

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2013-001212

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015
Petition for Rehearing Denied March 13, 2015

RECEIVED

APR 13 2015

SC Court of Appeals

Joseph Mickle,

Appellant - Respondent,

v.

Boyd Brothers' Transportation, Inc., Employer,
And Lumbermans' Underwriting Alliance,
Carrier

Petitioners.

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that he did file a Petition for Rehearing with the South Carolina Court of Appeals on or about March 2, 2015, and that the South Carolina Court of Appeals, on March 13, 2015 denied the Petition.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is being sought to establish the criteria for determining when a wholly owned subsidiary of a company not qualified as an employer in South Carolina under the South Carolina Workers' Compensation Act could become a qualified employer due to the fact that the parent company is a qualified employer under the South Carolina Workers' Compensation Act. In *Poch v. Bayshore Concrete Products*, 405 S.C. 359 (2013) this Court held, "South Carolina courts have repeatedly held that determination of the employer-employee relationship for workers' compensation purposes is jurisdictional."

This is a Workers' Compensation Appeal arising out of the injuries sustained by Appellant-Respondent, Joseph Mickle, when he was removing a tarp from the load on his flatbed truck on July 12, 2010, in Vernon, Alabama. (R. p. 17) At the time of this injury, Appellant-Respondent Mickle drove a flatbed truck for WTI Transport, Inc. ("WTI Transport"). (R. p. 16) who was not an employer under the South Carolina Workers' Compensation Act.

Appellant-Respondent was hired by WTI Transport in 2002 as an owner/operator. (R. p. 15) On April 19, 2010, Appellant-Respondent became a full-time, regular employee of WTI Transport. (R. p. 16) After injuring his back in July 2010, Appellant-Respondent reported his injury to WTI Transport, who paid him temporary benefits from July 12, 2010 until February 24, 2011 under the Alabama Workers' Compensation Act. (R. p. 17) On July 1, 2011, Appellant-Respondent sought benefits for total and permanent disability resulting from the injury to his back and legs. (R. p. 14) Though his injury occurred in Alabama and he received his temporary total weekly benefits in Alabama, Appellant-Respondent now seeks benefits for personal disability in South Carolina. (R. p. 14)

WTI Transport and Respondent-Appellant, Boyd Brothers Transportation, Inc. ("Boyd Brothers") have taken the position that Appellant-Respondent was employed by WTI Transport, and because WTI Transport does not regularly employ four or more employees in South Carolina, the South Carolina Workers' Compensation Commission ("Commission") does not have jurisdiction over this case. (R. p. 14)

A hearing was held in this matter on November 18, 2011, in Columbia, South Carolina. (R. p. 12) In an Order dated March 14, 2012, the Hearing Commissioner ruled that the Commission had jurisdiction in the proceeding pursuant to §§ 42-3-180 and 42-1-400 of the South Carolina Code. Respondents-Appellants appealed to the Appellate Panel of the Full Commission of the Workers' Compensation Commission which affirmed the Hearing Commissioner in its Order of May 14, 2013. Respondents-Appellants appealed from the Appellate Panel Order to the South Carolina Court of Appeals who heard the appeal on December 11, 2014, and affirmed jurisdiction in its Order of February 11, 2015. Respondent-Appellants' Petition for Re-Hearing was denied on March 13, 2015 and this Petition for Certiorari followed.

ARGUMENT

I. **Did the lower court err in affirming the Workers' Compensation Commission's determination that South Carolina has jurisdiction under *Poch v. Bayshore Concrete*, 405 S.C. 359 when Boyd Brothers Transportation, who was not a Statutory Employer, but who wholly owned WTI Transport as a subsidiary, when WTI was the employer of the Appellant-Respondent, but not an employer in South Carolina?**

A. **WTI Transport did not employ four or more employees in South Carolina at the time of the Appellant-Respondent's injury, thus Appellant Respondent is not a covered employee authorized to file a Workers' Compensation Claim, and the South Carolina Workers' Compensation lacked jurisdiction to hear this claim.**

The Commission is without jurisdiction because WTI Transport did not regularly employ four or more employees in South Carolina at the time of Claimant's injury. (See Order at 2, 12.) Section 42-15-10 of the South Carolina Code conditions an employee's right to file a claim under the Workers' Compensation Act on the employee being "covered" by the Act. Nolan v. Nat'l Sales Co., 292 S.C. 1, 3-4, 354 S.E.2d 575, 577 (Ct. App. 1987), aff'd, 294 S.C. 371, 364 S.E.2d 752 (1988). Sections 42-1-50 and 42-1-360 of the Act exempt employers with fewer than four employees from coverage under the Act, and the Commission has no jurisdiction to hear any claims asserted against such employers. See Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998) (stating that whether an employer regularly employs the requisite number of employees to be subject to the Act is a jurisdictional issue). Thus, where an employer does not regularly employ four or more employees in South Carolina, the employer is exempt from the Act, its employees are not covered by the Act, and they are therefore "not authorized to file a claim at all." Nolan, 292 S.C. at 4, 354 S.E.2d at 577.

To be authorized to file a worker's compensation claim, Claimant is required to show that he was an "employee covered by the provisions of [the Act]." § 42-15-10. This means that he first has to show that his employer, WTI Transport, was subject to the Act's provisions. The parties stipulated and the Single Commissioner held that WTI Transport did not regularly have four or more employees in the state of South Carolina, (Order at 2, 12), thus WTI Transport is exempt from the Act's provisions, see § 42-1-360, and the Commission has no jurisdiction to hear any claims asserted against it. Claimant is employed by an exempt employer, thus he is not an employee "covered by the provisions" of the Act, and he was not authorized to file a worker's compensation claim. See 292 S.C. at 3-4, 354 S.E.2d at 577 ("Unless the employee is 'covered by the provisions' of South Carolina's Workers' Compensation Act, he is not authorized to file a claim at all."). Claimant was an employee of WTI Transport at the time of his injury, and WTI Transport was exempt from the Act's provisions, thus the Act did not cover Claimant and the Commission lacked jurisdiction to hear his claim. See id. ("[T]his state's Workers' Compensation Act did not cover [Claimant] because [the employer] regularly employed less than four employees in South Carolina.").

B. Appellant-Respondent was not a Statutory Employee of Boyd Brothers, thus Appellant-Respondent was not a Covered Employee authorized to file a worker's compensation claim, and the Commission lacked Jurisdiction to hear this claim.

The Single Commissioner held that Claimant was a statutory employee of Boyd Brothers under § 42-1-400 of the Workers' Compensation Act and that because Boyd Brothers has more than four employees in South Carolina the Commission has jurisdiction in this proceeding. (Order at 14-15.) Appellants maintain that there is no jurisdiction. The consideration of the facts of this case mandates a holding that Claimant was not a statutory employee of Boyd Brothers.

South Carolina Code § 42-1-400 states:

When any person . . . referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution . . . 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.

§ 42-1-400. Known as the Statutory Employer Doctrine, this provision states that employees of a subcontractor are statutory employees of a general contractor when the work they perform constitutes a part of the trade or business of the general contractor. See Marchbanks v. Duke Power Co., 190 S.C. 336, 362-63, 2 S.E.2d 825, 836 (1939). The determination of whether a worker is a statutory employee is jurisdictional, thus the question on appeal is one of law. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

Three tests are applied to determine whether an employee's activity is sufficient to make him a statutory employee within the meaning of § 42-1-400: (1) Is the activity an important part of the owner's business or trade; (2) Is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; and (3) Has the identical activity previously been performed by the owner's employees? See Ost v. Integrated Prods., Inc., 296 S.C. 241, 245-47, 371 S.E.2d 796, 799 (1988); Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner. Voss v. Ramco, Inc., 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997). Whether an individual is a statutory employee is generally resolved by determining whether the alleged employer has the "right and authority to control and direct [the] particular work or undertaking, as to the manner or means of its accomplishment." Id. (citing S.C.

Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 549, 459 S.E.2d 302, 303 (1995)).¹ For example, where the employer exerted almost complete control over the claimant, had the ability to terminate the claimant, and directed where the claimant would work, how he engaged in sales of machinery, and to whom he could make his sales, the claimant was a statutory employee of the employer. Id. at 567-68, 482 S.E.2d at 586.

Because Claimant argues that WTI Transport's employees should be counted as statutory employees of Boyd Brothers, the relevant inquiry concerns the nature of WTI Transport's relationship with Boyd Brothers and the nature of the activities performed by WTI Transport's employees. See id. at 568, 482 S.E.2d at 586. An examination of the record will show that there is no evidence that the activity performed by Claimant is an important part of the Boyd Brothers' business or trade, that it is a necessary, essential, or integral part of Boyd Brothers' trade, business, or occupation, or that Claimant was performing said activity in furtherance of Boyd Brothers' business interests.

The record reveals that Claimant's activities as a flatbed truck driver are not a necessary or important part of Boyd Brothers' business or trade. Lynn Ingram Colley, the Human Resources Director for Boyd Brothers, (Tr. 59:16-18), testified that Boyd Brothers and WTI Transport operate as two separate and distinct entities, (Tr. 60:3-4). Each company has its own president, recruiting department, fleet managers, pricing schemes, and dispatchers. (Tr. 60:5-18.) WTI Transport maintains its own fleet of trucks, (Tr. 60:9-10; 65:3-6), has its own clients,

¹ Voss was decided in the context of an independent contractor relationship. See Voss, 325 S.C. at 568, 482 S.E.2d at 586. However, cases decided in the context of a contractor/subcontractor relationship between the two employers are equally applicable to cases involving a parent/subsidiary relationship. See Poch v. Bayshore Concrete Prods., 386 S.C. 13, 29, 686 S.E.2d 689, 698 (Ct. App. 2009).

(Tr. 60:12), and handles its own bookkeeping, (Tr. 64:23-65:2). This evidence makes clear that no work done by WTI Transport's employees benefits Boyd Brothers' business or trade.

Though Claimant testified that he considered himself to work for "WTI/Boyd Brothers," (Tr. 37:6-8), the remainder of the record shows that he is, at best, confused about the relationship between the two companies. He acknowledged that his paychecks came from only WTI Transport, not from Boyd Brothers, (Tr. 33:23-25; see Tr. 64:14-65:2), that he was dispatched by only WTI Transport, (Tr. 48:11-13), and that he drove for only WTI Transport, not for anyone else, (Tr. 48:8-10). In fact, he explicitly testified that he did not know the nature of the relationship between WTI Transport and Boyd Brothers. (Tr. 50:4-7.)

The only evidence in the record of a business relationship between the two companies regards Boyd Brothers' administration of WTI Transport's employees' insurance claims. (See Tr. 35:7-36:22 (explaining that Claimant's insurance cards say "Boyd Care").) While Appellants acknowledge that Boyd Brothers administers WTI Transport's insurance benefits, the record shows that WTI Transport pays for these services and Boyd Brothers is merely providing an administrative service. (See Tr. 61:15-21.) That WTI Transport pays Boyd Brothers to administer its insurance plan does not show that Claimant's truck driving for WTI Transport constituted a necessary, essential, or integral part of Boyd Brothers' business.

Although both WTI Transport and Boyd Brothers are flatbed truck carriers, (Tr. 73:3-6), there is no evidence in the record that activities identical to those performed by Claimant have been performed by Boyd Brothers' employees, that Claimant was retained by Boyd Brothers to perform those activities, or that those activities were performed in furtherance of Boyd Brothers' business interests. This case is distinguishable from Smith v. T.H. Snipes & Sons, Inc., 306 S.C.

289, 290, 411 S.E.2d 439, 439 (1991), where the South Carolina Supreme Court held that the decedent employee was a statutory employee of the defendant, because the employee in that case was *hired by the defendant* to do work which was an essential part of the defendant's business. Similarly, in Woodard v. Westvaco Corp., 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993) (overruled on other grounds), the employee was held to be a statutory employee of the defendant because the employee's firm was *hired by the defendant* to perform work that is a necessary part of the defendant's business.

Flatbed truck driving may be a part of Boyd Brothers' business, but the instant case is distinguishable from cases like Smith and Woodward because there is *no evidence* that Boyd Brothers hired Claimant or WTI Transport to drive a truck for them. Further, unlike in Voss, there is no evidence that Boyd Brothers controlled or directed Claimant's work, had the ability to terminate him, or directed where and when he would work. See Voss, 325 S.C. 567-68, 482 S.E.2d at 586. In fact, all evidence in the record is to the contrary. Claimant testified that he was not dispatched by Boyd Brothers, did not drive for Boyd Brothers, and was not paid by Boyd Brothers. (See Tr. 33:23-25, Tr. 48:8-13 (explaining that Claimant's checks came from only WTI Transport, he was dispatched by only WTI Transport, and he drove for only WTI Transport).)

It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry. Claimant did not perform any activity that was an important part of Boyd Brothers' business or necessary, essential, or integral to Boyd Brothers' interests because none of his activities as an employee of WTI Transport benefitted Boyd Brothers' business interests. Though Boyd Brothers may have employees who perform the same work as

Claimant—an assumption which has no evidentiary support in the record—Claimant was not a statutory employee of Boyd Brothers because he was not hired to perform any work for them. None of the three tests that qualify a worker as a statutory employee is satisfied, thus Claimant is not a statutory employee of Boyd Brothers, and the South Carolina Workers' Compensation Commission cannot rely on Boyd Brothers' coverage under the Workers' Compensation Act to derive jurisdiction in this case.

It appears that the basis for the Hearing Commissioner's finding that South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries. Other than the testimony of Lynn Colley, HR Director of Boyd Brothers, that both companies have the same owners, there is no evidence as to any business relationship between the two companies other than Boyd Brothers being paid to adjust the workers' compensation and medical claims of WTI Transport, Inc. As mentioned above, the Claimant testified he was hired by WTI Transport, Inc., he drove for WTI Transport, Inc., was dispatched by WTI Transport, Inc. and was working for WTI Transport, Inc. at the time of his injury. There is no testimony that the Claimant was performing part of the trade, business or occupation of Boyd Brothers. Just because the two companies are subsidiaries does not make one the statutory employer of the other. There is no case law, without more evidence, that support this holding. Therefore, the finding that South Carolina has jurisdiction in this case is error.

C. The lower court err in affirming the Workers' Compensation Commission's determination that South Carolina has jurisdiction under *Poch v. Bayshore Concrete*, 405 S.C. 359.

This case is not similar to *Poch v. Bayshore Concrete*, 405 S.C. 359. The Appellant-Respondent was an employee of WTI Transport, Inc. driving a tractor-trailer. The Appellant-Respondent was injured in Alabama lifting a tarp in July 2010. There is no evidence that the Appellant-Respondent was performing any trade, business or occupation of Boyd Brothers Transportation, or that Boyd Brothers Transportation was the Appellant-Respondent's statutory employer. There was no employer-employee relationship of any type between Appellant-Respondent and Boyd Brothers Transportation, Inc. The Appellant-Respondent was not working on the property of Boyd Brothers Transportation, nor alongside any employees of Boyd Brothers Transportation, Inc. There is no finding that Boyd Brothers Transportation is the alter ego of WTI Transport, Inc.

Boyd Brothers Transportation and WTI Transport, Inc. are separate and distinct entities, having separate presidents, recruiting departments, fleet managers, pricing schemes, dispatchers, separate fleet of trucks, their own clients, their own employees and handle their own bookkeeping. Appellant-Respondent admits his paychecks came only from WTI Transport, Inc., and that he was dispatched only by WTI Transport, Inc. and that he drove only for WTI Transport, Inc.

There is no evidence of fraud, abuse of corporate privilege or an attempt to circumvent the law to avoid liability. In fact, WTI Transport, Inc. was paying the Appellant-Respondent workers' compensation benefits under the Alabama workers' compensation Act. There is no allegation or argument that WTI Transport, Inc. and Boyd Brothers Transportation, Inc. operated essentially as one. The evidence introduced shows just the opposite. They were in two different parts of the State of Alabama.

An examination of the eight factors set forth in *Poch*, supra reveal the following:

(1) WTI Transport, Inc. and Boyd Brothers Transportation are two separate companies and maintained separate corporate identities, in that they each had their own tax Id numbers, their own recruiting departments, their own pricing and their own customers. (R. 60, L 3 – L 12)

(2) WTI Transport, Inc. and Boyd Brothers Transportation, Inc. had separate Presidents. There is no evidence on the Board of Directors.

(3) These two companies transaction business from different locations under different managers. WTI Transport, Inc. is located in Tuscaloosa, Alabama, and Boyd Brothers Transportation, Inc. is located in Clayton; Alabama. (R. 65, L 16 – 23) Each company had its own Fleet Manager. (R. 60, L 9)

(4) WTI Transport, Inc. and Boyd Brothers Transportation, Inc. had their own employees, payroll departments and personnel departments. (R. 60, L7; R. 63, L 6)(R 64, L 21 – 24)

(5) There is no evidence as to how each company represented itself to its employees as of July 2010.

(6) Both WTI Transport, Inc. and Boyd Brothers Transportation, Inc. are trucking companies. They each had their own fleet of trucks (R. 65, L 3 – 4) and WTI Transport has its own service and repair shops. (R 65, L 14 – 15) Whether their business were similar or whether they were engaged in different types of business is not known.

(7) WTI Transport, Inc. and Boyd Brothers Transportation, Inc. had separate payroll departments. (R. 64, L 21) The Appellant-Respondent's pay check was from WTI Transport, Inc. Bank accounts were not addressed and they are not in evidence. Both WTI Transport, Inc. and Boyd Brothers Transportation, Inc. had separate bookkeeping. (R 64, L 25)

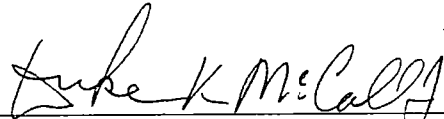
(8) Since both WTI Transport, Inc. and Boyd Brothers Transportation, Inc. had separate tax Id numbers it is assumed that they filed separate tax returns.

For the reasons stated above the Respondent-Appellant request this Court to issue a Writ of Certiorari to correct and reverse the South Carolina Court of Appeal's decision.

CONCLUSION

It is respectfully submitted that this Court issue a Writ of Certiorari in this case and grant the Appellants the opportunity to submit either briefs and/or to submit oral arguments on these issues. There is a need sought to establish the criteria for increasing the average weekly wage and compensation rate above the actual earnings of the employee which is the bench mark of Section 42-1-40, Code of Laws of S.C., 1976, as amended. Further, the bench and bar need to be reminded that an employee cannot reach maximum of medical improvement from medical treatment without a finding of fact that further medical treatment would not "tend to lessen" the employee's period of disability.

Respectfully submitted,



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April 9th, 2015

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

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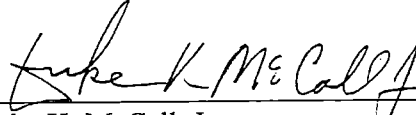
Petitioners.

PROOF OF SERVICE

I certify that I have served the **Petitioners' Petition for Writ of Certiorari** by depositing a copy of it in the United States Mail, postage prepaid, on the 9th day of April, 2015, addressed to the attorney of record and to the Clerk of the Court of Appeals as follows:

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Re: Court of Appeals Appellate Case No: 2013-001212
Joseph Mickle v. Boyd Brothers Transportation, Inc.
Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015
Petition for Rehearing Denied March 13, 2015

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SC Court of Appeals

Dear Mr. Shearouse:

Enclosed for filing are the following:

1. Original and six copies of the Petitioners' Writ of Certiorari;
2. Original and six copies of the Proof of Service; and,
3. Two copies of the Appendix to Petitioners' Writ of Certiorari.

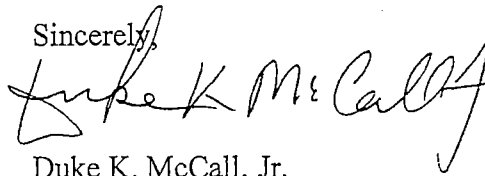
Also enclosed is our check in the amount of \$100.00 for the filing fee.

Please return a filed copy of the Petition for Writ of Certiorari and Proof of Service in the envelope I have enclosed for your convenience.

By copy of this letter to opposing counsel and Jenny Kitchings, Clerk of the Court of Appeals, I am serving them with a copy of our Petition for Writ of Certiorari and a copy of our Proof of Service.

Thank you for your assistance in this matter.

Sincerely,



Duke K. McCall, Jr.

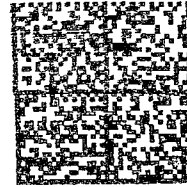
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April 9, 2015

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