

**DECISION AND ORDER OF THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

W.C.C. FILE NO: 1202332

ELLIOTT BARBER,

**EMPLOYEE,
CLAIMANT/RESPONDENT,**

-v-

CANDIES CONSTRUCTION CO., LLC,

EMPLOYER,

AND

**GRANITE STATE INSURANCE CO.,
AND**

CARRIER, DEFENDANTS/APPELLANTS,

CUSTOM COATED COMPONENTS, LLC,

UNINSURED EMPLOYER,

AND

THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND.

DEFENDANTS.

Appellate Panel Review held in Columbia,
South Carolina on July 22, 2014,
per notices timely and properly served
on all parties of interest.

Appellate Panel Decision and Order filed on

October 2nd, 2014

VACATED AND REMANDED

RECEIVED

OCT 27 2014

SC Court of Appeals

APPEARANCES

Elliott Barber, Claimant/Respondent represented by Ryan T. LeBlanc, Esquire of Joye Law Firm, LLP, of North Charleston, South Carolina

Candies Construction Company, LLC, and Granite State Insurance Company, Defendants/Appellants represented by William Thomas Bacon, IV, Esquire, of Collins & Lacy, L.P., of Charleston, South Carolina

The South Carolina Uninsured Employers' Fund, Defendant represented by Lisa Glover, Esquire, of Columbia, South Carolina.

Custom Coated Components, LLC, Defendant is unrepresented and failed to appear.

STATEMENT OF THE CASE

This matter was heard before the Single Commissioner in Charleston, South Carolina on November, 11, 2013, pursuant to notice timely and properly given to all parties of record. The initial hearing was conducted before the Single Commissioner on September 19, 2013. The Hearing was postponed to November 11, 2013, in order to allow the owner of Custom Coated Components, LLC ("Custom"), Earnest Candies, thirty (30) days to hire legal representation since he was not represented and his company did not have coverage for the alleged accident. On November 11, 2013, Mr. Earnest Candies, on behalf of Custom, waived his right to legal representation for this case.

The main issue for determination was whether an employer/employee relationship existed at the time of the alleged accident between either Candies Construction Company, LLC ("Candies") and the Claimant, or Custom and the Claimant. The Claimant stipulated the activities that led to his alleged injuries were outside the normal scope of his employment with both Candies and Custom. However, the Claimant alleged a direct benefit to either or both employers and thus the injury should be found compensable. If an employer/employee relationship existed, then the Claimant requested a finding of injury to his neck, left shoulder, and left upper extremity as well as his entitlement to temporary total disability benefits and causally related medical treatment.

Candies denied the Claimant was an employee at the time of the alleged accident stating the actions leading to his alleged injuries were outside the scope and course of his employment with Candies. Candies further alleged the Claimant was committing a crime at the time of the alleged accident and thus

his theft would have removed him from the course and scope of any employment. Candies requested the Single Commissioner find the Claimant was stealing and refer him to the Attorney General for investigation of insurance fraud.

Ernest Candies took the position the Claimant was not working for either company at the time of the alleged accident, that they were simply taking scrap metal, selling it and dividing the money as “pocket change” for the weekend.

By Order dated February 28, 2014, the Single Commissioner found the Claimant was an employee within the scope and course of his employment with Candies at the time of the January 4, 2012 accident. Candies, and their carrier Granite State, were ruled the responsible parties for the claim and the other parties were dismissed. The Claimant was awarded TTD from the date of accident to present and continuing, as well as causally related medical treatment. On March 18, 2014, Candies and Granite State filed a Form 30, Request for Commission Review, challenging the Single Commissioner’s Decision and Order. The following issues were raised on appeal:

1. The Hearing Commissioner erred in Finding of Fact #8, the Claimant testified the same on direct examination as in cross-examination. I find the Claimant very credible. He is not hiding anything from his past. He admitted to past jail time history, etc., when the same is not supported by the preponderance of the evidence in the record.
2. The Hearing Commissioner erred in Finding of Fact #9, Candies Construction Co., LLC raised an argument that a crime had been committed during the time of the accident. The defense requested referral to the Attorney General’s office for fraud. This defense fails as the owner, Mr. Ernest Candies, was part of the process and finally testified that he believed was not stealing at the time of the accident, when the same is not supported by a preponderance of the evidence in the record.
3. The Hearing Commissioner erred in Finding of Fact #10, Elliot Barber’s testimony – credible. He testified that he was paid cash no matter what the job he worked. Testified regarding his jobs and descriptions. Mr. Barber believed he was an employee of Candies,

at the time of the accident, while removing metal. His pay was about the same as he was making while working for Candies, when the same is not supported by the preponderance of the evidence in the record.

4. The Hearing Commissioner erred in Finding of Fact #11, I believe a nexus exists between Mr. Barber and Candies Construction Co., LLC and that he was an employee of Candies Construction the whole time, when the same is not supported by the preponderance of the evidence in the record.
5. The Hearing Commissioner erred in Finding of Fact #12, I base this finding off of the testimony of Mr. Barber and Mr. Candies that he was employed with Candies Construction and not Custom Coated Components at the time of the accident, when the same is not supported by the preponderance of the evidence in the record.
6. The Hearing Commissioner erred in Finding of Fact #13, the Uninsured Employers Fund is not a responsible party to this claim, when the same is not supported by the preponderance of the evidence in the record.
7. The Hearing Commissioner erred in Finding of Fact #14, Mr. Candies asked Mr. Barber to help him remove equipment form the Custom Coated warehouse. Mr. Barber agreed, when the same is not supported by the preponderance of evidence in the record.
8. The Hearing Commissioner erred in Finding of Fact #16, Pursuant to the South Carolina Supreme Court's holding in Hicks v. Piedmont Storage, 335 S.C. 46, 515 S.E.2d 532 (SC 1999), when the work of injured employee is outside the course of his employment, the work needs to benefit the company, not an individual, in order for the Claimant to be entitled to compensation under the SC Workers' Compensation Act, when the same is not supported by the preponderance of the evidence in the record.
9. The Hearing Commissioner erred in Finding of Fact #17, in the case at hand, Mr. Barber testified that he was told by Mr. Candies that the job of removing equipment from the Custom Coated warehouse was so the employer could make enough money to make

payroll at Candies Construction, as well as, so he would not have to pay taxes on the equipment. Furthermore, the Claimant was to be paid his hourly rate at Candies Construction since he was still on Candies Construction's time, when the same is not supported by the preponderance of the evidence in the record.

10. The Hearing Commissioner erred in Finding of Fact #19, as noted earlier, I find Mr. Barber to be credible and Mr. Candies not to be credible. Therefore, I place more weight with Mr. Barber's testimony than Mr. Candies, when the same is not supported by the preponderance of the evidence in the record.
11. The Hearing Commissioner erred in Finding of Fact #20, as such, since the money used from scrapping the equipment was to help make payroll at Candies Construction, I find that Candies Construction has benefited from this job. Coupled with the fact that this job led to the Claimant's injury, Candies Construction is the responsible party in this action, when the same is not supported by the preponderance of the evidence in the record.
12. The Hearing Commissioner erred in Finding of Fact #21, Custom Coated Components is not a responsible party in this action and thus has no liability toward the Claimant's work-related injury, when the same is not supported by the preponderance of the evidence in the record.
13. The Hearing Commissioner erred in Finding of Fact #23, during the week, Ernest Candies, and others, would go directly to the plant of Custom Coated Components to remove metal, if it were a work day, when the same is not supported by the preponderance of the evidence in the record.
14. The Hearing Commissioner erred in Finding of Fact #25, Mr. Candies initially testified that they were stealing metal from the plant. He later corrected himself regarding the theft of the material. He testified that he believed he owned the metal even though he was in foreclosure with the bank, when the same is not supported by the preponderance of the evidence in the record.

15. The Hearing Commissioner erred in Finding of Fact #29, credibility of Ernest Candies is in question – pays everybody cash, no records, no W-2s, no 1099s, when the same is not supported by the preponderance of the evidence in the record.
16. The Hearing Commissioner erred in Finding of Fact #30, I find that an employer/employee relationship existed between Mr. Ernest Candies and Mr. Elliot Barber. Specifically, I find that said relationship existed, only, between Candies Construction Co., LLC and Mr. Elliot Barber at the time of the accident, when the same is not supported by the preponderance of the evidence in the record.
17. The Hearing Commissioner erred in Finding of Fact #31, I find that a work-related injury occurred on January 4, 2012, when the same is not supported by the preponderance of the evidence in the record.
18. The Hearing Commissioner erred in Finding of Fact #32, I find that the work-related accident caused injuries to the Claimant's neck, left shoulder, and left upper extremity, when the same is not supported by the preponderance of the evidence in the record.
19. The Hearing Commissioner erred in Finding of Fact #33, I base this finding on the fact that both Mr. Barber and Mr. Candies admitted to the accident taking place. In addition, a qualified, licensed, medical physician has opined to a reasonable degree of medical certainty that the accident on January 4, 2012 directly caused the injuries to Mr. Barber's neck, left shoulder, and left upper extremity, when the same is not supported by the preponderance of the evidence in the record.
20. The Hearing Commissioner erred in Finding of Fact #34, I find that Candies Construction and Granite State are responsible for any and all past, causally-related medical treatment and will reimburse Mr. Candies for any causally-related medical bills he has paid, when the same is not supported by the preponderance of the evidence in the record.
21. The Hearing Commissioner erred in Finding of Fact #35, I find that Candies Construction and Granite State are responsible for future medical treatment to the neck, left shoulder,

- and left upper extremity, when the same is not supported by the preponderance of the evidence in the record.
22. The Hearing Commissioner erred in Finding of Fact #36, I would find that the AWW = \$440.00 with a corresponding CR = \$293.48. This is based on the testimony of the Claimant and the Employer – paid more on some jobs than others, when the same is not supported by the preponderance of the evidence in the record.
 23. The Hearing Commissioner erred in Finding of Fact #37, The Claimant is entitled to TTD benefits from June 25, 2012 to present and continuing, when the same is not supported by the preponderance of the evidence in the record.
 24. The Hearing Commissioner erred in Finding of Fact #38, I would refer the Employer to the Attorney General’s office. I suspect employer fraud, when the same is not supported by the preponderance of the evidence in the record.
 25. The Hearing Commissioner erred in Conclusions of Law #1, Under Section 42-1-130, the Claimant was a covered employee with Candies Construction Company, LLC, at the time in question, when the same is based upon erroneous legal conclusions.
 26. The Hearing Commissioner erred in Conclusions of Law #2, Under Section 42-1-140, the Defendant employer, Candies Construction Company, LLC, was a covered employer under the Act, when the same is based upon erroneous legal conclusions.
 27. The Hearing Commissioner erred in Conclusions of Law #3, Under Section 42-1-140, the Defendants employer, Custom Coated Components, LLC, was subject to the Act and uninsured. This is to be addressed in a separate Order, when the same is based upon erroneous legal conclusions.
 28. The Hearing Commissioner erred in Conclusions of Law #4, Under Section 42-1-160, the Claimant sustained a compensable injury by accident, arising out of the course and scope of his employment, to his neck, left shoulder, and left upper extremity on January 4,

- 2012, while working for Candies Construction Company, LLC, when the same is based upon erroneous legal conclusions.
29. The Hearing Commissioner erred in Conclusions of Law #5, Under Section 42-1-40, the Claimant's average weekly wage is \$440.00, with a corresponding compensation rate of \$239.48, when the same is based upon erroneous legal conclusions.
 30. The Hearing Commissioner erred in Conclusions of Law #6, Under Regulation 67-503, the Claimant is entitled to temporary, total disability benefits from June 25, 2012 to present and continuing, when the same is based upon erroneous legal conclusions.
 31. The Hearing Commissioner erred in Conclusions of Law #7, Under Section 42-15-60, the Claimant is entitled to any causally-related medical treatment for his work-related injuries. The Defendant employer, only Candies Construction Company, LLC, is responsible for all past, causally-related medical treatment as a result of the work accident the Claimant sustained on January 4, 2012 and shall reimburse the Claimant for any out-of-pocket expenses he may have incurred as a result of this work accident, when the same is based upon erroneous legal conclusions.
 32. The Hearing Commissioner erred in Ordering the Claimant, Elliot Barber, sustained a compensable, work-related injury to his neck, left shoulder, and left upper extremity on January 4, 2012, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.
 33. The Hearing Commissioner erred in Ordering the Defendant, Candies Construction Company, LLC, is the employer in this claim and therefore responsible for any causally-related medical treatment the Claimant, Elliot Barber received and will need to receive as a result of his work accident, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.
 34. The Hearing Commissioner erred in Ordering the Defendants, Custom Coated Components, LLC and the Uninsured Employers Fund are not responsible parties for this

claim, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

35. The Hearing Commissioner erred in the Claimant's, Elliot Barber, average weekly wage is \$440.00 with a corresponding compensation rate of \$293.48, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.
36. The Hearing Commissioner erred in Ordering the Claimant is entitled to temporary total disability benefits from June 25, 2012 to present and continuing, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.
37. The Hearing Commissioner erred in Ordering Ernest Candies be referred to the Employer to the Attorney General's office for employer fraud, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.
38. The Hearing Commissioner erred in preventing counsel for Candies Construction Company and Granite State from eliciting testimony from the Claimant regarding, among other things, his knowledge of the business operations of Candies and then making findings of employment, compensability and credibility when there was insufficient evidence to support such findings.

STANDARD OF REVIEW

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

FINDINGS OF FACT

The following factual findings are based upon the records contained in the Workers' Compensation files, the stipulations of the parties, the testimony rendered at the hearing, the APA submissions, and any other evidentiary submissions:

- 1. The February 28, 2014 Decision and Order is hereby vacated and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

CONCLUSIONS OF LAW

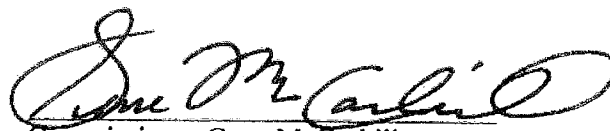
The following legal conclusions are based upon the records contained in the Workers' Compensation files, the stipulations of the parties, the testimony rendered at the hearing, the APA submissions, and any other evidentiary submissions:

- 1. The February 28, 2014 Decision and Order is hereby vacated and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

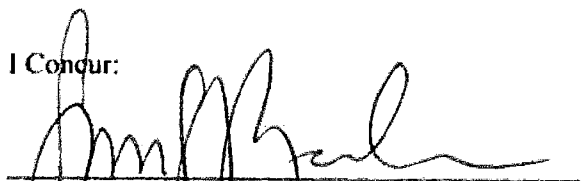
ORDER


IT IS HEREBY ORDERED the Appellate Panel vacates the February 28, 2014 Decision and Order and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

AND IT IS SO ORDERED on this 2nd day of October, 2014.


Commissioner Gene McCaskill

I Concur:


Commissioner Susan S. Barden


Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By *Kim Falls* on October 2, 2014