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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

Workers' Compensation Claim No.: 2023223
The Honorable Susan S. Barden
The Honorable Avery J. Wilkerson, Jr.
The Honorable Aisha Taylor

Appellate Case No.: 2022-001012

Pablo Lopez, ……..Claimant, Appellant

v.

Alan F. McNeal, LLC, Employer, and
South Carolina Uninsured Employers' Fund,……...Defendants, Respondents.

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STATEMENT OF THE CASE

Pursuant to Rule 208, SCACR, Respondents Alan F. McNeal, LLC and South Carolina Uninsured Employers' Fund jointly file this Initial Brief of Respondents. This appeal arises from a denied workers' compensation claim occurring on May 8, 2020, when Claimant was shot in the eye with a nail gun. The Single Commission denied Claimant's request for benefits holding Claimant was an independent contractor and not subject to the South Carolina Workers' Compensation Act. The Appellate Panel of the South Carolina Workers' Compensation Commission affirmed the Single Commission's ruling. Claimant now files this appeal of the Appellate Panel's Order denying Claimant's request for benefits.

STATEMENT OF ISSUES ON APPEAL

I. Did the full Commission correctly determine that the Claimant was an independent contractor, not an employee?

STATEMENT OF FACTS

On Friday, May 8, 2020, the Claimant was framing a house at 43 Fiddler Drive in Beaufort, South Carolina when a nail from a nail gun struck the Claimant in his left eye, causing him to be blind in his left eye. (Cl. Depo, P.6, l.7-11; P.15, l.6-17; P.17-19). Defendant Alan F. McNeal, LLC ("McNeal") is a licensed general contracting company and was building this house as a spec home to be sold upon completion of construction (Cl. Depo, 9:4-17; Def. Depo 7:2-22). The Claimant had been working on the project for five days at the time of the accident. (Cl. Depo, 8:19-23). At the time of the accident, the Claimant and three other people: Mario, Juaquin, and Otoneil, worked as a carpentry crew for various other people doing jobs that included framing houses and building porches (Cl. Depo, 6:24-7:24; 11:18-12:16; 13:6-19; 33:8-15). Mario fired the nail that injured the Claimant. The Claimant's crew got most but not all their jobs from another contractor named Keith, and they also worked for other contractors and homeowners (Cl. Depo, 34:21-35:3,

Tr. P.23, l.19-25). The Claimant found most of the jobs for his crew, and the Claimant's brother would send them jobs. (Tr. P.24, l.1-6). The Claimant owned the tools his crew used to frame and the car his crew used to get from job to job, and he spoke the most English, so he negotiated jobs for the crew (Cl. Depo, 35:4-7; 15:6-17). The Claimant had the most knowledge about how to read blueprints and how to frame houses. (Tr. P.24, l.15-18). Keith would pay him directly, and he would pay the other guys, but he kept a little more for himself because he owned the tools and could read the plans (Cl. Depo 35:22-36:9). The Claimant's crew had a project going for Keith at the time of the accident, but that project was experiencing delays, so he and his group sought out McNeal for work. (Cl. Depo. P.15, l.6-17). The Claimant learned about McNeal through the Claimant's brother, who was working for another framing subcontractor, Don Juan Roofing, that had started the framing on this house for McNeal. (Cl. Depo 8:19-3; Tr. P.16, l.13-15; P.28, l.13-19). McNeal agreed that Claimant's crew could finish framing the house at 43 Fiddler Drive for McNeal while they waited for Keith's job to get going again. (Cl. Depo 37:2-13). This was the Claimant's first project for McNeal. (Cl. Depo, 11:4-6).

The Claimant, the Claimant's brother, and Mr. McNeal met on the Sunday before the accident. At the meeting, the Claimant and McNeal agreed that McNeal would pay the Claimant's crew $3,200 for a week of work to finish framing the residence at 43 Fiddler Drive (Cl. Depo 9:23-3; 11:7-12:2; 36:10-23). McNeal told the Claimant to keep the jobsite clean and gave the Claimant the blueprints for the job (Cl. Depo 14:6-15:5). The Claimant knew how to read blueprints and could frame the house based on the plans (Cl. Depo 14:6-15:5). The Claimant was going to split the $3,200 with the other three guys in his crew, but he planned to keep around $1,000.00 for himself because he found the job and had the tools (Cl. Depo 35:22-36:23). The Claimant's crew determined among themselves how to divide up the lump sum payment, and McNeal was not

involved in this (Cl. Depo 19:16-19). The Claimant and his crew used the Claimant's tools for the job, except the Claimant thinks they borrowed a nail gun from McNeal (Cl. Depo 14:4-5). The Claimant had his own nail guns too (Cl. Depo 35:8-21). When the Claimant finished framing the house at 43 Fiddler for McNeal, he was going to take his guys and his tools back to the job he was doing for Keith (Cl. Depo 37:2-13).

On the day of the accident, the Claimant's crew was installing blocking and plywood sheathing to the roof framing at the very top of the roof. (Cl. Depo., P.17, l.12-P.18, l.4). The Claimant was on the outside of the roof setting up plywood, and Mario was on the inside of the roof nailing blocking to the roof trusses. Mario fired a nail at an angle that deflected off the wood and struck the Claimant in the left eye. (Cl. Depo. P.18, l.5-P.20, l.19).

ARGUMENT

I. Public Policy

The Claimant argues in his brief that by failing to have Worker's Compensation insurance, McNeal "left more than 75 employees of subcontractors exposed," and "[i]n this light justice demands that the four factors… (be) examined with an eye toward coverage and a finding of the Employer/Employee relationship." (Cl. Initial brief, P.8). This is simply not the case. First, examining the factors "with an eye towards" finding an employment relationship is contrary to South Carolina law. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 476, 753 S.E.2d 416, 419, ("we 'return[ed] to our jurisprudence that evaluates the four factors with equal force in both directions.' We now analyze the factors 'in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.'") (*citing Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 307, 676 S.E.2d 700, 702, 706 (2009)).

Second, there is no evidence that the employees of the other subcontractors on this job were not covered by workers compensation insurance. McNeal testified that he routinely asks subcontractors to provide certificates of insurance before they begin work. (McNeal Depo., P.23, l.11-13). The other subcontractors who worked on the project were a site clearing subcontractor, Landon's Backhoe, a foundation subcontractor, Compas Concrete, a different framing subcontractor, Don Juan Roofing, an electrician, Kintz Electric, and a plumber, Jenkins Plumbing. (McNeal Depo., P.11, l.1-P.12, l.22, P.29, l.13-20). McNeal obtained certificates of insurance from these subcontractors before they began work on the project (McNeal Depo. P.22, l.15-P.23, l.13). The South Carolina Worker's Compensation Commission's online coverage search engine shows that all these subcontractors had valid South Carolina worker's compensation insurance policies on the date of the Claimant's accident.[1] The Claimant admits McNeal asked the Claimant whether he had comp insurance before the Claimant's crew started work, so there is no reason to doubt that McNeal also asked the other subcontractors on the job for certificates of insurance. (Tr. P.29, l.14-18). As the other subcontractors on this project had worker's compensation policies in place, there is no evidence to support the claim that 75 people were exposed on this project.

Given that the Claimant's crew worked for a variety of contractors and homeowners, given that the Claimant had been framing for ten years but this was his crew's first job for McNeal, and given that the Claimant only intended to work briefly for McNeal on this one house while waiting to return to work on another job for Keith, the Claimant, not McNeal, was in the best position to obtain worker's compensation coverage for himself and his crew. The Workers' Compensation Act does not protect a sole proprietor or a partner in a business, such as the Claimant, who elects not to purchase coverage for himself and his crew. *See Ramirez v. May River Roofing, Inc.*, 433

[1] McNeal requests the court take judicial notice of this fact pursuant to Rule 201, SCRE.

S.C. 519, 526, 860 S.E.2d 680, 683-684 (S.C. 2021) ("A sole proprietor's employees may be the statutory employees of another business, but the sole proprietor may not be a statutory employee."). The Claimant was the leader of his crew. He owned the tools and the vehicle, negotiated the jobs, knew how to read plans, and kept more of the money. The other guys may have been the Claimant's partners, but there is certainly no evidence the Claimant was an employee of one of the other crew members. This four-man crew was not required to purchase worker's compensation insurance under the Act pursuant to SC Code Ann. 42-1-360, but the Claimant was free to do so pursuant to SC Code Ann. 42-1-380. As the Claimant was in the best position to obtain coverage for his crew for this job, justice does not demand finding that the Claimant, who contracted with McNeal for his four-man crew to finish the framing on one house before returning to a different job for a different contractor, was a direct employee of McNeal. Instead, the Court should analyze the factors "with equal force in both directions" and affirm the full commission's order. *Id.*

II. Right of Control

> Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.

Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). Applying these factors to the facts of this case, the Claimant was a subcontractor, not an employee.

A. direct evidence of the right or exercise of control

McNeal did not control how the Claimant performed the framing at the project. The Claimant relies heavily on *Ramirez v. May River Roofing* for his position that there is direct

evidence of control here. *See* 433 S.C. 519, 860 S.E.2d 680 (Ct.App. 2021). There are several similarities between this case and Ramirez: both claimants had their own workers, both set their own hours, both had their own tools, and neither had their own worker's compensation insurance. However, the two most critical factors on which the Court relied in *Ramirez*, "an exclusive relationship and controlling Ramirez's clothing," are completely absent here. *Id.* at 528, 684. Mr. Ramirez had been working "continuously and exclusively" for May River for three years at the time he was injured. He did not think he was allowed to work for any other roofing companies. *Id.* By stark contrast, the Claimant and his crew worked for various contractors and property owners. They had another job going for Keith at the time they started the job for McNeal, and they had never worked for McNeal until the week of the accident. The *Ramirez* court held, "the exclusivity of [Ramirez's and May River's] arrangement also suggests [Ramirez's company] was less an 'independent' business, and more an extension of May River." *Id.* at 529, 685. Here, the evidence shows the Claimant's crew operated independently from, and not as employees of, McNeal. This weighs heavily in favor of the Claimant being an independent contractor, not a direct employee of McNeal.

Mr. Ramirez was required to wear May River shirts on the jobsite, and he had a May River decal on his truck. There is no evidence McNeal provided the Claimant or his crew with branded clothing or other McNeal marketing materials. This also cuts in favor of independent contractor status.

The Claimant in this case is more similar to the claimant in *Marlow v. E.L. Jones* than he is to the Claimant in *Ramirez*. *See Marlow v. E.L. Jones & Son, Inc.*, 248 S.C. 568, 151 S.E.2d 747 (1966). The *Ramirez* Court specifically addressed *Marlow*, but distinguished the two cases, holding, "we believe the control May River exercised by being [Ramirez's] exclusive provider of

work in his full time profession and by controlling Ramirez's appearance while working distinguishes this case from that one." *Ramirez*, 433 S.C. at 529, 860 S.E.2d 685. Here, like *Marlow* and unlike *Ramirez*, the Claimant and his crew worked for a variety of contractors and was not required to were McNeal clothing. This is more consistent with being an independent contractor than an employee.

The Claimant relied on the meeting between the Claimant and McNeal before the work began to show that McNeal exercised control over the job. However, the testimony of what took place at the meeting does not establish that McNeal controlled means and methods of how the project was framed. The Claimant testified that the meeting, McNeal gave him the plans, and the Claimant knew how to frame the building from the plans. (Cl. Depo. P.14, l.20-P.15, l.5). Providing the building plans to a framer is not evidence of controlling the means and methods of framing. Holding otherwise would effectively eliminate the independent contractor distinction entirely. When asked what "rules" were discussed at the meeting, the Claimant testified that McNeal "liked to have a job really tight, really well done. So [Mr. McNeal] would explain, like, he wanted to keep the work area clean, like no nails, no leftover nails." (Cl. Depo. P.14, l.10-13; Tr. P.16, l.19-21). These "rules" have nothing to do with the means and methods of framing. "The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control of the method or means of doing it does not necessarily have the effect of creating the relation of… master and servant because such relates only to the result to be obtained." *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797, (S.C. 1969). Telling the Claimant to do a good job framing and keep the jobsite free of loose nails does not direct the Claimant's crew as to how to frame the job, and the Claimant admitted they framed this house the same way the always framed houses. (Tr. P.24, l.19-22; P.26, l.19-21; P.27, l.1-3).

The Claimant also argues that the following exchange shows McNeal controlled the work: **Q.** "Mr. McNeal didn't tell you how to frame, right?" **A.** "A few things because not all carpenters work the same way." The full exchange during this line of questioning was:

Q. And you frame- -- I think you said earlier you framed this house the way you always framed?

A. Yes.

Q. So Mr. McNeal didn't tell you how to frame, right?

A. A few things because not all carpenters work the same way.

Q. But you framed it the way you always work, right?

A. Yes, the part that everybody does the same.

(Tr. 26:19-27:3). This clearly shows that the Claimant's crew framed this house the same way they always did. This does not establish that McNeal controlled how the Claimant's crew framed this job.

The Claimant also testified that McNeal's son and another McNeal employee were on the jobsite, "But they worked alongside of us, and they just did kind of like a cleanup. We'd actually do the heavy work, and they were just there." (Cl. Depo., P.12, l.20-24). The Claimant and his crew were building this house on their own, and McNeal's son and the other guy were just picking up trash. (Cl. Depo. P.13, l.20-25). This also shows that the Claimant was framing the job as he saw fit without input from Mr. McNeal's son, even though he was present at the jobsite. This also favors independent contractor status.

McNeal did not control the Claimant's hours or who the Claimant brought with him to perform the work. (Tr. P.33, l.22-P.34, l.2). Mr. McNeal had never met the other three guys before they started working at the jobsite the Monday before the accident (Tr. P.36, l.9-13). It would be strange indeed for a new employee to be allowed to bring three other employees whom the

employer had never met with him to work on his first day, yet that is exactly what the Claimant alleges took place here.

In *Ramirez*, the Court specifically noted that Mr. Ramirez was "free to enlist others if the job was too big for him to handle," and this favored independent contractor status. *Ramirez*, 433 S.C. at 528, 860 S.E.2d at 684. However, Court ultimately determined that because Mr. Ramirez worked exclusively for May River for three years, he was an employee. *Id.* at 528, 684-685. Here, where there is no exclusive long-running relationship between the Parties, the Claimant's autonomy to bring three other guys with him must weigh in favor of finding the Claimant was an independent contractor.

B. Furnishing of Equipment

The Claimant testified he brought most of the tools for this job, and "I think the one thing I might have borrowed was a nail gun." (Cl. Depo. P.14, l.1-5). Given that the Claimant and his crew typically worked for various contractors and homeowners on a per-project basis, and this was their first project for McNeal, it certainly stands to reason that they would have the necessary tools to perform their work, and the Claimant kept a larger share of the money on their jobs for himself because he provided the tools and the vehicle. (Cl. Depo 35:22-36:23; Cl. Depo 19:16-19; Tr. 19:10-19; Tr. 26:15-18). Mr. McNeal did not knowingly provide the Claimant with any tools. McNeal had a trailer of tools at the jobsite, and it's possible the Claimant got the nail gun out of the trailer without McNeal's knowledge. (Tr. P.34, l.3-14). Borrowing one nail gun, with or without Mr. McNeal's knowledge, does not weigh in favor of the Claimant being an employee. The rationale for the equipment factor is "[t]he owner of a $100,000 truck who entrusts it to a driver is naturally going to dictate details such as the speed, maintenance, and the like in order to protect his or her investment. This being the rationale, the rule should not be applied to items of

equipment whose size and value are not so large as to provide this incentive for control and for efficient employment of capital." *Lewis v. L.B. Dynasty*, 411 S.C. 637, 639, 770 S.E.2d 393, 394 (S.C. 2015). One nail gun is not of sufficient value to provide an incentive to control how the job was framed. Therefore, because the Claimant provided all of the other tools necessary for the job, the provision of equipment weighs in favor of the Claimant being an independent contractor.

The Claimant testified in his deposition, "The day of, I remember that [Mr. McNeal] was there, helping us put some rafters up with a machine that he has." (Cl. Depo., P.14, l.14-16). This was the only instance where the Claimant said Mr. McNeal participated in the framing. Mr. McNeal testified that he was not on the jobsite the day the Claimant was injured, and he did not help them with the framing. (McNeal Depo., P.16, l.14-16; Tr. P.36, l.14-19). Even if Mr. McNeal did lift some rafters onto the roof with equipment, this does not make the Claimant an employee. The key to the equipment factor is the assumption when valuable equipment is **entrusted to the worker**, the owner will naturally want to maintain control over how it is used. *See Id.* Mr. McNeal did not "entrust" that equipment to the Claimant because the Claimant was not operating the machine. Therefore, this does not change that the provision of equipment favors the Claimant being an independent contractor. There is no dispute that Mr. McNeal was not on the jobsite when the Claimant was injured, and the Claimant testified his crew was using a ladder to install blocking and plywood on the roof. This work did not involve any lifting machine.

The Claimant argues that "there is a very small sample size of hours worked which tends to magnify the significance of each item of evidence" and because there were two instances within the first week on the job where McNeal allegedly provided tools, this weighs in favor of an employment relationship. This argument distorts the facts. The Claimant acknowledged McNeal was paying his crew $3,200 for one week of work. There is a dispute about whether the job would

take more than a week, but at the most, it would only take two weeks. At the time the Claimant was injured, he was attaching plywood to the very top of the roof, which is consistent with the framing being nearly complete, and Mr. McNeal testified that the framing was completed the day of the accident. As soon as this job was finished, the Claimant, his crew, and his tools were going back to the stalled project for Keith. The Claimant's crew had never worked for McNeal before, and there were no plans to work for him again after this job. These facts weigh heavily in favor of independent contractor status. The Claimant's argument that the short duration of the contract heightens the significance of McNeal providing any equipment is nothing more than a request for the court to ignore the greater weight of the evidence in this case, and it should be rejected because all four factors must be weighted evenly in both directions. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. at 476, 753 S.E.2d at 419.

C. Method of Payment

The Claimant argues in his brief that Mr. McNeal gave inconsistent testimony about how the Claimant was to be paid. Specifically, the Claimant alleges Mr. McNeal testified in his deposition that he agreed to pay the Claimant's crew $3,200 a week, and he testified at the hearing that the Claimant's crew was making $3,200 for the entire job. This is not an accurate description of Mr. McNeal's testimony. In his deposition, Mr. McNeal testified that the Claimant and his crew were only going to be working for one week (McNeal Depo. P.10, l.5-10). This is not the same as saying he would pay them $3,200 per week. At the hearing, Mr. McNeal testified:

Q. All right. But you testified earlier that you paid him $3,200 for the entire job no matter how long it took. Bur you just testified that they didn't complete the job but you paid him $3,200 anyway.

A. I believed he was going to be all done Friday.

Q. Okay. Did you pay him before they – before this happened?

A. No.

Q. All right. You didn't pay him in advance, did you?

A. No.

Q. Okay, you paid him after he got hurt, right?

A. I believe so.

Q. Okay. And if this was for the whole job and paid him $3,200, then they must have completed the job, right?

A. I was going to be all done with it. We got it done Friday.

(Tr. P.38, l.12-18). It is clear from this testimony that the job took one week to complete. Mr. McNeal believed the Claimant was going to be able to finish the job that Friday, but the Claimant got hurt. Mr. McNeal got the job finished that Friday and paid the Claimant in full even though the Claimant technically did not finish the job. This does not call Mr. McNeal's credibility into question, and the payment arrangement of $3,200 to finish the framing weighs in favor of finding the Claimant was an independent contractor.

The issue of whether the Claimant's crew was making $3,200 for the job or $3,200 per week on the job is a red herring. Employees do not get paid a lump price for a job or for a week of work that they then split up with co-employees as they see fit. Employees do not negotiate an up-front weekly payment for a crew of four people, three of whom the employer has never met. That is simply not how employees are paid. Whether the amount was per week or for the job, when a contractor pays one person an amount for that person's crew for work and has no involvement in who makes what between the members of the crew, that is more consistent with an independent contractor than an employee.

Even if the Court determines that the payment arrangement here weighs in favor of an employment relationship, this is insufficient to overcome the independent contractor status. *Ramirez* is instructive on this. Mr. Ramirez was being paid by the roofing square, which favored Ramirez being an independent contractor. *Ramirez,* 433 S.C. at 530, 860 S.E.2d at 685. However, the Court still ultimately decided that Ramirez was an employee due to the exclusive nature of the relationship. *Id.* Even if the Court concludes that the manner of payment here cuts in favor of employment, it is insufficient to overcome that the Claimant was operating as an independent contractor under the facts of this case.

D. Right to fire

There is insufficient evidence to weigh this factor. "This factor is often the most problematic, for a putative employer generally has the ability to terminate both employees and independent contractors." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 481, 753 S.E.2d 416, 422 (S.C. 2013). McNeal paid the Claimant $3,200 after the Claimant's accident, which is the amount they agreed to, even though the Claimant did not work the full week or finish the framing because he was injured around 11:15am that Friday.[2] The Claimant's crew did not return to the job after the accident because the framing was completed the framing that Friday. Under these facts, there is insufficient evidence of the right to fire to impact the outcome in either direction. This is the same conclusion the Court reached in *Ramirez* when "there was little to nothing in the record to show what right May River had to terminate Ramirez from a job, what right Ramirez had to quit, and what claims (if any) the parties had against each other in those circumstances." *Ramirez*, 433 S.C. at 531, 860 S.E.2d at 686.

[2] EMS assessed the Claimant after the accident at 11:25am, Cl. APA 1, P.3.

CONCLUSION

The overwhelming evidence in this case shows that the Claimant was an independent contractor, not a direct employee. He had a four-man crew that did jobs for a variety of contractors and owners, and this was the crew's first job ever for McNeal. Perhaps the most telling fact of all is that the Claimant's crew did this job because a project they had already started for another contractor was experiencing delays, and they were planning to return to that job as soon as this job was finished. The Claimant owned most of his crew's tools, the vehicle they used, and found the crew most of their jobs. His crew had all the tools they needed to frame, but they may have borrowed one nail gun on this job. The Claimant negotiated the price for his crew and divided the money up between his guys, while keeping a larger share for himself. Under these facts, Claimant's crew was clearly operating as an independent business concern separate and apart from McNeal. Therefore, Respondents McNeal and the South Carolina Uninsured Employers' Fund respectfully requests the Court affirm the Commission's order in full.

DATED this 5th day of December, at Beaufort South Carolina, and

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of *Joint Brief of Respondents* has been served on the following parties this 5th day of December 2022 via electronic mail.

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