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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS
COMPENSATION COMMISSION APPELLATE PANEL

SC Court of Appeals

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.

MOTION FOR REHEARING

Pursuant to Rule 221, SCACR, the respondents, American Zurich Insurance Co. and
Travelers Property & Casualty Co. hereby move for rehearing of this matter as it relates to an
Opinion issued on June 23, 2021. This motion is based on Respondent's contention that the Court
has overlooked or misapprehended the applicable precedent in determining that Appellant was a
direct employee of May River Roofing, Inc. ("May River").

In the Court's June 23, 2021 Opinion, the Court reversed the determination of the South
Carolina Workers Compensation Commission ("Commission") that found insufficient evidence of
direct employment of Appellant by May River. Among the items referenced as indicating a direct

employment relationship, the Court referenced several facts that weighed in favor of that determination. As discussed more fully, Respondents contend that the Court misapprehended the import of these facts in reaching its decision.

I. **The Commission correctly found that the evidence did not support a direct employment relationship.**

Under South Carolina law, it is the claimant's burden to demonstrate by the greater weight of the evidence that an employer-employee relationship existed at the time of his injury in order to be compensable. The courts have developed a four-factor test to analyze these situations. The four factors to be analyzed are:

- (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*

In its opinion, the Court found that the evidence was somewhat in conflict but determined the evidence weighed in favor of May River's right to control and exercise control over Appellant. In reaching this decision, the Court first correctly noted that "everyone concedes Ramirez is a skilled roofer who did not need day-to-day supervision. To sum, there is little direct evidence May River controlled the finer points of how Ramirez went about his work as a roofer." Opinion, p. 6. Furthermore, Appellant did not punch a clock, was free to renegotiate payments or decline jobs,

and free to enlist others in the performance of his contracted work. The factors noted as showing the right to control were in essence, the fact that May River provided branded t-shirts, and the exclusive working relationship between Appellant and May River. In reaching this conclusion, the Court appears to have overlooked and misapprehended the facts of the case and the application of the relevant precedent.

First, with regard to the use of the t-shirts, the evidence in the record is in conflict on this issue. The evidence demonstrated that while the t-shirts were provided, there were not specifically required and, in fact, workers were noted to have work shirts displaying other logos. (R. p. 125, line 20-p. 126, line 19). Regardless of the specific requirement of wearing the shirt, such use of branded clothing does not rise to the level of “exercising control over the details of the work and how it is performed.” *See Farrar*, 309 S.C. at 524, 424 S.E.2d at 544. The cases addressing the necessary “control” make it clear that the control is focused on the type of work being conducted and the manner in which it is conducted. As discussed above, the Court correctly noted that there was little evidence of this type of control over Appellant in the performance of his work. The fact that he wore a branded shirt while performing work that he was autonomously performing should not override the evidence of his ability to independently perform his work.

The other factor cited by the Court is the exclusivity of the working relationship. Respectfully, Respondents contend that the Court has likewise misapprehended the import of this evidence. The evidence is clear that Appellant was free to accept job, reject jobs, renegotiate work, and hire his own workers to perform his duties. The fact that May River had so much work available that they could keep a subcontractor busy full time is not the type of evidence our courts have found to be indicative of an employer-employee relationship. The Court found that this exclusivity “suggests May River had the right to control Ramirez by withholding work.” Opinion

p. 7. Respectfully, this conclusion is speculative and not supported by the record. If May River did have the ability to withhold work, it follows that Appellant would have the ability to work elsewhere.

For these reasons, Respondents respectfully request rehearing to reconsider the evidence in the record as it relates to this factor.

b. *Furnishing of Equipment*

In its Opinion, the Court concluded that the evidence that May River provided the materials for the job weighed in favor of an employment relationship. Respondents respectfully submit that this determination misapprehends the evidence in the record. The record is clear that 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). May River may have supplied the materials that were required under the project contract, that provision was essentially the same as any materials vendor and did not create an employer/employee relationship. The “equipment” used on these jobs was primarily Appellant’s equipment. This is distinguishable from the supplies used as part of a project.

For these reasons, Respondents respectfully request rehearing to reconsider the evidence in the record as it relates to this factor.

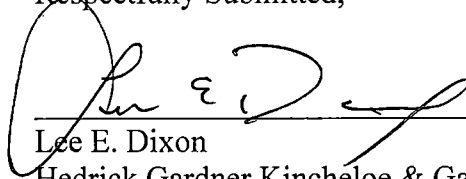
c. *Method of Payment and Right to Terminate Employment*

With regard to these factors, the Court noted that they either supported an independent contractor relationship or did not favor either side. As such, Respondent simply rely on the evidence cited as showing an independent contractor relationship.

II. Conclusion

For the foregoing reasons, Respondents respectfully request rehearing and reconsideration of the decision related to the existence of a direct employer/employee relationship.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Lee E. Dixon", is written over a horizontal line. The signature is stylized and cursive.

Lee E. Dixon
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

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APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

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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.

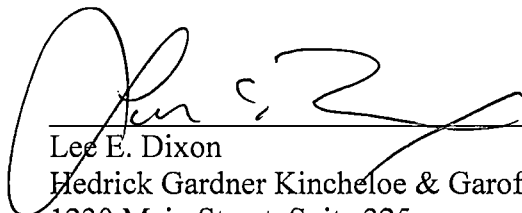
May River Roofing, Inc. Employer, and American Zurich Insurance Co., Carrier, and Cedano
Roofing, Employer, and Travelers Property & Casualty Co., Carrier,

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

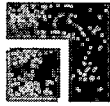
PROOF OF SERVICE

I certify that I have served the Motion for Rehearing, by depositing a copy of it in the
United States Mail, postage prepaid, on July 8, 2021 addressed to the attorney of record, Joseph
DuBois, P.O. Box 7228, Hilton Head Island, SC 29938.

July 8, 2021



Lee E. Dixon
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803-727-1215
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HEDRICK GARDNER
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ATTORNEYS AT LAW

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SC Court of Appeals

July 8, 2021

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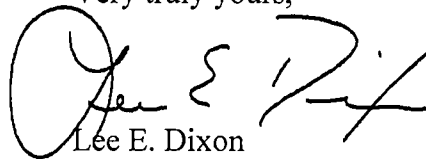
RE: Ramirez, Francisco Cedano v. May River Roofing, Inc. (1600686)
WCC File No.: 1600686
Appellate Case No.: 2018-000652
Claim No.: 026-CB-E5V8210-F
Our File: 00082L.00515

Dear Ms. Kitchings:

Enclosed for filing with the Court of Appeals are the original and 1 copy of the Respondents' Motion for Rehearing in the above-referenced workers' compensation claim.

By copy of this letter to Joseph DuBois, the Appellant's attorney, I am serving a copy of this document on him. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,


Lee E. Dixon

LED/lcs
Enclosure

cc: Joseph Dubois, Esquire
Brenda Strong (via email)
Tiffany Jones (via email)