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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JAN 22 2016

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1306446

Jerry Sims,.....Appellant,

vs.

Edwin Pate Vinyl Siding, Employer,
and Uninsured Employer Fund, Carrier.....Respondent **S**

FINAL BRIEF OF RESPONDENT

LISA C. GLOVER
ATTORNEY FOR RESPONDENT
SC BAR No. 64209
SC UNINSURED EMPLOYERS'
FUND
P.O. BOX 210039
COLUMBIA, SC 29221-0039

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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?

STATEMENT OF THE CASE

Appellant asserts he suffered a compensable injury by accident on April 29, 2013 when he fractured his ankle in the course and scope of his employment. Defendants denied the claim, asserting that Employer did not regularly employ four (4) or more employees and was, therefore not subject to the Act. The hearing Commissioner found that Employer did not regularly employ four (4) or more employees during the relevant time 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

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 (4) 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 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 the Employer did not regularly employ four or more employees during the relevant time period which was 2013. (R. p. 18, ¶ 5, p. 19, ¶ 6). 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 (R. p. 105, 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 is 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 (R. p. 58, line 1-p. 59, line 3). Employer further clarified "And they-they come and work two days and leave or a day (R. p. 59 lines 10-11). Employer averred that the week after Appellant 's accident on April 29, 2013, he worked with Mr. Border [sic], Mr. Beverly and Brent (R. p. 63, lines 7-15). Lawrence Barefoot worked with [them] but that was after Brent was gone" (R. p. 63, 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. Summerton 383 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 number of hours worked that week (R. p. 60 line 20-p.62 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 (R. p. 17 ¶ 19, 20). 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. 5308 (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' (R. p. 29, lines 4-6). Appellant further asserted that he worked "probably 9, 10 hours per day "mostly every day of the week, weather permitting" (R. p. 29, lines 7-16, p. 42, lines 15-16, p. 25, lines 21-23).

Employer, Edwin Pate agreed that he paid Appellant \$14/hour (R. p. 51, line 13-15). He further testified however that Appellant worked 25-30 hours per week and seldom on Sunday (R. p. 51 lines 1-3, p. 52, line 1). Shondra Pate testified that her husband worked "maybe six hours five or six hours a day (R. p. 48, lines 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 (R. p. 70, lines 1-12). She further testified that husband only works "occasionally not a lot" on Sundays (R. p. 70, 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 he made Nine Hundred Dollars (\$900.00) a week. He's never made Nine Hundred Dollars (\$900.00) a week. And I've worked with him for three and a half years" (R. p. 30, 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 (\$480.00) if we get to work all week." "On average, I bring home anywhere from Two Fifty (\$250.00) to Three Twenty-Five (\$325.00) (R. p. 30, lines 13-20).

The deposition of Ted Byerly was submitted into evidence Byerly testified he worked 20 to 30 hours per week, if that (R. p. 27, lines 12-14). He further stated that they only worked between 6 and 8 hours per day (R. p. 27, lines 16-20). There was no evidence in the record impeaching the credibility of Mr. Byerly or Mr. Borden.

An additional 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 (R. p. 33, lines 2-24). 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" (R. p. 34, lines 11-14). When asked "Do you use your crutches all the time?" Appellant replied "Pretty much" (R. p. 37, lines 24-25). Appellant admitted, however, that a "few times I've walked in the store" (R. p. 39, 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 (R. p. 206). Other x-rays taken June 6, 2013 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 store without crutches (R. p. 66, line 17 – p. 68, 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.

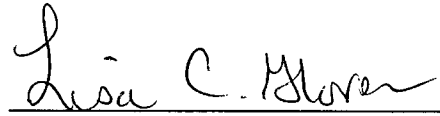
Since Appellant lacked credibility on multiple issues (number of hours worked, working on Sundays, wages earned and nature of injury), the Appellant Panel did not abuse its discretion in not giving weight to his testimony regarding number of employees.

Based on Appellant's failure to show by a preponderance of the evidence that Employer regularly employed four or more people with some constancy over the relevant period Respondent contend that the Appellate Panel's Order finding a lack of jurisdiction under the Act should be affirmed.

CONCLUSION

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

Respectfully submitted,



Lisa C. Glover
Attorney for Respondent
SC Uninsured Employers' Fund
SC Bar No 64209
P.O. Box 210039
Columbia, SC 29221-0039
(803) 896-5898
lglover@saf.sc.gov

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WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1306446

Jerry Sims, Employee.....Appellant/Claimant,

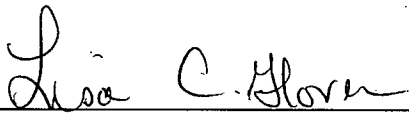
vs.

Edwin Pate Vinyl siding, Employer,
and South Carolina Uninsured Employer Fund.....Respondent/Defendants

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with Rule 211(b), SCACR

January 22, 2016

BY: 
LISA C. GLOVER
SC BAR NO. 64209
ATTORNEY FOR RESPONDENT
P.O. BOX 210039
COLUMBIA, SC 29221-0039
(803) 896-5898

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Appellate Case No. 15-001838

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 Edwin Pate Vinyl Siding, and)
 South Carolina Uninsured)
 Employers' Fund, Respondents.)
 _____)

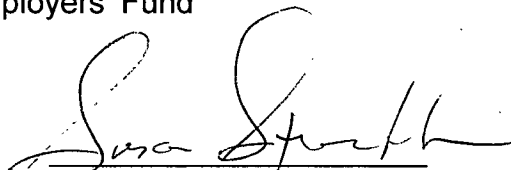
PROOF OF SERVICE

The undersigned employee of the South Carolina Uninsured Employers' Fund, 800 Dutch Square Boulevard, Suite 240, Columbia, SC, 29210, does hereby certify that she has served opposing counsel with a copy of the pleading indicated below by mailing a copy of same to him in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED: Stephen J. Wukela, Jr., Esquire
 Wukela Law Firm
 Post Office Box 13057
 Florence, SC 29504

Honorable Gerald Malloy
 Malloy Law Firm
 Post Office Box 1200
 Hartsville, SC 29551

PLEADING: Final Brief of Respondent South Carolina Uninsured Employers' Fund


 Susan Strausbaugh

January 22, 2016
 Columbia, South Carolina