

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Case No: 2020-200923

Kevin M. Todd.....Claimant, Respondent,

v.

Mike Roberts, D/B/A Mike Roberts Home Repair.....Employer,
and S.C. Uninsured Employers' Fund,, Defendants,

of which S.C. Uninsured Employers' Fund is theAppellant.

FINAL BRIEF OF APPELLANT
SOUTH CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND

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STATEMENT OF ISSUES ON APPEAL

- I. THE FULL COMMMISON APPELLATE PANEL ERRED IN FINDING THE CLAIMANT KEVIN M. TODD SUFFERED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH MICHAEL ROBERTS HOME REPAIR
- II. THE FULL COMMISSION APPELLATE PANEL ERRED IN FINDING THAT MIKE ROBERTS HOME REPAIR REGULARLY EMPLOYED FOUR OR MORE PERSONS AT THE TIME OF THE CLAIMANT'S ACCIDENT, SUGJECTING THAT BUSINESS TO THE JURISDICTION OF THE WORKERS' COMPENSATION COMMISSION
- III. THE FULL COMMISSION APPELLANT PANEL ERRED IN AWARDING BENEFITS IN THIS CASE AS THE ACCIDENT DID NOT ARISE OUT OF OR IN THE SCOPE OF THE CLAIMANT'S EMPLOYMENT AND BECAUSE THE COMMISSION LACKED JURISDICTION OVER THIS CLAIM
- IV. THE FULL COMMISSION APPELLANT PANEL ERRED IN CONSIDERING THIS MATTER AT CONFERNCE RATHER THAN ALLOWING APPELLANT ARGUMENTS. THE PANEL ALSO ERRED IN ADMITTING ADDITIONAL EVIDENCE FROM THE CLAIMANT WITHOUT THE CONSENT OF THE EMPLOYER WHO APPEARED PRO SE

STATEMENT OF THE CASE

This matter arises out of an accident which occurred on August 9, 2013 when the Claimant was seriously injured as a result of a boat explosion. As a result of the explosion, the Claimant suffered serious burns to his left arm and right arm and was hospitalized from the date of the accident until August 23, 2013 at the University of North Carolina Hospital in Chapel Hill. On February 28, 2014, the Claimant filed a Form 50 alleging that the above accident arose out of in the course of his employment with Mike Roberts Home Repair.

Following the filing of the Claimant's Form 50, it was determined that Mike Roberts Home Repair did not have in place a policy of Workers' Compensation Insurance at the time of the Claimant's accident. The Compliance Division of the Workers' Compensation Commission performed an investigation. The Compliance Division was unable to conclusively determine that Mike Roberts Home Repair was subject to the South Carolina Workers' Compensation Act. Thus, the Claimant, by and through a letter to his Attorney, was informed that he would have the burden of proving that Mike Roberts Home Repair was subject to the South Carolina Workers' Compensation Act when the matter was set heard. Because of the uninsured situation, the South Carolina Uninsured Employers' Fund was made a party to the claim.

On September 25, 2014, a Hearing was held before Commissioner Gene McCaskill in Conway, South Carolina. Numerous documents were placed into evidence at that time. In addition, the Claimant, the Alleged Employer, Mike Roberts, and three other individuals, provided testimony. Following the Hearing, the matter was taken under advisement by Commissioner McCaskill.

On March 30, 2015, Commissioner McCaskill issued an Order finding that the Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury while in the scope

and course of his employment. The Order further denied the Claimant's claim for benefits.

Following the issuance of the Single Commission Order, the Claimant timely filed an Appeal to the Appellant Panel of the Workers' Compensation Commission. On July 20, 2015, the matter was heard by the Appellant Panel. That panel issued an Order on January 12, 2016 unanimously affirming the decision of Commissioner McCaskill. Following the Appellant Panel's ruling, the Claimant filed an Appeal to the South Carolina Court of Appeals on January 28, 2016. On May 23, 2018, the Court of Appeals, in an unpublished decision, vacated the Appellant Panel Order and remanded the matter to the Appellant Panel of the Workers' Compensation Commission. The Court of Appeals held that the Panel's original order did not contain findings of fact and conclusions of law sufficiently detailed to allow the court to determine whether or not the decision was erroneous.

Following the remand, the matter was returned to the Judicial Department of the Workers' Compensation Commission and erroneously reassigned to a Single Commissioner for a Hearing *De Novo*. Eventually, the South Carolina Uninsured Employers' Fund notified the Single Commissioner a Hearing *De Novo* had not been ordered by the Court of Appeals. Instead, the Court of Appeals simply requested a more detailed Order. Pursuant to the Supreme Court decision of *Russell vs. Walmart Stores*, the Workers' Compensation Commission agreed, and the matter was returned to an Appellant Panel. That panel, without notice to the parties, considered the claim on February 20, 2020.

On May 23, 2018, the Appellant Panel issued its Decision and Order reversing the original decision of Commissioner McCaskill and the original Appellant Panel, finding the claim compensable and ordering benefits. This Appeal was timely filed thereafter.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) S.C. Code Ann. §1-23-350 (2005) establishes the standard of review for decisions by the Appellate Panel of the Workers' Compensation Commission. See Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E. 2d 324, 326 (Ct.App. 2012). Under the scope of review established in the APA, this Court may not substitute its judgement for that of the Appellate Panel of the Workers' Compensation Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if substantial rights have prejudiced or the decision is affected by an error law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See S.C. Code Ann. § 1-23-380 (5) (e) (Sup. 2012). Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Full Commission reached. Lark v. Bilo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") Palmetto Alliance, Inc. v. S.C. Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

The Jurisdictional issues in the present case are not governed by the substantial evidence standard of review. The issue regarding the number of employees regularly employed by Mike Roberts Home Repair is jurisdictional. Therefore, the Commission's Findings of Fact as to that issue are not conclusive on Appeal and Appellate Courts have the power and duty to review the record and decide those issues in accordance with the preponderance of the credible evidence. Kirksey v. Assurance Tire Company, 314 S.C. 43, 443 S.E. 2d 803 (1994). Thus, an Appellant Court must review the record in accordance with its own view of the preponderance of the credible evidence.

However, while the Appellate Court may take its own view of the preponderance of the evidence on jurisdictional issues, the final determination of witness credibility is usually reserved to the Appellate Panel of the South Carolina Workers' Compensation Commission. *Porter v. Labor Depot*, 613 S.C.2d 96, 103 (S.C. Court of Appeals, 2007).

FACTS OF THE CASE

This matter arises out of an accident which occurred on August 9, 2013 when the Claimant suffered severe burns as a result of a gasoline explosion. The Claimant alleged that his injuries arose out of and in the course of his employment with Mike Roberts who does business as Mike Roberts Home Repair. A Hearing was held before Commissioner Gene McCaskill on September 25, 2014. At that Hearing, the Claimant, the Employer Mike Roberts, and three other witnesses testified.

On March 30, 2015, Commissioner McCaskill issued an Order denying the Claimants claim for benefits. On page 2 of that Order, Commissioner McCaskill notes that the parties stipulated that the South Carolina Workers' Compensation Commission had jurisdiction over the parties and the subject matter of this claim and further noted that the parties stipulated that the Uninsured Employer was subject to the South Carolina Workers' Compensation Act on the date of the Claimant's injury but not insured. Those stipulations are in error. The record from the proceedings show that jurisdiction was not stipulated to. Furthermore, the Attorney for the South Carolina Uninsured Employers' Fund, denied that the Commission had jurisdiction over the claim. (Record on Appeal, page 15, line 18-25).

Mr. Holmes Adams was the first witness to testify at the Hearing before Commissioner McCaskill. Mr. Adams stated that he was a subcontractor for Mike Roberts. He did not consider himself an Employee. Furthermore, he did not know the relationship between other workers and Mike

Roberts. According to his testimony, "That wasn't my gig." (Record on Appeal, page 18, line 16)

During direct examination, he testified, to the best of his knowledge that Kevin, Bobby Days, Ryan Harrelson, and James all drew weekly pay. (Record on Appeal, page 18, line 21-22) However, he qualified that testimony during cross examination. He stated that he knew Bobby drew a weekly check and Kevin drew a weekly check but that those were the only two that he knew for sure. He stated that he had personally seen those two collect their checks more than once. (Record on Appeal, page 24, lines 9-16).

Michelle Bratcher also testified at the Hearing. At the time of the Hearing, Mrs. Bratcher was the girlfriend of the Claimant, Kevin Todd. They had been together for fourteen years and had one child together. She testified that Kevin, Bobby Day, James Flom, and Ryan Harrelson worked for Mike Roberts. However, on cross examination, she stated that she had no personal knowledge of the relationship between those individuals and Mr. Roberts. She did not know what their pay was based upon. (Record on Appeal, page 38, lines 4-25)

Anthony Williams testified at the Hearing. Anthony was present on the day the boat explosion occurred. He had been hired to do some electrical work on the boat that day. Mr. Williams is an electrician. Mr. Williams had no knowledge of other employees who worked for Mike Roberts.

The Claimant, Kevin Todd, testified at the Hearing. He testified that he had paid Ryan Harrelson, James Flom and Bobby Days on behalf of Mike Roberts occasionally. (Record on Appeal, page 51, lines 23-25)

Mike Roberts, the owner of Mike Roberts Home Repair testified at the Hearing. At the time of the Hearing, he had been in business for five years. The primary function of his business was to do home repairs. He was working for financial institutions repairing and remodeling houses that had

been foreclosed upon. Mr. Roberts admitted that the Claimant, Kevin Todd was his Employee at the time of the accident. He testified that he was his right-hand man. He paid him Five Hundred (\$500.00) Dollars per week.

Mr. Roberts also stated that Bobby Days worked for him full-time at that time. He stated that Bobby had worked for him off and on, quit and come back. He believes Bobby may have been there for about three months at the time of the accident on that occasion. (Record on Appeal, page 76, line 22—page 77, line 12)

James Flom was also alleged to be an Employee of the Claimant. However, Mr. Roberts testified that he had already quit working with him by the time the accident occurred. He believes that Mr. Flom quit three to four weeks earlier. He stated that Mr. Flom and Bobby were involved in some type of dispute and Mr. Flom quit as a result of that dispute. (Record on Appeal, page 77, lines 14-19)

Regarding Ryan Harrelson, Mr. Roberts stated that Ryan Harrelson was not his Employee. He subbed work to him. He and Ryan Harrelson had been friends for twenty years. He used him as a subcontractor for cabinet jobs or electrical trim work. He stated that his relationship was basically the same as his relationship with Holmes Adams who admitted that he was subcontractor. Those gentlemen would negotiate a price with Mr. Roberts for a job and upon completion would be paid that price. (Record on Appeal, page 77, line 23—page 78, line 8)

Mr. Roberts testified that the Claimant, Kevin Todd, the Claimant, was paid a salary of Five Hundred (\$500.00) Dollars per week. However, Kevin was the only one on salary. The other two Employees were paid by the hour.

Following the remand from the Court of Appeals, the Claimant's Attorney secured the deposition of James Marshall Flom. Mr. Flom was an Employee of Mike Roberts Home Repair

beginning in 2012 and ending a month or so before the accident in question occurred. At the time he stopped working for Mr. Roberts, he stated that he was paid by the hour and sometimes by the day. He stopped working for Mike Roberts Home Repair when he entered Coastal Carolina University full-time. Mr. Flom stated that one other person worked for Mike Roberts and believed his name was Ryan Harrelson. He also stated that there were a couple of guys that he really did not know well that he was unable to name. Mr. Flom testimony did not elaborate on the relationship between the Alleged Employer, Mike Roberts, and those other unnamed individuals.

ARGUMENT

I. THE FULL COMMISSION APPELLATE PANEL ERRED IN FINDING THE CLAIMANT KEVIN M. TODD SUFFERED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH MICHAEL ROBERTS HOME REPAIR.

In its Order of May 18, 2020, the Appellate Panel of the Full Commission found that the Claimant suffered an injury while working on a boat and that the work in question, arose out of and in the course and scope of his employment with Mike Roberts Home Repair. In one of its Findings of Fact, the Commission held that the work being performed benefited the Employer and was done at his direction. In another Finding of Fact, the Panel finds that the work on the salvaged boat benefited both Roberts as the Employee and Todd as the Employer. The Defendant, South Carolina Uninsured Employers' Fund, believes this to be in error.

An injury arises "in the course of employment within the meaning of the Workers' Compensation Act when it occurs within the period of employment at a place where the Employee may reasonable be in the performance of his duties. An accident arises out of, the employment when the accident has origins in the nature of the employment.

In the present case, testimony shows that the Claimant was "on the clock" from early in the morning until 4:30 in the afternoon. He was paid a salary. The above, coupled with the fact that he was directed to go to the boat location by his Employer clearly shows that he was in the scope of his employment at the time the accident occurred.

However, in order to be compensable, the injury must also "arise out of his employment." The Employer, Mike Roberts, is in the home repair business. Repairing and salvaging boats are not part of that business. Although the Claimant was instructed to do this work by the Employer, the work had no

relation to the home repair business.

The Appellate Panel seems to believe that because the work benefited the Employer personally, it arose out of employment. However, the South Carolina Supreme Court has denied benefits where an Employee was performing personal errands for a mill superintendent and where an employee was repairing the personal vehicle of the plant manager on a Saturday at the place of employment. (See Fountain v. Hartsville Oil Mill and Hicks v. Piedmont Coal Storage, Inc. and Atlantic Mutual Insurance Company).

The Commission also found that work in question benefited the Employee. Employees who are injured while engaging in personal acts are generally denied compensation unless they can show an employment connection. In the present case, it is hard to show that working on boats has any relationship to the Employers business of home repair.

II. THE FULL COMMISSION APPELLATE PANEL ERRED IN FINDING THAT MIKE ROBERTS HOME REPAIR REGULARLY EMPLOYED FOUR OR MORE PERSONS AT THE TIME OF THE CLAIMANT'S ACCIDENT, SUBJECTING THAT BUSINESS TO THE JURISDICTION OF THE WORKERS' COMPENSATION COMMISSION.

III. THE FULL COMMISSION APPELLANT PANEL ERRED IN AWARDING BENEFITS IN THIS CASE AS THE ACCIDENT DID NOT ARISE OUT OF OR IN THE SCOPE OF THE CLAIMANT'S EMPLOYMENT AND BECAUSE THE COMMISSION LACKED JURISDICTION OVER THIS CLAIM.

In its Finding of Fact number 13, the Full Commission Appellate Panel found that Mike Roberts d/b/a/ Mike Roberts Home Repair, regularly employed four or more individuals in furtherance of its business interest. According to the Order, the finding was based upon the preponderance of the evidence as a whole including the testimony of the Claimant, James Flom, Holmes Adams, Michelle Bratcher, and Anthony Williams. Because of the finding, the panel concluded that Mike Roberts d/b/a

Mike Roberts Home Repair is subject to the Workers' Compensation Act but uninsured under the Act.

As mentioned above, this matter was commenced with the filing of a Form 50 on February 28, 2014. When that document was filed, the Commission determined that the Alleged Employer was operating without insurance. An investigation was completed by the Compliance Division of the Workers' Compensation Commission. The Compliance Division was unable to conclusively prove that the Alleged Employer was subject to the Workers' Compensation Act by regularly employing four or more persons. Because of that finding, the burden shifted to the Claimant to prove that the Employer was subject to the Workers' Compensation Act.

In South Carolina, the definition of "employment" includes only those "private employments in which four or more employees are regularly employed in the same business or establishment." (§42-1-150). The Act furthermore specifically exempts "any person who has regularly employed in service less than four employees in the same business within the State" (§42-1-360). Both Code Sections require that employees be "regularly employed" but the Code does not define the term "regularly employed".

In Harding v. Plumley, the Court of Appeals noting that §42-1-360 does not define the term "regularly employed" stated: "The term regularly employed connotes employment of the same number of persons throughout the period with some consistency. It would not seem that the purpose of the Act would be accomplished by making it applicable to an Employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act."

The Court went on to state that in deciding whether an Employee is regular or casual, consideration should be given to both duration and regularity of occurrence.

The Court of Appeals further addressed the issue in Hernandez-Zuniga v. Tickle, adopting the definition of “regularly employed” to mean employment of the same number of people with some consistency during the “relevant time period” which was to be determined by considering three factors:

- (1) Employers mode of operation;
- (2) Whether an Employer employs the jurisdictional number of Employees generally;
- (3) If the period of employment is definite rather than occasional, sporadic, or indefinite.

In the current case, the Appellate Panel simply found that the Employer regularly employed four or more individuals in furtherance of his business interest without naming those individuals or commenting on the relevant time period. At the Hearing, the Claimant, his girlfriend Michelle Bratcher, Holmes Adams, and Anthony Williams testified on behalf of the Claimant. Although Holmes Adams testified on direct examination that four persons received paychecks on Friday, he admitted that he did not know the relationship of those persons to the Alleged Employer, Mike Roberts. Furthermore, on cross-examination, he testified that he was unable to confirm that the individuals named drew a weekly check. He only guaranteed that Bobby and Kevin drew a weekly check. Those are the two that he knew for sure.

Michelle Bratcher and the Claimant Kevin Todd also testified other individuals who worked for Mr. Roberts. However, neither were able to elaborate on the relationship of those individuals and Mr. Roberts.

In his testimony, Holmes Adams admitted that he was not an Employee of Mr. Roberts but rather a subcontractor. He and Mr. Roberts would reach an agreement for a price on a particular job and he would complete that job under no supervision and get paid when the job was completed. The

only testimony regarding the relationship between Mike Roberts and Ryan Harrelson came from Mr. Roberts. Mr. Roberts testified that Ryan Harrelson was also a subcontractor. He basically subbed out work to him in a manner similar to the work subbed out to Holmes Adams.

James Flom was named as an Employee. Mr. Roberts admitted James was his employee but testified that James stopped working for him a month or so before this accident. That was confirmed by deposition testimony of James Flom.

In this case, the burden of proof was on the Claimant to prove that the Employer regularly employed four or more persons. In this case, it can be established that the Employer regularly employed three persons. Those persons would be the Claimant, Kevin Todd, Bobby Days, and possibly James Flom although Mr. Flom quit working a few weeks before the accident.

The only testimony regarding the relationship with Holmes Adams and Ryan Harrelson establishes that they were not employees but instead Independent or Sub Contractors.

In reviewing the testimony as a whole regarding the jurisdictional question, it is clear that the Appellant Panel of the Workers' Compensation Commission erred in finding that the Alleged Employer, Mike Roberts d/b/a Roberts Home Repair was subject to the South Carolina Workers' Compensation Act as he did not regularly employ four or more persons. The Commission's Order does not specify who were employees and who were subcontractors. Basically, they just made a finding. That was an error.

Because the Workers' Compensation Commission erred in finding that the Employer was subject to the Workers' Compensation Act, the award of benefits was also improper and should be reversed.

IV. THE FULL COMMISSION APPELLATE PANEL ERRED IN CONSIDERING THIS MATTER AT CONFERENCE RATHER THAN ALLOWING APPELLANT ARGUMENTS. THE PANEL ALSO ERRED IN ADMITTING ADDITIONAL EVIDENCE FROM THE CLAIMANT WITHOUT THE CONSENT OF THE EMPLOYER WHO APPEARED PRO SE.

By Order dated October 21, 2019, the South Carolina Workers' Compensation Commission transferred the above case to the Appellate Panel of the Commission to take up action and enters an Order consistent with the Court of Appeals remand of May 23, 2018. The case was assigned to Commissioners Campbell, Taylor and Wilkerson. Although the Order which is the subject of this Appeal shows that the matter was considered at conference on February 20, 2020 and that appearances were made on behalf of all parties, no actual Hearing was held. In addition, the parties were not notified on when and where the matter would be considered.

When the panel considered the case, the deposition of James Flom, which was secured in October of 2019, was allowed into evidence. The Defendants contend that the Commission erred in considering the deposition testimony of Mr. Flom.

The original Hearing in this case was held on September 25, 2014 in Conway, South Carolina. Prior to the Hearing, the Claimant had filed a Form 58 listing numerous witnesses, including Mr. Flom. Mr. Flom did not testify at the Hearing. If Mr. Flom has been subpoenaed to the original Hearing but was unavailable, Commission Regulation 67-613 (c) (2) allows for the introduction of a Deposition following the Hearing. In this case, no such deposition was requested by the Claimant. In addition, Commission Regulation 67-707 allows for the introduction of additional and newly discovered evidence. However, in order to introduce a deposition into evidence after the record has been closed, a Motion must be filed pursuant to Regulation 67-707. In this case no such Motion was filed.

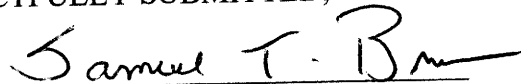
The Employer in this case appeared at the Initial Hearing *Pro Se*. When the Deposition of James Flom was forwarded to the Workers' Compensation to be considered, the Employer was not copied. Because a party did not consent and was not notified of the additional evidence and because a Motion was not filed pursuant to Commission Regulations, the Appellate Panel of the Full Commission erred in considering that deposition.

On behalf of the Uninsured Employers' Fund, no objection was made to the introduction of the deposition of James Flom into evidence. Mr. Flom did not testify regarding the jurisdictional issues argued above. He did not add any evidence regarding the number of employees regularly employed by the Alleged Employer. However, the Attorney for the South Carolina Uninsured Employers' Fund does not represent the Employer in this case.

CONCLUSION

In this case, the South Carolina Workers' Compensation Commission lacks jurisdiction over the above claim as the Claimant failed to establish that the alleged Employer, Mike Roberts d/b/a Mike Roberts Home Repair regularly employed four or more persons as required by Code Section 42-1-360. Furthermore, boat repair was not part of the business of Mike Roberts, and thus the accident did not arise out of the Claimant's employment. For those reasons, the Order of the Appellate Panel should be reversed, and the case dismissed.

RESPECTFULLY SUBMITTED,



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