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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

South Carolina Workers' Compensation Commission Appellate Panel

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 APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

FACTS 2

ARGUMENTS 6

1. THE SOUTH CAROLINA WORKER'S COMPENSATION APPELLATE PANEL ERRED BY APPLYING THE FOUR FACTOR TEST TO DETERMINE THE EXISTENCE OF A DIRECT EMPLOYER-EMPLOYEE RELATIONSHIP. 6

2. THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERRED IN FINDING A DIRECT EMPLOYEE-EMPLOYER RELATIONSHIP BETWEEN THE CLAIMANT AND JOSE EFRAIN HENRIQUEZ SALGADO USING EITHER OF THE TESTS SET FORTH IN ALEWINE OR FARRAR. 10

3. THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERRED IN FINDING A CONTRACTUAL RELATIONSHIP BETWEEN JOSE EFRAIN HENRIQUEZ SALGADO AND FARLEY CONSTRUCTION AT THE TIME THE INJURY. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Addison v. Dixie Chevrolet Co., 246 S.C. 86, 142 S.E.2d 442 (1965) 10, 13
Alewine v. Tobin Quarries Inc, 33 S.E.2d. 81, 206 S.C. 103 (1945)........................ passim
Chavis v. Watkins, 180 S.E.2d 648, 256 S.C. 30 (1971) 11, 13
Coakley v. Tidewater Const. Corporation, 194 S. C. 284, 9 S.E.2d 724 9
Farrar v. D.W. Daniel High School, 309 S.C. 523, 424 S.E.2d 543 (1992) 7, 13
Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 51 S.E.2d 744 (1949) 8
Holloway v. G.O. Cooley & Sons, 208 S.C. 234, 243, 37 S.E.2d 666, 670 (1946) 9
Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970) 7
Wallace v. Campbell Limestone Co., 198 S. C. 196, 17 S.E.2d 309 (1941) 9

Statutes

S.C. Code Ann. 42-1-130 10

STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERR IN APPLYING THE FOUR FACTOR TEST USED IN FARRAR TO DETERMINE THE EXISTENCE OF AN EMPLOYER-EMPLOYEE RELATIONSHIP?
2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERR IN FINDING A DIRECT EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN JOSE EFRAIN HENRIQUEZ SALGADO AND THE CLAIMANT?
3. DID THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERR IN FINDING A CONTRACTUAL RELATIONSHIP BETWEEN JOSE EFRAIN HENRIQUEZ SALGADO AND FARLEY CONSTRUCTION AT THE TIME THE CLAIMANT WAS INJURED?

STATEMENT OF THE CASE

This matter was heard before the Single Commissioner on April 22, 2015 to determine which Defendant was the Claimant's employer at the time of the injury and would therefore be responsible for providing the Claimant benefits under the South Carolina Workers' Compensation Act ("the Act") pursuant to a Form 50 requesting a Hearing dated January 6, 2015. Claimant alleges that he suffered an injury by accident within the course and scope of his employment on December 12, 2014. Defendants Jose Efrain Enrique Salgado ("Salgado") and Auto-Owners Insurance Company ("Auto-Owners") denied that the Claimant was an employee of Salgado at the time of the alleged accident, and asserted the Claimant was an employee of Farley Construction. Defendants Farley Construction and Builders Mutual Insurance Company denied that the Claimant was an employee of Farley Construction and took the position that the Claimant was an employee of Salgado, who was acting as a subcontractor for Farley Construction on the jobsite in question. After the initial Hearing on April 22, 2015, the Single Commissioner ruled

in his Order dated March 29, 2016 that Salgado was the Claimant's direct employer at the time of the accident. Defendants Salgado and Auto Owners filed a Form 30 Request for Commission Review on April 4, 2016, and a Hearing before the South Carolina Workers' Compensation Commission's Appellate Panel was held on July 18, 2016. In their decision dated September 20, 2016, the South Carolina Workers' Compensation Commission's Appellate Panel affirmed the Single Commissioner's Decision and Order in its entirety. This appeal follows.

FACTS

Claimant has alleged an injury on December 12, 2014 sustained from a fall while working on a metal roof in Gaffney, South Carolina. Ron Farley testified that he owns 60% of Farley Construction, while his son, Michael, owns 40%. (R. p. 55, lines 18-22). Ron Farley testified that Farley Construction has 3 employees: Ron Farley, Michael Farley, and James Butler. (R. p. 56, lines 1-6). Ron Farley testified that if they needed additional help, they hire subcontractors. (R. p. 57, lines 15-18). When asked if he requires his subcontractors to have insurance, Ron Farley replied "I would like for everyone to have it, not everyone does, but some of them are good enough that we pay it for them." (R. p. 58, lines 5-9). Ron Farley testified that Michael Farley would not need his permission to hire someone as an employee of Farley Construction. (R. p. 57, lines 3-8). Ron Farley testified that he has known Salgado for four or five years and was a subcontractor that Farley Construction used. (R. p. 60, lines 23-25; p. 61 lines 1-2). Michael Farley also testified that Salgado was a subcontractor used by Farley Construction. (R. p. 72, lines 7-8).

Michael Farley testified that Salgado has his own employees, but was unsure as to how many. (R. p. 72, lines 23-25; p. 73, lines 1-2).

Michael testified that the week before the accident, he worked with Salgado on a shingle job a few blocks away from the jobsite in question. (R. p. 74, lines 23-25; p. 87, lines 20-25; p. 88, lines 1-9). Michael Farley testified that he took Salgado's crew to the jobsite in question to show them where it was, and testified that Salgado agreed that his crew would assist him at that job. (R. p. 74, lines 23-25; p. 75, lines 1-12). Michael Farley then testified that the day before the work was to begin at the jobsite in question, he "found out that they were not planning on being there on Wednesday morning like we had planned." (R. p. 75, lines 13-19). Michael Farley testified that he called Salgado the day before the morning work was to begin and Salgado told him that "nobody was coming." (R. p. 75, lines 20-24). Michael Farley testified that he told Salgado that he needed help, and Salgado called him the next day and told him "I have somebody with experience with metal, I'll send him." (R. p. 76, lines 1-8). Claimant testified that Salgado told him that Farley Construction was going to pay him for his work on the date in question. (R. p. 47, lines 7-9). Claimant testified that around the time of the injury, he was working five or six days a week, sometimes for Salgado and sometimes for other people. (R. p. 50, lines 1-5). Claimant testified that Salgado told him to wait for Michael Farley of Farley Construction at exit 93 near the jobsite. (R. p. 49, lines 1-5). Claimant testified that it was his understanding that Salgado referred him to the jobsite instead of hiring him to be there as an employee. (R. p. 53, lines 3-7). Claimant

testified that Salgado told him that Farley Construction needed him and that they were going to pay him that day. (R. p. 53, line 25; p. 54 lines 1-2).

Claimant testified at the time he was injured while he was working for Farley Construction. (R. p. 50, lines 14-15; p. 53 lines 16-22). Michael Farley testified that he did the job on Petty Street in Gaffney, South Carolina on December 12, 2014, installing a metal roof. (R. p. 73, lines 21-25; p. 74, lines 1-9). Ron Farley testified that there were four men at the jobsite in question. (R. p. 65, lines 3-8). When asked if any of the four men were subcontractors, Ron Farley replied "I guess they would have to be." (R. p. 65, lines 9-11). Claimant testified that there was no doubt in his mind that he was working for Farley Construction on the day of his accident. (R. p. 53, lines 23-25). Upon cross-examination, Michael Farley testified that he didn't know who was coming the morning of the accident, only that Salgado had told him that he and his crew were not coming. (R. p. 84, lines 4-11). Michael Farley testified that when Claimant first came to the jobsite, they had a conversation about the job, how old they were, how many kids they have. (R. p. 89, lines 1-5). Michael Farley testified that they did not discuss Salgado that morning. (R. p. 89, lines 6-9).

Claimant testified that he brought his own tools to the jobsite, but used Farley Construction's tools when he got there. (R. p. 49, lines 20-22). Michael Farley admitted that he provides whatever tools are necessary to get the job done. (R. p. 83, lines 12-13). Claimant testified that Michael told him what to do on the jobsite. (R. p. 53, lines 20-22). Similarly, Michael Farley testified that he told Claimant what to do, and when to do it. (R. p. 85, lines 8-11). Claimant testified that if Michael

Farley told him he was fired, he believed he would still have a job with Salgado. (R. p. 51, lines 12-16). Michael Farley testified that he would have the right to send Claimant home if he was not working well. (R. p. 82, lines 24-25; p. 83, lines 1-2). When asked how it was determined that $100 was to be paid to Jose for the day in question, Michael Farley testified that he recalled telling Salgado that Claimant was at the jobsite for six or seven hours, asked Salgado how much that would be, and they came to an agreement of $100. (R. p. 89, lines 14-25; p. 90, lines 1-20). Michael Farley then testified that the rate of pay was not based on how many shingles he put on or how much work he actually performed. (R. p. 90, lines 21-24).

Claimant testified that he drove his truck to the jobsite, and after his injury Michael drove Claimant's truck to Michael's house. (R. p. 53, lines 1-14). Michael Farley also testified that after Claimant fell he got the keys to Claimant's truck and took it to his home for safekeeping. (R. p. 82, lines 2-11). Michael Farley testified that Salgado came to pick up the Claimant's truck from his home, and that is when he gave a check to Salgado. (R. p. 86, lines 6-10). Claimant testified that the next time he saw his truck was when Salgado delivered it to his house along with the $100 from Michael for work performed. (R. p. 53, lines 3-15). Claimant testified that Salgado gave him $100 that Michael Farley sent him for work he had done on the day of the injury. (R. p. 51, lines 20-21).

Michael Farley identified two invoices as invoices produced to him by Salgado. (R. p. 78, lines 11-19). Michael Farley testified that invoice 131924 was for the Petty Street job, and on the invoice he included the $100 for Jose's time. (R. p. 79,

lines 1-18). Michael Farley testified that the other invoice in evidence for 130 Brookshire Drive was a job in which Salgado and his crew of four worked for him on. (R. p. 86, lines 14-25). When asked why Salgado's employee's names were not on the Brookshire Drive invoice, but Claimant's name was on the Petty Street invoice, Michael Farley testified "I just wrote in Jose's name because that was what it was for, that's what I was paying him for, so that's what I wrote." (R. p. 87, lines 10-17). Michael Farley further explained that invoice 131924 was for two separate jobsites, although both were on Petty Street. (R. p. 87, lines 18-25; p. 88, lines 1-8). Michael Farley testified that it was not common for him to write an employee's name on the invoice because it's not common for Salgado to send just one person. (R. p. 88, lines 13-17).

ARGUMENTS

1. THE SOUTH CAROLINA WORKER'S COMPENSATION APPELLATE PANEL ERRED BY APPLYING THE FOUR FACTOR TEST TO DETERMINE THE EXISTENCE OF A DIRECT EMPLOYER-EMPLOYEE RELATIONSHIP.

The Single Commissioner and Appellate Panel erred in applying the four factor test discussed in Farrar v. D.W. Daniel High School, 309 S.C. 523, 424 S.E.2d 543 (SC Ct. App. 1992), when trying to determine who the Claimant's direct employer was; the error being that this test is used to establish the difference between an employee or a subcontractor, not to determine the existence of an employment contract. In Farrar v. D.W. Daniel High School, a full time practicing attorney who officiated high school football games during football season was

injured while officiating a football game at Daniel High School. In Farrar, the Court stated:

> In determining whether an injured person is an employee covered by the Workers' Compensation Act, the test is whether the employer has the right to direct the manner or means by which the particular work or undertaking is accomplished. Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970). Four factors to be considered are: (1) the employer's right to exercise or the actual exercise of control over the details of the work and how it is performed; (2) the method of payment; (3) who furnishes the equipment; and (4) the employer's right to terminate the employment. Id. A person engaged to do work for another is an independent contractor not covered by workers' compensation if he contracts to do the particular work according to his own knowledge, skill, judgment, means, and methods, free from the employer's control except as to the result of his work.

Id. Although the plain reading of the first sentence of the above quotation from the case indicates that this would be an applicable test for the determination of a direct employee/employer relationship, the full reading of Farrar clearly explains that the issue therein was to determine if the Claimant was an employee or an independent contractor. In Farrar, there was no question as to who Farrar was working for, the question was if he was an employee or an independent contractor. Thus, Farrar is inapplicable to the case at hand, as the issue here was to determine who the Claimant's direct employer was at the time of the injury.

When determining the existence of an employer-employee relationship, the law looks for a contract of employment between two parties. The Act defines an employee as a "person engaged in an employment under any appointment or

contract of hire or apprenticeship, express or implied, oral or written..." S.C. Code Ann. 42-1-130. "Before the provisions of the Workmen's Compensation Act can become applicable, the relation of master and servant, or employer and employee, or some appointment must exist. This is the initial fact to be established." Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 51 S.E.2d 744 (1949). "No award under the Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which claim is made." Alewine v. Tobin Quarries Inc, 33 S.E.2d. 81, 206 S.C. 103 (S.C., 1945). The "contract of employment" is the jurisdictional factor used to determine if an employment relationship exists. Alewine, 33 S.E.2d. 81, 206 S.C. 103 (1945). This relation is contractual in character and to constitute one an employee it is essential that there shall be a contract of service. Id. However, no formality is required. Id. The contract may be oral or written. Id. It may be accomplished with a few words, or it may be implied from conduct without words. Id. It is sufficient if the circumstances show unequivocally that the parties recognize each other as employer and employee. Id. "A contract will arise even where the employer does not intend to enter into one, if his conduct is such as to lead claimant, acting as a reasonable man, or in good faith, to believe that he is being employed." Id., *quoting* 71 C.J., page 431. While the Workmen's Compensation Act is to be liberally construed to the end that the benefits thereof may not be denied upon technical, narrow and strict interpretation, words should be given their established legal meaning or the meaning which the Legislature intended. Coakley v. Tidewater Const. Corporation, 194 S. C. 284, 9 S.E.2d 724; nor is the Court justified in so construing it as to do violence to a specific requirement of

the Act. Wallace v. Campbell Limestone Co., 198 S. C. 196, 17 S.E.2d 309 (1941). "Employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent." Holloway v. G.O. Cooley & Sons, 208 S.C. 234, 243, 37 S.E.2d 666, 670 (1946). The proper test for determining if the employer/employee relationship exists is not the 4 factors as set out in Farrar, but whether or not there was an employment contract as set forth in Alewine.

Courts have turned to the Claimant's understanding to determine who the direct employer is in other scenarios as well. In Addison v. Dixie Chevrolet Company, there was a dispute as to who the claimant's employer was due to a recent change in ownership of the body shop in which he was injured. Addison v. Dixie Chevrolet Co., 246 S.C. 86, 142 S.E.2d 442 (1965). In this matter, Mr. Frank Burn (doing business as Dixie Body Shop) took over the body shop previously owned and operated by Dixie Chevrolet Company. Id. Claimant was injured after the takeover, and the court analyzed which employer was the direct employer. Id. The court explained that "[t]he vital, and single, factual issue was whether respondent knew of and consented to the new employer-employee relationship from the take-over of the body shop by Burn..." Id. As the claimant in Addison was unaware of the new relationship, the Court found Dixie Chevrolet Company the responsible party under the Act.

In Chavis v. Watkins, the court examined a similar situation to the one at hand. Chavis v. Watkins, 180 S.E.2d 648, 256 S.C. 30 (1971). In Chavis, the court was presented with an issue of a change in employment. The defendants in Chavis

argued that the Claimant was an employee of the church, and not Watkins, based on the theory that Watkins merely coordinated the work, and was not engaged as a builder on this job. The Court found that Watkins did not claim to have informed the claimant that the church was his employer, and ruled that "[u]nless Chavis knew of and agreed to a new employer-employee relationship, replacing the one theretofore existing with Watkins, his rights under the Workmen's Compensation Act against his regular employer was unabridged." Id. This case is directly opposite of the case at hand, being that the Claimant knew of and agreed to work for Farley Construction, therefore Farley Construction is the direct employer.

2. THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERRED IN FINDING A DIRECT EMPLOYEE-EMPLOYER RELATIONSHIP BETWEEN THE CLAIMANT AND JOSE EFRAIN HENRIQUEZ SALGADO USING EITHER OF THE TESTS SET FORTH IN ALEWINE OR FARRAR.

Under the Alewine analysis, the issue is if the Claimant had an employment contract with Farley Construction or Salgado for the jobsite in question. Here, it is clear that Salgado was not acting as Claimant's direct employer on the jobsite in question. Salgado refused to work on the job in question, and later referred Claimant to Farley Construction to assist with the metal roof.

Farley Construction was the direct employer of Claimant. When Claimant arrived to the jobsite in question, Michael Farley had no idea who was coming. (R. p. 84, lines 4-11). When they met, Michael Farley and Claimant had a conversation about the job and Michael Farley engaged in conduct that lead Claimant, acting as a reasonable man, or in good faith, to believe that he was being employed by Farley

Construction. Claimant testified that there was no doubt in his mind that he was working for Farley Construction on the day in question. (R. p. 53, lines 23-25).

As for any employment contract between Salgado and Claimant for this specific job, there is no evidence in the record outlining the communications and conduct between Salgado and Claimant except through Claimant's testimony. While it is true that Claimant had worked for Salgado in the past, Claimant testified that he works for many different people. (R. p. 46, lines 16-23; p. 50, lines 1-5). Claimant's testimony is that he was working for Farley Construction, and was told that Farley Construction was going to pay for him. (R. p. 47, lines 7-9; p. 53, line 25; p. 54, lines 1-2). Claimant testified that there was no doubt in his mind that his employer was Farley Construction, and that it was his understanding that Salgado was referring him to the jobsite. (R. p. 53, lines 23-25). Applying the Alewine analysis, there is no question that the Claimant was directly employed by Farley Construction.

Perhaps more on point to the case at hand is Chavis and Addison, discussed above. In both cases, the court found that there was no new employer-employee relationship because the Claimant was unaware of a change in employment. Here, the Claimant was completely aware of, and agreed to, a change in employment as he was under the impression that Farley Construction was his new employer.

Even if Farrar is found to be the correct test to use in this case, the four factors all indicate that Farley Construction was responsible for the injury. The record reflects that Farley Construction paid the Claimant, provided the tools for the jobsite, and could ask the Claimant to leave the jobsite. Ron Farley testified that he

told the Claimant what to do, and when to do it. These examples clearly show that Farley Construction had the right to exercise control over the Claimant. The only control that Salgado exercised was informing the Claimant where to meet Farley Construction, which Appellants argue is a referral and not control. Under either analysis, Farley Construction was the Claimant's employer at the time of the accident.

3. THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL ERRED IN FINDING A CONTRACTUAL RELATIONSHIP BETWEEN JOSE EFRAIN HENRIQUEZ SALGADO AND FARLEY CONSTRUCTION AT THE TIME THE INJURY.

The record reflects that Salgado was not a subcontractor of Farley Construction at the time of the injury as he refused to work on the jobsite in question. According to his own testimony, Michael Farley took Salgado by the jobsite in question, and Salgado agreed to provide his services. (R. p. 74, lines 23-25; p. 75, lines 1-12). However, Salgado told Michael Farley the day before work was to begin that he and his crew were not coming to the Petty Street job (R. p. 75, lines 13-19), which nullified the contract. Only after Michael Farley complained that he needed a worker did Salgado refer Claimant to Farley Construction. Salgado was not the subcontractor on the Petty Street job as he rejected the offer to work on the Petty Street job with Farley Construction and even went to work on another job in Columbia, South Carolina on the day in question. Therefore, Salgado was not a subcontractor on the jobsite in question and thus cannot be responsible for Claimant's injuries.

Salgado did not profit from the jobsite in question. Michael Farley testified that he gave Salgado $100 extra on a check to pay Claimant (R. p. 87, lines 15-17), and Claimant testified that Salgado gave Claimant $100 for work performed on the jobsite before his injury (R. p. 51, lines 20-21). While the record reflects that Salgado accepted the check from Farley and delivered the cash to Claimant, it was at the same time he was delivering Claimant's truck which was being held at Michael Farley's home for safe keeping. If Salgado did not get paid for the jobsite in question, then he was not a subcontractor and therefore cannot be held liable for Claimant's benefits under the Act.

Salgado did not produce an invoice for the jobsite in question. According to Michael Farley's own testimony, invoice 131924 was for another jobsite on Petty Street, and Michael Farley himself added "Jose - $100" on this pre-existing invoice for a different job on Petty Street that was prepared by Salgado. (R. p. 79, lines 1-18). This is not evidence of a subcontract agreement between Salgado and Farley Construction for the jobsite Claimant was injured on, as Salgado did not bill Farley Construction for the jobsite in question or for Claimant's work on said jobsite; Michael Farley handwrote it on an invoice for a different job.

Farley Construction relies on the certificate of insurance produced by Salgado. However, this certificate of insurance is not job-specific. The certificate of insurance was obtained by Farley Construction on December 8, 2014, and the date of injury was December 12, 2014. Michael Farley testified that the week prior to the injury, he and Salgado's crew completed a shingle job a couple blocks away. (R. p.

74, lines 23-25). Ron Farley testified that he refused to allow Salgado to work for Farley Construction until they furnished their workers' compensation Certificate of Insurance (R. p. 62, lines 2-6), so the evidence indicates that the work done a couple blocks away must have been done after receipt of the Certificate of Insurance dated December 8, 2014. Appellants admit to working as a subcontractor for Farley Construction around the time of the accident, but deny being a subcontractor on the jobsite in question. While certificates of insurance are commonly used as evidence of a contract between two parties, it is not a subcontractor agreement in of itself, and in this scenario should be given no weight as evidence of a contract between Salgado and Farley Construction as Salgado backed out of the job after the date on the certificate of insurance was produced, but before the date of injury.

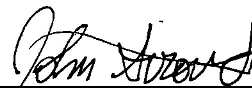
CONCLUSION

The evidence reflects that under either the Farrar and/or the Alewine analysis, Salgado was not the direct employer of the Claimant on the jobsite in question. Appellants maintain their position that the Commission erred in applying the four factor test to determine which of two possible employers would be the direct employer. Under Alewine and associated case law, the direct employer in this matter was Farley Construction, even if they did not intend to enter into an employment contract with Claimant. Salgado was not a subcontractor on the jobsite in question, and was not the Claimant's direct employer for this jobsite. Salgado simply referred Claimant to Farley Construction and Claimant was then hired as an employee by Farley Construction to assist them. Salgado did not prepare an invoice for this jobsite and did not profit any money from the job. Farley

Construction exercised control over Claimant by instructing him what to do and when to do it. (R. p. 85, lines 8-11). Additionally, Michael Farley paid the Claimant $100 based on the number of hours worked, and not by the job. (R. p. 90, lines 21-24). Salgado referred Claimant to Farley Construction, and Farley Construction agreed to allow him to work on the jobsite while Salgado and his crew were working another job in Columbia. As such, Salgado was not involved in the jobsite, did not employ the Claimant, and therefore cannot be held liable for Claimant's injuries.

For the reasons stated above, Appellants respectfully request that the Appellate Panel issue an Order finding Farley Construction to be the Claimant's direct employer, finding Farley Construction and Liberty Mutual liable for Claimant's benefits under the Act for the injury sustained on December 12, 2014, and dismissing Salgado and Auto-Owners from this matter with prejudice.

Respectfully Submitted,



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