

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 04 2015

Joseph Mickle, Appellant-Respondent,

SC Court of Appeals

v.

75242

Boyd Brothers' Transportation, Inc., Employer, and
Lumbermans' Underwriting Alliance, Carrier,
Respondents-Appellants

Appellate Case No. 2013-001212

Appeal from the Workers' Compensation Commission

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015

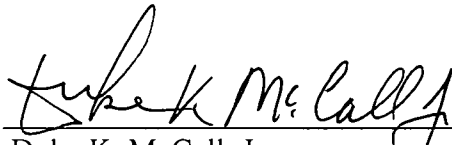
RESPONDENTS-APPELLANTS' PETITION FOR REHEARING

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Boyd Brothers Transportation, Inc., Employer and Lumbermans' Underwriting Alliance, Carrier (collectively, "Petitioners") respectfully submit this Petition for Rehearing in connection with the Court's Opinion No. 2015-UP-068 filed February 11, 2015, on the grounds that the Court error in concluding that South Carolina has jurisdiction of this Alabama Workers' Compensation claim. It is submitted that the conclusion that WTI, Appellant-Respondent's (Mickle) employer, did not regularly employ four or more employees in South Carolina at the time of the Respondent's injury was indeed dispositive of the issue of jurisdiction.

Casting the jurisdiction net to the Respondents-Appellant on the basis that WTI was a wholly owned subsidiary failed to determine whether the Appellant-Respondent (Mickle) was performing any part of the trade, business or occupation of the Respondents-Appellant under Section 42-1-400, Code of Laws of South Carolina as amended. WTI, a wholly owned subsidiary, then was a subcontractor of the owner, Boyd Bros. Transportation, Respondent-Appellant. This failure requires an Award in favor of the Respondents-Appellant.

In so moving, Petitioners reassert and incorporate by reference all arguments and grounds previously set forth in their Final Brief filed with the Court. The ground for Petitioner's request is that the record does not contain evidence sufficient to establish the vocational consultant as an expert qualified to render the opinions expressed in the report admitted. This ground is addressed in the accompanying Memorandum in Support of Petition for Rehearing.

WHEREFORE, Petitioners respectfully request that the Court grant rehearing and reconsider its affirmance of the admissibility of the vocational consultant's report in this matter.



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March 2, 2015

THE STATE OF SOUTH CAROLINA
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v.

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**MEMORANDUM OF RESPONDENTS-APPELLANTS IN
SUPPORT OF PETITION FOR REHEARING**

The Court of Appeals concluded that the South Carolina Workers Compensation Commission had jurisdiction of this Alabama Workers' Compensation claim on the basis that the employer, WTI who was an exempt employer not having four or more employees in this State at the time of the Appellant-Respondent's injury, was a wholly owned subsidiary of Boyd Brothers' Transportation, Inc., a qualified employer in South Carolina. The Court of Appeals stopped there in its decision and did not go the second step which was to determine whether the Appellant-Respondent Mickle was performing part of the trade, business or occupation of the Respondent-Appellant Boyd Brothers at the time of his injury.

Section 42-1-400, Code of Laws of South Carolina, 1976, as amended says:

"When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner", undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as

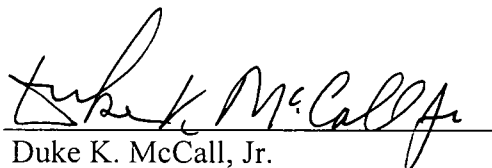
“subcontractor) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.”

Even if the Appellant-Respondent was working for a wholly owned subsidiary of the Respondent-Appellant, Boyd Brothers, the Respondent-Appellant is not liable until and unless the Appellant-Respondent was performing the trade, business or occupation of the owner, Boyd Brothers under this Code Section. The owner is not automatically liable for the workmen of the subcontractor/wholly owned subsidiary because the subcontractor would have been liable if it had the required number of employees in South Carolina at the time of the accident. There is no Code Section which declares this to be true, and Workers’ Compensation in South Carolina is Statutory.

Further, it is submitted the Court misconstrued the testimony of Ms. Colley as to the “owners”. The owners own both WTI and Boyd Brothers Transportation, Inc. They control both companies. However, there is no contention by the Appellant-Respondent, that because the owners control both companies they are subject to the South Carolina Workers’ Compensation Act. There is no contention that the Appellant-Respondent was performing the trade, business or occupation of the owners. The owners owned WTI. The fact that they coincidentally owned Boyd Brothers Transportation does not make the two companies a single company either under Alabama law or under South Carolina law. The factors of *Poch v. Bayshore Concrete Products/S.C., Inc.*, 386 S.C. 13, 686 S.E. 2d 763, do not lead to this conclusion.

Therefore, it is submitted that the Court should re-consider this matter and Reverse the Award in favor of the Respondents-Appellants.

Respectfully submitted,

A handwritten signature in cursive script, reading "Duke K. McCall, Jr.", is written over a horizontal line.

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Attorney for Respondents-Appellants/Petitioners

March 2, 2015

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In the Court of Appeals

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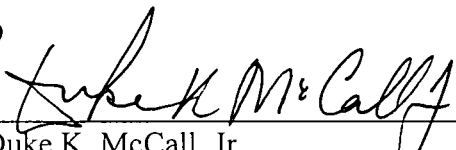
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PROOF OF SERVICE

I certify that I have served the **RESPONDENTS-APPELLANTS' PETITION FOR REHEARING and RESPONDENTS-APPELLANTS' MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING** by depositing a copy of it in the United States Mail, postage prepaid, on the 2nd day of **March, 2015**, addressed to her attorney of record as follows:

Frank A. Barton, Esq.
Mullis Law Firm
1611 Augusta Road
West Columbia, SC 29169-5629



Duke K. McCall, Jr.
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100
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(864) 751-7600; (864) 751-7800 (fax)
Attorney for Respondents-Appellants/Petitioners

March 2, 2015

Ms. Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Appellate Case No: 2013-001212
Joseph Mickle v. Boyd Brothers Transportation, Inc.

Dear Ms. Kitchings:

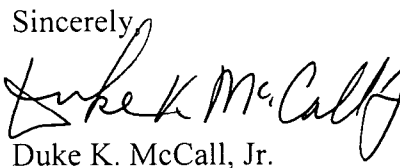
Enclosed for filing are the following:

1. Original and six copies of the Petition for Rehearing;
2. Original and six copies of the Memorandum in Support of Petition for Rehearing;
3. Original and six copies of the Proof of Services; and,
4. Our firm check in the amount of \$25.00.

Please return filed copies of the Petition and Memorandum in the envelope I have enclosed for your convenience.

Thank you for your assistance in this matter.

With kind regards,

Sincerely,

Duke K. McCall, Jr.

DKM,Jr./bcw

Enclosures

cc: Mr. Frank A. Barton, Esq.
Attorney at Law
1611 Augusta Road
West Columbia, S.C. 29169-5629

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