

APPELLATE PANEL DECISION AND ORDER
OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

W.C.C. FILE NO. 1419236

JOSE MARTINEZ

vs.

JOSE EFRAIN HENRIQUEZ SALGADO; FARLEY CONSTRUCTION;
AUTO-OWNERS INSURANCE COMPANY; AND
BUILDERS MUTUAL INSURANCE COMPANY

Hearing: July 18, 2016

Appearances: For the Claimant/Respondent:
Joseph R. Baldwin, Esquire
Attorney at Law
Greer, South Carolina

For the Defendants/Appellant
Jose Efrain Henriquez Salgado
and Auto-Owners Insurance Company:
F. Reid Warder, Jr., Esquire
John D. Stroud, Esquire
Warder Law Firm
Charleston, South Carolina

For the Defendants/Respondents
Farley Construction Company
and Builders Mutual Insurance Company
George A. Taylor, Esquire
Callison Tighe & Robinson, LLC
Columbia, South Carolina 29201

Purpose of Hearing: Appellate Panel Review of Issues Raised in Form 30

Decision and Order: By Gene McCaskill, Aisha Taylor, Avery B. Wilkerson

Filed:

September 20th, 2016

STATEMENT OF THE CASE

This matter was originally heard by Commissioner Michael Campbell on April 22, 2015 in Anderson, South Carolina. On March 29, 2016, Commissioner Campbell issued on Order with the following Findings of Fact, Conclusions of Law, and Award:

FINDINGS OF FACT

1. Jose Efrain Henriquez Salgado was the Claimant's employer at the time of the accident; therefore, Auto-Owners Insurance Company is the responsible carrier. I base this finding on the record as a whole and the testimony of the Claimant, Michael Farley and Ron Farley.
2. Claimant sustained a compensable injury to his back arising out of and in the course and scope of his employment on December 12, 2014.
3. Farley Construction was the general contractor for the Petty Street job where the Claimant was injured on December 12, 2014. Farley Construction hired Salgado to work as a subcontractor on the Petty Street job and specifically to assist in the installation of a metal roof. The Claimant was directed to the Petty Street job by his employer, Salgado, because he had experience working with metal roofs.
4. The Claimant was an employee of Salgado prior to December 12, 2014.
5. Salgado had the right to control the Claimant, and although Salgado was not present at the Petty Street job on December 12, 2014, Salgado had the right and authority to control and direct the Claimant's work and the manner in which his work was performed and accomplished.
6. Salgado exercised control over the Claimant. Salgado directed the Claimant to the Petty Street job on December 12, 2014 instead of the other job Salgado was performing out of town.

7. Salgado paid the Claimant for his work on December 12, 2014 (and prior) and Salgado determined the Claimant's wages. Salgado paid the Claimant \$100 cash for the work the Claimant performed on December 12, 2014.

~~8. Salgado had the right to fire the Claimant. Although Farley Construction could likely insist that Salgado not allow the Claimant on his projects (including the Petty Street job), Farley Construction had no right to fire the Claimant.~~

9. On the day of the accident, the Claimant used his own hammer and tool belt; Farley Construction provided at least a ladder and drill; the Claimant had his own tools in his truck but they were not used because Michael Farley was already on the jobsite with his tools.

10. Salgado produced a Certificate of Insurance, Accord Form 25, on December 8, 2014 through his insurance agent, Calidad Latina Insurance, representing to Farley Construction that he had workers compensation insurance just prior to the Petty Street job commencing.

11. Salgado does have workers compensation insurance, and his carrier is Auto-Owners Insurance Company.

12. Salgado did not appear for the Hearing although he was provided proper notice. Salgado did not appear for his deposition in this case although he was properly served notice.

13. A determination of permanency is premature at this time.

14. Claimant is entitled to an evaluation and any additional causally related medical treatment recommended by a physician, with a specialty to the back, of Salgado and Auto-Owners Insurance Company's choosing.

15. The specialist is to be selected from a practice that has not previously treated Claimant and is to be provided with all of Claimant's medical records pertaining to his work related injury.

~~16. Claimant is entitled to reimbursement for all past out-of-pocket causally related expenses.~~

17. As stipulated to at the hearing, a determination of AWW and CR are held in abeyance at this time.

CONCLUSIONS OF LAW

1. This matter is governed by the South Carolina Workers' Compensation Act, § 42-1-10, et. seq. of the South Carolina Code.

2. The Claimant sustained an injury by accident pursuant to S.C. Code Ann. § 42-1-160 on December 12, 2014 within the course and scope of his employment with Salgado, and Salgado and its carrier, Auto-Owners Insurance Company, were given proper notice of Claimant's injury.

3. Salgado was the Claimant's employer at the time of the accident; therefore, Auto-Owners Insurance Company is the responsible carrier.

4. Salgado had the right to control the Claimant. I base this conclusion on the record as a whole and the testimony of Ron Farley, Michael Farley and Jose Martinez, as well as, relevant South Carolina case law. See Farrar v. D.W. Daniel High School, 309 S.C. 523, 424 S.E.2d. 543 (Ct. App. 1992) (the factors to be considered when determining whether an injured person is an employee or independent contractor are: (1) the employer's right to exercise or the actual exercise or control over the details of the work and how it is performed; (2) the method of payment; (3) furnishing of equipment; and (4) the right to terminate.) Though Salgado did not directly furnish the

equipment (the company that hired Salgado did provide some equipment), the other factors weigh heavily in favor of finding the Claimant was an employee of Salgado.

5. Defendants Farley Construction and Builders Mutual Insurance Company are not ~~the responsible employer and carrier in this case and are hereby dismissed.~~

6. Farley Construction justifiably relied on a Certificate of Insurance provided by Salgado through his insurance agent and therefore is relieved of any and all liability pursuant to S.C. Code Ann. § 42-1-415.

7. A determination of permanency is premature at this time.

8. Claimant is entitled to an evaluation and any additional causally related medical treatment recommended by a physician, with a specialty to the back, of Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company's choosing.

9. The specialist is to be selected from a practice that has not previously treated Claimant and is to be provided with all of Claimant's medical records pertaining to his work related injury.

10. Claimant is entitled to reimbursement for all past out-of-pocket causally related expenses.

11. As stipulated to at the hearing, a determination of AWW and CR are held in abeyance at this time.

AWARD

ACCORDINGLY IT IS HEREBY ORDERED that Defendant Salgado and its carrier, Auto-Owners Insurance Company provide Claimant an evaluation and any additional causally related medical treatment recommended by a physician, with a specialty to the back; the physician to be selected by Auto-Owners Insurance Company. The specialist is to be selected from a practice that has not previously treated Claimant

and is to be provided with all of Claimant's medical records pertaining to his work related injury. Additionally, Defendants Salgado and Auto-Owners Insurance Company shall reimburse Claimant for all past out-of-pocket causally related medical expenses.

~~Additionally, Defendants Farley Construction and Builders Mutual Insurance Company~~
~~are dismissed with prejudice.~~

APPEAL TO THE FULL COMMISSION

Within the statutory period, counsel for Defendants/Appellants Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company filed a Request for Commission Review (Form 30) setting forth its grounds for review, copies of which were furnished to all parties prior to oral argument scheduled before the Appellate Panel of the Full Commission on July 18, 2016. Prior to oral argument, the Commission received Briefs from Defendants/Appellants Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company (including a Reply Brief) and Defendants/Respondents Farley Construction, LLC and Builders Mutual Insurance Company. The Claimant did not file a brief and maintained its position that the Commission should determine which of the defendants and carriers were responsible for compensation. 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 since been under study and consideration. By appeal, Defendants/Appellants submit the following questions presented in their Brief:

1. Did the Single Commissioner err in finding that Salgado was a subcontractor on the jobsite in question?
2. Did the Single Commissioner err in applying the test set out in Farrar v. D.W. Daniel High School for a determination of who Claimant's direct employer was?

3. Even if the test set out in Farrar is applicable, did the Single Commissioner err in his application of the Farrar test?
4. Did the Single Commissioner err in finding Salgado was Claimant's direct employer?

~~The Appellant Panel, pursuant to S.C. Code Ann. § 42-17-50, "shall review the award, and if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award."~~

The Appellate Panel may make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Appellate Panel, by unanimous vote, fully affirms the Single Commissioner's March 29, 2016 Decision and Order, and the following Findings of Fact and Conclusion of Law:

APPELLATE PANEL'S FINDINGS OF FACT

1. Jose Efrain Henriquez Salgado was the Claimant's employer at the time of the accident; therefore, Auto-Owners Insurance Company is the responsible carrier. We base this finding on the record as a whole and the testimony of the Claimant, Michael Farley and Ron Farley.
2. Claimant sustained a compensable injury to his back arising out of and in the course and scope of his employment on December 12, 2014.
3. Farley Construction was the general contractor for the Petty Street job where the Claimant was injured on December 12, 2014. Farley Construction hired Salgado to work as a subcontractor on the Petty Street job and specifically to assist in the installation of a metal roof. The Claimant was directed to the Petty Street job by his employer, Salgado, because he had experience working with metal roofs.

4. The Claimant was an employee of Salgado prior to December 12, 2014.

5. Salgado had the right to control the Claimant, and although Salgado was not present at the Petty Street job on December 12, 2014, Salgado had the right and ~~authority to control and direct the Claimant's work and the manner in which his work was performed and accomplished.~~

6. Salgado exercised control over the Claimant. Salgado directed the Claimant to the Petty Street job on December 12, 2014 instead of the other job Salgado was performing out of town.

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11. Salgado does have workers compensation insurance, and his carrier is Auto-Owners Insurance Company.

12. Salgado did not appear for the Hearing although he was provided proper notice. Salgado did not appear for his deposition in this case although he was properly served notice.

~~13. A determination of permanency is premature at this time.~~

14. Claimant is entitled to an evaluation and any additional causally related medical treatment recommended by a physician, with a specialty to the back, of Salgado and Auto-Owners Insurance Company's choosing.

15. The specialist is to be selected from a practice that has not previously treated Claimant and is to be provided with all of Claimant's medical records pertaining to his work related injury.

16. Claimant is entitled to reimbursement for all past out-of-pocket causally related expenses.

17. As stipulated to at the hearing, a determination of AWW and CR are held in abeyance at this time.

APPELLATE PANEL'S CONCLUSION OF LAW

1. This matter is governed by the South Carolina Workers' Compensation Act, § 42-1-10, et. seq. of the South Carolina Code.

2. The Claimant sustained an injury by accident pursuant to S.C. Code Ann. § 42-1-160 on December 12, 2014 within the course and scope of his employment with Salgado, and Salgado and its carrier, Auto-Owners Insurance Company, were given proper notice of Claimant's injury.

3. Salgado was the Claimant's employer at the time of the accident; therefore, Auto-Owners Insurance Company is the responsible carrier.

4. Salgado had the right to control the Claimant. I base this conclusion on the record as a whole and the testimony of Ron Farley, Michael Farley and Jose Martinez, as well as, relevant South Carolina case law. See Farrar v. D.W. Daniel High School,

309 S.C. 523, 424 S.E.2d. 543 (Ct. App. 1992) (the factors to be considered when

determining whether an injured person is an employee or independent contractor are:

(1) the employer's right to exercise or the actual exercise or control over the details of the work and how it is performed; (2) the method of payment; (3) furnishing of equipment; and (4) the right to terminate.) Though Salgado did not directly furnish the equipment (the company that hired Salgado did provide some equipment); the other factors weigh heavily in favor of finding the Claimant was an employee of Salgado.

5. Defendants Farley Construction and Builders Mutual Insurance Company are not the responsible employer and carrier in this case and are hereby dismissed.

6. Farley Construction justifiably relied on a Certificate of Insurance provided by Salgado through his insurance agent and therefore is relieved of any and all liability pursuant to S.C. Code Ann. § 42-1-415.

7. A determination of permanency is premature at this time.

8. Claimant is entitled to an evaluation and any additional causally related medical treatment recommended by a physician, with a specialty to the back, of Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company's choosing.

9. The specialist is to be selected from a practice that has not previously treated Claimant and is to be provided with all of Claimant's medical records pertaining to his work related injury.

10. Claimant is entitled to reimbursement for all past out-of-pocket causally related expenses.

11. As stipulated to at the hearing, a determination of AWW and CR are held in abeyance at this time.

ORDER OF APPELLATE PANEL

The Appellate Panel of the South Carolina Workers' Compensation Commission,

by unanimous vote, hereby affirms the Single Commissioner's March 29, 2016 Decision and Order in FULL and same shall constitute the Decision and Order of the Appellate Panel.


IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

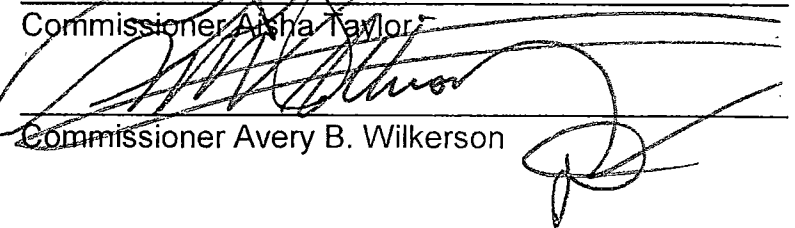


Commissioner Gene McCaskill

FULL AFFIRMATION



Commissioner Aisha Taylor



Commissioner Avery B. Wilkerson

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 September 20, 2016