

STATEMENT OF ISSUES ON APPEAL

DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE EMPLOYER WAS NOT SUBJECT TO THE ACT IN THAT IT DID NOT REGULARLY EMPLOY FOUR OR MORE EMPLOYEES DURING THE RELEVANT TIME PERIOD?

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SC Court of Appeals

STATEMENT OF THE CASE

Appellant 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 during the relevant period and denied the claim. Appellant appealed to the Full Commission, which affirmed unanimously. This appeal ensued.

STANDARD OF REVIEW

On appeal from the Appellate Panel, “an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel.” Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013), Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007). The appellant bears the burden of demonstrating by a preponderance of the evidence that jurisdiction is proper. Id.

ARGUMENT

- 1. The Workers’ Compensation Commission did not err in finding that the Employer was not subject to the Act in that it did not regularly employ four or more employees during the relevant time period.**

The Workers Compensation Act specifically exempts from coverage any 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 test

for regular employment involves five factors: (1) employment of the same number of persons although not necessarily the same individuals; (2) during the relevant period of time; (3) with some constancy; (4) not by chance or for a particular occasion; and (5) without regard to the regularity of the days or hours worked. Hartzell, supra. The Hernandez-Zuniga court recognized that “it is particularly difficult [to determine the relevant time period] for employment in which workers come and go due to the nature and type of work they perform.” Hartzell, supra, citing Hernandez-Zuniga.

The Commission found and concluded that Employer did not regularly employ four or more employees during the relevant time period, which was 2013. (Order, pp. 7, 8.) It should be noted that the finding regarding the relevant time period was not appealed. Appellant asserts that there was a finding of a fourth employee on the day of Appellant’s accident. However, having a fourth employee on one day is not proof that Employer regularly employed four or more employees. In fact, there is no evidence that Employer regularly employed more than 3 people on any other job in 2013, which was found to be the relevant time period and not appealed. While Employer may have employed a 50 to 75 people during the year (Dep. of Edwin Pate, p. 15, lines 2-4), that is not proof that four or more of them were employed simultaneously with some constancy over the relevant time period. In fact, Employer testified that “... we hire people, it’s almost like going to pick somebody up on the corner. Mike can tell you that many a time there’s only me and him working. (Tr. p. 39, line 1-p.40, line 3.) Employer further clarified: “And they - they come and work two days and leave, or a day. (Tr. p. 40, lines 10, 11.) Employer averred that the week after appellant’s accident on 4/29/13, he worked with Mr. Border [sic], Mr. Byerly and Brent. (Tr. p. 44, lines 7-15.) “Lawrence Barefoot

worked with [them] but that was after Brent was gone.” (Tr. p. 44, lines 23, 24.) There is no other credible evidence that Employer hired four or more people regularly and with some constancy during the relevant time period.

Appellant also asserts that the Court should apply the doctrine of spoliation; however, this argument was not raised and ruled on below. Therefore, it has not been preserved for appeal. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486 (Ct. App. 2014). However, if the issue were preserved, appellant failed 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 of Summerton, 382 S.C. 297, 675 S.E.2d 783(Ct. App. 2009)*citing* Kevin Eberle, Spoliation in South Carolina, S.C. Law., Sept. 2007, 26, 32. According to the testimony of the Employer, the notebook pages only included first names and numbers of hours worked that week (Tr. p. 41, line 20 – p. 43, line 8). There is no evidence that employment records as described by Appellant ever existed at any time, yet he argues that Employer should be penalized for not creating them. The doctrine of spoliation does not apply to failure to keep records. For the foregoing reasons, Appellant would not be entitled to an inference that the unavailable notebook pages were favorable to a finding of regular employment of four or more people.

In reaching its conclusion concerning the number of employees, the Commission considered Appellant’s testimony and found him not to be credible for several reasons. (Order, p. 6.) The final determination of witness credibility and the weight of the evidence is for the appellate panel. Clemmons v. Lowe’s Home Ctrs., Inc., Op. No. 5408 (S.C. App. filed April 1, 2015.) Questions of credibility rest within the discretion of

the Appellate Panel.... Carter v. Verizon Wireless, 407 S.C. 651, 757 S.E.2d 528 (Ct. App. 2014).

One reason the Commissioner found Appellant lacking in credibility was that he testified he was paid \$14.00 per hour, “[a]t least 35 hours per week. That was on a rainy week.” (Tr. p. 10, lines 4-6.) Appellant further asserted that he worked “probably 9, 10” hours per day “mostly every day” of the week, “weather permitting.” (Tr. p. 10, lines 7-16; p. 23, lines 15-16; p. 25, lines 21-23.)

Employer, Edwin Pate, agreed that he paid Appellant \$14/hour. (Tr. p. 32, lines 13-15.) He further testified, however, that Appellant worked 25-30 hours per week and seldom on Sunday. (Tr. p. 32, lines 1-3, 24-p. 33, line 1.) Shondra Pate testified that her husband worked “maybe six hours, five or six hours a day....” (Tr. p. 23-25.) Although she was not involved in the business, Employer would call her when they quit for the day. In addition, since her husband is an amputee, she knows he cannot work long hours in the heat. (Tr. p. 51, lines 1-12.) She further testified that husband only works “occasionally, not a lot” on Sundays. (Tr. p. 51, lines 19-21.)

The deposition of Bueil Delaine Borden was submitted into evidence by Appellant. Mr. Borden testified therein that “And that man right there lied to you when he told you he made Nine Hundred Dollars (\$900) a week. He’s never made Nine hundred Dollars (\$900) a week. And I’ve worked with him for three and a half years.” (Depo. Tr. p. 11, lines 3-7.) Borden further testified: “I make Thirteen Dollars (\$13.00) an hour.” “[I]f we get to work forty (40) hours, I might bring home Four Eighty (\$480) if we get to work all week.” “On average, I bring home about anywhere from Two Fifty (\$250) to Three Twenty-Five (\$325). (Depo. Tr. p. 11, lines 13-20.)

The deposition of Ted Byerly was submitted into evidence. Byerly testified he worked 20 to 30 hours per week, "if that." (Depo. Tr. p. 8, lines 13-14.) He further stated that they worked between 6 and 8 hours per day. (Depo. Tr. p. 8, lines 16-20.) There was no evidence in the record impeaching the credibility of Mr. Byerly or Mr. Borden.

Another reason the Commissioner found Appellant lacked credibility was his exaggeration regarding his foot/injury. When asked about what his problems were with his foot, Appellant asserted: "It don't never stop burning from my foot up my main bone in my leg. It's got five fractures in it and my ankle's broke four times...." (Tr. p. 14, lines 22-24.) He further claimed: "I have to use crutches to get around. I can't – he told me don't put no pressure on it and I can't stand for it to hit the floor. Some days I can stand it a few minutes then again I can't let it hit the floor." (Tr. p. 15, lines 11-14.) When asked: "Do you use your crutches all the time?" Appellant replied: "Pretty much." (Tr. p. 18, lines 20-23.) Appellant asserted he needed his crutches to walk. (Tr. p. 18, lines 24-25.) Appellant admitted, however, that "a few times I've walked in the store." (Tr. p. 19, lines 19-21.)

X-ray reports in the record do not indicate that Appellant had 5 fractures in his leg and 4 in his ankle. (APAs, p. 40.) Other x-rays taken 6/06/13 establish that Appellant had a "trimalleolar fracture of the left ankle." Moreover, Employer's wife, Shondra Pate, witnessed Appellant walking into his house and at the Dollar General without crutches. (Tr. p. 47, line 17-p. 49, line 8.) Appellant even admitted he walked at times without crutches, although at the same time he claimed he could only stand a few minutes and could not bear to let his foot hit the floor.

Since Appellant lacked credibility on multiple issues (number of hours worked, working on Sundays, wages earned, and nature of injury), the Appellate Panel did not abuse its discretion in not giving weight to his testimony regarding number of employees.

Based on Appellant's failure to show by a preponderance that Employer regularly employed four or more people with some constancy over the relevant period.

Respondents contend that the Appellate Panel's Order finding lack of jurisdiction under the Act should be affirmed.

CONCLUSION

For the foregoing reasons, Respondents contend that the Order of the Appellate Panel South Carolina Workers' Compensation Commission should be affirmed.

Respectfully submitted.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

W.C.C. FILE NO. 1306446

APPELLATE CASE NO. 2015-001838

JERRY SIMS, Employee.....Appellant/ Claimant,

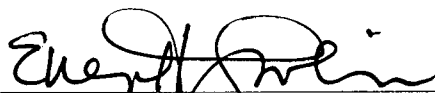
vs.

EDWIN PATE VINYL SIDING, Employer,
and UNINSURED EMPLOYERS' FUND. Carrier,Respondents/Defendants.

I certify that I have served the Respondent's Initial Brief on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 2015, addressed to his attorney of record. Stephen J. Wukela, Post Office Box 13057, Florence, South Carolina 29504, and the Honorable Gerald Malloy, Post Office Box 1200, Hartsville, SC 20550.

UNINSURED EMPLOYERS' FUND

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