THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

Appellate Case No. 2022-001153
W.C.C. No. 1824344

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This claim arises out of the October 29, 2018, workplace injury of Zachary Brown (hereinafter, "Respondent," or "Claimant"), wherein he injured his left leg and knee when he fell from a ladder, while in the course and scope of his employment with Southeastern Services, H.H.I., LLC. This claim was set for a hearing before R. Michael Campbell on February 18, 2021, in Walterboro, South Carolina. At the hearing, Respondent sought a determination of whether the employer was subject to the Act at all times relevant to his workplace injury. Respondent further sought payment of all past medical treatment, additional medical treatment for his injuries, temporary benefits from the date of injury continuing until such time as Respondent reached maximum medical improvement (MMI), a calculation of his average weekly wage and resulting compensation rate in his claim for benefits due to his workplace injuries.

At the hearing, Respondent asserted that the employer was subject to the Workers' Compensation Act (hereinafter, "the Act") by regularly employing four or more employees at the time of Respondent's workplace injury. Respondent asserted that the employer's mode of operation at the time of his injury included employing four or more employees. In support of this assertion, the sole member of the LLC, Jamie Brown, admitted to regularly employing three employees. In addition to those three employees, Jamie Brown was employed by and through the

LLC and there was another employee besides the three admitted to by Jamie Brown, named Chance Jones, who worked less frequently than the other employees of the employer LLC. Respondent further asserted that the employer was also subject to the Act, as it regularly employed four or more employees in this State, through its statutory employees, by "regularly" employing subcontractor employees through the employer's general contracting business. Respondent claimed that the evidence of record supported that the employer LLC is merely an alter ego of Jamie Brown, the sole member of the employer LLC, who conducted the same business with the same name prior to organizing the LLC, and who previously elected to be subject to the Act and failed to file a Form 38, withdrawing his waiver of exemption to the Act.

The Single Commissioner issued his Decision and Order on February 18, 2022. In the Decision and Order, the Single Commissioner found, *inter alia*, the following: Claimant was hired in mid to late October 2018 by Southeastern Services, HHI, LLC; that on October 29, 2018, Claimant fell 6 ft from a ladder while working for the Defendant LLC, sustaining a left tibia and fibula fracture; Claimant testified that two other employees of the LLC were working with him on the day of the accident, Daniel Smith and Taylor Smith; Claimant first returned to work at full capacity with Crossroads Construction on April 15, 2019 and that he did not work from the date of injury to April 14, 2019; that beginning with pay period ending in November 2, 2018, Chance Jones, worked between 34-40 hours per week and was paid by the LLC; that Claimant testified that Chance Jones worked with the Claimant about three times while he was employed with the Defendant LLC; that Jamie Brown admitted that the LLC regularly subcontracts plumbing, flooring, tile, and painting; that Jamie Brown received remuneration for work performed for the LLC, and that the Commission File contains no Form 5 filed by Jamie Brown. R. at 4 – 18.

The Single Commissioner made several Conclusions of Law, including that the South Carolina Workers' Compensation Commission has jurisdiction over the claim because the LLC employed four or more employees at the time of the Claimant's workplace accident; that Jamie Brown, the sole member of the employer LLC, is considered an employee under the Act, because he is not a "sole proprietor," reasoning that as a member of an LLC he is more akin to a corporate officer or employee of the employer LLC; that Jamie Brown's status as a tax payer has no bearing on his status as an employee under the Workers' Compensation Act; that Jamie Brown was required to file a Form 5 excluding himself from coverage under the Act and the Commission file was devoid of a Form 5 from Jamie Brown; and that Defendant South Carolina Uninsured Employer's Fund (hereinafter, "SCUEF" or "Appellant") shall be responsible for paying the awarded benefits on behalf of Defendant LLC. R. at 9 – 18.

In support of his conclusion that members of an LLC are more akin to corporate officers, the Commissioner cited the Uniform Limited Liability Company Act, specifically S.C. Code Ann. § 33-44-1205 which provides as follows:

> Except (1) as otherwise required by the context, (2) as inconsistent with the provisions of this chapter and (3) for this chapter, Chapter 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 Commissioner reasoned that "[b]ecause the legislature specifically set for the terms that could be interchanged with "limited liability company" and those terms do not include "sole proprietor" or "partner" as used in section 42-1-130, members or owners of an LLC are treated as corporate officers for purposes of the Workers' Compensation Act." R. at 10. The Commissioner noted that "the cannon of statutory construction 'expressio unius est exclusion alterius' or 'inclusio unius est

exclusion alterius' holds that "to express one thing implies the exclusion of another, or the alternative," citing *Hodges v. Rainey,* 341 S.C. 79, 86 (2000). R. at 10.

Given the Single Commissioner's Findings of Fact and Conclusions of Law, it was ordered that the SCUEF pay for or reimburse the cost of Respondent's emergency medical treatment and prescriptions, that the SCUEF pay the Respondent $3,146.85 representing 6.3 weeks of back-due temporary indemnity benefits at his compensation rate of $499.50, and that SCUEF receive all recommended and causally related medical treatment for Respondent's left leg injury by an authorized treating orthopedic surgeon of Defendants' choosing. R. at 17.

The UEF filed a Form 30 Request for Commission Review on March 1, 2022, and a hearing before the Appellate Panel of the Full Commission was held on May 16, 2022. On July 22, 2022, the Appellate panel issued a majority affirmation with Commissioners T. Scott Beck and Avery B. Wilkerson, Jr. voting to affirm, with Commissioner Aisha Taylor dissenting. This appeal followed. R. at 19 – 51.

STATEMENT OF THE FACTS

Testimony of Zachary Brown

Respondent, Mr. Brown, testified that on October 29th, 2018, he was employed by Southeastern Services, HHI, LLC. R. at 139, ln. 17 – 23. He testified that he was employed as a laborer for this employer, which was a general construction contracting business. R. at 140, ln 1 – 12. He testified that on that date he was pulling stucco from around a window on the top floor of a home, when the ladder slipped, causing him to fall, and resulting in Respondent fracturing bones in his left leg. He testified that on the date of the accident he was working at a home in Hilton Head Plantation on Hilton Head Island, and that two co-workers, Daniel Smith and Taylor Smith, were there on the date of the accident and transported him to the hospital. R. at 141. Respondent

stated that after his workplace accident he was taken to Hilton Head Hospital, where he underwent surgery for his leg, and later received some outpatient treatment. R. at 142. Respondent testified that his earnings as listed in Employer's payroll records in Claimants APA submissions were accurate. R. at 147, ln 1 – 15.

Respondent stated at the hearing that after the accident he did not go back to work for the employer, and that the sole member of the LLC, Jamie Brown, never offered him employment after his workplace injury. R. at 147 - 148. Respondent also testified that while he did not return to work with the employer, he was able to return to work after he recovered from his workplace injury on April 15, 2019, with Crossroads Construction. R. at 149.

At the hearing Respondent testified in addition to himself, Daniel Smith, and Taylor Smith, that Chance Jones was also employed by Southeastern Services, HHI, LLC, and that he would fill in for people as the employer required "instead of pull[ing] people off jobs." R. at 149 – 150. In his Deposition, Respondent testified that during his short term of employment with Southeastern Services HHI, LLC, Chance Jones worked approximately three times with the Respondent. He further testified that Jamie Brown, the owner of the employer, would work with him and the other employees of the employer, that he directed the work, supervised the other employees, and was responsible for contracting the work to be completed by the Employer. R. at 150 - 151. Respondent also testified that at one time there would be as many as five employees of Southeastern Services, HHI, LLC on one job site R. at 151, ln. 1 – 19.

In addition to the employees named by the Respondent, he also testified that the employer frequently employed subcontractors as part of the employer's general construction contracting business. Specifically, he testified that the employer "would use subcontractors for electric work, tile work, and painting." R. at 151, ln 21 – 22. Respondent testified that in his very short period

of employment with the Employer, that he recalled seeing at least one employee or agent of Dedicated Electric that was subcontracted by the employer, also working on one of the job sites on which Respondent was assigned to work, identifying him as an "older gentleman with glasses who did panel work." R. at 151 - 152. During the hearing, Respondent also testified that he knew that the employer did not typically perform painting on construction and remodeling jobs, but that the employer subcontracted this work to a painting company, identifying "Romero's painting," specifically. He also identified one job site to which he was assigned by his employer, where he was aware that Romero's Painting and a crew of up to three painters from that subcontractor were present doing painting prior to the Claimant and other direct employees of Southeastern Services, HHI, LLC performing the trim work at that site. R. at 153 – 154. Respondent further testified that the employer, a general construction contracting company, did not do painting and that Jamie Brown always subcontracted this work. R. at 155, ln 15 – 22. Respondent stated that it was his understanding that the employer subcontracted all of the tile, flooring, and plumbing work and that the employer's employees did not engage in any of that work. R. at 156, ln 14 – 25. Respondent came to know that the tile and flooring was performed only by subcontractors of the employer because he asked Jamie Brown about performing this work when he began his employment with the employer; he specifically asked about this work because it was work with which he had prior experience, and in which he took interest. R. at 156, ln. 1 – 10. Respondent testified that the employer regularly employed subcontractors for electrical, painting, flooring and tile, and plumbing work in its general construction contracting business, during his employment with Southeastern Services, HHI, LLC.

Testimony of Jamie Brown

Jamie Brown was duly sworn and testified that in December 2017 or January 2018 he formed the Employer, Southeaster Services, HHI, LLC. R. at 165, ln 22 – 23. He testified that he was the sole member of the employer LLC. R. at 168, ln. 9 – 10. Jamie testified that Southeastern Services only ever had three employees, and that on October 29th, 2018, he claimed to have three employees, who he identified as Daniel Smith, Taylor Smith, and Zachary Brown. R. at 166, ln 5 – 14. Jamie testified that by the time of the Respondent's accident, Respondent had been working for the employer for three weeks at most. R. at 166, ln 18 – 20. Jamie stated that the Respondent was hired full time with the employer as a laborer/carpenter helper. R. at 166 - 167. He further stated that at no point in 2018, did he have four or more employees. R. at 167 - 168.

Jamie testified that although Southeastern Services, HHI, LLC had been operating since late 2017 or early 2018, he had been working in the field of general contracting for 25 years. Tr. R. at 173, ln. 11 – 13. On cross examination by Respondent's attorney, Jamie stated that the employer held a home builders license and a general contractor license. R. at 174, ln. 12 – 17. On cross examination, Jamie testified that electrical work, painting, plumbing, and flooring and tile work were all integral to his business' work in general construction contracting. R. at 175, ln. 12 – 23. He further testified that all of the aforementioned jobs were ones that he regularly subcontracted out in 2018. R. at 176, ln. 1 – 14. Specifically, he stated that in 2018 and the period relevant to this claim and Respondent's employment, the employer subcontracted electrical work to Dedicated Electric, which was owned and operated solely by one individual to his knowledge, that he regularly subcontracted plumbing work to Padgett Plumbing and/or Low Tide Plumbing, and that he subcontracted all tile and flooring work to a Milton Ayende. R. at 176 - 179. He also testified that he subcontracted painting work to Romero's Painting in 2018, and that when

Romero's was contracted to do the painting in 2018, that the business would typically come with three to five workers to perform the subcontracted work. R. at 180 - 181.

As to his relationship with the employer, on cross examination, Jamie Brown stated that although he does not draw a paycheck from the employer LLC, he pays his bills and other necessities of life through the LLC, is compensated for the work he does through the LLC, and that he is involved in the day-to-day operations of the business. R. at 181 - 182. Jamie stated that prior to organizing the employer LLC, that he was working as Jamie Brown d/b/a Southeastern Services, HHI, and that he maintained workers' compensation insurance at one point while working as a sole proprietorship under that business name. R. at 182, ln. 20 – 25. It was Jamie's testimony that the sole proprietorship that he maintained prior to his organization of the employer LLC did the same general contracting business, conducted this business in the same geographical location, that both businesses were operated outside of his personal home, and that the business did not change management when the employer LLC was organized. R. at 184, ln. 6 – 23. Jamie further testified that the business' employees did not change when the employer LLC was organized and that when the LLC was organized, his employees did not know at the time of LLC's organization that they began working for a new company or entity. R. at 184, 65. In response to questioning from Respondent's attorney, Jamie identified his work van, a photo of which was submitted as Respondent's APA #8, which had a decal on the side, reading Southeastern Services, HHI, (as opposed to Southeastern Services, HHI, LLC) and Jamie claimed that it was purchased after the organization of the employer LLC. R. at 186 – 187.

When asked about his payroll records, Jamie Brown testified that the week leading up to the Respondent's workplace injury, that the Respondent was paid over $200.00 in overtime and that he worked more than 40 hours for that week. R. at 188, ln. 15 – 22.

Medical Evidence

Admission notes from Hilton Head Hospital provide that on October 29, 2018, Zachary Brown fell from a 6-foot ladder when working in on a house remodeling project in Hilton Head Plantation, and an x-ray taken in the emergency room demonstrated left tibial and fibular fractures. R. at 325 - 442. The mechanism of injury reported at the hospital was that the Claimant's left leg was fractured when it went through the rungs of the ladder as he fell. Further assessment at the hospital revealed closed bicondylar fracture of tibial plateau, closed displaced comminuted fracture of shaft of left tibia, and comminuted oblique fracture of the mid left fibula with medial displacement of the distal fracture fragment. R. at 364. On October 30th, 2018, the Claimant underwent an open reduction and internal fixation of his left midshaft tibia fracture with intramedullary nailing. R. at 384 – 386. After his surgery, he had two follow-up visits with Douglas Scott, MD, who performed the surgery, on November 8, 2018, and December 23, 2018. R. at 439 - 442. Notably, in Claimant's second and last visit, Dr. Scott states that the Claimant may graduate out of the cam boot as tolerated with weightbearing as tolerated and that he may gradually return to working duties but did not state restrictions or place the Claimant at MMI. R. at 442.

The Claimant was examined by Joseph P. Tobin, MD, on July 28, 2020. Dr. Tobin noted that the Claimant never had physical therapy or any subsequent care for more than a year at the time of his visit on July 28, 2020, and that the Claimant noted ongoing problems including pain in the leg and popping in the left knee. R. at 443 - 444. Dr. Tobin opined that it was in the Claimant's best interest to have the retained hardware removed, that the Claimant likely had meniscal pathology of the left knee that required further imaging and likely also required arthroscopy. Dr.

Tobin further opined that his symptoms associated with his left leg and knee were causally related to his workplace injury on October 29, 2018. *Id.*

Pay Records

Claimant and employer submitted payroll records which show the following gross amounts earned by the Claimant in his employment with the Employer. R. at 453 - 635

10/19/18	$756.00
10/26/18	$742.50
11/02/2018	$540.00

Personnel Records from Crossroads Construction

Records from Crossroads Construction indicate that the Claimant returned to work for that employer on April 15, 2019. R. at 445 – 452.

Employer's Tax Records

Tax filings by Jamie Brown for the Employer LLC show gross receipts of $651,213.00 and gross profit of $299,624.00 for 2018. R. at 707. For 2019 the Employer reported gross receipts of $876,660.00 and gross profit of $258,796.00. R. at 725. Tax filings for "Southeastern Services" for 2017, the year prior to Employer's organization as an LLC, demonstrate gross receipts of $860,381.00 and gross profit of $239,593.00. R. at 678.

STANDARD OF REVIEW

The standard for judicial review of decisions rendered by the South Carolina Workers' Compensation Commission is provided by the Administrative Procedures Act ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, an appellate court can reverse

or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable probative and substantial evidence within the entire record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010)(citing S.C. Code Ann. § 1-23-380(5)(d),(e)). "The issue of whether an employer regularly employs the requisite number of employees to be subject to the Workers' Compensation Act is jurisdictional." *Harding v. Plumley*, 329 S.C. 580, 584 (Ct. App. 1998). Because findings of fact relating to the number of employees employed by an employer is a jurisdictional question, the findings of the South Carolina Workers' Compensation Commission "are not conclusive on appeal and the appellate court has the power and duty to review the record and decide the issue in accordance with the preponderance of the evidence." *Id.* (citing *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994). However, the Workers' Compensation Act is to be given liberal construction, with doubts of jurisdiction resolved in favor of inclusion of employees within Workers Compensation coverage. See *Gray v. Club Group, Ltd.*, 339, S.C. 173, 185 (Ct. App. 2000) (citing *Ost v. Integrated Products. Inc.*, 296 S.C. 241, 371 S.E.2d 796 (1988).

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND AND CONCLUDED THAT JAMIE BROWN WAS AN EMPLOYEE OF SOUTHEASTERN SERVICES, HHI, LLC.

The Decision and Order of the Single Commissioner, which was affirmed by the majority of the Appellate Panel of the Full Commission correctly found and concluded that Jamie Brown, the sole member of Southeastern Services, HHI, LLC, was an employee of the LLC for purposes of meeting the requisite number of employees to establish jurisdiction over the Employer LLC in the present case. The factual findings constituting the basis of the Commission's legal conclusions

are also based upon the preponderance of the evidence. Jamie Brown testified that although he had previously operated as a sole proprietor doing business as "Southeastern Services," that prior to the Respondent's workplace accident, he had organized the employer LLC in late 2017 or early 2018. This factual finding was further based on testimony and evidence that although Jamie Brown did not receive a paycheck from the LLC, he was compensated for work performed through the LLC, using the LLC account to pay his personal expenses. As noted in the Commission's orders, Jamie Brown's status as a sole proprietor for tax purposes has no bearing on his status as an employee, and because he was required to file a Form 5 to exclude himself from coverage under the Act, he was an employee under the Act for purposes of jurisdiction.

Under the Act, an employee is defined as follows:

> every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed but excludes a person whose employment

S.C. Code Ann. § 42-1-130.

This broad definition of the term "employee has been interpreted liberally, and "doubt as to a workers' status should be resolved in favor of including him under the Act." *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 405 S.C. 359, 367 (2013) (quoting *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19 (Ct. App. 2008). Additionally, under the South Carolina Uniform Limited Liability Company Act, "[e]ach member is an agent of the limited liability company for the purposes of its business." S.C. Code Ann. § 33-44-301.

Pursuant to S.C. Code Ann. § 42-1-130, sole proprietors or general partners of a business are excluded from the Act as employees, but "may elect to be included as employees under the workers' compensation coverage of the business if they are actively engaged in the operation of the business." Thus, the only exclusion in the definition of employee under the Act is as to "sole

proprietors" and "partners," and not members of LLC's. As astutely noted by the Single Commissioner, the canon of statutory construction "*expressio unius est exclusion alterius*" or "the expression or inclusion of one thing implies the exclusion of the other or of the alternative," when applied to this context requires a plain reading of the statute and interpretation of legislative intent to exclude *only* sole proprietors and partners, and not members of limited liability companies. R. at 10. Likewise, exceptions and restrictions on coverage are to be strictly construed. See *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993).

While S.C. Code Ann. § 33-44-120 provides that the term "partnership" or "general partnership, includes "limited liability company", it must further be noted that the absence of any mention of LLC members in the statute defining "employee" under the Act, which specifically excludes sole proprietors and partners, cannot be construed as a mere accidental omission or incongruity caused by the later addition of the South Carolina Limited Liability Company Act to the South Carolina Code. Rather, the General Assembly had an opportunity to exclude LLC members as employees under the Act with the 2007 Workers' Compensation Reform Act, more than a decade after the establishment of the South Carolina Limited Liability Company Act. Thus, it is clear from a plain reading of the statute, and the history of both the South Carolina Workers' Compensation Act, and the South Carolina Limited Liability Company Act, that members of an LLC are not excluded and were not intended to be excluded under the definition of "employee" under the Act, and are to be treated under the Act as corporate officers, pursuant to S.C. Code Ann. § 42-1-520, who may elect to exclude themselves from coverage via a WCC Form 5.

The SCUEF erroneously asserts in their brief that Jamie Brown cannot be an employee under the Act because he is the only member of a single member LLC, and that it is impossible for him to create an employment relationship with himself. The SCUEF argues that because S.C.

Code Ann. § 42-1-130, requires a "contract of hire," and because a sole proprietor cannot enter a contract with himself, there is no employment relationship, and Jamie Brown cannot be an employee for purposes of the Act. This argument misses the mark and simply ignores the fact that at the time of the Claimant's workplace injury, Jamie Brown was not operating as a sole proprietor, but had organized his business as an LLC. Because Southeastern Services, HHI, LLC is a separate entity and not a sole proprietorship, an employment relationship can, and did at the time of the Claimant's workplace injury, exist between Jamie Brown and the Employer LLC, based on his testimony that he was remunerated for work he performed through the LLC. Further, a formal, written "contract of hire" as described by the SCUEF is not a requisite for being considered an employee under S.C. Code Ann. § 42-1-130, as the term "employee" includes individuals under implied and less formal agreements of employment. While the Commission found that Mr. Brown dispensed with the formalities of the LLC in his relationship with the Employer LLC and its operating account, this cannot defeat Jamie Brown's status as an employee for purposes of the Act.

While the SCUEF claims that our courts have addressed the issue of exclusion of LLC members "head on," this assertion is misleading because the authority cited by the SCUEF concerns "working partners," specifically *Marlow v. E.L. Jones & Son, Inc.*, 151 S.E.2d 747, 248 S.C. 568 (1966); and *Daniels v. Roumillat*, 264 S.C. 497, 216 S.E.2d 174 (1975). Those cases stand for the proposition that because a partner in a general partnership is an employer of employees of the partnership, they cannot be an employee. However, reliance on this authority and rationale behind it in the present context is misplaced because these cases predated the South Carolina Limited Liability Company Act by more than two decades, and because an LLC is a separate legal person.

In further support of their argument that a sole member of an LLC should be excluded from

the definition of "employee" under the Act, SCUEF cites dicta from *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013). In that case, the Court of Appeals stated in a footnote that for purposes of analyzing whether an employer LLC in that case met the jurisdictional limit, the Court excluded counting the sole member of the employer LLC because "the record does not indicate he elected to be included as an employee for workers' compensation purposes." *Id* at 244. Again, making a bold, yet erroneous assertion, the SCUEF would have this Court believe that the "inquiry should end there." To their credit, the SCUEF correctly notes that the case was reversed by the Supreme Court, and thus is null and void, having no precedential value. *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617 (2016); See *Moore v. North American Van Lines*, 319 S.C. 446, 448 (1995)("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered").

Furthermore, the dicta found in *Hartzell*, was recently challenged by the South Carolina Workers' Compensation Commission. Prior to the Supreme Court's reversal of the Court of Appeals in *Hartzell*, the Commission addressed the dicta in *Hartzell*, in its decision in *Rish v. Berry's Custom Tree Service, LLC*, 2015 SC Wrk. Comp. Lexis 266 (October 15, 2015) (Affirmed by the Appellate Panel of the Full Commission in *Rish v. Berry's Custom Tree Service, LLC*, 2017 SC Wrk. Comp. LEXIS 126 (July 18, 2017)). In that case, the Single Commissioner found and concluded that the sole member of the employer LLC was an employee for purposes of establishing jurisdiction under the Act, reasoning that the sole member of the employer LLC was more akin to an executive officer of a corporation, and that "inclusion of an LLC as a corporation for jurisdictional purposes is consistent and fits logically within the structure of the Workers' Compensation Act." *Id.* The Commission in *Rish* concluded that the footnote in *Hartzell* discussing an LLC member's status as an employee under the Act was "quintessentially dicta" and

not binding on the Commission. The dicta in this Court's subsequently vacated *Hartzell* decision concerning the employment status of LLC members for purposes of meeting the jurisdictional number of employees has no precedential value. Accordingly, this issue should be fully examined by this Court with deference to the well-reasoned decisions of the Commission in the present case.

In an attempt to overcome the lack of support for their argument in South Carolina law, the SCUEF would divert the Court's attention to North Carolina law. While our Courts look to North Carolina precedent for guidance in interpreting the law of Workers' Compensation in South Carolina, North Carolina authority is unpersuasive, because as correctly noted by the SCUEF, the North Carolina legislature has amended their Workers Compensation Act to allow LLC members to opt into the Act like sole proprietors or general partners, after the creation of Limited Liability Companies in North Carolina. However, as noted above, South Carolina amended its Workers' Compensation Act more than 10 years after the adoption of the South Carolina LLC Act, and our legislature chose not to codify the status of LLC members to be treated similarly under the Act to sole proprietors and general partners. Thus, the fact that North Carolina specifically chose to treat LLC members as sole proprietors and partners, and South Carolina has not, does not support the argument that our Workers' Compensation Act's statutory definition of "employee" should be interpreted in the same fashion as that of North Carolina. Rather, the opposite is true, and the intent of the General Assembly in choosing not to treat LLC members as sole proprietors or general partners should be honored.

Furthermore, the Respondent has never argued or taken the position that the Fund's rights of attachment should be in any way altered in the context of a single member LLC. The fact that the SCUEF has been given the right to essentially pierce the veil of an LLC, to protect the Fund's interests and the public interest in maintaining a fund to provide for the injured employees of

delinquent and irresponsible employers in this State, has no relevance upon the interpretation of the Act's definition of employee for purposes of jurisdiction and coverage.

II. THE COMMISSION CORRECTLY FOUND AND CONCLUDED THAT THE EMPLOYER WAS SUBJECT TO THE ACT BECAUSE THE PREPONDERANCE OF THE EVIDENCE SUPPORTS THAT THE EMPLOYER EMPLOYED FOUR OR MORE REGULAR EMPLOYEES AT THE TIME OF RESPONDENT'S WORKPLACE INJURY

Assuming *arguendo* that this Court were to find that the Commission erred as a matter of law in concluding that Jamie Brown was an employee for purposes of establishing jurisdiction under the Act, the Commission correctly found that the employer regularly employed four or more employees in the State, because Chance Jones was a regular employee of the employer during the relevant time period. Pursuant to the Commission's findings, based on the employer's pay records, "Chance Jones worked between 30-40 hours per week as of the period ending November 2, 2018," which is the same week in which Respondent was injured. The pay records further demonstrate that Chance Jones continued to work the week after Respondent's injury, supporting the conclusion that it was the employer's intention to continue to employee Chance Jones. The Commission's findings are further supported by Respondent's testimony that during his very short tenure of employment with the employer, that Chance Jones worked alongside Claimant about three to four times. R. at 310. Respondent also testified that at one time there would be as many as five employees of Southeastern Services, HHI, LLC on one job site. R. at 151. Thus, in addition to Jamie Brown's employment with the employer LLC, substantial evidence, and indeed, the preponderance of the evidence supports the Commission's finding that Chance Jones was a regular employee of the employer at the time of Respondent's workplace injury.

While unnecessary for establishing jurisdiction, the Respondent would further assert that this Court should find that the employer LLC also regularly employed four or more employees by

virtue of statutory employees through the employment of subcontractor employees. Under South Carolina's statutory employee doctrine, owners and contractors are liable for injuries sustained by workers of subcontractors, when the work being undertaken is a part of the contractor's "trade business or occupation." Further, statutory employees may be counted to meet the jurisdictional number of employees. See *Ost v. Integrated Products, Inc.* 296 S.C. 241 (1988).

At the hearing, Jamie Brown testified that as a general contractor, all of the electrical work, painting, plumbing, and flooring and tile work were integral to his business, and that all of the aforementioned jobs were ones that he regularly subcontracted out in 2018. Tr. p. 174 - 175. As discussed above, Jamie Brown specifically identified the subcontractors to whom these jobs were subcontracted and stated that he subcontracted painting work to Romero's painting in 2018, who would bring three to five workers to perform the subcontracted work. R. at 176 - 181. The Respondent also testified that he was aware that at one job in his short tenure with the employer, Romero's Painting brought a crew of up to three painters from that subcontractor, and that they were present at the job site immediately before Respondent and other direct employees of the employer were tasked with performing the trim work. Tr. p. 153 - 154. Accordingly, there is substantial evidence of record to support that at the time relevant to the Respondent's workplace injury the employer regularly employed statutory employees that may be counted toward establishing jurisdiction.

Additionally, while the preponderance of the evidence establishes that the employer had at least four regular employees at the time of the Respondent's workplace accident, the employer is also subject to the Act, as the employer LLC may be seen as an alter-ego of the sole member which failed to properly withdraw from the Act by filing a Form 38. For years leading up to 2018, shortly before the beginning of Respondent's employment, Jamie Brown operated as a sole proprietor

doing business as Southeastern Services, voluntarily electing to submit to jurisdiction under the Act. Jamie Brown never withdrew from the Act at any point before or after his organization of the employer LLC. Thus, if we are to believe the Appellants, that Jamie Brown is the employer and not an employee, then virtually nothing changed regarding the operation of the business (even maintaining some of the same employees) and the LLC is simply an alter ego of Jamie Brown d/b/a Southeastern Services HHI. Thus, if this Court is not inclined to affirm the findings of the Commission that Jamie Brown is an employee of the employer LLC that he created, the alternative is that the LLC is merely an alter ego of Jamie Brown, who failed to withdraw from the Act. Furthermore, the election to be subject to the Act without withdrawal is evidence supporting that the business' mode of operations was one which regularly employs four or more employees in the State.

CONCLUSION

Given the foregoing, the Respondent would respectfully submit that this Honorable Court **AFFIRM** the Decision and Order of the Appellate Panel of the Workers' Compensation Commission.

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January 6, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-001153
W.C.C. No. 1824344

Zachary Brown.....Claimant/Respondent

v.

Southeastern Services HHI, LLC, Employer and
Uninsured Employers' Fund, Carrier, Defendants
of which Uninsured Employers' Fund is the .....Appellant

CERTIFICATE OF COUNSEL

Counsel for Claimant/Appellant certifies that the Record on Appeal complies with Rule 210(g), SCACR.

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