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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AUG 30 2017

SC Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLANT PANEL
The Honorable Susan S. Barden, The Honorable Avery B. Wilkerson, Jr.,
The Honorable Scott T. Beck

Appellate Case No. 2015-001676

Stacey Sellers, Claimant, Respondent,

-vs-

Tech Services, Inc., Employer,
and
Builders Mutual Insurance Company, Carrier/Appellants.

MOTION FOR REINSTATEMENT OF APPEAL

The Appellants, Tech Services, Inc. and Builders Mutual Insurance Company, bring this Motion before this Honorable Court to reinstate their appeal in this matter, pursuant to Rule 260 of the SCACR. The Appellants would show that this Court issued its opinion affirming the South Carolina Workers' Compensation Commission on August 9, 2017. The Appellants intended to file a Petition for Writ of Certiorari seeking review by the South Carolina Supreme Court. The Appellants Petition for Rehearing should have been filed on or before August 24, 2017. However, by excusable neglect the Appellants failed to do so. The undersigned

counsel for the Appellants would show that his co-counsel, who was primarily responsible for handling this matter and arguing this appeal before this Court, recently left to practice at another firm and as a result the undersigned's office failed to properly calendar and file the Petition for Rehearing. The undersigned further would show that the Petition for Rehearing is being filed contemporaneously with this Motion for Reinstatement.

NOW THEREFORE, the undersigned counsel for the Appellants respectively request that this Honorable Court allow for the reinstatement of the appeal in this matter and for the filing of the Petition for Rehearing out of time.

RESPECTFULLY SUBMITTED,



Richard C. Detwiler
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ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

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Builders Mutual Insurance Company, Carrier/Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the **Motion for Reinstatement of Appeal** on all counsel of record by causing a copy of same to be hand delivered on August 30, 2017, addressed as follows:

SC Workers' Compensation Commission
1333 Main St., Suite 500
Columbia, SC 29201

Robert F. Goings, Esquire
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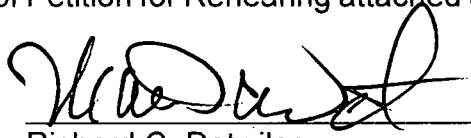
Stacey Sellers, Claimant, Respondent,

-vs-

Tech Services, Inc., Employer,
and
Builders Mutual Insurance Company, Carrier/Appellants.

PETITION FOR REHEARING

The Appellants hereby petition this Honorable Court for a rehearing of this matter, pursuant to Rules 240 and 221 of the SCACR, on the grounds as set forth in the Memorandum in Support of Petition for Rehearing attached and made a part by reference hereto.



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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

In its opinion filed on August 9, 2017 (Opinion No. 5508), this Honorable Court determined that the Respondent Stacey Sellers was a Tech Services' employee rather than an independent contractor. The Appellants hereby respectfully request a rehearing of this matter and that the Court reconsider its decision as its opinion was governed by errors of both fact and law.

STANDARD OF REVIEW

This matter involves the existence of an Employer-Employee relationship and is therefore a jurisdictional question. This court may take its own view of the

preponderance of the evidence. Shatto v. McLeod Regional Medical Center, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting Wilkinson ex rel. Wilkinson v. Palmetto State Transportation Company, 382 S.C. 295, 299, 676 S.E.2d. 700, 702 (2009)). While this scope of review does not require the Court to ignore the findings of the Commission, where there are no findings evaluating witness credibility by the Commission, this Court is left only with the record to make such determinations.

DISCUSSION

“No award under the workers’ compensation law is authorized unless the employer-employee ... relationship existed at the time of the alleged injury for which a claim is made.” McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 469, 313 S.E.2d 38, 39 (Ct. App. 1984). “The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence.” Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 W.E.2d 393, 395 (2015).

The determination of whether a Claimant is an employee or independent contractor focuses on whether the purported employer has the right to control the Claimant in the performance of his work. In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. Wilkinson at p. 299.

This Court's opinion quoted extensively from Dawkins v. Jordan, 341 S.C. 434, 534 S.E.2d 700 (2000) a case specifically overruled by Wilkinson. Thus, this Court fell into the trap of earlier opinions which over-emphasized the direct evidence of the employer's right to or exercise of control over the purported employee. In Wilkinson, a decision in which this court was reversed, the Supreme Court admonished that the analytical framework in Dawkins was overruled "for it most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions." Wilkinson at p. 300. While the Supreme Court in Wilkinson was guided initially by a written agreement, "more importantly" it was "guided by the parties' conduct, which mirrored the terms of the contract." Wilkinson, at p. 300.

In this case, this Court erred in its blanket acceptance of findings of the Workers' Compensation Commission and its over-emphasis on what the Commission perceived to be Tech Services' "right and authority to control and direct the particular work or undertaking" (citations omitted). It ignores the fact that the parties had a contract, just not one reduced to writing, and the parties' actual conduct.

This Court incorrectly adopted the erroneous findings of the Commission that (1) Sellers was instructed by Tech Services on the work he was to perform and his work was supervised, a finding not at all supported by the preponderance of the evidence; (2) Sellers reported to work as he was instructed, again contrary to the clear evidence in the record that Sellers worked as and when he wanted to, including working for other customers who were not customers of Tech Services;

(3) Sellers did not bid for work on any projects he performed for Tech Services, a factor not particularly relevant when all independent contractors who work for Tech Services used the same pricing structure for particular jobs they were hired to do; (4) Tech Services did not inform the general contractor of the project on which Sellers was injured that Sellers was a subcontractor, a fact which has absolutely no relevance to the relationship between Tech Services and Sellers; (5) Tech Services directed Sellers to wear a Tech Services uniform, a finding not supported by the record, which reflects only that Tech Services required Sellers to wear a Tech Services shirt to identify himself on Tech Services jobs only; again, not relevant to any right or authority to control; (6) Sellers carried Tech Services business cards and service contracts which he executed with customers as an agent of Tech Services, a finding which could be consistent with either employment or independent contractor, but ignores the fact that Stacey Sellers also had his own business cards for and submitted invoices on behalf of "Sellers Heating & Cooling," his independent contractor business; and (7) Sellers had the authority to order, purchase and pick up supplies at Gateway Supply using Tech Services' account, again which is not inconsistent with his being an independent contractor and reflects no right of control over Sellers' work.

Stacey Sellers had his own workers' compensation policy from which coverage he specifically excluded himself. Therein lies the rub. He clearly acted as an independent contractor in getting his own workers' compensation policy but made the poor business judgment to exclude himself from its coverage. That poor decision led to this dispute. When an accident occurred and he was injured, Stacey

Sellers specifically requested the managers of Tech Services to lie on his behalf so that he could have workers' compensation coverage under Tech Services' policy.

See, ROA, pp. 303-305; 336. Stacey Sellers never disputed this testimony.

This court also brushes off the fact that Sellers issued invoices for his work and was issued a 1099 by Tech Services, all in the name of "Sellers Heating & Cooling." This court erroneously dismisses these facts because there was no "written independent contractor agreement" as there was in Wilkinson. Based upon the over-emphasis on this fact, this court slides back into the pre-Wilkinson analysis found in Dawkins specifically repudiated in Wilkinson.

With regard to furnishing of equipment, this Court simply deferred to the findings of the Commission for which there was little to no evidence in the record. Where in the record, for example, can it be found that "Sellers was not financially capable of purchasing all of the tools pictured in the hearing exhibits", or that most of the tools were purchased by Tech Services and provided to Sellers? Likewise, it is error to have found that "Sellers was able to charge *any supplies he needed* on a Tech Services account." This is simply not true and is not supported by the record. He was, in fact, allowed to charge supplies for Tech Services jobs. It is also beyond dispute that Sellers worked for other individuals for which he was paid directly. This Court also found that "the evidence was unclear whether Sellers was provided a van by Tech Services," while the record clearly shows that he purchased an old van from Tech Services, by his own admission.

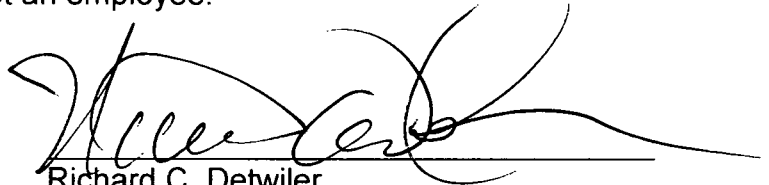
All of these factual errors stem from the confusion created by the Claimant himself, colored by the familial relationship between Stacey Sellers and Tracy Davis, the owner of Tech Services. The record reflects, and it is undisputed, that the Claimant spoke to Tracy Davis about becoming an independent contractor. It is also undisputed that Tracy Davis, while trying to talk the Claimant out of becoming an independent contractor, gave in to this request and attempted to help his cousin. As this Court pointed out, the record reflects that Sellers paid for all costs associated with his van after March, 2013. There was no logical explanation for Sellers paying the regular expenses, including gas, for the van if he was an employee. And, while there may have been conflicting testimony about how Stacey Sellers paid for the van, there is no dispute among the parties and witnesses that the van was transferred to him.

This Court also erred in determining that the method in which Sellers was paid did not strongly favor an independent contractor relationship. It is undisputed that the Claimant was paid on a Form 1099 based upon the invoices he submitted to Tech Services in the name of "Sellers Heating & Cooling." He was paid by the job or by the task according to a fixed schedule. For some tasks, he was paid one price, and for other tasks he was paid another price, based upon this fixed schedule. This was the exact same way Tech Services paid its other independent sub-contractors. See, ROA, p. 297-298.

Tech Services did not have the right to terminate Sellers without liability at the time of his injury. While Tech Services certainly had the right not to use Stacey Sellers as an independent contractor, it is not disputed by the evidence in the record

that it had an obligation to pay him for any work he performed according to the fee schedule and for the jobs he was given.

For the foregoing reasons, this Court should re-hear this matter and re-evaluate the record on appeal, and issue a new opinion reversing the South Carolina Workers' Compensation by determining that Stacey Sellers was an independent contractor and not an employee.



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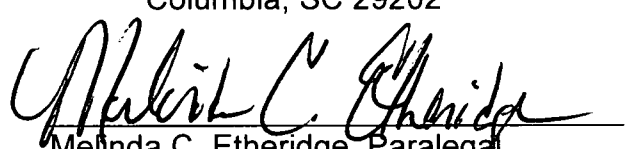
PROOF OF SERVICE

I certify that I have served a copy of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** on all counsel of record by causing a copy of same to be hand delivered on August 30, 2017, addressed as follows:

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1333 Main St., Suite 500
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Columbia, South Carolina
August 30, 2017

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CALLISON  TIGHE

August 30, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1220 Senate Street
Columbia, SC 29201

**RE: Stacey Sellers v. Tech Services, Inc. and
Builders Mutual Insurance Company
SCWCC No. 1315454
Appellate Case No. 2015-001676
Our File No. 3399.383**

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Dear Ms. Kitchings:

Enclosed for filing with your office please find the following:

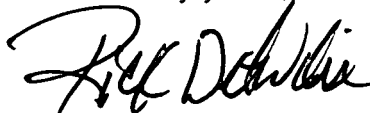
1. The original and six (6) copies of Motion for Reinstatement of Appeal, along with Proof of Service; and
2. The original and six (6) copies of Petition for Rehearing and Memorandum in Support of Petition for Rehearing, along with Proof of Service.

By copy of this letter, I am serving copies of same upon the South Carolina Workers' Compensation Commission and all counsel of record.

Thank you for your assistance in this matter.

With kind regards, I am

Sincerely yours,



Richard C. Detwiler

RCD/mce
Enclosures

cc: SC Workers' Compensation Commission (w/enclosures) - Via Hand-Delivery
Robert F. Goings, Esquire (w/enclosures) - Via Hand-Delivery
Jacqueline M. Pavlicek, Esquire (w/enclosures) - Via Hand-Delivery
Tech Services, Inc. (w/enclosures) - Via U.S. Mail
Janey Wilson, Builders Mutual Ins. Co. (w/enclosures) - Via Email