

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
W.C.C. FILE NO. 1320600

RECEIVED

FEB 01 2016

SC Court of Appeals

KEVIN M. TODD

EMPLOYEE/CLAIMANT/APPELLANT

V

MICHAEL ROBERTS dba  
MICHAEL ROBERTS HOME REPAIR

EMPLOYER/DEFENDANT/RESPONDENT

AND

S.C. UNINSURED EMPLOYERS' FUND, DEFENDANT/RESPONDENT

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Appellant Panel Review held in Columbia, South Carolina on July 20, 2015, per notices timely and properly served on all parties of interest

Appellate Panel Decision and Order filed

January 12<sup>th</sup>, 2016

APPEARANCES:

Claimant/Respondent, represented by Gene M. Connell, Jr., Esquire, of Surfside Beach, South Carolina

Defendant/Employer did not make an appearance

Defendant/Respondent South Carolina Uninsured Employers' Fund represented by Lisa C. Glover, of Columbia, South Carolina.

## **STATEMENT OF THE CASE**

The Claimant filed a WCC Form No. 50 on February 28, 2014, alleging he sustained injuries by accident to his arms and torso arising out of and in the course of his employment on or about August 9, 2013. The Claimant contends he has an Average Weekly Wage of \$500.00 with a resulting Compensation Rate of \$333.33. The Claimant requests payment for past medical treatment. The Claimant requests temporary compensation for his period of temporary disability from August 9, 2013 through July 28, 2014. The Claimant contends he is has reached Maximum Medical Improvement and request an award for scarring.

The uninsured employer, Mike Roberts, did not file a Form 51 but did attend the hearing. Mr. Roberts appeared Pro Se. Upon questioning by the undersigned Mr. Roberts acknowledged understanding that he was given an opportunity to retain legal counsel at a prior hearing but failed to do. Mr. Roberts further acknowledged that his business is a sole proprietorship and not required to have legal counsel. Finally, Mr. Roberts acknowledged and agreed that he would represent himself.

The South Carolina Uninsured Employers' Fund filed a Form 51 on March 19, 2014 generally denying the claim. The Fund further denied the claim on the basis that this injury did not occur in the course and scope of Claimant's employment. This incident occurred while Claimant was engaged in a personal venture with his Employer.

## **REVIEW OF THE EVIDENCE**

The Claimant submitted various documents and medical records into evidence pursuant to the APA. The Claimant called three witnesses to testify on his behalf before testifying himself. The Claimant first witness was Holmes Adams. Mr. Adams testified that he worked for Mike

Roberts's dba Mike Roberts Home Repair, herein referred to as Employer, as a subcontractor for seven to eight months. He testified that the employer did work cleaning up houses that were bank foreclosures. Mr. Adams testified that he and the employer negotiated a price for each job before the work commenced. Mr. Adams testified that the employer assigned him a task and he would complete it. He further testified that the employer did not supervise his work but inspected it upon completion.

Mr. Adams also testified that the employer had three other employees besides the Claimant. Mr. Adams testified that Bobby Day, Ryan Harrelson and James Flawn worked for the Employer. Mr. Adams testified that he was not present on the date of accident but previously did some mechanical work on the boat in question. Mr. Adams currently works for Chevrolet Cadillac in Myrtle Beach.

Michelle Bratcher testified next. She is the girlfriend of the Claimant. Ms. Bratcher testified that the Claimant worked for the employer along with Bobby Day, Ryan Harrelson and James Flawn. Ms. Bratcher admitted on cross examination that she did not personally know the employment relationship between these persons and the employer. Ms. Bratcher testified that Claimant's job duties were mainly home repairs but did anything the employer asked of him. For example, Claimant went on service calls after hours. He also took the employers' son to school.

Ms. Bratcher testified that Claimant helped the employer work on boats but that was not his regular job. She further testified that she and the Claimant socialized with the employer and his family outside of work to include taking boat trips. Ms. Bratcher further testified the employer gave Claimant \$1700.00 after the accident. Finally, Ms. Bratcher testified that the Claimant was out of work from the date of accident until July 28, 2014. She testified that the

Claimant is currently working for Reliable Electric.

Anthony Renard Williams testified next. Mr. Williams testified that he was called by the Claimant. The Claimant told him that the Defendant/Employer needed help doing some electrical work on his boat. Mr. Williams testified that he is an electrician. Mr. Williams testified that he was to be paid for working on the date of accident and if things worked out he would possibly do more work for Defendant/Employer as he was unemployed. Mr. Williams testified that he was present when the explosion occurred and was injured.

The Claimant testified on his behalf. The Claimant is thirty-six (36) years old. The Claimant resides with girlfriend Michelle Bratcher and their son. The Claimant's work history work is an electrician.

The Claimant testified that Mike Roberts was his boss/supervisor. He testified that they were personal friends as well. Claimant testified that there were at least four (4) employees working for the Defendant Company. Claimant testified that his job duties included painting, roofing, plumbing and anything else he was asked to do. Claimant also testified that he was always on the clock when he was with Defendant/Employer. This included while working on boats with the Defendant/Employer. Claimant also testified that he paid his co-workers on several occasions at the behest of Mr. Roberts.

The Claimant testified he was hurt while working for the uninsured Defendant/Employer on Friday, June 14, 2014. The Claimant testified that he along with Anthony Williams and Mike Roberts were trying to clean up a boat owned by Defendant/Employer. The boat was pulled out of the river and had gas in the tank. The boat was located in the river behind the Defendant/Employers' fathers home and not on a jobsite. Claimant testified they were trying to pump the gas out of the tank when the explosion occurred. Claimant testified that he was

burned on his left arm just above the elbow down to his fingertips and on the right arm just above the elbow down to his wrist.

Claimant testified that he was hospitalized at the University of North Carolina Hospital from the date of accident until August 23, 2013. Claimant underwent several skin grafts. Claimant testified that while he was hospitalized and out of work Defendant/Employer paid him a total of \$1,700.00.

Claimant testified that he returned to work for two days but could not do the work. Claimant further testified that he is currently working as an electrician with Reliable Electric. He started this job on July 28, 2014. Claimant testified that he did not seek other employment between the time he tried to return to work with the Defendant/Employer and securing this job.

Claimant testified that he is currently having problems with pain and skin tightness

On cross-examination, the Claimant testified that he worked on boats with the Defendant/Employer on five (5) occasions. He also testified that he took boat trips with Defendant/Employer along with their spouses.

Mike Roberts, owner of Mike Roberts's dba Mike Roberts Home Repair, testified on his behalf. Mr. Roberts testified that he has been in business for about five years. He further testified that the primary function of the business is to do repair and/or maintenance work on homes and rental properties owned by financial institutions. The business does not do any repairs to boats.

Mr. Roberts testified that Claimant worked for him in the home repair business. Mr. Roberts testified that he and Claimant became personal friends as they worked together. Mr. Roberts further testified that he and the Claimant worked on boats owned by both parties as

personal ventures. Mr. Roberts testified that they took trips together on the boats once they were repaired.

Mr. Roberts testified that he paid the Claimant a salary of Five Hundred dollars (\$500.00) per week. Mr. Roberts further testified that the Claimant was the only employee who was on salary. He paid everyone else an hourly wage. He also testified that he paid the Claimant his weekly salary even if they finished work early or if the Claimant was out sick.

Mr. Roberts testified that Bobby Days was an hourly employee at the time of the accident. He further testified that James Flawn was not employed on the date of accident. He quit several weeks before the date of accident due to a confrontation with Bobby Days. Mr. Roberts testified that Anthony Holmes and Ryan Harrelson were subcontractors.

Mr. Roberts testified that on the date of accident he and the Claimant were on the way to a job when they decided to stop by his father's house and work on the boat. Mr. Roberts contends they were not engaged in any work for Mike Robert's Home Repair. Mr. Roberts testified that while he was trying to pump gas from the tank of the boat into a metal drum an explosion occurred. Mr. Roberts testified that he suffered burns to his arms and hands.

Mr. Roberts testified that he gave the Claimant at least Four Thousand dollars (\$4,000.00) while he was hospitalized and out of work. Mr. Roberts testified that he gave the Claimant or other family members Five Hundred dollars (\$500.00) per week for eight (8) weeks.

### **FINDING OF FACTS**

After due consideration of the claim and defenses and after reviewing all the evidence contained in the record, I make the following findings of fact as required under §42-17-40,

South Carolina Code of Laws, 1976 as amended, are hereinafter set forth:

1. The Claimant alleges that he suffered severe burns arising out of and within the course and scope of his employment on August 9, 2013.
2. The Defendant/Employer asserts that the Claimant's injuries were not the result of a work-related accident.
3. The Defendant/Employer, who was advised of his right to counsel, represented himself.
4. There is no dispute in the case as to the mechanism of the injury. The Claimant was severely burned working on a boat belonging to the Defendant on August 9, 2013.
5. The Claimant was air-lifted to and treated at the University of North Carolina Burn Center where he spent a number of week recovering.
6. The question at bar at this hearing was whether the work on the boat was in the course and scope of the Claimant's employment by the Defendant/Employer.
7. The Claimant's position was that he was paid a salary of \$500.00 per week by the Defendant/Employer and anything the Defendant/Employer asked him to do could be considered work because he paid him a salary.
8. The exchange between the Claimant and the Defendant/Employer when the Defendant Employer cross-examined the Claimant is illustrative of that point.

Q: What about on the-now, you say that just because I paid you \$500.00 a week, that Monday through Friday anytime you were with me you were on the clock; right?

A: After certain hours.

Q: Do you think you were still on the clock on them days we knocked off at 12:00 o'clock, went to the river and rode down there and drank beer

before we got home from work?

A: That's up to you.

Q: Were you on the clock?

A: Yeah, because you paid me.

(Transcript, page 60, lines 2-12)

9. Based on the testimony the Claimant, the Claimant's girlfriend-Michelle Bratcher, Holmes Adams, and the Defendant, it is clear that the Claimant not only worked for the Defendant/Employer, the two interacted socially outside of work. The extent of that interaction is subject to interpretation, but they clearly were interacting socially before this accident.
10. For me to believe the Claimant, I have to believe that all the times he spent with the Defendant/Employer was time for which he was paid. That conclusion is simply not supported by the facts.
11. The Claimant and Defendant/Employer took at least one boat trip-on a different boat-with their mates. If the Defendant/Employer is to be believed-and I do as to this fact-the Claimant and the Defendant spent additional time together on and around boats that was not work time.
12. The Defendant/Employer's business is Mike Robert's Home Repair. Work related to that business has nexus to home repair and maintenance, not working on boats.
13. The houses that the business worked on were owned by financial institutions. The Defendant/Employer personally owned this boat.
14. The Defendant/Employer paid Holmes Adams and Anthony Williams to work on the boat that exploded. Mr. Adams is a subcontractor who also works on houses for the

Defendant/Employer. Mr. Williams was contracted for an electrical job on the boat and was present and injured in the explosion. That was the first time he had worked for the Defendant/Employer. He testified that he was never paid for that work. (The Claimant, Defendant/Employer and Mr. Williams were all injured in the explosion. The Claimant's injuries were the most serious). It is interesting to note that Mr. Williams and the Claimant both now work for the same employer.

15. There is no testimony in this case that anyone other than the Claimant was paid a salary by the Defendant/Employer.
16. There is a note in the record from Monika C. Atansesian who is a social worker at UNC Medical Center which reads in part, "Pt. is a 35yo Caucasian male admitted to burn surgery service on 8/9/13 for treatment of 10% second degree flash burns to his bilateral upper and lower extremities (L>R) sustained when he was working on his boats' engine and there was a gas fire followed by an explosion that injured pt. Pt. stated that they been salvaging the boat from the bottom of the river and were drying off the engine etc, and so the explosion was completely unexpected. Pt. stated he was doing this on his personal time and was not working..."
17. The Claimant contends he was on some much medication, he could not remember what he said.
18. This case comes down to who and what to believe.
19. While I do not believe everything the Defendant said, his account is the more believable as to the facts of this case.
20. The Claimant has the burden of proof since this is a denied claim. When I consider the evidence as a whole, the Claimant simply has not met his burden. The Claimant failed to prove that he was working for the Defendant/Employer's home repair business at the

time of the accident; and that what he was doing at the time of the explosion was in the course and scope of his employment.

21. These finding are based on the testimony and the record when reviewed as a whole.

22. All benefits under the South Carolina Workers' Compensation Act are hereby denied.

### CONCLUSION OF LAW

The burden of proof in a claim for workers' compensation benefits is the preponderance of the evidence. The Claimant must establish by a preponderance of the evidence the facts that will entitle him to an award under the Workers' Compensation Act. *Walsh v. U.S. Rubber Co.*, 120 S.E.2d 685 (S.C. 1965). The Claimant did not meet his burden of proof in establishing his claim by a preponderance of the evidence that he was injured in the course and scope of his employment as outlined in section 42-1-160.

IS THEREFORE ORDERED that the Claimant, Kevin M. Todd, failed to prove by a preponderance of the evidence that he suffered compensable injuries while in the course and scope of his employment as outlined in section 42-1-160. It is further,

ORDERED, ADJUDGED AND DECREED the Claimant, Kevin Michael Todd, claim for benefits under the South Carolina Workers' Compensation Act is DENIED AND DISMISSED with prejudice subject to his appellate rights.

AND IT IS SO ORDERED.

Within the statutory period, counsel for the Appellant filed an Application for Review in the case setting forth her reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on July 20, 2015. All proffered testimony has been taken. Such, together with all documentary evidence has been delivered by oral argument to the individual members of the Full Commission and has been under study and consideration.

By appeal, Appellant respectfully submits the following:

1. The Hearing Commissioner erred in finding the Claimant was engaged in a personal venture with his Employer.
2. The Hearing Commissioner erred in finding that for him to believe the Claimant he would have to find all the times he spent with the Claimant was time for which he was paid.
3. The Hearing Commissioner erred in concluding that the Employee could only be on the job if he worked in the home business setting when in fact the evidence shows he does other task for the Employer.
4. The Hearing Commissioner erred in finding that because the Employer owned the boat that the Claimant was not on the job.
5. The Hearing Commissioner erred in finding that the case comes down to who and what to believe.

## **ORDER**

**IT IS THEREFORE, ORDERED** the Order of the Single Commissioner filed in the above-captioned matter on March 24, 2015 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

**IT IS FURTHER ORDERED,**

### **FINDING OF FACTS**

After due consideration of the claim and defenses and after reviewing all the evidence contained in the record, the following findings of fact as required under §42-17-40, South Carolina Code of Laws, 1976 as amended, are hereinafter set forth:

1. The Claimant alleges that he suffered severe burns arising out of and within the course and scope of his employment on August 9, 2013.
2. The Defendant/Employer asserts that the Claimant's injuries were not the result of a work-related accident.
3. The Defendant/Employer, who was advised of his right to counsel, represented himself.
4. There is no dispute in the case as to the mechanism of the injury. The Claimant was severely burned working on a boat belonging to the Defendant on August 9, 2013.
5. The Claimant was air-lifted to and treated at the University of North Carolina Burn Center where he spent a number of week recovering.
6. The question at bar at this hearing was whether the work on the boat was in the course and scope of the Claimant's employment by the Defendant/Employer.
7. The Claimant's position was that he was paid a salary of \$500.00 per week by the

Defendant/Employer and anything the Defendant/Employer asked him to do could be considered work because he paid him a salary.

8. The exchange between the Claimant and the Defendant/Employer when the Defendant Employer cross-examined the Claimant is illustrative of that point.

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12. The Defendant/Employer's business is Mike Robert's Home Repair. Work related to that business has nexus to home repair and maintenance, not working on boats.
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19. While we do not believe everything the Defendant said, his account is the more believable as to the facts of this case.

20. The Claimant has the burden of proof since this is a denied claim. When we consider the evidence as a whole, the Claimant simply has not met his burden. The Claimant failed to prove that he was working for the Defendant/Employer's home repair business at the time of the accident; and that what he was doing at the time of the explosion was in the course and scope of his employment.

21. These finding are based on the testimony and the record when reviewed as a whole.

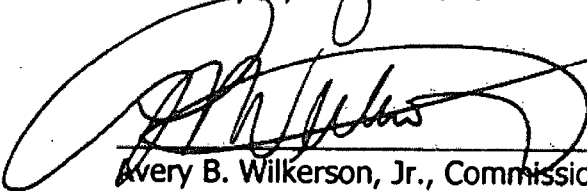
22. All benefits under the South Carolina Workers' Compensation Act are hereby denied.

**AND IT IS ORDERED.**

FULL AFFIRMATION

  
Aisha Taylor, Commissioner

CONCUR:

  
Avery B. Wilkerson, Jr., Commissioner

  
R. Michael Campbell II, 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 January 12, 2016