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DEC 13 2013

SC Court of Appeals

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December 13, 2013

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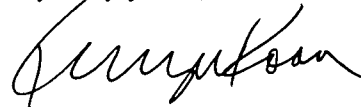
RE: Richard A. Hartzell v. Palmetto Collision, LLC
Appellate Case #: 2012-211870
Opinion No.: 5176 (S.C. Ct. App. filed October 9, 2013)

Dear Ms. Allen,

As we discussed please find enclosed a copy of the bound Appendix regarding the above referenced matter.

With kindest regards, I am

Very truly yours,



Kerry W. Koon

KWK:mm
Enclosures

cc: Kirsten Barr, Esq.
Lisa Glover, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2012-211870
Opinion No. 5176 (S.C. Ct. App. filed October 9, 2013)

RECEIVED
DEC 13 2013
SC Court of Appeals

Richard A. Hartzell, Employee.....Petitioner

v.

Palmetto Collision, LLC, Employer,.....Respondent

and

the S.C. Uninsured Employers Fund.....Respondent

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Richard A. Hartzell, Employee, Respondent,

v.

Palmetto Collision, LLC, Employer, Appellant,

and

South Carolina Worker's Compensation Uninsured
Employers Fund, Respondent.

Appellate Case No. 2012-211870

Appeal From The Workers' Compensation Commission

Opinion No. 5176

Heard September 11, 2013 – Filed October 9, 2013

REVERSED

Kirsten Leslie Barr, Harold Eugene Trask, and David
Alan Westerlund, Jr., all of Trask & Howell, LLC, of
Mount Pleasant, for Appellant Palmetto Collision, LLC.

Kerry W. Koon, of Charleston, for Respondent Richard
A. Hartzell.

Lisa C. Glover, of Columbia, for Respondent the South
Carolina Workers' Compensation Uninsured Employers
Fund.

PER CURIAM: The Appellate Panel of the Workers' Compensation Commission (Appellate Panel) awarded Richard A. Hartzell (Claimant) medical care and treatment benefits for a back injury. Palmetto Collision, LLC, (Employer) appeals the award, arguing the Appellate Panel erred in (1) determining Employer regularly employed four or more employees and, therefore, was subject to the South Carolina Workers' Compensation Act (Act)¹; (2) finding Claimant accidentally injured his back "on or about February 25, 2009," and failing to make any conclusion of law thereon; (3) finding Claimant reported the injury timely and failing to make any conclusion of law thereon; and (4) awarding Claimant medical benefits for the injury. We find jurisdiction was proper and reverse on the issue of notice.

FACTS

On May 10, 2010, Claimant submitted a Form 50 claim for workers' compensation benefits, alleging he had injured his back at work on or about February 25, 2009. Employer filed a Form 51 denying Claimant's injury, the applicability of the Act to Employer, and receipt of any notice of Claimant's injury prior to the Form 50. The South Carolina Uninsured Employers' Fund (the Fund) filed its own Form 51, which echoed Employer's responses.

I. Evidence Presented to the Single Commissioner

A. Employment and Injury

On July 12, 2011, the parties presented their case to the single commissioner. Claimant testified he was fifty-two years old and had worked as an automobile body and paint technician for more than twenty-five years. In March 2009, Claimant worked primarily doing body work for Employer, a company solely owned and operated by Mike Stallings. Claimant had previously worked for the Stallings family in two of their other auto body shops. Although Claimant admitted he suffered from arthritis in his shoulders, he denied ever having chronic or significant lower back pain before this injury.

Claimant stated besides Stallings and himself, four other employees worked for Employer at the time of his injury: Doug Alexander (Doug), Jamie Alexander (Jamie), Harold Brock, and Jimmy Morris. Claimant did not know Employer's

¹ S.C. Code Ann. §§ 42-1-10 to -19-50 (1985 & Supp. 2012).

business arrangements with the other men. He recalled Morris was present at the shop daily. Jamie had left Employer previously and returned while Claimant worked there. According to Claimant, the other men had worked regularly for Employer.

Claimant recalled that, on or about February 25, 2009,² he began cleaning up the shop so he could access his tools more easily. According to Claimant, the clean-up required moving heavy equipment. Later that afternoon, Claimant began feeling pain in his lower back. He believed the pain was "part of the job" and would subside on its own. He did not report an injury that day.

The next day, Claimant's lower back pain had intensified so that he could hardly bend over, and "it just progressively got worse." He testified that on the day after he moved the heavy equipment, he "said something to [Stallings] that I was pretty sore, I must have hurt myself." Claimant recalled Stallings suggesting he should go to the emergency room if he were having problems. Despite experiencing back problems when bending, kneeling, squatting, and lifting, Claimant did not see a doctor and continued working for approximately two weeks after the injury. Although Claimant explained he and Stallings talked about the lower back pain during the last couple of weeks Claimant worked for Employer, nothing was done about it. Claimant stated he left Employer because work had slowed down due to the economy and Employer had no work for him.

In June 2009, Claimant applied for unemployment compensation, which was ultimately awarded. In May 2010, he filed his Form 50. Late in 2010, Stallings contacted Claimant and asked him to remove some equipment he had stored in Employer's building. Claimant recalled three of his friends moved the equipment for him. Once again, he did not ask Stallings to provide him with medical treatment.

B. Employer's Testimony and Records

Stallings testified he owned Employer as the sole member of a limited liability company. He explained that, during the third and fourth quarters of 2007 and at the time of the hearing, he had two employees. Doug, who was Stallings's uncle, worked full-time as a fireman on an Air Force base and worked part-time for

² On cross-examination, Claimant conceded he could not remember exactly which day the injury occurred.

Employer. Doug's son, Jamie, worked for Employer intermittently but on a full-time basis beginning in 2007. Brock worked for Employer throughout 2009 doing restoration work. Stallings conceded he occasionally called Morris to repair heavy frame damage but testified Morris received a Form 1099 for tax purposes. With regard to Claimant, Stallings explained he believed an employer "could legally pay an individual \$600 . . . [per] year tax free." Stallings testified that because of this belief, he paid Claimant directly when he began work at the end of 2008, even though Claimant's pay exceeded \$600. He added Claimant to Employer's payroll at the beginning of 2009.

On cross-examination, Stallings conceded that during the first quarter of 2009, Doug worked for Employer part-time but regularly. In addition, Jamie, Brock, and Claimant worked for Employer during the first quarter of 2009. Stallings maintained Morris worked as-needed but not regularly; he "would hang around sometimes when he didn't have work to do." In summary, counsel and Stallings engaged in the following exchange:

Q. [F]or the second quarter of 2009 after [Claimant] left you still had the same three other guys that were reported during . . . [the] first quarter of 2009, being Douglas Alexander, Harold Brock and James Alexander . . . ?

....

They were your guys during that period of time; is that correct?

A. Well technically it would have been James and Douglas because Harold, like I said, even though he was an employee[,] and I mean I have to say this because it's the truth, he was working on a -- on side work in the shop, not on the main flow of cars and stuff.

Q. But it was [Employer's] work?

A. Absolutely.

With regard to the injury, Stallings denied being asked to pay for medical treatment for Claimant's lower back until he received Claimant's Form 50. He further denied having any recollection of Claimant notifying him of an injury or a need to go to the doctor.

Stallings testified that although an insurance agent suggested, quoted, and submitted an application for workers' compensation insurance in 2008, he neither signed the application nor approved or paid for the policy.³ However, he testified he paid payroll taxes and reported to the state and federal governments the wages he paid his employees. An accountant who handled Employer's bookkeeping provided a letter stating (1) Employer never paid any company for workers' compensation insurance and (2) Employer had "no more than three full time employees" on its payroll.

Records obtained from the Employment Security Commission (ESC) reflect Employer reported two employees for the third and fourth quarters of 2007 and the first quarter of 2008. Employer reported five employees for the second quarter of 2008, four for the third quarter of 2008, three for the fourth quarter of 2008. It reported four employees for the first quarter of 2009, three for the second quarter of 2009, and five employees (including Stallings) for the third and fourth quarters of 2009.

II. Order and Appeal to the Appellate Panel

On September 8, 2011, the single commissioner issued an order finding Employer was subject to the Act because it regularly employed four or more employees at the time of the injury, and Claimant had suffered and timely reported to Employer an injury at work. The single commissioner ordered Employer and the Fund to provide an evaluation to determine whether Claimant had reached maximum medical improvement and whether he needed any additional medical treatment. Employer appealed to the Appellate Panel, asserting twenty-one separate errors.

On December 20, 2011, the Appellate Panel heard arguments. In a split decision, the Appellate Panel affirmed the single commissioner's award. The Appellate Panel identified numerous facts as significant. First, the Appellate Panel noted records from the ESC and testimony from Stallings indicated Employer had four

³ As a result, the carrier issued an insurance policy but cancelled it for an unpaid premium after the first quarter of the term elapsed.

regular employees at the time of the injury: Doug, Jamie, Brock, and Claimant. Moreover, an application for workers' compensation insurance was submitted on Employer's behalf on May 27, 2008, and, had Employer paid the premiums, its workers' compensation coverage would have expired May 27, 2009. The Appellate Panel noted Employer did not file a Form 38 to withdraw itself from the coverage of the Act.

Furthermore, the Appellate Panel found Claimant established his report to Employer of a work-related injury primarily through his own testimony, but he was able to continue working after the injury. The Appellate Panel noted that, in rebutting Claimant's evidence, Stallings testified he could not deny with certainty that Claimant had reported the injury, but the report did not "ring a bell." However: "On[] balance, the Claimant's testimony [wa]s more credible on the issue[s] of the fact, and reporting, of the injury." The Appellate Panel observed neither side contended Employer had provided Claimant with any medical care.

In view of these findings, the Appellate Panel affirmed the single commissioner's award of benefits, concluding the Act covered both parties at the time of Claimant's injury. This appeal followed.

LAW/ANALYSIS

I. JURISDICTION

Employer asserts the Appellate Panel erred in determining it regularly employed four or more employees and, therefore, was subject to the Act. We disagree.

On appeal from the Appellate Panel, "an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel." *Hernandez-Zuñiga v. Tickle*, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007). The appellant bears the burden of demonstrating by a preponderance of the evidence that jurisdiction is proper. *Id.* at 244, 647 S.E.2d at 696.

The Act establishes, among other benefits, medical care and treatment for workers injured "by accident[s] arising out of and in the course of employment." S.C. Code Ann. §§ 42-1-160(A), -310 (Supp. 2012). South Carolina courts follow a policy of liberally construing the Act in favor of coverage. *Schulknicht v. City of N. Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002). However, the Act

specifically exempts from coverage any employer "who has regularly employed in service [fewer] than four employees in the same business within the State." S.C. Code Ann. § 42-1-360(2) (Supp. 2012). The General Assembly has broadly defined "employee" as "every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, . . . whether lawfully or unlawfully employed, but exclud[ing] a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer." S.C. Code Ann. § 42-1-130 (Supp. 2012).

In *Harding v. Plumley*, 329 S.C. 580, 586 n.2, 496 S.E.2d 29, 32 n.2 (Ct. App. 1998), this court acknowledged:

Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases. Decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret the South Carolina Workers' Compensation Law because the South Carolina statute was fashioned after that of North Carolina.

(citations omitted). Thus, the *Harding* court looked to North Carolina precedent for guidance in evaluating the number of persons a business "regularly employed." 329 S.C. at 585-86, 496 S.E.2d at 32. The North Carolina court reasoned:

[T]he term 'regularly employed' connotes employment of the same number of persons throughout the period with some constancy. It would not seem that the purpose of the Act would be accomplished by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act.

Patterson v. L. M. Parker & Co., 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 575 (1968). Moreover, this court has found:

In the context of construing the statute, the term "regular" is often juxtaposed with the term "casual." 4 Larson, *Workers' Compensation* §§ 74.01-02 ("It has been said that the two concepts are the same . . . in the casual employment definition, both duration and regularity of recurrence are important factors."). Where employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual.

Employment is casual when not permanent or periodically regular but occasional or by chance and not in the usual course of the employers trade or business.

Hernandez-Zuniga, 374 S.C. at 248, 647 S.E.2d at 697-98 (some citations and quotation marks omitted). In its reasoning, this court recognized that although employees "worked irregular days and hours, their employment extended over a period of some four weeks, during which they worked, not by chance or for a particular occasion, but according to a definite employment at hourly-wages which were paid at the end of each week worked." *Id.* at 250, 647 S.E.2d at 699, quoting *Durham v. McLamb*, 59 N.C. App. 165, 171, 296 S.E.2d 3, 7 (1982).

A. Test for Regularity of Employment

Our prior examinations of related issues, relying upon North Carolina law, have highlighted several common characteristics of regular employment under the Act: (1) "employment of the same number of persons," although not necessarily the same individuals; (2) during the relevant period of time; (3) "with some constancy"; (4) "not by chance or for a particular occasion"; and (5) without regard to the regularity of the days or hours worked. *Harding*, 329 S.C. at 585-86, 496 S.E.2d at 32; *Hernandez-Zuniga*, 374 S.C. at 249-50, 647 S.E.2d at 698-99; *Patterson*, 2 N.C. App. at 48-49, 162 S.E.2d at 575; *Durham*, 59 N.C. App. at 171, 296 S.E.2d at 7. We clarify that the first characteristic, "employment of the same number of persons," establishes a minimum number of employees, depending upon the facts at hand. This language does not preclude a finding of regularity if, at

some point during the relevant time period, an employer employs more than "the same number" of persons.⁴

In addition, each characteristic may require a complex analysis, depending upon the available evidence. For example, the *Hernandez-Zuniga* court examined the concept of a "relevant time period" in some depth and noted the identification of such a time period "is particularly difficult for employment in which workers come and go due to the nature and type of work they perform." 374 S.C. at 249, 647 S.E.2d at 698. However, it recognized "the employer's established mode or plan of operation dictates, to a large extent, the relevant time period, and both duration and regularity of occurrence are important factors." *Id.* Thus, the "relevant time period" turns on the facts of each case. See, e.g., *Harding*, 329 S.C. at 586-87 n.3, 496 S.E.2d at 32-33 n.3 (using the time period from "July through November" and noting the Appellate Panel had found that time period to be "critical" and neither party challenged that finding on appeal); *Grouse v. DRB Baseball Mgmt., Inc.*, 121 N.C. App. 376, 378-80, 465 S.E.2d 568, 570-71 (1996) (examining one-year period to determine number of regular employees, where employer admitted to hiring additional seasonal employees from April to August).

B. Analysis

The preponderance of the evidence, viewed in light of these five characteristics, supports a finding Employer regularly employed at least four persons, and thus, the Appellate Panel had jurisdiction over this claim. As a threshold matter, we note neither the single commissioner nor the Appellate Panel identified the time period relevant to Claimant's injury. The record contains evidence concerning Employer's employees from 2007 to 2009, subdivided into quarters annually. In view of this evidence and Claimant's assertion his injury occurred on February 25, 2009, we find the relevant time period for his claim is the first quarter of 2009, up to the date of Claimant's injury.

Accordingly, we must determine whether Employer (1) employed the same number of persons, although not necessarily the same individuals, (2) during the first quarter of 2009, (3) with some constancy, (4) not by chance or for a particular occasion, and (5) without regard to the regularity of the days or hours worked. The

⁴ If read literally, the existing description could improperly exclude from the Act employers whose payroll consistently reflected four or more regular employees but fluctuated upward.

record reflects that during that time period, Claimant, Doug, Jamie, Brock, and Morris performed work for Employer.⁵

The ESC's records, corroborated by Stallings's and Claimant's testimony, establish the first two characteristics, that Employer employed the same number of persons during the first quarter of 2009 through February 25, 2009. During the first quarter of 2009, Claimant, Doug, Jamie, and Brock were on Employer's payroll and worked together repairing, restoring, and painting automobiles for Employer. Claimant specifically recalled working with Doug, Jamie, Brock, and Morris. Doug consistently appeared on Employer's payroll beginning no later than 2007. Jamie and Brock joined the payroll in the first quarter of 2009. According to Stallings, Jamie returned to Employer during the first quarter of 2009, "[m]ost likely" while Claimant was working there.⁶ The record does not indicate any of those men departed Employer's service before Claimant became injured. Rather, all but Claimant remained with Employer through the end of 2009.

In addition, the preponderance of the evidence demonstrates Claimant, Doug, Jamie, and Brock worked for Employer with some constancy and not by chance or for a particular occasion. According to the ESC's records, all of those men appeared on Employer's payroll during the first quarter of 2009, and all but Claimant continued working for Employer through the end of 2009. Furthermore, Stallings established Claimant, Doug, Jamie, and Brock worked regularly for Employer and not for a particular occasion. He testified those men "would do, you know, the regular flow of work." By contrast, Stallings explained Employer did not always have vehicles with heavy frame damage. When he received such a vehicle, he called Morris to come to the shop and repair it. Morris used Employer's heavy frame machine but otherwise supplied his own tools. However, Morris did

⁵ We exclude Stallings from this analysis because, although he worked for Employer as well as being the sole member of its limited liability company, the record does not indicate he elected to be included as an employee for workers' compensation purposes. *See* § 42-1-130 ("Any sole proprietor or partner of a business whose employees are eligible for benefits under this title 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 and if the insurer is notified of their election to be included.").

⁶ Claimant recalled Jamie returned to work "a few weeks before" the injury, and Employer failed to present any evidence to the contrary.

not appear on the company payroll: his work for the shop was "sporadic," and Employer issued him a form 1099.

Accordingly, based upon the facts described above, we find the preponderance of the evidence demonstrates Employer regularly employed Claimant, Doug, Jamie, and Brock during the first quarter of 2009. As a result, the Appellate Panel did not err in finding it had jurisdiction over Employer under the Act.⁷

II. NOTICE

Employer asserts the Appellate Panel erred in finding Claimant reported the injury timely and failing to make any conclusion of law thereon. We agree.

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *accord Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify a decision of the Appellate Panel 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 on the whole record." *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010); S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2012).

⁷ We decline Claimant's invitation to affirm the finding of jurisdiction because Employer became subject to the Act by procuring workers' compensation insurance. This court has previously examined the effect of "[m]ere procurement of workers' compensation insurance" and determined it does not estop the employer from denying workers' compensation coverage. *Deanhardt v. Neal C. Deanhardt Masonry Contractors*, 298 S.C. 244, 248, 379 S.E.2d 726, 728 (Ct. App. 1989). To subject itself to the Act, an otherwise exempt employer must substantially comply with section 42-1-380, which permits an employer to file a written notice of its desire to be subject to the terms and conditions of the Act. *Id.* When no evidence indicates an employer filed the requisite written notice of its desire to subject itself to the Act, an appellate court will not find the exemption waived. *Id.* In the case at bar, no evidence indicates Employer filed a notice indicating its desire to be subject to the Act.

The Appellate Panel is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436; 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." *Id.*

Generally, an injured employee must give his employer notice of the accident upon "the occurrence of an accident, or as soon thereafter as practicable," but he must do so within ninety days after the accident. S.C. Code Ann. § 42-15-20 (Supp. 2012). The notice provisions of section 42-15-20 "should be liberally construed in favor of claimants." *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002), citing *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951). Nonetheless, the *Etheredge* court recognized the basic information a claimant must convey in giving such notice:

For adequate notice, there must be "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Larson's Workers' Compensation Law* § 126.03[1][b] (2001) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor . . . physician, or nurse." *Id.* at § 126.03[2][a] (footnotes omitted).

Id. at 457, 562 S.E.2d at 682.⁸ The notice requirement protects the employer by enabling him to "investigate the facts and question witnesses while their memories

⁸ We acknowledge the notice requirement outlined by the *Etheredge* court is more relaxed than the former statutory notice requirement. See, e.g., *Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (reciting statutory notice must be in writing and "shall state in ordinary language the name and

are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52. "The claimant bears the burden of proving compliance with these notice requirements." *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005).

We find the Appellate Panel's determination that Claimant provided Employer with adequate notice he had suffered a work-related injury is not supported by substantial evidence in the record, and we reverse. In particular, the record does not contain substantial evidence that Claimant notified Employer of any "facts connecting [his] injury . . . with [his] employment." See *Etheredge*, 349 S.C. at 457, 562 S.E.2d at 682 (recognizing adequate notice supplies "facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim" (citation and quotation marks omitted)).

The only evidence in the record of the notice Claimant asserts is the testimony of Claimant and Stallings. Claimant testified: "The next day I said something to [Stallings] that I was pretty sore, I must have hurt myself." Claimant further testified he and Stallings "talked about" his back hurting during his last couple of weeks with Employer, but he did not indicate whether their conversation in any way connected the injury with his work for Employer. Stallings denied learning of the injury before receiving Claimant's Form 50 but also admitted he simply did not remember Claimant reporting an injury.

While these facts establish Claimant reported an injury to Employer, they are devoid of any reference to an alleged connection between Claimant's injury and his employment. In fact, the only reference in the record to Claimant asserting to Employer a connection between his injury and his work lies in a question Employer's attorney posed to Claimant at the hearing before the single commissioner: "And you said you had some discussion, you said you mentioned that your back was sore from working one day is that what you told [Stallings]?" We find this question, although answered affirmatively by Claimant, does not constitute substantial evidence in view of the entire record. See *Hill*, 373 S.C. at 436, 645 S.E.2d at 431 ("Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the

address of the employee and 'the time, place, nature and cause of the accident and of the resulting injury").

conclusion the [Appellate Panel] reached."). Accordingly, the Appellate Panel erred by entering a finding that was not supported by substantial evidence in the record.

III. REMAINING ISSUES

Because the issue of notice is dispositive of this appeal, we need not address Employer's remaining issues. See *Earthscapes Unltd., Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) (recognizing when the disposition of a prior issue is dispositive of an appeal, analysis of the remaining issues is unnecessary).

CONCLUSION

We find the preponderance of the evidence in the record demonstrates Employer regularly employed four employees during the first quarter of 2009. Therefore, we affirm the Appellate Panel's determination of jurisdiction.

We further find substantial evidence in the record does not support the Appellate Panel's determination that Claimant provided Employer with timely notice of his injury. Consequently, we reverse the award of benefits to Claimant. Because the reversal on the issue of notice disposes of this appeal, we do not reach the remaining issues on appeal. Accordingly, the decision of the Appellate Panel is

REVERSED.

HUFF and GEATHERS, JJ., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2012-211870

Richard A. Hartzell,

Employee.....Respondent

v.

Palmetto Collision, LLC, Employer,.....Appellant

and

the S.C. Uninsured Employers Fund.....Respondent

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondent Richard A. Hartzell Petitions this Court to Rehear and Reconsider its opinion in Hartzell v. Palmetto Collision, LLC and S.C. Uninsured Employers Fund, Op. No. 5176, filed October 9, 2013.

I. In reversing the decision of the Workers' Compensation Commission, the Court may have overlooked or misapprehended the fact that the Worker's Compensation

Commission's order was not a final order within the meaning of the Administrative Procedures Act. Section 1-23-380 (A) of the APA provides:

"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."

and

"A preliminary, procedural, or intermediate agency, action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. Section 1-23-380 (A).

In Bone v. U.S. Food Service, 404 S.C. 67, 744, S.E. 2nd 552 (2013), which was decided after briefing in this case, the South Carolina Supreme Court determined that an Order of the Circuit Court reversing the Worker's Compensation Commission's denial of benefits to a Claimant was not a final judgment under Section 1-23-380 (A), stating; "An order as to compensability without addressing the claimant's current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment." Id. at 404 S.C. 64, 79, 744 S.E. 2nd 552, 559.

Here, the order of the Worker's Compensation Commission Appellate Panel fits squarely within the Bone rule. The Order/Award provided as follows:

"IT IS HEREBY ORDERED that the Claimant be provided an evaluation to determine whether he is at MMI and whether he is in need of any additional medical treatment, together with any benefits under the Act necessarily resulting from such evaluation and determination. IT IS FURTHER,

ORDERED, that the Employer and South Carolina Worker's Compensation Uninsured Fund may choose the provider.

No hearing costs are assessed in this instance.

AND IT IS SO ORDERED!" (Record page 18).

Thus, whether Hartzell should be provided treatment after initial evaluation, MMI, the existence and degree of permanent impairment and any financial award flowing therefrom have not been decided. This case is, in this respect, factually undistinguishable from Bone. Appellants may appeal the issue of compensability if they choose to appeal the final award.

Though a matter of appellate rather than subject matter jurisdiction, see Great Games, Inc. v. South Carolina Department of Revenue, 339 S.C. 79, 83, 529 S.E. 2nd 6, 8 (2000), the issue is nonetheless jurisdictional and may be raised at any stage of the proceedings. Both the Supreme Court and the Court of Appeals have raised the lack of appellate jurisdiction on the Court's own motion. South Carolina Department of Transportation v. McDonald's Corporation, 375 S.C. 90, 650 S.E. 2nd 473 (2007); Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E. 2nd 127 (2000); Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010). In Ashenfelder, this Court stated: "Even if not raised by the parties, this Court may address the issue of appealability, *ex mero motu*." Id. at 389 S.C. 568, 571, 698 S.E. 2nd 856, 858.

II. The Court may also have overlooked or misapprehended that Hartzell's testimony concerning notice of injury was substantial evidence, sufficient to affirm the Worker's Compensation Commission.

Palmetto Collision was a small shop, at the relevant time employing only four (4) employees plus the owner, Mike Stallings. Stallings and the shop employees were a close group akin to friends and family (R. p. 112, lines 15-22). Stallings daily brought breakfast

and lunch "for the guys" (R. p. 113, lines 10-12). Hartzell testified that he told Stallings that he had hurt himself the day after he became sore from moving the frame machine and that Stallings' reply was that if he was having problems he should go to the emergency room (R. p. 44, line 14- p. 45, line 4). Stallings' response is proof that the notice given was enough to indicate "...to a reasonably conscientious manager that a case might involve a potential compensation claim." Etheredge v. Monsanto Co., 349 S.C. 451, 457, 562 S.E. 2nd 679, 682 (Ct. App. 2002).

Etheredge requires only that the notice to convey the "potential" of a compensable injury. Particularly in light of the relaxed atmosphere described by Stallings, the record as a whole would allow reasonable minds to reach the conclusion the Commission reached.

Mr. Hartzell testified that in addition to the discussion with Stallings the day after the injury there were subsequent discussions between the date of the injury and the end of his employment. (R. p. 65, lines 16-22).

The Respondent further contends that the Court misapprehended the importance of Mr. Hartzell's cross examination testimony found on page 64 of the Record, lines 17- page 65, line 15. The entire premise of the discussion was framed by counsel in the initial question beginning on line 17:

"Q: And you said you had some discussions, you said you mentioned that your back was sore from working one day; is that what you told him?

A: Yes, that was the next day after I had realized that I had somehow injured my back."

After that question and answer, counsel went on to demonstrate Mr. Stallings availability to discuss such issues and his knowledge that Hartzell had arthritis in his shoulders which was not work related, thereby distinguishing it from the work related back injury.

A judgment upon which reasonable persons might differ, or from which two (2) inconsistent conclusions could be drawn from the same evidence, does not prevent the agency's finding from being supported by substantial evidence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 383, 335 S.E. 2nd ,91, 94 (Ct. App. 1985).

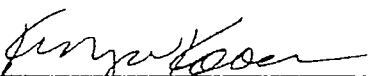
Respondent respectfully submits that the evidence of Mr. Hartzell's next day report to Mr. Stallings, the close knit nature of the shop, the subsequent discussions testified to by Mr. Hartzell, the knowledge of Hartzell's unrelated shoulder problems and the line of testimony based upon the entire premise that Mr. Hartzell's report to Mr. Stallings was concerning a work injury, provides substantial evidence of notice of an injury to a "to a reasonably conscientious manager" that the case might involve a potential compensation claim." Etheredge Supra at 349 S.C. 457, 562 S.E. 2nd at 682.

Conclusion

This Court should grant this Petition for Rehearing, and pursuant to the above cited authority, withdraw its opinion, dismiss the appeal without prejudice, and remit the case for further proceedings before the Workers' Compensation Commission.

Respectfully Submitted,

October 21, 2013


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843-795-7000

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION
T. Scott Beck, Commissioner

W.C.C. 0922546

Richard A. Hartzell, Employee,.....Respondent,

v.

Palmetto Collision, LLC, Employer,.....Appellant,

and

the S.C. Uninsured Employers Fund.....Respondent.

RETURN TO PETITION FOR REHEARING

Palmetto Collision, LLC, respectfully requests that the Petition for Rehearing filed by Richard A. Hartzell be denied pursuant to Rule 221, S.C.A.C.R., because the Court of Appeals did not overlook or misapprehend any issue. Instead, the Court of Appeals properly concluded that the Workers' Compensation Commission erred in finding that the Claimant timely reported his alleged accident and in failing to make any conclusions of law with respect to S.C. Code Ann. § 42-15-20. In addition, despite the new argument raised in the Petition for Rehearing, the Court of Appeals has appellate jurisdiction over this appeal pursuant to S.C. Code Ann. § 1-23-380.

I. The Court of Appeals has appellate jurisdiction over this case.

Hartzell argues that the Court of Appeals lacks appellate jurisdiction over this appeal from the South Carolina Workers' Compensation Commission pursuant to Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552(2013). Hartzell's argument is without merit. At issue in Bone was whether a Circuit Court order remanding a case to the Workers' Compensation Commission constituted a "final judgment" in accordance with S.C. Code Ann. § 1-23-390, the statute that governs administrative appeals from the Circuit Court to the Court of Appeals.¹

However, the case *sub judice* does not involve an appeal from the Circuit Court. Therefore, the statute governing such appeals from the Circuit Court-- § 1-23-390 – and the *Bone* opinion construing that statute, are neither applicable, nor even relevant, to whether the Court of Appeals presently has appellate jurisdiction. Instead, the statute governing the present appeal is S.C. Code Ann. § 1-23-380, which, unlike § 1-23-390, does not limit the Court's appellate jurisdiction to review of "final judgments."² Section 1-23-380 plainly states that a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

Palmetto Collision respectfully contends that the Commission's March 26, 2012 Order is a "final decision" as contemplated by § 1-23-380, because it fully and finally addresses the only claim advanced by the Claimant, *i.e.*, a claim for medical

¹ According to the Bone opinion, "At issue here is the meaning of a 'final judgment' under section 1-23-390."

² Note that S.C. Code Ann. § 1-23-380 does not even use the term "final judgments."

benefits, by making a blanket award of such medical benefits.³ R. p, 17, Conclusion of Law #3; p.36, lines 6-15. There are no further claims or issues pending before the Commission and it would be entirely speculative to suggest that there will be any new claim filed in the future. If the Commission's March 26, 2012 Order is not a "final decision" simply because Hartzell may or may not file a claim for additional benefits in the future, then the Court's appellate jurisdiction and Palmetto Collision's right to due process hinges entirely on the speculative future actions of an adverse party.

What if the present appeal is dismissed, but Hartzell files no future claim and there is no further, more "final" order to appeal? Would Palmetto Collision never have any right to review the March 27, 2012 Order? Plainly, such a result would be absurd.

Palmetto Collision respectfully contends that the concept of finality under S.C. Code Ann. § 1-23-380 should be considered definite, not speculative, and relative only to the issues presently in dispute, not those which may or may not come before the Commission in the future. As such, the March 27, 2012 Order should be considered final.

Even assuming, *arguendo*, that the Commission's March 26, 2012 is merely a "preliminary" or "intermediate" agency action, Palmetto Collision respectfully contends that it is immediately reviewable pursuant to S.C. Code Ann. § 1-23-380. Under the terms of the March 26, 2012 Order, Palmetto Collision must contract with third-party medical providers to render "medical, surgical, hospital and authorized treatment" for Hartzell. No appeal of some future Commission order (which may or

³ Palmetto Collision respectfully contends that the Commission erred as a matter of law in making this award of medical benefits; however, because the notice issue under S.C. Code Ann. § 42-15-20 was dispositive, the Court of Appeals did not reach this issue.

may not ever even come into existence) could alleviate or “remedy” Palmetto Collision’s contractual obligations to authorized medical providers necessitated by the March 26, 2012 Order. Therefore, to force Palmetto Collision to contract with third-party medical providers without some immediate right of review would eliminate any semblance adequate remedy and would be otherwise violative of Palmetto Collision’s right to due process. Palmetto Collision respectfully requests that the Court interpret S.C. Code Ann. § 1-23-380 so as to preserve its constitutional and statutory right to meaningful review.

II. The Court of Appeals did not misapprehend the standard of review.

Hartzell argues that the Court of Appeals somehow misapprehended the substantial evidence standard of review in reversing the Workers’ Compensation Commission’s vague and cursory finding regarding the statutory notice requirement. After discussing the substantial evidence standard of review, the Court of Appeals properly applied that standard to the paltry evidence in the record. After reviewing, considering, and discussing this paltry evidence, including the Claimant’s testimony that he said “something to [Stallings] that I was pretty sore” and that he “mentioned that [his] back was sore,” the Court properly concluded that reasonable minds could not reach the same conclusion reached by the Commission.

Palmetto Collision respectfully contends that the Court of Appeals did not misapprehend the evidence in the record or the standard or review, but instead properly applied that standard to the evidence. Furthermore, the Court of Appeals properly applied S.C. Code Ann. § 42-15-20 so as to require Hartzell to prove, by a

preponderance of the evidence, that his alleged back problem was caused by a work-related accident. The Court of Appeals properly concluded that it was legally insufficient for Hartzell to simply complain of back pain while at work. For these reasons, Palmetto Collision respectfully contends that Hartzell's argument does not satisfy the requirements for rehearing.

Conclusion

Because the Court of Appeals did not overlook or misapprehend any issue or argument, Palmetto Collision respectfully requests that the Petition for Rehearing be denied.

Respectfully submitted,



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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION
T. Scott Beck, Commissioner

Appellate Case No.: 2012-211870
Trial Court Case No. W.C.C. 0922546

Richard A. Hartzell, Employee,.....Respondent,

v.

Palmetto Collision, LLC, Employer,.....Appellant,

and

the S.C. Worker's Compensation Uninsured Employer's Fund,.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondents, Richard A. Hartzell and the S.C. Workers's Compensation Uninsured Employer's Fund, were each served with a copy of the Return to Petition for Rehearing of the Appellant this 30th day of October 2013 by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

Kerry W. Koon, Esq.
147 Wappoo Creek Drive, Suite 203
Charleston, SC 29412

Lisa Glover, Esq.
S.C. Uninsured Employers Fund
Santee Building
100 Executive Center Dr., Ste. 101
Columbia, SC 29210



Kirsten L. Barr
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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2012-211870

Richard A. Hartzell,

Employee.....Respondent

v.

Palmetto Collision, LLC, Employer,.....Appellant

and

the S.C. Uninsured Employers Fund.....Respondent

REPLY TO APPELLANT'S RETURN TO PETITION FOR REHEARING

Appellant's contention that *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) is inapplicable here, is misplaced. Appellant argues that since the instant case did not involve an appeal from the circuit court, *Bone* is not controlling. Due to the 2006 amendment of S.C. Code Ann. § 1-23-380, the first appeal from the Worker's Compensation Commission is now to the Court of Appeals. Therefore, the same principles governing appeals to the circuit court under former procedure, now apply to appeals from the agency

to this court.

Bone makes clear that a denial of benefits is an appealable final judgment, but an order granting benefits, the extent of which is yet to be determined, is not. In *Bone*, the circuit court's remand order contemplated further action by the Commission to determine the claimant's "medical status and specific benefits to be awarded,..." and was "...not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment." *Id.* at 744 S.E.2d 552, 559.

The Commission's order of March 26, 2012 is the procedural equivalent of the Circuit Court's remand in *Bone*, as it also contemplates the future determination of the issues of maximum medical improvement, the need for additional medical treatment, and award of other benefits "necessarily resulting from such evaluation and determination." R. at 18.

Respondent contends that, even if the Commission's order is "preliminary" or "intermediate", it is immediately reviewable under S.C. Code Ann. § 1-23-380(A), arguing that no future review could alleviate or remedy past medical issues or obligations to medical providers necessitated by the order. This issue was considered in *Bone* and determined adversely to the employer:

"Petitioners and the South Carolina Defense Trial Attorneys Association lastly argued it is 'unfair' and 'inequitable' to allow a claimant to receive benefits while the matter is pending on appeal, since there is no stay of an award applicable here... Petitioners, however, do not address the opposite result, *ie.*, what happens when a claimant is denied benefits and is made to wait during the pendency of appeals by their employer and the insurance carrier, when the ultimate determination is made that the claimant suffered a compensable injury for which medical care and benefits were wrongfully withheld? The claimant may receive interest after the fact, per S.C. Code Ann. § 42-17-60, but there is no provision for medical support during this time. Claimants and employers are treated the same depending on who

prevails before the commission. Moreover, there has been no definitive enforceable award entered in this case. That is the point being made here."

Id. at 561. (emphasis added)

Appellant's argument is squarely against the *Bone* precedent.

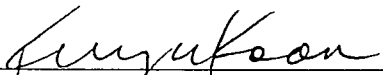
Finally, Appellant argues that this court properly applied the substantial evidence standard. On this issue, Respondent relies upon his argument in the Petition for Rehearing.

Conclusion

The Petition for Rehearing should be granted, the opinion withdrawn, and the appeal dismissed.

Respectfully Submitted,

November 6, 2013



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2012-211870

Richard A. Hartzell, Employee.....Respondent

v.

Palmetto Collision, LLC, Employer,.....Appellant

and

the S.C. Uninsured Employers Fund.....Respondent

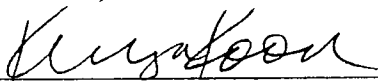
PROOF OF SERVICE

I certify that I have served Respondent Richard A. Hartzell's Reply to Appellant's Response to Petition for Rehearing on the Appellants by depositing a copy of same in the United States mail, postage prepaid, on November 6, 2013, addressed to their attorney of record, Kirsten Barr, Esq and to attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq., as follows:

Kirsten Barr, Esq.
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Mt. Pleasant, SC 29465

Lisa Glover, Esq.
State Accident Fund
P.O. Box 210039
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November 6, 2013



Kerry W. Koon
147 Wappoo Creek Drive, Ste 203
Charleston, SC 29412
(843) 795-7000
*ATTORNEY FOR RESPONDENT
RICHARD A. HARTZELL*

The South Carolina Court of Appeals

Richard A. Hartzell, Employee, Respondent,

v.

Palmetto Collision, LLC, Employer, Appellant,

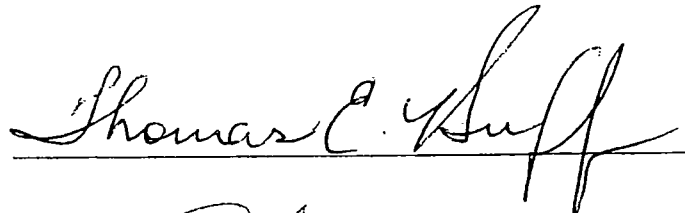
and

South Carolina Worker's Compensation Uninsured
Employer's Fund, Respondent.

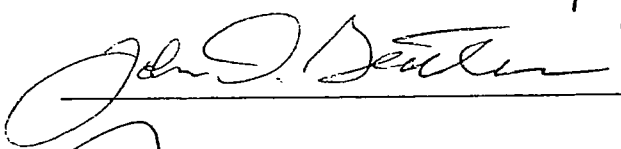
Appellate Case No. 2012-211870

ORDER

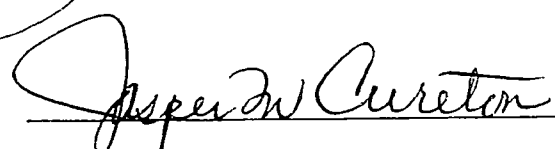
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc: Kirsten Leslie Barr
Kerry W. Koon
Lisa C. Glover
Harold Eugene Trask
David Alan Westerlund, Jr.
Virginia L. Crocker

FILED

14 November 2013