

APPELLATE PANEL

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DECISION AND ORDER
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JUL 19 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1320141

SC Court of Appeals

IGNACIO RODRIGUEZ,

EMPLOYEE,
CLAIMANT/RESPONDENT,

V.

ROBERT T. PIERSON, D/B/A ROBERT PIERSON CONSTRUCTION, CO., ET. AL.

EMPLOYER,

AND

PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD,

CARRIER,
APPELLANT.

AND/OR

THE SOUTH CAROLINA UNINSURED EMPLOYERS FUND,

DEFENDANT/RESPONDENT.

Appellant Panel Review held in Columbia,
South Carolina on February 22, 2016 per notices
timely and properly served on all parties of interest.
Appellate Panel Decision and Order filed

June 20, 2016

APPEARANCES:

Claimant/Respondent represented by
William H. Ehliens, Esq. of Greenville, South Carolina

Employer/Respondent represented by
Randall Scott Hiller, Esq. of Greenville, South Carolina

South Carolina Uninsured Employers Fund, Defendant/Respondent, represented by
David Hill Keller, Esq. of Greenville, South Carolina

Property Casualty Insurance Company of Hartford, Defendant/Appellant, represented by
David M. Padgett, Esq. of Greenville, South Carolina

STATEMENT OF THE CASE

This matter comes before the Full South Carolina Workers' Compensation Commission based on the Petition of the Property and Casualty Insurance Company of Hartford appealing the Order of Commissioner Aisha Taylor dated July 30, 2015. It appears from the record that the Claimant suffered an injury by accident on or about December 23, 2013. He suffered injuries to various body parts, including his mouth, left leg, left knee, left arm, left hip, back and neck.

At the hearing before Commissioner Taylor, various issues were presented by the parties. The issues can be summarized as follows: (1) That Pierson Construction was the Employer, and because Robert Pierson is the owner of the company, he would have had no more than three employees and Pierson Construction would not be subject to the South Carolina Workers' Compensation Act; (2) That ABC Care, Inc. was the primary employer and Pierson was an Employee of ABC Care, Inc. and, therefore, there were four or more employees in South Carolina making ABC Care, Inc. subject to The Act and the Property and Casualty Insurance Company of Hartford is potentially responsible for their claim; (3) That ABC Care, Inc. was the Employer and the individual who hired the Claimant, Mr. Chavez was an contractor himself. rather than an Employee of ABC Care, Inc. giving ABC only three employees in South Carolina and being, therefore, not subject to The Act; (4) That Hartford is not responsible for benefits even if ABC Care, Inc. was the employer, because ABC Care, Inc. was not in the trade, business or occupation of construction and Hartford only insured ABC Care, Inc. and its employees in the State of Maryland.

In Commissioner Taylor's Order she made the following Findings of Fact and Conclusions of Law:

1. That ABC Care, Inc. is a nonprofit corporation providing day care services, based out of Maryland.
2. That part of ABC Care, Inc.'s business includes running summer camps in various locations within and outside the State of Maryland, including South Carolina.
3. That ABC Care, Inc. purchased land on Lake Keowee in South Carolina for the purpose of constructing a home which would be used to house children and counselors during various camps in South Carolina.
4. That Robert Pierson is the owner and sole proprietor of Pierson Construction Company.
5. That Robert Pierson is also a salaried employee of ABC Care, Inc. and in that capacity oversees facilities and facilities construction.
6. That Pierson is also a non-voting board member of ABC Care, Inc.
7. That Pierson hired Francisco Chavez as an employee to construct a home on Lake Keowee on behalf of ABC Care, Inc.
8. That at some point during this construction, Mr. Chavez requested additional help and was given authorization by Pierson to hire Ignacio Rodriguez and Francisco Bello.
9. That although all paychecks were written from Robert Pierson Construction, Pierson testified that all of the paychecks and all of the checks written by him on Robert Pierson Construction checks were reimbursed dollar for dollar by ABC Care, Inc. and were based on hours worked by each employee.
10. That all construction permits and all governmental documents related to this job confirm that the owner, operator and builder of the house located on Lake Keowee was ABC

Care, Inc.

11. The preponderance of the evidence, therefore, does not support that Chavez or the Claimant were contractors or employees of Robert Pierson Construction, but rather that ABC Care, Inc. was their employer.

12. That at the time of the Claimant's injury, ABC Care, Inc. had four employees in South Carolina: Robert Pierson, Francisco Chavez, Francisco Bello, and Ignacio Rodriguez, (the Claimant), and was, therefore, subject to Title 42.

13. That the APA submissions of the parties show that the Claimant received an injury by accident on or about December 23, 2013.

14. That on that date, the Claimant was picked up by Pickens County EMS and transported to Greenville Health System.

15. That the history at GHS indicates that the Claimant fell from a 22 foot high roof and was transported with a cervical collar and backboard.

16. That the Claimant was referred to Dr. Scott Watson, who diagnosed Claimant with a left femoral shaft fracture and a left lateral condyle elbow fracture.

17. That Dr. Watson recommended surgery for Claimant's leg and also recommended that while he was under anesthesia, that the left condyle elbow fracture be repaired through open reduction and internal fixation.

18. That during surgery, the surgeon discovered Claimant's left knee was also injured in the fall.

19. That the treating surgeon, Dr. Finley, however, deferred the lateral condylar repair pending a CT Scan.

20. After CT Scan was obtained, Claimant also underwent an open reduction and

internal fixation of his left elbow at the hand of Dr. Kyle Jeray.

21. On January 2, 2014 Claimant was released from GHS and referred to Roger C. Peace Hospital for physical therapy and rehabilitation.

22. The Claimant is not at maximum medical improvement and is in need of additional medical services for injured body parts, including but not limited to his mouth, left leg, left knee, left arm, left hip, back, and neck.

23. That the Claimant's average weekly wage is \$480.00 giving him a compensation rate of \$320.02.

CONCLUSIONS OF LAW

1. That Ignacio Rodriguez, Employee/Claimant, and ABC Care, Inc., and Property and Casualty Insurance Company of Hartford are subject to and bound by the terms and provisions of Title 42 of the South Carolina Code of Laws Annotated.

2. That Robert T. Pierson, d/b/a Robert T. Pierson Construction and the South Carolina Uninsured Employers Fund for purposes of this claim, are not subject to the terms and provisions of Title 42 and are not proper parties to this action.

3. That pursuant to §42-1-160, the Claimant suffered an injury by accident arising out of and in the course of his employment with ABC Care, Inc. on or about December 23, 2013.

4. That pursuant to §42-1-130, the Claimant, Ignacio Rodriguez, was an employee of ABC Care, Inc. at the time of his injury by accident.

5. That pursuant to §42-1-360, the Employer, ABC Care, Inc., had four employees regularly employed in the same business and occupation during the relevant period surrounding the date of Claimant's injury by accident.

6. That pursuant to §42-1-360, the Employer, ABC Care, Inc. was subject to and

bound by the terms and provisions of Title 42 of the South Carolina Code of Laws Annotated.

7. That pursuant to §42-5-20, the Employer, ABC Care, Inc. was insured for workers' compensation purposes by Property and Casualty Insurance Company of Hartford, by virtue of (1) Hartford's own admission that it had covered other employees in the State of South Carolina previously; and (2) that the policy of workers' compensation insurance has an All States' endorsement that covers South Carolina.

8. That pursuant to §42-15-60, the Claimant has not achieved maximum medical improvement and is entitled to ongoing medical care and treatment, to be provided by ABC Care, Inc. and its Carrier, The Hartford, for all injured body parts, aforesaid.

9. That pursuant to §42-9-10, the Claimant has been temporarily and totally disabled since the date of this accident, December 23, 2013 and is entitled to temporary total disability compensation payments from the date of his injury and continuing until further Order of this Commission or agreement of the parties, at the compensation rate of \$320.02.

10. That pursuant to §42-1-360, Robert T. Pierson, d/b/a Robert Pierson Construction Company is not a proper party to this action and is not subject to the jurisdiction of the South Carolina Workers' Compensation Commission, and, therefore is dismissed from this action with prejudice.

11. That pursuant to §42-1-360 and §42-7-200, because ABC Care, Inc. is the Employer, subject to and bound by the provisions of Title 42, and because they are insured for workers' compensation purposes in South Carolina by Property and Casualty Insurance Company of Hartford, the Uninsured Employers Fund is not a proper party to this action and is, therefore, dismissed from this action with prejudice.

Commissioner Taylor therefore Found and Ordered that ABC Care, Inc. was the

employer and held its carrier, The Hartford, responsible for paying the claimant temporary total disability compensation at the rate of \$320.02 per week commencing December 23, 2013 and continuing until further Order of the Commission or agreement of the parties. She further Ordered the Employer, ABC Care, Inc. and its carrier, The Hartford, to provide ongoing medical care and treatment to the Claimant for all injured body parts and Found and Ordered that Robert T. Pierson, d/b/a Robert T. Pierson Construction Co., and the South Carolina Uninsured Employers Fund were not proper parties to the action.

By way of appeal, The Hartford asserts that ABC Care, Inc. was not the employer of the claimant and that even if they were, Hartford was not liable for payments under Title 42 because the "ALL STATES" endorsement did not cover employees outside of the state of Maryland and also did not cover employees for any work other than the normal work of a daycare facility. The panel has reviewed the entire evidence of the claim including APA Submissions, the transcript of record, the positions of the parties, the briefs of all the parties, and the oral argument held on February 22, 2016.

The evidence in this case fully supports the determination of Commissioner Taylor that Robert Pierson was an employee of ABC Care, Inc. and in that capacity as a board member and as a facilities manager, he undertook a building project on behalf of ABC Care, Inc. to include the actual procuring of building permits and certificates of insurance on behalf of ABC Care, Inc. He personally hired three additional employees to assist him in the project and although the employees were paid with Pierson Construction Co. checks, nonetheless, Pierson was reimbursed dollar for dollar by ABC Care, Inc. as a "pass-through." There is a valid and unrefuted reason in the record for the payment of these individuals by virtue of the inability of those individuals to cash checks issued by ABC Care, Inc. because ABC Care Inc.'s bank had no branches outside of

Maryland, while Pierson Construction Co. had an account with BB&T, which has branches in South Carolina. Pierson was the paid facilities manager of ABC Care, Inc., a direct employee of ABC and a member of its board. In that capacity, he obtained various permits on behalf of ABC Care, Inc. for the purpose of constructing a residential building which would be used for multiple purposes by ABC Care, Inc. to include housing employees during anticipated summer camps in the area and potentially obtaining rental income for ABC Care, Inc. In his capacity as facilities manager for ABC Care, Inc., he hired three employees, Francesco Chavez, Francisco Bello, and the claimant.

While it is not required that any traditional tests be used exclusively to determine employment status, nonetheless, the Commission, as a matter of course, looks at four factors which would serve as a means for analyzing a work relationship. Shatto v. McLeod Regional Medical Center, 406 SC 470, 753 SE2d 416 (2013). Further, any doubts as to a worker's status are to be resolved in favor of including the worker under the terms of the Workers' Compensation Act. Poch v. Bayshore Concrete Products, Inc., 405 SC 359, 747 SE2d 757 (2013).

The ultimate issue is the issue of control. Shatto. The four factors that the Commission and Courts looked at to determine the relationship as a whole are: (1) Direct evidence of right to exercise control; (2) Furnishing of tools and/or equipment; (3) Method of payment; and (4) Right to fire. The evidence in this case is more than sufficient to meet the requirements of Shatto. In this case, Pierson directed the actual operation on behalf of ABC Care, Inc. There were no actual blueprints and therefore Pierson did drawings and sent regular text messages in order to ensure that the workers knew exactly what they were to accomplish. While it appears that a concrete mixer may have been furnished by Chavez, according to the testimony, all of the other tools,

equipment and items used in the actual construction, including construction materials, were provided by ABC Care, Inc. and/or Mr. Pierson. The employees were paid on an hourly basis and their hours were kept track of by Chavez who turned in the time sheets to Pierson for all three employees on a weekly basis. Pierson then wrote the checks to the workers based on the number of hours worked and was reimbursed directly by ABC, Care, Inc., the same company that had sent him to South Carolina for the purpose of constructing the building where claimant was injured. Finally, the undisputed testimony was that Chavez could fire workers, but in order to do so he was required to first consult with Pierson.

It is the further opinion and decision of the Full Commission Panel that the insurance policy in this matter, from the Hartford, insuring ABC Care, Inc. in the State of Maryland was a valid policy of insurance in the State of South Carolina because of the "ALL STATES" endorsement to the policy as follows: "Part 3 of this policy applies to the states, if any, listed here: ALL STATES *EXCEPT* ND, OH, WA, WY, AND STATES DESIGNATED IN ITEM 3.A. OF THE INFORMATION PAGE." (Emphasis added) (Hartford APA Pg. 4) Part 3 of the policy applies to "workers' compensation insurance."

Contrary to the argument of Hartford in their brief the case of Deanhardt v. Neal C. Deanhardt Masonry Contractors, 298 SC 244, 379 SE2d 776 (Cl. App. 1989) does not apply to this case. The Deanhardt case involves subject matter jurisdiction as it relates to the procuring of insurance with an ALL STATES endorsement and becoming subject to Title 42 when the employer does NOT have four or more employees in South Carolina under Section 42-1-360 (2). While the employee in Deanhardt did claim the employer had four or more employees in this state, both the Commission, and the Courts determined they did not. Therefore, the Court determined that having an "ALL STATES" endorsement was insufficient to bring someone

under the Act who was not already subject to the jurisdiction of the Workers' Compensation Commission by virtue of having four or more employees.

The preponderance of the evidence is clear that ABC Care, Inc. was the employer of at least four individuals in the State of South Carolina and was, therefore, subject to the South Carolina Workers' Compensation Act pursuant to South Carolina Code of Laws Annotated §42-1-360(2). The Full Commission Panel, therefore, fully affirms and adopts the Findings of Fact and Conclusions of Law and Order of Commissioner Taylor in her Order dated July 30, 2015. See, Baldwin v. James River Corp., 304 S.C. 485, 405 SE2d 421 (Ct. App. 1991).

Further, the Full Commission notes that the Order of Commissioner Taylor clearly addresses the issue of whether ABC Care, Inc. was in the trade, business or occupation of construction in her Findings of Fact and Conclusions of Law. However, the Full Commission specifically makes the following Findings of Fact:

FINDINGS OF FACT

1. That the claimant was an employee of ABC Care, Inc and was subject to the South Carolina Workers' Compensation Act by virtue of having four or more employees in the State of South Carolina in the same trade, business and/or occupation.
2. That ABC Care, Inc. undertook specifically to do construction in the State of South Carolina including the site where claimant was injured.
3. That Robert Pierson was an employee and non-voting board member of ABC Care, Inc. who was directed by the board to undertake construction projects including the Lake Keowee project upon which the claimant was injured.
4. That, therefore, the board specifically brought construction projects within the ambit of the trade, business and/or occupation of ABC Care, Inc.

CONCLUSIONS OF LAW

1. That pursuant to §42-1-130 the claimant, Ignacio Rodriguez, was an employee of ABC Care, Inc. on the date of his injury by accident;
2. That pursuant to §42-1-360 the employer, ABC Care Inc., which was subject to the South Carolina Worker's Compensation Act by virtue of having four or more in the State of South Carolina employees in the same trade, business and/or occupation. specifically undertook construction projects including the Lake Keowee project on which the claimant was injured as part of its trade, business or occupation by a vote of the board of directors directing Robert Pierson to obtain appropriate permits and build a house as described hereinabove for ABC Care, Inc.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Findings of Fact and Conclusions of Law and Order of Commissioner Taylor in her Order dated July 30, 2015 should be and hereby are fully affirmed by the unanimous vote of the Full Commission panel.

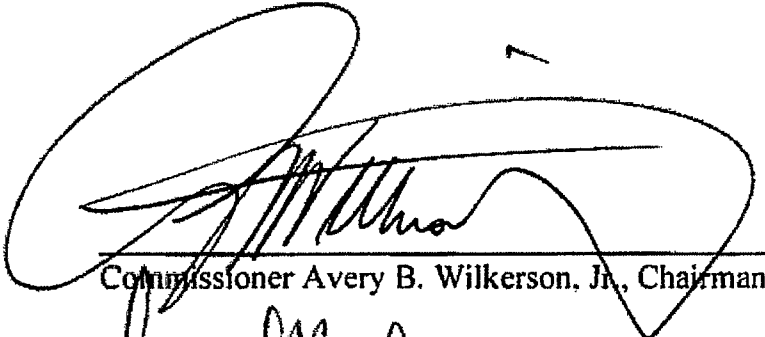
IT IS FURTHER ORDERED that the defendants ABC Care, Inc. and their insurance carrier, the Property and Casualty Insurance Company of Hartford are subject to and bound by the terms and provisions of Title 42.

IT IS FURTHER ORDERED that the defendants ABC Care, Inc. and Property and Casualty Insurance Company of Hartford shall provide benefits to the claimant including temporary total disability compensation and ongoing medical care and treatment as outlined in the Order of Commissioner Taylor and pursuant to §42-15-60 for so long as such care, in the opinion of the treating physician and the Commission, shall tend to reduce the claimant's period of disability.

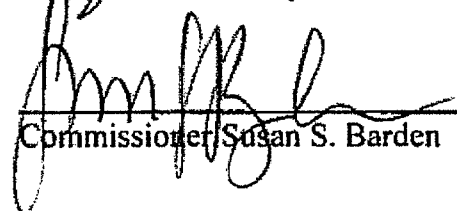
IT IS FURTHER ORDERED that Robert T. Pierson, d/b/a Pierson Construction Co. and the South Carolina Uninsured Employers Fund are improper parties to this action and are hereby dismissed as parties hereto.

IT IS FURTHER ORDERED that the claimant shall be started on a temporary total disability compensation running award at the rate of \$320.02 per week pursuant to the Order of Commissioner Taylor and §42-9-260 until further Order of this Commission or agreement of the parties.


SO ORDERED.



Commissioner Avery B. Wilkerson, Jr., Chairman



Commissioner Susan S. Barden



Commissioner Melody L. James

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 Eugenia Hollmon on June 20, 2016