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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Gene McCaskill
The Honorable Aisha Taylor
The Honorable Avery B. Wilkerson, Jr.

Appellate Case No. 2016-002148

Jose Martinez, Respondent,

v.

Jose Efrain Henriquez Salgado; Farley Construction; Auto-Owners Insurance Company; and Builders Mutual Insurance Company,

Of whom Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company are the Appellants,

And

Farley Construction Co., and Builders Mutual Insurance Company are the Respondents.

FINAL BRIEF OF RESPONDENTS

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FARLEY CONSTRUCTION CO. AND
BUILDERS MUTUAL INSURANCE CO.

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STATEMENT OF ISSUE ON APPEAL

Did the South Carolina Workers' Compensation Commission ("the Commission") properly find and conclude that Jose Martinez ("Claimant") was an employee of Jose Efrain Henriquez Salgado ("Salgado").

STATEMENT OF THE CASE

This matter was heard before the Single Commissioner on April 22, 2015, pursuant to a Form 50 filed by the Claimant/Respondent on January 6, 2015 and the Form 51s filed by: (1) Defendant/Respondent Farley Construction, LLC ("Farley Construction") and its carrier Builders Mutual Insurance Company ("BMIC") and (2) Defendant/Appellant Salgado¹ and its carrier Auto-Owners Insurance Company. The Claimant alleged an injury by accident on December 12, 2014. The Claimant named both Salgado and Farley Construction as his employers. Both employers denied the claim and alleged the other was responsible for the claim.

At the hearing, the Claimant appeared and testified on his own behalf, but did not present any further witnesses. Ron Farley and Michael Farley appeared and testified on behalf of Farley Construction. Salgado, though properly named and served, did not appear at the Hearing and did not present any witnesses to testify on his behalf. The Single Commissioner, by Decision and Order dated March 29, 2016, ruled Salgado was the Claimant's employer at the time of the accident and dismissed Farley Construction and its carrier, BMIC.

¹ Salgado was known to Farley Construction and its owners as "Joseph" and was referred to as such at the Hearing on April 22, 2015. He was also referred to as Efrain by the Claimant.

Salgado timely filed a Request for Commission Review, and a hearing was held before the Workers' Compensation Commission's Appellate Panel on July 18, 2016. The Claimant did not file a brief prior to the Appellate Panel Review and at the hearing again took no position on which employer was responsible for the claim. After review of the record and oral argument, the Appellate Panel issued its decision on September 20, 2016, affirming the Single Commissioner's Decision and Order in its entirety.

Salgado now appeals the Decision and Order of the Commission alleging: (1) the Appellate Panel erred in applying the four factor test used in Farrar to determine the existence of an employer-employee relationship; (2) the Appellate Panel erred in finding a direct employer-employee relationship between Jose Efrain Henriquez Salgado and the Claimant; and (3) the Appellate Panel erred in finding a contractual relationship between Jose Efrain Henriquez Salgado and Farley Construction at the time the Claimant was injured.

The Claimant has not appealed the Commission's Order.

STATEMENT OF THE FACTS

The Claimant works as a roofer. The Claimant was employed by Salgado prior to his work injury. (R. p. 50, lines 3-5; Hr'g Tr. 18:3-5, April 22, 2015.) The Claimant worked for Salgado two to three days a week and occasionally five days a week. (R. p. 50, lines 3-4; Hr'g Tr. 18:3-4.) The Claimant was injured on December 12, 2014, while working on a metal roof on Petty Street in Charleston (hereinafter referred to as the "Petty Street job").

Farley Construction is a general contractor that primarily handles insurance repair work. (R. p. 57, lines 15-21; Hr'g Tr. 25:15-21.) Farley Construction has three employees and primarily utilizes subcontractors. (R. p. 56, lines 3-4, R. p. 57, lines,11-12; Hr'g Tr. 24:3-4, Hr'g Tr. 25:11-12.) At the time of the Hearing, Farley Construction had a business relationship with Salgado for approximately four to five years. (R. p. 60, line 23-p. 61, line 2; Hr'g Tr. 28:23-29:2.) Salgado is a former employee of Extreme Construction, a subcontractor that previously worked for Farley Construction. (R. p. 61, lines 3-11; Hr'g Tr. 29:3-11.) Salgado left Extreme Construction in the summer of 2014 and started working with his own crew. (R. p. 61, line 22-p. 62, line 6; Hr'g Tr. 29:22-30:6..) Farley Construction then began contracting with Salgado's new company. (R. p. 61, line 18-p.62, line 6; Hr'g Tr. 29:18-30:6.) Farley Construction required Salgado to regularly show proof of insurance. (R. p. 62, line 4-p.63, line 10; Hr'g Tr. 30:4-31:10.) In fact, Salgado's insurance agent delivered a valid certificate of insurance on December 8, 2014, just four days prior to Claimant's accident. (R. p. 63, lines 4-10, R. p. 174; Hr'g Tr. 31:4-10, Def. Farley's Hr. Ex. 1.)

The week prior to the Claimant's injury, Michael Farley, a part owner of Farley Construction, met with Salgado at the site of the Petty Street job to discuss the work to be performed there. (R. p. 74, line 19-p.75, line 9; Hr'g Tr. 42:19-43:9.) Salgado agreed his company would perform work on the Petty Street job for Farley Construction. (R. p. 75, lines 10-12; Hr'g Tr. 43:10-12.) The day before the start of the Petty Street job, Salgado informed Michael Farley that

he could not have his crew available December 12, 2014, because they were working on another job. (R. p. 75, lines 15-19; Hr'g Tr. 43:15-19.) Salgado later agreed he would help, but that he could not have his entire crew at the jobsite. (R. p. 75, line 15-p.76, line 8; Hr'g Tr. 43:15-44:8.) Salgado told Michael Farley he had someone with specific experience with metal roofs and that he would send that individual to the Petty Street job. (R. p. 76, lines 6-8; Hr'g Tr. 44:6-8.)

Salgado instructed the Claimant to meet Michael Farley off the interstate to work the Petty Street job because the Claimant's GPS was not working properly. (R. p. 49, lines 4-10; Hr'g Tr. 17:4-10.) The Claimant met Michael Farley and followed him to the Petty Street job. The Claimant was injured that same day on the Petty Street job.

Following the Claimant's injury, Farley Construction paid Salgado under invoice No. 131924 a total of \$805 (R. p. 79, lines 1-9, R. p. 175; Hr'g Tr. 47:1-9, Def. Farley's Hr. Ex. 7.) Farley Construction paid with a single check in the amount of \$805. (R. p. 79, lines 1-9, R. p. 176; Hr'g Tr. 47:1-9, Def. Farley's Hr. Ex. 3.) The payment includes \$100 for the services provided by Salgado. The invoice itemized the \$100 designated for the Petty Street job with the entry line reading "Jose." (R. p. 79, lines 6-7, R. p. 175; Hr'g Tr. 47:6-7, Def. Farley's Hr. Ex. 7.) Michael Farley and Salgado collaboratively determined how much Farley Construction owed Salgado for the Petty Street job. (R. p. 89, lines 17-20; Hr'g Tr. 57:17-20.) Farley Construction never paid the Claimant any wages and was not concerned with what portion of the \$100 earmarked for the Petty Street job

would be paid by Salgado to the Claimant. (R. p. 79, line 19-p.80, line 2; Hr'g Tr. 47:19-48:2.)

Salgado paid the Claimant \$100 in the form of five \$20 bills. (R. p. 51, lines 17-24; Hr'g Tr. 19:17-24.) Salgado paid the Claimant for the work performed on December 12, 2014, via hand delivery when he was returning the Claimant's car. (R. p. 47, lines 21-25; Hr'g Tr. 15:21-25.)

The Claimant testified at the Hearing that he believed that the only day he ever worked for Farley Construction was the day of his injury. (R. p. 50, lines 10-15; Hr'g Tr. 18:10-15.) The Claimant then admitted that he and Salgado spoke after his injury, and during that conversation Salgado made his case as to why he was not responsible for the Claimant's injury. (R. p. 50, lines 16-25; Hr'g Tr. 18:16-25.) The Claimant and Salgado are friends. (R. p. 48, lines 11-12; Hr'g Tr. 16:11-12.)

The Claimant filed a Form 50 Request for Hearing and named both Salgado and Farley Construction as Defendants. The Claimant has never taken a formal position on which of the Defendants should be responsible for the claim. Following the filing of this claim, Salgado has intentionally evaded participation in the case.

Counsel for Farley Construction noticed the Claimant's deposition on January 29, 2015, and service was effective. (R. p. 166-189.) The Claimant, however, did not appear for his deposition. Furthermore, in spite of being named as a Defendant in the case and specifically identified as a witness at the Hearing

before the Single Commissioner by both Defendant Farley Construction and his own counsel, Salgado did not appear at the Hearing.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is typically reviewed under the substantial evidence rule of the Administrative Procedure Act. Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006). However, if the question before the Court is jurisdictional, the court's review is governed by the preponderance of the evidence standard. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002). The issue in this case is whether the Appellant is the employer of the Claimant, a jurisdictional question. Id. at 594, 564 S.E.2d at 112. The Commission's conclusion is therefore "subject to judicial review even though supported by evidence." Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). The appellant bears the burden of showing that the Commission's decision is against the preponderance of the evidence. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (2007). "While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel." Id. at 573, 643 S.E.2d at 103.

ARGUMENT

The Single Commissioner properly found as a matter of fact and ruled as a matter of law that Salgado was the Claimant's employer.

The preponderance of the evidence supports the Commission's determination that the Claimant was employed by Salgado at the time of his injury.

The Workers Compensation Act defines both "employer" and "employee." Employer is defined to include "every person carrying on any employment..." S.C. Code Ann. § 42-1-140. "The term 'employee' means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed..." S.C. Code Ann. § 42-1-130. For the Workers Compensation Act to apply, there must be an employer-employee relationship at the time of the injury. Alewine v. Tobin Quarries Inc., 206 S.C. 103, 110, 33 S.E.2d. 81, 83 (1945). It is essential there be a contract of service. Id. Formalities, however, are not necessary. Id.

This Court has stated,

[t]he fundamental test of the employment relationship is the right of the employer to control the details of the employee's work. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. There are four elements which determine the right of control: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) right to fire; and (4) method of payment.

Porter, at 572, 643 S.E.2d at 102-03 (internal quotation marks and citations omitted).

Furthermore, it is well established that the Workers' Compensation Act is to be "construed liberally in favor of coverage, and South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage." Porter, at 572, 643 S.E.2d at 102. Reasonable doubts should be resolved in favor of coverage. Mauldin v. Dyna-Color/ Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992). The definitions of employer and employee should be broadly construed in favor of including employees and not excluding them. Yeomans v. Anheuser-Busch, Inc., 198 S.C. 65, 15 S.E.2d 833, 835 (1941).

The preponderance of the evidence supports the Commission's determination that the Claimant was employed by Salgado. Salgado certainly meets the statutory requirements of an employer as it is undisputed that Salgado carries on employment and employs an entire crew of roofers. (R. p. 62, lines 2-6; Hr'g Tr. 30:2-6.) The Claimant testified that he was employed by Salgado and worked for him 2-5 days a week. (R. p. 50, lines 1-5; Hr'g Tr. 18:1-5.) Salgado even purchased workers compensation insurance for his crew, which was valid at the time of Claimant's injury. (R. p. 63, lines 4-6, R. p. 174; Hr'g Tr. 31:4-6 Def. Farley's Hr. Ex. 1.)

The Claimant was engaged in employment with Salgado on December 12, 2014. It is undisputed that Salgado and Claimant had been engaged in an employee-employer relationship prior to December 12, 2014. (R. p. 50, lines 1-5;

Hr'g Tr. 18:1-5.) The employment relationship between Salgado and the Claimant did not suddenly change simply because the Claimant was the only worker directed to the Petty Street job by Salgado on December 12.

On the day of the accident, Salgado still exercised control over the Claimant. Salgado pulled the Claimant off another job that his company was performing in order to direct the Claimant to work on the Petty Street job. (R. p. 76, lines 4-8, R. p. 76, lines 22-24; Hr'g Tr. 44:4-8, Hr'g Tr. 44:22-24.) Salgado told the Claimant where to be on December 12, 2014. (R. p. 76, lines 22-24; Hr'g Tr. 44:22-24.) Additionally, Salgado paid the Claimant his earnings for the day of the accident. Salgado was responsible for determining how much money he paid the Claimant for his work on December 12, 2014. (R. p. 79, line 25-p.80, line 2, R. p. 89, line 14-p. 90, line 20; Hr'g Tr. 47:25-48:2, Hr'g Tr. 57:14-58:20.) It is undisputed that the Claimant worked for Salgado leading up to his accident; thus, Salgado had the right to fire the Claimant. (R. p. 50, lines 1-5; Hr'g Tr. 18:1-5.) Based on these facts, there is certainly sufficient evidence supporting the Commission's findings of fact and conclusion of law that the Claimant was employed by Salgado. Moreover, to the extent there is doubt as to whether the Claimant was employed by Salgado, this Court should resolve that doubt in favor of coverage so as to effectuate the intent of the act. See, Porter, at 572, 643 S.E.2d at 102; see also, Yeomans, 198 S.C. 65, 15 S.E.2d at 835.

A. *The Commission's analysis and application of the law was appropriate.*

The Commission properly applied the facts of the case to the law. Contrary to Salgado's assertions, the Commission's application of the four-factor control test was proper.

The Commission's Conclusion of Law No. 4 provides:

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.

(R. p. 23; Order of July 18, 2016.)

This conclusion provides that the Claimant was an employee of Salgado and is consistent with this State's case law. In Porter v. Labor Depot, this Court analyzed whether a claimant was an employee of Labor Depot where the Labor Depot denied the existence of an employer-employee relationship. This Court upheld the Commission's order providing that the claimant failed to meet his burden of establishing an employment relationship, a determination that was fact intensive and based, in part, on the credibility of the claimant. In Porter, this Court used the same four elements set forth in Farrar to determine whether an

employment relationship existed. Porter dealt solely with determining whether a claimant met his burden of establishing jurisdiction by showing the existence of an employment relationship. Porter did not contemplate the existence of an independent contractor relationship versus that of employment. Thus, Appellant's assertion that the Commission erred in its reliance on the control test laid out in Farrar is inconsistent with this State's case law.

Moreover, Salgado seemingly attempts to impute a greater significance to the Commission's ruling by implying that the Farrar case citation infers that the case was erroneously analyzed as the sole source to determine which named Defendant was Claimant's employer. Even if such a comparative analysis would be in error, the Commission made no such ruling. Instead, the Commission ruled that Salgado was the subcontractor for Farley Construction on December 12, 2014, (Finding of Fact No. 3) and that Salgado was the Claimant's employer at that time (Finding of Fact No. 1 and Conclusion of Law No. 3). (R. p. 20 and 22; Order of July 18, 2016.) As discussed above, the findings and conclusion are supported by a preponderance of the evidence and are in accordance with the applicable statutory provisions and case law.

B. Salgado seeks to benefit from his failure to appear by re-characterizing his relationship with Farley Construction.

Salgado (after ignoring a lawful subpoena and notice for deposition and refusing to show up at the Hearing) would have this Court believe that the Claimant was not his employee on December 12, 2014, because he "nullified" his contract to perform the Petty Street job by informing Michael Farley that he could not have his whole crew on the jobsite and would only be sending one worker.

This position cannot withstand scrutiny. There is no requirement that Salgado have his entire crew present to be engaged as a subcontractor. There is no reason that Salgado cannot be engaged in work as a subcontractor at multiple locations for multiple general contractors; in fact, such is the practice for many subcontractors. Farley Construction certainly had no reason to understand their agreement was nullified considering Salgado was sending manpower to the jobsite. (R. p. 75, line 15-p. 76, line 8; Hr'g Tr. 43:15-44:8.) Further, Salgado did not testify that he did not intend to provide additional manpower and services once he completed his other project. The evidence is that Salgado met with Farley Construction to discuss the Petty Street job. (R. p. 74, line 19-p. 75, line 9; Hr'g Tr. 42:19-43:9.) Salgado agreed to do the job. (R. p. 75, lines 10-12, R. p. 76, lines 6-8; Hr'g Tr. 43:10-12, Hr'g Tr. 44:6-8.) Salgado was delayed on another project and was limited in the resources available for the Petty Street job and therefore provided only the Claimant to perform the work at the Petty Street job on the day the Claimant was injured. (R. p. 75, line 15-p.76, line 8; Hr'g Tr. 43:15-44:8.) Following the Claimant's injury, Salgado met with Farley Construction to decide an appropriate payment for the services provided to Farley Construction. (R. p. 89, lines 17-20; Hr'g Tr. 57:17-20.) Salgado was responsible for how much the Claimant was paid. (R. p. 79, line 25-p. 80, line 2; Hr'g Tr. 47:25-48:2.)

Salgado has offered no testimony or written record to refute the greater weight of the evidence showing he subcontracted to work the Petty Street job, and has instead, through the arguments of counsel, re-characterized his

obligations with respect to the Petty Street job. Salgado elected to avoid the proceedings before the Commission and this Court should disregard his arguments contrary to the evidence showing that he was Farley Construction's subcontractor. See In re Gonzales, 409 S.C. 621 (2014), (providing the general rule, "that if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness"). The preponderance of the evidence supports the Commission's conclusion that Salgado was engaged as a subcontractor for Farley Construction on December 12, 2014, and that Salgado sent the Claimant, his employee, to perform the work. Salgado's arguments re-characterizing his role on the Petty Street job are without merit.

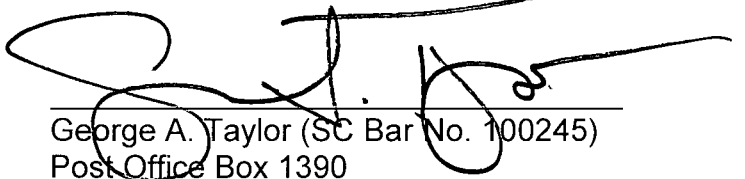
CONCLUSION

The Commission properly found as a matter of fact and ruled as a matter of law that the Claimant was an employee of Salgado. The preponderance of the evidence supports the Commission's ruling and this Court should affirm the Decision and Order of the Commission in full.

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Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

A handwritten signature in black ink, appearing to read "G. Taylor", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.



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