The State of South Carolina
In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner
Gene McCaskill, Commissioner

Appellate Case No.: 2020-000739

Jorge Lopez-Celestin.....Claimant, Appellant,

v.

Reeves Young, LLC, and
Holder Construction Group.....Employers,

And

Amerisure Insurance Company, and
American Zurich Insurance Company.....Carriers, Defendants

of whom Reeves Young, LLC, and
Amerisure Insurance Company are the .....Respondents.

Reply of Appellant

C. Daniel Vega, Esquire, Bar No.: 71639
Chappell, Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC
PH: (803) 929-3600
dvega@csa-law.com
Attorney for Appellant

Table of Contents

Table of Authorities

South Carolina Cases

Cases from other Jurisdictions

Statutes and Rules

Other Sources

Argument

I. The Commission Erred in excluding the deposition testimony of Juan Ochoa

The Commission erred in excluding the deposition testimony of Juan Ochoa and should have considered that testimony in its determinations of compensability in the case *sub judice*. As a baseline, Appellant and Respondents agree the Rules of Evidence do not apply to workers' compensation cases. *See* S.C. Code Ann. § 1-23-330. The import of such, however, appears to be subject to dispute. Respondents assert the lack of evidence rules operate to exclude evidence. The opposite is true.

The exclusion of the Rules of Evidence from workers' compensation actions does not restrict the evidence that may be received by the Commission but expands it. By way of comparison, the Rules of Evidence apply to matters before a magistrate judge; however, they are "relaxed" in the interest of justice. Rule 13, SCRMC. Likewise, the Rules of Procedure of the Administrative Law Court provide for the simplification of procedures in hearings, including workers' compensation cases. SCALC Rule 10. These procedural deviations do not restrict the evidence that may be received, but rather expand the evidence that may be considered. Correspondingly, the removal of the Rules of Evidence from a workers' compensation case expands the evidence that may be heard.

Depositions, admissible in civil trials under certain circumstances, as discussed further below, pursuant to the Rules of Civil Procedure, are otherwise excluded based upon the Rules of Evidence. For example, deposition testimony, not subject to an exception in the Rules of Civil Procedure, could be excluded from trial on the basis of hearsay, to the extent no hearsay exclusion or exception is applicable. *See generally* Rules 801, 802, SCRE. That would not be the case when the Rules of Evidence do not apply. While not directly cited in the hearing at issue, the

Commissioner and counsel for Respondents implicitly argued pursuant to the Rules of Evidence for the exclusion of the subject testimony. Counsel for Respondents argued "You can't use the deposition transcript unless he wants to try to impeach him somehow." (R. p. 145). And further stated, "Witness is right in front of him." (R. p. 144). Likewise, Commissioner Campbell stated, "if you need to for impeachment purposes I'll - - I'll allow it come in, okay." (R. p. 145). Again, this testimony shows that while not expressly cited, Commissioner Campbell and Counsel for Respondents treated this issue as one controlled by the Rules of Evidence. *See Generally* Rules 801, 802, 803, SCRE.

Correspondingly, the Single Commissioner erred in excluding deposition testimony admissible pursuant to Rule 32(a)(2), SCRCP. That rule permits the use at trial of a deposition of anyone who is a managing agent of the party company. Respondents cite *Rubin v. General Tire and Rubber Co.*, 18 F.R.D. 51, 56 (S.D.N.Y. 1955) as the standard South Carolina applies to determine who is a managing agent in the absence of other guidance. That reliance is misplaced. First, *Rubin* has never been cited by a South Carolina court, state or federal. Likewise, it has never been cited by any of South Carolina's neighboring states or any state or federal court of a state in the Fourth Circuit. Moreover, to the extent the Court finds *Ruben* persuasive, the Respondents mischaracterize the application of the factors. "[I]t has been said that the third factor, identification with the interests of the employer, is the 'paramount test.'" Wright and Miller, Federal Practice and Procedure § 2103 (citing *Independent Prod. Corp. v. Loew's, Inc.*, 24 F.R.D. 19 (S.D.N.Y. 1959)).

Here, Juan Ochoa could reasonably be expected, and did, align himself with the interests of the employer and not those of any other party. (R. pp. 141 - 142). Likewise, Juan Ochoa was vested with the right and responsibilities to exercise his judgment and discretion in dealing with

corporate matters. (R. pp. 148 – 150) (discussing Ochoa's role in personnel matters and staffing for various jobs)). Finally, the company depended on Ochoa to give testimony at his employers' direction. (R. pp. 195 – 197). Juan Ochoa was a foreman with managerial responsibilities, he testified at the bequest of the employer, and his interests are aligned with the company. For these reasons the Commission erred in its exclusion of his deposition testimony from consideration in the present matter.

Commissioner Campbell ruled deposition testimony could not be used for any purpose other than impeachment. That ruling summarily excluded deposition testimony rightfully available for use at a hearing pursuant to Rule 32(a)(2), SCRCP. As such, various officers also testified on behalf of Respondents while the deposition testimony was improperly excluded.

Based upon the foregoing, the Commissioner erred in the exclusion of deposition testimony. Rather than exclude depositions, the Rules of Evidence should have operated to permit their use, consistent with Rule 32(a)(2), SCRCP. Therefore, Appellant respectfully requests this Court reverse the Commission's ruling on this matter and order a new hearing because of those errors.

II. *McMillan v. Huntington & Guerry Electric Co.* is directly applicable to the facts at bar.

The Commission erred in concluding Appellant did not receive compensation for traveling from Georgia to work in South Carolina. Appellant contends the Commission erred because it did not apply the analysis the supreme court adopted in *McMillan v. Huntington & Guerry Electric Co.*, 277 S.C. 552, 290 S.E.2d 810 (1982). Respondents contend the Commission did not err because: Appellant was merely commuting to and from work without travel compensation; Appellant failed to demonstrate any additional compensation paid while he worked out-of-state

was compensation for working out-of-state; and contend *McMillan* is wholly distinct in nature from the present claim and of no value to the Court's current analysis.

In *McMillan*, the employer compensated its employees with an increased rate of pay if they traveled greater than fifteen miles away from the employers' office. *McMillan*, 277 S.C. at 553, 290 S.E.2d at 810-11. In that case, the increase in hourly pay was for commuting or boarding incident to the out of town work. *Id.* at 555, 290 S.E.2d at 811. The same is true here. Reeves Young is a Georgia company doing construction in South Carolina. Juan Ochoa testified the increase in hourly wages and the $35.00 per day was for out-of-state work; they did not receive that increased compensation while working in the state of Georgia. (R. p. 153). Likewise, William Reeves clarified the additional funds paid to employees working at the Clemson site were only for those individuals from out-of-state and local employees did not receive the increased compensation. (R. p. 159).

In *McMillan*, and as noted by the Respondents, the injured employee testified the increased pay was to compensate him for commuting. Respondents erroneously assert there is no similar evidence in this case despite the fact Appellant testified, "Juan Ochoa told me that he was going to talk to William [Reeves], who is the company's president, about money for gas which ended up being the $175." (R. p. 100). Likewise, Respondents rely on the fact the employer in *McMillan* did not offer housing at the job site in support of their argument *McMillan* is inapplicable. However, in *McMillan*, in addition to the increased hourly compensation for out of town work, the employer also paid fifteen cents per mile to cover travel on the first day of the job and on the last day of the job. *McMillan*, 277 S.C. at 556, 290 S.E.2d 812. Despite the fact that on the first and last day the employees were paid an increased wage in addition to the fifteen cents a mile, the court still found the increased wages bore a definite relation with the travel.

Respondents here argue there is no relation between distance travelled and compensation, asserting every employee received the same without regard to distance traveled. That statement is in direct contradiction to the testimony of William Reeves, who testified that only out-of-state employees received increased compensation at the Clemson job; those who were local received no increased compensation. (R. p. 159).

Respondents additionally argue Appellant presented no testimony as to the actual costs associated with his travel to and from Clemson. Appellant, however, testified as to both the mileage required for his travel, as well as the time it required. (R. pp. 103, 121). Likewise, Appellant presented evidence of gas costs associated with that travel to the Single Commissioner. (R. pp. 184 – 85).

Moreover, the argument Reeves Young received no tangible benefit from paying employees a $175.00 per diem is unfounded. Both William Reeves and Matthew McCormack testified the purpose of the per diem was to remain competitive and to keep good employees. (R. pp. 165 – 173; 177 – 181 ("Q: Was [Appellant] a good employee? A: He was. Q: Did y'all enjoy having him around? A: Yes.")).

McMillan is particularly relevant to this Court's analysis of the present case, as the facts of this case and those of *McMillan* are aligned. The supreme court held no explicit agreement as to the purpose of the compensation is required, and that standard should be applied here. *McMillan*, 277 S.C. at 555, 290 S.E.2d at 811 ("It is sufficient if the agreement is implied."). As in *McMillan*, Reeves Young employees traveling out-of-state received a wage increase for their out-of-state work. More specifically, Reeves Young's employees received a $175.00 per week per diem and a $2.00 hourly rate increase when they worked out-of-state. Respondents, however, deny this additional compensation covers travel time or travel expenses. Respondents note their supervisor

and foreman Juan Ochoa also received the $175 per week, and conclude that since he had a gas card, the $175.00 was not for travel. These facts demonstrate employees receiving the additional $2.00 wage increase, which Ochoa did not receive, were compensated for travel time. The only reasonable conclusion supported by these facts is that the additional compensation was for travel, thus bringing this claim within an exception to the coming and going rule. Therefore, Appellant respectfully requests this Court reverse the decision and order of the Commission and find the Appellant's claim compensable.

Conclusion

Based upon the foregoing, Appellant respectfully requests this Court reverse the opinion and order of the Commission. The Commissioner erred in the exclusion of deposition testimony from Juan Ochoa and William Reeves, and a new trial should be granted on that basis. Likewise, the Commission erred in its application of the coming and going rule and the exceptions appurtenant thereto. Therefore, Appellant additionally requests this Court find as a matter of law that Appellant was in the course and scope of his employment when the subject collision occurred and requests this Court award benefits for the injuries he sustained.

Respectfully Submitted,

C. Daniel Vega, Esquire, Bar No.: 71639
Chappell, Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC
PH: (803) 929-3600
dvega@csa-law.com
Attorney for Appellant