p. 39, ll. 24 – p. 40, l. 8.

Claimant's attorney deposed Daniel Smith on July 1, 2020. ROA ; *see* Depo. of Smith. Daniel Smith testified that he works for Employer. ROA ; Depo. of Smith, p. 6, ll. 18 – 19. He testified that his job duties consist of "[r]unning the crew of me and another guy." ROA ; Depo. of Smith, p. 7, l. 8. Daniel Smith testified he first began working with Jamie Brown in 2012 or 2013. ROA ; Depo. of Smith, p. 7, ll. 22 – 23. He testified he has worked for Employer since the organization of the LLC. ROA ; Depo. of Smith, p. 8, ll. 10 – 15. Daniel Smith testified his "[o]ld friend", the Claimant, worked for Employer for "two weeks. It wasn't long. It was very short." ROA ; Depo. of Smith, p. 9, ll. 9 – 18. Daniel Smith testified that "the reason I brough Zach [Claimant] on was because Taylor [Smith] was leaving and I needed . . . another person." ROA ; Depo. of Smith, p. 15, ll. 7 – 9. He testified that, on the date of the incident, Employer had three (3) employees: Daniel Smith, Taylor Smith, and Claimant. ROA ; Depo. of Smith, p. 11, ll. 13 – 17. Daniel Smith tesfieid that Chance Jones "worked off and on with he, but he wasn't working

with us when it [Claimant's incident] happened. He come after it happened because we needed the extra hand." ROA ; Depo. of Smith, p. 14, ll. 17 – 19. Daniel Smith testified that, during his tenure with Employer, there were never four people working without including Jamie Brown in that number. ROA ; Depo. of Smith, p. 17, ll. 3 – 7. Daniel Smith testified that the normal mode of operations for Employer was to have two (2) employees working on smaller jobs and three (3) employees working on larger jobs. ROA ; Depo. of Smith, p. 17, ll. 15 – 19.

Jamie Brown testified at the hearing that he formed Employer in December of 2017 or January of 2018. ROA ; Tr. p. 45, ll. 22 – 23. At that time, Employer had two (2) employees. ROA ; Tr. p. 45, l. 24 – p. 46, l. 1. Mr. Brown testified that Employer has never had more than three (3) employees at any time. ROA ; Tr. p. 46, ll. 5 – 12; Tr. p. 47, ll. 24 – p. 48, l. 4. At the time of the accident, Employer's employees were Claimant, Daniel Smith, and Taylor Smith, per Jamie Brown's testimony. ROA ; Tr. p. 46, ll. 8 – 14.

Jamie Brown did not consider himself an employee of Employer. ROA ; Tr. p. 47, ll. 6 – 8. Jamie Brown does not draw a paycheck from Employer. ROA ; Tr. p. 47, ll. 9 – 11; ROA ; Claimant's APA Submissions, pp. 367, 379, 396 (income tax returns showing he earned no wages); ROA ; Tr. p. 61, ll. 23 – 25. Jamie Brown's testified his "bills get paid through the company." ROA ; Tr. p. 62, l. 3.

Jamie Brown is the sole member of the Employer LLC. ROA ; Tr. p. 48, ll. 5 – 10. Jamie Brown filed his tax returns as a sole proprietor in 2017, 2018, and 2019. ROA ; Tr. p. 51, l. 22 – p. 52, l. 4; ROA ; Claimant's APA Submissions, pp. 369, 383, 401; ROA ; Tr. p. 53, ll. 21 – 23; ROA ; Tr. p. 63, ll. 15 – 16. Jamie Brown filed his tax returns jointly with his wife. Claimant's APA Submissions, pp. 367, 379, 396. Jamie Brown paid self-employment tax in 2017, 2018, and 2019. Claimant's APA Submissions, pp. 372, 386, 404.

The Employer does not have a Board of Directors. ROA ; Tr. p. 53, ll. 17 – 18. The Employer does not have shareholders. ROA ; Tr. p. 53, ll. 19 – 20. Employer operates out of Jamie Brown's home. ROA ; Tr. p. 64, ll. 15 – 17.

ARGUMENTS

I. WHETHER A SOLE MEMBER OF AN LLC TAXED LIKE A SOLE PROPRIETOR IS AN EMPLOYER OR AN EMPLOYEE UNDER THE WORKERS' COMPENSATION ACT?

The Commission found that, on the date of Claimant's injury, Jamie Brown was the sole member of LLC. ROA ; Appellate Panel Order p. 19, 21, Findings of Fact 16, 28. The Commission found that LLC was taxed like a sole proprietor, rather than as a corporation. Order p. 21, Finding of Fact 28. As explained below, this creates a unique scenario, insofar as workers' compensation coverage in South Carolina is concerned.

To that end, because an employment relationship requires a contract of hire, and a contract requires more than one party, an Employer cannot also be an employee of himself. Accordingly, since Jamie Brown isn't an employee of the business, the UEF asserts that he, in turn, cannot be counted as an employee to reach the jurisdictional minimum number of employees required to subject the Employer to terms and provisions of the South Carolina Workers' Compensation Act.

The Act was never intended to be an absolute safety net for every individual who suffers a work-related injury. Such legislation would be unworkable for many reasons. Accordingly, not every employer whose employee suffers a work-related accident is liable for benefits thereunder. Because of the great burdens it would place on very small employers, those employers are exempt from the Act's terms and provisions. Under S.C. Code Ann. § 42-1-360(2), the Act excludes "[a]ny person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous calendar year of less than

three thousand dollars regardless of the number of persons employed during that period[.]" According to the Court of Appeals, "[t]he statutory language unequivocally exempts employers who do not regularly employ four or more employees." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 257, 647 S.E. 2d 691, 702 (2007). An employee of an employer who is not subject to the Act has other avenues for recovery, of course, such as civil liability.

To be subject to the Act and the Commission's jurisdiction, the Act specifically requires that an employer "regularly employ[]" four (4) or more "*employees*" within South Carolina. S.C. Code Ann. § 42-1-360(2) (emphasis added). S.C. Code Ann. § 42-1-130 defines "employee." This section marks a clear distinction between an employee and a sole proprietor and/or a partner of a business (more on why a discussion of partnerships/sole proprietorships is relevant *infra*). Resultantly, a sole proprietor or partner in a business is not an employee under the terms of the Act. Importantly, that section, as well as an employment relationship, requires a "contract of hire." S.C. Code Ann. § 42-1-130. It is axiomatic that a contract requires two (2) parties, and one party as a sole proprietor or partner cannot enter into a contract of hire with himself as employee.

Nevertheless, this section does allow sole proprietors and partners in businesses subject to the Act to *elect* coverage under the Act. As the Supreme Court wrote, "The obvious purpose of this section is *to expand coverage* of the Act by making its benefits available *to working partners* . . . whose employees are covered under the Act, but who would be otherwise excluded because of their status [as working partners]." *Carver v. Bill Pridemore & Co.*, 294 S.E.2d 419, 420, 278 S.C. 235, 235 (1982) (emphasis added). If the purpose of a section is to "expand coverage . . . to working partners," *there can be no coverage available to working partners without such an election*. If there is no such coverage, there can be no finding that a working partner or sole

proprietor is an employee, as employees whose employers are subject to the Act are covered without making further election.

The Supreme Court of South Carolina has addressed this issue head-on. See *Marlow v. E.L. Jones & Son, Inc.*, 151 S.E.2d 747, 248 S.C. 568 (1966). In *Marlow*, the Supreme Court explicitly wrote that "'[w]orking partners' are not employees." 151 S.E. 2d at 568, 248 S.C. at 571 (quoting *Larson's Workmen's Compensation Law*, Sections 54.30 – 54.32); also see *Dawkins v. Jordan*, 534 S.E.2d 700, 341 S.C. 434 (2000), *Smith v. Squires Timber Co.*, 428 S.E.2d 878, 311 S.C. 321 (1993).

This issue was further addressed by the Supreme Court in in the tort context in *Daniels v. Roumillat*, 264 S.C. 497, 216 S.E.2d 174 (1975):

> Professor Larson in his treatise 'The Law of Workmen's Compensation,' Vol. 2, section 72.10, said: '. . . a member of a partnership, even if he is a 'working partner,' is still in law the employer of employees of the partnership and cannot be sued.' The foregoing rule is supported by the cases of *Sonberg v. Bergere,* 220 Cal.App.2d 681, 34 Cal.Rptr. 59; *Cockerham v. Consolidated Underwriters, La.App.,* 262 So.2d 119; and *Candler v. Hardware Dealers Mutual Ins. Co.,* 57 Wis.2d 85, 203 N.W.2d 659. In the cited cases a member of the partnership is held to be an employer of an injured employee and an action based on negligence against the member of the partnership is barred by the Workmen's Compensation Law. In our own case of *Marlow v. E. L. Jones & Son, Inc.,* 248 S.C. 568, 151 S.E.2d 747, *we stated that 'working partners' are not employees.*

Daniels v. Roumillat, 264 S.C. 497, 501 – 502, 216 S.E.2d 174, 176 – 177 (1975) (emphasis added).

Though there is not voluminous case law on LLCs in this context in South Carolina, this Court in *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013) excluded the sole member of the employer limited liability company from the number of employees counting towards the jurisdictional number because "the record does not indicate he elected to be included as an employee for workers' compensation purposes." *Hartzell v. Palmetto*

Collision, LLC, 406 S.C 233, 249, 750 S.E.2d 97, 106. (Ct. App. 2013). The reasoning of the Court of Appeals should be persuasive in this matter, where it is undisputed that Jamie Brown did not elect "to be included as an employee for workers' compensation purposes." The inquiry should end there. Claimant will argue that this case was reversed by the Supreme Court, but it was reversed on other grounds and relative to the issue of notice to the employer, not the number of employees. *See Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 785 S.E.2d 194 (2016). The Court of Appeals' reasoning was sound on the issue at hand.

Of course, we look to North Carolina as being instructive in the application of Workers' Compensation laws, since the South Carolina law was based on theirs. The North Carolina legislature has gone as far as to codify the status of LLC members, so far as workers' compensation laws are concerned. The North Carolina code says that LLC members have the same status as sole proprietors and partners, and that they aren't covered under the N.C. Act unless they choose to be covered. N.C. Gen. Stat. § 97-2.[3] This is the same reasoning the Court of Appeals used in *Hartzell*, above. And the inquiry should, again, end there.

Another complicating factor, though, is that under S.C. Code Ann. § 42-7-200 the Fund has rights of attachment and indemnification against uninsured employers for the benefits, costs, and expenses it pays on their behalf. Fund may file a judgment against employers for those amounts. Importantly, Fund "has all rights of attachment . . . as the Department of Revenue . . . ." S.C. Code Ann. § 42-7-200(D).

Those rights of attachment are outlined in the South Carolina Code. Of particular note here is the DOR's rights against limited liability companies *and their members* are outlined in S.C.

[3] "Any sole proprietor or partner of a business or any member of a limited liability company may elect to be included as an employee under the workers' compensation coverage of such business if he or she is actively engaged in the operation of the business and if the insurer is notified of his election to be so included."

Code Ann. § 12-2-25. Under S.C. Code Ann. § 12-2-25(B)(1), "for South Carolina tax purposes[,] a single-member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, *is not regarded as an entity separate from its owner*." (emphasis added). Thus, single-member LLCs taxed like sole proprietorships provide no shield for the personal assets of the member, at least so far as DOR and Fund are concerned.

Further, because Fund has the rights of attachment of the DOR, *Fund can attach the personal assets of the members of single-member LLCs taxed like sole proprietorships*. In this case, if Employer is ultimately deemed subject to the Act and the Fund must pay benefits, the Fund will attach Jamie Brown's personal assets. As it stands now, all of Jamie Brown's personal assets are at risk to pay for the benefits to and for a co-employee. Nowhere in the Workers' Compensation Act would an employee have to pay for the benefits of another employee. This result of such a finding would turn the idea of workers' compensation on its head and would certainly not be one intended by the Legislature. The ultimate result makes an employee liable for the payment of workers' compensation benefits on behalf of a co-employee. This result is the result of the Appellate Panel's Order.

Because of the reasons set forth herein and that may be heard at oral arguments, because Employer did not regularly employ the jurisdictional number of employees within South Carolina, the Order of the Appellate Panel of the Full Commission should be reversed.

II. WHETHER EMPLOYER REGULARLY EMPLOYED THE JURISDICTIONAL NUMBER AFTER HIRING CHANCE JONES OR WHILE CLAIMANT WAS EMPLOYED?

The Commission determined that Chance Jones was a regular employee of Employer during the relevant time period, which he also determined to be the entire year of 2018. ROA ; Order pp. 25 – 26, Conclusion of Law 7; Order p. 23, Conclusion of Law 5. The Commission

concluded that "Chance worked between 30 – 40 hours per week as of the period ending November 2, 2018." ROA ; Order, p. 25, Conclusion of Law 7. It went on the conclude: "Chance was paid for 34 hours of his services for the week ending November 2, 2018. It would be physically impossible to work 34 hours in 1 day." ROA ; Order, p. 25, Conclusion of Law 7. There was no testimony, allegation, or evidence that Chance Jones only one day following Claimant's injury date. See Record as a whole. The injury date was a Monday. November 2, 2018, was a Friday.

Employer conceded that he regularly employed two (2) employees in 2018 prior to hiring Claimant in October. This is clearly reflected in the payroll records. ROA ; Employer's APA pp. 1 – 84. The Commission agreed with this ("Defendant LLC became subject to the Act the day it hired Claimant in October 2018 . . . ."). ROA ; Order p. 24, Conclusion of Law 5. However, the records show that there were four (4) employees being paid at the same time only for two (2) pay periods in 2018, and those were the pay periods ending November 2, 2018, and November 9, 2018. ROA ; Employer's APA pp. 1 – 84. We know from the Claimant's testimony and the Commission's findings that Chance Jones was not a regular employee during Claimant's employment ("Claimant testified at the hearing that Chance 'would come in once per week or so if he could help out' and that [Claimant] worked with [Chance Jones] about 3 times." ROA ; Order p. 26, Conclusion of Law 7; "Additional testimony at the hearing established that Chance worked intermittently prior to the accident but wasn't on the jobsite the day Claimant was injured." *Id*.; "[Chance Jones'] employment, though perhaps irregular . . . ." *Id*.).

The Commission determined the relevant period to analyze whether the Employer was subject to the Act was the entire year of 2018. In finding that Chance Jones brought Employer under the terms of the Act, the Single Commissioner cast aside fifty-one (51) weeks of the year where the Employer had, at most, three (3) employees. Instead, the Single Commissioner imputed

Chance Jones' employment after the accident – time when Claimant was no longer employed – to a time period when Claimant was employed.

For these reasons and those that may be set forth at oral arguments in this matter, the Order of the Single Commissioner should be reversed, and the Claimant's claim for benefits should be denied and dismissed.

CONCLUSION

Based upon the foregoing arguments and authorities, if the ultimate determination is that Carrier did not provide coverage to Employer on the date of incident, because Claimant was self-employed at the time of the incident and did not elect to be covered under the South Carolina Workers' Compensation Act, he is not entitled to benefits, and the Order of the Appellate Panel of the Full Commission should be reversed.

RESPECTFULLY SUBMITTED,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1824344

Appellate Case No. 2022-001153

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.

PROOF OF SERVICE

I hereby certify that I have served Appellant Fund's Initial Brief and Designation of Matter to be included in the Record on Appeal of the attorneys for all other parties by electronic mail on November 2, 2022, as follows:

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November 2, 2022

VIA EMAIL – ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **Appellate Case No. 2022-001153**
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.

Dear Ms. Kitchings:

Enclosed for filing in the above referenced case please find Appellant Fund's Initial Brief, Designation of Matter; and Certificate of Counsel.

Respectfully,

HOLDER PADGETT LITTLEJOHN + PRICKETT

Michelle A. Adams
Paralegal to Timothy B. Killen

TBK/maa
Enclosures
cc: Joshua Fester, Esquire (via email)
Michael P. Bennett, Esquire (via email)
Amy Bracy, SC WCC Judicial Director (via email)
Jarrid Alexander (via email)