

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Anthony Graham,)
Claimant,)
vs.)
Stacy Whitfield d/b/a Whitfield Land &)
Tree Service,)
Direct Employer,)
and,)
S.C. Uninsured Employers' Fund,)
Defendants.)

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SC Court of Appeals

DECISION AND ORDER
AFFIRMING THE SINGLE COMMISSIONER'S ORDER
DATED DECEMBER 21, 2017 ON THE MERITS OF THE CASE
AND VACATING THE FINE ORDER DATED JANUARY 19, 2018

Appellate Panel Review held in
Columbia, South Carolina on March 19, 2018

Appellate Panel Decision and Order

Filed:

August 9, 2018

APPEARANCES:

The Claimant was represented by Samuel D. Harms, III,
Esquire of the Harms Law Firm, P.A., Piedmont, South
Carolina.

Defendant Stacy Whitfield appeared *pro se*.

Defendant S.C. Uninsured Employers' Fund was
represented by David H. Keller, Esquire of Turner, Padgett,
Graham & Laney, P.A., Greenville, South Carolina.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the following medical and expert witness reports were submitted into evidence:

Claimant's APA:

APA #	NAME OF PHYSICIAN / OTHER PROVIDER	FIRST DATE OF SERVICE	LAST DATE OF SERVICE	PAGE RANGE
1.	Greenville Memorial Orthopaedic Surgery	01/27/17	02/07/17	1-28
2.	Greenville Radiology	01/27/17	06/20/17	29-47
3.	Greenville Memorial Surgery/Ortho Clinic	04/26/17	08/09/17	48-114
4.	Greenville Memorial Hospital	05/09/17	06/20/17	115-143
5.	Roger C. Peace Rehabilitation Hospital	Unknown	Unknown	Unknown

Defendant Stacy Whitfield's APA:

Defendant Stacy Whitfield relied on the documents submitted by the Claimant and Defendant S.C. Uninsured Employers' Fund.

Defendant S.C. Uninsured Employers' Fund's APA:

Defendant S.C. Uninsured Employers' Fund relied on the documents submitted by the Claimant, and the following documents and exhibits were admitted at the hearing.

APA #	NAME OF PHYSICIAN / OTHER PROVIDER	FIRST DATE OF SERVICE	LAST DATE OF SERVICE	PAGE RANGE
6.	Greenville Memorial Hospital Notes	12/17/2011		144-197
7.	Pictures of Claimant			Trial Exhibits 1-4

STIPULATIONS

At the call of the case, the parties agreed to the following stipulations:

1. The purpose of the hearing was to determine all issues in dispute as set forth in Forms 50 and 51 and pursuant to Regulation 67-601.
2. The notice of the hearing was timely and properly served upon all parties of interest.
3. All parties agreed upon venue as set in Anderson County, South Carolina.
4. The South Carolina Workers' Compensation Commission's file, with the exception of unstipulated medicals and self-serving declarations, was made part of the record.
5. The APAs and medicals were timely presented and without objection were made a part of the record.

STATEMENT OF THE CASE

The case was heard by the Hearing Commissioner on October 25, 2017 in Anderson, South Carolina, on which date the parties and their representatives appeared and evidence was received. The case was called pursuant to the Claimant's Form 50, and the S.C. Uninsured Employers' Fund answer by Form 51. The Claimant called Stacy Whitfield (hereinafter "Whitfield" or "Employer") and the Claimant as witnesses. Defendant S.C. Uninsured Employers' Fund (hereinafter "SC UEF") relied upon the cross-examination of the Claimant and Whitfield.

This is a denied case and no benefits have yet to be paid to the Claimant. The Claimant contends that on January 27, 2017 he injured at work his back, ribs, and left leg due to the work injury. He seeks the payment of casually-related past medical expenses

and future medical care. In addition, the Claimant seeks TTD benefits from January 27, 2017 and continuing until further order of the Commission. The Claimant believes that he is not at MMI. The Claimant further contends that his Employer was Stacy Whitfield at the time of the work injury. The Claimant asks for a finding of an AWW of \$500.00 and a CR of \$333.35.

Defendant Whitfield admits that the Claimant is an employee of the Employer and that the Claimant was injured on the job; however, Defendant Whitfield denies that he is subject to the Act. Defendant SC UEF has a general denial in its Form 51; however, it does not dispute that the Claimant was injured at work. The SC UEF denies that the Employer was subject to the Act. Defendant Whitfield did not have workers' compensation coverage on the day of the alleged work injury.

EVIDENCE OF THE CASE

Testimony

A. Mr. Stacy Joe Whitfield, the Employer

The Employer testified as the first witness. (Tr. 13). In January 2017, he was running a tree cutting service. (Tr. 14). In order to run the tree cutting service, he supplies the bucket truck, a tractor, a dump truck, ropes, poll saws, gasoline, and oil. (Tr. 14-16). On January 27, 2017, the Claimant was working with the Employer at a job site when a tree branch fell and struck the Claimant. (Tr. 17-19). The Employer does not question that the Claimant was injured on January 27, 2017. (Tr. 18-19). The Employer does not dispute that the Claimant was an employee of the Employer. (Tr. 19). The Employer offered to take the Claimant to the emergency room because the Employer thought the Claimant might be hurt. (Tr. 19-20).

The Employer paid the Claimant \$100 a day. (Tr. 22). If the Claimant had to climb a tree, he was paid \$125 to \$150 a day. (Tr. 23). The Employer paid the Claimant in cash and did not keep any records of the payments. (Tr. 25).

The Employer had other people working for him as employees. (Tr. 25). Brant Ritchie, the Employer's son, works for the Employer for \$80 a day. (Tr. 25, 30). Cody Moore works for the Employer and was paid \$8 an hour. (Tr. 25-27). Trinity Moore works for the Employer and was paid \$8 an hour. (Tr. 27). Teddy (last name unknown to Employer) works for the Employer and is paid \$100 a day. (Tr. 30). Gary Whitfield works for the Employer at \$100 a day. (Tr. 32-33). Mike Swain, Jr. works for the Employer and is paid \$8 an hour. (Tr. 33-34). Johnny Whitman works for the Employer and is paid \$100 a day. (Tr. 34). Stick Floyd works for the Employer and is paid \$10 an hour. (Tr. 35). In addition, Carla Weaver works for the Employer (Tr. 36). She keeps the books. (Tr. 36). The Employer called Carla Weaver his wife at times (Tr. 36); however, they have different last names, don't have a marriage license, and did not have a wedding ceremony. (Tr. 39). The Employer pays her light bill and her car bill. (Tr. 37).

On cross-examination by the SC UEF, the Employer testified that he only employs 2 people on any one day (Tr. 40). He would work 2 people one day, and then bring in other people the next day. (Tr. 40). The Claimant works at a peanut stand. (Tr. 41, 52). The Claimant can walk normally without a cane. (Tr. 48). The Employer testified that he only works two employees at one time on a job site. (Tr. 54).

On re-direct examination by the Claimant, the Employer testified that he rotated 2 employees, then another 2 employees, and then another 2 employees each day. (Tr. 54). On a Monday, he would use two guys, and then on Tuesday use two different guys. (Tr. 54-55). On Wednesday, he would use two more different guys. (Tr. 55). He is always

using Carla Weaver to do his books. (Tr. 57). Carla Weaver runs to the bank to put money in the bank for the business. (Tr. 58). Brant Ritchie works for him most days. (Tr. 58).

On re-cross examination, the Employer, when asked if he was married, said: "Well, I'm not actually – I'm not actually law abiding married to anyone; I've never been law abiding married, in a court of law, to no one." (Tr. 60).

B. Mr. Anthony Graham, Claimant

Claimant Anthony Graham then testified at the hearing. (Tr. 62). He is 42 years old. (Tr. 62). On January 27, 2017, he was pulling on a tree limb that was being cut when the rope slipped out of his hand and the tree limb struck him. (Tr. 63). He told the Employer that he was hurt bad. (Tr. 64). He thought his back was broken, and his left leg was numb. (Tr. 64). He told the Employer he had broken ribs. (Tr. 64). He went home for about 20 minutes, and when he went to the bathroom, he started to urinate blood. (Tr. 64-65). He called the Employer and told him that he had to go to the emergency room. (Tr. 65). He went to the ER and was rushed into the trauma unit and the ER did a CT scan. (Tr. 65). He had a fracture in his back and a broken rib. (Tr. 65). The Claimant treated at Roger C. Peace and is still getting physical therapy at Roger C. Peace. (Tr. 66). He goes there twice a week. (Tr. 67). He has seen an orthopedic specialist. (Tr. 69). All of his medical treatment is from the work injury. (Tr. 69). The day before the accident, he was able to climb a tree 30 feet in the air. (Tr. 69). He was paid \$500 a week, \$100 a day. (Tr. 69). He was paid \$150 a day if he had to climb trees. (Tr. 70). He was paid cash. (Tr. 71).

He also worked for Kelvin Mann at the time of the accident, but he did not get paid any money – he worked for his rent. (Tr. 72). He still sits at a peanut wagon for

Kelvin Mann. (Tr. 72). He does not work the festivals or the shows because he cannot do the lifting. (Tr. 73). He cannot lift a box of apples. (Tr. 73). Kelvin Mann is his landlord. (Tr. 73). Claimant has to work 2 to 2 ½ days a week to earn his rent. (Tr. 74). He must have a second person working with him to keep up. (Tr. 74). The heaviest thing he has to pick up is a bucket of peanuts that weighs 10-18 pounds. (Tr. 74). He can sit at the job. (Tr. 75). In his current condition, the Claimant could not do his job with the Employer because his left leg gives out and it goes numb. (Tr. 75). He could not do the lifting requirements of the job with the Employer because the chainsaws weigh too much, and he could not pull on the tree limbs with the ropes because of the amount of pressure he would have to pull. (Tr. 76). He could not do the standing requirement of the job with the Employer (Tr. 76). The Claimant has pain in his back. (Tr. 76). His left leg goes numb. (Tr. 76).

On cross-examination, the Claimant testified that he got a sponsorship from Greenville Hospital that pays some of the medical bills. (Tr. 77). The Claimant testified that he got hurt 2 years prior to the work accident while working for Cooper Sand and Gravel, but that he healed from that injury and had been released by the doctors. (Tr. 80). While he worked for the Employer, he saw the Employer have more than 2 people working at a time. (Tr. 81). The Employer would have 4-6 different people working on various job sites. (Tr. 81). In the week the Claimant got hurt, the Employer had up to 5 people working for the Employer. (Tr. 81).

Medical Records

The Claimant was seen at Greenville Memorial Hospital on January 27, 2017, the day of the accident. (Cl. APA. pp. 1-18). A CT of the abdomen indicated a rib fracture

and left L1-L5 tranverse process fractures with associated primarily intramuscular hematoma and a small amount of blood within the left pericolic gutter. (Cl. APA p. 32). He followed up at Greenville Memorial on February 7, 2017. (Cl. APA p. 20). He was diagnosed with blunt trauma, fracture of rib of left side, hematuria, lumbar transverse process fracture, and trauma. (Cl. APA p. 19). He was given prescription medications. (Cl. APA. p. 21). He complained of back pain and pain in his left leg. (Cl. APA p. 23). He was written out of work. (Cl. APA p. 24). On May 9, 2017, the Claimant had an MRI of the lumbar spine and it indicated that at T12-L1 there was a small posterior central disc protrusion minimally compresses the thecal sac and that at L4-5 there was a left posterior paracentral outer annular tear potentially with a tiny disc protrusion that abuts the thecal sac and left L5 nerve root. (Cl. APA p. 44). He followed up with Greenville Memorial for back pain and left leg pain. (Cl. APA pp. 48-143)(Def. APA pp. 144-197).

FINDINGS OF FACT

Based on all of the evidence, including the hearing testimony as cited above and the APAs filed with the Commission as referenced and cited above, the Commission makes the following findings of fact:

1. The Hearing Commissioner filed a Decision and Order regarding the merits of the case on December 21, 2017. The Hearing Commissioner found the claim compensable and awarded benefits to the Claimant. In addition, the Hearing Commissioner filed a second Decision and Order dated January 19, 2018 in which the Employer was fined for not having workers' compensation coverage.

2. As to the merits of the case, the parties agreed that the only issue before the Commission was whether the Commission had jurisdiction over the parties (i.e. whether the Employer regularly employed four or more employees).

3. We find that the Employer, Stacy Whitfield, operated his business as a sole proprietor. He was advised of his right to retain counsel but elected to proceed *pro se*.

4. The Hearing Commissioner admitted into evidence the photos marked SC UEF Exhibits 1-4 showing the Claimant under a tree and the Claimant selling peanuts.

5. We find that the Employer testified that the Employer was rotating his employees from day to day. The Employer testified that he thought that if he only had 2 employees at a job site on a specific day, he was not subject to the Act. For example, he testified that he would use two employees on a Monday, two different employees on a Tuesday, two different employees on a Wednesday, and then use different employees on a Thursday. We also find that the Claimant testified that more than two employees would be working at one job site at the same time; therefore, the Employer's testimony conflicts with the Claimant's testimony as to the number of employees on a job site at one time.

6. We find the Employer was improperly moving employees around in an attempt to avoid buying the required workers' compensation insurance.

5. We find that the Claimant testified that he witnessed up to 6 employees working for the Employer at one time, and 5 employees working for the Employer in the week before the accident.

6. We find that the Employer paid his employees cash and did not keep any records of the payments to his employees, including payments to the Claimant.

7. We find that the Employer regularly employed the following employees at the relevant time period before the accident: 1. Anthony Graham (the Claimant), 2. Brant

Ritchie, (the Employer's son), 3. Cody Moore, 4. Trinity Moore, 5. Teddy (last name unknown to Employer), 6. Gary Whitfield, 7. Mike Swain, Jr., 8. Johnny Whitman, and 9. Stick Floyd. We find that the Employer employed the Claimant for more than one year as the Claimant's full-time job. We find that the Employer employed the Claimant and Brant Ritchie (the Employer's son) on a daily basis, based on the testimony of the Employer and the Claimant. We find the Employer had 4 or more employees working for the Employer on the same day, on a regular basis, based on the testimony of the Claimant that the Claimant saw up to 6 people (not including Carla Weaver) working for the Employer at one job site. We find that the Employer had 5 different people working for the Employer in the week before the accident (not including Carla Weaver). We find that since the Employer paid the employees in cash and kept no records of who was working on any given day, we find believable the Claimant's testimony that the Employer had up to 6 people working at one time at a job site.

8. In addition to the employees mentioned above, we find that Carla Weaver regularly works for the Employer on a daily basis. The Employer testified that: "Well, I'm not actually – I'm not actually law abiding married to anyone; I've never been law abiding married, in a court of law, to no one." (Tr. 60). The SC UEF objects to counting Carla Weaver as an employee for purposes of determining if there are four or more employees of the Employer since she is the wife of the Employer and does not get paid to work in the business. For purposes of deciding if Carla Weaver should count as an employee for determining if the Employer regularly employs 4 or more employees, we hold that there are already four or more employees regularly employed by the Employer even if we do not count Carla Weaver. We find that Carla Weaver was not the wife of the Employer according to the testimony of the Employer that he has never been married. We

find that for purposes of deciding if she should count as a regular employee of the Employer, it is immaterial if she was or was not his wife because a wife can count as an employee of a business. We find that Carla Weaver worked daily for the Employer doing the books of the business, making bank runs, and completing the tax documents necessary to run the business. We find that Carla Weaver was compensated for her work for the Employer based on the testimony of the Employer. We find she received room, board, access to a car, and other goods in exchange for her work for the Employer.

9. We find that Defendant Stacy Whitfield had four or more regularly employed individuals working for him during the relevant time period before the accident. We find that the Employer has run a tree cutting service for about 20 years, the business is his full-time work, and the tree cutting business is not just a temporary job or a hobby for the Employer.

10. We find that the enumeration of employees does not include Mr. Stacy Whitfield. Larsons 74.03 (sole proprietors and partners are excluded from enumeration), and Hartzell v. Palmetto Collision, LLC, 750 S.E.2d 97 (Ct. App. 2013)(in particular footnote 5).

11. We find that Defendant Stacy Whitfield is uninsured and is subject to the Act, as regularly employing more than four employees.

12. We find that on January 27, 2017, the Claimant sustained compensable injuries to his back, ribs, and left leg within the course and scope of his employment with Stacy Whitfield.

13. We find Claimant has an average weekly wage of \$500.00, which yields a compensation rate of \$333.35.

14. We find Claimant is not at maximum medical improvement.

15. We find Claimant is entitled to additional medical treatment at the direction of the Fund until he is placed at maximum medical improvement. The SC UEF shall send the Claimant to an orthopedic doctor for a full evaluation of the back, ribs, and left leg. The SC UEF may choose the doctor.

16. We find Claimant is entitled to temporary total disability benefits at the compensation rate listed above from January 27, 2017, through the present and continuing until he is placed at maximum medical improvement or is otherwise released to return to work and a Form 17 is filed with the Commission.

17. We find that the Claimant is entitled to reimbursement for all causally-related out-of-pocket expenses including mileage reimbursement, if any.

18. All previously incurred causally-related medical treatment are to be paid according to the WC Fee Schedule, including the medical treatment and providers at Greenville Memorial Hospital, Greenville Memorial Orthopaedic Surgery, Greenville Radiology, the Surgery/Ortho Clinic, and Roger C. Peace Rehabilitation Hospital.

19. No hearing costs are assessed.

20. The Employer, Stacy Whitfield, did not have workers' compensation insurance on the date of the injury. The benefits awarded herein shall be provided and payments shall be made by the Employer Stacy Whitfield; however, if Employer is unable or unwilling to pay this award, then the South Carolina Workers' Compensation Uninsured Employers' Fund shall be required to pay. Any payments made or benefits provided by the South Carolina Workers' Compensation Uninsured Employers' Fund shall be made with all rights of indemnification and reimbursement as prescribed by statute. Nothing appearing in this Order, explicit or implied, shall limit any claim the South Carolina

Workers' Compensation Uninsured Employers' Fund has against the Employer pursuant to S.C. Code Ann. Section 42-7-200 or otherwise.

21. We find that Anthony Graham, Stacy Whitfield, and the South Carolina Workers' Compensation Uninsured Employers' Fund were subject to the South Carolina Workers' Compensation Act on the date of the injury.

22. Regarding the Order dated January 19, 2018, fining the Employer, we hereby vacate the fine Order.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, Section 42-17-40, it is the determination of this Commissioner that:

1. Under Section 42-3-180, the Commission has jurisdiction over the parties to hear the issues in dispute.
2. Under Section 42-1-130, the Claimant was a covered employee.
3. Under Section 42-1-140, the Employer, Stacy Whitfield, was a covered employer.
4. Under Section 42-3-150, there was an employer/employee relationship between the Claimant and Stacy Whitfield.
5. Under Section 42-17-20, venue in Anderson County, South Carolina, was proper and agreed to by the parties.
6. Under Section 1-23-320(b) and Regulation 67-607, notice of the hearing was timely and properly served upon all parties of interest.
7. Under Section 42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course of his employment on January 27, 2017. The injury is to his back, ribs and left leg.

8. Under Section 42-1-40, the Claimant's average weekly wage is \$500.00 and his compensation rate is \$333.35.
9. Under Section 42-15-60, the Defendants are to pay for all causally-related past and future medical expenses allowed under the Act.
10. Under Section 42-9-10, the Claimant is temporarily and totally disabled as of January 27, 2017 due to the work injury and is entitled to TTD benefits from January 27, 2017, through the present and continuing until he is placed at maximum medical improvement or is otherwise released to return to work and a Form 17 is filed with the Commission.
11. Under Section 42-7-200, the South Carolina Workers' Compensation Uninsured Employers' Fund has a right of indemnification and reimbursement against Stacy Whitfield for any benefits paid in this case pursuant to this Order or pursuant to a subsequent agreement or settlement with the Claimant.

AWARD

IT IS THEREFORE ORDERED that Defendant Stacy Whitfield is to pay for all causally related past and future medical expenses allowed under the Act for the back, ribs, and left leg.

IT IS FURTHER ORDERED that Defendant Stacy Whitfield is to pay the Claimant temporary total disability at a weekly compensation rate of \$333.35 from January 27, 2017 through the present and continuing until he is placed at maximum medical improvement or is otherwise released to return to work and a Form 17 is filed with the Commission.

IT IS FURTHER ORDERED that the benefits awarded herein shall be provided and payments shall be made by the Employer Stacy Whitfield; however, if Employer is unable or unwilling to pay this award, then the South Carolina Workers' Compensation Uninsured Employers' Fund shall be required to pay. Any payments made or benefits provided by the South Carolina Workers' Compensation Uninsured Employers' Fund shall be made with all rights of indemnification and reimbursement as prescribed by statute. Nothing appearing in this Order, explicit or implied, shall limit any claim the South Carolina Workers' Compensation Uninsured Employers' Fund has against the Employer pursuant to S.C. Code Ann. Section 42-7-200 or otherwise.

IT IS FURTHER ORDERED that the Order dated January 19, 2018, fining the Employer is vacated.


AND IT IS SO ORDERED.

CONCUR:


SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Susan S. Barden, Commissioner



T. Scott Beck, Commissioner



R. Michael Campbell, Commissioner