THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lensik, Administrative Law Judge

Appellate Case No. 2017-001797

David Eastman, d/b/a Grading and Landscaping Material Company . . . . . Appellant

v.

South Carolina Department of Labor Licensing and Regulation, South Carolina Contractor's Licensing Board . . . . . Respondents

---

BRIEF OF THE APPELLANT

Melvin Hutson (SC Bar ID 2850)
MELVIN HUTSON, PA
33 Southview Ledge Road
Landrum, SC 29356
(864) 241-4000
mrhlaw@bellsouth.net

September 22, 2017

Other Counsel of Record:

Kyle Tennis, Esquire
P.P. Box 11329
Columbia, SC 29211-1329

TABLE OF CONTENTS

Table of Contents 1

Table of Cases 2

Statement of Issues on Appeal 3

Statement of the Case 4

Argument 7

1. Standard of Review 7

2. Factual Issues 7

3. Does the statute prohibit a contractor, who does not have a license and is not otherwise required to be licensed, from performing very small amounts of work covered by the statute? 8

A. What deference, if any, should be given to the interpretation of the statute by the Contractor's Licensing Board? 9

B. Is the Ruling Below Consistent with the Purposes of the Licensing Statute? 11

C. This Case Should be Dismissed because Eastman Performed Less than $5000 of work in the Concrete category. 12

4. Is the Board's Decision Inconsistent with its Deregulation of "Heavy" Construction? 13

TABLE OF CASES

Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E. 2d 751, 753 (2007) 8

Christopher v. Smithkline Beecham Corp., 132 S.Ct 2156, 2166-69 (2012) 10

Kiawah Dev. Partners, II v. Dep't of Health & Environmental Control, 411 S.C. 16, 30-36, 766 S.E.2d 707, 717-719 (2014) 9

Town of Summerville v. North Charleston, 378 S.C. 107, 662 S.E. 2d 40 (2008) 8

STATUTES CITED

S.C. Code Ann. § 1-23-380 7

S.C. Code Ann. § 40-11-20(23) 12

S.C. Code Ann. § 40-11-30 5, 8

S.C. Code Ann. § 40-11-300(A) 9

S.C. Code Ann. § 40-11-370(C) 4

S.C. Code Ann. § 40-11-410(4)(B) 7

S.C. Code Ann. § 49-11-110

STATEMENT OF ISSUES ON APPEAL

1. Does the statute prohibit a contractor, who does not have a license and is not otherwise required to be licensed, from performing very small amounts of work covered by the statute?
2. Is the Contractor's Licensing Board's decision inconsistent with its deregulation of "Heavy Construction"?

STATEMENT OF THE CASE

David Eastman is an individual with a place of business near Travelers Rest, South Carolina where he has performed earthmoving and landscaping services for more than 30 years. His unincorporated business is done under the name of Grading and Landscaping Materials Company. He does not have a contractor's license issued by the Contractor's Licensing Board and has never had one.

He performed work for a resident of the Travelers Rest area on a relatively small pond and a larger lake that were no longer retaining water. He received some payments, but when the payments stopped, he ceased doing work and file a lawsuit in Greenville County (case number 2014-CP-23-00524, filed January 28, 2014) to collect the additional amounts he believed to be due. Before beginning work, David told the defendant in that suit that he was not a licensed contractor, but the Defendant filed a complaint with the Contractor's Licensing Board, and moved to dismiss the lawsuit on the basis that David did not have a license. The licensing statute, S.C. Code Section 40-11-370 (C) provides "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." The defendant also filed a counter claim. This action has been stayed pending the outcome of this appeal.

The date of the complaint to the Contractor's Licensing Board is unknown but the Citation and Notification of Penalty is dated December 17, 2014 and the amount of the penalty imposed is $500. Of course, the amount in dispute in the underlying lawsuit far exceeds the $500 penalty, and, unless this court reverses the decisions below, Eastman will not be able to purse his claim in Greenville County but the defendant will be able to pursue his counterclaim against him.

There are several exemptions and exceptions to the general requirement in S.C. Code § 40-11-30 that contractors be licensed. Some exceptions are created by the statute itself and some by decision of the Contractor's Licensing Board. For the purposes of this case, it is undisputed that contractors who do grading and landscaping work are not normally required to have a license. Likewise, contractors who do "heavy construction" which includes building dams and similar structures are not required to be licensed by this agency. However, the Licensing Board's investigator issued a citation to David because, in addition to the earth work he did, David did some work in connection with pouring concrete, he repaired some PVC piping and he placed concrete culverts in a stream to allow access across that stream.

David denied that he had done any work that required a license and, alternatively, defended on the basis that the work allegedly requiring a license was valued at less than $5000. The licensing statute does not require that a contractor have a license to do a job for less than $5000, S.C. Code § 40-11-30.

The Contractor's Licensing Board heard evidence and arguments on the issues before Commissioner Legrand Richardson, Jr. on June 6, 2016. Commissioner Richardson affirmed the citation in a decision dated June 16, 2016, stating (among other things):

> 3. The intent of the parties is difficult to determine because of conflicting testimony of the witnesses and the lack of a written contract between the parties. However, balancing the credibility of the testimony and a review of the documents submitted, specifically Respondent's own invoice number 3543 (State's Exhibit 2), provides sufficient evidence that Respondent's work on the Subject Property was over $5000 and that Respondent should have been licensed pursuant to S.C. Code Ann. § 40-11-410(4)(b) (General Contractor-Specialty-Concrete). This concrete licensing subclassification requires a license for all work in connection with concrete forming and placing; assembling of forms, molds, slipforms and pans; centering, trenching, excavating, backfill and grading in connection with concrete construction. **The Board has interpreted that the $5000 construction amount in S.C. Code §40-11-30 is for the total cost of construction, so Respondent's argument that the regulated concrete work was for less than the $5000 construction amount is not accepted.**

> Furthermore, Respondent's testimony of this work and the equipment used on the Subject Property for this project included work in connection with concrete forming and placing and included excavating, backfilling and/or grading in connection with the concrete construction. (Emphasis added)

Commissioner Richardson's decision does not mention piping or concrete culverts and it does not make a finding on the actual value of the concrete work performed. David Eastman's evidence that the total cost of the concrete poured was only $1,737 and that the accepted cost of concrete work is double the cost of the concrete itself [Respondent's Exhibit 2 and tr. 84:23-85:24] is not contradicted. Likewise, although there is some conflict in the testimony, there is agreement that a separate, unconnected company that specializes in concrete work, Bacilio Ramirez Concrete Company, poured and finished the concrete [tr. 19:20-20:20]. Eastman's work relating to the concrete involved grading the area and moving the concrete from the concrete delivery truck to the site where it was poured in the bucket of his skid-steer because the concrete delivery truck could not drive to the area where the concrete was poured.

Eastman appealed the Commissioner's decision to the Administrative Law Court of July 12, 2016. The Administrative Law Court did not hold a hearing in this matter and issued its final decision affirming the decision of the Contractor's Licensing Board on July 28, 2017.

There is a great amount of conflict in the testimony before Commissioner Richardson about what work David Eastman performed and whether that work was good. The Administrative Law Court's statement of fact is based completely on the testimony of the landowner and ignores David Eastman's evidence. However, those facts need not be an issue before this court. The decision of the Licensing Board is based solely on the

facts that (1) Eastman did some small amount of work in connection with pouring concrete and (2) the total amount of work he performed significantly exceeded $5000.

The Notice of Appeal to this Court was filed and served on August 24, 2017.

ARGUMENT

1. *The Standard of Review.*

Judicial review of agency decisions is governed by S.C. Code § 1-23-380 which prohibits the court from substituting its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. It imposes no such limitation on issues of law or statutory interpretation. It is well established that determining the proper interpretation of a statute is a question of law and the court reviews questions of law de novo, *Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E. 2d 751, 753 (2007); *Town of Summerville v. North Charleston*, 378 S.C. 107, 662 S.E. 2d 40 (2008).

2. *Factual Issues.*

Eastman disagrees with many of the facts discussed in the Commissioner's decision. However, he does not seek review of those factual decisions by this court. The Findings of Fact section of the Commissioner's decision consists of six paragraphs which contains a recitation of the testimony of the various witnesses. The testimony of the parties on most issues differs dramatically and the Commissioner did not attempt to resolve most of those issues. Instead, in paragraph 3 of his Conclusions of Law he explained that he relied on only two facts.

First, he found that the total value of the work done exceeded $5000. That finding was not at issue. Eastman's bill sought a total of $78,398.28. That amount is contested in the underlying court case but there is no dispute that he was paid $36,500.

Second, he found that Eastman's work "included work in connection with concrete forming and placing and included excavating, backfilling and/or grading in connection with the concrete construction."

Those two facts are the only facts relied on to justify the determination that he should have been licensed. The Administrative Law Court made findings on many other factual issues including such things as placing concrete culverts in a creek and repairing some PVC pipe. All those factual findings are improper. That court did not see the testimony and should not make findings on disputed facts. It also should have limited its review of the case to the facts relied upon by the Agency.

The Commissioner did not make any factual finding about the value of the concrete work. In his view, the amount was irrelevant. However, it appears from the decision that he accepted Eastman's evidence that it was significantly less than $5000. Eastman placed the total value of all concrete work performed at approximately $3500, with half that being the cost of the concrete itself. The cost of the "excavating, backfilling and/or grading" that the Commissioner found Eastman had done was not determined but we suggest that if a finding had been made on it, it would have been only a few hundred dollars—likely less than 1% of the total cost of the work done.

3. *Does the statute prohibit a contractor, who does not have a license and is not otherwise required to be licensed, from performing very small amounts of work covered by the statute?*

The statute specifically addresses the $5000 minimum size a job must be for a license to be required. S.C. Code § 40-11-30 states:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

However, the statute does not address the question presented here of what happens when a contractor doing a large job which is exempt from the licensing process preforms a small amount of work where a license would be required if that work exceeded $5000.

There is a section of the code that makes it unlawful to divide work into portions "to avoid the financial or other requirements of this chapter as it relates to license classifications or subclassifications or license groups, or both." S.C. Code § 401-11-300(A). The statute requires different levels (or classifications, subclassifications and groups) of licensing depending on the size of the job and section 300(A) is referring to those provisions and not the $5000 minimum.

Not only is the statute silent of this issue, there is no indication that it has ever been considered by a court in this state.

A. *What deference, if any, should be given to the interpretation of the statute by the Contractor's Licensing Board?*

Courts certainly consider the view of an agency charged with administering a statute when deciding statutory interpretation cases. In fact, courts will defer to an agency's interpretation of the statute, at least where the court finds that the agency's interpretation is worthy of deference, see *Kiawah Dev. Partners, II v. Dep't of Health & Environmental Control*, 411 S.C. 16, 30-36, 766 S.E.2d 707, 717-719 (2014) and the cases cited therein.

In this case, deference is not warranted. First, there is nothing in the statute that compels extending the licensing requirement in this situation. In fact, the Agency's interpretation would logically extend its licensing requirements to almost comical situations. For example, if an unlicensed landscaping contractor installed a fence post and poured a single bag of concrete mix into the post hole, he would be in violation of this statute.

Second, the Agency has not always held to its current view. Appellant provided the Administrative Law Court with a copy of an official South Carolina Licensing Board publication describing some of the situations were no license is required. It contains the following statement:

> No license is required for commercial work performed for exterior siding at this time. If related repair work is performed on a commercial structure, it cannot exceed $5000 unless performed by a licensed building general contractor.

A copy of that publication is attached to this brief as Exhibit A. The significance of that exhibit is that it shows the Licensing Board has been inconsistent in interpreting the provision on the minimum $5000 cost for requiring a license. The Administrative Law Court did not consider that argument. It acknowledged the publication in footnote 8 (page 10) and replied to it by stating that "substantial evidence supports a finding that Appellant's work did not fall within these exempt classifications."

Inconsistent or changing interpretations of a statute have been recognized by the U.S. Supreme Court as one of the situations where deference should be withheld, *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct 2156, 2166-69 (2012). In that case, the U.S. Department of Labor changed its interpretation of whether certain pharmaceutical representatives were employed as "outside salesmen." Among the reasons the Court gave for rejecting deference is that the change was announced in an enforcement action and the affected employers did not have advance notice that the change was to be made. The case precedent in South Carolina is based on the U.S. Supreme Court's analysis of the reasons for deferring to interpretations of a statute or regulation by an expert agency with special expertise in the field. Thus, this decision refusing to uphold a change in position announced in an enforcement action is particularly persuasive.

That unfairness consideration should prevail here. The Contractor's Licensing Board did not give advance notice of its change of position on the $5000 minimum for licensing and it has

not to date given any explanation for the reasoning for the change or the reasoning for its current interpretation. Those factors should be sufficient to deny deference.

B. ***Is the Ruling Below Consistent with the Purposes of the Licensing Statute?***

The licensing statute is a comprehensive law that establishes a Board with broad authority to determine the qualifications of people and entities performing construction and related work and to regulate, inspect and penalize inadequate performance. In creating that system, the legislature decided not to require licenses for people who performed small jobs. The legislature's reasoning is not explained but it is apparent that regulation of such small jobs was not considered to be a public necessity. The Board's construction of the $5000 minimum is inconsistent with that apparent intention. If David Eastman had done only the concrete work for his customer, the Board would have had no interest in him because of the size of the job and it would not have considered issuing a citation. What difference does it make that he also did other admittedly unregulated work for a much larger amount? The answer is that it makes no difference at all as far as the quality of work, his qualifications to do the work or any other aspect of the work.

That lack of a difference in any aspect of the work compels the rejection of the Board's position in this case. In the absence of a difference in the work, the only thing the Board gains is extending its authority over a person who had no reason to believe that he was subject to it regulation and licensing requirements. Expanding the scope of the Board's authority without accomplishing anything that benefits the public is not consistent with the purpose of the statute or the overall statutory scheme.

Third, the Contractor's Licensing Board has not explained its rationale for the interpretation of the statute it advocates. The Commissioner's decision does not address the

issue at all. Its brief to the Administrative Law Court only refers to the statutory definition of the "total cost of construction" in S.C. Code § 40-11-20(23). That section does not address the question of how to interpret the $5000 minimum for licensing. The statutory definition of "total cost of construction" may not be totally inconsistent with the Board's position but it certainly does not compel or even support that interpretation.

C. ***This Case Should be Dismissed because Eastman Performed Less than $5000 of work in the Concrete category.***

The licensing statute exempts jobs of less than $5000 from the requirement that the contractor have a license. Does that exemption apply to Eastman? Numerous cases have held that statutory interpretation is a two-step process and the first step is deciding if the plain language of the statute speaks directly to the issue. It would certainly be reasonable to conclude that it does and that the statute is inconsistent with the Board's citation.

If it is determined that the plain language of the statute does not speak to the issue, the analysis must advance to the second step, i.e. determining whether the Board's interpretation of the statute is reasonable and consistent with the statutory purpose. In that case, for the reasons discussed above, the Board's position should still be rejected. Bringing Eastman under the licensing requirement does little or nothing to advance legitimate statutory objectives and does very significant harm to him. It is also unfair to him because he did not have advance notice of the purported requirement for a license and had no reason to think a license was required. Thus, the decision below should be reversed and this case dismissed.

4. ***Is the Board's Decision Inconsistent with its Deregulation of "Heavy" Construction?***

Since 1999 Heavy Construction has been exempt for a licensing requirement in South Carolina. Dam construction has always been included in the category of Heavy Construction. There is no definition of Heavy Construction in the statute and the rationale for excluding it has

not been published. However, Appellant believes and has argued below that the logical reason for excluding it is that dams, dam construction and dam maintenance are strictly regulated by other agencies. Federal regulation applies on certain waterways and the Corp of Engineers administers those regulations. If state regulation applies the South Carolina Department of Health and Environmental Control administers the regulation.

The South Carolina Dams and Reservoirs Safety Act, S.C. Code § 49-11-110 et seq. specifically assigns the regulation of Dams to the Department of Health and Environmental Control and that Department has adopted detail and extensive regulations on the construction and maintenance of dams, see S.C. Code of Regulations, Chapter 72.

The concrete work at issue in this case was done on a pond and a lake. Both bodies of water were impounded by dams. The purpose of licensing contractors is ultimately to ensure that construction work is done by qualified individuals who know the proper ways to perform specific jobs and who will perform the work in a proper fashion. Since the Contractor's Licensing Board is not involved in any way with dam construction, it should not be involved in examining or licensing contractors to do such work. Having it involved in dam work creates a double set of regulations and regulators and creates a potential for conflicting requirements.

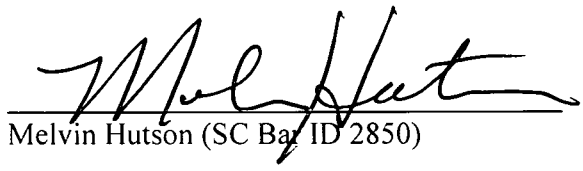
This Court should conclude that it is inappropriate for this Agency to make any rulings or requirements concerning work performed or to be performed on dams. Since Eastman's work at issue in this case was all performed on dams, that ruling would preclude enforcing the Board's order here.

CONCLUSION

For the foregoing reasons, Appellant, David Eastman d/b/a as Grading and Landscaping Materials Company, asks that this court dismiss the citation issued against him hy

the South Carolina Contractor's Licensing Board and declare that he was not in violation of the South Carolina licensing statute when the performed the work at issue in this case.

Respectively submitted this 22nd day of September 2017.



Melvin Hutson (SC Bar ID 2850)

MELVIN HUTSON, PA
33 Southview Ledge Road
Landrum, SC 29356
(864) 241-4000
mrhlaw@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Initial Brief has been served on the following by first class mail this 22nd day of September 2017.

Kyle Tennis, Esquire
Assistant Disciplinary Counsel
Office of General Counsel, Office of Disciplinary Counsel
South Carolina Department of Labor Licensing and Regulation
110 Centerview Drive
P.O. Box 11329
Columbia, SC 29211-1329

Melvin Hutson

LAW OFFICES
MELVIN HUTSON, P.A.

WEBSITE:
melvinhutsonpa.com

33 SOUTHVIEW LEDGE ROAD
LANDRUM, SOUTH CAROLINA 29356
(864) 241-4000

FACSIMILE: (864) 241-4000
SENDER'S EMAIL:
mrhlaw@bellsouth.net

October 3, 2017

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Appellant's Brief

Dear Ms. Kitchings:

In response to your letter of September 26, 2017 a signed copy if the Initial Brief of the Appellant in David Eastman, d/b/a Grading and Landscaping Materials Company v. South Carolina Department of Labor, Licensing and Regulation and South Carolina Contractor's Licensing Board. Appellate Case No 2017-001797 is enclosed.

Also, please note the change in my address to"

33 Southview Ledge Road
Landrum, SC 29356

Thank you for your attention to this matter.

Very truly yours,

Melvin Hutson

cc: Kyle Tennis, Esquire
South Carolina Administrative Law Court