

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1306446

JERRY SIMS, CLAIMANT/APPELLANT,

VERSUS

EDWIN PATE VINYL SIDING/EMPLOYER/RESPONDENT,

and

UNINSURED EMPLOYERS' FUND, CARRIER/RESPONDENT.

RECEIVED

AUG 31 2015

SC Court of Appeals

APPELLATE PANEL DECISION AND ORDER

Appellate Panel Review held in Columbia, South Carolina on January 13, 2015 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed:

July 28th, 2015

APPEARANCES:

Claimant was represented by Stephen J. Wukela, Esquire of the Wukela Law Firm, P.O. Box 13057, Florence, SC 29504-3057.

Defendants were represented by Ellen H. Goodwin of The South Carolina State Accident Fund, P.O. Box 102100, Columbia, South Carolina 29221-5000.

STATEMENT OF THE CASE

Claimant asserted he suffered a compensable injury by accident on 4/29/13, when he fractured his ankle in the course and scope of his employment. Defendants denied the claim, asserting that Employer did not regularly employ 4 or more employees and was, therefore, not subject to the Act. The hearing Commissioner found that Employer did not regularly employ 4 or more employees and denied the claim. The hearing Commissioner issued the following Findings of Fact:

1. The purpose of the hearing was to determine whether Employer is subject to the Act and what benefits, if any, Claimant is entitled to.
2. Notice of this hearing was timely and properly served upon all parties of interest.
3. Venue is proper set in Florence County, South Carolina.
4. Claimant is 50 years old and attended school to the 9th grade.
5. Claimant has a history of construction-type work.
6. Claimant has worked for Pate Vinyl Siding on and off for 16 years, installing windows, vinyl siding and gutters.
7. Claimant fractured his ankle while working on the Mount Elon Baptist Church job.
8. Claimant broke his left ankle when he fell from a scaffold.
9. Claimant has not worked since the date of the accident.
10. Claimant has to use crutches to get around; however he has been seen not using them.
11. Claimant's foot was bandaged. He also wears a splint.

12. Edwin M. Pate owns Pate Vinyl Siding, which is not incorporated.
13. Mr. Pate did not regularly employ four or more employees and made it a practice not to do so. This is especially true, given that the amount of business he had feel due to the recession.
14. On the Mount Elon project, Edwin Pate regularly hired Ted Byerly, claimant and Delaine Borden.
15. Pate paid claimant \$14/hour, 25-30 hours per week. The business rarely operated on weekends.
16. Shondra Pate saw claimant after the accident on 9/18/13, walking into his house without crutches and on 9/23/13 at Dollar General and then at his house with no crutches and carrying a bag.
17. X-ray reports taken the day after the accident state that claimant had a “dislocation with the [of] the talus”, “posterior malleolar fracture”, and an “oblique fracture through the distal diaphysis of the fibula”, not “5 fractures in [his] leg and 4 fractures in [his] ankle” as claimant testified. (APAs, p. 40.)
18. X-rays taken on 6/06/13 indicate claimant had a “trimalleolar fracture of the left ankle.”
19. Claimant was not credible regarding the number hours worked per week or the extent of pain he has. His testimony regarding the need for using crutches and his pain level is not consistent with his admission that he walked into a store without crutches.
20. Since claimant’s testimony lacked credibility on pertinent issues, his testimony regarding the number of employees employed by the employer is unreliable.

21. The testimony of Mrs. Pate was credible as to seeing claimant walking without his crutches.

The hearing Commissioner further made Conclusions of Law as follows:

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into, and the foregoing Findings of Fact, this Commissioner makes the following Conclusions of Law:

1. I find and conclude that there is no basis in the medical records for claimant's assertion that he had 4 fractures in his ankle and 5 in his leg.
2. Under the Act, an employer must have regularly employed four or more employees with some constancy during the relevant time period. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (S.C. App. 2007).
3. Working partners and sole proprietors are not included under the Act until the Act allows them the opportunity to elect coverage if they are actively involved in the business. The Law of Workers' Compensation Insurance in South Carolina, 6th Edition, pp. 23, 24. Although a sole proprietor can elect to be included under the Act, there is no evidence of an election or previous election in this case. S.C. Code Ann. § 42-1-130. As this Section provides for an affirmative election and there has not been one, Mr. Pate is not an employee.
4. I find the relevant time period to be 2013, since that is when the accident took place and because Mr. Pate testified that the business suffered due to the recession. This is especially true, given that this was the type of employment

where workers regularly come and go. Harding v. Plumley, 329 S.C. 580, 495 S.E.2d 29 (S.C. App. 1998).

5. Based on the testimony of the remaining witnesses, I find that the Employer regularly employed the claimant, Delaine Borden and Ted Byerly during 2013. Although there was a fourth person working at the time of the accident, I find and conclude that the claimant's evidence does not support a finding or conclusion that the Employer employed 4 or more people throughout the period with some constancy.
6. As the Claimant has not established that Mr. Pate regularly employed four or more employees, the Commission lacks jurisdiction.

Appellant then filed a timely Form 30 Application for Review stating the following grounds for review:

1. The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the Employer was subject to the Act and that he regularly employed four or more employees.
2. The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the claimant suffered a compensable injury by accident and was entitled to temporary total disability and medical benefits pursuant to the Act.
3. The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the claimant was not credible based on "his testimony regarding the need for using crutches and his pain level is not consistent with his admission that he walked into a store without crutches.
4. The Single Commissioner erred as a matter of fact and conclusion of law in discounting the claimant's testimony regarding the number of employees based on the conclusion that he was not credible which was in turn based on his testimony regarding his need for crutches.
5. The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the testimony of the Employer's wife was credible.

6. The Single Commissioner erred as a matter of fact and conclusion of law in relying upon the testimony of the Employer with regard to the number of employees he regularly employed in spite of the fact that the Employer testified that he did not keep payroll records or pay taxes.

Oral arguments were delivered by the parties on 01/13/15. All proffered testimony has been taken. Such, together with all documentary evidence and legal briefs, has been delivered to the individual members of the Full Commission and has since been under study and consideration.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1976, as amended), 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 reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Stephen J. Wukela, Esquire, for the Claimant and Ellen H. Goodwin for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties. Having heard oral arguments on behalf of the parties, considered their briefs and viewed the record as a whole, the Appellate Panel hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

It is found by a preponderance of the substantial evidence as a fact:

1. The purpose of the hearing was to determine whether Employer is subject to the Act and what benefits, if any, Claimant is entitled to.
2. Notice of this hearing was timely and properly served upon all parties of interest.
3. Venue is proper set in Florence County, South Carolina.
4. Claimant is 50 years old and attended school to the 9th grade.
5. Claimant has a history of construction-type work.

6. Claimant has worked for Pate Vinyl Siding on and off for 16 years, installing windows, vinyl siding and gutters.
7. Claimant fractured his ankle while working on the Mount Elon Baptist Church job.
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11. Claimant's foot was bandaged. He also wears a splint.
12. Edwin M. Pate owns Pate Vinyl Siding, which is not incorporated.
13. Mr. Pate did not regularly employ four or more employees and made it a practice not to do so. This is especially true, given that the amount of business he had feel due to the recession.
14. On the Mount Elon project, Edwin Pate regularly hired Ted Byerly, claimant and Delaine Borden.
15. Pate paid claimant \$14/hour, 25-30 hours per week. The business rarely operated on weekends.
16. Shondra Pate saw claimant after the accident on 9/18/13, walking into his house without crutches and on 9/23/13 at Dollar General and then at his house with no crutches and carrying a bag.
17. X-ray reports taken the day after the accident state that claimant had a "dislocation with the [of] the talus", "posterior malleolar fracture", and an "

oblique fracture through the distal diaphysis of the fibula”, not “5 fractures in [his] leg and 4 fractures in [his] ankle” as claimant testified. (APAs, p. 40.)

18. X-rays taken on 6/06/13 indicate claimant had a “trimalleolar fracture of the left ankle.”
19. Claimant was not credible regarding the number hours worked per week or the extent of pain he has. His testimony regarding the need for using crutches and his pain level is not consistent with his admission that he walked into a store without crutches.
20. Since claimant’s testimony lacked credibility on pertinent issues, his testimony regarding the number of employees employed by the employer is unreliable.
21. The testimony of Mrs. Pate was credible as to seeing claimant walking without his crutches.
22. While Employer has not filed tax returns, claimant, by his own admission, has not filed tax returns either.
23. While Employer may have serially employed more than 4 employees in a given year, there is no evidence that he regularly employed 4 or more *at the same time during the relevant time period.*

CONCLUSIONS OF LAW

Accordingly, as provided by the South Carolina Code Section 42-17-50, it is the determination and finding of this Appellate Panel:

1. We agree and conclude that there is no basis in the medical records for claimant’s assertion that he had 4 fractures in his ankle and 5 in his leg.

2. Under the Act, an employer must have regularly employed four or more employees with some constancy during the relevant time period. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (S.C. App. 2007).
3. Working partners and sole proprietors are not included under the Act until the Act allows them the opportunity to elect coverage if they are actively involved in the business. The Law of Workers' Compensation Insurance in South Carolina, 6th Edition, pp. 23, 24. Although a sole proprietor can elect to be included under the Act, there is no evidence of an election or previous election in this case. S.C. Code Ann. § 42-1-130. As this Section provides for an affirmative election and there has not been one, Mr. Pate is not an employee.
4. We find and conclude the relevant time period to be 2013, since that is when the accident took place and because Mr. Pate testified that the business suffered due to the recession. This is especially true, given that this was the type of employment where workers regularly come and go. Harding v. Plumley, 329 S.C. 580, 495 S.E.2d 29 (S.C. App. 1998). This finding was not appealed by the claimant and is the law of the case.
5. Based on the testimony of the remaining witnesses, we find and conclude that the Employer regularly employed the claimant, Delaine Borden and Ted Byerly during 2013. Although there was a fourth person working at the time of the accident, we find and conclude that the claimant's evidence does not support a finding or conclusion that the Employer employed 4 or more people throughout the period with some constancy.

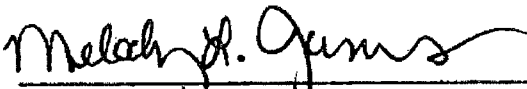
6. As the Claimant has not established that Mr. Pate regularly employed four or more employees, the Commission lacks jurisdiction.

ORDER

IT IS, THEREFORE, ORDERED: The Order of the hearing Commissioner is AFFIRMED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Melody L. James, Chair



Gene McCaskill, 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 July 28, 2015

Stephen J. Wukela

From: appeals@wcc.sc.gov
Sent: Tuesday, July 28, 2015 1:23 PM
To: EGOODWIN@SAF.SC.GOV; GMALLOY@BELLSOUTH.NET; JDEATRICK@SAF.SC.GOV;
LGLOVER@SAF.SC.GOV; SSTRAUSBAUGH@SAF.SC.GOV; STEPHEN@WUKELALAW.COM;
APPEALS@WCC.SC.GOV
Subject: Full Commission Order - WCC#:1306446 - SIMS
Attachments: R08 ORD - SCWCC Order PDF - 07_28_2015 - WCC #_ 1306446.PDF

Attached is the Full Commission Order for WCC#: 1306446

R08 ORD - Full Commission Order - 7/28/2015 - ORDER#: 52808 - WCC #: 1306446