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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-20-436

Case Tracking No. 2012-212898

James Clark, Jr., Respondent,

v.

Pyramid Masonry Contractors, Inc., and
Hartford Accident Insurance Company, Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

Contrary to Respondent's Argument, this Court's initial opinion and remand in this matter did not decide, nor require the Commission to find, compensability of Respondent's accident. This case was remanded to the Commission to consider two issues: (1) Horton, which had become a final decision (although an Unpublished Opinion); and (2) to make findings of fact and conclusions of law on the issue of actual or apparent authority and the effect thereof. Clark v. Pyramid Masonry Contractors, Inc., Unpublished Opinion No. 2010-UP-332 (Ct. App. 2010); Horton v. Pyramid Masonry Contractors, Inc., No. 2008-UP-208 (Ct. App. March 27, 2008).

A plain reading of Clark does not mandate compensability in this case (despite this argument being made numerous times by Respondent following the initial remand of this case). In fact, the exact *opposite* argument could be made. Clark specifically instructs the Commission to make findings of fact and conclusions of law on actual or apparent authority and the effects thereof. The Commission could not make such findings unless it was to thoroughly review the circumstances of the hiring of the Respondent by Mark Hinson and all of the facts and evidence surrounding the same. The question of compensability turns on the question of authority. As such, if the facts and evidence surrounding the hiring of the Respondent by Mark Hinson are different than the facts and evidence that surrounded the hiring of the Claimant in the Horton case, then it is just as likely that this case was remanded to the Commission to make findings regarding the reasons that the Respondent's case is not compensable.

Respondent argues repeatedly that the facts surrounding his hiring by Mark Hinson support compensability based on "apparent authority." As Respondent has done

throughout the entire duration of this claim, he completely disregards the fact that he had actual notice, in writing, that Pyramid did not provide transportation to and from the jobsite for any of its employees. (R. p. 599) This is an overt manifestation by Pyramid to Respondent, though Mark Hinson, that Pyramid would not be providing him, or any other employee, transportation to and from work. (R. p. 599)

Although Respondent continues to make the "red herring" argument that the employment package given to Respondent by Mark Hinson contains a document that "authorizes Mark Hinson to answer any questions Respondent Clark may have had concerning any item in the application," Respondent now also argues that this Court is not bound by the language in employment agreements or contracts. *See* Initial Brief of Respondent, p. 8 (emphasis in original).

Respondent obviously seeks to rely on language contained in his Pyramid employment package as supportive evidence that Mark Hinson had apparent authority to offer employer-provided transportation as part of his employment package. *See supra* Initial Brief of Appellant, p. 8. However, in the immediate following paragraph of his Brief, Respondent argues that South Carolina Courts are not bound by language in employment agreements or contacts. Respondent cannot explain the irrefutable fact that Hinson himself handed Respondent Pyramid documents, which Respondent read and signed, that clearly stated that Respondent would need his own means of transportation to and from work. Pyramid would not be providing transportation.

The facts surrounding the hiring of Respondent are different than the facts surrounding the Claimant in Horton. Respondent tries to lump himself in with the Horton claim as much as possible, but Respondent should not be permitted to "cherry-pick" facts

and law. Respondent quotes this Honorable Court in Horton regarding "employee's belief that foreman had apparent authority." Horton at p. 6. However, what Respondent fails to discuss is the legal doctrine of agency and that the "employee's belief" must be based on some indicia of authority originated by the principal. *See* Beasley v. Kerr-McGee Chem. Corp., Inc., 273 S.C. 523, 257 S.E.2d 726 (1979).

The indicia of authority originated by the principal in the instant case are shown by Pyramid's written job description, accepted and signed by Respondent, stating that Respondent "[m]ust have means of transportation to and from project." This is a fact that is completely absent from the Horton, case, wherein this Honorable Court specifically mentioned that Joey Horton "testified he had not seen the job description prior to the hearing." Horton at p. 5 (emphasis added). It is unquestioned that the Respondent in this case did see this description and signed off on it.

Assuming *arguendo* that Mark Hinson offered Joey Horton and James Clark transportation, to be provided by Pyramid, as part of their employment, then Mark Hinson's actions were that of a rogue agent. Appellants submit that in South Carolina it takes more than the words of a rogue agent to bind a principal to the actions of the rogue agent. There must be some action on the part of the principal that causes the employee to reasonably rely on the actions or words of the agent. Simply employing Mark Hinson as a foreman and allowing Mark Hinson to hire workers and set their rates of pay is not an action by Pyramid that would cause the Respondent to reasonably assume that Mark Hinson had carte blanche authority to offer whatever terms of employment he so desired, especially given the undeniable fact that Mark Hinson provided written documentation to the Respondent describing the terms of the Respondent's employment, including the fact

that Pyramid would not provide transportation to Respondent, and Respondent read and signed the documents.

Respondent further disputes a hypothetical situation posed by Appellants. Respondent changes the facts to a compensation rate dispute. However, in Respondent's version, Mark Hinson offers Respondent $100 per hour for a job despite Pyramid documentation stating that the job was to pay $12 per hour, and Pyramid actually pays Respondent $100 per hour for his work, and then disputes a compensation rate based on the $100 per hour pay rate.

Respondent misapprehends the hypothetical. Respondent's version presumes that Respondent received a regular paycheck directly from Pyramid at the rate of $100 per hour. That would mean that, translated back into Appellants' original hypothetical, that Pyramid actually provided transportation for Respondent to and from work after he was hired. That is absolutely not the case. Pyramid never provided Respondent with transportation to and from work. It was Mark Hinson that agreed, as a gratuitous act, to provide Respondent with transportation to and from work. Respondent was never paid any wages during his trips to and from work with Hinson. Hinson was never paid to drive Respondent to and from work. Another veteran foreman for Pyramid testified that Pyramid did not provide transportation for its employees and did not provide company vehicles to foremen. Hinson drove Respondent to and from work in his own personal Honda vehicle. If Hinson did not go to work, then Respondent did not go to work. Pyramid would not send any company vehicle to pick up Respondent in the event that Mark Hinson was unavailable.

Respondent himself testified at the original hearing that he was supposed to get to work not through Pyramid, but through Mark Hinson's gratuitous act of giving him a ride to work:

Q: [Counsel for Respondent] How were you going to get to work?

A: [Respondent] He was gonna take me. He was gonna drive me to work.

Q: Did he tell you that Pyramid Construction ---

[Counsel for Appellants] Object to the leading, your Honor.

Q: How were you supposed to get to work?

A: **Through Mark**.

Q: Through Mark?

A: Right.

Q: And is that how you got to work?

A: That's how I got to work.

Q: And if he hadn't taken you, you had no way to get there?

A: I didn't have no way.

Q: And when he came and you talked about the job, what did you tell him? What did you tell him?

A: I told him, "I ain't got no license. The only way is you come and get me. If you'll take me to work, that's the only way -- I don't have any transportation to go to work -- get to work."

Q: You couldn't get there unless the company provided ---

[Counsel for Appellants] Object, your Honor, to the leading.

[Commissioner Lyndon] All right. Please don't suggest the answer.

[Counsel for Respondent] I'm sorry.

Q: So how were you to get to work?

A: Through Mark.

Q: Now, is that how you did get to work?

A: That's how I got to work.

Q: You got to work every day like that?

A: Right.

(R. pp. 501, l. 23- p. 503, l. 9). Respondent's re-worked version of the hypothetical fails. Pyramid did not provide transportation for Respondent to and from work, and Respondent knew that Pyramid would not provide such transportation.

Finally, Respondent argues that there is evidence in the record to support the Commission's finding that Respondent has been completely disabled since the accident on November 17, 2004. However, Respondent has never testified at all, at any time during this claim, with regard to the level of his disability. The medical records do not "speak for themselves." Medical records are inanimate objects that reflect documentation of medical treatment. The Respondent has the burden of proving his disability. Without testimony about the extent of disability, the Commission's finding that Respondent has been disabled since the original accident is nothing more than speculation. The Circuit Court clearly agreed with this argument; however, the Circuit Court compounded the Commission's error by affirming the Commission's award of benefits related to the Respondent's alleged disability. Appellants respectfully submit that it was legal error on the part of the Circuit Court to affirm the payment of disability benefits despite acknowledging that the Commission never determined whether Respondent was

incapable of work. As further set forth in their Initial Brief, Appellants are being greatly prejudiced in this situation and seek meaningful judicial review.

CONCLUSION

For the reasons stated in their briefs, Appellants respectfully request reversal of the rulings from the Circuit Court.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY: _____

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June 6, 2013

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CERTIFICATE

I certify that the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

June 6, 2013

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PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief of Appellants on James Clark, Jr. by depositing a copy of it in the United States Mail, postage prepaid on June 7, 2013, addressed to his attorney of record, Gary W. Popwell, Esq., Lee, Eadon, Isgett, Popwell and Reardon, P.A., 1314 Lincoln Street, PO Box 1505, Columbia, SC 29202.

June 7, 2013

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