

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Trial Court Case No. 0909301

Gustavo Palma,

Respondent,

v.

Felicia Scott, Luis Cardona, and Pee Dee
Community Action Partnership, and Liberty Mutual
Insurance Company, Carrier for Felicia Scott, State
Accident Fund, Carrier for Pee Dee Community
Action Partnership, and SC Workers' Compensation
Uninsured Employers' Fund,

Defendants,

Of Whom,

Pee Dee Community Action Partnership, and
South Carolina State Accident Fund are,

Appellants.

INITIAL BRIEF OF APPELLANTS
PEE DEE COMMUNITY ACTION
PARTNERSHIP AND STATE
ACCIDENT FUND

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MAY 13 2013

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. THE WORKERS' COMPENSATION COMMISSION ERRED IN FAILING TO ALLOT PEE DEE COMMUNITY ACTION PARTNERSHIP AND ITS CARRIER, STATE ACCIDENT FUND TO TRANSFER LIABILITY FOR THIS CLAIM TO THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND AS THE APPELLANTS FULLY COMPLIED WITH § 42-1-415 AND ARE ENTITLED TO SAID TRANSFER.**

STATEMENT OF THE CASE

This case is on appeal to the Court by the alleged statutory employer, Pee Dee Community Action Partnership and their carrier, the State Accident Fund, from an Order issued by the Appellate Panel of the South Carolina Workers' Commission dated November 30, 2012. That Order affirms the Order of Commissioner Derrick Williams dated February 7, 2012. In that Order, Commissioner Williams found that the Claimant suffered an injury by accident to his right lower extremity on April 30, 2009, in Marion County. The evidence in this case supports findings that the Claimant suffered a compensable injury by accident and no parties have appealed those findings. However, Commissioner Williams found that the Claimant was an employee of Luis Cordona at the time he was injured. Furthermore, Commissioner Williams found that the Pee Dee Community Action Partnership was acting as a general contractor on the job in question. Pursuant to §42-1-410, PDACP was found to be responsible for benefits in this case as the direct employer was uninsured. In addition, Commissioner Williams denied that PDACP properly complied with §42-1-415 and, thus, was not allowed to transfer liability for the Claimant's benefits to the South Carolina Uninsured Employers' Fund. The Defendants, Pee Dee Community Action Partnership and their carrier, State Accident Fund, take exception to those findings.

On December 29, 2010, the Claimant filed an amended Form 50 alleging that he suffered an injury to his right foot and ankle on April 30, 2009, in Marion County. In that amended Form 50, the Claimant named Felicia Scott as his direct employer and the Pee Dee Community Action Partnership as a possible upstream employer. Because no carrier was listed for Felicia Scott, the South Carolina Uninsured Employers' Fund was also made a party to the claim.

The matter was first scheduled to be heard before Commissioner Susan Barden on April 26, 2011, in Florence, South Carolina. At that time, counsel for the Uninsured Employers' Fund made a motion to add Liberty Mutual as a possible carrier for Felicia Scott. That motion was granted and an Order was issued on May 18, 2011, adding Liberty Mutual Insurance Company as a party.

The matter was next scheduled to be heard on July 5, 2011, in Conway, South Carolina. At that time, Felicia Scott appeared without an attorney. Felicia Scott alleged that she was not the Claimant's direct employer but, instead, the Claimant was employed by Luis Cordona. The matter was postponed at that time to allow Ms. Scott an opportunity to procure counsel and Luis Cordona was also added as a possible employer.

The matter was finally heard on November 7, 2011, in Sumter. On February 7, 2012, Commissioner Williams issued an Order finding Luis Cordona to be the Claimant's direct employer and the Pee Dee Community Action Partnership to be an upstream employer. Because Mr. Cordona was uninsured, the Pee Dee Community Action Partnership was ordered to provide benefits. In addition, Commissioner Williams held the Appellants did not properly comply with Section 42-1-415 and thus, were not entitled to transfer liability for this claim to the SC Uninsured Employers' Fund. That decision was affirmed by the Appellate Panel of the Workers' Compensation Commission by Order dated November 30, 2012.

This appeal follows.

FACTS OF THE CASE

The first witness to testify at the hearing was the Claimant, Gustavo Palma. Gustavo Palma is from Mexico and speaks little English. For that reason, he testified through an

interpreter. At the time of the hearing, he was 26 years of age. He had been in the United States for approximately six years. He had done farm and construction work during that period of time. (Transcript of Record, p. 13)

Mr. Palma testified that he was injured on April 30, 2009. Prior to that date, he had requested work from Luis Cordona, and Mr. Cordona informed him that he had some houses to work on. Those houses were located in Marion, South Carolina. Mr. Palma testified that Mr. Cordona was there, David Hart was there, a fellow named Yabbo, and two other employees. He stated that there were more than four employees. Mr. Palma further testified that he was paid \$10.00 per hour and would sometimes work 40 hours per week, sometimes more. (T.R. pp. 14-15)

Mr. Palma testified that he got hurt on that job when he fell 14 to 16 feet from a roof. He stated that he injured his right ankle and leg. Mr. Palma was taken to the hospital by David Hart in Luis's truck. Mr. Palma suffered a rather severe fracture to his right leg. He was released by the medical doctor on May 19, 2011. He still has four screws in his leg. Mr. Palma testified that he has done some farm work since being released by the doctor, but is unable to do construction work at the present time. He would be unable to climb ladders or go up on roofs. (T.R. pp. 16-17)

Mr. Palma testified that he believes he worked on the Marion job for approximately two months before he was injured. He was hired by Mr. Cordona in Hamer, South Carolina. (T.R. p. 23) According to the Claimant, Mr. Cordona told him that he was working for Felicia Scott. (T.R. p26) He thought Ms. Hart was Felicia Scott and Mr. Cordona informed her that she had the insurance. (T.R. p.24) In his Form 50, Mr. Palma named Felicia Scott as his employer.

Mr. Tony Bethea testified on behalf of Pee Dee Community Action Partnership. Mr. Bethea is from Dillon, South Carolina, and finished Dillon High School in 1977. Following high school, he joined the Marine Corps. He was a member of the Marine Corps for 15 years when he suffered injuries to his knees and was, at that time, medically discharged. He was an E-7, General Sergeant. (T.R. p. 34)

Following his discharge from the Marine Corps, Mr. Bethea returned to Dillon and went into the construction business. The name of his company was Quality and Affordable Construction. He built houses. Mr. Bethea explained that, in 2008, the housing market declined and, at that time, he went to work for Pee Dee Community Action Partnership. He believes he began work in June, 2008. (T.R. p. 35)

Mr. Bethea explained that Pee Dee Community Action Partnership is a non-profit organization that provides community service to economically challenged persons. He worked for that agency in a self-help housing program. Mr. Bethea was employed as a construction supervisor. The program was funded by the U.S. Department of Agriculture. (T. R. p. 35)

Mr. Bethea explained that a self-help housing program is a program for low-income people that allows those persons to obtain quality housing. Those persons act as their own contractor and the construction supervisor guides these persons in their construction project. Mr. Bethea had a construction trailer out at the job-site. He explained that the U.S. Department of Agriculture gives construction loans to the low-income persons. (T.R. p. 36)

According to Mr. Bethea, the first portion of this project dealt with six houses being built for six individuals. He was the construction supervisor on the project and was paid a salary by the Pee Dee Community Action Partnership. He believed construction first began around August, 2008. Mr. Bethea testified that he knew the Claimant. He further testified that the

Claimant approached him about doing continuing work on the project. He explained that the Claimant did not have proper credentials and insurance. Mr. Bethea explained that he has been in the construction business since about 1977. He knows that, if a subcontractor has four or more employees, he needs a certificate of insurance. In his job as construction supervisor for the self-help housing project, he required certificates if someone had four or more employees. (T. R. pp. 37-38)

Mr. Bethea testified that he met Felicia Scott and her grandmother, Brenda Hart. It was his understanding that the grandmother had some health concerns and was, thus, transferring her business to her granddaughter. Mr. Bethea stated that he entered into a contract on behalf of the self-help housing group with Ms. Scott. Ms. Scott was required to go to the City of Marion and obtain a business license. (T.R. pp. 39-40)

Mr. Bethea testified that Ms. Scott provided him with a certificate of insurance. Mr. Bethea called the agency that issued the insurance certificate and had them fax another copy of that certified directly to him. (T.R. p. 40) Mr. Bethea testified that he did not take "at face value" that the certificate provided coverage in South Carolina. He actually called the company. He explained where he was located and where the project was located. He asked them if the policy was good in the state of South Carolina. However, he admitted that he had not received a copy of the actual insurance policy. (T.R. pp45-46)

Ms. Brenda Hart also testified at the hearing. Ms. Hart is from Lumberton, South Carolina and has lived there for the past 18 years. Felicia Scott is her granddaughter. Ms. Hart explained that prior to April 30, 2009, she was in the boxing and framing business. She stated that she was approached by Luis Cordona during 2009 and he wanted to know if he could use her Workers' Compensation insurance. She explained that the insurance was not in her name. It was

in the name of her granddaughter. She placed the insurance in her granddaughter's name as she was applying for Social Security disability. (T.R. pp. 61-62)

Ms. Scott testified that she, Luis, and Felicia went to Marion to talk with Tony Bethea. Eventually, an agreement was reached to do framing work. She stated that she allowed Luis to do the framing work as she was going to get the siding work. That never came to be. Ms. Hart stated that the Claimant actually worked for Luis. (T. R. pp. 63-65) She explained that Luis would get a check for the job on Friday and bring it to Felicia to cash. Felicia would go into the bank, cash the check, and bring the money out in envelopes. Mr. Cordona would then pay the workers. Ms. Hart stated that she would receive \$100 or \$150 because she was carrying the insurance. (T. R. p. 67)

Ms. Hart testified that her granddaughter has never been in the construction or framing business. She further stated that her granddaughter has never had employees in North or South Carolina. Ms. Hart stated that her granddaughter was working as a waitress in 2009. (T. R. pp. 69-70)

Ms. Hart testified that she only attended school through the ninth grade. However, she learned the construction business through her ex-husband through on-the-job-training. She further explained that she took out Workers' Compensation insurance in her granddaughter's name because she was filing for disability. For that reason, she did not want to show any income in her name. Ms. Hart admitted that all of the checks that came out of this job were made payable to Felicia Scott. (T. R. pp. 71-73)

I. THE WORKERS' COMPENSATION COMMISSION ERRED IN FAILING TO ALLOW THE PEE DEE COMMUNITY ACTION PARTNERSHIP AND ITS CARRIER, THE STATE ACCIDENT FUND TO TRANSFER LIABILITY FOR THIS WORKERS' COMPENSATION CLAIM TO THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND AS THE APPELLANTS FULLY COMPLIED WITH § 42-1-415 AND ARE THUS ENTITLED TO TRANSFER RESPONSIBILITY

The Pee Dee Community Action Partnership and their carrier, the State Accident Fund, contend that Commission erred in finding the Claimant to be an employee of Luis Cordona rather than of Felicia Scott. Although Ms. Hart testified on behalf of her granddaughter that her granddaughter was not in the construction business, it is clear that Felicia Scott signed construction contracts in South Carolina, obtained a business license in South Carolina, and received all payments for framing on the job in question. All checks for framing on the job in question were made payable to Felicia Scott. The Claimant was told by Luis Cordona that they were all working for Felicia Scott. In his Form 50, the Claimant named Felicia Scott as his direct employer. Thus, it is clear that the true employer in this case was Felicia Scott. The fact that she was only on the job three or four times does not have any bearing on her status. It is common for construction jobs to be run by supervisors; supervisors such as Luis Cordona.

The Defendants, Pee Dee Community Action Partnership and the State Accident Fund chiefly contend that Commissioner Williams erred in failing to allow the Fund to transfer liability in this case to the South Carolina Uninsured Employers' Fund pursuant to §42-1-415.

§42-1-415 provides

(A) upon the submission of documentation to the Commission that a subcontractor has represented himself to a higher tier contractor as having Workers' Compensation insurance at the time the subcontractor was engaged to perform work, the higher tier contractor must be relieved of any and all liability. In the event that the subcontractor is uninsured, the higher tiered contractor may petition the Commission to transfer responsibility for continuing compensation and benefits to the Uninsured Fund.

(B) To qualify for reimbursement, the higher tier contractor must collect documentation of insurance as provided in Subsection (A) on a standard form acceptable to the Commission. The documentation must be collected at the time the subcontractor is engaged to perform work and must be turned over to the Commission at the time a claim is filed by an injured employee.

The above section was added to the Workers' Compensation law in 1996 and has been the subject of litigation since that time. According to Commissioner Williams' Order, Pee Dee Community Action Partnership failed to comply with §42-1-415 as interpreted by the case of Hopper v Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (Ct.App.2009). The Commissioner's reliance on Hopper is misplaced. Of course, Hopper states that the facts of these type of cases must be established on a case-by-case basis and the facts of this case differ substantially from those in Hopper.

In Hopper, both the subcontractor and the general contractor were out-of-state companies. Here, the alleged general contractor is a state agency. In addition, the alleged employer, Felicia Scott, although located just across the border in North Carolina, did obtain a contractor's license within the City of Marion, South Carolina. In Hopper, the court held that, because the certificate of insurance did not clearly show on its face where coverage was provided, the certificate holder "could not turn a blind eye to the obvious" and avoid liability. In this case, as in Hopper, the certificate did not show on its face clearly where coverage was provided. Thus, the construction superintendent for the Pee Dee Community Action Partnership contacted the insurance producer and was told by persons there that the policy provided the necessary coverage. Thus, the certificate holder did not "turn a blind eye to the obvious" and made further inquiries as envisioned by Hopper (See Hopper footnote 1).

In his questioning of Tony Bethea, the attorney for the Uninsured Employers' Fund appears to contend that Mr. Bethea should have requested the actual insurance policy. Regulation 67-415 governs the documentation of insurance required for purposes of §42-1-415. In 2009, when this accident occurred, the Accord Form 25S, Certificate of Insurance, served as documentation of that insurance. Nowhere is the actual insurance policy required by §42-1-415 or Regulation 67-415.

Interestingly enough, Regulation 67-415 was amended in 2010 and it appears that amendment was designed to avoid these types of cases. According to the amendment, when an out-of-state employer is used, the Accord Form is acceptable providing that a representative of the insurance carrier affirms that South Carolina is a named insured State on the policy's declaration page. Although not in effect at the time of this case, Mr. Bethea essentially complied with the new regulation by contacting the producer of the certificate and confirming coverage. It is clear that Pee Dee Community Action Partnership did not "turn a blind eye to the obvious."

CONCLUSION

Based upon the foregoing argument, the Pee Dee Community Action Partnership and the State Accident Fund respectfully request the Court reverse the Workers' Compensation Commission and allow transferal of liability to the Uninsured Fund Pursuant to 42-1-415. It is clear that the PDACP complied with §42-1-415 and responsibility for this claim should be transferred to the South Carolina Uninsured Employers' Fund.

RESPECTFULLY SUBMITTED,



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April 24, 2013

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM THE SOUTH CAROLINA
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Trial Court Case No. 0909301

Gustavo Palma,

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Felicia Scott, Luis Cardona, and Pee Dee
Community Action Partnership, and Liberty Mutual
Insurance Company, Carrier for Felicia Scott, State
Accident Fund, Carrier for Pee Dee Community
Action Partnership, and SC Workers' Compensation
Uninsured Employers' Fund,

Defendants,

Of Whom,

Pee Dee Community Action Partnership, and
South Carolina State Accident Fund are,

Appellants.

PROOF OF SERVICE

I certify that I have re-served one (1) copy of the Initial Appellant's Brief by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2013, addressed to the following:

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