

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

RECEIVED

Case No. 2017-001422

AUG 28 2017

SC Court of Appeals

Rey Perez, Claimant,.....Respondent.

v.

The Lamar Group, LLC and/or Green Valley Country Club, Employer, and Bridgefield Casualty Insurance Company, Carrier,..... Respondents.

and

South Carolina Uninsured Employers Fund,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

DID THE FULL SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING A COUNTRY CLUB MANAGEMENT COMPANY CAN EXEMPT ITSELF AS A GENERAL CONTRACTOR UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT WHEN IT OBTAINS A CONSTRUCTION LICENSE, HIRES A CONSTRUCTION MANAGER, AND ACTUALLY UNDERTAKES A CONSTRUCTION, PROJECT?

STATEMENT OF THE CASE

This is a workers' compensation case involving an injury to claimant/respondent, Rey Perez, which occurred on March 28, 2012. The facts of this case are not in dispute and this appeal presents a question of law for the court.

This claim originally involved multiple additional parties to include Cornell Dublier Electronics and Durham Greene, Inc. which had been joined as a party to this action. However, the Single Commissioner dismissed both of these parties by Consent. All remaining parties agreed Cornell Dublier and Durham Greene, Inc. were not proper parties to the action. (Consent Order) Cornell Dublier is a family business owned by the Kaplan family, who are also the owners of Green Valley Country Club. Cornell Dublier was inadvertently added and dismissed. (Consent Order)

Durham Greene, LLC was added because they provided the contractor's license to EA Operations, the operators of Green Valley Country Club. The license was provided by Durham Greene to EA Operations so that EA Operations would not have to obtain their own contractor's license. (Hr. Tr. Pg. 47) The court should note that while Durham Greene was not a proper party to this action, nonetheless, the provision of the license to EA Operations by Durham Greene was illegal. South Carolina Code of Laws Annotated §40-11-110 A (9).

EA Operations subsequently hired a construction manager, who worked directly for EA Operations and their executive director, Mike Kaplan. (Hr. Tr. pgs. 47-48) The construction manager, John Coleman, was a longtime construction manager as well as a personal friend of Mr. Kaplan's. (Hr. Tr. pg. 56) Mr. Coleman's duties included finding subcontractors to perform the various tasks necessary for the construction of a health club on the premises of Greenville Valley Country Club. (Hr. Tr. pgs. 47-48, Coleman pg. 14) Part of the process involved the

setting of trusses on the roof which, according to the testimony, is a very specialized job. (C pg.8) Coleman found the owner of The Lamar Group, Lauro Martinez, through information he received from a member of Green Valley Country Club. (Coleman pg. 13) Coleman actually went out and observed Lauro Martinez at work and determined that he had the specialized knowledge and ability to put the trusses on the building. He therefore hired The Lamar Group, LLC and Lauro Martinez to set the trusses on the building.

The setting up of trusses requires a specialized crane and there was no certainty as to when this crane would be available. However, when Coleman found out that the crane was going to be available, he contacted Lauro Martinez who brought a crew out to Green Valley Country Club to set the trusses.

The testimony indicates that the crew brought to Green Valley Country Club was not the same crew that Coleman had been observing and, in fact, shortly before Rey Perez was injured Mr. Coleman was in the process of stopping the job because he felt that the actions of the individuals working for Lauro Martinez were unsafe. (Coleman pgs. 40-41)

Perez was injured during the placement of the roof trusses when he was knocked off the top of building receiving injuries to his face, head, jaw, and ear. It was subsequently determined and is not in dispute that The Lamar Group, LLC was subject to the South Carolina Workers' Compensation Act having four or more employees on a regular basis. However The Lamar Group, LLC did not have valid workers' compensation insurance at the time of this injury.

Part of Coleman's duties were to obtain certificates of insurance to ensure that all subcontractors had workers' compensation insurance. (Coleman pgs. 13-14) Doing so insulates the General Contractor under the South Carolina Workers' Compensation Act if an employee of a subcontractor is injured. South Carolina Code of Laws Annotated §42-1-415. However,

because of the exigencies of this particular job, and the sudden availability of the specialized crane, a valid certificate of insurance was not obtained prior to the commencement of work and the subsequent injury of Perez.

The project undertaken by EA Operations at Green Valley Country Club involved the renovation of several buildings at the Country Club as well as portions of the golf course. (Hr. Tr. pgs. 47, 55; Coleman pgs. 11-18) As noted above, a construction license was obtained by EA Operations, albeit illegally, so that they could undertake a construction project. All necessary permits were obtained by Coleman in the name of Green Valley Country Club (Exhibit A) and the license of Durham Greene was illegally used by EA Operation/Green Valley Country Club (Exhibit A 25). Kaplan, the executive director of EA Operations specifically hired a construction manager to oversee the job and let all contracts. Coleman's duties included the overseeing of letting all contracts and the day-to-day operations of the building projects that were occurring at Green Valley. Further, Kaplan maintained direct control over the project and reviewed all contracts before they were actually executed. (Coleman pg. 18) Under the authority of Kaplan, Coleman would actually deal with all of the contractors. (Hr. Tr. pg.48, Coleman pg.18) However, the final approval for hiring of contractors and the price to be paid to them rested with and came directly from Kaplan as Executive Director of EA Operations. (Coleman pg. 18)

When the injury occurred to Perez, the Human Resources Department of Green Valley Country Club generated a first report of injury. (Hr. Tr. pg. 60; Coleman pg. 30) This first report of injury is required by South Carolina Workers' Compensation Commission Regulation 67-411 and was signed by Coleman.

In short, EA Operations and its Executive Director, Mike Kaplan, decided that they would conduct an in-house construction project. To do so they had to obtain a contractor's license which was "loaned/borrowed" from Durham Greene, Inc. in violation of §40-11-110. (Hr. Tr. pg. 47) Because Kaplan did not personally have direct construction experience he hired John Coleman to direct the project with Kaplan maintaining the final right to approve or disapprove the final contracts, work methods, etc. As part of this process, Coleman was supposed to obtain and/or create actual written contracts with all subcontractors and was also supposed to obtain valid certificates of workers' compensation and liability insurance prior to the work commencing. (Coleman pgs. 12-13) However, in this instance that did not occur. Because The Lamar Group, LLC was subject to the South Carolina Workers' Compensation Act and was operating without valid workers' compensation insurance the South Carolina Workers' Compensation Commission joined the South Carolina Uninsured Employers Fund (UEF) as a party to this action.

In this particular case, however, there is no question that Mike Kaplan hired John Coleman to undertake a construction project using Durham Greene, LLC's contractor's license. EA Operations claimed that construction projects were not part of the regular trade, business or occupation of EA Operations, even though Kaplan did all of the groundwork necessary to conduct a construction project to include the obtaining of a contractor's license and hiring of a project manager. Nonetheless, the Full South Carolina Workers' Compensation Commission ordered the UEF to pay the claim rather than EA Operations. (Order)

A hearing was originally held in this matter before the Single Commissioner on April 20, 2016. Commissioner R. Michael Campbell subsequently issued an Order finding that by obtaining a contractor's license and hiring a construction manager to specifically oversee a

construction project, EA Operations had voluntarily made construction a regular part of their trade, business or occupation and, therefore, the UEF was not a proper party and the carrier for Green Valley Country Club, Bridgefield Casualty Insurance Company, should be responsible for this claim. (Order)

EA-Operations appealed and the matter then went before a panel and the full South Carolina Workers' Compensation Commission. Oral Argument was held on January 23, 2017 and on May 25, 2017 the Full Commission unanimously reversed Commissioner Campbell. (Order) They reasoned even though EA Operations was overseeing a construction project, that because EA Operation's regular business was the operating of a Country Club, rather than the building of a Country Club, that, therefore, EA Operations should not be responsible for this claim. (Order)

The sole issue in this case, therefore, is whether, if a company in the business of operating Country Clubs, obtains a contractor's license, hires a construction manager, lets construction contracts, and oversees a construction project they nonetheless can avoid payments under the South Carolina Workers' Compensation Act and require the State of South Carolina to pay the claim.

ARGUMENTS

ISSUE I

WHETHER A COUNTRY CLUB MANAGEMENT COMPANY CAN EXEMPT ITSELF AS A GENERAL CONTRACTOR UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT WHEN IT OBTAINS A CONSTRUCTION LICENSE, HIRES A CONSTRUCTION MANAGER, AND ACTUALLY UNDERTAKES A CONSTRUCTION PROJECT?

As a general rule in order for a company to be subject to the South Carolina Workers' Compensation Act (Title 42) at the time of the injury the employer must be engaged in something that is an important part of its regular trade, business or occupation. South Carolina Code of Laws Annotated §42-1-400; Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E. 2d 49 (1997). However, when any company undertakes a specific trade, business, or occupation; in this case, by creating a construction company and undertaking of construction project they are subject to The Act. §42-1-400.

The issue in this case is whether EA Operations, by doing everything that a company must do to constitute a construction company, and then operating as a construction company, remains exempt from the South Carolina Workers' Compensation Act. Because The Lamar Group, LLC was uninsured at the time of the injury, but subject to the South Carolina Workers' Compensation Act, the South Carolina Uninsured Employers Fund (UEF) is responsible for paying the claim on behalf of The Lamar Group, LLC if, indeed, EA Operations and its insurance carrier, Bridgefield Casualty Insurance Company, can avoid The Act.

THE BASICS

(A) The South Carolina Uninsured Employers Fund was established by an Act of the Legislature in 1992. §42-7-200 governs the operation of the UEF. Specifically, the UEF's purpose is to cover the claims of unscrupulous employers who are subject to the South Carolina Workers' Compensation Act but fail to obtain workers' compensation coverage. In the event an employee of an employer who fails to obtain workers' compensation insurance has an injury, the Commission will order that the claim to be paid by the employer and in the event they are unable or unwilling to do so, the UEF pays the claim and then maintains a lien right over the direct employer for any amounts paid. §42-7-200 (D). The UEF is funded by a tax on insurance

companies and self-insurers; i.e. it is a state run, taxpayer funded, agency. As a general rule, a general contractor is required to obtain a valid certificate of and proof of compensation insurance from a subcontractor in order for the employer/owner to shift compensability to the UEF.

Hardee v. McDowell, 381 S.C. 445, 673 S.E. 2d 813 (2009).

(B) Statutory Employment in South Carolina Code of Laws Annotated §42-1-400 et. seq. recognizes that an owner or general contractor who hires a subcontractor is responsible for the subcontractor's workers' compensation benefits in the event a direct employer does not have workers' compensation insurance. The easiest way of thinking of this is on a construction worksite similar to Green Valley Country Club. When there is a general contractor, which Appellant alleges to be EA Operations, undertakes a construction project and hires subcontractors to perform the work, the general contractor becomes liable for benefits to the employees of the subcontractor and in the event the subcontractor does not have workers' compensation insurance Id. As noted above, the general contractor can avoid liability in the case of an unscrupulous subcontractor if the general contractor obtains a valid certificate of insurance which he has a right to rely on. Hardee. The issue of whether a worker is a statutory employee is jurisdictional and, therefore, the question is a matter of law for the Court. Glass. Therefore, the Court is not bound by the substantial evidence rule, but rather has the power and duty to review the entire record to decide the jurisdictional facts in accordance with the Court's own view of the preponderance of the evidence Id., See also, Woodard v. Westvaco Corp., 315 S.C. 229, 433 S.E. 2d 890 (Ct. App. 1993).

The problems in this case are clearly defined in Glass and Woodard. In both cases the Court held that there were three factors that the Court must consider to determine if the employer is a statutory employer: (1) Whether the activity of the subcontractor is an important part of the

owner's trade business or occupation; (2) Whether the activity performed by the subcontractor is a necessary, essential and integral part of the owner's business; or (3) Whether the identical activity being performed by the subcontractor has been performed by employees of the owner. The Court in Glass held in the event any one of those three factors exist, then the owner is the statutory employer. Commissioner Campbell felt that it was obvious that the Kaplans were in essence starting a new construction company and all the things that they did had the indicia of a new construction company and therefore, by voluntarily undertaking all of the activities of a construction company, they had, therefore, for all intents and purposes made construction a part of their regular trade business or occupation. (Order) The Full Commission, however, viewed EA Operations as a company that operates Country Clubs and not as a construction company, and therefore reversed. (Order)

Further, any questions as to a claimant's employment status either as an employee or a statutory employee are resolved in favor of inclusion within The Act which Commissioner Campbell did, but the Full Commission did not. Shatto v. McLeod Regional Medical Center, 406 S.C. 470, 753 S.E. 2d 416 (2013); Edens v. Bellini, 359 S.C. 453, 597 S.E. 2d 863 (Ct. App. 2004). The Single Commissioner believed clearly that at least two of the Glass factors were met; that one, once EA Operations determined to operate in the same manner as a construction company the work of setting the trusses was an important part of their adopted trade business or occupation and two, that the activity was necessary and an essential part of trade business or occupation that they had voluntarily undertaken. (Order) For some reason, the Full Commission did not directly address the fact that EA Operations had obtained a construction license, obtained construction permits, hired individuals to draw plans for a construction project, hired a construction manager, let contracts for construction and actually oversaw and conducted a

construction project. The UEF asserts that this failure of the Commission to consider these factors was a fatal error to this claim. Further, when considering all of the indicia of a construction company which were undertaken by EA Operations, it is difficult to argue under the Shatto and Edens doctrine of inclusion that the employee, Perez, was not a statutory employee of EA Operations.

The UEF would also point to several other factors that Commissioner Campbell considered but which the Full Commission did not. First, EA Operations actually obtained a contractor's license. The fact that they did so in and of itself should be dispositive of the issue of whether they were a construction contractor. If not, why did they need to obtain a contractor's license? Second, they did other acts not mentioned by the Commission which only a contractor would do with an eye avoiding liability under the South Carolina Workers' Compensation Act. First, they sought to obtain valid certificates of insurance from all of their subcontractors so as to be exempt a statutory employer pursuant to South Carolina Code of Laws Annotated §42-1-415. Second, when this injury occurred, they obtained a first report of injury of the accident which is required of employers operating under The Act by Regulation 67-411. If EA Operations was not operating as construction company, the Human Resources Department of EA Operations would have no reason to obtain a first report of injury as it relates directly to the South Carolina Workers' Compensation Act because if they were not a construction company, but rather a company operating a Country Club, they would have had no reason to believe they had any liability under The Act.

There is no case law the UEF could discover directly governing this particular factual situation. The UEF would submit that the undertakings done by EA Operations to do the construction project in question are so clearly indicative of EA Operations having voluntarily

adopted construction as part of its trade business or occupation that a case like this has seldom come before any Court. In South Carolina there really are no cases directly or closely on point. The South Carolina Courts have noted on numerous occasions, however, that the situation involving the determination of statutory employment must be evaluated on its own merits. See e.g. Myer v. Piggly Wiggly No. 24 Inc., 231 S.C. 261, 500 S.E. 2d 190 (Ct. App. 1998).

EA Operations alleges it was not in the trade business or occupation of construction, but rather its trade business or occupation is the management of the Country Club. Certainly, the Kaplans purchased Green Valley Country Club, which was under financial distress, in order to renovate the Country Club and bring it back to profitability. However, a part of this plan was to do specific upgrades on several portions the property. One of these was the building on which the claimant was injured, a flat roofed clubhouse that was being renovated into a spa/workout facility at the time this accident occurred. However, EA Operations did **NOT** contract the renovations of the building to a general contractor, but rather undertook to do this job as if it was a general contractor itself. Mr. Kaplan obtained (illegally) a contractor's license and then he personally hired Mr. Coleman as a project manager. Kaplan specifically maintained the right of control over the project, and personally maintained a right to approve the contractor choices made by Coleman.

Kaplan, further, setup a series of procedures to be followed. These included estimates, written contracts, and the provision of proof of insurance, all of which were maintained in the HR Department at the Country Club. Unfortunately for the Country Club in the instance of The Lamar Group, LLC the established procedures were not followed. However, clearly all of the elements of being involved in construction and the business thereof were undertaken by Kaplan:

- (1) He obtained a contractor's license;

- (2) He hired a construction manager;
- (3) He established procedures for the construction process;
- (4) He maintained personal control over the ultimate decisions of the construction process.

The UEF would urge that the statutory employment sections of the South Carolina Workers' Compensation Act were designed specifically to protect workers like the Respondent, Rey Perez. The South Carolina Code of Laws Annotated §42-1-400 refers to a project "owner" and clearly includes entities such as the Green Valley Country Club/EA Operations and their Executive Director, Kaplan.

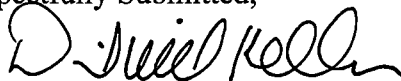
Finally, the UEF would urge that affirmation of the Full Commission's Order in this case sets a bad precedent for future cases of this type. If the argument of Kaplan/EA Operations is adopted by this Court, it is arguable that any company which starts a new line of business, no matter what that may be, will be exempt from workers' compensation laws, particularly the statutory employment sections, any time an injury occurs on the first job they have undertaken. Further, by adopting the Order of Commissioner Campbell and rejecting the reasoning of the Full Commission, the Court will make Bridgefield Casualty Insurance Company responsible for this claim. Bridgefield is an insurance company which accepts premiums to take on workers' compensation risks. These risks include the possibility of a determination of statutory employment. The UEF urges strongly that it is bad public policy to force an agency which is funded by a tax levy to pay a claim when, if the Court applies the reasoning of Shatto and Edéns, a company whose business is to insure workers' compensation cases should be responsible for this claim. The UEF is essentially a public tax fund established as a last resort for the protection of employees against unscrupulous employers. The Court should also take strong notice of the

fact that the contractor's license in this case was never validly issued to EA Operations and at some level EA Operations comes to the Commission and this Court with "unclean hands".

CONCLUSION

It is therefore respectfully submitted that the Order of the Full Commission was in error in reversing the Order of Commissioner Campbell. It is clear from the evidence in this case that EA Operations adopted construction as part of its regular trade business or occupation. Unfortunately for Respondent, Perez, this accident occurred at the very beginning of the construction process, thus allowing EA Operations to claim that while they did everything a construction company does, because this was the first time they had done it, it was not part of their trade business or occupation.

Respectfully Submitted,



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and

South Carolina Uninsured Employers Fund,.....Appellant.

PROOF OF SERVICE

I certify that I have served the forgoing Initial Brief of Appellant and Designation of Matter to be Included in Record on Appeal on Rey Perez, by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2017, addressed to his attorneys of record, Donald E. Kamb, Jr., and Kathryn Williams at Kathryn Williams P.A., Post Office Box 10693, Greenville, South Carolina 29603, and on Green Valley Country Club (EA Operations) and their carrier Bridgefield Casualty Insurance Company, addressed to attorney of record, Tracy Welsh Tiddy, at Willson Jones Carter & Baxley, P.A., 872 S. Pleasantburg Drive, Greenville, South Carolina 29607, and on the South Carolina Workers' Compensation Commission, addressed to Amy Bracy, Judicial Director, P.O. Box 1715, Columbia, South Carolina 29202.

August 23, 2017



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August 23, 2017

Honorable Jenny Abbott Kitchings
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Re: Rey Perez v. Durham Greene, et. al.
SAF No. 12-4308
Case No. 2017-001422
Date of Injury: 3/28/2012
TPGL File No. 04206.00112

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing is the South Carolina Uninsured Employers Fund's *Initial Brief of Appellant* and *Designation of Matter to be Included in Record on Appeal* with Proof of Service.

By copy of this correspondence, we are serving all counsel of record.

Should you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

TURNER PADGET GRAHAM & LANEY P.A.



David H. Keller

DHK/sbd

cc: Donald E. Kamb, Jr.
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