

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Respondent,

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. and American Zurich Insurance Co. are Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioners certifies that a Motion for Reconsideration to the South Carolina Court of Appeals was made on July 8, 2021, and finally ruled upon on July 23, 2021.

QUESTIONS PRESENTED ON APPEAL

Did the Court of Appeals err in finding that Respondent was a direct employee of May River Roofing based on facts that have no bearing on the tests established by prior precedent and do not rise to the level of a preponderance of the evidence?

STATEMENT OF THE CASE

This is an alleged workers compensation case arising out of an accident that occurred on January 18, 2016. The claimant, Francisco Cedano Ramirez (“Claimant”), owned and operated a roofing company under the name of Cedano Roofing. Claimant was contracted to perform roofing work by May River Roofing (“May River”). On January 18, 2016, Claimant fell from a ladder and was injured.

Claimant brought two separate claims for workers compensation coverage related to this accident. His first claim was filed against May River and its workers compensation carrier, American Zurich Insurance Company (“Zurich”) alleging he was either a direct employee or statutory employee of May River. Claimant’s second claim was filed against his own workers compensation policy issued to Cedano Roofing by Travelers Property Casualty Company of America (“Travelers”).

A hearing was held before the South Carolina Workers’ Compensation Commission on November 17, 2016. Claimant’s two claims were consolidated for the hearing. The hearing commissioner, Commissioner Gene McCaskill (“Single Commissioner”), found that Claimant was an independent contractor of May River and was, therefore, not a direct employee or a statutory employee. The Single Commissioner also found that Claimant had expressly excluded himself from coverage on the policy issued to his company and, therefore, was not entitled to coverage under that policy. The Single Commissioner’s order was affirmed in its entirety by the Appellate Panel of the

Full Commission on March 30, 2018.

Claimant appealed the decision of the Appellate Panel to the Court of Appeals. In an Opinion issued on June 23, 2021, the Court of Appeals affirmed the findings that Claimant was not entitled to coverage under the Cedano Roofing policy and that Claimant was not a statutory employee of May River. The Court of Appeals, however, reversed the Appellate Panel and concluded that Claimant was a direct employee of May River and entitled to coverage under May River's/Zurich's policy.

STANDARD OF REVIEW

Upon review, 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. 130, 133-34, 276 S.E.2d 304, 306 (1981). 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).

The question of an employee relationship is a jurisdictional issue for the purposes of workers' compensation benefits and thus, the Courts' review is governed by the preponderance of the evidence standard. *Vines v. Champion Bldg. Prod.*, 315 S.C. 13, 431 S.E.2d 585 (1993); *but see Smith v. Squire Timber Co.*, 311 S.C. 321, 428 S.E.2d 878 (1993) (applying substantial evidence standard to independent contractor analysis). As to a jurisdictional question, the Court may take its own view of the preponderance of the evidence. *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995).

ARGUMENT

THE APPELLATE PANEL CORRECTLY DETERMINED THAT CLAIMANT WAS AN INDEPENDENT CONTRACTOR AND NOT A DIRECT EMPLOYEE OF MAY RIVER.

Under the South Carolina Workers Compensation Law (the "Act"), only employees are entitled to benefits. Independent contractors are not. *See e.g., Smith*, 311 S.C. at 324, 428 S.E.2d at 880 ("As a general rule, independent contractors or subcontractors are not included under the Workers' Compensation Act."). The Appellate Panel, after a thorough review of the facts of this case, came to the conclusion that Claimant was, in fact, an independent contractor and not an employee of May River. This decision rested upon the Commission's analysis of the applicable four-factor test, as well as the simple reality that the parties, including Claimant, did not consider their relationship to be that of employer-employee. The Court of Appeals erred in disregarding this reality and erroneously relied on evidence not relevant to the four-factor test established by prior precedent.

I. Neither Claimant nor May River considered their relationship to be employer-employee.

Claimant started his own roofing company approximately four years prior to the hearing in this case. (App. p. 188, lines 22-25). Following the creation of his company, and prior to the point where he began working with May River, he filed taxes and obtained workers' compensation insurance for that company. (App. p. 192, lines 6-9). The record shows that Claimant had used an agent to purchase a workers compensation policy in the name of his company. (App. p. 189, lines 5-12; *see also* App. 362). At the time he obtained this policy, Claimant, as the sole proprietor of the business, elected to exclude himself from coverage. (App. p. 156, lines 3-23). Claimant testified that when he began working with May River, the owner, Antonio Sandoval, told him he had to have

insurance in order to be a subcontractor. (App. p. 175, lines 18-22). May River also obtained copies of Certificates of Insurance from its subcontractors, including Claimant, and routinely confirmed that those policies remained in effect periodically during their relationship. (App. p. 207, lines 6-22).

According to the testimony from May River's manager, Leslie Sandoval, all subcontractors were issued 1099s at the end of the year. (App. p. 204, lines 6-8). Claimant was issued a 1099 for each year he worked for May River. (App. p. 204 lines 9-15; *see also*, App. p. 576). Claimant agreed that he received a 1099 from May River and that he gave them his tax preparer. (App. p. 187, lines 17-21). In this tax returns, Claimant reported all of his income as a "Roofing Contractor" coming from "Cedano Roofing and Woodworking." (App. pp. 553, 581). Claimant declared himself "self-employed." (App. pp. 552, 580). Claimant also took deductions for his work expenses and paid self-employment tax. (App. p. 195, lines 6-18; *see also*, App. p. 554, 555, 582, 583).

In light of these facts, and the record as a whole, the Appellate Panel determined that "the weight of evidence is clearly on the side of the Claimant being in independent contractor." (App. p. 91, ¶ 11). The Appellate Panel further found that "[w]hen the evidence is viewed as a whole, we must conclude that the Claimant was a sub-contractor who carried valid workers' compensation coverage. Unfortunately, the Claimant elected not to cover himself on his own policy." (App. p. 92, ¶ 22). In making these findings, the Appellate Panel affirmed the order of the Single Commissioner and found that May River and Zurich were not responsible for providing workers compensation benefits to Claimant. The Court of Appeals, however, took a different view and concluded that the evidence weighed in favor of an employer-employee relationship. In reaching this decision, the Court focused on the few facts it deemed determinative: (1) whether Claimant was required to wear a May River branded T-shirt and use a vehicle decal; (2) the exclusivity of the relationship; and (3) the fact

that May River provided the construction materials to be used on the job. May River contends that the Court of Appeals misapplied the law in analyzing these factors and erred in reaching the decision that Claimant was an employee despite the course of conduct that showed otherwise.

II. The evidence supports the Appellate Panel's decision that Claimant was an independent contractor.

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, 770 S.E.2d 393 (2015). As stated by this court,

Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant *in the performance of his work*. In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.

Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)(internal citations omitted)(emphasis added). 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. *Id.*, 382 S.C. at 307, 676 S.E.2d at 706.

a. Right or Exercise of Control

In its Opinion, the Court of Appeals noted that this factor weighed both in favor of and against a finding that May River exercised control over Claimant. The Court stated:

In terms of regular supervision, there appears to be conflicting testimony. Ramirez says the owner of May River supervised his work and would sometime give him directions. May River contends Ramirez had no supervision other than May River verifying his work once he completed a job. This dispute aside, everyone concedes Ramirez is a skilled roofer who did not need day-to-day supervision. To sum, there is

little evidence May River controlled the finer points of how Ramirez went about his work as a roofer.

(App. p. 5) The record certainly supports this conclusion that there is little evidence of control. According to Claimant, he didn't punch a clock (App. p. 194, lines 6-8); he wasn't told when to start work (App. p. 194, lines 9 – 18); he wasn't required to work a certain number of hours per work day (App. p. 194, line 23 – p. 195, line 1); and he was only supervised "on occasion" (App. p. 193, line 19 – p. 194, line 5). Claimant testified that if he needed help to complete a job he was hired for, he had the ability to hire workers for his crew and that he would have to pay those workers out of his own pocket using the money he was being paid by May River. (App. p. 184, lines 19-22). The testimony of May River corroborates this lack of control. May River contracted Claimant to perform roofing work and was only concerned with the finished product, not the specifics of how the job was to be done. (App. p. 201, line 19 – p. 202, line 18). According to May River, 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. (App. p. 201, lines 8-18; p. 204, line 25-p. 125, line 4). May River specifically relied on Claimant to get the job done timely and correctly, without supervision. (App. p. 221, lines 12-24).

Notwithstanding this "great deal of autonomy," the Court of Appeals reversed the Appellate Panel. In doing so, the Court relied on its belief that May River "required" Claimant to wear May River branded t-shirts and display a magnetic May River decal on the side of his truck. (App. p. 6). As an initial matter, the evidence on this point is also in conflict. Claimant testified "I had to wear his T-shirts and I had to use the images from the company wherever I went on my automobile." (App. p. 176, lines 3 – 5). May River testified that these were marketing materials that were handed

out to workers and non-workers alike on jobs and other outside events. (App. p. 205, line 23 – p. 206, line 19). According to May River, workers on their job sites routinely wore shirts from other companies so there was no specific “requirement” for Claimant to wear or use the branded items. Regardless of whether or not the use of these branded items was “required,” it is clear that under South Carolina law the use of such branded items does not give rise to an inference of control for purposes of determining the employment status of a worker.

In *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168 (2009), this court directly addressed the argument as to whether the requirement to use branding renders a worker an employee. *Jamison* involved a franchise location where the franchisor was sued in tort for the actions of an employee of the franchisee. This Court determined that the use of such branding did not rise to the level of constituting control over the operations of the franchisee. *Jamison*, 385 S.C. at 225, 684 S.E.2d at 173 (“We find no evidence to support a finding that either entity had the right or power to control Mini Mart in the performance of its retail alcoholic beverage sales or in the manner in which that work was done”); *see also Wilkinson*, 382 S.C. at 303, 676 S.E.2d at 703 (finding presence of insignia on tractor not controlling where contractor owned tractor and paid all costs associated with it).

Likewise, the use of branded T-shirts for marketing purposes does not rise to the level of control over the performance of the work that Claimant was contracted to do. *See e.g., Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 477, 753 S.E.2d 416, 420 (2013) (“The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services.”). In this case, the use of branded t-shirts simply has no bearing

on whether May River had the right control the time, place, degree, and amount of roofing work that Claimant did for May River. His appearance while performing work has no relevance to May River's alleged right to control the performance of that work.

The Court of Appeals also found that the exclusivity of Claimant's relationship weighed in favor of an employment relationship because the "fact that [Claimant] relied on May River for work *suggests* May River had the right to control [Claimant] by withholding work." (App. p. 6)(emphasis added). According to Claimant, he was told by the owner of May River that "if I worked with him, that I could only work for him and no one else." (App. p. 176, lines 2 – 3). May River admitted that it "preferred" their contractors to work only with the but there was no requirement for that. (App. p. 204, lines 16 – 24). In reversing the Appellate Panel, the Court of Appeals apparently inferred a right of control over the manner and means of doing a contracted piece of work based solely on the frequency with which the worker is contracted to perform it. There is simply no evidence or prior precedent to support this inference.

As discussed above, the testimony is undisputed that Claimant was free to accept jobs, reject jobs, renegotiate work and compensation, and hire his own employees to complete any contracted work. If May River were to determine that it no longer wanted to continue contracting work through Claimant, the record is clear that Claimant was free to find other work as a roofer. This right to determine whether the working relationship continues, while arguably of value in analyzing the "right to fire" has no relevance to the "right to control." Creating a legal presumption of an employment relationship based on the exclusivity of the relationship will certainly lead to unintended consequence. For example, if a large grocery chain contracted with a freight company to handle all of its deliveries from its suppliers, this inference would render that grocery chain the employer of all of

the freight company's employees. This presumption is not supported by existing precedent and it was err for the Court of Appeals to create this inference.

For the foregoing reasons, Petitioners respectfully contend that it was error for the Court of Appeals to reverse the findings of the Appellate Panel and determined that the evidence of the right to control weighed in favor of an employer/employee relationship.

b. Furnishing of Equipment

In reversing the Appellate Panel, the Court of Appeals determined that the fact that May River provided the construction materials to be used on the job constituted evidence that weighed in favor of an employer/employee relationship. Petitioners respectfully contend that this was error as the Court misconstrued and conflated the supply of "materials" with that of supplying the "equipment" used by Claimant on the job. The record demonstrates that Claimant provided all or most of the essential equipment used on the job. According to Claimant, "I provide my auto, my compressor, the pouch, everything that should go be on the pouch. I had my own ladder, but he would lend me his own." (App. p. 184, lines 2 – 4) Claimant confirmed he provided his own transportation to and from work (App. p. 188, lines 18 – 20). According to Claimant, May River provided the "shingles, nails, and other materials" for the jobs he was hired to do. (App. p. 177, lines 12 – 14)

The materials provided by May River were the necessary components of the job (i.e., "roofing") that Claimant was hired to install as part of a larger construction project. These materials are not the types of items properly considered to be "equipment" for purposes of this analysis. As cited by this Court in *Lewis*, supra:

Major items of equipment include such things as tools, machinery, special clothing, parts, and other similar items necessary for the worker to accomplish the task to be performed. For example, a plumber, hired to perform plumbing repairs on a building, usually brings the tools, the parts, and often special equipment in the form of augers, pipe cutters and threaders, etc., in order to perform the service. Those are the sorts of items which constitute the 'major items of equipment' under the third element of the right to control test.

Lewis, 411 S.C. at 643, 770 S.E.2d at 396 (quoting *Matter of Hanson*, 754 P.2d 444, 447 (1988)); see also, *Ray Covington Realtors, Inc.*, 318 S.C. at 548, 459 S.E.2d at 303 (providing forms and office space did not weigh in favor of employee/employer relationship). The facts in this case demonstrate that May River provided only those construction materials for which it would bill the ultimate client in accordance with an estimate that had been provided to the customer. (App. p. 349, 423) Claimant was contracted to take those materials and perform the roofing installation in accordance with this best judgment, skill, and ability. It would be a poor business practice for a roofing contractor like May River to give its independent contractors the ability to choose the specific roofing shingles, roofing paper, and flashing to be installed without regard to the quality specified or expected by the ultimate customer. Moreover, the evidence is clear that Claimant was paid for his labor only based on the specific scope of work to be done and his own productivity. If materials were to be provided by the contractor, the pricing agreement would necessary have to include that. It makes no practical sense to find a contractor to be an employee for performing work using materials that he was not contracted to supply. The critical issue for this analysis is whether the contractor provided his own equipment that was needed in order to perform the work he was hired to do. The uncontroverted evidence in this case is that Claimant did provide that equipment.

For the foregoing reasons, Petitioners respectfully contend that it was error for the Court of Appeals to reverse the findings of the Appellate Panel and determined that the evidence regarding furnishing of equipment weighed in favor of an employer/employee relationship.

c. Method of Payment and Right to Fire

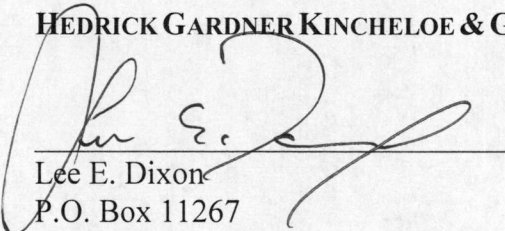
With regard to method of payment and right to fire, the Court of Appeals noted that they either supported an independent contractor relationship or did not favor either side. As such, Petitioners simply rely on the evidence cited as supporting the decision of the Appellate Panel that Claimant was an independent contractor.

CONCLUSION

The evidence in this case, whether viewed by the substantial evidence or preponderance of the evidence standard, supports the decision of the Appellate Panel that Claimant was not a direct employee of May River. Accordingly, Respondents respectfully request that the Court grant certiorari in this case and reverse the decision of the Court of Appeals.

Respectfully submitted,

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