

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-001676

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SC Court of Appeals
Respondent,

Stacey Sellers.....

v.

Tech Services, Inc., Employer, and Builders Mutual Insurance
Company, Carrier..... Appellants.

FINAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

- I. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED STACEY SELLERS WAS AN EMPLOYEE OF TECH SERVICES, INC.

STATEMENT OF THE CASE

This matter involves the jurisdictional question of whether Respondent Stacey Sellers was injured in the course and scope of his employment with Appellant Tech Services, Inc. On November 8, 2013, Sellers fell off a ladder while performing HVAC work during the construction of a single-family home located at 751 McKinley Way in the Market Commons subdivision in Horry County. Sellers injured his lower extremities, his back, and his neck as a result of the fall. Sellers alleged that he was a long time employee of two HVAC companies, Tech Services, Inc. and Tech Services of Myrtle Beach, LLC, and that he was working in the course and scope of his employment with one or both Tech Services entities at the time of the accident.

On November 20, 2013, Sellers filed a Form 50 requesting a hearing with the South Carolina Workers' Compensation Commission ("Commission"). An Amended Form 50 was filed on December 13, 2013. Appellants admitted Sellers was injured as a result of falling off a ladder on November 8, 2013, but denied Sellers was an employee and his injuries were compensable under South Carolina Workers' Compensation laws.

Following a March 25, 2014 hearing on Sellers's Amended Form 50, the Single Commissioner issued a Decision and Order on August 29, 2014, finding Sellers was an employee or servant of Tech Services. The Single Commissioner's Order was affirmed and adopted in whole by the Commission's Appellate Panel by Order dated July 17,

2015. Thereafter, Tech Services, Inc., and its carrier, Builders Mutual Insurance Company, filed this appeal.

STATEMENT OF THE FACTS

Sellers injured his lower extremities, back, and neck in the course and scope of his employment with Tech Services when he fell off a ladder while performing HVAC work for Tech Services during the construction of a single residence home located at 751 McKinley Way in the Market Commons subdivision in Horry County. Tech Services is a heating and air conditioning company in Horry County, owned by Tracy Davis.¹ Prior to this incident, Sellers had worked for Tech Services for over 12 years. Tech Services represented to the City of Myrtle Beach for purposes of permitting and inspection that no independent contractors would be working on this job site. (R. pp. 498-512; 513-662).

The evidence considered by the Commission consists of the testimony of the following individuals: (a) Sellers; (b) Emily Hardee; (c) Kristi Evans; (d) Tracy Davis; (e) LeGrande Todd; and (f) Jacob Hamilton. Because this case turns not on alleged errors of law, but on factual disputes alone, the testimony of these individuals is conveyed in detail below.

(a) Testimony of Sellers

Sellers is a 33-year-old husband and father. (R. pp. 137-138; 142). He is a cousin of Tracy Davis, the owner of Tech Services and Tech Services of Myrtle Beach, LLC. (R. p. 142). Sellers is not licensed to do business individually, and lacks the required licensing from the State of South Carolina to be a heating and air conditioning contractor.

¹ Tech Services of Myrtle Beach, LLC is also owned by Tracy Davis. Both companies have the same address, phone number, and fax number and share the same employees.

(R. pp. 111-112; 154). He worked for Tech Services and Tech Services of Myrtle Beach, LLC for more than 12 years before the injury occurred. (R. pp. 141-142; 288; 318).

Sellers testified that in March 2013, Tracy Davis told Sellers that he would be paid without deductions and his wages would be listed on a Form 1099. (R. pp. 185; 218). The discussion regarding his wages occurred after Sellers complained about not receiving proper overtime and deductions from his paycheck. (R. pp. 145-151). For example, Sellers testified that on occasions, Tracy Davis would avoid paying time and a half by separating the hours worked between Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (R. pp. 143-144).

After March 2013, Sellers did not sign an independent contractor agreement and believed that he was continuing to work for Tech Services and Tech Services of Myrtle Beach, LLC. (R. pp. 150-151). Sellers testified that Tracy Davis instructed him to purchase his own workers' compensation insurance policy for "tax purposes." (R. pp. 148; 150). Davis gave him money to purchase a workers' compensation insurance policy that excluded Sellers personally from coverage. (R. pp. 149-150; 495). Sellers believed he was covered under Tech Services' workers compensation insurance. (R. pp. 225-226). Although Sellers performed "side work" in order to make extra money both before and after March 2013, he testified that his employment relationship with Tech Services did not change and he continued to work for both Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (R. pp. 150, 182, 190-194; 214-215).

Sellers testified that after March 2013, Tracy Davis on behalf of his respective companies, Tech Services and Tech Services of Myrtle Beach, LLC, controlled, and had the right to exercise control, over Sellers in the performance of his work. (R. p. 194).

Davis directed the time, place, degree, and amount of his work. (R. pp. 151-154; 164-166; 182-186; 194-201). He worked along side other employees, had a supervisor, and the quality of his work was inspected and monitored by Tech Services. (R. pp. 196-198). He never “bidded” out any jobs to work for Tech Services. (R. p. 200). Sellers reported to work in the manner that he was instructed, either coming to the office or directly to the job site. (R. p. 152). He reported to Tracy Davis, or his manager, Josh Hamilton. (R. p. 153). He ate lunch with other employees, and typically left work around 5:00 pm. (R. p. 154).

In addition to providing HVAC construction work, Sellers also performed service calls and entered into service contracts for Tech Services both before and after March 2013. (R. pp. 177-182). Sellers carried his employer’s service contracts as part of his job, and executed an estimated 20 to 100 service contracts for Tech Services at times after March 2013. (R. pp. 180-182; 469).

Sellers also testified that Tech Services furnished Sellers with uniforms, tools, equipment, and supplies to complete his work. (R. pp. 145; 151; 156-161; 178). The tools regularly used by Sellers, including the actual ladder from which he fell, were purchased and furnished by Tech Services, Inc. (R. pp. 165-175; 391-404). There were several other tools and pieces of equipment owned by Tech Services to which Sellers had access and permission to use on a daily basis at all times before and after March 2013. (R. pp. 167-174). Sellers was wearing a Tech Services uniform at the time of the fall. (R. pp. 157-161). Sellers carried Tech Services business cards with him while performing Tech Services work. (R. pp. 162; 164-165). Sellers testified that he made

business cards that stated “Sellers Heating and Cooling,” but primarily only gave them to other Tech Service employees as an ongoing joke. (R. pp. 193-194).

Sellers had access to supply accounts of Tech Services, such as Gateway Supply. (R. pp. 175-178). Numerous invoices support the fact Sellers had permission to purchase and sign for supplies on behalf of Tech Services. (R. pp. 405-467). The supplies listed on the invoices included not only those needed to complete Tech Services jobs, but also a variety of items typically provided by an employer to an employee such as overalls and batteries. (R. pp. 177; 405-467). Sellers never had a supply account for himself. (R. pp. 176).

Before and after March 2013, Sellers was paid on a weekly basis, typically on Thursdays or Fridays. (R. p. 183). Prior to March 2013, Sellers was paid on an hourly basis but the hours were based on a preset amount for certain jobs based on the “flat rate pricing book.” (R. pp. 182-184; 189; 207-210). Based on this pay structure, Sellers testified that “pretty much you were getting paid by the job.” (R. pp. 182; 185; 207-210). After March 2013, Sellers was paid based on invoices that he was directed to submit by Tracy Davis who predetermined the amount of time required to complete certain jobs. (R. pp. 183-186, 218). Sellers testified that he “was getting paid by what [Tracy Davis] had figured up as how long it should take to do the job.” (R. p. 218). Davis “controlled the price on [the invoices]” that Sellers submitted to him for his weekly checks after March 2013. (R. p. 186). Sellers never entered into any bids for jobs. (R. p. 322). Several weeks before Sellers fell, Davis informed Sellers he was planning to start paying Sellers as he was paid before March 2013 for financial reasons. (R. pp. 198-200).

Sellers testified that Tracy Davis had the right to fire him from Tech Services. (R. pp. 200-201). If Sellers was fired from Tech Services, then he would be required to seek employment with another heating and air company. (R. p. 201).

(b) Testimony of Kristi Evans and Emily Hardee

Kristi Evans and Emily Hardee are employed by the City of Myrtle Beach. (R. pp. 109, 130). They testified regarding policies for the issuance of business licenses and permitting for construction work for the City of Myrtle Beach. (R. pp. 109-111; 130; 498-512; 513-661). Evans testified that Sellers does not hold a license to do business in the City of Myrtle Beach. (R. pp. 111-112; 117-118). Any subcontractors or independent contractors that performed work in the City of Myrtle Beach are required to have a business license. (R. p. 112). Hardy, in particular, testified that one is required to have a permit to perform HVAC for a construction project in the City of Myrtle Beach. (R. p. 131).

According to Evans, Tech Services was required to list the names of any subcontractors or independent contractors that would perform any work on any projects in which Tech Services had pulled a HVAC permit. (R. pp. 113-119). She explained that when a licensed contractor pulls a permit to perform construction services, the contractor must disclose on the permit application any sub or independent contractor that would be providing work under the permit. (R. pp. 113-119). As it related to Tech Services' permit to provide HVAC to the subject location at 751 McKinley Way, Tech Services did not disclose that any sub or independent contractor would be working for it on this job site. Rather, Tech Service affirmatively represented that no sub or independent contractor was involved. (R. pp. 117; 127).

(c) Testimony of LeGrande Todd

LeGrande Todd is both a cousin of Sellers and Tracy Davis, and a close friend and business associate of Davis. (R. pp. 264; 270-272; 280; 14). Mr. Todd owns several plumbing related companies in the Myrtle Beach area. (R. pp. 265-266). Mr. Todd testified that both prior to and after March 2013 he hired Sellers to perform “sub work.” (R. pp. 264-265; 272; 279-280).

Todd believes Sellers’ reputation in the community is “not too good.” (R. pp. 269; 281). However, Todd has a close relationship with Mr. Davis, and even helped Mr. Davis start Tech Services. (R. pp. 270-272). Also, Todd assisted the Appellants in producing documents to aid in the defense of this claim, but failed to produce documents Sellers had requested pursuant to a subpoena. (R. pp. 273-280).

(d) Testimony of Tracy Davis

Davis, owner of Tech Services and Tech Services of Myrtle Beach, LLC, testified that Sellers worked for both companies for at “least ten, twelve years” and had never been fired from either company. (R. pp. 287-288; 318). In regards to the Tech Services job at Market Commons where Sellers was injured, Davis neither advised nor notified the general contractor on the project that Sellers was working as a subcontractor. (R. pp. 308; 319; 323-324). Davis knew that Sellers wore a Tech Services uniform and never saw Sellers wear any other uniform. (R. p. 319). He admitted that Sellers was wearing his Tech Services’ uniform on the date of his fall. (R. p. 319).

Davis testified that prior to March 2013, Sellers was paid by the hour, at \$14 per hour. He explained that although his company uses a flat rate pricing book, he did not use it to pay Sellers. (R. pp. 290-292). Considering Davis had employees working for

both Tech Services entities, an employee's time would be shared between the two entities in order to avoid overtime pay for any work in excess of 40 hours. (R. pp. 293-294).

Davis denied that he gave Sellers money to purchase workers' compensation insurance. (R. p. 295). Davis claimed he selected the amount to pay Sellers for each job. (R. p. 297). Davis gave Sellers a work van that was "about wore out." (R. p. 300). He stated that the tools and equipment used by Sellers were from Tech Services. (R. p. 301). Davis claimed it was "not usual" for him to send a "subcontractor" to perform a service call for Tech Services. (R. pp. 309-310). According to Davis, Sellers had permission to enter service contracts on behalf of Tech Services and to order and purchase supplies on behalf of Tech Services. (R. p. 322).

(e) Testimony of Jacob Hamilton

Jacob Hamilton assists in the "day-to-day" operations of the Tech Service companies. (R. pp. 333; 340). Hamilton's wife works as Mr. Davis' secretary. (R. p. 341). Hamilton was working in the Market Commons development at the time of Sellers's fall. (R. p. 334). Hamilton received a call from Sellers about Seller's fall. (R. p. 334). Mr. Hamilton and another employee went to the location where Sellers was working and saw him laying on the floor. (R. pp. 335-336). Hamilton claimed Sellers asked him to file the claim under Tech Services' workers compensation policy because Sellers did not have insurance. (R. p. 336).

Hamilton agreed that it was company policy for "employees" of Tech Services to wear a Tech Services' uniform. (R. p. 342). Hamilton's testimony that Sellers was not wearing his Tech Services' uniform at the time of the fall directly conflicts with both Sellers' and Tracy Davis' testimony that Sellers was wearing a Tech Services' uniform

when he fell. Hamilton's testimony was questioned by the Single Commissioner "because Sellers actually brought in his blue Tech Services shirt and khaki pants that were cut off of him by medical personnel." (R. pp. 16; 1495).

(f) The Commission's Order

In determining Sellers was an employee of Tech Services when he was injured, the Commission weighed conflicting factual testimony and held:

We find Sellers was an employee of Tech Services, Inc. on the date of accident. This finding is based on the preponderance of the evidence including (1) the City of Myrtle Beach Business License information, which did not list Sellers as a subcontractor or independent contractor working on the jobsite; (2) the fact that Sellers was wearing a Tech Services, Inc.'s uniform when he was injured (I find this as a fact - additionally Tracy Davis admitted Sellers was wearing the uniform on the date of injury); (3) all of the witnesses admit Sellers did side work throughout his employment with Tech Services, Inc., both before and after March 2013; and (4) Sellers continued to perform service calls for Tech Services, Inc. while wearing a Tech Services uniform and providing customers with Tech Services, Inc. invoices even after the alleged change in Sellers's employment status. I find that Tech Services, Inc. affirmatively and tacitly represented to the public at large that Sellers was an employee of Tech Services, Inc. This was done through the representations made to the City of Myrtle Beach Business License and Construction Services departments and customers of Tech Services, Inc.

(R. pp. 17-18).

STANDARD OF REVIEW

The standard for judicial review of workers' compensation decisions is provided by the Administrative Procedures Act ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, an appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South*

Carolina Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010) (citing S.C. Code Ann. § 1–23–380(5)(d),(e)). However, because this case presents a question of jurisdiction, the appellate court may take its own view of the facts upon which jurisdiction is dependent. *Wilson v. Georgetown County*, 316 S.C. 92, 447 S.E.2d 841 (1994).

Although an appellate court may take its own view of the preponderance of the evidence on matters affecting jurisdiction, to the extent this determination turns on credibility, this broader scope of review does not require the court to ignore the findings of the Commission, which was in a superior position to evaluate witness credibility. *Paschal v. Price*, 392 S.C. 128, 708 S.E.2d 771, 773 (2011) (citing *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000) (stating the final determination of witness credibility is reserved to the Commission); *Wallace v. Milliken & Co.*, 300 S.C. 553, 389 S.E.2d 448 (Ct. App. 1990) (observing in matters where an appellate court may take its own view of the preponderance of the evidence, an appellate court need not disregard the findings of the hearing tribunal, which occupies a much better position to evaluate the credibility of witnesses).

LAW / ARGUMENTS

“No award under the Workers’ Compensation Law is authorized unless the employer-employee or master-servant relationship existed at the time of the alleged injury for which claim is made.” *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 469, 313 S.E.2d 38, 39 (Ct. App. 1984) (citing *Cooper v. McDevitt*, 260 S.C. 463, 196 S.E.2d 833 (1973); *Alewine v. Tobin Quarries*, 206 S.C. 103, 33 S.E.2d 81 (1945)). “South Carolina’s policy is to resolve jurisdictional doubts in favor of the inclusion of

employers and employees under the Workers' Compensation Act.” *Spivey v. D. G. Constr. Co.*, 321 S.C. 19, 21, 467 S.E.2d 117, 117 (Ct. App. 1996); *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 713 S.E.2d 267, 270 (2011).

Sellers bears the burden of proving an employment relationship existed by the greater weight of the evidence. *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 151 S.E.2d 747 (1966). Under settled law, the determination of whether Sellers is an employee or independent contractor focuses on the issue of control, specifically whether Tech Services had the right to control Sellers in the performance of his work. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013). “Under the controlling common law rubric of the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.” *Id.* (citations omitted). As *Shatto* requires, these factors should be applied “in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.” *Id.* In reviewing the totality of these factors, the Commission stated as follows:

11. We conclude as a matter of law that the greater weight of the evidence in the application of the above-mentioned four factors supports a finding of an employment relationship between Sellers and Tech Services, Inc. at the time of the accident. In sum, the fact that Sellers was employed for many years with Tech Services, wore Tech Services' uniforms, fell off a Tech Services' ladder, used tools, equipment and supplies purchased by Tech Services, had Tech Services' business cards, performed the same duties as other employees, had the authority to bind Tech Services in contract, and that Tech Services did not list him as an subcontractor/independent contractor for permits and licensure documentation with the City of Myrtle Beach overwhelmingly establish that Sellers was working as an employee of Tech Services, Inc.”

(R. pp. 25-26). Respondents do not contend the Commission committed an error of law in finding an employment relationship. Instead, Respondents argue the Commission simply failed to adopt Respondents' version of the facts. While factual disputes in this case are numerous, the Commission was in a superior position to weigh the facts and evaluate witness credibility. Giving deference to the Single Commissioner and the Full Commission in considering the evidence, there is no dispute Sellers was a Tech Service employee at the time he was injured based upon an application of the factors in *Shatto*.

(a) Direct Evidence of the Right or Exercise of Control

The Commission determined that “[a]s to the first factor, ‘*direct evidence of the right or exercise of control*,’ we find that the preponderance of the evidence weighs heavily in favor of employer-employee or master-servant relationship.” (R. p. 23).

“While evidence of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is ‘whether there exists the *right and authority* to control and direct the particular work or undertaking.’ *Id.* at 477, 753 S.E.2d at 420. “The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the *right* to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services.” *Id.*

As to the finding of facts related to evidence of the right or exercise of control, the Commission correctly found as follows:

5. Tech Services, Inc. exhibited the right and authority to control and direct Sellers's particular work or undertaking. Sellers did not perform the work according to his own methods or discretion. Rather, the scope, degree, performance and quality of his work were subject to the direct supervision and control of Tech Services, Inc. Sellers had been an employee of Tech Services, Inc. and Tech Services of Myrtle Beach, LLC

for over twelve years, and the control exhibited over him by Tracy Davis was pervasive based on the totality of the evidence. Sellers was instructed by Tracy Davis, or the manager Jacob Hamilton on the work to perform and his work performance was directly supervised. Sellers reported to work for Tech Services, Inc. as he was instructed. He also performed the work that he was instructed to perform. Sellers did not bid for the work performed on the project on which he was working when he was injured or on any other projects on which he worked. Tech Services, Inc. did not advise or notify the general contractor on the project where Sellers was injured that Sellers was working as a subcontractor/independent contractor. Sellers would either report to Tech Services, Inc. office or the various jobsite that he was working on a daily basis. He was not given the option to not perform jobs that were assigned to him. He ate lunch with other employees and kept normal work hours as with other employees. Other Tech Services, Inc. employees performed substantially the same general job duties as the Sellers. The amount of work that he performed for Tech Services, Inc. is also consistent with employee/employer relationship. Sellers performed "side work" at all times throughout his employment, which is not uncommon for tradesmen. Sellers was directed what to wear to work. He wore a Tech Services, Inc. uniform, as this was the dress code for Tech Services employees. He had Tech Services, Inc. business cards. He has access to Tech Services, Inc. supply accounts. He had authority to order, purchase, and pick up supplies on behalf of Tech Services, Inc. He carried Tech Services, Inc.'s service contracts, and entered into service contracts with customers as an agent of Tech Services, Inc. Based on his access to supply accounts and service contracts, he had the direct authority to act for and bind Tech Services, Inc. in contractual relationships and transactions with third-parties. The overwhelming evidence strongly supports that Tech Services, Inc. had the right to, and in fact did, control the Sellers in the performance of his work.

(R. pp. 18-19).

The evidence to establish Tech Services' right or exercise of control over Sellers is pervasive throughout the record. First, and foremost, Tech Services' represented to the public that Sellers was an employee of Tech Services. In obtaining permits with the City of Myrtle Beach for this job, Tech Services represented that no sub or independent contractor would provide work on the job site. However, in an attempt to win this worker's compensation claim, Tech Services is disavowing the clear representations it made to the City of Myrtle Beach. Tech Services should not be allowed to take one

position with the City of Myrtle Beach in order to secure a work permit, and take a diametrically opposed position to secure a victory in court. Tech Services cannot have it both ways.

Further, Sellers routinely ordered and purchased supplies on Tech Services' accounts and sold service contracts to customers, signing as an employee and agent. The scope, degree, performance and quality of his work were subject to the direct supervision and control of Tech Services, as he had been an employee for over twelve years. Tech Services continued to list Sellers as an "employee" on internal records after the time it claims Sellers became an independent contractor. (R. pp. 832-834). Thus, the evidence supports the Commission's finding that Tech Services had the right to, and in fact did control the Sellers in the performance of his work.

(b) Furnishing of Equipment

When considering the second factor, furnishing of equipment, the Commission found that "the preponderance of the evidence weighs heavily in favor of employer-employee or master-servant relationship." (R. p. 49). "When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business." *Shatto*, 406 S.C. at 479, 753 S.E.2d at 421 (citing 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.07[2] (2013)).

As to the finding of facts related to evidence of furnishing of equipment, the Commission correctly found as follows:

6. Tech Services, Inc. furnished the equipment, tools, and supplies necessary for Sellers to complete his work. A significant amount of the hearing testimony was spent describing pictures of tools used during Sellers's employment with Tech Services. I find that Tech Services, Inc. supplied those tools to Sellers. I find Sellers was not financially capable of owning all of those tools pictured and that most if not all of the tools were

owned by Tech Services, Inc. and provided to the Sellers. Sellers fell off a Tech Services, Inc.'s ladder. Additionally, Sellers testified he was able to pick up any supplies he needed from Gateway Supply and other supply company using the account of Tech Services, Inc. The supplies listed on the invoices were for purposes of completing Tech Services, Inc. jobs, but also included the Sellers purchasing overalls, batteries, and a variety of other items that an employer would typically provide for an employee to complete his work. Sellers did not pay for any of the supplies out of pocket, and did not have a supply account for himself. The evidence is unclear as to whether Sellers was given a work van by Tech Services, Inc. or if he paid \$500.00 for it.

(R. pp. 44-45). Sellers fell off a Tech Services' ladder. The supplies to complete his job were purchased by Tech Services. It is undisputed that he always purchased supplies on Tech Services' accounts. Also, Tech Services did not offer any substantive testimony to dispute that it purchased the tools and that Sellers had complete access to Tech Services' tool room. Sellers was also supplied a uniform bearing the "Tech Services" logo on the front. Accordingly, the evidence supports the Commission's finding that Tech Services furnished the equipment used by Sellers.

(c) Method of Payment

The Commissioner considered the third factor, method of payment, and held the preponderance of the evidence favored of employment relationship rather than an independent contractor status. (R. p. 49). In *Shatto*, the Supreme Court held that "[p]ayment on a time basis is a strong indication of the status of employment while payment on a completed project basis is indicative of independent contractor status." *Id.* at 480, 753 S.E.2d at 421 (citations omitted). "If an employer...purchases personal labor by the hour...it is almost certain to insist on the right to see that the time is well and efficiently spent...[T]he employer wants to see that it gets a full hour's work, and that the hour is applied where it is most needed...if there is not enough of one kind of work to

fill the workers' time, the employer will if possible direct the use of time at some other point." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 61.06 (2013).

The Commission held "[i]t was apparent based on the evidence that Tech Services, Inc. attempted to get a full days work out of the Sellers." (R. p. 50). This finding is very telling of an employment relationship. When Sellers completed one task, he was sent to perform another task, job, complete a service call, or sell a service contract. The Commission correctly found as follows:

7. Claimant was paid on a weekly basis, typically on Thursdays or Fridays, both before and after March 2013. Before March 2013, Claimant was paid \$14.00/hr. but the evidence is disputed about how Claimant's wages were calculated which further supports the fact that Claimant and employer had dispute about how his wages were being calculated. Claimant claimed that his hours were based on preset amount used to complete a certain job based on the flat rate pricing book, in which the hours would have a relationship to the type of job performed. At times after March 2013, Claimant was paid based on invoices that he was directed to submitted to Tracy Davis of Tech Services. The invoices were based on amounts set by Tracy Davis based on a preset time that Tracy Davis determined it should take to complete a job. I find that Tech Services controlled the price and the amount that Claimant was paid for the work that he performed. If [Claimant] finished an assigned task, he would be directed to perform other tasks, help other employees, or perform service calls.

Claimant's wages from Tech Services, Inc. during 2013 were largely consistent with his wages from prior year. Tech Services, Inc. continued to control the method of payment, in that several weeks before Claimant fell, Tech Service, Inc. had plans to start paying Claimant in the manner that he was paid before March 2013.

(R. pp. 45-46).

The Commission weighed the evidence and further held:

The most significant change was the employer's classification after March 2013 was that Claimant would be issued a Form 1099. We recognize that Tech Services, Inc. attempted to classify him for tax purposes under a

Form 1099, instead of a Form W-2, but the issuance of a Form 1099 does not necessarily define an employment relationship. When the method and manner of payment is viewed in the greater context in this case, Tech Services, Inc. exhibited overwhelming control of how, and how much, the Claimant was paid.

Viewed in the “greater context” in this case, the evidence supports the Commission’s finding that that Tech Services “got a full days work out of the Sellers.” Thus, the method of payment factor favors the finding of an employment relationship instead of an independent contractor.

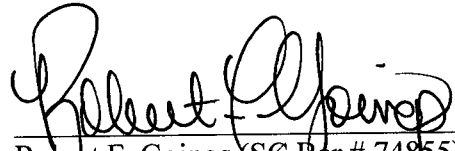
(d) Right to Fire

The Commission considered the fourth factor, right to fire, and found “the preponderance of the evidence weighs in favor of an employment relationship more than an independent contractor status.” (R. p. 50). The Supreme Court reasoned “[t]he power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project” *Shatto*, at 481, 753 S.E.2d at 422 (citations omitted). The Single Commissioner found as a matter of fact that “Defendant Tech Services had the right to hire and fire Claimant. Claimant could be fired at any time; and that if he was terminated, then he would have to find employment with another HVAC company.” (R. p. 46). The only evidence for this factor favors Sellers. (R. pp. 200-201).

CONCLUSION

Based on South Carolina's policy to resolve jurisdictional questions in favor of inclusion of employees within workers' compensation coverage and considering the fact the Commission was in a superior position to evaluate witness credibility, Sellers respectfully requests this Court affirm the Commission and find he was Tech Services' employee at the time he was injured.

Respectfully submitted,



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February 3, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-001676

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SC Court of Appeals

Stacey Sellers Respondent,

v.

Tech Services, Inc., Employer, and Builders Mutual Insurance
Company, Carrier Appellants.

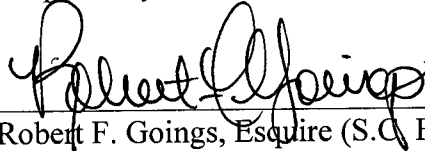
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE TO FOLLOW]

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