THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

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SC Court of Appeals

Appellate Case No. 2018-001664

Anthony Graham, Employee, ...Respondent,

v.

Stacy Whitfield d/b/a Whitfield Land & Tree Service, Direct Employer,
and S.C. Uninsured Employer's Fund, Carrier,

Of which Stacy Whitfield d/b/a Whitfield Land & Tree Service is the
Respondent and S.C. Uninsured Employers' Fund is the ....Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On January 27, 2017, claimant Anthony Graham was injured while working for his employer Stacy Whitfield. (R. p. 29) (Appellate Panel decision, FOF No. 12). The claimant established a claim with the South Carolina Workers' Compensation Commission by serving a Form 50 on March 24, 2017. (R. pp. 36-37) (Form 50 served 03/24/2017). On July 21, 2017, the claimant requested a hearing by serving a second Form 50. (R. pp. 40-41) (Form 50 served 07/21/2017). Defendant S.C. Uninsured Employers' Fund served a Form 51 on August 7, 2017. (R. p. 44) (Form 51 served 08/07/2017). A hearing was held before Commissioner Avery B. Wilkerson, Jr. on October 25, 2017 in Anderson, South Carolina. (R. p. 1) (Hearing Commissioner decision filed 12/21/2017). On December 21, 2017, the hearing commissioner issued a decision holding that the employer regularly employed four or more employees. (R. p. 10) (Hearing Commissioner decision filed 12/21/2017, p. 10). Defendant S.C. Uninsured Employers' Fund served a Request for Commission Review (Form 30) on January 4, 2018. (R. p. 348) (Form 30 served 01/04/2018). The Appellate Panel of the Workers' Compensation Commission heard oral arguments on March 19, 2018 and issued a decision on August 8, 2018. (R. p. 19) (Appellate Panel decision filed 08/08/2018, p. 1). The Appellate Panel held that the employer regularly employed four or more employees. (R. p. 29) (Appellate Panel decision filed 08/08/2018, p.11). On September 10, 2018, the S.C. Uninsured Employers' Fund served a Notice of Appeal on the claimant. (R. p. 370) (Notice of Appeal).

FACTS

The employer, Stacy Whitfield, operates a professional tree cutting service. (R. pp. 29, 271) (Hr. Tr. p. 14; Appellate Panel decision, FOF No. 9). He conducts business

as Whitfield Land and Tree Service. (R. pp. 19, 271) (Appellate Panel decision, p. 1; Hr. Tr. p. 14). The tree cutting business is the employer's full-time job, he has been doing it for 20 years, and the tree cutting business is not just a temporary job or hobby for the employer. (R. pp. 29, 271) (Hr. Tr. p. 14; Appellate Panel decision, FOF No. 9). The employer uses a bucket truck, a tractor, a dump truck, ropes, and pole saws to conduct his business. (R. pp. 271-273) (Hr. Tr. pp. 14-16).

The employer testified that he has a total of ten individuals working for him. (R. pp. 27-29, 279-315) (Hr. Tr. pp. 22-58; Appellate Panel decision, FOF No. 7-8). The employer testified that he has three people working for him full time, and seven part-time workers that he uses one or two days a week ($8 an hour, or $80 to $100 for the day). (R. pp. 27-29, 279-315) (Hr. Tr. pp. 22-58; Appellate Panel decision, FOF No. 7-8). The employer said that: "everyone that you have mentioned [the 10 employees] I have worked for over – I mean, the years ... for years." (R. p. 291) (Hr. Tr. p. 34).

Three employees work full-time for the employer. (R. pp. 274-276, 279-280, 282, 288-289, 293-294, 315) (Hr. Tr. pp. 17-19, 22-23, 25, 31-32, 36-37, 58). The employer's son, Brant Ritchie, continuously works for the employer on a daily basis as a tree-cutter. (R. pp. 282, 288-289, 315) (Hr. Tr. pp. 25, 31-32, 58). Mr. Ritchie gets paid $80.00 a day. (R. p. 289) (Hr. Tr. p. 32). The employer testified that Mr. Ritchie works "most days" for the employer. (R. p. 315) (Hr. Tr. p. 58). The employer's girlfriend, Carla Weaver, continuously works for the employer on a daily basis as a bookkeeper, a bank runner, and a clerk who completes the employer's paperwork and "legal stuff" since the employer is "not a very good reader." (R. pp. 293-294, 315) (Hr. Tr. pp. 36-37, 58). The employer is Carla Weaver's sole source of income and support, and in in exchange for her labor, the employer buys Carla Weaver "everything" that she needs to live. (R. p.

294) (Hr. Tr. p. 37). The employer testified that Ms. Weaver works for the employer "always" doing the "books and everything," and all the "paperwork and legal stuff." (R. pp. 293, 314) (Hr. Tr. p. 36, 57). She does "everything" for him. (R. p. 314) (Hr. Tr. p. 57). She works "every day" for the employer. (R. p. 314) (Hr. Tr. p. 57). The third full-time employee, claimant Anthony Graham, continuously worked for the employer on a daily basis as a tree-cutter for over one year before the work accident. (R. pp. 27-28, 274-276, 279-280, 282) (Appellate Panel decision, FOF No. 7; Hr. Tr. pp. 17-19, 22-23, 25). The employer paid the claimant $500 a week, on average, for the one year the claimant worked for the employer before the accident. (R. pp. 29, 326-328) (Appellate Panel decision, FOF No. 13) (Hr. Tr. pp. 69-71). The employer said he paid the claimant between $100 to $150 dollars a day depending on whether the claimant had to climb the trees or just stay on the ground. (R. pp. 279-280) (Hr. Tr. pp. 22-23). The Commission found that the claimant's average weekly wage was $500 a week over the one year of employment. (R. p. 29) (Appellate Panel decision, FOF No. 13). The employer paid the claimant $26,000 in the year before the accident. (R. pp. 29, 274-276, 279-280, 282) (Appellate Panel decision, FOF No. 13; Hr. Tr. pp. 17-19, 22-23, 25).

In addition to the three employees who work for the employer full-time, the employer has seven part-time employees that he uses one or two days a week on a continuous basis. (R. pp. 282-292, 311-312) (Hr. Tr. pp. 25-35, 54-55). Those seven part-time employees are: Coody Moore, Trinity Moore, Teddy (LNU), Gary Whitfield, Mike Swain, Jr., Johnny Whitman, and "Stick" Floyd. (R. pp. 282-292, 311-312) (Hr. Tr. pp. 25-35, 54-55). The employer said that he worked the part-time tree-cutters on a rotational basis in which two of the part-time workers worked on Monday, two different

tree-cutters worked on Tuesday, two different tree-cutters worked on Wednesday, and then on Thursday, he used the two workers from Monday, and on Friday he used two workers from Tuesday or Wednesday, and so forth. (R. pp. 311-312) (Hr. Tr. pp. 54-55). Using this rotational method, the employer used four part-time cutters for two days a week, and the employer used two part-time workers one day a week. In any given average week, the arithmetic indicates the employer would use six different part-time tree cutters. (R. pp. 311-312) (Hr. Tr. pp. 54-55). The employer has used all of the employees mentioned *supra* for years. (R. p. 291) (Hr. Tr. p. 34). In the one year before the accident, according to the employer's testimony taken as a whole, the employer would have only five people working for him on any given day: Anthony Graham, Brant Ritchie, Carla Weaver, and two-part time tree cutters who rotate each day. In any given average week, the employer had ten people working for him during the week according to his testimony.

The claimant's testimony contradicted the employer's testimony. The claimant testified that the employer hired up to six tree-cutters, in addition to the claimant, to work at the same time at various job sites. (R. p. 338) (Hr. Tr. p. 81). Since Carla Weaver did not cut trees, the employer had a total of eight employees on the same day. ("The only thing she doesn't do is cut the trees." (R. p. 314) (Hr. Tr. p. 57). In addition, the claimant testified that the employer used between two to five tree cutters at the various job sites in the one week prior to the accident. (R. p. 338) (Hr. Tr. p. 81). That means there was up to six people on the payroll on a single day in the one week prior to the accident, once bookkeeper Carla Weaver is added as an employee on that day. (R. p. 338) (Hr. Tr. p. 81). Since the employer's testimony showed he worked five employees each day,

the claimant's testimony that the employer was working six to eight employees a day contradicted the employer's testimony.

The Commission made a finding of fact that the Commission believed the claimant's testimony over the testimony of the employer because the employer paid the employees in cash and the employer kept no records of who was working for him on any given day. (R. p. 28) (Appellate Panel decision, FOF No. 7). The employer paid his employees in cash and he kept no records of the hours. (R. pp. 27, 282-285) (Hr. Tr. pp. 25-28; Appellate Panel decision, FOF No. 6 (second)). The Commission made a finding of fact that the employer hired five tree-cutters in addition to the claimant and bookkeeper Carla Weaver during the week prior to the accident. (R. pp. 27-29, 338) (Appellate Panel decision, FOF Nos. 7, 8; Hr. Tr. p. 81). There was a total of seven employees working for the employer in the week leading up to the accident according to the findings of fact. (R. pp. 27-29, 338) (Appellate Panel decision, FOF Nos. 7, 8; Hr. Tr. p. 81). The Commission made a finding of fact that the employer would have up to six different tree-cutters (not including bookkeeper Carla Weaver) working at one job site. (R. pp. 27-28) (Appellate Panel decision, FOF No. 7). The Appellate Panel found the claimant more credible than the employer. (R. p. 28) (Appellate Panel decision, FOF No. 7).

STANDARD OF REVIEW

If the issue before the Court involves a jurisdictional question, the "appellate bears the burden of showing the [lower] decision is against the preponderance of evidence." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691, 696 (Ct.App.2007). It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d

720, 723 (1964). Any reasonable doubts as to construction should be resolved in favor of the claimant. Hall v. Desert Aire, Inc., 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct.App.2007). On appeal, under the preponderance of evidence standard of review, "the final determination of witness credibility is usually reserved to the Appellate Panel." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691, 694 (Ct.App.2007).

ARGUMENTS

The only issue on appeal is whether the employer regularly employed four or more employees in the State. S.C. Code Ann. § 42-1-360(2) (Supp.2017). The Commission found that the employer regularly employed four or more employees. (R. p. 29) (Appellate Panel decision, FOF No. 9). The Commission heard the live witnesses in this case. The Appellate Panel found the claimant more believable then the employer because the employer pays his employees in cash and does not keep any records of the dates and times his employees work. In addition, both the employer and the claimant testified that the employer employed four or more employees. The brief of defendant S.C. Uninsured Employers' Fund completely ignores the most relevant testimony and basic arithmetic. In addition, defendant S.C. Uninured Employer's Fund asks this Court to disregard the findings of fact of the Commission that were based on the credibility of the witnesses. The Commission heard the live testimony of the witnesses and its findings of fact should not set aside.

PART I

I. The employer regularly employed four or more individuals in the State.

In finding of fact number nine, the Appellate Panel found that defendant Stacy Whitfield had four or more regularly employed individuals working for him during the

relevant time period before the accident. (R. p. 29) (Appellate Panel decision, FOF No. 9). As stated in James v. Anne's Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010):

> [T]he Commission regularly exercises its flexibility in making compensation awards to ensure the best interests of the workers are protected to the extent the award is not otherwise prohibited by the Workers' Compensation Act. This is consistent with the general rule **that workers' compensation law is to be liberally construed in favor of coverage** in order to serve the beneficent purpose of the Act. (emphasis added).

Id. The preponderance of the evidence supports the conclusion that the employer regularly employed four or more employees in the State.

The employer testified that he has a total of ten individuals working for him. (R. pp. 27-29, 279-315) (Hr. Tr. pp. 22-58; Appellate Panel decision, FOF No. 7-8). The employer testified that he has three people working for him full-time, and seven part-time workers that he uses one or two days a week. ($8 an hour, or $80 to $100 for the day). (R. pp. 27-29, 279-315) (Hr. Tr. pp. 22-58; Appellate Panel decision, FOF No. 7-8). The employer said that: "everyone that you have mentioned [the 10 employees] I have worked for over – I mean, the years ... for years." (R. p. 291) (Hr. Tr. p. 34). The employer used words such as "most days" and "everyday" to describe how often Ritchie Brant and Carla Weaver work for him. (R. pp. 314-315) (Hr. Tr. pp. 57-58). The employer paid the claimant an average of $500 a week for an entire year. (R. pp. 29, 326-328) (Appellate Panel decision, FOF No. 13; Hr. Tr. pp. 69-71). The claimant was paid $26,000 by the employer in the year before the accident. (R. pp. 29, 326-328) (Appellate Panel decision, FOF No. 13) (Hr. Tr. pp. 69-71). The employer testified he used seven more individuals to run his professional tree cutting service. He used two on Monday, two more on Tuesday, two more on Wednesday, and then on Thursday he

reused the two individuals from Monday, and on Friday, he reused two more individuals. (R. pp. 311-312) (Hr. Tr. pp. 54-55).

The claimant's testimony is sufficient to resolve this case and the appeal. The employer paid his employees cash and did not keep any records of the payments to his employees, including payments to the claimant. (R. pp. 27, 282) (Hr. Tr. p. 25) (Appellate Panel decision, FOF No. 6 (second)). Therefore, there is no written payroll records to contradict the testimony of the claimant. The Court can decide the case on the testimony of the claimant alone, especially since the employer cannot produce any payroll records that contradict the testimony of the claimant. In short, the claimant testified there were four or more employees working for the employer and this Court can decide the case based solely on the testimony of the claimant. (R. p. 338) (Hr. Tr. p. 81). The employer has been paying these individuals for years. (R. p. 291) (Hr. Tr. p. 34). The finding of fact by the Appellate Panel that defendant Stacy Whitfiled had four or more regularly employed individuals working for him during the relevant time period before the accident is supported by the preponderance of the evidence.

PART II

II. The employer's employees were not casual employees.

The S.C Uninsured Employers' Fund argues that the employer's employees were merely casual employees and they should be excluded from the total number of employees. Brief of Appellant pp. 10-12. The defendants did not submit any pay records of the employees into evidence at the hearing. Also, no one testified at the hearing that the employees were casual employees. No one testified that the labor was irregular, unpredictable, sporadic or brief. In fact, the employer and claimant testified to just the opposite. The employer testified that Brant Richie works for the employer "most days"

and he pays Mr. Richie $80 a day. (R. pp. 289, 315) (Hr. Tr. pp. 32, 58). The employer testified that he is "always needing Carla Weaver to do his books" and that "she does everything" for him except cutting the trees. (R. p. 314) (Hr. Tr. p. 57). The employer testified that Carla Weaver works for him "every day." (R. p. 314) (Hr. Tr. p. 57). The employer paid the claimant $100 to $150 a day, $500 a week on average, for the one year before the accident. (R. pp. 279-280, 282, 326-328) (Hr. Tr. pp. 22-23, 25, 69-71).

The employer testified that the part-time workers work on a weekly rotation. According to the testimony of the employer, four individuals would work two days a week, and two more individuals would work one day a week. (R. pp. 311-312) (Hr. Tr. pp. 54-55). These employees consistently worked two days a week for the employer. The employer has employed these individuals for years in a business that has now operated for twenty years. The business is a successful business that consistently needs labor to make a profit for the employer.

According to the claimant's testimony, the business has up to six tree cutters working at a single job site, and five different tree cutters (in addition to the claimant) worked as a tree cutter in the week before the accident. If the employer kept pay records, there may be a lot more employees on the payroll. There is a reason why the employer pays his employees cash and keeps no records of the wages paid to the employees. The employer is not credible, according to the Commission, because he pays his employees cash and does not keep any records of payments to his employees.

PART III

III. Carla Weaver is not a gratuitous employee.

Defendant S.C. Uninsured Employer's Fund argues that Carla Weaver should not count as an employee because she is just a gratuitous employee. Appellant's Brief

at 12. This argument was not made to the hearing commission and is not preserved for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). At the hearing, counsel for the S.C. Uninsured Employer's Fund argued as follows: "Mr. Commissioner, I would just point out for the record, there is case law that says that family members who work in the business and don't get paid cash, even if – even if they live in the family home, are not employees." (R. p. 295) (Hr. Tr. p. 38). This legal argument by the defendant caused the parties to ask direct questions to the employer about his relationship with Carla Weaver since the defendants were arguing that family members cannot count as an employee of the business. The employer then 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." (R. p. 317) (Hr. Tr. p. 60). When the employer was asked what he meant by the term "wife," the employer said that: "South Carolina says that anyone ... that lives in your house for over a year and has clothes and stuff in your house, in any situation, for over a year is your wife by State law." (R. p. 318) (Hr. Tr. p. 61). Based on these statements by the employer, and in response to the S.C. Uninsured Employers' Fund legal argument that "family members who work in the business and live in the family home, are not employees," the hearing commissioner made a finding of fact that Carla Weaver is not the wife of the employer. (R. pp. 10, 295) (Hr. Tr. p. 38; Hearing Commissioner decision, FOF No. 8). In addition, the Appellate Panel, in finding of fact number eight found that the employer and Carla Weaver are not married. (R. pp. 28-29) (Appellate Panel decision, FOF No. 8) No party appealed that finding of fact and it has become the law of the case.

On appeal, the defendant has changed its legal argument from "family members" are not employees to gratuitous employees are not employees. The appellant has not

preserved this argument for appeal because it was not argued to or ruled upon by the hearing commissioner. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The claimant asks this Court to hold that this issue was not preserved for appeal.

As to the issue of Carla Weaver's employment status, the employer testified that he is "always needing Carla Weaver to do his books" and that "she does everything" for him except cut the trees. (R. pp. 293, 314) (Hr. Tr. pp. 36, 57). The employer testified that Carla Weaver works for him "every day." (R. p. 314) (Hr. Tr. p. 57). Carla Weaver runs to the bank to put money in the bank for the business. (R. p. 315) (Hr. Tr. p. 58). She helps him read maps, and does "all" of the paperwork. (R. p. 293) (Hr. Tr. p. 36). The employer testified that he is not a good reader, so he relies on her to understand legal documents. (R. p. 293) (Hr. Tr. p. 36).

As to the compensation paid to Carla Weaver, the employer testified as follows:

> Q. And what does she get – what does she get for that?
> A. She don't get nothing.
> Q. Well, you – she doesn't get anything at all?
> A. Well, I mean, I pay her bills, I pay her light bill, I pay her – I buy her cars, I buy her panties; I buy everything for her.
> Q. Okay
> A. I mean, that's what she gets.
>
> ***
>
> Q. All right, but you already said she gets some food, she gets some clothing, she gets shelter; is that correct?
> A. Yeah.

(R. pp. 294-295) (Hr. Tr. pp. 37-38).

The case cited by the S.C. Uninsured Employers' Fund, Kirksey v. Assurance Tire Co., 311 S.C. 255, 428 S.E.2d 721 (Ct.App.1993), specifically states that a person is an employee if they receive payment "of some kind" for her services, and "[p]ayment,

however, 'need not be in money, but may be in anything of value.'" Kirksey, at S.E.2d 723 (citing 1B Arthur Larson, The Law of Workmen's Compensation § 47.10 at 8-302 (1992)). The Kirksey case specifically states that room and board are sufficient to sustain a finding of employment:

> Board, room, and training, such as might be furnished a student nurse or hospital intern or laboratory assistant trainee, or student teacher are treated as the equivalent of wages.

Kirksey, S.E.2d at 723. In this case, the employer testified that he provided room, board, a car, clothing, and other goods to Carla Weaver for her wages. Carla Weaver does not work for anyone else. She receives all of her support from the employer. Carla Weaver received "payment of some kind" for her work, and therefore, she is an employee. In the Kirksey case, the daughter of the employer was paid nothing for keeping the books and she received nothing of value according to the Court. Kirksey, S.E.2d at 723.

Finally, in Finding of Fact No. 8, the Appellate Panel found:

> For purposes of deciding if Carla Weaver should count as an employee for determining if the Employer regularly employees 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.

(R. pp. 28-29). Therefore, even if Carla Weaver is excluded as an employee, the Appellate Panel found that the employer still had four or more employees.

PART IV

IV. The case law supports the Commission's finding that the employer regularly employed four or more employees.

The Brief of the Appellant raises the issue, for the first time on appeal, the amount of time that should be allocated to the "relevant time period" in this case. In this case, the relevant time period is 20 years since the employer has been in the same type of work for 20 years, without any interruptions or change. The tree cutting business is

the employer's full-time job, and the tree cutting business is not just a temporary job or hobby for the employer. (R. pp. 29, 271) (Hr. Tr. p. 14; Appellate Panel decision, FOF No. 9). As a practical matter, the employer did not maintain or submit any pay records to the Commission for the past 20 years. As such, the employer prevented the Commission from counting the number of employees paid and the frequency of pay over the past 20 years. Why does the employer pay his employees cash and not keep any records of the wages paid to the employees? At the hearing, the employer was asked questions about the number of employees – name by name. The claimant had to rely on his memory of the names of the people he worked with during his tenue with the employer. As a practical matter, the testimony at the hearing centered around the workers who worked for the employer during the one year the claimant worked for the employer prior to the accident. If the relevant time period is the one year the claimant worked for the employer, the factual analysis results in the conclusion that the employer had ten regularly employed individuals working for him during a relevant time period of one year.

A. The S.C. Uninsured Employers' Fund relies on Harding v. Plumley, 329 S.C. 580, 496 S.E.2d 29 (Ct.App.1998). In Harding, the employer submitted the payroll records from his accountant to the Commission and the Commission could see exactly who worked what days and what the employees were paid. The Court determined that the employer had two regularly employed employees because two employers worked partial, part-time hours for the two months before the work accident. The claimant was injured on his first day on the job. In the year before the work accident, the employer paid one employee one paycheck for $126, another employee two paychecks for part-time work over a two month period, and a final employee one paycheck for $350. The

Court held that the employees who were only paid one or two times for essentially a day or two of labor in the 12 months before the claimant's work accident were not regularly employed. The employees who were paid more than two times were all considered regularly employed by this Court, even though those employees worked only partial, part-time hours during those weeks.

In this case under review, the employer paid ten employees more than two times in the year before the work accident. Following the factual and legal analysis of the Harding case, in the case under review, all ten employees of the employer are regularity employed by the employer. In addition, the Harding case is distinctly different from the case under review because in Harding the employer provided the Court with a printout of the wages paid to the employees. In the case under review, the employer paid his employees in cash and kept no records of the hours worked. If the employer had kept records of the payments, the Court could very well find that the employer had more than ten employees using the Harding analysis that part-time employees who receive more than two paychecks in a 12 month period are regularly employed by the employer. For this reason, the Commission found the claimant more believable than the employer when the claimant testified that the employer had up to six tree cutters, not including the claimant and Carla Weaver, working at one job site.

The following comment by the Court of Appeals in the Harding case is directly on point for the facts in this case:

> While the facts of this case support no other conclusion, we do not imply that employers can avoid the Act simply by shifting the particular employees they hire. Rather, in deciding whether an employee is regular or casual, consideration should be given to both duration and regularity of recurrence.

329 S.C. 580, fn.4, 496 S.E.2d 29 fn.4 (Ct.App.1998) (citing 4 Arthur Larson, Workers' Compensation Law, § 53.20 (1997)). The Court of Appeals makes it clear that employers cannot rotate employees on a daily (or weekly) basis to avoid purchasing workers' compensation coverage. In finding of fact number six, the Appellate Panel stated: "We find the Employer was moving employees around to avoid buying workers' compensation insurance." (R. p. 27). The finding of fact is consistent with the Court of Appeals' comment in Harding and supports the claimant's position in this case.

In the case under review, the employer testified that he had employed the ten individuals for years. (R. p. 291) (Hr. Tr. p. 34). The employer has operated a tree cutting service full-time for twenty years. (R. pp. 29, 271) (Hr. Tr. p. 14; Appellate Panel decision, FOF No. 9). Using the "duration and regularity of recurrence" standard in the Harding case, the facts in this case demonstrate that the ten employees are regularly employed since they worked for the employer for at least a year.

B. The S.C. Uninsured Employers' Fund relies on Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691, (Ct.App.2007). In Hernandez-Zuniga, this Court stated that:

> an employer cannot be allowed to oscillate between coverage and exemption as its labor force exceed or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the act, it remains there even when the number employed temporarily falls below the minimum. The term "regularly employed" has been construed to embrace regularly-employed part-time as well as full-time workers. In all these cases, the fact that the number working at the exact time of injury was below the minimum is of course immaterial.

Id. at 647 S.E.2d 691, 696 (emphasis added). If the facts indicate that the employer, even once, regularly employed four individuals, then the employer is subject to the

Workers' Compensation Act. Hernandez-Zuniga, 647 S.E.2d 691, 696. After the employer reaches four regularly employed individuals on one occasion, the employer remains subject to the Workers' Compensation Act even though the number of employees drops below four at the time of the injury. Id.

In the case at bar, the claimant testified that up to eight people worked for the employer at one time (6 tree cutters on a job site, plus the claimant, plus Carla Weaver). In addition, it is clear that the term "regular employment" includes the seven part-time workers who worked each week for the employer for years. If at any time the employer reached four regular employees, the employer is subject to the Workers' Compensation Act.

C. The S.C. Uninsured Employers' Fund relies on Ferguson v. New Hampshire Ins. Company, 412 S.C. 203, 771 S.E.2d 851 (Ct.App.2015). In Ferguson, the employer worked by himself and testified that he had no employees. The Court found that the employer had no employees because that was the testimony of the employer and the claimant agreed to defer to the employer's testimony. The facts of the Ferguson case are so different than the facts in the case at bar that the Ferguson case has no significant relevance to the determination of this case.

PART V

V. The employer was rotating employees in an effort to avoid his responsibilities under the Workers' Compensation Act.

The S.C. Uninsured Employers' Fund takes exception to the Appellate Panel's finding that the employer was rotating employees in an effort to avoid his responsibilities under the Workers' Compensation Act. In finding of fact number six, the Appellate Panel stated: "We find the Employer was moving employees around to avoid buying workers'

compensation insurance." (R. p. 27). The following comment by the Court of Appeals in the Harding case is directly on point for the facts in this case:

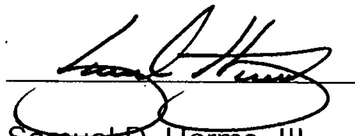
> While the facts of this case support no other conclusion, we do not imply that employers can avoid the Act simply by shifting the particular employees they hire. Rather, in deciding whether an employee is regular or casual, consideration should be given to both duration and regularity of recurrence.

329 S.C. 580, fn.4, 496 S.E.2d 29 fn.4 (Ct.App.1998) (citing 4 Arthur Larson, Workers' Compensation Law, § 53.20 (1997)). The Court of Appeals makes it clear that employers cannot rotate employees on a daily (or weekly) basis to avoid purchasing workers' compensation coverage. The finding of fact by the Appellate Panel is consistent with the Court of Appeals' comment in Harding and supports the claimant's position in this case.

CONCLUSION

For the reasons stated, this Court should affirm the Decision and Order of the Appellate Panel of the Workers' Compensation Commission.

January 5, 2019



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

RECEIVED
JAN 09 2019
SC Court of Appeals

Appellate Case No. 2018-001664

Anthony Graham, Employee, ...Respondent,

v.

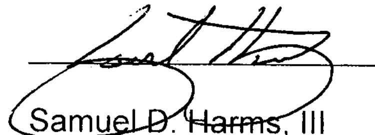
Stacy Whitfield d/b/a Whitfield Land & Tree Service, Direct Employer, and S.C. Uninsured Employer's Fund, Carrier,

Of which Stacy Whitfield d/b/a Whitfield Land & Tree Service is the Respondent and S.C. Uninsured Employers' Fund is the ....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief of Respondent complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

January 7, 2019



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