

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION  
COMMISSION

Appellate Panel

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Appellate Case No. 2012-211870

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MAR 14 2013

MAR 14 2013

SC COURT OF APPEALS

Richard A. Hartzell, Employee.....Respondent

v.

Palmetto Collision, LLC, Employer,.....Appellant

and

the S.C. Uninsured Employers Fund.....Respondent

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***FINAL BRIEF OF RESPONDENT RICHARD A. HARTZELL***

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***STATEMENT OF ISSUES ON APPEAL***

I. The Workers' Compensation Commission did not err in finding and concluding that Palmetto Collision regularly employed four or more employees and; therefore, subject to the South Carolina Workers' Compensation Act.

II. The Worker's Compensation Commission did not err in finding that Claimant sustained an injury to his back by accident "on or about February 25, 2009" or in failing to make an enumerated conclusion of law with respect to S.C. Code Ann. § 42-1-160.

III. The Worker's Compensation Commission did not err in finding that the Claimant "timely reported the injury" or in failing to make an enumerated conclusion of law with respect to S.C. Code Ann. § 42-15-20.

IV. The Worker's Compensation Commission did not contravene S.C. Code Ann. Sec. 42-15-60 in awarding Claimant "medical, surgical, hospital and other authorized treatment."

***STATEMENT OF THE CASE***

Respondent Hartzell filed a Form 50 Complaint with the South Carolina Worker's Compensation Commission on March 23, 2011, alleging an injury by accident occurring on or about February 25, 2009, when employed as a paint and body man by Appellant Palmetto Collision, LLC. The Respondent alleged an injury to his lower back while moving a heavy automotive frame machine when cleaning up the employer's shop.

The employer timely filed a Form 51 disputing the claim. No benefits or compensation have yet been provided.

A hearing was held before Commissioner Andrea C. Roche on July 12, 2011. Commissioner Roche filed her Decision and Order on September 8, 2011, ordering that Respondent be provided an evaluation to determine whether or not he is at maximum medical improvement and whether he is in need of any additional medical treatment and for any benefits

under the Worker's Compensation Act necessarily resulting. Respondent has not claimed a period of temporary total disability, but is seeking medical care, a determination on maximum medical improvement and any resulting benefits provided for in the Act.

Appellant Palmetto Collision, LLC, timely filed an application for review.

An Appellant Panel of the Commission heard the matter on December 20, 2011, and in a majority decision, affirmed the single Commissioner, from which Decision and Order, Appellant Palmetto Collision, LLC, has appealed.

### ***FACTS***

The facts, as summarized and found by the Commission (R. pp. 12-17), are that on or about February 25, 2009, while engaged in cleaning up his employer's shop, Respondent was moving tires, rims and a heavy frame machine consisting of steel posts and chains weighing approximately 200-300 pounds. In order to move the machine it must be tilted back and set on wheels in the manner of tilting a hand truck. Respondent testified that after moving the frame machine he began having pain in his lower back which then got progressively worse. The following day he reported this to shop owner Mike Stallings. Mr. Stallings suggested that he go to the emergency room if he was having problems (R. p. 43, line 4 -p. 45, line 12).

Although the Respondent was unsure of the exact date of injury, he testified that it was at the end of February 2009 and fixed the date because he only worked for the Appellant another couple of weeks.

Respondent sought chiropractic treatment at his own expense with Dr. Austin Murray, but eventually discontinued treatment with Dr. Murray for financial reasons R. p. 52, line 15 - p. 53,

line 1).

On Dr. Murray's intake form, the Respondent indicated the onset of his problem was "February 30<sup>th</sup>, 2009". The Commission found this to be an obvious error but generally corroborative of the approximate date of injury determined by the Respondent as February 25, 2009 (R. p. 174).

The Commission found that Mr. Stallings acknowledged that he could not testify with certainty that Respondent had not reported the injury, only that "It does not ring a bell" (R. p. 117, line 20 - p. 118, line 18).

The Commission found the Respondent's testimony to be more credible than Mr. Stallings, on the issues of the fact of injury and its reporting (R. p. 14). Concerning the jurisdictional issue, the Commission found that Appellant regularly employed 4 employees as of the date of injury. The Commission relied upon the records of the South Carolina Employment Security Commission for the first quarter of 2009, which included the date of injury (R. p. 192). The report indicates that Palmetto Collision, LLC had 4 regular employees including the Respondent, Jamie Alexander, Douglas Alexander and Harold Brock. The Commission further relied on Mr. Stallings' own testimony acknowledging that all 4 men worked at the same time within the first quarter of 2009 (R. pp. 130-131). The Commission found that the regularity of employment was demonstrated by the Employment Security records indicating that Respondent himself was employed in the second and third quarters of 2008. Mr. Stallings testified that Respondent was also employed during the fourth quarter of 2008 but that he was not reported on the Employment Security documents (R. p. 127, line 4 - p. 128, line 15). Both Alexanders and Harold Brock continued to be reported during the second quarter of 2009 and are listed on

several other quarterly reports as well (R. pp. 188-195). Another worker, Jimmy Morris was also regularly working as a heavy collision specialist during the relevant time period, though Mr. Stallings characterized him as an independent contractor (R. p. 107, line 8 - p. 108, line 9). The Commission acknowledged that Respondent contested Mr. Morris's status as an independent contractor but observed that it was unnecessary to determine that issue as the Employment Security Commission's records and Mr. Stallings own testimony provided ample evidence of the jurisdictional requirement of at least 4 regular employees during the relevant period.

The Commission also noted that a Worker's Compensation insurance policy application was submitted for Appellant, and that coverage went into effect on May 27, 2008 (R. pp. 204-207), but lapsed on August 5, 2008 due to non-payment of premium (R. pp. 208-209). No form 38 was filed to withdraw Palmetto Collision, LLC, from coverage under the Act (R. p. 200).

Based upon these facts the Appellate Panel found that the Commission had jurisdiction, and that Respondent suffered an injury by accident on or about February 25, 2009.

### ***ARGUMENTS***

Standard of Review. As to jurisdictional issues, this Court reviews the entire record and decides the facts in accordance with its view of the preponderance of the evidence Fortner v. Thomas M. Evans Construction and Development, LLC Op. No. 5073 (Ct. App. Filed January 16, 2013).

As to all other factual issues, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence, and will affirm if the record contains substantial evidence to support the Commission's findings. Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which,

considering the record as a whole, would allow reasonable minds to reach the conclusions reached by the Commission. Canteen v. McLeod Regional Medical Center 400 S.C. 551, 735 S.E. 2<sup>nd</sup> 246, 249 (S.C. App. 2012).

I. The Workers' Compensation Commission did not err in finding and concluding that Palmetto Collision regularly employed four or more employees and; therefore, subject to the South Carolina Workers' Compensation Act.

Examination of the record as a whole demonstrates, to a preponderance of the evidence, that Palmetto Collision, LLC, regularly employed at least 4 employees. The Appellate Panel summarized in detail the evidence upon which it relied in finding jurisdiction (R. p. 13). The panel specifically relied upon the 2009 first quarter contribution and wage report by the Appellant to the South Carolina Employment Security Commission (R. p. 192), in which it reported 4 employees. That quarter included the date of injury. The panel further relied upon Mr. Stallings testimony found at pages 99 and 100 of the transcript (R. pp. 130-131) where he testified as follows:

“Q: And Jamie Alexander is his son; is that correct:

A: Yes sir that’s correct.

Q: All right. And he left for a time and came back during the first quarter of 2009; is that correct?

A: Uh huh.

Q: Now he was there at the same time that Ricky Hartzell was there, was he not?

A: Most likely.

Q: All right. And Harold Brock came in in the first quarter of 2009; is that correct?

A: Yes.

Q: And he was certainly there at the same time that Ricky Hartzell was there; is that correct?

A: That is correct.

Q: And Douglas Alexander was there at the same time that Ricky Hartzell was there; is that correct?

A: Yes sir.

Q: **All in the first quarter of 2009?**

A: **Uh huh.**

**The Court: Is that a yes?**

**The Witness: I am sorry.**

**The Court: You need to say yes or no instead of “uh huh” and “huh uh” because we’re getting it for the record.**

**The Witness: I am sorry.**

**A: Yes, that is correct.**

Respondent testified that he, both Alexanders, Brock and Morris were at work on the date of injury (R. p. 45, line 14 -p. 48, line 3).

This testimony conclusively demonstrates that all 4 employees listed on the first quarter 2009 report were working contemporaneously. Further corroboration is found in the fourth quarter 2008 report which lists 3 employees, Tommy D. Griffin, Edward A. Davis and Doug K. Alexander. Mr. Stallings’ testified that Respondent was also employed late in the fourth quarter though his name was not included on the fourth quarter report (R. p. 96, line 22 - 9.97, line 12) Employment Security records also show 5 employees during the second quarter of 2008 (R. p. 189) and 4 employees for the third quarter 2008 (R. p. 190). Thus, there is evidence of 4 or more

employees at least for the second, third and fourth quarters of 2008 and the first quarter of 2009. The records for the second quarter of 2009 show that both Alexanders and Harold Brock continued as regular employees.

Despite claiming to have Quickbook records, which, inferentially would have shown the dates each employee worked, the Appellant failed to produce those records (R. p. 100, lines 2-19).

In Hernandez-Zuniga v. Tickle 374 S.C. 235, 647 S.E. 2<sup>nd</sup> 691 (Ct. App. 2007), this Court considered the 4 employee requirement. The Court observed:

“The most common problem under the usual wording of statutes conferring this type of exemption is the question of whether the employer “regularly” employs more than the minimum number. Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer can not be allowed to oscillate between coverage and exemption as its labor force exceeds or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the Act, it remains there even when the number employed temporarily falls below the minimum. The term “regularly employed” has been construed to embrace regularly-employed part time as well as full time workers. In all these cases, the fact that the number working at the exact time of injury was below the minimum is of course immaterial...” Id. at 647 S.E. 2<sup>nd</sup> 696.

By this reasoning ,Palmetto Collision, LLC, came under the Act in the second quarter of 2009 when it had 5 employees and remained covered on the date of injury.

The Court further stated:

“The question whether a particular employee should be disregarded for numerical/minimum purposes is very similar to the question whether he or she is a casual employee.” Id. at 647 S.E. 2<sup>nd</sup> 691.

and:

“...Employment is casual when not permanent or periodically regular but occasional or by chance and not in the usual course of the employer’s trade or

business.” Id. at 647 S.E. 2<sup>nd</sup> 698.

None of the employees can be characterized as “casual” under the this definition, since all were working in the usual course of the employer’s trade or business.

The relevant time period must be identified. The relevant time period could be said to have begun in the middle of December 2008 when Respondent returned to the Appellant’s employ and continuing through approximately the middle of March 2009 when work slacked off and Respondent separated from employment. Or, the Court could reasonably determine that the relevant time period began in the second quarter of 2008 when the Appellant employed 5 workers and continued through the date of injury.

The record contains an alternative ground for a determination of coverage.

A preponderance of the evidence indicates that the employer voluntarily subjected itself to the Act by procuring insurance coverage effective May 27, 2008, (R. pp. 204-212). This was within the quarter in which the Appellant reported 5 employees. Since Appellant did not file a Form 38 to remove itself from coverage, it was subject to Act continually from May 27, 2008 (the date of the policy) at least through the date of the Respondent’s injury.

Any contention that the panel did not make adequate findings of fact on this issue is misplaced. Though the panel’s enumerated finding of fact is brief, elsewhere in the Decision and Order it recited in detail the evidence on which it relied (R. p. 13). Under the Administrative Procedures Act, findings of fact and conclusions of law need not be presented in any particular format, but need only be sufficiently detailed to enable a reviewing court to determine if fact findings are supported by the evidence and whether the law has been correctly applied, Cloyd v. Mabry 295 S.C. 86, 367 S.E. 2<sup>nd</sup> 171, 173 (S.C. App. 1988). The panel’s decision and order is

more than sufficient for that purpose.

II. The Worker's Compensation Commission did not err in finding that Claimant sustained an injury to his back by accident "on or about February 25, 2009" or in failing to make an enumerated conclusion of law with respect to S.C. Code Ann. § 42-1-160.

This question is determined under the "substantial evidence" rule.

The Respondent presented his own testimony concerning the manner of his injury while moving the heavy frame machine and the resulting low back pain. The pain got progressively worse until the following day when he reported the injury to Mike Stallings (R. p. 43, line 4- p. 45, line 12). Corroborative of his testimony, is the fact that he sought treatment with a chiropractor and fixed the date of the injury, and stated that it was job related (R. p. 174).

Although, Mike Stallings testified that Respondent had no business "messing" with the frame machine. He acknowledged that Respondent was the type of employee that would clean up the shop on his own, was not "scared to pick up a broom", move tires and possibly move the frame machine (R. p. 134, line 9 -p. 135, line 20).

The Respondent's recollection of the circumstances of his injury is substantial evidence. The Appellate Panel found the Respondent's testimony on this issue more credible than that of Mike Stallings (R. p. 14). In a Worker's Compensation Commission case, the task of assessing the credibility of witnesses is reserved to the Appellate Panel. Canteen v. McLeod Regional Medical Center, *supra* at 735 S.E. 2<sup>nd</sup> 249.

The Appellate Panel's findings as to the fact of injury are substantially supported in the record and should be affirmed.

The form of the Panel's findings and conclusions on this issue is sufficient under Cloyd v.

Mabry, supra.

III. The Worker's Compensation Commission did not err in finding that the Claimant "timely reported the injury" or in failing to make an enumerated conclusion of law with respect to S.C. Code Ann. § 42-15-20.

This issue is also governed by the "substantial evidence" rule. The Respondent testified that he reported his injury to Mike Stallings on the day following the onset of pain (R. p. 44, line 23 - p. 45, line 7). He reiterated this fact at pages 33-34 (R. pp. 64-65) of the hearing transcript, where he once again recounted the conversation with Mike Stallings the day after the injury, but also testified that they talked about it (the injury) during the last couple of weeks that Respondent was employed (R. p. 64, line 17- p. 65, line 22).

When Mr. Stallings was pressed on cross examination, he acknowledged that he could not testify with certainty that Respondent had not reported the injury, only that "it does not ring a bell" (R. p. 117, line 20 -p. 118, lien 18).

On this issue, the Appellate Panel also found the Respondent's testimony more credible than that of Mr. Stallings (R. p. 14).

The findings and conclusions of the Appellate Panel on this issue are, also, sufficiently stated under Cloyd v. Mabry, supra.

IV. The Worker's Compensation Commission did not contravene S.C. Code Ann. Sec. 42-15-60 in awarding Claimant "medical, surgical, hospital and other authorized treatment."

The question framed by this issue is whether Section 42-15-60 (A) requires an expert medical opinion where the employer has not first provided initial treatment as mandated. That section provides:

“The employer shall provide medical, surgical, hospital, and other treatment including medical and surgical supplies as reasonably may be required, for a period not exceeding ten (10) weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the Commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty....”

To reach its conclusion the Appellate Panel first looked at the general purposes of the Worker’s Compensation Law. The panel cited Yeomans v. Anheuser Busch, Inc. 198 S.C. 65, 15 S.E. 2<sup>nd</sup> 833 (1941) :

“The basic purpose of the Compensation Act is inclusion of employers and employees and not their exclusion.” Id. at 15 S.E. 2<sup>nd</sup> 835,

and Caughman v. Columbia YMCA 212 S.C. 337, 47 S.E. 2<sup>nd</sup> 788 (1948):

“To great extent the whole scheme of workman’s compensation is to place the economic burden of industrial accidents upon industry rather than upon the worker’s and their dependents, and as to the latter thereby rendered indigent, upon the state.” Id. at 15 S.E. 2<sup>nd</sup> 789-790.

The panel also cited Elliot v. South Carolina Department of Transportation 362 S.C. 234, 607 S.E. 2<sup>nd</sup> 90 (Ct. App. 2004), wherein this Court observed:

“The Workman’s Compensation Act is remedial legislation enacted to protect the worker and therefore the law is given a broad construction in order to accomplish that end.” Id. at 607 S.E. 2<sup>nd</sup> 92.

The Appellate Panel correctly recognized that the legal principles above cited prohibit placing undue burdens upon the employee. The panel therefore concluded that the requirement of expert medical evidence is not triggered until the employer has complied with the Act by providing medical treatment for the initial ten (10) week period after the date of injury (R. p. 15). The panel reasoned that to do otherwise would shift the burden of providing initial treatment “to effect a cure or give relief” to the employee which is inconsistent with the statute and the

purposes of the Act.

The Appellate Panel further relied upon settled rules of statutory construction.

“Words used in a statute must be given their plain and ordinary meaning without resort to settle or forced construction to limit or expand its operation” (Citation omitted). “The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” Smith v. South Carolina Insurance Company 350 S.C. 82, 564 S.E. 2<sup>nd</sup> 358, 361 (Ct. App. 2002).

It considered State v. Woody 345 S.C. 34, 545 S.E. 2<sup>nd</sup> 521 (Ct. App. 2001) wherein this Court held:

“...the Court should not consider a particular clause in isolation but should read it in conjunction with the purpose of the whole statute and the policy of the law.” Id. at 545 S.E. 2<sup>nd</sup> 521, 522,

and Heape v. Heape 335 S.C. 420, 517 S.E. 2<sup>nd</sup> 1 (Ct. App. 1999) where it was stated:

“A statute must, as a whole be interpreted practically, fairly, and reasonably such that the interpretation harmonizes with the purpose, design, and policy of the lawmakers.” Id. at 517 S.E. 2<sup>nd</sup> 2.

The Appellate Panel concluded that under these rules of construction and in order to be consistent with the Act’s statutory purpose to place the economic burden of workers’ accidents upon industry and favor inclusion rather than exclusion, Section 42-15-60 (A) should not be interpreted to deny an employee the right to employer provided medical treatment where the employer had failed to provide such treatment during the initial ten (10) week period. Otherwise, the panel reasoned, the phrase “...and for additional time as in the judgment of the Commission will tend to lessen the period of disability...” would be made meaningless by eliminating the distinction between employer responsibility to provide initial treatment and the Claimant’s responsibility to demonstrate by expert opinion the need for additional treatment, see Barnhill v. Bank of America, N.A. 318 F. Supp., 2<sup>nd</sup> 696 (DSC 2005) wherein United States District Judge

Herlong observed:

“It is a cardinal principal of statutory construction that statutes, ought, upon the whole to be construed that, if it can be prevented, no clause, sentence or words shall be superfluous, void or insignificant.” *Id.* at 700.

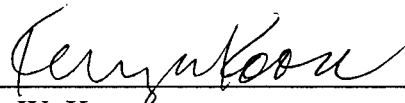
In the routine case, the expert medical opinion required by 42-15-60 (A) is rendered by the physician chosen by the employer to provide mandatory initial treatment. The interpretation urged by the Appellant, would require that, before receiving treatment, the employee identify a doctor willing to accept a workers compensation case without the usual prior employer approval, and procure and pay for an expert opinion. Such a burden on the employee would be unreasonable and inconsistent with our Appellate Courts’ interpretation of the purposes of the Act.

***CONCLUSION***

The Decision and Award of the Worker’s Compensation Commission Appellate Panel of December 20, 2011, should be affirmed in its entirety.

Respectfully Submitted,

March 12, 2013



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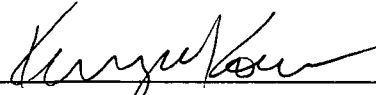
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**CERTIFICATE OF COMPLIANCE**

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The undersigned counsel hereby certifies that Respondent Richard A. Hartzell's Final Brief complies with Rule 211 (b) of the S. C. Rules of Appellate Practice.

Date: March 13, 2013

  
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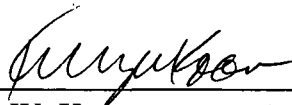
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SC Court of Appeals

I certify that I have served Respondent Richard A. Hartzell's Final Brief on appellants by depositing a copy of same in the United States mail, postage prepaid, on March 13, 2013, addressed to their attorney of record, Kirsten Barr, Esq and to attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq.

**March 13, 2013**



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