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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SEP 22 2015

SC Court of Appeals

WCC File No. 1306446

Jerry Sims, Employee Appellant/Claimant,

vs.

Edwin Pate Vinyl Siding, Employer,
and Uninsured Employers' Fund, Carrier, Respondents/Defendants.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Standard of Review 3

Argument

I. THE APPELATE PANEL ERRED IN FAILING TO FIND THAT THE EMPLOYER WAS SUBJECT TO THE ACT IN THAT THEY REGULARLY EMPLOYED FOUR OR MORE EMPLOYEES 4

Conclusion 14

TABLE OF AUTHORITIES

CASES

Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3(1982) 5

Harding v. Plumley, 329 S.C. 580, 496 S.E.2d 329(1998) 5

Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97(Ct. App. 2013) 4

Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691(2007) 5

Kershaw County Bd. of Educ. v. United States Sypsum Co., 302 S.C. 390,
396 S.E.2d 369(1990) 12

Kirksey v. Assurance Tire Co., 314 S.C. 43, 443 S.E.2d 803(1994) 3

Kirksey v. Assurance Tire Co., 311 S.C. 255, 428 S.E.2d 721(Ct. App. 1993) 3

Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571(1982) 5

Pringle v. SLR, Inc., 382 S.C. 397, 675 S.E.2d 783(Ct. App. 2009) 11,12

Schulknight v. City of N. Charleston, 352 S.C. 175, 574 S.E.2d 194(2002) 4

STATUTES

S.C. Code of Laws Ann. §42-1-130(Supp. 2012) 4

S.C. Code of Laws Ann. §42-1-160(Supp. 2012) 4

S.C. Code of Laws Ann. §42-1-360(2)(Supp. 2012) 4

OTHER AUTHORITIES

Kevin Eberle, *Spoilation in South Carolina*, S.C. Law, Sept. 2007 12

STATEMENT OF ISSUES ON APPEAL

- I. **DID THE APPELATE PANEL ERR IN FAILING TO FIND THAT THE EMPLOYER WAS SUBJECT TO THE ACT IN THAT THEY REGULARLY EMPLOYED FOUR OR MORE EMPLOYEES?**

STATEMENT OF THE CASE

This is a Workers' Compensation case decided by the Commission on the question of whether the Employer regularly employed four or more employees and was, therefore, subject to the Act. As the Commission found, it was undisputed that the Claimant worked for Edwin Pate Vinyl Siding for sixteen years installing windows, vinyl siding, and gutters and that he fractured his ankle on the job on April 29, 2013 when he fell from a scaffold to the ground. (Order 07/28/15 p. 7, Findings of Fact Nos. 7-8). The fall was witnessed by the Claimant's co-worker. (Dep. Ted Byerly, p. 9, lines 9-11; and Dep. Edwin Pate, p. 27, lines 17-18).

Claimant was transported to Carolina Pines Emergency Room where he described the fall and complained of left ankle pain. Radiographs revealed, and the Commission found, that Claimant suffered a fractured distal fibula and probable fractured posterior malleolus with anterior dislocation of the tibia in relation to the talus. (APA #1, p. 11; Order 07/28/15, pp. 7-8, Findings of Fact Nos. 17, 18). Claimant was treated by orthopaedic Jason B. O'Dell who recommended surgery, which the Claimant has not undergone for lack of funds.

The Commission found:

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.

(Order 07/28/15, p. 9, Conclusions of Law No. 5).

The Commission discounted the testimony of the claimant regarding the number of regular employees, finding:

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. ... Since claimant's testimony lacked credibility on pertinent issues, his testimony regarding the number of employees employed by the employer is unreliable.

(Order 07/28/15, p. 8, Findings of Fact Nos. 19, 20).

Based on this finding, both the Single Commissioner and, on appeal, the Appellate Panel denied the case.

This Appeal followed.

STANDARD OF REVIEW

The issue of whether an employer regularly employs the requisite number of employees to be subject to the Worker' Compensation Act is jurisdictional. Therefore, the commission's findings of fact relative to the number of employees employed by the employer are not conclusive on appeal and the appellate court has the power and duty to review the record and decide the issue in accordance with the preponderance of the evidence. See Kirksey v. Assurance Tire Co., 314 S.C. 43, 443 S.E.2d 803 (1994)(aff'g Kirksey v. Assurance Tire Co., 311 S.C. 255, 428 S.E.2d 721 (Ct. App. 1993)).

ARGUMENT

I. THE COMMISSION ERRED IN FAILING TO FIND THAT THE EMPLOYER WAS SUBJECT TO THE ACT IN THAT THEY REGULARLY EMPLOYED FOUR OR MORE EMPLOYEES.

The Workers' Compensation Act establishes, among other benefits, medical care and treatment for workers injured "by accident[s] arising out of and in the course of employment." S.C. Code Ann. §§42-1-160(A)-310. (Supp. 2012). South Carolina courts follow a policy of liberally construing the Act in favor of coverage. Schulknicht v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002). However, the Act specifically exempts from coverage an employer "who has regularly employed in service [fewer] than four employees in the same business within the State." S.C. Code Ann. §42-1-360(2) (Supp. 2012). The General Assembly has broadly defined "employee" as "every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written ... whether lawfully or unlawfully employed, but exclude[ing] a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of this employer." S.C. Code Ann. §42-1-130(Supp. 2012). See Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 241-241 (S.C. App. 2013).

This Court has, relying upon North Carolina law, highlighted several common characteristics of regular employment under the Act: (1) employment of the same number of persons, although not necessarily the same individuals; (2) during the relevant period of time; (3) with some consistency; (4) not by chance or for a particular occasion; and (5) without regard to the regularity of the days or hours worked. See Hartzell v. Palmetto

Collision, LLC, 406 S.C. 233, 242-243(S.C. App. 2013)(citing Harding v. Plumley, 329 S.C. 580, 585-86, 496 S.E.2d 29, 32 (Ct. App. 1998); Hernandez-Zuniga v. Tickle, 374 S.C. 235, 249-50, 647 S.E.2d 691, 698-99 (Ct. App. 2007); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 575 (1968); Durham v. McLamb, 165 N.C. App. 165, 171, 296 S.E.2d 3,7(1982)).

It is undisputed, and the Commission found, that there were 4 people working on the job site on the date of the accident. (Order 07/28/15, p. 9, ¶5). At deposition Edwin Pate, the Employer, testified:

Q. All right. And Number One, you gave me a name Delaine Borden?

A. Right?

Q. At 2200 Beaver Dam Drive, Hartsville?

A. (Shakes head affirmatively).

Q. All right. Who is Delaine Borden?

A. He's an employee.

Q. Okay.

A. Or a guy - - he is a subcontract laborer.

Q. Okay. He is someone who works with you on jobs and you direct how to install vinyl siding?

A. Right.

Q. All right. The next name you gave me was Ted Byerly, 2132 West Billy Farrow Highway, Hartsville.

A. Right.

Q. Is Mr. Byerly also an employee?

A. Yes.

Q. Okay.

A. Well, a subcontractor just like Mike was.

Q. Okay. Well, let me ask you this way. Do you control and tell Mr. Byerly and Mr. Borden what to do and how to do it?

- A. Yeap. And if they're not there, I try to hire somebody else off - - whoever I need.
- Q. I understand that. And I imagine in your business, sometimes they show up and sometimes they don't?
- A. Yeah, and as Mike can tell you, sometime there's just one of two of us.
- Q. I understand. The next name you have here is Brent Win- -.
- A. Winburn.
- Q. --Winburn?
- A. Yeah. He had worked with us on a job for Eddie Knotts the week before and was staying with Delaine Borden. He brought him ot that job and he stayed there. And he asked me how long we would be there, and I said, "About three hours." He stayed there and he helped.
- Q. Okay.
- A. By he was not actually hired; I went ahead and paid him Twenty-five Dollars (\$25.00).
- Q. He was at the job site as an employee the date of the accident?
- A. Not - - well - - yeah. He really wasn't an employee. But he was handing stuff to us and everything.
- Q. He worked and you paid him?
- A. Yeah. I paid him. Yeah.
- Q. Okay.
- A. I mean, three hours.
- Q. Now, were all three of these individuals, Mr. Borden, Mr. Byerly, and Mr. Winburn, Windham (sic), on the job site on April 29, 2013?
- A. Right. Right.
- Q. Okay. Were you also on the job site?
- A. Yes, I was.
- Q. Okay. And Mr. Sims was on the job site?

A. Right.
(Dep. Edwin Pate, p.11, line 16 - p. 13, line 21). (emphasis added).

With regard to the work of the fourth man, Mr. Pate testified at trial:

Q. And Brent Winburn was working; was he not?

A. I don't know what Brent's last name is but he wasn't working.

Q. So your testimony today is Brent Winburn or Brent Gainey or whatever Brent's last name, was not working on the date of the accident?

A. No, he got - - he brought Delaney Borden - - they were roommates, he brought him over there.

Q. You didn't pay him any money?

A. Yeah, I paid him for his gas.

Q. Now, do you recall telling me in your deposition that he was working there that day?

A. He had -- had handed up some vinyl and stuff but, I mean, he wasn't working for me. He had worked -- he asked me about working on that church and I told him I didn't know.

Q. So he -- he handed up vinyl siding to the men that were putting it on?

A. Yeah.

Q. And he paid you money. You paid --

A. People were always coming up --

Q. No, listen, you've got to answer my question. Did you pay him money?

A. I paid him gas, yeah.

Q. And he did physical work?

A. I don't know. I was on the scaffold. I - - he -- he was there.

Q. Wait a second. I thought you just testified that he handed up vinyl siding to the guys.

A. Well, yeah, I mean, people walk up to us. Vinyl's not heavy, you got to hand it to us when we're on the

scaffold, even if they're waiting around.

Q. So your testimony is he was not working there that day?

A. No, he was not.

(Tr. p.36, line 21 - p. 38, line 5)

Q. He wanted to work, yes?

A. Yes.

Q. He was there?

A. Yes.

Q. He at least handed up vinyl siding to people who were hanging it?

A. Yeah.

Q. And you paid him money?

A. Yes.

Q. That's the job of a helper, correct?

A. No, what a helper would -- yes. Yes.

(Tr. p. 38, line 17 - p. 39, line 2).

The Commission found that the fourth man, Brent, was working the date of the accident. (Order 07/28/15, p. 9). In particular, the Commission found:

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.

(Order 07/28/15, p. 9, Conclusions of Law No. 5).

There has been no appeal by the Defendants from the finding that three employees (the Claimant, Delaine Barden, and Ted Byerly) were regularly employed, (Order 07/28/15, p. 9, Conclusion of Law No. 5), and such is the law of the case.

Thus, the case turns on the question of the regularity with which Mr. Pate employed a fourth person. The Single Commissioner noted that: "Claimant asserted that Mr. Pate hired 50-75 different people over the course of 2012." (Order 06/19/14, p. 3).

The Single Commissioner and the Appellate Panel went on to then disregard Claimant's testimony as not credible. (Order 06/19/14, p. 6, Findings of Fact Nos. 19, 20; Order 07/28/15, p. 8, Findings of Fact Nos. 19-20).

However, both the Single Commissioner and the Appellate Panel failed to acknowledge the fact that the employer admitted to employing 50-75 different helpers, such as Brent, over the course of the relevant year. At his deposition, Mr. Pate testified:

Q. All right. Do you maintain any payroll records at all?

A. From week to week. Believe me, we're liable to have fifty (50) to seventy-five (75) different guys helping us in a year.

Q. Okay. All right.
(Dep. Edwin Pate, p.14, line 25 - p. 15, line 5).

He went on to testify at deposition:

Q. **Okay. Okay. All right. Now, we were talking before about over the year before the accident, you said that there were a number of people that come and go working for you. Can you tell me those names?**

A. **First names I can probably remember.**

Q. **That would be fair.**

A. **Bruce, Corey - - I may not even be able to remember them all - - Ricky, Wallace. There are so many of them. These - - these guys - -**

Q. **They come and go?**

A. **They're laborers. They don't - - you know, you teach them how to drive a nail or cut a piece of siding.**

Q. **Sure. Sure. Sure. Not particularly reliable?**

A. Not very. No.
(Dep. Edwin Pate, p. 22, lines 6-19).

Further, at trial, Mr. Pate testified:

Q. Well, let me ask you then; is it fair to say that you have 50 to 75 different guys helping you in a year?

A. Yeah, different - - and we always -
-

Q. Is that true?

A. Yeah.

Q. Okay.

A. And they - - they come and work two days and leave, or a day.

Q. And most of those 50 to 75 guys that come and go during the course of the year do that helper job?

A. Yeah.

(Tr. p. 40, lines 4-14)(Emphasis added).

Unfortunately, there are no records of the names, or addresses, or days or hours worked, or wages of those 50-75 different helpers because the employer destroys what few records he creates.

Mr. Pate testified:

Q. Okay. Now, you don't have any records, though, of how many people have worked for you over the last year or over the last five years or any time; is that right?

A. No.

(Tr. p. 40, lines 15-18).

Q. All right. Do you maintain any payroll records at all?

A. From week to week. Believe me, we're liable to have fifty (50) to seventy-five (75) different guys helping us in a year.

- Q. Okay. All right.
- A. Or helping me in a year. I mean, it's just - - I need - - I need an accountant to know.
- Q. And you maintain - - you maintain those records week to week, but then you - - you - - how long do you keep them?
- A. For about a week.
- Q. For about a week, and then you destroy them?
- A. Well, I mean, it's just - - it's actually their time sheets.
- Q. Okay.
- A. And that's it.
- Q. And you don't maintain those in any way? Once that week's over and everybody's paid, - - -
- A. Yeah.
- Q. - - you go on to the next week and destroy the records from the last week, or throw them away or whatever?
- A. (Witness shakes head affirmatively).
- Q. Is that yes?
- A. Yes.
- (Dep. Edwin Pate, p. 14, line 25 - p. 15, line 24).

Our courts have recognized the doctrine of spoliation, which provides that the destruction of evidence by a party supports an inference that the evidence destroyed would have been adverse to that party. In Pringle v. SLR, Inc., 382 S.C. 397 (Ct. App. 2009), this Court has recognized the doctrine of spoliation; finding:

when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.

* * *

As an initial matter, however, the party seeking the inference, ... must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder.

Pringle v. SLR, Inc., 382 S.C. 397, 405 (Ct. App. 2009)(quoting Kershaw County Board of Education v. U.S. Sypsum Co., 302 S.C. 390, 394, (1990)(citing Kevin Eberle, *Spoilation in South Carolina*, S.C. Law., Sept. 2007, 26, 32)).

Mr. Pate admitted that he destroyed records of the 50-75 different individuals that he had employed in the helper position over the relevant time period, (Dep. Edwin Pate p. 14, line 25 – p. 15, line 24), that he paid his employees cash, (Tr. p. 16, lines 10-11), and that he filed no tax returns. (Dep. Edwin Pate, p. 16, lines 16-23).

Thus, the employer intentionally avoided making a record of the dates and times that his employees worked and what they were paid, and destroyed what records were generated. The employer did so in order to avoid his legal obligations under the Income Tax Code, the Social Security Act, and the Workers' Compensation Act. Such evidence, were it not destroyed, could confirm the Claimant's contention that the Defendant regularly employed a fourth person as helper. Pursuant to the doctrine of spoliation, the Court should adopt that presumption that such destroyed evidence would have been adverse to the Defendants..

In sum, the employer admitted, and the Commission found, that the employer regularly employed 3 employees, Ted Byerly, Claimant, and Delaine Borden. (Order 07/28/15, p. 9, Conclusion of Law No. 5). The Commission also found that a fourth employee, Brent, was working as a helper at the time of the accident. (Order 07/28/15, p. 7, Conclusion of Law No. 5). The employer admitted to employing 50-75 different

helpers, like Brent, over the course of the last year. (Tr. p. 40, lines 4-14, "Q. And most of those 50-75 guys that come and go during the course of the year do that helper per job? A. Yeah.").

The Employer admitted that he regularly destroyed any records of the identity of these individuals or the time they worked, (Tr. p. 40, lines 15-18), and he admitted that he paid his employees cash and filed no tax returns. (Dep. Edwin Pate, p. 16, lines 10-23).

However, based on this evidence, the Commission found that the employer did not regularly employ four or more employees.

This finding turned on the Commission's conclusion that the Claimant was not credible. The Commission found:

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. ... **Since claimant's testimony lacked credibility on pertinent issues, his testimony regarding the number of employees employed by the employer is unreliable.**

(Order 07/28/15, p. 6, Findings of Fact Nos. 19, 20)(emphasis added).

The Commission made this finding in spite of the undisputed fact that the Claimant was suffering from an unrepaired fractured distal fibula, and a fractured posterior malleolus with anterior dislocation tibia, as found by the Commission (Order 07/28/15, pp. 7-8, Findings of Fact Nos. 17-18), and evidenced by the x-rays of Carolinas Hospital System taken the day of the accident. (APA # 1, p. 11).

CONCLUSION

It is undisputed, and the law of the case, that the employer regularly employed three employees. (Order 07/28/5, p. 9, Conclusion of Law No. 5). The Commission also found that a fourth employee, a helper, was working on the date of the accident. (Order 07/28/15, pp. 7-8, Conclusions of Law No. 5). The employer admitted that 50-75 different employees performed that helper job in the course of a year, (Tr. p. 40, lines 4-14), the records of whose employment the employer destroyed regularly, (Dep. Edwin Pate p. 14, line 25 – p. 15, line 24), given that he paid them cash, and paid no taxes. (Tr. p. 16, lines 10-11; Dep. Edwin Pate, p. 16, lines 16-23).

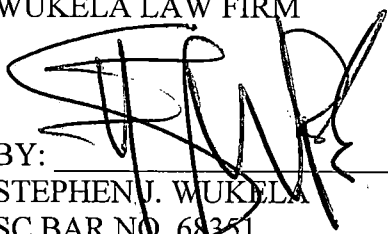
Nevertheless, the Commission found that the employer did not regularly employ four employees because the Claimant, who suffers from unrepaired ankle fractures, (APA #1, p. 11), admitted to walking on two occasions without crutches. Therefore, in the Commission's view, the Claimant made incredible complaints of ankle pain. (Order 07/28/15, p. 8, Findings of Fact Nos. 19-20). Moreover, the Commission reasoned, "Since Claimant's testimony regarding the matter lacked credibility on pertinent issues, his testimony regarding the number of employees employed by the employer is unreliable." (Order 07/28/15, p. 6, Finding of Fact No. 20).

Put differently, the Commission found that the complaints of ankle pain from a Claimant with unrepaired ankle fractures were incredible; and therefore, it denied the case, in spite of the Employer's admissions that he regularly employed 3 people consistently and employed 50-75 different people in a fourth "helper" position over the relevant year, though he has no records because he destroys them.

The denial was in error and should be reversed.

Respectfully submitted,

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September 18th, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1306446

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SC Court of Appeals

Jerry Sims, Employee, Appellant,

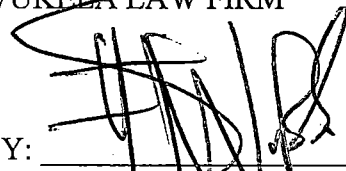
vs.

Edwin Pate Vinyl Siding, Employer,
and Uninsured Employers' Fund, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2015, addressed to their attorneys of record, Ms. Ellen H. Goodwin, SC State Accident Fund, PO Box 102100, Columbia SC 29221-5000, and Honorable Gerald Malloy, PO Box 1200, Hartsville SC 29550.

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September 18, 2015

RECEIVED
SEP 22 2015
SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Jerry Sims v. Edwin Pate Vinyl Siding, et al
Appellate Case No. 2015-001838

Dear Ms. Kitchings:

Enclosed please find for filing the following:

1. Appellant's Initial Brief and Proof of Service;
2. Appellant's Designation of Matter to be Included in Record on Appeal, Certificate of Counsel and Proof of Service.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

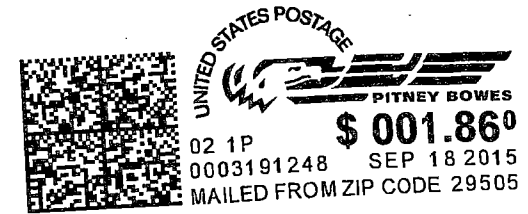
STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: Ms. Ellen H. Goodwin
State Accident Fund

Honorable Gerald Malloy



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