

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Appellate Case No. 2018-000652
Workers Compensation Claim No.: 1600686

Francisco Cedano Ramirez, Employee, Appellant,

v.

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

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

REPLY BRIEF OF APPELLANT

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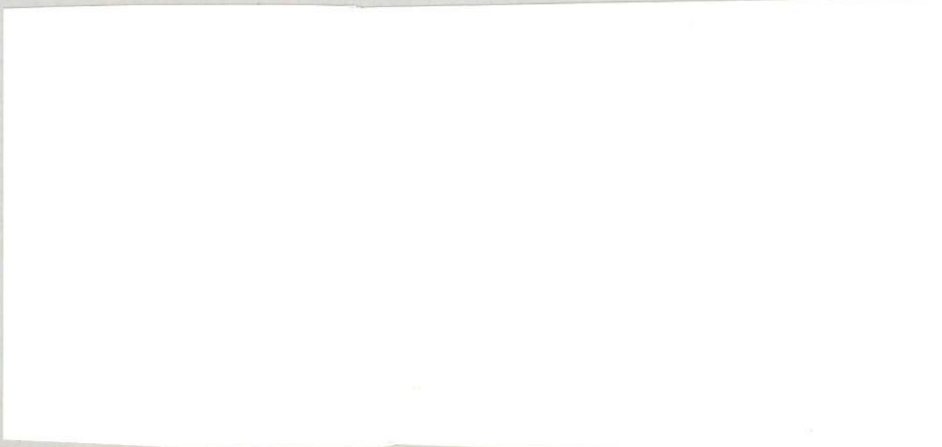


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Statement of Issues on Appeal

1. Whether the Commission erred in failing to find that Claimant’s January 18, 2016 work accident and resulting injuries are compensable under South Carolina law and the plain language of Claimant's insurance policy with Travelers' Insurance Company;

2. Whether the Commission erred in failing to find that Claimant’s January 18, 2016 work accident and resulting injuries are compensable under South Carolina law and May River Roofing's insurance policy with American Zurich Insurance Company due to Claimant being a direct employee of May River Roofing pursuant to the applicable four-factor right to control test;

3. Whether the Commission erred in failing to find that Claimant's January 18, 2016 work accident and resulting injuries are compensable under South Carolina law and May River Roofing's insurance policy with American Zurich due to Claimant being a statutory employee of May River Roofing pursuant to S.C. Code § 42-1-410 and May River Roofing not strictly meeting the requirements for exemption from same set forth in S.C. Code § 42-1-415; and

4. Whether the Commission erred in finding that the parties agreed upon the applicable compensation rate and ordering same as a result without further consideration.

Background Facts

Appellant/Claimant Francisco Cedeno Ramirez is a 40-year-old resident of Beaufort County, South Carolina where he earns his living as a roofer. On January 18, 2016, while performing roofing work atop the roof of a residential home located in Beaufort, South Carolina, Claimant fell from the roof to the ground below, a drop of approximately sixteen (16) feet. Claimant was treated at the scene by the Beaufort County EMS and thereafter transported to Beaufort Memorial Hospital. As set forth in a medical questionnaire completed by treating physician Dr. Leland Stoddard, M.D., Claimant suffered injuries to his back, neck, both shoulders, chest, ribs, lungs, and bilateral upper extremities as a result of the fall. (R. p. 250).

Argument

Appellant replies to the arguments set forth in the Initial Brief of Respondents as follows:

Travelers' Policy

Respondents fail to reconcile their argument that "the policy does cover Claimant but only as defined by the policy – namely as the employer" (Resp. brief, p. 14, lines 4-5) with the subject policy's written definition of who is insured:

B. Who Is Insured

You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

(R. p. 286, lines 21-26).

Respondents' arguments attempt to include Appellant in the categorical exclusion in this paragraph applicable to partnerships, yet the policy accurately identifies Appellant as an individual insured, who necessarily cannot, by himself, be a partnership:

1.

INSURED:

**CEDEÑO RAMIREZ, FRANCISCO DBA
CEDEÑO ROOFING & WOODWORKING
90 DILLON RD. APT. D1
HILTON HEAD SC 29926-3792**

Insured is AN INDIVIDUAL

(R. p. 282, lines 9-14). Respondents' concede that Appellant is a sole proprietor. (Resp. brief, p. 3, line 20).

Accordingly, the fairest interpretation of the subject workers' compensation policy's definition of "who is insured" is that Appellant is an individual insured doing business as a sole proprietorship, and that any exclusions relating to partnerships have no applicability to Appellant or his claim insofar as he cannot alone be a partnership. Further, such policy containing a merger clause restricting its interpretation solely to its stated terms, this interpretation as to coverage controls regardless of any outside testimonial or documentary evidence as to the purported intent of the parties.

Indicia of Employment

Respondents fail to address that the substantial indicia of employment remaining in Respondent May River Roofing's business practices toward its roofers, including Appellant, since

its transition from employee-roofers to subcontractor-roofers clearly indicates the continuing existence of an employer-employee relationship.

Regarding right to and exercise of control, it is uncontroverted that Respondent May River Roofing assigned Appellant roofing jobs, including the job on which he was injured, that Respondent May River Roofing supervised and/or inspected Appellant's work, and Appellant was encouraged to work only for Respondent and was assigned jobs by Respondent to keep him busy enough to achieve that end. It is also uncontroverted that at times Respondent assigned up to five roofing jobs per day to Appellant.

Regarding furnishing of equipment, it is uncontroverted that Respondent Roofing supplied most of the essential equipment, including the ladder and blower, and most of the essential roofing materials, including the shingles, roofing paper, and nails, to Appellant for use in the roofing jobs through its accounts at vendors such as Espy Lumber.

Regarding method of payment, it is uncontroverted that at least part of Appellant's compensation was payment at an hourly rate and at least part of Appellant's compensation was payment upon a piecemeal rate based upon the number of roofing squares installed on a particular job.

Regarding right to fire, Appellant presented testimony that Respondent retains the right to fire him for any particular job. (R. p. 101, lines 6-9). Respondent contests this point, asserting that were it to fire Appellant for any particular job it would incur liability for breach of contract. Nevertheless, Respondent concedes that "for smaller projects, the contract is signed after the work is completed" (Resp. brief, p. 21, line 6), such concession undermining its assertion regarding breach of contract.

Viewing the substantial evidence in the record as a whole, including the above-referenced indicia of employment, the picture that plainly emerges is of a roofing business, May River Roofing, that formerly employed its roofers in the traditional sense and then, prior to Appellant's accident, made a business decision for its own purposes to re-classify its employees as independent subcontractors. Unfortunately, in doing so May River Roofing failed to remove all indicia of employment, including as set forth above, resulting in Appellate being properly considered an employee under the law and an independent contractor to May River Roofing in name only.

Certificate of Coverage

Respondents fail to reconcile their business practice of regularly collecting certificates of insurance for their purported independent subcontractors such as Appellant from their insurance agents rather than the subcontractors themselves, including Appellant, at the commencement of each job for which the parties contract. Respondents' workaround of the Workers Compensation Act ignores the requirements set forth in the statutory code section controlling here, S.C. Code § 42-1-415, the "relief of liability" provision that requires the purported subcontractor to have "represented himself" as "having workers' compensation insurance" at the "time the contractor was engaged to perform work" with the higher tier subcontractor.

As the South Carolina Supreme Court held in Lewis v. L.B. Dynasty, exceptions and restrictions to the Workers' Compensation Act are to be "strictly construed" "to further the beneficent purpose of the Workers' Compensation Act. Lewis, 411 S.C. 637, 641 (2015), citing James v. Anne's Inc., 390 S.C. 188, 198 (2010).

The record establishes that Appellant represented nothing whatsoever to Respondents as to his workers compensation coverage at the time of the time of engagement to perform work on the job upon which he was injured, and further that any representation made on his behalf by the

insurance agent was not contemporaneous with the subject job. Accordingly, should Appellant be held to be an independent subcontractor of Respondent May River Roofing, S.C. Code § 42-1-410 (the statutory employee provision) applies, and Respondent may not be relieved from liability from same.

Compensation Rate

Respondents assert that Appellant's appeal of the Full Commission's finding regarding the compensation rate being stipulated at \$512.93 per week is not preserved insofar as it was not included in the prior appeal from the Single Commissioner. In response Appellant asserts that such error was set forth as Item 1 on Claimant's Form 30 Addendum, dated June 5, 2017. (R. p. 568, lines 20-21).

Conclusion

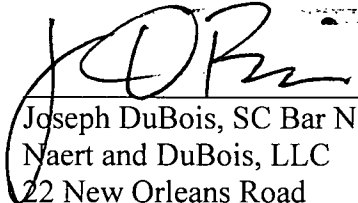
"We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and restrictions are strictly construed." Lewis v. L.B. Dynasty, 411 S.C. 637, 641 (2015), citing James v. Anne's Inc., 390 S.C. 188, 198 (2010).

Based upon the foregoing, Appellant respectfully requests the following:

1. Reversing the Commission's ruling that Claimant was not covered under the plain language of the Traveler's Insurance Policy;
2. Reversing the Commission's ruling that Claimant was not a direct employee of May River Roofing pursuant to the four-factor right of control test and thereby covered by the American Zurich Insurance policy;
3. Reversing the Commission's ruling that Claimant cannot recovery as a "statutory employee" of May River Roofing under the American Zurich insurance policy; and

4. Remanding the case to the Commission for consideration and determination of Claimant's compensation rate.

Respectfully submitted,



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August 21, 2018
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