

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
South Carolina Workers' Compensation Commission

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APR 22 2013

Derrick L. Williams, Hearing Commissioner

S.C. Supreme Court

Opinion No. 5087 (S.C. Ct. App. filed February 20, 2013)

Willie Lee Simmons, Employee Petitioner,

v.

SC STRONG, Employer and Hartford Underwriters Ins. Co., Carrier
..... Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner, Willie Lee Simmons, certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 22, 2013.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err by finding Petitioner was a volunteer rather than an employee of SC STRONG for Worker's Compensation purposes?
- II. Did the Court of Appeals err by failing to liberally construe the law and facts in favor of coverage?

STATEMENT OF THE CASE

This matter was heard by Commissioner Derrick Williams on May 27, 2011. Commissioner Williams' order found, among other things, that Petitioner was not an employee of Defendant SC STRONG. (R.8 - July 12, 2011 Order).

Petitioner filed a Form 30 requesting the Appellate Panel reverse. (JA.31)

Specifically, Petitioner asked:

1. Did the single Commissioner err in failing to Find as Fact and conclude as a Matter of Law that the Claimant was an employee of the employer (defendant) South Carolina STRONG, rather than a volunteer? (See Findings of Facts #2, 3, 4, 5, 6, and 8); Conclusions of law #1, 2, 3, 4, and 5) (Final section stating award/decision also appealed).
2. Did the Commissioner err in failing to liberally construe law and fact, in favor of coverage of the Claimant, by the Act?

(JA.31 - Claimant's Form 30)

Respondents also filed a Form 30 contesting the Commissioner's Finding of Fact #6.

(JA.32) In that Finding, the Commissioner wrote:

It is undisputed that the Claimant sustained an injury and had he been found to be an employee (which I specifically do not find), he would have been entitled to temporary total disability from January 14, 2011 to the present and continuing, medical treatment for his injuries, and reimbursement for medical expenses to date. His average weekly wage and resulting compensation rate would have been based on working 6 days per week at \$15.00 per hour. However, as stated above, I do not find that he is an employee.

(JA.24 - Commissioner's Order at 17) (emphasis in original).

The Appellate Panel omitted the above-quoted paragraph #6, affirmed the remaining portions of the Commissioner's Order, and made what remained the Order of the Appellate Panel. (JA. 7 - Appellate Order at 7)

The Court of Appeals affirmed finding Petitioner had no right to demand payment for his services. (JA. 373- Ct. App. opin. at 5-6).

Petitioner requests this Court issue a Writ of Certiorari to the Court of Appeals finding Petitioner was an employee at the time of the undisputed accident for Worker's Compensation purposes.

STATEMENT OF THE FACTS

On January 14, 2011, Willie Lee Simmons (Petitioner) slipped on ice and fell approximately 30 feet off a roof. (JA.16-17 - Order at 9-10) Petitioner's injuries were substantial, including a head laceration requiring sutures and a fractured cervical vertebrae. (JA.17 - Order at 10) At the time of the accident, Petitioner was a participant in the SC STRONG program, a non-profit corporation providing a residential setting with educational opportunities, as well as work training and work opportunities to participants. (JA.17 - Order at 10)

SC STRONG provides room and board, educational and counseling services for individuals on parole, to train and work on building projects. (JA.12-13 - Order at 5-6) SC STRONG provided the tools used in the daily work assignments, controlled the hours and types of work Petitioner performed, and required Petitioner and similar workers to forgo other employment as a condition to participation in the program. (JA.12-13 - Order at 5-6) SC STRONG is paid for the contracting services provided by its participants to carry out controlled, supervised building contracts. (JA.13 - Order at 6)

In an acceptance letter to Petitioner, SC STRONG wrote:

South Carolina STRONG is now providing a much needed opportunity for

South Carolinians willing to make a minimum two year commitment to change their lives. . . . After speaking with you during our February 4, 2009 interview, we have decided that you have expressed enough of a sincere desire to change your life that we are willing to work with you toward that end. The two-year commitment required for this is made by both you and our family

(JA.220 - Acceptance Letter)

When the time came for Petitioner to move in to the facilities, he was required to sign a Resident Statement. In this form, Petitioner agreed:

(1) Any remuneration which was, or in the future will be, due because of work which I have performed, or will perform, for South Carolina STRONG, I donate to South Carolina STRONG. This donation is done freely, and without duress.

(2) Any work, which I have done, or will do, for South Carolina STRONG, is done as a volunteer without any expectation of remuneration.

(3) Notwithstanding paragraphs (1) and (2) above, if any governmental body determines that I am not a volunteer or cannot donate to South Carolina STRONG any remuneration which might be due to me from South Carolina STRONG, then I state that I was more than adequately paid by room, board, and services that I received from South Carolina STRONG including counseling, vocational training, entertainment, clothing, medical¹ and dental services, education, rehabilitation, transportation, recreational and legal services, which have, and will be, provided to me by South Carolina STRONG free of charge for the duration of my time as a resident of South Carolina STRONG.

(JA.245 - Resident Statement)

The SC STRONG program initially admitted the employer-employee relationship.

(JA.28 - Form 51) It, thereafter, amended the Form 51 to deny that relationship and has since refused to be responsible for any medical bills or other worker's compensation benefits.

¹ SC STRONG's John Hamilton explained the organization did not pay Petitioner's hospital bills because "Our insurance company informed us not to." (JA.77 - May 25, 2011 Tr. P.45, l.7-8)

ARGUMENT

I. The Court of Appeals erred in finding Petitioner was not an employee of SC Strong for purposes of Worker's Compensation purposes.

The Commissioner determined Petitioner was not an employee. (JA.24 - Order at 17) Instead, the Commissioner determined he was a "volunteer and/or a gratuitous worker, similar to Shuler, Kirksey and McCreery." (JA.22 - Order at 15) "The phrase 'contract of hire' connotes payment, and a worker who neither receives nor expects payment for his services is not generally considered an employee within the definition." (JA.23 - Order at 16) Petitioner contends physical monies changing hands is not required under South Carolina law. In South Carolina, an employee is defined as:

The term "employee" means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written . . . but excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . .

S.C. Code Ann. § 42-1-130 (1976, as amended).

Under South Carolina law, the primary consideration in determining whether an employer/employee relationship exists is whether the alleged employer has the right to control the employee in the performance of the work and the manner in which it is done. Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993) (citing Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991)). "The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work or undertaking." Id. The four principal factors indicating the right of control are (1) direct evidence of the right to, or exercise of, control;

(2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. South Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995); Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970).

SC STRONG does not dispute that it exercised control of the participants. Neither does SC STRONG dispute it furnished equipment to the participants. (In fact, it paid an \$8,000 fine for OSHA violations for not providing harnesses and helmets following an investigation into Petitioner's accident.) (JA.16 - Order at 9) It does not seemingly challenge it's ability to fire, though SC STRONG does not use that word. In lieu of "firing" a participant, the participants may be asked to leave the residence which necessarily means no further jobs. The crux of the argument focuses on the method of payment, in this case, lack of monetary payment.

South Carolina law, however, does not require a particular form of payment. In Wilson v. Georgetown County, 316 S.C. 92, 447 S.E.2d 841 (1994), our supreme court found the requisite employment relationship between that claimant and the county. Id. Mr. Wilson reported for jury duty. Id. Because of his religious beliefs, he explained to the court that he could not sit in judgment of others. Id. The court allowed Mr. Wilson to perform alternate service which consisted of janitorial work. Id. While washing the outside court windows, Mr. Wilson slipped and fell from a ladder resulting in a back injury. Id. Although no payment was at issue, the supreme court found Mr. Wilson received the benefit of performing alternate work in lieu of jury service and that work was labor for the benefit of the county. Id. The supreme court held that Mr. Wilson was entitled to worker's compensation benefits. Id.

Similarly, Petitioner in the instant case, was performing work for the benefit of SC STRONG as the company billed customers for the participants' work. (JA.14 - Order at 7)

Using funds from these customers, SC STRONG then provided Petitioner with room, board, clothing, meals, etc. That SC STRONG effectively keeps track of monies earned by the participants is supported by SC STRONG's view that residents of the program are restricted from having money to limit the temptations of making bad decisions while they are just coming out of prison. (JA.16-17 - Order at 9-10) In fact, after being accepted into the program, participants are required to apply for food stamps which were then turned over to SC STRONG "because we were not allowed to keep those." (JA.94 - May 25, 2011 Tr. P. 62, 1.1-4) That Petitioner physically did not touch those funds simply does not mean he did not receive the tangible benefits of his work.

In fact, Mr. Hamilton of SC STRONG explained the process:

And you would get your first job So, you would get a regular job, just like anyone else would, within the foundation. So, typically the first job would be in either construction or landscaping or both. . . You would get up and go to work every day . . . So, after the first time you get a job - three or four times a year we change jobs. Everyone changes jobs. . . I depended on [Claimant] as an extremely hard worker and smart.

(JA.83 - May 25, 2011 Tr. P. 51, 1.18 - Tr. P.54, 1.4 (emphasis added)).

The Commissioner, Appellate Panel, and Court of Appeals relied on Kirksey v. Assurance Tire Co., 311 S.C. 255, 428 S.E.2d 721 (1994). In that case, the court found the business owner's daughter was a gratuitous worker (adopting the majority rule), noting there was no allegation of payment in any form and the daughter helped her father because he was in bad financial shape. That case is inapposite. First of all, it was decided a mere months

before Wilson, *supra*. Although Mr. Wilson was not actually paid for his janitorial service, he received a benefit tantamount to payment. Thus, a tangible benefit can be a proper form of payment for worker's compensation issues relating to the employer/employee relationship.

The court of appeals' analysis of the existence of an employment relationship confuses the "gratuitous worker" doctrine by stating that the "benefits and compensation [given to Petitioner] constitute gratuitous payments." Shuler, 374 S.C. at 524, 649 S.E.2d at 102. We take this opportunity to clarify that doctrine.

According to Larson's Workers' Compensation Law, which this Court relied upon in Kirksey, gratuitous employees are those who "neither receive nor expect to receive any kind of pay for their services." 3 Larson's Workers' Compensation Law §§ 65.01 (2009). Thus, the term "gratuitous," in this context, normally is used to describe the nature of the work being performed, not the nature of the compensation received.

Shuler v. Tri-County Electric Co-Op, 385 S.C. 470, 684 S.E.2d 765 (2009)(emphasis added).

Even though the Commissioner, Appellate Panel, and Court of Appeals cited this case in support of their respective findings, the case more supports Petitioner's position that physically being handed money is unnecessary. As noted above, "gratuitous" does not describe the nature of the compensation received. In exchange for his work, SC STRONG billed customers, collected funds, then used those funds to provide housing, meals, clothing, and entertainment for participants because it did not want them tempted by physically having the funds. While the participants did not have the right to demand monetary payments, under the program's plan, they did have the right to demand a bed to sleep in, food to eat, and clothes to wear.

Next, the Commissioner, Appellate Panel, and Court of Appeals relied on McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 383 S.E.2d 264 (Ct. App. 1989), reversed

on other grounds, 303 S.C. 271, 400 S.E.2d 130 (1990). In that case, Mr. McCreery admitted donating his labor in the construction of the church. “There is no evidence he was paid wages or had a right to demand payment. There is also no evidence Mr. McCreery entered into a tithing agreement . . . so that his work could be considered as a credit toward his tithing obligation.” As with Shuler, this case predates Wilson. The court in McCreery, however, does indicate that something other than actual, physical money is sufficient to satisfy the compensation prong in definition of employee. The quote above suggests that a tithing agreement seeking credit from his work against his tithing obligation would support a finding of sufficient payment for worker’s compensation purposes. Like Shuler, this case actually supports Petitioner’s contention that the room, board, clothing, educational/vocational training are sufficient to support a finding that Petitioner is an employee for worker’s compensation purposes.

SC STRONG relies on a letter from the Department of Labor to support its contention that participants are not employees. (DOL letter) The question asked of and answered by the Department, however, was whether the program was subject to the payroll requirements of the Davis-Bacon Act. The question was not whether the participants were employees for Worker’s Compensation purposes.

SC STRONG and the Commissioner relied on a California case. (Case no. SFO 0351419) which found the privilege of enrolling in [California’s version of STRONG] rather than being confined in State prison does not amount to an employment relationship in California. Aside from differing statutes and cases in California, the argument made in that case is not the argument being made here. Instead, the argument here is that the program is

an apprenticeship and is, under South Carolina law, specifically covered by Worker's Compensation laws.² Petitioner also contends the benefits he received in exchange for his labors are tantamount to payment triggering Worker's Compensation laws.

Finally, SC STRONG requires a minimum two-year commitment before entry in the program is allowed. (JA.220 - Acceptance Letter) During those years, "residents earn at least a GED (in collaboration with Trident Literacy) and three marketable skills at no cost to them" according to its website. A definition of apprentice is "One bound by legal agreement to work for another for a specific amount of time in return for instruction in a trade, art, or business." Accordingly, SC STRONG's program is an apprenticeship program and specifically subject to South Carolina's Worker's Compensation laws.

The Court of Appeals focused on whether Petitioner received monies in exchange for his services. That court, relying on the Residential Statement, found Petitioner a volunteer. That same statement, however, contained a statement that if "any governmental body determines that I am not a volunteer . . . then I state that I was more than adequately paid by

²The Court of Appeals found in footnote 2 that Petitioner's argument that he was an apprentice was not preserved - finding the argument was first raised in his reply brief. This is incorrect. The issue was presented in writing to the Appellate Panel (JA.305) and addressed by Respondents in writing to the Appellate Panel (JA.316). That Petitioner was an apprentice was also addressed in his Appellant's Brief (JA.329 - AFB 4). The separate caption was added in the Reply Brief to assist the court when reviewing Petitioner's reply to Respondents' arguments.

Moreover, that Petitioner was an apprentice has been evident issue from the beginning of this case. The definition of an employee "means every person engaged in an employment under any appointment, contract of hire, or apprenticeship . . ." S.C. Code Ann. § 42-1-130 (1976, as amended). As described by Respondents, the very essence of the SC STRONG program is to "train" the participants to obtain "three marketable skills."

Finally, this argument was addressed by the Commissioner and the Appellate Panel in their determinations that Petitioner was not an employee. Accordingly, Petitioner requests this court to consider his argument.

room, board, and services” It seems even SC STRONG considered the room, board, and services could support a finding that a participant was an employee. With this statement, SC STRONG protected itself from unemployment issues and other filing requirements. It did not, however, take any action to opt out of our workers’ compensation laws.

Petitioner also contends the Court of Appeals placed too much emphasis on the characterization of participants as “volunteers” in the Residential Statement. Petitioner, who was required to sign the form prior to participation, was unlikely to appreciate this term of art. What he understood was that he had to sign a bunch of forms, follow the rules, and work hard in exchange for room, board, and services.

The Court of Appeals correctly noted that Petitioner cited Wilson v. Georgetown County, 316 S.C. 92, 447 S.E.2d 841 (1994) for the proposition that actual receipt of funds is not required before a person is found to be an employee. Distinguishing Wilson, however, the Court of Appeals found that Petitioner’s participation in the program was in lieu of serving his prison sentence, not in lieu of jury service. Petitioner contends this finding does not resolve the employment issue of whether Petitioner’s receipt of room, board, and services in exchange for his labor is sufficient to warrant a finding that he is an employee, given the inclusive nature of our workers’ compensation law. Petitioner believes he should be found to be an employee for Worker’s Compensation purposes.

II. The Court of Appeals erred in failing to liberally construe the law and facts in favor of coverage.

The question whether a claimant is an employee is a jurisdictional issue. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009); Vines

v. Champion Bldg. Prods., 315 S.C. 13, 431 S.E.2d 585 (1993). Where the disputed issue concerns jurisdiction, this Court may take its own view of the preponderance of the facts upon which jurisdiction is dependent. Wilson v. Georgetown County, 316 S.C. 92, 447 S.E.2d 841 (1994); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996). It is South Carolina's policy to resolve jurisdictional questions in favor of inclusion of employees within workers' compensation coverage rather than exclusion. Shuler v. Tri-County Elec. Co-op., 385 S.C. 470, 684 S.E.2d 765 (2009); Hill v. Eagle Motor Lines, 373 S.C. 422, 645 S.E.2d 424 (2007); Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). Clearly, the Commissioner, Appellate Panel, and Court of Appeals erred by not resolving this jurisdictional question in favor of coverage.

CONCLUSION

The issue in this case is whether Petitioner was an employee for Workers' Compensation purposes. The Commissioner, Appellate Panel, and the Court of Appeals ruled he was a volunteer. Petitioner contends the resolution to his employment status hinges on whether the room, board, and services he received in exchange for his labor are tantamount to receiving payment sufficient to satisfy the "payment" prong of the test for determining whether he was an employee. Given that this court must resolve doubts in favor of inclusion of employees (Shuler v. Tri-County Elec. Co-op., Inc., 374 S.C. 516, 520, 649 S.E.2d 98, 100 (Ct. App. 2007)), Petitioner submits that he was an employee for Worker's Compensation purposes. He, therefore, requests this court to issue a Writ of Certiorari to the Court of Appeals finding Petitioner was an employee.

For the reasons above, Claimant respectfully requests this court reverse the findings of the Court of Appeals opinion.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of Petitioner's Petition for Writ of Certiorari to the Court of Appeals was served this day on Respondents by depositing a copy in the United States Postal Service, first class to Respondents' attorney of record: F. Reid Warder, Jr., One Wesley Drive, Charleston, SC 29407.

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April 22, 2013