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SC Court of Appeals

DECISION AND ORDER
OF THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1600686

Francisco Cedano Ramirez,

Employee/Claimant

Appellant,

vs.

May River Roofing, Inc.,

Employer,

and

American Zurich Insurance Co.,

Carrier,

Carrier,

and

Cedano Roofing,

Employer,

and,

Travelers Property & Casualty Co.,

Carrier,

Respondents,

Appellate Panel Decision and Order filed

March 30 2018

APPEARANCES:

Employee/ Claimant/ Appellant Francisco Ramirez Cedano, represented by
Joseph DuBois, Esquire
of Hilton Head, South Carolina

Employers/ Carriers/Respondents represented by
 Nikole D. Haltiwanger, Esquire
 of Columbia, South Carolina

PANEL:
 Commissioner R. Michael Campbell, II,
 Commissioner T. Scott Beck
 Commissioner Avery B Wilkerson, Jr.

APA SUBMISSIONS

At the time of the hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, the parties have made records and reports on the following a part of the Record in this matter:

Claimant's APA:

APA #	EXHIBIT	NO.
1	Beaufort County EMS records	1-4
2	Beaufort Memorial Hospital	5-104
3	Dr. Leland Stoddard completed medical questionnaire	105
4	Francisco Cedano Ramirez deposition transcript	106-116
5	Leslie Sandoval deposition transcript	117-134
6	Travelers workers compensation policy issued to Francisco Cedano d/b/a Cedano Roofing	135-155
7	Certificate of Liability Insurance dated 9/9/2015	156
8	American Zurich subpoena response dated 4/11/2016	157-197
9	Construction Agreement	198-200
10	May River Roofing check	201
11	Travelers subpoena response	202-316

Defendants' May River Roofing APA

TAB	EXHIBIT	NO.
A	Certificate of Insurance for Francisco Cedano Ramirez d/b/a Cedano Roofing	317-318
B	Records from May River Roofing	319-320
C	Claimant's 2014-2015 tax returns	321-373
D	Claimant's 2013 tax returns	374-400

E	Deposition Transcript of Francisco Cedano Ramirez	
F	Deposition Transcript of Leslie Sandoval	

Defendants' Travelers APA:

TAB	EXHIBIT	NO.
E	Insurance policy application of Francisco Cedano Ramirez d/b/a Cedano Roofing	320-327
F	Claimant's 2014-2015 Tax returns	328-380
G	Claimant's 2013 Tax return	381-407
H	Deposition Transcript of Francisco Cedano Ramirez	

STIPULATIONS

The parties have stipulated to the jurisdiction of the South Carolina Workers' Compensation Commission.

The parties have stipulated to venue in Yemassee, South Carolina.

The parties have stipulated that Claimant's average weekly wage is \$769.35 with a resulting compensation rate of \$512.93.

The Commission file with the exception of self-serving declarations and unstipulated medicals are made a part of the Record.

STATEMENT OF THE CASE

This matter is before the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") upon the petition for review by the Claimant, Francisco Ramirez Cedano ("Claimant"), from a decision and order ("Order") of Commissioner Gene McCaskill ("Single Commissioner") entered on May 23, 2017. The case involves two claims filed by Claimant arising out of the same accident, which occurred on January 18, 2016. Claimant filed one claim against the insurance policy for May River Roofing, Inc. ("May River"), alleging that he should have coverage under its policy, either as a direct employee or as a statutory employee.

This claim was assigned SC WCC No. 1600686. May River and its Carrier, American Zurich Insurance Company ("Zurich") denied the claim on the grounds that Claimant was an independent contractor and that it collected a certificate of insurance from Claimant covering his business, Cedano Roofing, thereby insulating May River. Claimant then brought a second claim, assigned SC WCC No. 1608257, against his company, Cedano Roofing, and its Carrier, Travelers Property Casualty Company of America ("Travelers"), alleging that he was individually covered for the claim by the plain language of the subject Cedano Roofing policy with Travelers. Travelers denied the claim on the grounds that Claimant did not elect coverage and therefore was not covered under the policy. The claims were consolidated pursuant to Claimant's request under SC WCC NO. 1600686 and SC WCC No. 1608257 was closed.

The parties were heard by Commissioner Gene McCaskill on November 17, 2016, in Jasper County, South Carolina. Following the hearing, Commissioner McCaskill issued his Decision and Order on May 23, 2017, finding Claimant was a sole proprietor who was not included under Cedano Roofing's workers' compensation policy. Additionally, the Commissioner determined Claimant was not an employee of May River Roofing or Cedano Roofing. The Commissioner also found Claimant could not recover as a "statutory employee" of May River Roofing or Cedano Roofing.

Within the statutory period, Claimant filed an Application for Review, a copy of which was furnished to all interested parties prior to oral arguments presented before an Appellate Panel on January 22, 2018, and comprised of Commissioners R. Michael Campbell, II, T. Scott Beck, and Avery B Wilkerson, Jr. All proffered testimony had been taken. Such together with all documentary evidence was delivered by oral argument to the individual members of the Appellate Panel convened on the aforesaid date.

By appeal, Employee/ Claimant/ Appellant Francisco Ramirez Cedano respectfully submitted sixty-seven (67) errors in his Application for Review, which were narrowed to the following three (3) issues:

1. Did the Single Commissioner err in finding that Claimant did not have coverage under Cedano Roofing's insurance policy with Travelers?
2. Did the Single Commissioner err in finding that Claimant did not have coverage under May River Roofing's insurance policy with Zurich as a direct employee of May River Roofing?
3. Did the Single Commissioner err in finding that Claimant did not have coverage under May River Roofing's insurance policy with Zurich as a statutory employee of May River Roofing?

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1976), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the record for this matter, and listening to and considering the statements and arguments of Counsel, a majority of the Appellate Panel hereby affirms the decision and order of the Single Commissioner as follows below.

EVIDENCE OF THE CASE

In his Form 50, *Employee's Request for Hearing*, Claimant alleged injuring his back, spine, right arm, left arm, left wrist, left hand, neck, pelvis, and chest as the result of falling from a roof on January 18, 2016.

By way of background, May River contracted with Anchor Construction to perform roofing

work for a residential home in Bull Point, a subdivision in Beaufort, South Carolina. May River subcontracted part of the roof installation work to Cedano Roofing. Cedano Roofing is a sole proprietorship, with the sole proprietor being Francisco Cedano Ramirez ("Claimant"). On January 18, 2016, Claimant was working on the Bull Point property. *See* Transcript of Hearing (hereinafter "T.") 36. Claimant fell from a ladder sustaining physical injuries. T. 36. These facts are not disputed.

In the Cedano Roofing insurance application, Claimant marked himself as excluded. T. 24. When signing up for the policy, Isabelle Diaz, Hispanic Business Specialist at PC&L, testified that she specifically recalled meeting with Claimant when he initially applied for coverage. T. 13-14. She spoke to Claimant in his native language of Spanish. T. 13. She explained the coverage being purchased and further explained what the difference in premiums would be if Claimant chose to elect coverage for himself, T. 13. Diaz further explained the consequences of Claimant not electing to cover himself under the policy, T. 14, and was able to authenticate Claimant's signature on the application, T. 29. Claimant opted not to cover himself in order to have a less-expensive premium, T. 13-14. Ultimately, Travelers issued a workers compensation insurance policy to Claimant. *See* APA 137-155. Although Claimant argues that, pursuant to the parole evidence rule and a merger clause contained within the policy, evidence of coverage extrinsic to the policy language itself is irrelevant, I find such argument to be non-persuasive.

Typically, for any given project, May River only interacted with Claimant when it submitted the work order to him and received an invoice from him. APA 120. Primarily, Claimant had free reign to work how and when he desired. Claimant was not supervised; instead, May River would only visit a job site once the project was completed to ensure the work had been performed. APA 120. May River did not supervise the amount of work Claimant performed; instead, May

River relied on invoices submitted by Claimant to determine remuneration for a given project. APA 114, T. 51, 56. Additionally, Claimant was free to alter the work order, unless it substantially altered the contract. APA 113-114. Claimant was not required to check in with May River nor keep it apprised of his schedule; instead, Claimant created his own schedule—he was “on his own time.” APA 124, *see also* T. p. 60. Claimant was also free to negotiate the price of what he would get paid on a job by job basis. T. 59. Finally, Claimant chose his own employees, without requiring the approval of May River. APA 111. Claimant paid his employees, APA 111, not May River—who may or may not have known of the existence of Claimant’s staff and had no part in selecting Claimant’s workers, APA 120.

May River required its subcontractors to display its logo on shirts and magnets, but this was for advertisement purposes. APA 119, T. 34. May River obtains business exclusively through referrals. APA 131. To that end, it also provided t-shirts and magnets (as well as hats, sweatshirts, and occasionally jackets) as gifts in great abundance including but not limited to May River’s landlord, its clients, staff, subcontractors, and even people it had not met such as when the company sponsored a community event. APA 119, T. pp. 63-64.

As for payment, May River and Claimant negotiated the contractual price of \$60.00 per 10 x 10 square of roofing laid, APA 123, and Claimant would invoice May River for any repairs performed (amounting to approximately \$25/hour), APA 109, 123. Claimant negotiated his rate per square from \$55.00 to \$60.00, which was higher than what May River paid its other subcontractors. APA 129, T. 41, 59. Payments were not paid on any regular interval: May River would pay Claimant by check the week after a job was completed. APA 114, T. 35. Then, Claimant was responsible to pay his employees however he saw fit. APA 111, T. 42. Additionally, May

River did not withhold any employee deductions from Claimant's pay; instead, May River issued Claimant a 1099, which Claimant used to file taxes in the name of his business. T. 45-46, 62.

Claimant procured all of the tools/equipment required to complete each job: truck, ladder, compressor, roofing gun, tool pouch, hammer, razors, etc. APA 109. Meanwhile, May River, acted as a vendor in supplying materials to Cedano Roofing. May River would provide only those materials for which it would bill the ultimate client; for instance, it would provide shingles, paper, plastic, caps, and flashing. APA 109, 124.

For larger projects, the contract between the parties was signed prior to the work; for smaller projects, the contract is signed after the work is completed. APA 114, 120. May River decided on this system to save its subcontractors time—instead of having to drive to the May River office for every change that arose at the job site, the hardcopy contract was formalized at the end of smaller jobs. APA 129.

Finally, Claimant filed taxes for his business and represented Cedano Roofing to the state and federal government as a distinct legal entity for tax purposes. T. 45-46. In addition, Claimant purchased workers' compensation insurance for the business, from which he knowingly excluded himself. T. 13-14. He provided May River with a certificate of insurance for his business. T. 62. Although Claimant asserts that because the requirements of S.C. Code 42-1-110 were not strictly met, see T. 67, line 8, it is inapplicable. We find such assertion to be non-persuasive. Beginning on June 2, 2015, Cedano Roofing's carrier, PC&L, automatically sent May River a Certificate of Insurance for Cedano Roofing's workers' compensation policy. APA 120, 121. Had one of Claimant's workers been injured, coverage would exist under Cedano Roofing's policy.

FINDINGS OF FACT

1. The Claimant suffered an injury by accident on January 18, 2016, when he fell from a roof. The event is not in dispute. Based on the evidence in the record, the Claimant was clearly performing work at the time of the accident that meets the requirement under the Act for an accident to be found to be compensable.

2. What is in dispute is whether the Claimant was an employee or an independent contractor at the time of his accident.

3. Should he be found to be an employee, he would then be entitled to coverage under May River's workers' compensation policy.

4. Should he be found to be an independent contractor, the question then would be did he elect coverage under the workers' compensation policy he purchased for Cedano Roofing?

5. Entitlement to benefits hinges on those determinations stated in Finding of Facts 2-4.

6. As to the question of whether the Claimant is an employee or an independent contractor, there is evidence in the record that weighs to both. However, based on the preponderance of the evidence, we must conclude that the Claimant is an independent contractor.

7. The Claimant owns his own company – Cedano Roofing. That company has its own workers' compensation insurance coverage.

8. Ms. Isabelle Diaz testified at the hearing. She is the agent who wrote the coverage for the Claimant. Ms. Diaz is bilingual and explained in Spanish to the Claimant exactly what type of policy he was purchasing. She testified that the Claimant purchased what is commonly referred to as a "ghost policy". In other words, it is a policy that covers no one because the

Claimant has no employees. Ms. Diaz testified that the Claimant did not select coverage for himself.

9. We found Ms. Diaz to be very credible. The Single Commissioner questioned as to whether she carried errors and omissions insurance coverage. She testified that she did. She also testified that she had never had a claim filed against her.

10. Claimant testified that his company files tax returns.

11. When we consider the controlling factors as to whether an individual is an employee or an independent contractor, the weight of the evidence is clearly on the side of the Claimant being an independent contractor. In addition to having his own workers' compensation insurance, the Claimant has his own truck, his own tools and his own ladder. If he hires someone to assist him with a job, he does the hiring and that individual(s) answer solely to him. He pays them out of what he is paid for the job.

12. There was testimony at the hearing as to how the roofing job is priced. The Claimant forthrightly testified that he prices roofing jobs he performed for May River by the "square" which is a common way that roofing and re-roofing projects are priced. Three bundles of shingles are equal to a "square".

13. He, at another time during testimony, testified that he was paid \$25.00 an hour.

14. We are not persuaded that his testimony is inconsistent on that point. The Claimant did both complete roofing jobs for May River as well as smaller repair jobs.

15. That being said, he also testified that he had a salary, but that it was not fixed. He testified that it was approximately \$1,200 a week.

16. Claimant testified that May River provided the building materials.

17. Claimant testified that May River would assign him a project and that he would begin work normally at 8:00 or an hour before or after.

18. Based on Claimant's testimony, it appears that the Claimant determined when he finished work for the day.

19. Leslie Sandoval who is the office manager for May River and the daughter of the owner, testified at the hearing. It was her testimony that the Claimant was a sub-contractor. She testified that the company does have employees who are handy men and drivers, but they do not currently employ any roofers. She testified that she contacts roofers and hires "companies" (her word) to come in and roof a house. If they can't find a roofer, the job is delayed.

20. Ms. Sandoval also testified that she schedules the jobs, does the estimates, and pays for work performed. She testified that she issues IRS Form 1099s at the end of the year.

21. There was other testimony about the Claimant wearing a company T-shirt and having a sign for his car. Neither of those things are dispositive as to whether he was an employee or sub-contractor.

22. When the evidence is viewed as a whole, we must conclude that the Claimant was a sub-contractor who carried valid workers' compensation coverage. Unfortunately, the Claimant elected not to cover himself on his own policy. As such, May River, Travelers Property Casualty and American Zurich Insurance are all absolved any responsibility as to this claim. The financial responsibility for any medical care and treatment resulting from this work-related accident is the responsibility of the Claimant.

CONCLUSIONS OF LAW

Accordingly, as provided in S.C. Code Ann. § 42-17-40 (as amended), it is the determination of this Commissioner:

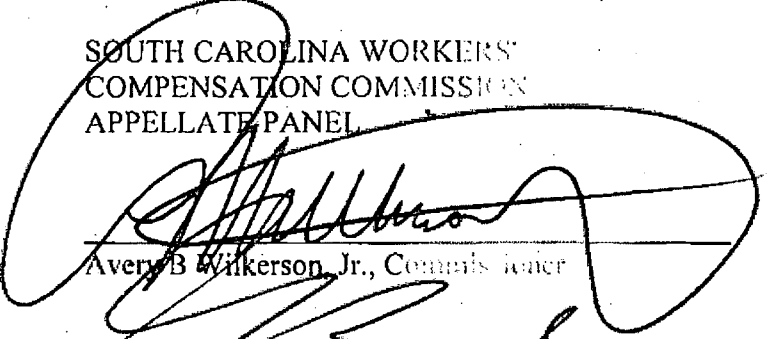
1. Under S.C. Code Ann. § 42-1-130, Claimant was a sole proprietor who was not included under Cedano Roofing's workers' compensation policy.
2. Under S.C. Code Ann. § 42-1-130, Claimant is not an employee of May River Roofing or Cedano Roofing; instead, he is the sole proprietor of Cedano Roofing.
3. Under S.C. Code Ann. § 42-1-400 to -450, Claimant cannot recover as a "statutory employee" of May River Roofing or Cedano Roofing.

ORDER

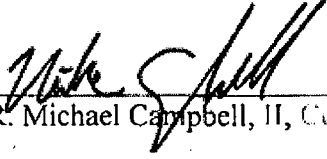
IT IS THEREFORE ORDERED that the decision and order of the Single Commissioner filed in this matter on May 23, 2017, is hereby affirmed by a majority of the Appellate Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION
APPELLATE PANEL


Avery B. Wilkerson, Jr., Commissioner


T. Scott Beck, Commissioner


R. Michael Campbell, II, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia on March 30, 2018