THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

Appellate Case No.: 2018-000652
W.C.C. File No.: 1600686

Francisco Cedano Ramirez, Employee, Appellant,

v.

May River Roofing, Inc. Employer, and American Zurich Insurance Co., Carrier, and Cedano Roofing, Employer, and Travelers Property & Casualty Co., Carrier,

Of which May River Roofing, Inc., American Zurich Insurance Co., and Travelers Property & Casualty Co. are Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Commissioner Gene McCaskill ("Single Commissioner") heard this matter on November 17, 2016, in Columbia, South Carolina after Claimant filed two claims arising out of the same January 18, 2016, incident. Claimant named May River Roofing, Inc. (hereinafter "May River") and Cedano Roofing as defendants/employers. Claimant filed one claim against the insurance policy for May River alleging that he should have coverage under its policy. This claim was assigned SC WCC No. 1600686. May River and its Carrier, American Zurich Insurance Company ("Zurich") denied the claim on the grounds that Claimant was an independent contractor and that it collected a certificate of insurance from Claimant covering his business, Cedano Roofing, thereby insulating May River. Claimant filed a second claim, assigned SC WCC No. 1608257, against his own company, Cedano Roofing, and its Carrier, Travelers Property Casualty Company of America ("Travelers"). Claimant's requested that the claims be consolidated under SC WCC NO. 1600686, and SC WCC No. 1608257 was closed.

In an Order dated May 23, 2017 ("Order"), the Single Commissioner found Claimant was

performing work at the time of the accident that met the requirements under the Act for a compensable accident. However, based on the preponderance of the evidence, the Single Commissioner concluded Claimant was an independent contractor, was not an employee of May River, and did not include himself in the workers' compensation coverage purchased for his company.

Claimant filed a Form 30, *Request for Commission Review*, dated June 5, 2017, asserting sixty-seven (67) alleged errors in the Single Commissioner's Findings of Fact and Conclusions of Law. Specifically, Claimant alleged the Single Commissioner erred in finding: 1) Claimant is not covered under his own Travelers insurance policy; 2) Claimant is not covered under May River Roofing's insurance policy with American Zurich as a direct employee of May River Roofing; and 3) Claimant is not covered under May River Roofing's insurance policy with American Zurich as a statutory employee of May River Roofing.

After oral argument on January 22, 2018, the Full Commission issued an Order on March 30, 2018, affirming the Order of the Single Commissioner. The Full Commission concluded Claimant was a sole proprietor who was not included under Cedano Roofing's workers compensation policy; Claimant is not an employee of May River; and Claimant is not a statutory employee of May River. Claimant filed his Notice of Appeal with the clerk of the Court of Appeals on April 6, 2018.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *accord Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 133–34, 276 S.E.2d 304, 306 (1981). Upon review in South Carolina, a decision of an administrative agency should be affirmed unless

that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C.Code Ann. § 1-23-380(g)(6)(1976); *Lark v. Bi-Lo*, Inc., 276 S.C. at 136; 276 S.E. 2d at 307. The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. *Tobey v. L&P Const. Co.*, 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988).

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its decision." *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). The substantial evidence rule means that the court will not overturn findings of fact by an administrative agency unless there is no reasonable probability that the fact could be as related by the witness upon whose testimony the finding was based. *Lark v. Bi-Lo, Inc.*, 276 S.C. at 136; 276 S.E. 2d at 307. When factual findings are supported by substantial evidence, analogous to a jury's finding of fact on disputed issues, it is not within the appellate court's purview to reverse those findings. *Hunter v. Patrick Const. Co.*, 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986).

STATEMENT OF FACTS

Francisco Cedano Ramirez ("Claimant") was born in Mexico, and has lived in South Carolina for 20 years. (R. p. 95, lines 2-3). He resides in Hilton Head, South Carolina with his wife and four children. He has worked in roofing for approximately 20 years. (R. p. 95, lines 4-12). Claimant started his own company approximately 4 years ago. (R. p. 108, lines 22-25). Cedano Roofing is a sole proprietorship, with the sole proprietor being Claimant. Claimant used to work for

Pana Roofing, and he purchased workers' compensation insurance at that time. (R. p. 110, lines 7-13).

Ms. Leslie Sandoval works as the office manager for May River Roofing, a position she has held for two (2) years. (R. p. 118, lines 16-24). Her father, Antonio Sandoval, has owned May River for twelve (12) years, and Ms. Sandoval has worked there for eight (8) years. (R. p. 118, lines 17-21). Claimant testified he met Antonio Sandoval, approximately 3 years ago, and Sandoval invited Claimant to work with him. (R. p. 95, lines 13-24). However, Claimant testified Sandoval told him he needed to get insurance to be able to work with him. (R. p. 95, lines 18-22).

Ms. Isabelle Diaz is employed by PC & L Agency Insurance Company, where she sells insurance. (R. p. 73, line 23-p. 74, line 2). She has been employed there for 15 years and has sold workers' compensation insurance. (R. p. 74, lines 3-7). Ms. Diaz explained that when someone comes in to her office to obtain a workers' compensation policy, she has to have an estimate of their payroll to give them a quote. (R. p. 74, lines 8-24). If they do not have a payroll, Ms. Diaz always explains to them before and after she sells the policy that if they are a sole proprietorship, they are always excluded. (R. p. 74, line 20-p. 75, line 2). Ms. Diaz always points this exclusion out because she wants to make sure they understand that they always have a choice to cover themselves, but they will have a higher premium if they elect to cover themselves. (R. p. 75, lines 3-9). Ms. Diaz explains the exclusion issue to everyone, but especially those that work in roofing because they work in a dangerous situation, and if they decide to be excluded and something happens to them, there will not be any coverage. (R. p. 76, lines 3-12). She cannot force them to choose to be included. Counseling people in this manner is part of Ms. Diaz' regular job duties, and Spanish is her first language. (R. p. 75, lines 10-18).

Ms. Diaz testified that if you have a high payroll, a lot of companies will provide coverage. However, for roofers, it can be difficult to find a company to write the policy. (R. p. 80, lines 8-10). She also explained that a ghost policy is used by a lot of people and that is where you do not have any employees. The owners of the businesses also exclude themselves from coverage with ghost policies. (R. p. 80, lines 15-23).

In May of 2014, after Claimant had the conversation with Sandoval that he needed to get his own workers' compensation insurance policy, he went to PC&L and purchased a policy. (R. p. 109, lines 5-12). Ms. Diaz recalled working with Claimant to set up his policy. Ms. Diaz had the exclusion conversation with Claimant and he decided not to be included. (R. p. 76, lines 3-23). Claimant told Ms. Diaz he had no employees or payroll, and he purchased a ghost policy. (R. p. 80, line 24-p. 81, line 7).

Ms. Diaz elaborated as to how Claimant knew he was excluded from coverage. She explained she would try to make sure her customers understood by making a kind of joke that if they fell or something happened, they should just say oops, get up and get going because the policy was not going to cover them. (R. p. 82, lines 4-23). She stated they always have a choice and can add the coverage at any time to the policy. However, when she explains how much they are going to pay per 100, they decline it, and she cannot force anyone to be included. (R. p. 82, line 23-p. 83, line 9).

After Claimant obtained insurance, he began working with May River about three years ago. (R. p. 95, lines 15-24). Ms. Sandoval testified that at the end of the year, subcontractors get their 1099s, and Claimant received a 1099 each year that he worked for May River. (R. p. 124, lines 6-15). Claimant agreed that he received a 1099 from May River and that he gave that to the person to prepare his taxes. (R. p. 107, lines 17-21). Claimant testified he deducted his work expenses from

his 2015 income taxes for some of his tools, his gas, and special shoes and clothing. (R. p. 115, lines 6-18).

When May River hires a new subcontractor, they request insurance information from them. (R. p. 123, line 24-p. 124, line 5). Ms. Sandoval testified May River would request certificates of insurance from its subcontractors and that Claimant had workers' compensation coverage in place the entire time he worked for May River. (R. p. 127, line 6-p. 128, line 4). Ms. Sandoval testified she knew Claimant was insured on the date of the accident because they routinely check insurance. When someone's insurance has been cancelled, the insurance agency sends them a certificate letting them know it has been cancelled. (R. p. 129, lines 16-22). Ms. Sandoval testified her responsibility was to make sure Claimant had workers' compensation and general liability insurance. (R. p. 131, lines 19-21). Ms. Sandoval also testified that beginning on June 2, 2015, May River received a copy of Cedano Roofing's certificate of insurance on a bi-monthly basis from his insurance agency, PC & L. (R. p. 265, lines 18-25).

Claimant testified he and May River had contracts for many jobs that would last three to four days. (R. p. 259, lines 14-15). Claimant testified that once he finishes a job, he is paid the following week and he is paid $25 per hour. (R. p. 97, lines 5-11). He stated that normally when he went to a house, he had a set amount that he knew ahead of time he was going to be paid for that job. If there was anything extra, Sandoval would pay him by the hour. (R. p. 100, lines 5-11). Claimant testified he did not have a fixed salary and that May River had the ability to fire him. (R. p. 101, lines 2-9). Claimant testified Sandoval would sometimes pay him by the job and sometimes by the square. If there was a repair, Sandoval would pay him $25 per hour. (R. p. 102, lines 2-17). When Claimant first began working for Sandoval, he made $55 per 10 x 10 square of roofing laid and that was later

increased to $60 per square. (R. p. lines 13-16). Ms. Sandoval confirmed Claimant negotiated an increase in his rate per square from $55.00 to $60.00 and his rate was higher than what May River paid its other subcontractors. (R. p. 274, lines 10-24).

Ms. Sandoval or Antonio Sandoval would measure the roof and order the appropriate number of squares for each job. (R. p. 120, lines 19-24). Ms. Sandoval testified Claimant would know the amount of squares a job would entail before he went to a job, so he would know how much money he could expect to make from that job before he started. (R. p. 121, lines 2-8). There were also times when Claimant would get to a jobsite and determine he needed more money for the job because it was a three story house or really pitched, so he would negotiate for his payment on a job-by-job basis. (R. p. 121, lines 8-12). When he did a repair job, he would report how many squares it was and how long he stayed on the repair to May River. (R. p. 113, lines 10-14). Ms. Sandoval would receive emails from Claimant for payment and she would cut the checks. Sometimes she would have to get her father involved when the math did not add up. She testified the price for each job is calculated per square. (R. p. 119, lines 14-23). Ms. Sandoval stated she would measure the roof for the job, come up with the amount of squares needed, have that number of squares delivered for the job, and then Claimant would invoice May River indicating how many squares he installed. (R. p. 275, sub p. 50, lines 8-16). Ms. Sandoval did not agree that Claimant was paid $25.00 per hour for roofing repairs. She stated Claimant invoices May River for a total amount for each repair and there is never an hourly amount stated, so she believes he must be estimating that amount. (R. p. 268, sub p. 24, lines 5-22). Ms. Sandoval testified there were times when Claimant would do five repairs in one day. (R. p. 133, lines 2-3).

Claimant stated the shingles, nails and other materials for the jobs are provided by May River. (R. p. 97, lines 12-14). Claimant testified he provided his car, his air compressor, his nail gun and his pouch and other tools for jobs. Claimant said he had his own ladder, but Sandoval would lend him a ladder anyway. (R. p. 104, lines 2-16). Claimant testified he provided his own transportation to and from work. (R. p. 108, lines 17-20). Ms. Sandoval testified Claimant was a subcontractor of May River and that they do not know what equipment subcontractors need for jobs, what cars they use or what people they have. They just contact the subcontractors about the job and they get it done. (R. p. 121, line 19-p. 122, line 18). When a job was too big, Claimant would get someone to help him and he would pay that person out of the money he received for the job. (R. p. 104, line 19-p. 105, line 13). Claimant testified he was not paid more per square when he had someone else helping him on the job. (R. p. 104, line 25-p. 105, line 11).

Ms. Sandoval testified she or Mr. Sandoval would rarely go to jobsites when Claimant was working because he had been working with May River for two years and they trusted him. (R. p. 277, sub p. 59, lines 17-22; sub p. 60, line 22-sub p. 61, line 4). She stated her father, Antonio Sandoval, did not supervise Claimant's work but would go to the jobsites once they were completed. (R. p. 265, sub p. 11, lines 2-8). Ms. Sandoval testified her only contact with Claimant is when he sends his invoice, when she sends him the work orders and when she pays him. (R. p. 265, sub p. 10, lines 24-25). Claimant testified Mr. Sandoval was the one who supervised him, but only on occasion. (R. p. 113, lines 19-24). He agreed that Mr. Sandoval trusted him to do the job right and would only occasionally give him directions. (R. p. 114, lines 2-5). Claimant testified he was not given a specific day and time to start a job, he was not told what hours he had to work and he did not punch a time clock. (R. p. 114, line 6-p. 115, line 1).

Claimant testified Mr. Sandoval told him that if he worked for him, he could only work for him and no one else. (R. p. 96, lines 1-3). However, Ms. Sandoval testified May River preferred Claimant work exclusively for May River but there was no requirement that he do that. They would keep Claimant busy intentionally so that hopefully he would only work for them. (R. p. 124, lines 16-19). Claimant was free to decline jobs, which Claimant did in June when he stopped working for them. (R. p. 124, line 25-p. 125, line 12). Ms. Sandoval also testified May River does not have any kind of agreement with its subcontractors stating they cannot work anywhere else, so they are free to do whatever they want, but they keep them busy. (R. p. 268, sub p. 23, lines 1-16; p. 274, sub p. 49, lines 12-13).

Claimant said he also had to wear Sandoval's t-shirts and use a company sign on his car. (R. p. 96, lines 3-7). Ms. Sandoval testified May River gives out t-shirts as the only form of advertising it does and the t-shirts are given to other people besides those that work on their jobsites, including people at company sponsored community events. (R. p. 125, line 20-p. 126, line 13). Ms. Sandoval testified May River gives out about ten (10) shirts per week and they sometimes does not even meet the people the shirts are given to. May River's landlord has a shirt, and shirts are given to clients. (R. p. 264, sub p. 7, lines 2-7).

At one time, May River classified its workers as employees but stopped using employees because they were very irresponsible and they had a lot of problems with them. Ms. Sandoval testified they still have a few employees such as drivers and people who do small repairs. (R. p. 122, line 19-p. 123, line 1). She testified they found that company owners care about their business and are very responsible. She further testified Claimant was probably one of the best people they had because he always got the job done correctly and his invoices were on time. (R. p. 123, lines 2-10).

Ms. Sandoval testified they used to classify their roofers as employees and have them on payroll, but as of January 2016, all of the roofers working for May River were subcontractors. (R. p. lines 14-23). While May River does have a few employees, none of those are roofers. May River changed from only having roofer employees to having subcontractors. (R. p. 133, lines 10-16; p. 134, lines 6-10). They switched to subcontractors because when the owner of the company is up on the roof, he makes sure the work is done correctly because he has his own insurance and he does not want to risk that. (R. p. 134, line 16-p. 135, line 3).

Ms. Sandoval testified that May River has had situations where roofing subcontractors have gone to jobs and decided they would not do them so May River was forced to delay the jobs for several weeks. (R. p. 140, line 25-p. 141, line 7). Ms. Sandoval testified that when they do not have enough roofing subcontractor crews to do a roofing job, they have to delay the work. There have been times when they have been booked out four months because they do not have enough crews. (R. p. 134, lines 2-5). She stated that if these roofers were May River employees, they would have to do the jobs because they were getting paid by the hour and it was their job. Additionally, the subcontractors are paid by the amount of work they get done, so it is important for them to do it fast and right. Further, if the roofers were employees, May River would have to hire a supervisor to be on site all the time and hire a cleanup crew. With a subcontractor, that is not necessary because the subcontractor handles the project from beginning to end. (R. p. 141, lines 6-24).

Ms. Sandoval testified there are written contracts signed in advance for big projects. For smaller projects, Claimant would sign the contract after the job, whenever he came in to pick up his check. (R. p. 273, sub p. 43, line 22 – sub p. 44, line 7.) Claimant signed an agreement on the bottom of his pay stub for this job stating he had workers' compensation and general liability

insurance and issuing a three-year warranty in case there was something wrong with the project. (R. p. 272, sub p. 41, line 2-p. 273, sub p. 42, line 3). Ms. Sandoval explained that doing any paperwork was tedious and time consuming for their subcontractors since they had their own business and needed to be working to get paid. (R. p. 274, sub p. 48, lines 2-21). May River had the subcontractors sign the hardcopy contracts for smaller jobs whenever they came into the office to save them time instead of having to drive to the May River office for every change that arose at the job site. (R. p. 273, sub p. 44, lines 2-7).

May River contracted with Anchor Construction to perform roofing work for a residential home in Bull Point, a subdivision in Beaufort, South Carolina. (R. p. 264, sub p. 8, line 16-sub p. 9, line 2). May River subcontracted part of the roof installation work to Cedano Roofing. (R. p. 265, lines 14-20). On January 18, 2016, Claimant was working on the Bull Point property. (R. p. 97, line 19-p. 98, line 2). Claimant fell from a ladder, sustaining physical injuries. (R. p. 98, lines 15-20).

Ms. Diaz testified her agency knew about Appellant/Claimant's injuries and they told him his injuries were not covered under his policy. She stated she looked at his application to make that determination. (R. p. 84, lines 18-25). Ms. Diaz explained that the May 30, 2014, application was the initial application and the policy renewed every year. (R. p. 87, lines 1-17). Ms. Diaz testified that while Appellant/ Claimant excluded himself from coverage and had no employees at the time he purchased the policy, the policy would cover anyone the insured hired for a day, an hour or even a minute. (R. p. 88, line 20-p. 89, line 7).

ARGUMENTS

I. THE APPELLATE PANEL CORRECTLY DETERMINED CLAIMANT'S JANUARY 18, 2016, ACCIDENT AND INJURIES ARE NOT COMPENSABLE UNDER THE

TRAVELERS POLICY PURCHASED BY CEDANO ROOFING AS CLAIMANT WAS EXCLUDED FROM THAT COVERAGE.

a. The Unambiguous Language of the Policy Excludes Claimant from Coverage.

South Carolina law provides that "[i]nsurance policies are subject to the general rules of contract construction." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.,* 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). An insurer's obligation under a policy must be defined by the terms of the policy itself and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc.*, 334 S.C. at 529, 514 S.E.2d at 330.

Here, the policy's plain language shows it affords no coverage for claimant's workers' compensation injury. Item 1. of the Information Page identifies the "INSURED" as "CEDANO RAMIREZ, FRANCISCO DBA CEDANO ROOFING & WOODWORKING." (R. p. 284). Sub-part A. of the "General Section" defines "you" as used in the policy as "the employer named in item 1 of the Information Page." (R. p. 286). The plain language of sub-part C. of this same section defines the term "workers compensation law" as the workers' compensation law of each state named in Item 3.A. of the Information page. (R. p. 286). Item 3.A. names South Carolina as the state to which sub-part C. applies. (R. p. 284).

Part One of the policy contains the insuring agreement detailing the "WORKERS COMPENSATION INSURANCE" coverage afforded by the policy. (R. pp. 286-287). Sub-part B. of Part One states that the insurer "will pay promptly when due the benefits required of you by the workers' compensation law." (R. p. 286). South Carolina law requires an employer to provide

benefits to an employee for injuries that arise out of the employment. S.C.Code Ann. § 42-1-160 (1976).

Sub-parts H.5. and H.6. of Part One of the policy further provide that the insurance afforded under the terms of the policy conform to the workers' compensation law to which the policy applies. (R. p. 287). This policy language comports with South Carolina's Workers' Compensation Act as Section 42-5-60 of the Act provides "[e]very policy for the insurance of the compensation provided in this Title or against liability therefore shall be deemed to be made subject to the provision of this Title." S.C.Code Ann. § 42-5-60 (1976).

Per the clear, unambiguous terms of the policy, the policy only covers liability of an employer for benefits due to an employee under the workers' compensation laws of South Carolina. To receive coverage, Claimant must first demonstrate that he is entitled to benefits under the workers' compensation laws of South Carolina. Establishing that he is an employee as defined by the Act is a necessary condition precedent to establishing entitlement to benefits under South Carolina law. "The claimant has the burden of proving facts sufficient to allow recovery under the Act." *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007).

The South Carolina Workers' Compensation Act clearly sets forth when a sole proprietor may be considered an employee and entitled to workers' compensation benefits.

> Any sole proprietor or partner of a business whose employees are eligible for benefits under this title may elect to be included as employees under the workers' compensation coverage of the business if they are actively engaged in the operation of the business and *if the insurer is notified of their election to be included.* Any sole proprietor or partner, upon this election, is entitled to employee benefits and is subject to employee responsibilities prescribed in this title.

S.C.Code Ann. 42-1-130 (1976) (emphasis added). The general rule is that a sole proprietor is not an

employee as defined by the Act, and as such, is excluded from any benefits afforded by the Act. *Id.* If a sole proprietor wishes to be included as an employee, thus availing himself of the protections afforded by the Act and the coverage provided by the workers' compensation policy he purchased for his employees, then he must elect to be included in the coverage. *Smith v. Squire Timber Co.*, 311 S.C. 321, 324-325, 428 S.E.2d 878, 880 (1993). A sole proprietor must act affirmatively to obtain coverage for himself. Absent such affirmative act, a sole proprietor is not an employee under South Carolina law, and if he is not an employee, then the sole proprietor as employer is not liable for any benefits to himself.

Here, Claimant offered no evidence showing he undertook affirmative action to secure coverage for himself. Claimant also offered no evidence showing that he notified Travelers that he wished to be included as an employee under the policy. Had claimant elected to include himself in coverage when he first obtained workers' compensation insurance or later notified Travelers that he wished to increase the coverage provided, the policy effective at the time of his accident would have included an amendatory endorsement identifying claimant as an employee, thus adding additional coverage beyond that afforded by the general terms of the policy. Lacking such endorsement, the policy by its terms provides no coverage. When the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage. *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001).

Claimant's only argument is that "individual" means "employee." Claimant's argument that this terminology "individual" refers specifically to the Claimant himself, instead of his business, is contradictory to the very terms of the policy itself. The policy does cover Claimant but only as defined by the policy – namely as the employer. While any employees of the insured are covered,

the policy covers Claimant only in his business capacity as an employer, and not Claimant himself. The term "individual" cannot mean employee. Claimant's argument fails because it cannot be reconciled with other provisions of the policy or with S.C. Code Ann. § 42-1-130. Thus, this Court need look no further than the plain language of the policy, and the plain language mandates the denial of Claimant's claim as asserted against the workers' compensation policy issued by Travelers Property Casualty Company of America.

b. *Other Evidence Shows Claimant Actively Excluded Himself from Coverage.*

Not only does the plain language of the policy, read in conjunction with S.C. Code Ann. § 42-1-130, provide no coverage for claimant because he took no affirmative action to include himself under the coverage, the evidence shows Claimant took specific actions to exclude himself from coverage. Claimant manifested his intention to be excluded from the policy by marking himself as excluded in the Cedano Roofing application for insurance (R. p. 241). Claimant also testified that when he purchased a workers' compensation policy for his business, he did not purchase workers' compensation insurance for himself. (R. p. 255, sub p. 15, lines 10-13). Further, Isabelle Diaz ("Diaz"), Hispanic Business Specialist at PC&L, testified that she specifically recalls meeting with Claimant when he initially applied for coverage. (R. p. 76, lines 13-16). She spoke to Claimant in Spanish—his native language; she discussed the difference in premiums depending on whether Claimant chose to elect coverage for himself; she explained the consequences of not electing to cover himself under the policy; and she authenticated Claimant's signature on the application. (R. p. 74, line 8-p. 76, line 21; p. 82, line 8-p. 83, line 9.) Claimant knowingly opted for cheaper premiums and did not elect coverage by the "E" marked on the application under the column titled "INC/EXC." (R. p. 386). Claimant signed the application. (R. p. 389). Claimant conceded at oral argument

before the Full Commission that he did not elect coverage. (R. p. 43, line 16-p. 44, line 9).

Because Claimant failed to elect coverage and pay premiums to be covered under the Travelers policy, he is not eligible for benefits under it.

c. *Claimant's Argument That the Parol Evidence Rule Bars the Admission of Evidence Extrinsic to the Policy Lacks Legal Basis.*

Claimant alleges that "all information outside the subject written policy are subsumed by the contract and not relevant to the analysis of the claim."[1] (R. p. 560). Essentially, Claimant is arguing that the parol evidence rule should have barred the Commission from considering any evidence related to the insurance application or the testimony of Diaz when deciding whether Claimant is excluded from the Travelers policy. Claimant argues this because he is attempting to side-step his failure of meeting his burden of proving he qualifies as an employee under the Act by encouraging this Court to misinterpret the clear language of the policy. Claimant contends that Item 1. of the Information Page identifies him as the insured because it refers to the insured as an "individual." Claimant argues that means the policy covers any injuries he suffers personally. Claimant wants this Court to look only at his misinterpretation of language in the policy, because if this Court looks at the other evidence, this Court must conclude Claimant clearly did not want himself to be an employee when he purchased the policy.

Nonetheless, Claimant's argument that this evidence should not be considered is erroneous for three reasons. Generally speaking, the parol evidence rule provides that:

> If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto. *However, where a contract is silent as to a particular matter, and ambiguity thereby arises*, parol evidence may be admitted to supply the deficiency and establish the true intent.

1 Claimant likely relies on the following clause in the policy to support this argument: "The only agreements relating to this insurance are stated in this policy."

Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989) (emphasis added); *accord Frewil, LLC v. Price*, 411 S.C. 525, 530, 769 S.E.2d 250, 253 (Ct. App. 2015).

First, the South Carolina Workers' Compensation Commission is not bound by the South Carolina Rules of Evidence: "*Except in proceedings before the Industrial Commission* the rules of evidence as applied in civil cases in the court of common pleas shall be followed." S.C.Code Ann. § 1-23-330 (1976) (emphasis added). *See also, Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("the Court of Appeals failed to recognize the fact that the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation commission"); *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940) ("[g]reat liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts, . . ."). Given that the Commission is not bound by the Rules of Evidence, the parol evidence rule clearly is not relevant to this case.

Second, Travelers is not offering the evidence of Claimant's application or Diaz' testimony to add another term to the contract. As demonstrated above, the Court need look no further than the policy language itself to determine the scope of coverage provided, and determine that coverage does not extend to Claimant. Rather, Travelers offers the evidence to show Claimant never intended to be an employee of his company for purposes of a workers' compensation policy. The policy itself is unambiguous in that it clearly provides that it will only cover injuries to the employees of the employer. Nonetheless, to determine whether Claimant's claim falls within coverage, this Court must look to the facts established by the evidence admitted in the case to decide if Claimant was an

employee under the policy. The documentary evidence regarding Claimant's insurance application and the testimony of Diaz constitute the only evidence of record on the question whether Claimant is an employee. If Claimant had evidence to the contrary that tended to show he did qualify as an employee, he should have offered it, and in that instance, the Commission could consider it when determining whether Claimant's claim falls within the scope of coverage. As the matter stands presently, if this Court considers the evidence presented, Claimant's claim must fail. Alternatively, if this Court disregards the documentary and testimonial evidence, Claimant's claim still must fail as he cannot meet his burden of proving his status as an employee otherwise.

Finally, if this Court finds the term "individual" is not defined or is ambiguous as to Claimant's coverage as an employee, it was certainly permissible for the Commission to admit parol evidence to clarify the contract and discover the true intent of the parties. *See Columbia East Assocs.*, 299 S.C. at 519-20, 386 S.E.2d at 261. Regardless, the evidence should not be excluded.

As argued above, the clear language of the policy indicates Claimant is not under its coverage and this Court must deny Claimant's claim as asserted against the workers' compensation policy issued by Travelers Property Casualty Company of America. Furthermore, Claimant's own actions demonstrate he actively chose to exclude himself from coverage under the policy.

II. THE APPELLATE PANEL CORRECTLY DETERMINED CLAIMANT'S JANUARY 18, 2016, ACCIDENT AND INJURIES ARE NOT COMPENSABLE UNDER MAY RIVER'S INSURANCE POLICY WITH ZURICH AS CLAIMANT WAS NOT A DIRECT EMPLOYEE OF MAY RIVER.

Claimant is not covered under May River's workers' compensation policy because he is not a direct employee of May River. Only employees are covered under the South Carolina Workers' Compensation Act; generally, independent contractors are not. *Smith v. Squire Timber Co.*, 311 S.C.

321, 324, 428 S.E.2d 878, 880 (1993). The burden of proving an employee-employer relationship is on the claimant, and the claimant must show such a relationship by the greater weight of the evidence. *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015). May River and Zurich argue that the simple fact that May River required Claimant to provide his own certificate of insurance is sufficient proof that Claimant was an independent contractor and not an employee. Beyond that inquiry, four other factors are relevant in determining whether a claimant is an employee or an independent contractor:

> (1) The employer's right to exercise or the actual exercise of control over the details of the work and how it is performed; (2) the method of payment; (3) who furnishes the equipment; and (4) the employer's right to terminate the employment.

See, e.g., *Farrar v. D.W. Daniel High Sch.*, 309 S.C. 523, 524, 424 S.E.2d 543, 544 (Ct. App. 1992). These four factors are to be "evaluated in an evenhanded manner" in making the determination whether a claimant is an employee or an independent contractor. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009). The mere presence of one of these factors is not dispositive of an employee-employer relationship. *Lewis v. L.B. Dynasty*, 411 S.C. at 642, 770 S.E.2d at 395.

a. *Right to Exercise or Exercise of Control*

May River's control over Claimant did not exemplify the control that an employer has over an employee. Typically, for any given project, May River only interacted with Claimant when it submitted the work order to him and received an invoice from him. (R. p. 119, lines 14-15). Primarily, Claimant had free reign to work how and when he desired. Claimant set his own work hours and days and did not punch a time clock. (R. p. 114, line 2-p. 115, line 1). Claimant was not supervised: instead, May River would only visit a job site once the project was completed to ensure

the work had been performed. (R. p. 265, sub. p. 11, lines 2-6). May River relied on Claimant to get the job done timely and correctly. (R. p. 114, lines 2-5; R. p. 141, lines 12-24). May River did not supervise the amount of work Claimant performed: instead, May River relied on invoices submitted by Claimant to determine remuneration for a given project. (R. p. 113, lines 4-14; p. 119, lines 12-15). Additionally, Claimant was free to negotiate for additional payment once he saw the job he was assigned by the work order and was able to decline jobs if he chose to. (R. p. 121, lines 8-18; p. 124, line 25-p. 125, line 4). Claimant was not required to check in with May River nor keep it apprised of his schedule; instead, Claimant created his own schedule—he was "on his own time." (R. p. 114, line 9-p. 115, line 1). Claimant was trusted to do the job right and only occasionally received instruction from anyone at May River. (R. p. 114, lines 2-5). Finally, Claimant chose his own employees, without requiring the approval of May River. (R. p. 104, lines 19-22; p. 122, lines 15-17). Indeed, it was Claimant who paid his employees, not May River, who did not know what if any employees Claimant had and had no part in selecting Claimant's workers. (R. p. 104, lines 21-24; p. 122, lines 15-17). May River preferred Claimant work only for them and they tried to keep him busy so he would do so but there was no specific requirement. (R. p. 124, lines 16-24; p. 268, lines 1-16).

While May River gave its subcontractors t-shirts with its logo to wear, this was solely for advertisement purposes, and subcontractors would also wear t-shirts displaying logos of other companies. (R. p. 125, line 20-p. 126, line 19). To that end, May River also provided t-shirts as gifts in great abundance including but not limited to May River's landlord, its clients, staff, subcontractors, and even people it had not met such as when the company sponsored a community event. (R. p. 126, lines 2-15; p. 264, sub p. 7, lines 2-7).

b. *Method of Payment*

Turning to the method of payment prong, May River did not pay Claimant in a way that typified an employee-employer relationship. May River and Claimant negotiated a contractual price per 10 x 10 square of roofing laid, and Claimant would invoice May River for any repairs performed (amounting to approximately $25/hour), (R. p. 102, line 13-p. 103, line 16; p. 113, lines 4-14; p. 119, lines 21-23; p. 268, sub p. 23, line 23-sub p. 24, line 22). As such, Claimant knew exactly what he was going to be paid for each job before he began it because he knew the number of squares a job would entail once he received the work order. (R. p. 100, lines 8-11; p. 121, lines 2-8). Claimant negotiated his rate per square from $55.00 to $60.00, which was higher than what May River paid its other subcontractors. (R. p. 103, lines 15-16; p. 274, sub p. 49, lines 10-24). Payments were not paid on any regular interval: May River would pay Claimant by check the week after a job was completed. (R. p. 97, lines 3-6). Then, Claimant would pay his employees out of the money he received from May River for the jobs. (R. p. 104, lines 21-24). May River did not withhold any employee deductions from Claimant's pay. May River issued Claimant a 1099 each year he worked for them, which Claimant turned around and used to file taxes in the name of his business, Cedano Roofing. (R. p. 107, lines 17-21; p. 124, lines 9-15). As such, Claimant's method of payment by May River indicates he was an independent contractor and not an employee.

c. *Furnishing of Equipment*

The equipment provided to Claimant does not indicate that an employee-employer relationship existed. Claimant procured all of the tools/equipment required to complete the job: truck, air compressor, nail gun, tool pouch, hammer, razors, etc. (R. p. 104, lines 2-16; p. 108, lines 18-20). Meanwhile, May River, at most, acted as a vendor in supplying materials to Cedano Roofing for the jobs. May River would provide only those materials for which it would bill the ultimate

client; for instance, it would provide shingles, paper, plastic, caps and flashing. (R. p. 97, lines 12-14). Therefore, Claimant's furnishing of his own equipment indicates he was an independent contractor, rather than an employee.

d. *Right to Terminate Employment*

Finally, May River did not have the right to terminate Claimant without incurring breach of contract. May River and Claimant contract for every job. For larger projects, the contract is signed prior to the work; for smaller projects, the contract is signed after the work is completed. (R. p. 265, sub p. 12, line 20-sub p. 21, line 8). May River decided on this system to save its subcontractors time—instead of having to drive to the May River office for every change that arose at the job site, the hardcopy contract was formalized at the end of smaller jobs. (R. p. 272, sub p. 41, lines 2-24).

Despite Claimant's claim to the contrary, this system of contracting did not permit May River to terminate Claimant. If May River decided to terminate Claimant, it would incur a breach of contract. This arrangement is paradigmatic of an independent contractor relationship.

e. *Other Factors*

Although not falling strictly within the four-prong analysis, other factors demonstrate Claimant was acting as an independent contractor as opposed to an employee for May River. Claimant filed taxes for his business and represented Cedano Roofing to the state and federal government as a distinct legal entity for tax purposes. In addition, Claimant purchased workers' compensation insurance for the business, from which he knowingly excluded himself. All things considered, in analyzing the four prongs of the employee-independent contractor test and in light of other factors, the evidence demonstrates Claimant was an independent contractor, not an employee of May River.

III. THE APPELLATE PANEL CORRECTLY DETERMINED CLAIMANT'S JANUARY 18, 2016, ACCIDENT AND INJURIES ARE NOT COMPENSABLE UNDER MAY RIVER'S INSURANCE POLICY WITH ZURICH AS CLAIMANT IS NOT A STATUTORY EMPLOYEE OF MAY RIVER.

The statutory employer doctrine in the Workers Compensation Act is intended to prevent employers from evading liability for workers' compensation benefits arising in the course of employment via subcontracting work. *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 n.1 (1997). In furtherance of this goal, the Act created the concept of the statutory employer/employee: "those who do not employ the plaintiff but are treated as if they did." *Eades v. U.S.*, 168 F.3d 481 (4th Cir. 1999). This mechanism operates as follows:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

S.C.Code Ann. § 42-1-400 (1976).

a. Claimant Cannot Recover as a Statutory Employee Because He is an Independent Contractor Who Excluded Himself Under His Own Coverage.

If the Claimant is considered a statutory employee of May River, May River is not liable because Cedano Roofing notified it of coverage pursuant to S.C. Code Ann. § 42-1-415. An up-stream contractor is relieved of liability if the down-stream subcontractor represents to it that the subcontractor is insured:

> Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

S.C.Code Ann. 42-1-415 (1976). A Certificate of Insurance is sufficient to satisfy this purpose. 21 S.C.Code Ann.Regs. 67-415 (Supp. 2010). Here, Cedano Roofing represented to May River it had workers' compensation insurance. (R. p. 109, lines 5-12; p. 126, line 20-p. 127, line 5; p. 254, sub p. 13, line 24-p. 255, sub p. 14, line 4). Beginning on June 2, 2015, Cedano Roofing's agent, PC&L, would automatically send May River a Certificate of Insurance for Cedano Roofing's workers' compensation policy bi-monthly. (R. p. 265, sub p. 13, line 18-p. 266, sub p. 17, line 10).

Had one of Claimant's workers been injured, coverage would exist under his policy. His company had coverage and May River relied on that coverage. There is no downstream contractor without coverage in this instance. Rather, there is coverage for the independent contractor who simply chose not to include himself as an employee under his own policy. The notion that S.C. Code Ann. §42-1-415 should not apply in this instance because Claimant did not hand May River a copy of his Certificate of Insurance but instead it was obtained directly from Claimant's insurance agent, PC&L, is absurd. Claimant was continuously performing jobs for May River, so he was always engaged to perform work within the meaning of the statute. As long as May River had a valid Certificate of Insurance and had not been notified of cancellation of Claimant's coverage, May River was in compliance with S.C. Code Ann. §42-1-415. Therefore, if Claimant is considered a statutory employee, May River is relieved of liability under S.C. Code Ann. §42-1-415 because Cedano Roofing had coverage.

b. The Statutory Employer Doctrine Does Not Apply Because Claimant Excluded Himself From Cedano Roofing's Workers' Compensation Policy.

A sole proprietor is not automatically covered under the Act.[2] As such, a sole proprietor must affirmatively elect coverage as set out by S.C. Code Ann. § 42-1-130—by (1) being active in the business, and (2) notifying the insurer of the election to be included. Although independent contractors are not included in the Workers' Compensation Act, and therefore, cannot be statutory employees, the Supreme Court of South Carolina has created a "narrow exception" to this rule "by allowing an independent contractor or subcontractor to become an 'employee' by electing coverage under [its own] business's workers' compensation benefits." *Smith v. Squire Timber Co.*, 311 S.C. 321, 324–25, 428 S.E.2d 878, 880 (1993) (citing *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 290–91, 411 S.E.2d 439, 440 (1991) and *Carver v. Bill Pridemore & Co.*, 278 S.C. 235, 294 S.E.2d 419 (1982)). However, in *Squires Timber*, the Court held this exception only applied to independent contractors who elected coverage under § 42-1-130; that is, it cannot apply when the Claimant fails to elect coverage under that section. *Squire Timber Co.*, 31.C. at 324–25, 428 S.E.2d at 880.

Here, Claimant does not fall within the narrow exception created because Claimant affirmatively excluded himself from coverage, as manifested in his company's policy and the application for insurance. PC&L's Workers' Compensation Application makes clear Claimant's intent to be excluded from coverage. (R. p. 386). Additionally, Diaz specifically remembers apprising Claimant in Spanish of the consequences of this choice. (R. p. 74, line 20-p. 76, line 16). Moreover, Claimant's Certificate of Insurance further acknowledges Claimant's decision to exclude himself from coverage, as it specifically states that the Cedano Roofing proprietor is excluded. (R. p.

2 "Sole proprietors ... are not automatically included under workers' compensation insurance." South Carolina Workers' Compensation Commission, Frequently Asked Questions, http://www.wcc.sc.gov/Pages/FrequentlyAskedQuestions.aspx (last visited Nov. 30, 2016).

301). Therefore, Claimant cannot be considered a statutory employee because he is an independent contractor who failed to elect to be covered under S.C. Code Ann. §42-1-130.

c. Permitting Claimant to Exclude Himself Under His Company's Policy, and Allowing Him to Recover Under the Statutory Employer Doctrine, Would Subvert the Spirit of the Statutory Employer Doctrine.

The statutory employer doctrine was created to protect the employees of subcontractors, who cannot dictate whether their employer purchases coverage. However, sole proprietors can decide to purchase coverage and decide what that coverage entails. Here, Claimant purchased Cedano Roofing's coverage and decided to exclude himself from it. It would subvert the legislature's intent to allow Claimant to exclude himself under Cedano Roofing's workers' compensation policy and allow him to recover under May River's policy. Claimant made the decision to exclude himself from his policy, thereby reaping the benefit of paying a lower premium. It would be unjust then to allow Claimant to recover under May River's policy and thereby increase May River's premium.

IV. THE APPELLATE PANEL CORRECTLY DETERMINED THE PARTIES STIPULATED TO CLAIMANT'S APPLICABLE AVERAGE WEEKLY WAGE AND COMPENSATION RATE AND IN ORDERING SAME.

Claimant asserts the Appellate Panel erred in Stipulation No. 4, which is actually Stipulation No. 3, when it provided that the parties stipulated that Claimant's average weekly wage was $769.35 with a resulting compensation rate of $512.93. In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court. *Holy Loch Distrib., Inc. v. Hitchcock*, 340 S.C. 20, 24 531 S.E.2d 282, 284 (2000). In order for an issue to be properly presented for appeal, appellant's brief must set forth the issue in the statement of issues on appeal. *Langehans v. Smith*, 347 S.C. 348, 351, 554 S.E.2d 681, 683 (Ct. App. 2001). An appellate brief must be divided into as many parts as there are issues to be argued, and an issue is not preserved for

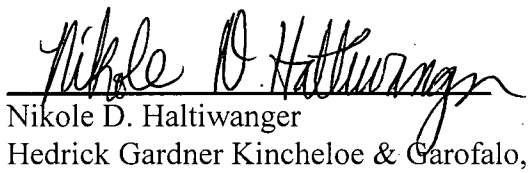
appeal if appellant's brief does not conform to these requirements. Id. Further, it is an error for the appellate court to consider issues not properly raised to it. *Id.*

While Claimant listed the average weekly wage and compensation rate stipulation as one of his grounds for appeal in his "Conclusions of Law That are Erroneous" section in his Request for Commission Review filed on June 5, 2017, Claimant did not set forth this issue in his "Questions Presented" in his Appellant's Brief filed with the Full Commission on December 15, 2017. No argument concerning the average weekly wage and compensation rate was presented to the Full Commission Appellate Panel during oral arguments on January 22, 2018. Appellant's Brief to the Court of Appeals is the first time he has made an argument concerning this issue. As such, the issue is not preserved for appeal and should not be considered by this Court.

CONCLUSION

The substantial evidence in the records supports finding that Claimant's accident and injuries are not compensable under the Travelers policy purchased by Cedano Roofing as Claimant was excluded from that coverage. Further, Claimant's accident and injuries are not compensable under May River's insurance policy with Zurich as Claimant was neither a direct employee nor a statutory employee of May River. Finally, the issue concerning stipulation as to Claimant's average weekly wage and compensation rate should not be addressed by this Court as it was not preserved for appellate review. Accordingly, Respondents submit the Commission's Decision and Order in this matter should be affirmed.

Respectfully submitted,



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