THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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 Employers' 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Commission err in finding and concluding that Stacy Whitfield d/b/a Whitfield Land and Tree Service was subject to the South Carolina Workers' Compensation Act by virtue of having four or more employees regularly employed in the same business or occupation?

STATEMENT OF THE CASE

This case arose following Anthony Graham's ("Respondent") filing of a claim under the South Carolina Workers' Compensation Act ("the Act") alleging injuries on January 27, 2017, while under the employ of Stacy Whitfield d/b/a Whitfield Land and Tree Service ("Mr. Whitfield"). Because Mr. Whitfield did not have four or more employees, and thus fell outside the purview of the Act, he neither had, nor was required to obtain, workers' compensation insurance. Because he did not have workers' compensation insurance, the South Carolina Uninsured Employers Fund ("Appellant") was added as a defendant in this claim.

Pursuant to Respondent's Form 50 Hearing Request, a hearing before the Single Commissioner, Avery B. Wilkerson, Jr., was held on October 25, 2017. (R. p. 39). Before the Commissioner were the issues of, *inter alia*, whether Mr. Whitfield was subject to the Act and so was required to have workers' compensation insurance, as well as whether the Respondent was entitled to medical or temporary disability benefits, past, present, or future, under the Act. (R. pp. 3-4).

By Decision and Order dated December 21, 2017, Hearing Commissioner Wilkerson concluded that Mr. Whitfield was within the scope of the Act, the Respondent sustained compensable injuries, and the Respondent was entitled to past and future medical expenses and temporary total disability benefits from the date of injury through the present and continuing. (R. p. 12).

More specifically, the Commissioner found that Mr. Whitfield had the following employees at various times: Anthony Graham, Brant Richey (Mr. Whitfield's son), Cody Moore, Trinity Moore, Teddy (last name unknown), Gary Whitfield, Mike Swain, Johnny Whitman, "Stick" Floyd, and Carla Weaver (common law wife of Mr. Whitfield). (R. pp. 9-10).

At the same time, the Commissioner found that Mr. Whitfield rotated employees from day to day. (R. p. 9). Despite no evidence to support his finding, the Commissioner went a step further and found that Mr. Whitfield was intentionally "moving employees around to avoid buying workers' compensation insurance" under the Act. (R. p. 9). In direct contrast to this finding, Mr. Whitfield testified that the needs of his business determine the individuals to be hired and when each is hired. (R. pp. 297, 311).

Commissioner Wilkerson interpreted § 42-1-360 and the case law related thereto as meaning that an employer with four different people working for him or her at various, unspecified times is subject to the Act even if he or she never employed four or more at any given time. (R. pp. 9-10). And thus, because Mr. Whitfield employed more than four different people at various, unspecified times, the Commissioner ultimately found that Mr. Whitfield was subject to the Act. (R. p. 10).

Appellant thereafter filed an appeal with the Appellate Panel of the Workers' Compensation Commission on January 4, 2018. (R. p. 348). Two weeks following the appeal and therefore without subject matter jurisdiction over the claim, Commissioner Wilkerson issued a second Decision and Order dated January 19, 2018, attempting to fine Mr. Whitfield without a hearing, without notice, and without following any of the procedures or the regulations regarding coverage and compliance issues, thereby depriving Mr. Whitfield of due process. (R. pp. 15-18).

Subsequently, Appellant appealed the second order and both matters came before the Appellate Panel of the Workers' Compensation Commission on March 19, 2018. (R. p. 367). By Decision and Order dated August 8, 2018, the Appellate Panel affirmed the Single Commissioner's Decision and Order dated December 21, 2017, in its entirety, but vacated the Decision and Order dated January 19, 2018, attempting to fine Mr. Whitfield. (R. pp. 32-33).

Appellant filed a Notice of Appeal with the Court of Appeals on September 10, 2018. (R. pp. 369-74). The sole issue on appeal is whether Mr. Whitfield is subject to the Act even though he never had of having four or more employees regularly employed on any single job pursuant to § 42-1-360 and supporting case law.

STATEMENT OF THE FACTS

The Respondent sustained an injury by accident occurring on or about January 27, 2017, when he was struck by a tree limb injuring his left back, ribs, and mid-back. (R. p. 275). Afterwards, the Respondent was able to get up and walk. (R. p. 276). At the time, the Respondent was working for Mr. Whitfield as a day laborer in Mr. Whitfield's tree cutting service business. (R. p. 276).

Mr. Whitfield does not dispute that the tree limb fell and caused the Respondent to sustain injuries that day and even offered to help the Respondent by taking him to the emergency room following the incident. (R. pp. 275-76). However, the Respondent refused the offer, but allowed his wife to take him to the emergency room later that night. (R. pp. 275-76). Mr. Whitfield tried to help the Respondent in any way he could and testified that he considered Respondent to be like a little brother to him. (R. pp. 277-78). Mr. Whitfield helped the Respondent get off the streets and obtain a place to live, bought the Respondent groceries and feed him when he was hungry, and paid Respondent's light and water bills in the past. (R. p. 278).

Along the same lines, Mr. Whitfield does not dispute that the Respondent was under his employ on the date of the injury. (R. p. 276). Indeed, Mr. Whitfield paid the Respondent 100 dollars per day of work. (R. p. 278). Plus, when the Respondent brought his own equipment in order to climb up and down trees, Mr. Whitfield paid the Respondent an additional 25 to 50

dollars to perform this task. (R. pp. 279-80). In the past, Mr. Whitfield requested that Respondent provide him with a social security number and drug test so that he could make the Respondent a full-time laborer and be entered on the company books, however the Respondent refused. (R. pp. 281-82). Therefore, the Respondent remained only a day laborer and was always paid for his work in cash. (R. p. 282).

In addition to the Respondent, Mr. Whitfield also employed other individuals at various times as day laborers in his tree cutting service business. (R. p. 283). Notably, Mr. Whitfield never worked these individuals all at once. (R. p. 285). Instead, no more than two individuals ever worked for Mr. Whitfield at the same time. (R. pp. 297, 310-11). The individuals hired to work and when they worked was determined strictly by the needs of Mr. Whitfield's business. For example, Mr. Whitfield might work by himself and hire no day laborers when the job in question was small. (R. p. 313). But in the case of a larger job, Mr. Whitfield might need to hire one or two day laborers. (R. p. 313). The identity of the individuals working for him varied based on who was available for work when Mr. Whitfield had a job.

Mr. Whitfield's son, Brant Ritchey, is the only individual entered on the company books, but even he does not work every day, often working a week and then going out of work for some time. (R. pp. 283, 315). Teddy (last name unknown) worked for Mr. Whitfield prior to when Mr. Whitfield's son was hired, and the two individuals' employment never overlapped. (R. p. 287). On the date of the Respondent's injury, only the Respondent and Mr. Whitfield's son were working. (R. p. 311).

Cody Moore worked for Mr. Whitfield for only two days and was paid $8.00 per hour in cash. (R. p. 283). Trinity Wilson, Cody Moore's son-in-law, was also paid $8.00 per hour in cash. (R. p. 284). Both were strictly contracted as day laborers because extra help was needed

on a job. (R. p. 285). Gary Whitfield, Mr. Whitfield's brother, has worked as a day laborer for Mr. Whitfield when no one else was available to work. (R. p. 290). Mike Swain, Mr. Whitfield's brother-in-law, has also worked as a day laborer and was paid $10.00 per hour. (R. p. 290). Johnny Whitman worked as a day laborer and was paid 100 dollars per day of work. (R. p. 291). "Stick" Floyd worked as a day laborer and was paid $10.00 per hour. (R. p. 292).

Finally, Carla Weaver, Mr. Whitfield's common law wife for 11 years, helps Mr. Whitfield with the company books and paperwork but has never been paid. (R. pp. 293-94, 296). Mr. Whitfield and Carla Weaver, although they do not hold a marriage license, hold themselves out to the public as a married couple and have lived together for years. (R. pp. 317-18). She does not work as an employee and only helps as Mr. Whitfield's spouse. (R. p. 314).

STANDARD OF REVIEW

The Administrative Procedures Act, South Carolina Code Ann. § 1-23-380, establishes the "substantial evidence" rule as the standard of review for decisions of the South Carolina Workers' Compensation Commission where no jurisdictional question arises. Lark v. Bi-Lo, 276 S.C. 130, 133-34, 276 S.E.2d 304, 305-06 (1981) (citing S.C. Code Ann. § 1-23-380). Under this standard, the Court of Appeals should affirm the Full Workers' Compensation Commission's decision where the factual findings are supported by substantial evidence in the record. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453, 458 (Ct. App. 1999).

The Court of Appeals may reverse the Workers' Compensation Commission's decision where "substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are," *inter alia*, not supported by substantial evidence or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f). An abuse of the Commission's discretion constitutes grounds for this Court to reverse and remand a case for a hearing *de novo*. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 659, 726 S.E.2d 9, 13 (Ct. App. 2012) (vacating, remanding, and ordering a *de novo* hearing).

With regard to jurisdictional questions, however, a *de novo* standard of review applies wherein "the Court may take its own view of the preponderance of the evidence." Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995)) (taking its own view of the preponderance of the evidence regarding whether the claimant was an employee or independent contract). Under this standard, "an appellate court reviews jurisdictional issues by making its own findings of fact without regard to

the findings and conclusions of the Appellate Panel." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007) (citing Harding v. Plumley d/b/a Plumley Construction Co., 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998)).

"The issue of whether or not an employer regularly employs the requisite number of employees to be subject to the Workers' Compensation Act is jurisdictional." Hernandez, 374 S.C. at 244, 647 S.E.2d at 695 (citing Harding, 329 S.C. at 584, 496 S.E.2d at 31). As a result, a *de novo* standard of review applies, and the Court must "review the record and decide the issue in accordance with its view of the preponderance of the evidence." Harding, 329 S.C. at 584, 496 S.E.2d at 32; see also Kirksey v. Assurance Tire Co., 311 S.C. 255, 428 S.E.2d 721 (Ct. App. 1993) ("the court of appeals has the power and duty to review the record and decide the issue in accordance with the preponderance of the evidence."). "The commission's findings of fact relative to the number of employees employed by the employer are not conclusive on appeal." Harding , 329 S.C. at 584, 496 S.E.2d at 32.

Moreover, the question of jurisdiction is a question of law. Hernandez, 374 S.C. at 244, 647 S.E.2d at 695 (citing Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct. App. 2000); Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997)). The Court of Appeals may reverse where the decision of the Workers' Compensation Commission is affected by an error of law. Id. (citing S.C. Code Ann. § 1-23-380(5)(d)).

ARGUMENT

I. The Commission erred in finding and concluding that Stacy Whitfield d/b/a Whitfield Land and Tree Service was subject to the South Carolina Workers' Compensation Act because the preponderance of evidence shows that Mr. Whitfield never regularly employed four or more employees as is explicitly required by § 42-1-360 for the Commission to have jurisdiction over a claim.

The Appellant respectfully requests that this Court reverse the Commission's Decision and Order finding that Mr. Whitfield regularly employed four or more employees because the preponderance of evidence supports just the opposite. Applying a *de novo* standard of review, Appellant respectfully submits that this Court take its own view of the preponderance of the evidence and conclude that Mr. Whitfield did not satisfy the minimum number requirement under § 42-1-360 during the relevant time period. Therefore, he was not within the purview of the Act and was not required to have workers' compensation insurance. Accordingly, this incident does not fall under the Commission's jurisdiction, and thus, neither Mr. Whitfield nor Appellant can be held liable for the payment of any benefits under the Act. Nevertheless, the Commission found that jurisdiction did, in fact, exist and thereafter proceeded to hold Mr. Whitfield and Appellant liable for benefits under the Act. Such a finding is contrary to the preponderance of the evidence and Appellant requests that this case be reversed.

In overview, pursuant to § 42-1-360, the Act exempts "any person who has regularly employed in service less than four employees in the same business within the State." S.C. Code Ann. § 42-1-360(2). Thus, an employer must employ, at minimum, four or more employees to fall within the scope of the Act and give the Commission jurisdiction. However, in calculating the total number of employees employed by any given employer, the Act specifically excludes several groups or types of employees. The Act simply does not mandate coverage for all employees.

A. Mr. Whitfield's employees were casual in nature, and thus excluded from counting toward the total number of employees employed by Mr. Whitfield for the purposes of the Act.

First, the Act excludes "casual employees" from counting toward the four or more total employees required to fall within the scope of the Act, even if the work of those "casual employees" is within the trade, business, profession, or occupation of the employer. S.C. Code Ann. § 42-1-130 ("The Act excludes a person whose employment is both casual *and* not in the course of the trade, business, profession, or occupation of his employer.") (emphasis added); S.C. Code Ann. § 42-1-360(1) ("This title does not apply to[] a casual employee, as defined in Section 42-1-130.").

"Employment is casual when it is irregular, unpredictable, sporadic and brief in nature." Smith v. Coastal Tire & Auto Service, 263 S.C. 77, 81, 207 S.E.2d 810, 811 (1974) (quoting 1A Larson, WORKMEN'S COMPENSATION LAW, § 51.00, p. 909) (internal quotations omitted); Benbow v. Edmunds High School, 220 S.C. 363, 67 S.E.2d 680 (1951). Or, as defined by Black's Law Dictionary, casual employment is "employment at uncertain times or irregular intervals . . . by chance, fortuitously, and for no fixed time." Smith, 263 S.C. at 81, 207 S.E.2d at 811 (quoting BLACK'S LAW DICTIONARY 275 (4th Ed. Rev.)) (internal quotations omitted).

For example, in Smith, the Supreme Court looked to the antonyms of "casual" such as "regular, systematic, periodic, and certain" in determining that the claimant in the case before the court was not a regular employee, but was casual, because "he worked on a most irregular, spasmodic, and sporadic basis." 263 S.C. at 81, 207 S.E.2d at 812. In the same way, the employees of Mr. Whitfield were not regular employees, but only casual in nature. In fact, Mr. Whitfield's son, Brant Ritchey, is the only individual entered on the company books. (R. pp.

283, 315). But, even he did not work every day, often working a week and then going out of work for some time. (R. pp. 283, 315).

Moreover, Cody Moore worked for Mr. Whitfield for only two days, and therefore, was not working in a "regular" or "certain" manner. (R. p. 283). See Smith, 263 S.C. at 81, 207 S.E.2d at 812. At best, his employment was "by chance" and "for no fixed time." Smith, 263 S.C. at 81, 207 S.E.2d at 811. In addition to Cody Moore, Mr. Whitfield also hired Trinity Wilson (Cody Moore's son-in-law), but both Cody and Trinity were only hired because extra help was needed on a particular job. (R. pp. 284-85). Therefore, their employment was in no way "certain." Smith, 263 S.C. at 81, 207 S.E.2d at 812.

Similarly, Gary Whitfield (Mr. Whitfield's brother) worked as a day laborer for Mr. Whitfield only when no one else was available to work. (R. p. 290). Plainly, this supports that "he worked on a most irregular, spasmodic, and sporadic basis." Smith, 263 S.C. at 81, 207 S.E.2d at 812. Moreover, all of the above laborers, in addition to Teddy (last name unknown), Johnny Whitman, and "Stick" Floyd, were paid by Mr. Whitfield in cash. (R. pp. 283-92). Nothing about these individuals' work was "regular" or "certain." Smith, 263 S.C. at 81, 207 S.E.2d at 812. Instead, their work for Mr. Whitfield was "irregular" and "sporadic." Id. Accordingly, all of Mr. Whitfield's employees were merely casual employees within the meaning of the Act, and all should be excluded from counting toward the four or more total employees required to place Mr. Whitfield within the Commission's jurisdiction.

B. Like casual employees, gratuitous employees, such as Mr. Whitfield's wife, are also excluded from counting toward the total number of employees employed by Mr. Whitfield for the purposes of the Act.

The testimony makes clear that Mr. Whitfield employed all his employees on a casual basis, and therefore, none should count toward the four or more total employees required to fall within the scope of the Act. However, even if several of these employees were not casual employees and could fairly be counted toward the required minimum number of employees, which is clearly not the case, Mr. Whitfield's own wife still cannot be counted as an employee for the purposes of the Act. Indeed, in addition to casual employees, the Act further excludes gratuitous employees, meaning those employees whom are not paid in some way or another for the work or services rendered. Kirksey, 311 S.C. at 255, 428 S.E.2d at 721 (holding a person who neither receives nor expects any kind of pay or remuneration for keeping the company books is not an employee).

As in the case of Mr. Whitfield's wife of 11 years, Carla Weaver, close family members have often been found to render work or services without remuneration, and in turn, been found to constitute mere gratuitous employees. See, e.g., Id. For example, in the almost identical case of Kirksey, this Court held that a family member keeping the company books and performing secretarial duties, but whom is never paid for that work, is not an employee for the purposes of the Act. 311 S.C. at 257-58, 428 S.E.2d at 723 (citing McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 383 S.E.2d 264, 266 (Ct. App. 1989)) (observing that "employee" is defined by the Act as a person in an employment under a contract of hire and that contract of hire connotes payment of some kind). Instead, this Court held that the family member qualified as merely a gratuitous worker. Id.

Likewise here, as the evidentiary record shows, Mr. Whitfield's wife only helped Mr. Whitfield with the company books and paperwork. (R. pp. 293-94, 296). But, she was never paid for her assistance. (R. pp. 293-94, 296). Therefore, case law dictates that Mr. Whitfield's wife be characterized as a mere gratuitous employee. As a result, she cannot count toward the total employees needed to give the Commission jurisdiction over Mr. Whitfield and this case.

C. Notwithstanding the fact that Mr. Whitfield's employees are casual in nature and his wife was a mere gratuitous worker, Mr. Whitfield still falls beyond the purview of the Act because he never "regularly" employed four or more of these individuals during the relevant time period.

Even if the preponderance of the evidence did not support that all of Mr. Whitfield's employees were mere casual or gratuitous employees, they cannot be counted toward the required four or more total employees to place Mr. Whitfield within the Commission's jurisdiction. Appellant respectfully requests that this Court still reverse the Commission's Decision and Order because Mr. Whitfield's employees were never "regularly" employed by Mr. Whitfield during the time period relevant to this case. Therefore, the Commission's finding that Mr. Whitfield fell within the scope of the Act constitutes reversible error on this separate and independent basis—regardless of whether or not the Court is in agreement with the above-characterization of Mr. Whitfield's employees as casual and gratuitous. Under either analysis, the Act simply does not apply here.

The requirement in § 42-1-360 that an employer "regularly" employ, at minimum, four or more employees in the same business in this State or else be exempted from the Act has been interpreted by our courts as establishing a minimum number requirement that entails more than simply adding up all the employees that have worked for an employer over various and unspecified times. See, e.g., Harding, 329 S.C. at 496 S.E.2d at 29. Instead, a higher standard applying a much tighter fitting timeframe has been adopted by our courts.

First, the court must identify the parameters of a specific, relevant time period contemporaneous to the work-related injury, which is determined on a case-by-case basis depending upon the nature and needs of the employer's business. See, e.g., Id. (determining the relevant time period to be two months before through two months after the accident); see also Hernandez, 374 S.C. at 245-46, 647 S.E.2d at 696 (quoting 4 Larson, WORKMEN'S COMPENSATION LAW, § 74.01-02) ("It is the established mode or plan of operation of the business that is decisive."). Second, once the relevant time period in the case is established, then the court adds up only the number of persons "regularly" employed during that particular relevant time period. Id. The number of workers employed at other, various times is immaterial to the court's analysis.

Although the term "regularly employed," as used in the second prong of the inquiry, is not defined in § 42-1-360, this Court has looked to Black's Law Dictionary, which defines "regularly" as meaning "[a]t fixed and certain intervals, regular in point of time. In accordance with some consistent or periodical rule or practice." Hernandez, 374 S.C. at 248, 647 S.E.2d at 697 (quoting BLACK'S LAW DICTIONARY 1285 (6th Ed. 1990)). With this definition in mind, this Court adopted the definition developed by North Carolina courts, which defines "regularly employed" as "employment of the ***same number of persons*** throughout the period with some constancy." Harding, 329 S.C. at 586, 496 S.E.2d at 32 (quoting Grouse v. DRB Baseball Mgmt., Inc., 121 N.C. App. 376, 378-79, 465 S.E.2d 568, 570 (1996); Patterson v. L.M. Parker Co., 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 575 (1968)) (emphasis added); see also Hernandez, 374 S.C. at 257, 647 S.E.2d at 702 (same).

As an example of precisely how this two-part inquiry plays out in its application, Professor Larson proposed concluding that "if the minimum number is exceeded on only eight of

the one hundred and four days preceding the accident, the employer is not regularly employing the minimum." Hernandez, 374 S.C. at 245-46, 647 S.E.2d at 696 (quoting 4 Larson, WORKMEN'S COMPENSATION LAW, § 74.01-02). By contrast, "if the number exceeds the minimum on seventeen out of twenty-seven days in the course of a construction job, the employer is covered." Id. 374 S.C. at 246, 647 S.E.2d at 697.

Notably, the language in this two-part inquiry mirrors that regarding the unique distinction of a casual employee as has been elucidated above. Reassuringly, Professor Larson explained that "[t]he question whether a particular employee should be disregarded for numerical-minimum purposes is very similar to the question whether he or she is a casual employee," and thus, "both duration and regularity of recurrence are important factors." Id. 374 S.C. at 245-46, 647 S.E.2d at 696 (quoting 4 Larson, WORKMEN'S COMPENSATION LAW, § 74.01-02). Therefore, while appearing similar to the above-distinction, the issue here is in fact separate.

At minimum, the Appellant respectfully requests that the Court reverse the Decision and Order below on this second and separate basis. In this case, the Commission muddled the two-part inquiry, wholly failed to apply its distinct analysis, and counted up Mr. Whitfield's employees of any and every characterization that worked over a broad and irrelevant period. Our case law, which stands in stark contrast to the case at bar, is illustrative on this point.

1. Harding v. Plumley d/b/a Plumley Construction Company

In Harding, for example, this Court determined that the relevant time period was two months before and two months after the work-related accident occurred as this corresponded to the period of the construction job. 329 S.C. at 584, 496 S.E.2d at 31. Then, the Court applied the constrained definition of "regularly" employed utilized by North Carolina courts

("employment of the same number of persons throughout the period with some constancy") and determined that, during the above relevant period, the employer "regularly" employed at most only two employees. Id. 329 S.C. at 586, 496 S.E.2d at 32-33 (citing Grouse, 121 N.C. App. at 378-79, 465 S.E.2d at 570; Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575).

More specifically, the alleged uninsured employer, Craig Plumley, had at least six individuals working for him at various times during the year in which the claimant's injury occurred. Id. 329 S.C. at 583, 496 S.E.2d at 30-31. These individuals included Greg Pruitt, Bryan Pittman, Stephen Harding, Clint Plumley, Gordon Trammel, and John Hall. Id. However, during the relevant time period identified as two month before and two months after the incident, the only two employees that arguably worked for Craig Plumley "with any regularity" were Greg Pruitt and Bryan Pittman. Id. 329 S.C. at 584, 496 S.E.2d at 31. As for the other four employees: Gordon Trammel and John Hall worked only on occasion during half of the relevant time period; Stephen Harding worked for only one day; and Clint Plumley was only paid $350 for work occurring sometime during the same year as the work-related accident. Id. 329 S.C. at 586-87, 496 S.E.2d at 33.

Thus, this Court concluded that, even though Craig Plumley may have employed some additional laborers on occasion, "the record does not support a conclusion that it employed the 'same number of persons throughout the period with some constancy.'" Id. (quoting Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575). Indeed, the Court opined that to count all the other employees toward the requisite four would prove contrary to the Act's very purpose:

> It would not seem that the purpose of the Act would be accomplished by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number [four employees] required by the Act.

Id. 329 S.C. at 586, 496 S.E.2d at 32 32 (quoting Grouse, 121 N.C. App. at 378-79, 465 S.E.2d at 570; Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575). This comports with the larger purpose of the exemption for employers with less than four employees, which is to relieve small employers from both the administration and jurisdiction of the Act.

As a result, this Court concluded that "regularly" employing only two employees during the relevant time period—regardless of additional laborers "entering and leaving" service that in total technically exceeded the minimum four required—was insufficient to bring the employer, Craig Plumley, within the scope of the Act. Id. 329 S.C. at 587, 496 S.E.2d at 33.

Here, like the Harding employer, Mr. Whitfield technically did have more than four individuals working for him at various times. Id. 329 S.C. at 583, 496 S.E.2d at 30-31. (R. pp. 278-84, 297, 310-11). However, Mr. Whitfield never worked these individuals all at once and never had four employees at the same time. (R. p. 285). No more than two individuals ever worked for Mr. Whitfield at the same time. (R. pp. 297, 310-11). And, on the date of the Respondent's injury, only the Respondent and Mr. Whitfield's son were working. (R. p. 311). Therefore, it cannot be said that four or more individuals worked "with any regularity." Harding, 329 S.C. at 584, 496 S.E.2d at 31. In all reality, the evidentiary record supports that, other than Mr. Whitfield, none of his employees worked "with any regularity," and he never had four or more employees on any single job.

Indeed, the preponderance of the evidence in the case at bar supports that Mr. Whitfield never employed the "same number of persons throughout the period with some constancy." Id.

329 S.C. at 586-87, 496 S.E.2d at 33 (quoting Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575). To be sure he did have additional employees "entering and leaving" his service as his business required, but pursuant to precedent, that is simply insufficient to bring Mr. Whitfield's employee count to the required minimum of four employees "regularly" employed. These additional employees of Mr. Whitfield, like the additional employees of Craig Plumley, are irrelevant to the jurisdictional inquiry because he never had four employees working for him at the same time. Thus, as this Court concluded in Harding, the employer in this case, Mr. Whitfield, does not fall within the scope of the Act because he did not "regularly" employ the required four or more employees in the same business. Id. 329 S.C. at 587, 496 S.E.2d at 33.

2. Hernandez-Zuniga v. Tickle

This Court later applied the legal framework of Harding, guided by the ethos of Professor Larson, to reach a similar outcome in Hernandez. 374 S.C. at 244, 647 S.E.2d at 695. In Hernandez, the Court determined that the relevant time period began approximately one month before the work-related accident and ended shortly after the claimant was injured, consisting of three painting projects. Id. 374 S.C. at 251, 647 S.E.2d at 699. Notably, this is an even tighter fitting timeframe than that arrived at by the Harding court. To arrive at this time frame, the Court ruled in Hernandez that "the relevant time period should be identified by considering: (1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation; and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite." Id. 374 S.C. at 257, 647 S.E.2d at 702.

Next, the Court determined that, during this period of time, only two employees were "regularly employed" workers engaged in employment "with some constancy throughout [the]

relevant time period." Id. Therefore, the employer did not regularly employ at least four employees as required under § 42-1-360. Id.

Here, Mr. Whitfield, like both the Harding employer and the Hernandez-Zuniga employer, had only two or fewer "regularly" employed workers. The remaining employees did not work "with some constancy," and Mr. Whitfield never had four or more employees at any time. (R. pp. 297, 310-11). While the Commission failed to define the parameters of what it believed constituted the relevant timeframe as required by Harding and Hernandez-Zuniga, it seemingly utilized an unspecified timeframe far broader in scope than that identified in Harding or Hernandez-Zuniga. Such an expansive timeframe strays from established precedent, and is especially problematic given the "employer's established mode of operation" in this case. Id., 374 S.C. at 257, 647 S.E.2d at 702.

In fact, some of Mr. Whitfield's jobs did not require any employees whatsoever and other jobs only required one employee. As the evidentiary record makes clear, Mr. Whitfield might work by himself and hire no day laborers when the job in question was small. (R. p. 313). Only in the case of a larger job would Mr. Whitfield possibly need to hire one or two day laborers. (R. p. 313). Thus, according to the "employer's established mode of operation," only the jobs closely proximate to the Respondent's injury should be examined. Id. These circumstances support that the Commission should have, but failed to, identify a narrow but relevant timeframe consisting of only a few jobs at most. If only it had done so, the Commission would have identified a timeframe consistent with, instead of in contradiction to, cases like Hernandez-Zuniga.

3. Ferguson v. New Hampshire Insurance Company

In reality, all of the case law on this point takes a narrow look at the limited number of people "regularly" working during only a short and relevant period, rather than the total number of individuals "entering and leaving" the services of the employer over a much broader period. More recently, as in Harding and Hernandez, this Court in Ferguson applied our accepted definition of "regularly" employed as "employment of the same number of persons throughout the period with some constancy." 412 S.C. 203, 213-14, 771 S.E.2d 851, 851 (Ct. App. 2015) (citing Hernandez, 374 S.C. at 235, 647 S.E.2d at 691). The employer in that case testified that he operated largely by himself with "some friends here and there, but no one in particular person for a certain—for a long, lengthy time." Id. 412 S.C. at 214, 771 S.E.2d at 851. He also explained that when he would find someone to help him was based on when he acquired work. Id. In response, this Court concluded that the employer did not "regularly" employ four or more employees. Id.

Here, the record in this case is clear that Mr. Whitfield's established mode of operation was identical to the Ferguson employer. Mr. Whitfield worked many jobs by himself. (R. p. 313). At other times, Mr. Whitfield hired "pick up" labor based on the particular job that he had and the daily availability of the laborers but never four or more. (R. p. 313). This is exactly like the Ferguson employer, who would decide to hire additional laborers based upon when he acquired new work that necessitated extra help. Thus, the "employer's established mode of operation" in Ferguson was, essentially, the exact same as the employer in the present case. See Hernandez, 374 S.C. at 257, 647 S.E.2d at 702. As a result, the Appellant respectfully requests that this Court, consistent with its findings and conclusions in Ferguson, conclude that the

employer here did not "regularly" employ four or more employees, and thus, is not subject to the Act.

Despite the patent similarities between this case and multiple cases set forth above, the Single Commissioner in this case interpreted and applied § 42-1-360 as providing that an employer with four different people working for him or her at various, unspecified times is subject to the Act. (R. pp. 9-10). In so doing, he counted even the employees "entering and leaving" Mr. Whitfield's service so that, in total, Mr. Whitfield exceeded the minimum four required. Harding, 329 S.C. at 587, 496 S.E.2d at 33. However, case law makes plain that this method of counting up employees is simply insufficient to bring the employer, within the scope of the Act. Id.

This erroneous method of calculating the total employees employed by Mr. Whitfield illustrates that the Commissioner completely misapprehended not only Hernandez, but also Harding and Ferguson, in interpreting § 42-1-360. The evidence is clear that Mr. Whitfield, while using various laborers on various jobs, never had the requisite four or more employees working for him at any given time and certainly not "with any regularity." ***This testimony is without contradiction in the record.*** Accordingly, the Commissioner should have concluded that Mr. Whitfield does not fall within the purview of the Act. See Ferguson, 412 S.C. at 203, 771 S.E.2d at 851; Hernandez, 374 S.C. at 235, 647 S.E.2d at 691; Harding, 329 S.C. at 580, 496 S.E.2d at 29. Compare with Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 239, 750 S.E.2d 97, 101 (Ct. App. 2013) (finding four employees during first quarter of 2009 when the date of injury occurred and therefore employer was subject to the Act), *rev'd on unrelated issue*, 415 S.C. 617, 785 S.E.2d 194 (2016).

But instead, the Commissioner's conclusion that Mr. Whitfield was subject to the Act because he employed more than four different people is erroneous, contrary to the preponderance of the evidence, and violative of establish case law consistently applied by this Court for more than two decades. (R. p. 10). For these reasons, Appellant respectfully request that this Court reverse.

D. In addition to counting and including employees contrary to established case law, the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act was arbitrary, capricious, and an abuse of discretion.

Plainly, this case should be reversed because the preponderance of evidence establishes that Mr. Whitfield never regularly employed four or more employees, and therefore, the Commission lacks any jurisdiction over this claim. However, even if this were not the case, the Appellant respectfully urges that this Court reverse this case because the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act is unsupported by any evidence and is therefore arbitrary, capricious, and an abuse of discretion. S.C. Code Ann. § 1-23-380(5)(f).

First, assuming *arguendo* that Mr. Whitfield intentionally set out to hire less than four employees specifically so that he did not have to obtain workers' compensation insurance, it is not illegal in South Carolina to choose to hire less than four employees for this reason. No statutory provision or case makes such a choice illegal.

Second, even if it were illegal to choose to hire less than four employees to avoid obtaining workers' compensation insurance, it is well-settled that an "award [of the Commission] must not be based on surmise, conjecture or speculation." Shealy v. Aiken Co., 341 S.C. 448, 455, 535 S.E.2d 438, 443 (2000); Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Otherwise, our courts will overturn an award by the Commission as unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006) (citing cases).

See also Lark, 276 S.C. at 135-136 ("'Substantial evidence' is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached."). Moreover, our courts will reverse decisions of the Commission that are arbitrary, capricious, or an abuse of discretion. S.C. Code Ann. § 1-23-380(5)(f). In this case, this Court may reverse for both of these reasons.

Here, the Commissioner found that Mr. Whitfield was intentionally "moving employees around to avoid buying workers' compensation insurance" under the Act. (R. p. 9). But, substantial evidence does not support this finding. In fact no evidence whatsoever supports that this is true. The evidentiary record establishes just the opposite: Mr. Whitfield testified specifically that the needs of his business determine the individuals to be hired and when each is hired. Hiring decisions were dependent upon the demands and size of each job and never required that all Mr. Whitfield's employees work at once. (R. p. 285). Instead, no more than two individuals ever worked at the same time. (R. pp. 297, 310-11). For example, Mr. Whitfield might work by himself and hire no day laborers when the job in question was small. (R. p. 313). But in the case of a larger job, Mr. Whitfield might need to hire one or two day laborers. (R. p. 313). This testimony is uncontradicted and directly undercuts the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act. There is simply no evidentiary support for this finding. On this record it is totally arbitrary speculation. S.C. Code Ann. § 1-23-380(5)(f).

Therefore, the Commissioner's finding should be reversed as completely unsupported by substantial evidence. Moreover, because not even a scintilla of evidence exists within the record to bolster the Commissioner's tenuous finding, it is abundantly clear that the Commissioner's belief that Mr. Whitfield is intentionally trying to avoid the Act is based solely on personal

speculation. Such a finding is entirely arbitrary, capricious, and an abuse of the Commissioner's discretion. Accordingly, Appellant respectfully requests that the Court reverse, if only because of the Commissioner's baseless speculation.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse.

First, the Act excludes "casual employees" from counting toward the four or more total employees required to fall within the scope of the Act, and here, all of Mr. Whitfield's employees were merely casual employees. Yet, the Commission counted these employees in concluding that Mr. Whitfield employed four or more employees.

Second, even if several of these employees were not casual employees and could fairly be counted toward the required minimum number of employees, Mr. Whitfield's own wife still cannot be counted as an employee for the purposes of the Act because she constituted a mere gratuitous employee, having never been paid for her work.

Third, even if the preponderance of the evidence did not support that all of Mr. Whitfield's employees were mere casual or gratuitous employees that cannot be counted toward the required four or more total employees to place Mr. Whitfield within the Commission's jurisdiction, these individuals were also never "regularly" employed by Mr. Whitfield during the time period relevant to this case. Thus, the Commission's finding that Mr. Whitfield fell within the scope of the Act constitutes error on a second, separate basis. In contrast to the Commission's analysis, all of the case law on this point requires taking a narrow look at the limited number of people "regularly" working during only a short and relevant period proximate to the injury in question.

Finally, the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act was arbitrary, capricious, and an abuse of discretion given that no evidence whatsoever supports this finding. The Commissioner's finding is baseless speculation.

Any of the above reasons constitutes sufficient grounds for reversing this case.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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 Employers' 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 the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

January 7, 2019

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