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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2015-000486

W.C.C. File No. 1219902

Anthony Ransom, Claimant,.....Respondent,

v.

John Clark, Employer, Builders FirstSource, and Liberty Mutual Insurance Co.,
Carrier, and S.C. Uninsured Employers Fund, Defendant,

of whom Builders FirstSource and Liberty Mutual Insurance Co. are theAppellants.

INITIAL BRIEF OF RESPONDENT

TABLE OF CONTENTS

| | |
|-------------------------|-----|
| Statement of Case..... | 1-2 |
| Statement of Facts..... | 3-5 |
| Argument..... | 5-6 |

STATEMENT OF CASE

Respondent Anthony S. Ransom ("Ransom") initiated these proceedings with the filing of his Form 50, Request for Hearing, against Employer John Clark, d/b/a John Clark Builders ("John Clark Builders"), on January 17, 2013. In his Form 50, Request for Hearing, Ransom alleged injuries to his head, back, right knee, lower back, left buttock, and left leg that occurred when he fell while placing a tarp over a gap in a roof on November 18, 2012. Since Ransom was informed and believed John Clark was uninsured, he served the Form 50 on the South Carolina Uninsured Employers' Fund ("the Fund"), the general contractor, Builders FirstSource, Inc. (Builders FirstSource"), and their Carrier, Liberty Mutual (collectively "Appellants") filed a form 51 and an Amended Form 51 denying liability for the claim, noting Ransom was not an employee of Builders FirstSource, and noting that they had received a certificate of insurance from John Clark Builders.

Following a hearing on July 9, 2013, the single commissioner issued an Order on February 18, 2014, finding Builders FirstSource was Ransom's statutory employer and that Appellants failed to meet their burden to transfer liability for the claim to the Fund. (February 18, 2014 Order, Conclusion of Law nos. 4, 11) The single commissioner concluded Ransom's hourly wage was \$14.00 per hour and that Ransom should have received time and a half for overtime pay. (*Id.*, Finding of Fact no. 20) Further, the single commissioner determined Ransom worked an average of 54 hours per week, resulting in an average weekly wage of \$854.00 and a compensation rate of \$596.36. (*Id.*) Finally, the single commissioner found Ransom was entitled

to temporary total disability benefits from March 25, 2013, to the present. (*Id.*, Finding of Fact no. 21)

Respondent filed a timely Form 30, Request for Commission Review, on February 27, 2014, in which they raised several grounds for review of the single commissioner's finding regarding Ransom's employment status, transfer of the claim to the Fund, and liability for on-going medical care and treatment. Ransom also filed a Form 30 Request for Commission Review on March 4, 2014, in which he challenged the single commissioner's denial of temporary total disability benefits from November 18, 2012, through March 24, 2013. Following oral argument on July 21, 2014, the Appellate Panel of the Full Commission issued its February 9, 2015 Decision and Order in which it unanimously affirmed the February 18, 2014 Order of the single commissioner in its entirety.

STATEMENT OF FACTS

All parties stipulated that Builders FirstSource is an upstream contractor of John Clark. (July 9, 2013 Hr'g Tr., p. 7, lines 1-2) Clark's work for Builders FirstSource occurred at Lafayette Park, where Ransom's injuries occurred. (*Id.*, p.25, lines 3-13) Ransom began working for Clark August 6 or 7, 2012, when Clark was performing work for non-party 84 Lumbar rather than Builders FirstSource. (*Id.*, p. 15, lines 6-16; p. 21, lines 16-19; p. 112, lines 5-12) Ransom concedes there was roughly a two week period in October 2012 when Clark had no work for him to do. (Ransom Dep., p. 59, line 7 – p.60, line 17) Clark's work for Builders FirstSource at Lafayette Park began about two weeks prior to November 15, or approximately November 1. (Clark Dep., p. 24, lines 23-25; lines 1-5; p. 26, lines 5-14) Clark's job for Builders FirstSource was to build a house from the slab up. (Clark Dep., p. 71, lines 13-17)

Ransom testified he was paid \$13.00 an hour by John Clark to perform carpentry work. (July 9, 2013 Hr'g Tr., p. 15, lines 17-24) He was then promoted to lead man and received \$14.00 an hour, plus time and a half for overtime. (*Id.*, p.17, lines 7-17; p. 24, line 22- p. 25, line 2) Ransom was paid in cash and he kept a record log of the time he spent on the job, subtracting thirty minutes for lunch daily. (*Id.*, p. 18, lines 4-17; APA p. 29) Ransom presented a record of hours from his time at Lafayette Park to the single commissioner, however, the time log was created all at one time and was not Ransom's original log of hours. (July 9, 2013 Hr'g Tr., p. 59, lines 16-25; APA p. 29) Ransom testified he has not seen his original log book since the date of accident. (July 9, 2013 Hr'g Tr., p. 21, lines 1-15) He also admits he does not know on average how many hours a week he worked, but, when looking at his typed log, he worked about 62 or 63 hours per week. (July 9, 2013 Hr'g Tr., p. 50, lines 1-20; p. 70, lines 8-12) Ransom later admitted he was not paid overtime. (*Id.*, p. 50, lines 21-23) He did not know how much he made in 2011 and did not know how much he planned to make in 2012. (*Id.*, p. 51, lines 20 – p. 53, line 18)

Ransom testified that, prior to the alleged accident, he would call his crew and instruct them not to come to work in the event of rainy weather. (July 9, 2013 Hr'g Tr., p. 23, lines 1-14) Clark fussed at Ransom for making the call since Clark was to decide when the work was to be cancelled because of weather, and Ransom stopped calling his crew. (*Id.*, p. 23, line 25 – p. 24, line 1) On the day before the accident, Clark spoke with Ransom and the crew about the next day's weather, and Clark instructed Ransom to get a tarp to put over the roof so the crew could work inside the house during the rain. (*Id.*, p. 26, line 19 – p. 27, line 13) Clark does not remember this meeting and testified Ransom never got a tarp from him to put on the roof. (*Id.*, p. 106, lines 4-16) Ransom does not remember Clark telling him not to work on the date of the alleged accident or telling him not to put the tarp on the roof. (*Id.*, p. 30, lines 2-7) Further, Ransom was not sure whether he spoke with Clark the morning of the alleged accident, despite phone records indicating a four minute conversation beginning at 7:23 a.m. (*Id.*, p. 29, line 22 – p. 30, line 1; p. 53, line 19 – p. 54, line 15; APA pp. 36-37)

While it was drizzling with the rain about to hit, Ransom was on the roof attempting to tie down a tarp to cover an open hole when he fell through the hole. (July 9, 2013 Hr'g Tr., p. 30, lines 14-19; p. 33, lines 9-18) Ransom lost consciousness and woke up to co-employee, Harley asking if he was OK. (*Id.*, p. 35, lines 1-11) Ransom left the site in an ambulance, but knows Harley, Robert Austin, Rick and John Grozia showed up at the job site that morning. (*Id.*, p. 36, lines 1-11)

Ransom testified he originally injured his head, face, neck, upper back, mid back, lower back, right shoulder, left leg, and right knee, but that on the date of the hearing, everything had resolved except for his head, right shoulder, lower back and radicular symptoms through his left hip and leg. (July 9, 2013 Hr'g Tr., p. 34, lines 11-21) Ransom also testified the emergency room report was inaccurate because he did not tell the doctor that he did not hit his head, and the doctor did not examine his head to determine whether it was non-tender. (*Id.*, p. 58, lines 7-20; APA p. 5) The report notes a loss of consciousness and a CT scan of the head, which was normal. (APA pp. 5-6, 23)

Ransom treated at the emergency room at Grand Strand Regional Medical Center and later had an appointment with Dr. Chambers. (APA pp. 1-28) Ransom testified Clark would not allow him to return to work until he was cleared by a physician that Clark was going to set up, but Clark never set up an appointment. (July 9, 2013 Hr'g Tr., p. 44, lines 13-21) Dr. Chambers noted in his March 25, 2013 report that it was not appropriate to release Ransom to work "at this point." (APA p. 4)

James Bray, a co-employee, was a carpenter who made \$13 an hour while working for Clark. (July 9, 2013 Hr'g Tr., p. 81, lines 18-25) Both Ransom and Bray worked 35-40 hours a week for Clark. (*Id.*, p. 83, lines 8-18) Bray worked overtime, but only received his normal wage for overtime work. (*Id.*, p. 83, lines 19-23)

John Clark testified Ransom worked an average of 40-50 hours per week at \$10 an hour. (July 9, 2013 Hr'g Tr., p. 102, lines 18-25) Ransom was not paid time and a half for overtime work. (*Id.*, p. 102, line 25 – p. 103, line 2)

Clark talked with Ransom the morning of the alleged accident. Clark instructed Ransom to call once he got to the jobsite and knew whether it was raining. (July 9, 2013 Hr'g Tr., p. 103, lines 19-23; p. 121, lines 6-10) Clark instructed Ransom during the call not to work if it was raining, and Clark had told Ransom in the past not to work on the roof in the rain. (*Id.*, p. 105, lines 9-13; p. 121, lines 18-21) Ransom never called Clark back, so he assumed it was raining and that Ransom was not working. (*Id.*, p. 103, lines 23-25)

Clark presented a certificate of insurance to Builders FirstSource created September 27, 2012 noting workers' compensation coverage from August 6, 2012, through August 6, 2013, produced by Waccamaw Insurance Services of Murrells Inlet, South Carolina for John Clark of Myrtle

Beach, South Carolina. (APA p. 35) Clark believes his policy lapsed a week prior to Ransom's accident. (Clark Dep., p. 127, lines 4-11)

ARGUMENT

I. **THE EVIDENCE DEMONSTRATES RESPONDENT DID SUSTAIN A COMPENSABLE INJURY ARISING OUT AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.**

Ransom's injury is compensable because he was instructed by Clark on November 17, 2012 to report to Clark's house to take possession of a tarp that was later the partial cause of the fall on November 18, 2012. Ransom and Bray testified to attending a meeting with Clark and the other members of the crew on the afternoon of November 17, 2012 in which Ransom was informed on the actions of the next day. The single commissioner and later a panel of experienced commissioners found the testimony of Bray and Ransom to be truthful and holding more weight than Clark. Clark testified in deposition and in open court that he was aware of federal wage laws, which includes that anything over 40 hours a week should be considered time and a half, yet refused to pay employees at that level. This further illustrates his general attitude toward rules that he feels should not apply to him. The evidence also demonstrates that no other member of Ransom's crew were contacted by Clark on the morning of November 18, 2012 to inform them that work would be cancelled due to rain.

Both Bray and Ransom testified to the commission that Ransom was *specifically* ordered at that meeting, by Clark, to secure the tarp to the roof to facilitate inside work during the storm. The fact that the other members of the crew arrived ready for work at Clark's appointed start time for the day further evidences that every member of the crew that was present at the meeting on November 17, 2012 were aware of Clark's plan and order for Ransom to secure a tarp, belonging to Clark, on the roof on the morning of November 18, 2012, before Clark's assigned start time.

II. **A PREPONDERANCE OF THE EVIDENCE SHOWS BUILDERS FIRSTSOURCE FAILED TO MEET THE BURDEN TO TRANSFER LIABILITY TO UNINSURED EMPLOYER'S FUND.**

Appellant's submitted a copy of a workers' comp insurance policy for John Clark that was prepared September 27, 2012. This policy was shown to be lapsed at the time of the accident and was also never confirmed to be a valid policy in the state of South Carolina, as it was issued in North Carolina. The single commissioner and later an experienced panel of commissioners, in their finding of fact, found Builders FirstSource to be liable for the lack of due diligence in verifying the validity and compensability of this policy. (February 18, 2015 finding of fact #22)

As it is the responsibility of the upstream contractor (Builders FirstSource) to ensure all of its downstream subcontractors (Clark) are properly insured to cover employees. The responsibility of Ransom's past, present, future medical care lies squarely on Builders FirstSource and should not be transferred to the uninsured workers' fund of South Carolina.

III. A PREPONDERANCE OF THE EVIDENCE SUPORTS THE CALCULATION OF RESPONDENT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

The finding that Ransom's weekly wage should be based on working 54 hours per week is not based on surmise or conjecture, but rather the testimony of Clark, Ransom, and Bray. Clark testified that Ransom worked 40-50 hours a week. The single commissioner, after hearing the testimony of Clark, Ransom and Bray, as well as reading time slips provided by Clark and a log sheet provided by Ransom, found the average of 54 hours per week. This was later upheld by an experienced panel of commissioners. As neither Clark nor Ransom have produced better records, there is simply no way to create a clearer picture of the weekly average hours worked.

Furthermore, the appellant's supposition of averaging Bray's wage and Ransom's wage has no validity. To wit, Bray's wage of \$13 an hour should have no bearing on Ransom's average.

The commissioner's assignment of time and a half above forty hours coincides with **federal** wage laws. The fact that Clark testified in deposition and in open court that he refused to abide by federal law goes to further show his lack of responsibility and truthfulness.

By: 

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