

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Appellate Case No. 2016-001497

Ignacio RodriguezEmployee, Claimant, Respondent,

v.

Robert T. Pierson d/b/a Robert T. Pierson Constr. Co., Employer, and
ABC Care, Inc., Employers, Respondents,

and

South Carolina Uninsured Employers' Fund, Property & Casualty
Insurance Co. of Hartford, Carriers, Defendants

Of which Property and Casualty Insurance Co. of Hartford., is theAppellant.

RECEIVED

DEC 09 2016

SC Court of Appeals

FINAL BRIEF OF APPELLANT

David M. Padgett (S.C. Bar #76026)
Holder Padgett Littlejohn + Prickett, LLC
1204 A. East Washington Street
Greenville, South Carolina 29601
(864) 335-8808
Attorney for Appellant

Other Counsel of Record:

William H. Ehliens, Esquire
310 Mills Avenue., Suite. 201
Greenville, South Carolina 29605
(864) 232-3503
Attorney for Respondent, Ignacio Rodriguez

Randall S. Hiller, Esquire
850-B Wade Hampton Boulevard
Greenville, South Carolina 29609
(864) 232-0026
Attorney for Respondents, Robert T. Pierson, d/b/a Robert T. Pierson Construction and ABC Care, Inc.

David H. Keller, Esquire
Turner Padgett Graham and Laney
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4622
Attorney for Respondent, South Carolina Workers' Compensation Uninsured Employers Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	5
STANDARD OF REVIEW.....	7
ARGUMENTS.....	7
I. THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ WAS AN EMPLOYEE OF ABC CARE, INC.....	7
II. THE COMMISSION ERRED IN FINDING ABC CARE, INC., REGULARLY EMPLOYED FOUR EMPLOYEES, IN SOUTH CAROLINA, IN THE SAME BUSINESS AND OCCUPATION DURING THE RELEVANT PERIOD SURROUNDING IGNACIO RODRIGUEZ’S INCIDENT.	10
III. THE COMMISSION ERRED IN FINDING ABC CARE, INC., WAS SUBJECT TO THE SOUTH CAROLINA WORKERS’ COMPENSATION ACT.	11
IV. THE COMMISSION ERRED IN FINDING PROPERTY AND CASUALTY INSURANCE CO. OF HARTFORD INSURED ABC CARE, INC., IN SOUTH CAROLINA.....	12
V. THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ IS ENTITLED TO MEDICAL BENEFITS.	13
VI. THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.	13

VII. THE COMMISSION ERRED IN FINDING ROBERT T. PIERSON,
D/B/A ROBERT T. PIERSON CONSTRUCTION, AND THE SOUTH
CAROLINA WORKERS' COMPENSATION UNINSURED
EMPLOYERS FUND ARE IMPROPER PARTIES TO THIS
ACTION.13

CONCLUSION14

TABLE OF AUTHORITIES

CASES

Alewine v. Tobin Quarries, Inc., 206 S.C. 103, 109, 33 S.E.2d 81, 83, (1945).....10

Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (S.C. 1971).....8, 14

Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013).....7

Deanhardt v. Neal C. Deanhardt Masonry Contractors, 298 S.C. 244, 248,
379 S.E.2d 726, 728 (S.C. Ct. App. 1989).....12

Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).....7

Hairston v. Re: Leasing, Inc., 286 S.C. 493, 496,
334 S.E.2d 825, 826 (Ct. App. 1985)11

Harding v. Plumly, 329 S.C. 580, 496 S.E.2d 29 (1998).....11

James v. Anne’s Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010)7

Lake v. Reader Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998).....11

Nicholson v. S.C. Dep’t of Soc. Servs., 411 S.C. 381, 769 S.E.2d 1, 3 (S.C. 2015).....7

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).....7

Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004)7

Privette v. S.C. State Forestry Comm’n., 265 S.C. 117, 123,
217 S.E.2d 25, 27 (S.C. 1975)8

S.C. Workers’ Compensation Comm’n v. Ray Covington Realtors, 318 S.C. 546, 548,
459 S.E.2d 302, 303 (S.C. 1995)8, 14

Shatto v. McLeod Reg’l Med. Ctr., 406 S.C. 470, 476,
753 S.E.2d 416, 419, (S.C. 2013)8, 13

Tharpe v. G.E. Moore Co., Inc., 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970)8, 14

Yoemans v. Anheuser-Busch, Inc., 198 S.C. 65, 68, 15 S.E.2d 833 (S.C. 1941).....12

STATUTES

S.C. Code Ann. § 40-59-260 (Supp. 2016).....5

S.C. Code Ann. § 42-1-130 (Supp. 2016).....3, 4, 7, 8

S.C. Code Ann. § 42-1-150 (Supp. 2016).....8, 10

S.C. Code Ann. § 42-1-160 (Supp. 2016).....2

S.C. Code Ann. § 42-1-360 (Supp. 2016).....3, 4, 10, 11, 12

S.C. Code Ann. § 42-1-380 (Supp. 2016).....12

S.C. Code Ann. § 42-5-20 (Supp. 2016).....3

S.C. Code Ann. § 42-7-200 (Supp. 2016).....4

S.C. Code Ann. § 42-9-10 (Supp. 2016).....3

S.C. Code Ann. §42-9-430 (Supp. 2016).....2

S.C. Code Ann. § 42-15-60 (Supp. 2016).....3

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ WAS AN EMPLOYEE OF ABC CARE, INC.
- II. WHETHER THE COMMISSION ERRED IN FINDING ABC CARE, INC., REGULARLY EMPLOYED FOUR EMPLOYEES, IN SOUTH CAROLINA, IN THE SAME BUSINESS AND OCCUPATION DURING THE RELEVANT PERIOD SURROUNDING IGNACIO RODRIGUEZ'S INCIDENT.
- III. WHETHER THE COMMISSION ERRED IN FINDING ABC CARE, INC., WAS SUBJECT TO THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.
- IV. WHETHER THE COMMISSION ERRED IN FINDING THAT PROPERTY AND CASUALTY INSURANCE CO. OF HARTFORD INSURED ABC CARE, INC., IN SOUTH CAROLINA.
- V. WHETHER THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ IS ENTITLED TO MEDICAL BENEFITS.
- VI. WHETHER THE COMMISSION ERRED IN FINDING IGNACIO RODRIGUEZ IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.
- VII. WHETHER THE COMMISSION ERRED IN FINDING ROBERT T. PIERSON, D/B/A PIERSON CONSTRUCTION, CO., AND THE SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS FUND ARE IMPROPER PARTIES TO THIS ACTION.

STATEMENT OF THE CASE

This case arises from a denied workers' compensation claim. Ignacio Rodriguez (hereinafter "Claimant") alleges that on December 23, 2013, he was involved in a work-related incident when he fell off a roof injuring his mouth, left leg, left knee, left arm, left hip, back and neck. Claimant originally filed a Form 50 while employed by Robert Pierson Construction. A hearing was scheduled per this pleading for October 29, 2015. On September 24, 2015, the South Carolina Uninsured Employers' Fund filed a Motion to Add ABC Care, Inc., (hereinafter "ABC Care") and its carrier Property and Casualty Insurance Co. of Hartford (hereinafter "Appellant").

On September 26, 2015, the Hearing Commissioner issued an Order adding ABC Care and Appellant. Prior to the call of the case, ABC Care and Appellant filed a Motion to Postpone.

After hearing arguments, the Hearing Commissioner issued a November 11, 2014 Interim Order postponing the hearing and finding: (1) the attorney representing both ABC Care and Appellant would be relieved as counsel for ABC Care but remain as Appellant; (2) Robert Pierson Construction and ABC Care were named defendants and would be represented by separate counsel from Appellant; (3) Claimant sustained a compensable injury subject to the South Carolina Workers' Compensation Act (hereinafter "the Act"); and, (4) all four named defendants would pay equal, per S.C. Code Ann. Section 42-9-430, the benefits owed to Claimant through the date of a hearing.

Appellant denied compensability of the incident under the Act because Appellant did not provide coverage for Claimant's injury. In response to Appellant's denial, Claimant requested a hearing.

On January 20, 2015, the parties presented various issues to South Carolina Workers' Compensation Commissioner Aisha Taylor (hereinafter "Commissioner Taylor"). Having considered the evidence presented, Commissioner Taylor issued a Decision and Order on July 30, 2015, concluding the following, as a matter of law:

1. Claimant and ABC Care are subject to and bound by the Act; that Robert T. Pierson, d/b/a Robert T. Pierson Construction and the South Carolina Uninsured Employers Fund for purposes of this claim, are not subject to the Act and are not proper parties to this action;
2. Pursuant to S.C. Code Ann. Section 42-1-160, Claimant suffered an injury by accident arising out of and in the course of his employment with ABC Care on or about December 23, 2013;

3. Pursuant to S.C. Code Ann. Section 42-1-130, Appellant was an employee of ABC Care at the time of his injury by accident;
4. Pursuant to S.C. Code Ann. Section 42-1-360 ABC Care had four employees regularly employed in the same business and occupation during the relevant period surrounding the date of Claimant's injury by accident;
5. Pursuant to S.C. Code Ann. Section 42-1-360, the Employer, ABC Care, was subject to and bound by the Act;
6. Pursuant to S.C. Code Ann. Section 42-5-20, the Employer, ABC Care was insured for workers' compensation purposes by Appellant, by virtue of (1) Appellant's own admission that it had covered other employees in the State of South Carolina previously; and (2) that the policy of workers' compensation insurance has an All States' endorsement that covers South Carolina;
7. Pursuant to S.C. Code Ann. Section 42-15-60, Claimant has not achieved maximum medical improvement and is entitled to ongoing medical care and treatment, to be provided by ABC Care and its Carrier, Appellant, for all injured body parts, aforesaid;
8. Pursuant to S.C. Code Ann. Section 42-9-10, Claimant has been temporarily and totally disabled since the date of this accident, December 23, 2013 and is entitled to temporary total disability compensation payments from the date of his injury and continuing until further Order of this Commission or agreement of the parties, at the compensation rate of \$320.02;
9. Pursuant to S.C. Code Ann. Section 42-1-360, Robert T. Pierson, d/b/a Robert Pierson Construction Company is not a proper party to this action and is not subject to the

jurisdiction of the South Carolina Workers' Compensation Commission (hereinafter "the Commission"), and, therefore is dismissed from this action with prejudice; and

10. Pursuant to S.C. Code Ann. Sections 42-1-360 and 42-7-200, because ABC Care is the Employer, subject to and bound by the Act, and because they are insured for workers' compensation purposes in South Carolina by Claimant, the Uninsured Employers Fund is not a proper party to this action and is, therefore, dismissed from this action with prejudice.

Appellant timely appealed the Decision and Order of Commissioner Taylor. A Full Commission Appellate Panel hearing was held before the Commission of April 18, 2016. On June 20, 2016, based upon the stipulations of the parties, oral arguments, and evidence from the hearing before the single Commissioner, the Full Commission panel affirmed Commissioner Taylor's Decision and Order. The Full Commission Panel found:

1. Pursuant to S.C. Code Ann. Section 42-1-130, Claimant was an employee of ABC Care on the date of his injury by accident; and
2. Pursuant to S.C. Code Ann. Section 42-1-360 the employer, ABC Care which was subject to the South Carolina Worker's Compensation Act by virtue of having four or more in the State of South Carolina employees in the same trade, business and/or occupation, specifically undertook construction projects including the Lake Keowee project on which Claimant was injured as part of its trade, business or occupation by a vote of the board of directors directing Robert Pierson to obtain appropriate permits and build a house as described hereinabove for ABC Care.

On July 19, 2016, Appellant timely appealed the decision of the Commission.

STATEMENT OF THE FACTS

Claimant sustained an injury by accident on December 23, 2013, while working at the construction site of a residential home located at 149 Lake Wood Lane, Sunset, South Carolina 29685 (hereinafter “149 Lake Wood Lane”) owned by ABC Care. (R. p. 40, line 14-p.41, line 2). Lake Wood Lane Properties, LLC, purchased two additional lots on Lake Keowee. (R. p. 179, lines 11-17). Robert T. Pierson (hereinafter “Pierson”) is the only member of Lake Wood LLC. (R. p. 179, lines 18-23).

Pierson is a licensed contractor in Maryland and has been “working in construction” most of his life. (R. p. 150, lines 6-8). In addition to owning and operating Robert Pierson Construction (R. p. 149, lines 23-25), which was an active and profitable entity in 2013, Pierson was hired as the “Facilities Manager” (a W2 employee) by ABC Care in 2010. (R. pp. 148, 149, 198). Pierson is married to Robin Pierson, who was Executive Director, of ABC Care. (R. p. 147, lines 24-25).

Prior to the purchase of 149 Lake Wood Lane, ABC Care’s Board of Directors decided to expand its business into South Carolina by purchasing a lakefront lot on Lake Keowee. (R. p. 168, line 23-p. 169, line 25). ABC Care sent Pierson to Sunset, S.C., to facilitate finding people for ABC Care to build the residence. (R. p. 156, lines 4-10). This property was allegedly intended to be used to house ABC Care’s employees, from Maryland, who would be in South Carolina operating summer camps at local public parks. (R. p. 171, lines 4-11).

At the time of purchases of 149 Lake Wood Lane, Pierson was not a licensed contractor in South Carolina, although he was a licensed contractor in the State of Maryland. (R. p. 153, lines 10-12). For this reason, on October 29, 2013, Pierson executed and filed an “Owner Builder Disclosure Statement,” as required by S.C. Code Ann. Section 40-59-260 (Supp. 2016). (R. p. 153, lines 11-13).

Sometime after filing the Owner Builder Disclosure Statement, Francisco Chavez (herein after “Mr. Chavez”) was recommended to Pierson for assistance with constructing 149 Lake Wood Lane, and Pierson hired Mr. Chavez to perform the foundation work for the residence at 149 Lake Wood Lane, including cutting down trees and site preparation. (R. p. 86, lines 7-10).

After approximately two weeks, Mr. Chavez requested permission to hire two additional workers to help him complete the framing portion of the residence. (R. p. 90, lines 5-10). Mr. Chavez approached Claimant and Francisco Vello (hereinafter “Mr. Vello”), who both agreed to work on the construction at 149 Lake Wood Road. **Id. Mr. Chavez, Mr. Vello, and Claimant were paid with checks issued from a checking account held by “Robert T. Pierson d/b/a Pierson Construction.”** (R. p. 61, line 23-p. 62, line 6, p. 75, lines 7-23). Once the residence at 149 Lake Wood Lane was completed, Robert T. Construction issued I.R.S. 1099 Forms to Mr. Chavez, Mr. Vello, and Claimant. (R. p. 181, lines 13-23). Claimant testified that he had never heard of ABC Care until after his incident occurred. (R. p. 70, lines 12-20). Pierson testified that ABC Care reimbursed him for the amounts that his company paid Mr. Chavez, Mr. Vello, and Claimant, for the work at 149 Lake Wood Lane, but that he did not profit from this construction job; however, he admitted that he was issued a 1099 by ABC Care for the payments that they were made to him for the work at 149 Lake Wood Lane. (R. p. 181, lines 20-23).

Pierson has since obtained his South Carolina builder’s license, and he and Mr. Chavez continue to work together building residential homes in the Lake Keowee area. (R. p. 195, line 24-p. 196, line 1). Lake Keowee is where Pierson and his wife “ultimately plan to retire.” (R. p. 172, lines 9-11).

STANDARD OF REVIEW

On appeal from an appellate panel of the Commission, the Court of Appeals can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). “The claimant has the burden of proving facts that will bring the injury within the workers’ compensation law, and such award must not be based on surmise, conjecture or speculation.” *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers’ compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). And, the Court of Appeals will not set aside the Commission’s findings unless they are not supported by substantial evidence. However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

While workers’ compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers’ Compensation Act, exceptions and restrictions on coverage are to be strictly construed. *See Nicholson v. S.C. Dep’t of Soc. Servs.*, 411 S.C. 381, 769 S.E.2d 1, 3 (S.C. 2015) (*citing James v. Anne’s Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010)).

ARGUMENTS

I. THE COMMISSION ERRED IN FINDING CLAIMANT WAS AN EMPLOYEE OF ABC CARE.

Claimant was not an employee of ABC Care. Instead, he was either an employee of Robert Pierson Construction or a subcontractor of Robert Pierson Construction. S.C. Code Ann. Section 42-1-130 defines an employee to mean “every person engaged in an employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written..., but excludes

a person whose employment is both casual and *not in the trade, business, profession or occupation* of his employer....” (Supp. 2016) (emphasis added).

The meaning of casual, in regards to Section 42-1-150, may be more clearly understood by referring to itsonyms, which are “regular,” “systematic,” “periodic,” and “certain.” *Privette v. S.C. State Forestry Comm’n*, 265 S.C. 117, 123, 217 S.E.2d 25, 27 (S.C. 1975). If this Court finds Claimant is an employee of ABC Care, there is no question he would be considered a casual employee. Claimant was not intended to be permanent, and it is abundantly clear that construction is not in ABC Care’s trade, business, profession, or occupation. ABC Care is a daycare operation based in Maryland. When asked whether any other employee of ABC Care was in the trade, course, or business of constructing homes, he answered “other than myself, no.” (R. p. 173, lines 13-17). Further, Pierson testified his role in ABC Care was that “Facilities Director,” (R. p. 148, lines 1-2) meanwhile Pierson also operated Pierson Construction. (R. p. 149, lines 23-25).

In addition, in *Shatto v. McLeod Reg’l Med. Ctr.*, the South Carolina Supreme Court provided the framework for analyzing employer/employee relationship, and the Court provided four “right to control” factors to consider: “(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment and (4) right to fire.” 406 S.C. 470, 476, 753 S.E.2d 416, 419, (S.C. 2013) (citing *S.C. Workers’ Compensation Comm’n v. Ray Covington Realtors*, 318 S.C. 546, 548, 459 S.E.2d 302, 303 (S.C. 1995); *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (S.C. 1971); *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970)).

In the case at hand, Claimant testified at the Hearing he believed Robert T. Pierson Construction Co. was his employer, not ABC Care:

Q: And were you an employee of [Mr.] Chavez?

A: No, Sir.

Q: Okay. Who were you looking to for direction?

A: Mr. Pierson

(R. p. 59, lines 8-11).

Q: Okay. So other than the checks that you got that said Robert Pierson Constriction, there was nothing. Was there anything else that you say or led – or that said Robert Pierson Constriction?

A: He would give me one of his cards ---

Q: Yeah.

A: --- that says Robert Pierson Construction.

Q: And who was your understanding you were working for on the date of injury?

A: Mr. Pierson.

Q: Okay. And by Mr. Pierson, you mean Robert Pierson Construction?

A: Yes.

Q: At any point in time, did you ever think that you had any connection or any relation to an ABC Daycare Facility in Maryland?

A: To be honest, I never knew nothing about this until all this begin to come up.

Q: Okay. And in fact, in your initial pleadings and hearing request, ABC Daycare wasn't even mentioned, was it?

A: Never.

(R. p. 69, line 24-p. 70, line 20).

ABC Care did not provide the tools to building 149 Lake Wood Lane. (R. p. 93, lines 2-25). As stated above, ABC Care did not provide compensation for Claimant's labor. ABC Care did not have the power to terminate Claimant. (R. p.99, lines 4-6). It is clear that ABC Care did not employ Claimant.

Even if the employer does not intend to enter into a contract, one will arise, if the person's conduct is such as to lead a claimant, acting as a reasonable man, or in good faith, to believe that

he is being employed. *Alewine v. Tobin Quarries, Inc.*, 206 S.C. 103, 109, 33 S.E.2d 81, 83, (1945). Claimant, acting reasonably, believed he was employed by Pierson Construction. Claimant was paid with Pierson Construction Co. checks. Claimant was issued an IRS Form 1099 from Pierson Construction. Claimant had no knowledge of the existence of ABC Care at any point in time during his employment. Claimant believed he was an employee of Pierson Construction and overwhelming evidence on record points to the same conclusion. There is no evidence which links Claimant to ABC Care other than ABC Care's ownership of 149 Lake Wood Lane.

II. THE COMMISSION ERRED IN FINDING ABC CARE, REGULARLY EMPLOYED FOUR EMPLOYEES, IN SOUTH CAROLINA, IN THE SAME BUSINESS AND OCCUPATION DURING THE RELEVANT PERIOD SURROUNDING CLAIMANT'S INCIDENT.

ABC Care did not employ four or more employees in South Carolina during the time in question. S.C. Code Ann. Section 42-1-360 provides in part, that the Act excludes "any person who has regularly employed in service less than four employees in the same business within the State..." (Supp. 2016). As stated *supra*; Claimant was not an employee of ABC Care at the time of the accident.

S.C. Code Ann. Section 42-1-150 explains that employment is defined to include "the State, all political subdivisions thereof, all public and quasi-public corporations therein and *all private employments* in which *four or more* employees are regularly employed in the same business or establishment. (Supp. 2016) (emphasis added). ABC Care is a daycare facility located in Maryland. Claimant was injured while building a lake-residence in South Carolina.

Pierson testified that he was using a subcontractor to assist with the build of residence at 149 Lake Wood Lane. (R. p. 173, lines 18-21). The Appellate Panel affirmed the Hearing Commissioner's finding that Pierson only hired, Mr. Chavez. And later, Mr. Chavez hired Mr. Vello and Claimant with Pierson's permission. Appellant submits that the Appellate Panel erred

by ignoring Pierson's direct testimony that he believed he subcontracted with Mr. Chavez to build the residence at 149 Lake Wood Lane. Had the Appellate Panel, properly considered this evidence, Mr. Chavez would not have been included as an employee of ABC Care; and thereby, excluding ABC Care from the Act.

In addition, Pierson paid the three other individuals with Robert T. Pierson Construction Co. checks. (R. p. 164, lines 11-13). No evidence exists that ABC Care repaid Pierson for these checks. The only evidence in this appeal shows that Robert Pierson Construction Co. paid Claimant, Mr. Vello, and Mr. Chavez.

In summary, Claimant, Mr. Vello, and Mr. Chavez were either employees of Robert T. Pierson Construction Co. or subcontractors of Robert T. Pierson Construction Co., but no evidence in the record suggests supports the legal conclusion they were employees of ABC Care.

III. THE COMMISSION ERRED IN FINDING ABC CARE, INC., WAS SUBJECT TO THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.

The Act excludes "any person who has regularly employed in service less than four employees in the same business within the State..." S.C. Code Ann. Section 42-1-360 (Supp. 2016). "A workers' compensation award may not be made unless an employment relationship existed at the time of the alleged injury for which the claim is made. The determination of the employer-employee relationship is jurisdictional and the relationship must be proven by a preponderance of the evidence." *Harding v. Plumly*, 329 S.C. 580, 496 S.E.2d 29 (1998); *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 496, 334 S.E.2d 825, 826 (Ct. App. 1985) (citations omitted). *Lake v. Reader Constr. Co.*, 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998), *reh'g denied* (April 25, 1998) ("The existence of the employer/employee relationship is jurisdictional and the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction is dependent").

In *Yoemans v. Anheuser-Busch, Inc.*, this Court noted that an employer, based in another state, was exempt from the Act because it employed “in South Carolina at the time of the accident only two persons.” 198 S.C. 65, 68, 15 S.E.2d 833 (S.C. 1941). As discussed *supra*, neither Claimant, Mr. Vello, or Mr. Chavez were employees of ABC Care at the time of Claimant’s incident. As a result, Claimant’s accident is outside the scope of the Act.

IV. THE COMMISSION ERRED IN FINDING THE PROPERTY AND CASUALTY INSURANCE CO. OF HARTFORD INSURED ABC CARE, INC., IN SOUTH CAROLINA BASED ON AN ALL STATES ENDORSEMENT.

First, because the record shows that ABC Care never employed four or more employees in South Carolina, the Appellate Panel erred in finding Appellant provided workers’ compensation coverage in South Carolina. As stated *supra*, S.C. Code Ann. Section 42-1-360 excludes employers from the Act if they employ less than four employees in South Carolina. (Supp. 2016).

Second, there is no evidence that Appellant insured ABC Care’s construction of a residence in South Carolina. Nothing in the record indicates any intention by Appellant to agree to insure the risks associated with building a lake residence.

Appellant provided insurance to ABC Care’s daycare operation in Maryland. The reliance on an all-state endorsement in Appellant’s insurance policy is misplaced. This Court held that “mere procurement of workers’ compensation insurance carrying a multi-state endorsement by an employer does not serve to estop him from denying coverage in South Carolina.” *Deanhardt v. Neal C. Deanhardt Masonry Contractors*, 298 S.C. 244, 248, 379 S.E.2d 726, 728 (S.C. Ct. App. 1989).

Third, there is no evidence in the record which shows that ABC Care complied with S.C. Code Ann. Section 42-1-380 (Supp. 2016) to become covered under the Act despite failing to have

four or more employees in South Carolina. If the Act does not cover an employer, the Act requires “written notice of his desire to be subject to the terms and provisions of this title.” Id.

According, the Appellate Panel erred in finding Appellant insured ABC Care in South Carolina and the Conclusion of Law should be reversed.

V. THE COMMISSION ERRED IN FINDING CLAIMANT IS ENTITLED TO MEDICAL BENEFITS.

The Appellate Panel erred in finding Appellant responsible for providing Claimant’s medical benefits. As stated *supra*, Claimant’s accident falls outside the scope of the Act because ABC Care did not employ four or more employees in South Carolina at the time of the accident and Appellant’s insurance coverage did not extend to construction activity in South Carolina. As a result, Claimant is not afforded the protections of the Act.

VI. THE COMMISSION ERRED IN FINDING CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

Similarly, the Appellate Panel erred in finding Appellant responsible for providing Claimant with temporary total disability benefits. As stated *supra*, Claimant’s accident falls outside the scope of the Act because ABC Care did not employ four or more employees in South Carolina at the time of the accident, and Appellant’s insurance coverage did not extend to construction activity in South Carolina.

VII. THE COMMISSION ERRED IN FINDING ROBERT T. PIERSON, D/B/A PIERSON CONSTRUCTION, CO., AND THE SOUTH CAROLINA WORKERS’ COMPENSATION UNINSURED EMPLOYERS FUND ARE IMPROPER PARTIES TO THIS ACTION.

Claimant, Mr. Chavez, and Mr. Vello were employee of Robert Pierson Construction. *Shatto v. McLeod Reg’l Med. Ctr.* provides four “right to control” factors to consider: “(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment and (4) right to fire.” 406 S.C. 470, 476, 753 S.E.2d 416, 419, (S.C. 2013) (*citing S.C. Workers’*

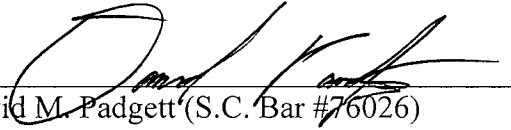
Compensation Comm'n v. Ray Covington Realtors, 318 S.C. 546, 548, 459 S.E.2d 302, 303 (S.C. 1995); *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (S.C. 1971); *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970)). Robert Pierson directed and controlled these employees (R. p. 66, lines 21-23). Robert Pierson provided tools for these employees to use while constructing 149 Lake Wood Lane. (R. p. 93, lines 2-25). Pierson paid these employees on Robert Pierson Construction checks (R. p. 96, line 23-p. 97, line 6, p. 110, lines 7-23). And Pierson had the ability to fire these employees. (R. p. 113, lines 11-15). Therefore, Robert T. Pierson d/b/a Pierson Construction, Co., employed at least Mr. Chavez and potentially Mr. Vello, and Claimant. According, Pierson is liable for Claimant's medical treatment and temporary compensation benefits, and Pierson is an active party to this claim. Similarly, the South Carolina Workers' Compensation Uninsured Fund is also a party to this claim because Pierson Construction did not have workers' compensation coverage in the State of South Carolina.

CONCLUSION

The Commission's decision should be reversed because Claimant was not an employee of ABC Care; and thus, ABC Care is not subject to the Act because they did not regularly employ four or more State of South Carolina employees. Further, ABC Care is not in the trade, course, or business of construction. The preponderance of the evidence shows that Robert Pierson built a residential home for his personal enjoyment. He attempted to build this home under the guise of a business investment. Acting as a contractor, he hired employees/subcontractors to build this residence. Unfortunately, Claimant was injured in the construction of this residence. However, it is unjust to allow Pierson to evade responsibility of his actions, including acting as an unlicensed contractor and failing to have workers' compensation insurance.

For these reasons, and the ones stated above, this Court should reverse the judgment of the South Carolina Workers' Compensation Commission.

Respectfully submitted,



David M. Padgett (S.C. Bar #76026)

Holder Padgett Littlejohn + Prickett, LLC

1204 A. East Washington Street

Greenville, South Carolina 29601

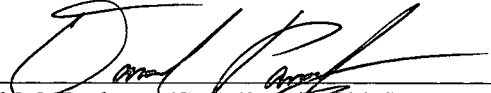
(864) 335-8808

Attorney for Appellant

December 8, 2016

Certificate of Counsel

The undersigned hereby certifies that the Final Brief of Appellant contains all material proposed to be included by any of the parties and not any other material.



David M. Padgett (S.C. Bar #76026)

Holder Padgett Littlejohn + Prickett, LLC

1204 A. East Washington Street

Greenville, South Carolina 29601

(864) 335-8808

Attorney for Appellant

December 8, 2016

RECEIVED

DEC 09 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Appellate Case No. 2016-001497

Ignacio Javier Rodriguez, Employee, Claimant, Respondent,

v.

Robert T. Pierson, d/b/a Robert Pierson Construction Co., Employer, and
ABC Care, Inc., Employers, Respondents,

and

South Carolina Uninsured Employers' Fund, Property & Casualty Insurance Co. of
Hartford, Carriers, Defendants

Of which Property & Casualty Insurance Co. of Hartford is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that the Final Brief of Appellant and the Final Reply Brief of Appellant in the above referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 8th day of December, 2016, addressed as follows:

William H. Ehliens, Esquire
310 Mills Avenue., Suite. 201
Greenville, South Carolina 29605
Attorney for Respondent

Randall S. Hiller, Esquire
850-B Wade Hampton Boulevard
Greenville, South Carolina 29609

Attorney for Robert T. Pierson, d/b/a Pierson Construction and ABC Care, Inc.


RECEIVED

DEC 09 2016

SC Court of Appeals

David H. Keller, Esquire
Turner Padgett
Post Office Box 1509
Greenville, South Carolina 29602
Attorney for South Carolina Workers' Compensation Uninsured Employers Fund

South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

A handwritten signature in cursive script, appearing to read "Mary Pate", written over a horizontal line.

Mary Pate, Paralegal
Holder, Padgett, Littlejohn + Prickett, LLC