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SC Court of Appeals

IN 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, Carrier.....Respondents.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT.....4

CONCLUSION.....11

TABLE OF AUTHORITIES

State Cases

Ramirez v. May River Roofing, Inc., *433 S.C. 519, 860 S.E.2d 680 (S.C. App. 2021)*...3,8,9,10

Wilkinson v. Palmetto State Transp. Co., *382 S.C. 295, 299, 676 S.E.2d 700 (2009)*.....8

STATEMENT OF ISSUES ON APPEAL

1. DID THE FULL COMMISSION ERR IN FINDING AS MATTERS OF FACT AND LAW THAT APPELLANT WAS AN INDEPENDENT CONTRACTOR AS OPPOSED TO AN EMPLOYEE?

STATEMENT OF THE CASE

This matter was commenced by the filing of a Workers' Compensation Form 50 by the Appellant arising out of an accident which occurred on May 8, 2020 in which he was struck in the eye by an errant nail fired from a nail gun. Form 51's were filed on behalf of Alan F. McNeal and by the South Carolina Uninsured Employer's Fund. A hearing was held on July 16, 2021 before the Single Commissioner, Gene McCaskill, who found that Appellant was, at the time of the injury, an independent contractor and not an employee. Subsequent to this ruling, Appellant filed a Form 30 requesting a full commission review. Pursuant to the filing of a full commission review, the Full Commission issued its ruling dated June 15, 2022 affirming the decision of the Hearing Commissioner.

This appeal then ensued.

STANDARD OF REVIEW

An Appellate Court normally owes deference to the Commission's factual findings because the Administrative Procedures Act mandates that those findings will stand unless they are clearly erroneous in the view of the reliable, probative and substantial evidence on the record as a whole. But the questions of whether an individual is an employee or an independent contractor for the purposes of Workers' Compensation is jurisdictional; therefore, this Court may take its own view of the preponderance of the evidence. See Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (S.C. App. 2021).

ARGUMENT

1. DID THE FULL COMMISSION ERR IN FINDING THAT THE APPELLANT WAS AN INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYEE OF THE EMPLOYER/RESPONDENT?

Appellant, Pablo Lopez Lorenzo, is 33 years old and originally from Mexico. He has lived in the United States for around 10 years, exclusively in the Beaufort, South Carolina area. Appellant is married and his wife's name is Brenda Hernandez. Appellant is a high school graduate. His working life has consisted of doing carpentry work, more specifically, doing siding and framing work. This is, likewise, true for his co-workers hereinafter discussed. *(R. p. 110, lines 10-11)*. Appellant was injured on May 8, 2020 while working for Alan F. McNeal, LLC, on a house located on Lady's Island near Beaufort, South Carolina. Appellant was part of a group of four workmen who began working for the employer on May 4, 2020; neither Appellant nor any of the other three workmen own or have ever owned their own business. *(R. p. 110, lines 10-11)*. These workers are identified as Mario, Otoneil, and Joaquin. The last names of the three workers are unknown to the Appellant. *(R. p. 110, lines 17-19)*. Prior to coming to work for the employer, the four workers had been working for an individual named Keith who provided them with most of their work, but when they needed work, they would look elsewhere. *(R. p. 131, lines 23-25)*. Just prior to going to work for the employer, there was a work stoppage on Keith's job which required the Appellant and his three co-workers to look elsewhere for work for a duration of approximately two weeks, after which time, they would return to work on Keith's job. *(R. p. 134, lines 6-8)*. Appellant's brother, Jorge Vidal Silvestre, worked for the employer as a member of Don Juan Roofing, a subcontractor, and was responsible for getting McNeal and Appellant together for a meeting on Sunday, May 3, 2020.

During this meeting, Appellant and McNeal discussed McNeal's rules and how he liked to have his work done. *(R. p. 107, lines 1-3)*. McNeal explained to Appellant that he wanted the job to be really tight and well done; the work area had to be kept really clean with no stray or leftover nails being left of the site. *(R. p. 111, lines 10-13)*. Perhaps the most important piece of evidence which bears on this question can be found on the Hearing Transcript. *(R. p. 47, lines 22 through 25)*. During this exchange between Appellant and Mr. Liipfort, Mr. Liipfort asked the question, "Mr. McNeal didn't tell you how to frame, right?" Appellant responded, "A few things, because not all carpenters work the same way." This exchange clearly speaks to the fact that Mr. McNeal exercised a measure of control over the means and methods of the framing work Appellant and his crew were doing. Appellant informed Mr. McNeal that he thought the project would take one to two weeks working Monday through Friday. *(R. p. 108, lines 13-15*. The rate of pay was to be $3,200.00 per week for all four collectively with Appellant making $1,000.00 per week and the remaining $2,200.00 being divided equally among the other three workers. *(R. p. 133, lines 20-23)*. The reason for this disparity between the workers was explained by Appellant as he spoke better English that the other three, that he owned a car, that he owned more tools than the other three and because he was the one who secured the job. Appellant testified at the hearing that, prior to beginning work, McNeal asked him if his group carried Workers' Compensation insurance and he informed McNeal that they did not. *(R. p. 60, lines 14-18)*. The four workers agreed among themselves on their respective weekly compensation. *(R. p. 109, lines 1-2)*. It was the plan of the workers to work for McNeal for two weeks and then return to Keith's job upon their completion of McNeal's job. *(R. p. 134, lines 6-8)*. It should be noted that there is sharp inconsistency in the testimony of Mr. McNeal in his deposition testimony and his testimony at the hearing with regard to manner of payment. On *(R.*

p. 170, lines 5-8) of his deposition, Mr. McNeal was asked whether the crew was hired for a specific job or just one week. Mr. McNeal responded, "I don't recall." In his hearing testimony, Mr. McNeal unequivocally testified that the crew was to be paid $3,200.00 for the entire job. *(R. p. 68, lines 7-18)*. Mr. McNeal further testified that he paid the $3,200.00 after the first week of work in spite of the fact that the work was not finished. *(R. p. 68, lines 19-20)*. This glaring inconsistency in his testimony bears on his credibility as a witness. Mr. McNeal's deposition and hearing testimony should be viewed and contrasted with Appellant's straight forward testimony that the crew was to be paid $3,200.00 per week. It is noteworthy that Mr. McNeal changed his testimony at the hearing so that it would weigh more heavily in favor of a finding the Appellant was an independent contractor.

The four workers began working on the McNeal job on Monday, May 4, 2020. The workman supplied their own utility belts and hammers, Appellant supplied a nail gun and McNeal supplied a nail gun which was specialized for nailing plywood as opposed to regular wood, as well as McNeal's own lifting machine which was operated by McNeal to assist in putting up rafters requiring McNeal to work side by side with members of the group of four on the date of the injury. *(R. p. 49, lines 9-15)* and *(R. p. 111, lines 14-16)*. On May 8, 2020, Appellant was struck in the eye by a nail fired from a nail gun operated by Mario (LNU) and has suffered a loss of vision in his left eye and issues with his right eye which remain unresolved. The workers were in the process of nailing plywood to the rafters of the structure when the injury occurred.

Alan F. McNeal, LLC, is an entity which has been in operation for around 10 years. *(R. p. 158, lines 23-25)*. The entity builds custom homes and spec houses. Mr. McNeal is a licensed general contractor who operates the entity with one employee, his son, Tyler McNeal. *(R. p.*

159, lines 23-25) and (R. p. 158, lines 8-9). He builds houses exclusively using independent contractors. *(R. p. 161, lines 7-8).* Mr. McNeal stopped carrying Workers' Compensation insurance essentially for financial considerations after carrying it for most of the 10 years he has operated Alan F. McNeal, LLC. *(R. p. 189, lines 17-25).* Mr. McNeal testified that he tries to verify whether his subcontractors carry Workers' Compensation coverage before they begin work. *(R. p. 175, lines 11-13).* The house located at 43 Fiddler (the house where the injury took place) was a spec house owned by Alan F. McNeal, LLC with Alan F. McNeal, LLC, the general contractor. Mr. McNeal testified in his deposition that while on his job sites, he is actively participating in the building as opposed to just having his crews do the work. His involvement in the construction of homes was a mixture of active participation and allowing subcontractors to work independently for him. *(R. p. 168, lines 9-13).* This testimony is consistent with that of Appellant for the time they were on the job site.

Insofar as the number of employees necessary to bring Defendant within the act, there can be no question in light of McNeal's assertion that during the course of construction of 43 Fiddler, there were in excess of 75 workers on the premises in addition to the Appellant and the fellow workers he brought with him. *(R. p. 185, lines 24-25).*

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 Appellant in his performance of his work. Analysis of this issued should take into consideration that the undisputed purposes of the Workers' Compensation Act is to protect workers, owners, and businesses by requiring a business covered by the Act to ensure its workforce against the cost of industrial accidents. This structure was designed to build the costs to the consumer who demand for the goods and services and to ultimately pass these costs to the

consumer whose demand for the goods and services brought about the conditions that led to Appellant's injury. The general rule is that Workers' Compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed. See Ramirez supra. In sum, Employer/Respondent, by not complying with the Workers' Compensation Code in not carrying the required insurance coverage, left more than 75 employees of subcontractors exposed in the event of injury to any one of those workmen. In this light, justice demands that the four factors be considered in evaluating right of control being examined with an eye toward coverage and a finding of the Employer/Employee relationship. See Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (S.C. App. 2021) quoting Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700 (2009).

1. Right or Exercise of Control.

Prior to the group of four reporting for work, claimant met with Mr. McNeal on Sunday, May 3, 2020, to go over McNeal's rules for the job site and how he liked to have his work done. McNeal explained that he wanted the job to be really tight and well done. The work area had to be kept really clean with no stray or leftover nails being left on the site. It is noteworthy that Mr. McNeal's involvement with the work itself was a mixture of both active participation in construction and deference to the workers on the job site. Appellant testified that McNeal controlled the manner and means of the carpentry work by controlling the manner in which Appellant did his framing.

This evidence of actual control being exercised over the manner and means of the work coupled with the fact that McNeal was both the owner and general contractor for 43 provides more than sufficient evidence of right of control to justify a finding of the

Employer/Employee relationship keeping in mind that the period of time Appellant was actually on the job prior to injury was actually only five days. The evidence suggesting the existence of an Employer/Employee relationship should be viewed in light of the fact there is a very small sample size of hours worked (less than 40 hours) which tends to magnify the significance of each item of evidence suggesting the existence of such evidence.

There is also the fact that Appellant was paid $1,000.00 per week for his labor. He was paid before the job was complete and there is no evidence whatsoever that any other monies ever changed hands which points to the fact that McNeal would have had to have supplied the materials for framing the house. The Ramirez case supra points to the supplying of materials as a factor which carries with it, the right to control the materials which are supplied. See Ramirez supra.

2. Furnishing of Equipment.

McNeal loaned one of his nail guns specifically designed for nailing plywood to the group when they began to erect the roof. McNeal participated directly in the placement of the rafters of the house using a piece of his separately owned lifting equipment. The actual injury occurred while Appellant was nailing plywood to the rafters. It can be inferred that this piece of equipment would likely have been a front-end loader used for hoisting building materials to the roof so that they might be nailed in place. The use of McNeal's separate equipment on two occasions over the space of less than a week clearly implied the existence of an Employer/Employee relationship.

3. Method of Payment.

Here there is clear conflict in the testimony. Appellant testified that his group was to be paid $3,200.00 per week. McNeal gave conflicting testimony on this; he changed his testimony on this after his deposition was taken rendering his testimony inconsistent and thus, not credible. In light of this inconsistency, the payment of wages on a weekly basis appears likely and clearly points toward the existence of an Employer/Employee relationship.

4. Right to Fire.

There was no written agreement between McNeal and the parties spelling out the rights and liabilities of the parties or characterizing the nature of their relationship. An independent contractor typically has the right to complete the job; the hallmark of the employment relationship is the right to unilaterally and immediately end the relationship without future liability. See Ramirez supra. Here the group of 4 never completed the job. They were paid one week's wages and never returned. It is unclear who exactly ended the relationship; however, McNeal knew he was not carrying Workers' Compensation insurance and that none of the 4 workers were carrying insurance either. It is certainly readily inferable that, given the fact the Appellant had suffered a serious injury, that McNeal would have ended their service rather than risking further exposure for injury due to the fact he was uninsured.

CONCLUSION

In light of the fact that this analysis is to be conducted liberally and in favor of a finding of coverage, it is clear that at the time of his injury, Appellant was a direct employee of Respondent and, as such, covered by the Workers' Compensation Act. The decision of the Full Commission should be reversed and remanded for proceedings consistent with a finding of a compensable injury.

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211, SCACR.

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