

**RECEIVED**

MAR 06 2015

**SC Court of Appeals**

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC File No. 1219902

ANTHONY RANSOM,

CLAIMANT/APPELLANT,

v.

JOHN CLARK,

EMPLOYER,

and

BUILDERS FIRSTSOURCE,

and,

LIBERTY MUTUAL INSURANCE CO.,

CARRIER,  
DEFENDANTS/APPELLANTS,

and,

S.C. UNINSURED EMPLOYERS FUND,

DEFENDANT.

---

Appellate Panel Review held in Columbia,  
South Carolina on July 21, 2014 per notices  
timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed

February 9<sup>th</sup>, 2015

---

**APPEARANCES:**

**Claimant/Appellant represented by  
J. Alan Bass of Myrtle Beach, South Carolina**

**Defendants/Appellants Builders FirstSource and Liberty Mutual Insurance Company  
represented by  
Ashley Kirkham of Columbia, South Carolina**

**Defendant/Respondent S.C. Uninsured Employers Fund represented by Lisa C. Glover of  
Columbia, South Carolina**

## STATEMENT OF CASE

Anthony Ransom was hired by John Clark in August, 2012. With the exception of a two week interval, Mr. Ransom worked for Mr. Clark until November 18, 2012.

On Sunday, November 18, 2012, Mr. Ransom drove to a job site in a housing development known as *Lafayette Park* in Little River, South Carolina. When he arrived at the job site, Mr. Ransom climbed onto the roof of a house which was being framed by Mr. Clark's employees in order to place a tarp over a hole in the roof. In the process of spreading the tarp over the hole in the roof, Mr. Ransom "flapped" the tarp in order to get enough air under it so it would lie down. Unfortunately, the wind caught the tarp and Mr. Ransom was forced head first through the hole in the roof. On his way through the hole, Mr. Ransom struck two rafters, pinballing back and forth between the two.

As a result of this accident, Mr. Ransom's suffered injuries to his head, face, neck, upper back, mid back, lower back, right shoulder, left leg, left hip and right knee. All injuries except those to Mr. Ransom's head, right shoulder and lower back have resolved. John Clark denies that Mr. Ransom suffered an injury arising out of and in the course and scope of his employment. The basis of Mr. Clark's denial is his allegation that he told Mr. Ransom not to climb onto the roof that morning. At the time of the accident at issue, John Clark had no workers' compensation insurance coverage, although he concedes that at the time of the accident he was subject to the South Carolina Workers' Compensation Act.

The general contractor for the *Lafayette Park* project was Builders FirstSource. At the time of the accident at issue, Builders FirstSource was insured by Liberty Mutual. Builders FirstSource contends that, even if the Claimant suffered a compensable injury-by-accident, it is not liable for Mr. Ransom's claim. Rather, Builders FirstSource claims that it received from

John Clark a "Certificate of Insurance", which document supposedly reflected that Clark had workers' compensation coverage in South Carolina, and that, pursuant to §42-1-415, it is insulated from liability with respect to Mr. Ransom's claim. Builders FirstSource contends that the South Carolina Uninsured Employers Fund should be liable for any benefits to which Mr. Ransom might be entitled under the South Carolina Workers' Compensation Act.

On January 17, 2013, Mr. Ransom filed a Form 50 "Employee's Request for Hearing". In his Form 50 the Claimant sought payment of past medical expenses; provision of additional medical treatment; and temporary total disability benefits from the date of the accident forward. In their respective Forms 51, Builders FirstSource, Liberty Mutual and the South Carolina Uninsured Employers Fund all denied that the Claimant was entitled to benefits under the Act. John Clark failed to file a response to the Claimant's Form 50.

A hearing on the forms 50 and 51 was held before Commissioner Melody L James in Conway, South Carolina on July 9, 2013. At the hearing, the claimant contended that on November 18, 2012, while in the employ of John Clark, he was involved in a work-related accident which resulted in injuries to his head, right shoulder and low back. The claimant contended that he was entitled to an order requiring the defendants pay past causally related medical expenses incurred at Grand Strand Regional Medical Center; requiring the defendants to pay him temporary total disability benefits, in the sum of \$675.53 per week, from November 18, 2012 to the present and continuing; and requiring the defendants to provide him with additional medical treatment, consistent with that recommended by Dr. Thomas chambers his report dated March 25, 2013.

The defendant/respondent John Clark contended at the hearing that claimant/appellant did not suffer injuries arising out of course and scope of his employment with Clark, inasmuch as

Clark had specifically forbidden him from climbing onto the roof of the house on which Clark's crew had been working. Clark further disputed that Ransom earned the average weekly wage which he alleged.

The defendants/appellants Builders FirstSource and Liberty Insurance Co. also denied that Ransom had suffered a compensable injury-by-accident. Moreover, Builders FirstSource and Liberty Insurance Co. alleged that John Clark had provided them a valid Certificate of Insurance prior Clark commencing work on homes in the development in which Ransom was injured. Builders FirstSource and Liberty Insurance Co. contended that their receipt of a valid Certificate of Insurance from Clark allowed them to transfer liability for any workers compensation benefits to which Ransom might be entitled to the South Carolina Uninsured Employers Fund.

The South Carolina Uninsured Employers Fund interposed a general denial of the allegations contained in Ransom's Form 50. The SCUEF also joined in the defenses raised by the other defendants.

Commissioner James issued her Decision & Order on February 18, 2014. In her Decision & Order, Commissioner James found that Anthony Ransom had suffered compensable injuries to his head, right shoulder and lower back in an accident arising out of and in the course and scope of his employment with John Clark. Commissioner James found that the Certificate of Insurance provided to Builders FirstSource by John Clark was insufficient to allow Builders FirstSource and Liberty Insurance Co. to transfer liability for workers' compensation benefits to which the claimant might be entitled to the South Carolina Uninsured Employers Fund. Commissioner James ordered John Clark to pay for Mr. Ransom's past causally related medical expenses and provide him with future medical benefits consistent with those recommended by Dr. Thomas Chambers. Commissioner James also ordered John Clark to pay Mr. Ransom temporary total

disability benefits, in the sum of \$569.36 per week, from March 25, 2013 to the present and continuing. Finally, Commissioner James ordered that, in the event John Clark either failed or refused to comply with the terms of her order, Builders FirstSource and Liberty Insurance Co. would pay all benefits to which Mr. Ransom might be entitled, reserving the right to seek subrogation from John Clark. This appeal ensued.

## **FINDINGS OF FACT OF THE SINGLE COMMISSIONER**

1. I find that, at all times pertinent herein, the Defendant John Clark regularly employed four or more persons within the state of South Carolina.
2. I find that, at all times pertinent herein, the Claimant was an employee of John Clark, having been hired in August, 2012. I find that at the time of his hire the Claimant was to be paid \$13 an hour. I find that after his first day at work, the Claimant was promoted by Mr. Clark to “lead man” and was given a raise to \$14 an hour.
3. I find that the first job on which the Claimant worked for John Clark was at a housing development in Brunswick County, North Carolina called The Farm. I find that while working at The Farm, the Claimant was supervising a crew of 6 or 7 of Mr. Clark’s employees.
4. I find that when he hired the Claimant John Clark told him that he would be paid in cash. I find that the Claimant kept track of the hours that he worked. I find that when the Claimant first started working for Mr. Clark he often worked 50 to 60 hours a week.
5. I find that when the Claimant’s crew finished their work in The Farm Mr. Clark was unable to provide them with additional work for approximately 2 weeks. I find that after that interval, Mr. Clark sent the Claimant and his other employees to work at a

housing development known as The Reserve at Market Common. I find that when their work was completed at The Reserve at Market Common Mr. Clark sent his employees, including the Claimant, to a development known as Lafayette Park in Little River, South Carolina. I find that the Claimant and his crew were tasked with framing houses in that development. I find that the Claimant continued to serve as lead man of Mr. Clark's employees and continued to earn \$14 an hour.

6. I find that at the end of the work day on Saturday, November 17, 2012 John Clark gathered his crew together. I find that he told his employees – including the Claimant – that the weather forecast for the next day called for rain. I find that Mr. Clark told his employees that they were going to work the next day. I find that Mr. Clark instructed the Claimant to travel to his, Clark's, home in Murrells Inlet and pick up a tarp which he could in turn place on the open roof on the house on which they were working so that the crew would be able to work inside of the house despite of the weather. I find that the Claimant complied with Mr. Clark's order and picked up the tarp from Mr. Clark's home. I find that the Claimant placed the tarp in his van and took it home.
  
7. I find that on the morning of Sunday, November 18, 2012, the Claimant woke up at approximately 5:30 a.m. I find that the Claimant, as was his habit, intended to arrive at the job site earlier than the rest of Mr. Clark's crew. I find that when the Claimant woke up that morning, the weather at his home in Nakina, North Carolina was wet and cold, but it was not raining. I find that the Claimant did not want to work that

day but he nevertheless got up, got dressed and headed to the work site. I find that it normally took the Claimant 30 minutes to travel from his home to the worksite in Lafayette Park.

8. I find that on the morning of November 18, 2012 the Claimant and John Clark spoke by phone. I find that Mr. Clark did not specifically tell the Claimant to refrain from working on November 18, 2012. In that respect, I find that John Clark usually calls his employees to tell them if they weren't going to work due to the weather. I also find that Mr. Clark did not call any of his employees that morning and tell them that they weren't going to work that day.
  
9. I find that when the Claimant arrived at the job site in Lafayette Park between 7:30 and 8:00 a.m., the weather was cold and it was raining slightly. I find that the Claimant took a 12 foot ladder and placed it against the house on which they had been working. I find that the Claimant put on his safety harness and his hard hat, tied onto the safety line, climbed up the ladder and commenced to roll out the tarp. I find that in the process of spreading the tarp over the hole in the roof, the Claimant "flapped" the tarp to get enough air under it so it would lie down. I find that the wind caught the tarp, however, and the Claimant was forced head first through the hole in the roof. I find that the Claimant struck two rafters, pinballing back and forth between the two. I find that in the process the Claimant sustained injuries to his head, face, neck, upper back, mid back, lower back, right shoulder, left hip, left leg and right knee. I find

that, as the date of the hearing, all the Claimant's injuries have resolved except for those to his head, right shoulder and lower back.

10. I find that due to his head injury the Claimant was rendered unconscious. I find that the Claimant is unaware for how long he was unconscious. I find that, after his fall, the next thing the Claimant remembers is "Harley", one of Mr. Clark's other employees, screaming at him from the ground saying "Hey, hey, you alright up there?". I find that the Claimant was taken from the scene of his accident in an ambulance. I find that before he left the scene of the accident, the Claimant saw several other members of Mr. Clark's Lafayette Park crew who had shown up for work, including Robert Austin, "Rick" and John Grozia.
11. I find that the Claimant was taken by ambulance from the job site to Grand Strand Regional Medical Center.
12. I find that, as a result of the accident on November 18, 2012, the Claimant suffered injuries arising out of and in the course and scope of his employment with John Clark to his head, face, neck, upper back, mid back, lower back, right shoulder, left leg, left hip and right knee. I find that all injuries except those to the Claimant's head, right shoulder and lower back have resolved.

13. I find that the Claimant is not at maximum medical improvement with respect to his work-related injuries. I find that the Claimant is entitled to additional evaluation/treatment for his head, right shoulder and lower back, all of which would tend to lessen his disability. I find that the Claimant is, at the least, entitled to the evaluation/treatment recommended by Dr. Chambers, all of which would tend to lessen the Claimant's disability

14. I find that while the Claimant was at Grand Strand Regional Medical Center on the date of the accident, he had a telephone conversation with John Clark. I find that during this telephone conversation Mr. Clark told the Claimant that he was going to have to talk to "his insurance people" to find out whether it would be cheaper to pay the Claimant out of his own pocket rather than turning it in to his insurance company. I find that during this telephone conversation Mr. Clark did not question why the Claimant climbed onto the roof of the house on which they were working. I also find that Mr. Clark failed during this telephone conversation to raise the issue that the Claimant had allegedly been injured performing a task which he had been told not to perform.

15. I find that the Claimant had a later telephone conversation with John Clark, during which they discussed the Claimant receiving medical treatment, as well as the Claimant returning to work. I find that during this telephone conversation Mr. Clark told the Claimant that he, the Claimant, would have to be examined by a doctor before he would be allowed to return to work. I find that Mr. Clark told the Claimant

that the need for a medical examination prior to his return to work was a “worker’s comp rule”. I find that Mr. Clark told the Claimant during this conversation that he, Clark, was going to send the Claimant to be evaluated by a doctor. I find that Mr. Clark failed to send the Claimant for the promised medical evaluation.

16. I find that the Claimant spoke to Mr. Clark on one or two occasions after he, the Claimant, was released from the hospital. I find that the day after Thanksgiving, 2012, the Claimant met with Mr. Clark. I find that at that meeting Mr. Clark gave the Claimant what amounted to approximately one half of a paycheck. I find that during that meeting Mr. Clark told the Claimant that the money he was giving him was to be counted against what he owed the Claimant. I find that the money paid by Mr. Clark was in the form of back pay, rather than in the form of workers’ compensation benefits.

17. I find that the Claimant was unaware of exactly how many hours of work he averaged each week while he worked for John Clark. I find that the Claimant expected to be paid time and a half for each hour he worked over 40 hours in a week. I find that the Claimant expected, in a good year, to make \$50,000. I find that the Claimant estimated that he averaged working 62 to 63 hours a week while he was employed by John Clark.

18. I find that John Clark told the Claimant that there was a reason why he, Clark, wished for the house on which they were working to be finished as quickly as possible. I find

that Mr. Clark told the Claimant that a representative of FirstSource had told him, Clark, that if the house was not completed on time, he, Clark, would not be given any more work by FirstSource. I find that Mr. Clark told the Claimant that if they did finish the house on time they would be given the remaining work in Lafayette Park.

19. I find that the Claimant is not at maximum medical improvement with respect to the work-related injuries to his head, right shoulder and lower back. I find that he is in need of additional evaluation/treatment for these body parts which would tend to lessen his disability. This finding is based on the evidence as a whole, including the medical records from Grand Strand Regional Medical Center and the report of Dr. Thomas Chambers.

20. I find that neither John Clark nor the Claimant kept comprehensive records concerning the Claimant's average weekly wage. I find that while the Claimant testified that he kept his records in a book and then transferred them to QuickBooks, the summary which he produced at the hearing was not a record generated by QuickBooks but was, rather, a summary which was prepared by his fiancé under his supervision. I find that Mr. Clark admitted that the Claimant worked between 40 and 50 hours a week. I find that the Claimant submitted time slips for two different weeks reflecting 54 and 54.5 hours of work, respectively. Based on the totality of the evidence, I find that the Claimant's average weekly wage is \$854.00 and his compensation rate is \$569.36. This finding is based on an average work week of 54 hours and anticipates that the Claimant would have been paid time and a half for all

work performed over 40 hours. Given that federal law required that the Claimant be paid time and a half for all work performed over 40 hours each week I find that it is fair that the computation of the Claimant's average weekly wage take that into account.

21. I find that the Claimant has been unable to perform his job with John Clark since March 25, 2013. I base this finding on the opinion of Dr. Thomas Chambers.

22. I find that John Clark submitted to Builders FirstSource a "Certificate of Liability Insurance" dated September 27, 2012. I find that no evidence was presented below as to the date on which Mr. Clark provided Builders FirstSource with this document. In other words, I find that there is no evidence that John Clark provided this "Certificate of Liability Insurance" at the time he commenced work at the project at Lafayette Park. Additionally, I find that the "Certificate of Liability Insurance" does not specifically indicate that workers' compensation coverage is provided in South Carolina. I find that, consistent with §42-1-415, the "Certificate of Liability Insurance" provided by John Clark to Builders FirstSource is insufficient to transfer liability from Builders FirstSource and Liberty Insurance Company to the South Carolina Uninsured Employers Fund.

23. I find that Builders FirstSource was the general contractor for the project at Lafayette Park in Little River, South Carolina. I find that, at all times pertinent herein, John Clark was a subcontractor of Builders FirstSource. I find that, at all times pertinent

herein, the Claimant was an employee of John Clark. I find that the Claimant was a statutory employee of Builders FirstSource, consistent with §42-1-410.

Based on the foregoing Findings of Fact, Commissioner James reached the following  
Conclusions of Law:

**CONCLUSIONS OF LAW**

1. At all times pertinent herein, the Claimant was an employee of John Clark, consistent with §42-1-130.
  
2. At all times pertinent herein, John Clark was the employer of the Claimant, consistent with §42-1-140.
  
3. At all times pertinent herein, the Claimant and John Clark were subject to the jurisdiction of the South Carolina Workers' Compensation Commission, consistent with §42-1-360.
  
4. At all times pertinent herein, Builders FirstSource was the statutory employer of the Claimant, consistent with §42-1-410.
  
5. At all times pertinent herein, Builders FirstSource, as statutory employer of the Claimant, is entitled to indemnity from John Clark for benefits it has paid, or will pay, to the Claimant under the South Carolina Workers' Compensation Act, consistent with §42-1-440.

6. On November 18, 2012, the Claimant suffered injuries arising out of and in the course and scope of his employment with John Clark, consistent with §42-1-160.
7. As a result of his work-related injuries, the Claimant received causally related medical treatment and incurred causally related medical expenses, consistent with §42-15-60.
8. As a result of his compensable work-related injuries the Claimant has been unable to work since March 25, 2013, consistent with §42-9-10.
9. The Claimant is in need additional causally related evaluation/treatment which would tend to lessen his disability, consistent with §42-15-60.
10. The Claimant's average weekly wage is \$845.00 and his compensation rate is \$569.36, consistent with §42-1-40 and REG. 67-1603.
11. Builders FirstSource failed to establish its entitlement to transfer liability to the South Carolina Uninsured Employers Fund for the benefits due the Claimant, consistent with §42-1-415; *Hardy v. McDowell*, 381 S.C. 435, 673 SE 2d 813(2009) and *Hopper v. Terry Hunt Construction*, 373 S.C. 475, 646 SE 2d 162, rehearing denied, certiorari granted, affirmed 383 S.C. 310, 680 SE 2d 1(2007)

Based on the foregoing Findings of Fact and Conclusions of Law, Commissioner James issued the following Order:

**ORDER**

**THEREFORE, IT IS HEREBY ORDERED** that Builders FirstSource and Liberty Insurance Company shall pay the bill incurred by the Claimant at Grand Strand Regional Medical Center for services rendered on November 18, 2012;

**AND IT IS FURTHER ORDERED** that Builders FirstSource and Liberty Insurance Company shall pay to the Claimant temporary total disability benefits in the sum of \$569.36 per week for the period March 25, 2013 to the present and continuing until lawfully suspended or terminated;

**AND IT IS FURTHER ORDERED** that Builders FirstSource and Liberty Insurance Company shall provide to the Claimant further evaluation and/or treatment for the injuries to his head, right shoulder and lower back, said evaluation/treatment to include at a minimum that recommended by Dr. Thomas Chambers;

**AND IT IS FURTHER ORDERED** that Builders FirstSource and Liberty Insurance Company shall have the right to be indemnified by John Clark for any benefits paid to the Claimant;

**AND IT IS SO ORDERED.**

Within the statutory period, the defendants Builders FirstSource and Liberty Insurance Co. filed a Form 30 "Application for Review." In their Application for Review, the defendants Builders First Source and Liberty Insurance Co. set forth the following grounds for review:

### **GROUND FOR REVIEW**

1. Did the Single Commissioner err in finding as fact and concluding as law that the Claimant sustained a compensable injury on November 18, 2012, and thereby ordering past and ongoing TTD benefits, reimbursement for past medical treatment, and ongoing medical treatment when the preponderance of the evidence indicated otherwise?
2. Did the Single Commissioner err in finding as fact and concluding as law that the Defendants/Appellants Builders First Source, Incl, and Liberty Insurance Company were not entitled to transfer liability to the South Carolina Uninsured Employer's Fund when the preponderance of the facts indicated otherwise?
3. Did the Single Commissioner err in awarding compensability when the preponderance of the evidence indicated that the Claimant's alleged injuries did not arise out of nor did they occur in the course and scope of employment?
4. Did the Single Commissioner err in findings as fact and concluding as law that Defendants/Appellants Builders First Source Inc., and Liberty Insurance Company were the statutory employer of the Claimant?
5. Did the Single Commissioner err in finding as fact and concluding as law that Defendants/Appellants Builders First Source, Inc., and Liberty Insurance Company are responsible for providing the Claimant with all ongoing causally related medical treatment and indemnity benefits?
6. Did the Single Commissioner err in finding as fact and concluding as law the Claimant's average weekly wage and compensation rate when such finding was based upon surmise, conjecture, and speculation?
7. Did the Single Commissioner err in finding as fact and concluding as law that Defendants/Appellants Builders First Source, Inc. and Liberty Insurance Company are responsible to pay the Claimant's past medical bills including Grand Strand Regional Medical Center when the preponderance of the evidence indicates otherwise?
8. Did the Single Commissioner err in finding as fact and concluding as law that Defendants/Appellants Builders First Source, Inc., and Liberty Insurance Company are

responsible for paying temporary total disability benefits at the rate of \$569.39 each week from March 25, 2013, to present and continuing as a preponderance of the evidence indicated otherwise?

9. Did the Single Commissioner err in finding as fact and concluding as law that Defendants/Appellants Builders First Source, Inc., and Liberty Insurance Company are responsible for providing the Claimant with further evaluation and treatment for injuries to the head, right shoulder and low back as recommended by Dr. Chambers when the preponderance of the evidence indicated otherwise?
10. Defendants/Appellants Builders First Source, Inc., and Liberty Mutual Insurance Company reserve the right to supplement additional grounds for appeal?

Within the statutory period, the Claimant filed a Form 30 "Application or Review". In his Application for Review, the Claimant set forth the following grounds for review:

1. Did the single Commissioner err in failing to award the Claimant temporary total disability benefits from November 18, 2012 through March 24, 2013 when the preponderance of the evidence established his entitlement thereto?

In an appellate review, the Appellate Panel shall, pursuant to S. C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and reached its own Conclusions of Law, consistent with, or inconsistent with, those of the Hearing Commissioner. After a careful review of the instant case, the Appellate Panel, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are hereby adopted by the Appellate Panel and are set forth as their own Findings of Fact and Conclusions of Law herein below:

### **FINDINGS OF FACT OF THE APPELLATE PANEL**

1. We find that, at all times pertinent herein, the Defendant John Clark regularly employed four or more persons within the state of South Carolina.
2. We find that, at all times pertinent herein, the Claimant was an employee of John Clark, having been hired in August, 2012. We find that at the time of his hire the Claimant was to be paid \$13 an hour. We find that after his first day at work, the Claimant was promoted by Mr. Clark to "lead man" and was given a raise to \$14 an hour.
3. We find that the first job on which the Claimant worked for John Clark was at a housing development in Brunswick County, North Carolina called *The Farm*. We find that while working at *The Farm*, the Claimant was supervising a crew of 6 or 7 of Mr. Clark's employees.

4. We find that when he hired the Claimant John Clark told him that he would be paid in cash. We find that the Claimant kept track of the hours that he worked. We find that when the Claimant first started working for Mr. Clark he often worked 50 to 60 hours a week.
  
5. We find that when the Claimant's crew finished their work in *The Farm* Mr. Clark was unable to provide them with additional work for approximately 2 weeks. We find that after that interval, Mr. Clark sent the Claimant and his other employees to work at a housing development known as *The Reserve at Market Common*. We find that when their work was completed at *The Reserve at Market Common* Mr. Clark sent his employees, including the Claimant, to a development known as *Lafayette Park* in Little River, South Carolina. We find that the Claimant and his crew were tasked with framing houses in that development. We find that the Claimant continued to serve as lead man of Mr. Clark's employees and continued to earn \$14 an hour.
  
6. We find that at the end of the work day on Saturday, November 17, 2012, John Clark gathered his crew together. We find that he told his employees -- including the Claimant -- that the weather forecast for the next day called for rain. We find that Mr. Clark told his employees that they were going to work the next day. We find that Mr. Clark instructed the Claimant to travel to his, Clark's, home in Murrells Inlet and pick up a tarp which he could in turn place on the open roof on the house on which they were working so that the crew would be able to work inside of the house despite of the weather. We

find that the Claimant complied with Mr. Clark's order and picked up the tarp from Mr. Clark's home. We find that the Claimant placed the tarp in his van and took it home.

7. We find that on the morning of Sunday, November 18, 2012, the Claimant woke up at approximately 5:30 a.m. We find that the Claimant, as was his habit, intended to arrive at the job site earlier than the rest of Mr. Clark's crew. We find that when the Claimant woke up that morning, the weather at his home in Nakina, North Carolina was wet and cold, but it was not raining. We find that the Claimant did not want to work that day but he nevertheless got up, got dressed and headed to the work site. We find that it normally took the Claimant 30 minutes to travel from his home to the worksite in *Lafayette Park*.
8. We find that on the morning of November 18, 2012, the Claimant and John Clark spoke by phone. We find that Mr. Clark did not specifically tell the Claimant to refrain from working on November 18, 2012. In that respect, we find that John Clark usually calls his employees to tell them if they weren't going to work due to the weather. We also find that Mr. Clark did not call any of his employees that morning and tell them that they weren't going to work that day.
9. We find that when the Claimant arrived at the job site in *Lafayette Park* between 7:30 and 8:00 a.m., the weather was cold and it was raining slightly. We find that the Claimant took a 12 foot ladder and placed it against the house on which they had been working. We find that the Claimant put on his safety harness and his hard hat, tied onto the safety line, climbed up the ladder and commenced to roll out the tarp. We find that in the

process of spreading the tarp over the hole in the roof, the Claimant “flapped” the tarp to get enough air under it so it would lie down. We find that the wind caught the tarp, however, and the Claimant was forced head first through the hole in the roof. We find that the Claimant struck two rafters, pinballing back and forth between the two. We find that in the process the Claimant sustained injuries to his head, face, neck, upper back, mid back, lower back, right shoulder, left hip, left leg and right knee. We find that, as the date of the hearing, all the Claimant’s injuries have resolved except for those to his head, right shoulder and lower back.

10. We find that due to his head injury the Claimant was rendered unconscious. We find that the Claimant is unaware for how long he was unconscious. We find that, after his fall, the next thing the Claimant remembers is “Harley”, one of Mr. Clark’s other employees, screaming at him from the ground saying “Hey, hey, you alright up there?”. We find that the Claimant was taken from the scene of his accident in an ambulance. We find that before he left the scene of the accident, the Claimant saw several other members of Mr. Clark’s *Lafayette Park* crew who had shown up for work, including Robert Austin, “Rick” and John Grozia.

11. We find that the Claimant was taken by ambulance from the job site to Grand Strand Regional Medical Center.

12. We find that, as a result of the accident on November 18, 2012, the Claimant suffered injuries arising out of and in the course and scope of his employment with John Clark to

his head, face, neck, upper back, mid back, lower back, right shoulder, left leg, left hip and right knee. We find that all injuries except those to the Claimant's head, right shoulder and lower back have resolved.

13. We find that the Claimant is not at maximum medical improvement with respect to his work-related injuries. We find that the Claimant is entitled to additional evaluation/treatment for his head, right shoulder and lower back, all of which would tend to lessen his disability. We find that the Claimant is, at the least, entitled to the evaluation/treatment recommended by Dr. Chambers, all of which would tend to lessen the Claimant's disability

14. We find that while the Claimant was at Grand Strand Regional Medical Center on the date of the accident, he had a telephone conversation with John Clark. We find that during this telephone conversation Mr. Clark told the Claimant that he was going to have to talk to "his insurance people" to find out whether it would be cheaper to pay the Claimant out of his own pocket rather than turning it in to his insurance company. We find that during this telephone conversation Mr. Clark did not question why the Claimant climbed onto the roof of the house on which they were working. We also find that Mr. Clark failed during this telephone conversation to raise the issue that the Claimant had allegedly been injured performing a task which he had been told not to perform.

15. We find that the Claimant had a later telephone conversation with John Clark, during which they discussed the Claimant receiving medical treatment, as well as the Claimant

returning to work. We find that during this telephone conversation Mr. Clark told the Claimant that he, the Claimant, would have to be examined by a doctor before he would be allowed to return to work. We find that Mr. Clark told the Claimant that the need for a medical examination prior to his return to work was a "worker's comp rule". We find that Mr. Clark told the Claimant during this conversation that he, Clark, was going to send the Claimant to be evaluated by a doctor. We find that Mr. Clark failed to send the Claimant for the promised medical evaluation.

16. We find that the Claimant spoke to Mr. Clark on one or two occasions after he, the Claimant, was released from the hospital. We find that the day after Thanksgiving, 2012, the Claimant met with Mr. Clark. We find that at that meeting Mr. Clark gave the Claimant what amounted to approximately one half of a paycheck. We find that during that meeting Mr. Clark told the Claimant that the money he was giving him was to be counted against what he owed the Claimant. We find that the money paid by Mr. Clark was in the form of back pay, rather than in the form of workers' compensation benefits.
17. We find that the Claimant was unaware of exactly how many hours of work he averaged each week while he worked for John Clark. We find that the Claimant expected to be paid time and a half for each hour he worked over 40 hours in a week. We find that the Claimant expected, in a good year, to make \$50,000. We find that the Claimant estimated that he averaged working 62 to 63 hours a week while he was employed by John Clark.

18. We find that John Clark told the Claimant that there was a reason why he, Clark, wished for the house on which they were working to be finished as quickly as possible. We find that Mr. Clark told the Claimant that a representative of FirstSource had told him, Clark, that if the house was not completed on time, he, Clark, would not be given any more work by FirstSource. We find that Mr. Clark told the Claimant that if they *did* finish the house on time they would be given the remaining work in *Lafayette Park*.
19. We find that the Claimant is not at maximum medical improvement with respect to the work-related injuries to his head, right shoulder and lower back. We find that he is in need of additional evaluation/treatment for these body parts which would tend to lessen his disability. This finding is based on the evidence as a whole, including the medical records from Grand Strand Regional Medical Center and the report of Dr. Thomas Chambers.
20. We find that neither John Clark nor the Claimant kept comprehensive records concerning the Claimant's average weekly wage. We find that while the Claimant testified that he kept his records in a book and then transferred them to QuickBooks, the summary which he produced at the hearing was not a record generated by QuickBooks but was, rather, a summary which was prepared by his fiancé under his supervision. We find that Mr. Clark admitted that the Claimant worked between 40 and 50 hours a week. We find that the Claimant submitted time slips for two different weeks reflecting 54 and 54.5 hours of work, respectively. Based on the totality of the evidence, We find that the Claimant's average weekly wage is \$854.00 and his compensation rate is \$569.36. This finding is

based on an average work week of 54 hours and anticipates that the Claimant would have been paid time and a half for all work performed over 40 hours. Given that federal law required that the Claimant be paid time and a half for all work performed over 40 hours each week, we find that it is fair that the computation of the Claimant's average weekly wage take that into account.

21. We find that the Claimant has been unable to perform his job with John Clark since March 25, 2013. We base this finding on the opinion of Dr. Thomas Chambers.
  
22. We find that John Clark submitted to Builders FirstSource a "Certificate of Liability Insurance" dated September 27, 2012. We find that no evidence was presented below as to the date on which Mr. Clark provided Builders FirstSource with this document. In other words, We find that there is no evidence that John Clark provided this "Certificate of Liability Insurance" at the time he commenced work at the project at *Lafayette Park*. Additionally, We find that the "Certificate of Liability Insurance" does not specifically indicate that workers' compensation coverage is provided in South Carolina. We find that, consistent with §42-1-415, the "Certificate of Liability Insurance" provided by John Clark to Builders FirstSource is insufficient to transfer liability from Builders FirstSource and Liberty Insurance Company to the South Carolina Uninsured Employers Fund.

23. We find that Builders FirstSource was the general contractor for the project at *Lafayette Park* in Little River, South Carolina. We find that, at all times pertinent herein, John Clark was a subcontractor of Builders FirstSource. We find that, at all times pertinent herein, the Claimant was an employee of John Clark. We find that the Claimant was a statutory employee of Builders FirstSource, consistent with §42-1-410.

## **CONCLUSIONS OF LAW OF THE APPELLATE PANEL**

1. At all times pertinent herein, the Claimant was an employee of John Clark, consistent with §42-1-130.
  
2. At all times pertinent herein, John Clark was the employer of the Claimant, consistent with §42-1-140.
  
3. At all times pertinent herein, the Claimant and John Clark were subject to the jurisdiction of the South Carolina Workers' Compensation Commission, consistent with §42-1-360.
  
4. At all times pertinent herein, Builders FirstSource was the statutory employer of the Claimant, consistent with §42-1-410.
  
5. At all times pertinent herein, Builders FirstSource, as statutory employer of the Claimant, is entitled to indemnity from John Clark for benefits it has paid, or will pay, to the Claimant under the South Carolina Workers' Compensation Act, consistent with §42-1-440.
  
6. On November 18, 2012, the Claimant suffered injuries arising out of and in the course and scope of his employment with John Clark, consistent with §42-1-160.

7. As a result of his work-related injuries, the Claimant received causally related medical treatment and incurred causally related medical expenses, consistent with §42-15-60.
8. As a result of his compensable work-related injuries the Claimant has been unable to work since March 25, 2013, consistent with §42-9-10.
9. The Claimant is in need additional causally related evaluation/treatment which would tend to lessen his disability, consistent with §42-15-60.
10. The Claimant's average weekly wage is \$845.00 and his compensation rate is \$569.36, consistent with §42-1-40 and REG. 67-1603.
11. Builders FirstSource failed to establish its entitlement to transfer liability to the South Carolina Uninsured Employers Fund for the benefits due the Claimant, consistent with §42-1-415; Hardy v. McDowell, 381 S.C. 435, 673 SE 2d 813(2009) and Hopper v. Terry Hunt Construction, 373 S.C. 475, 646 SE 2d 162, rehearing denied, certiorari granted, affirmed 383 S.C. 310, 680 SE 2d 1(2007).

**ORDER**

**THEREFORE, IT IS HEREBY ORDERED** that the Decision & Order of the Hearing Commissioner filed in the above-captioned matter on February 18, 2014 be, and hereby is, **AFFIRMED** in its entirety by the Appellate Panel and the same shall constitute the Decision & Order of the Appellate Panel.


**AND IT IS SO ORDERED.**


SC WORKERS' COMPENSATION COMMISSION

  
\_\_\_\_\_  
Gene McCaskill, Commissioner

**FULL AFFIRMATION**

WE CONCUR:

  
\_\_\_\_\_  
Susan S. Barden, Commissioner

  
\_\_\_\_\_  
Aisha Taylor, Commissioner

**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 February 9, 2015***