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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

South Carolina Workers' Compensation Commission

Derrick L. Williams, Hearing Commissioner

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

Willie Lee Simmons, Claimant.....Petitioner,

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Court of Appeals was correct in finding Petitioner was a volunteer and/or gratuitous worker for SC Strong for purposes of Workers' Compensation purposes.

a. The Statutory employee test is improper when determining whether or not a party is a volunteer or gratuitous worker.

Petitioner relies on the four part statutory employee test to determine whether or not an employee/employer relationship exists. The test that Petitioner is relying on is generally used to determine if the employee is an independent contractor, not determining whether or not someone is acting as an employee. *See* Tharpe v. G.E. Moore Company, Inc., 254 S.C. 196, 174 S.E.2d 397 (S.C. 1970) (holding that "In determining whether an injured person was an employee or an independent contractor, '(t)he general test applied is that of control by the employer.'" *citing* Bates v. Legette, 239 S.C. 25, 121 S.E.2d 289 (1961)). In determining whether someone is an employee or volunteer, the proper test is to determine if the Claimant meets the definition of an "employee."

In Schuler, a member of a rural electric cooperative's board of trustees was injured in a car accident traveling to an annual convention of the National Rural Electric Cooperative Association. Shuler v. Tri-County Elec. Co-op., Inc., 684 S.E.2d 765 (S.C. 2009). In order to determine whether or not the Claimant was an employee, the court reviewed the Worker's Compensation Act, the Electric Cooperative Act, and the Co-op's by-laws. Id. When construing the Worker's Compensation Act to define an employee, the court considered the contract of

employment and the employee's right to demand payment. Id. After considering all of the evidence, the court held that Shuler was not entitled to Worker's Compensation because: 1) the Electric Cooperative Act did not mandate the compensation or employment of the trustee, nor did it create in the trustee a right to demand payment; and 2) although the by-laws permitted compensation on a per diem basis, reimbursement for expenses, and other benefits, when read as a whole the by-laws do not create an employment relationship. Id.

In McCreery, the Court of Appeals found that Mr. McCreery was a volunteer using the following rationale:

> Mr. McCreery donated 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 with either Grace or Covenant so that his work could be considered as a credit toward his tithe obligation. *See* Schreckengost v. Gospel Tabernacle, 188 Pa.Super. 652, 149 A.2d 542 (1959); Clark v. First Baptist Church, 570 P.2d 327 (Okla.1977). We find no evidence of an employment relationship between Mr. McCreery and Covenant Presbyterian Church. He was not hired by Covenant and he was not performing any paid service for Covenant. The preponderance of the evidence does not support a finding Mr. McCreery was an employee of Covenant Presbyterian Church. *See* McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct.App.1984) (review by appellate courts of relationship of employment is governed by preponderance of evidence).

McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 383 S.E.2d 264 (S.C.App. 1989). As in Schuler, the court here also considered that there were no wages paid or a right to demand payment, and did not apply the statutory employee test. Similarly, in Doe, a candy striper was found to be a volunteer of a hospital under the Worker's Compensation Act. Doe by Doe v. Greenville Hospital System, 323 S.C. 33, 448 S.E.2d 564 (S.C. App. 1994). Again, the court focused on the definition of "employee," rather than the degree of control.

In Kirksey, an employer's daughter was not an employee for purposes of Worker's Compensation Act section exempting employer from its provisions if employer has regularly employed in service less than four employees. Kirksey v. Assurance Tire Company, 311 S.C. 255, 428 S.E.2d 721 (1993). In determining the amount of employees that were employed, the court again construed whether or not there was a contract for hire. Id. The court considered that she neither received nor expected to receive any payment, and the performance of her services did not "give rise to an implication that payment for her services was expected because the circumstances negated such an expectation." Id. The Court further stated that "Even if we were to assume a contract of hire existed, [the evidence] failed to establish Scurlock had a right of control over Foster." Id, (emphasis added). This implies that the right of control is not to be considered until it is established that there was a contract of hire.

b. Petitioner was acting as a volunteer of SC Strong, and not an employee.

Petitioner was not an employee of SC Strong for purposes of Workers' Compensation. Under §42-1-130 of the Workers' Compensation Act, an employee is defined as:

> Every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written,... whether lawfully or unlawfully employed, 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 (Supp. 2012). "To be considered an employee under a contract of hire pursuant to section 42-1-130, a person must have a right to payment for his services." Shuler v. Tri-County Elec. Co-op, Inc., 385 S.C. 470, 473, 684 S.E.2d 765, 767 (2009) (citing Kirksey v. Assurance Tire Co., 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) (finding unpaid daughter of store owner not an employee)); *see also* Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 39-40, 448 S.E.2d 564, 567-68 (Ct. App. 1994) (holding an unpaid volunteer candy striper was not the employee of a hospital); McCreery v. Covenant Presbyterian, 299 S.C. 218, 223-24, 383 S.E.2d 264, 267 (1989) (finding an unpaid church volunteer not an employee of the church for workers' compensation purposes), rev'd on other grounds, 303 S.C. 271, 400 S.E.2d 130 (1990). Coverage under the Workers' Compensation act depends on the existence of an employment relationship. Meyer v. Piggly Wiggly No. 24, Inc. (S.C. App. 1998) 331 S.C. 261, 500 S.E.2d 190, rehearing denied, certiorari granted, affirmed 338 S.C. 471, 527 S.E.2d 761.

Petitioner was a resident of the SC Strong program, not an employee. The South Carolina Department of Probation, Parole, and Pardon records show that the Claimant was sentenced in Case Nos. 2009-GS-3200770 and 2009-GS-3200769 to 15 years suspended to 3 years and 5 years of probation for two counts of burglary in the second degree. (JA. 276). As a special condition of his probation, Judge Keesely ordered that Mr. Simmons complete the SC Strong Program. (JA. 276). According to Mr. Simmon's testimony, Mr. Simmons asked the judge to put him in the program before he was sentenced. (JA. 107). According to the SC Strong Program information sheet submitted into the record, SC Strong is a residential self-help organization

where former substance abusers, ex-convicts, and homeless adults can find and develop their strengths through learning - and teaching - academics and vocational skills, as well as personal, interpersonal, and practical "survival" skills. (JA. 281). When the Claimant began the program in May 2010, he signed a Resident Statement wherein he acknowledged that "any work, which I have done, or will do, for South Carolina STRONG, is done as a volunteer without any expectation of remuneration." (JA. 245). Petitioner neither received nor expected to receive any kind of pay for his services, and acknowledged he was a volunteer and was not owed any remuneration for his services when he signed his Resident Agreement. (JA. 245). John Tecklenberg testified on the record that the food, clothing, shelter, and things of that nature were not given to Mr. Simmons in lieu of any wages he was earning. (JA. 62). In addition, after the accident, the Claimant was unable to work, yet SC Strong still provided him with room and board as well as medical care. (JA. 98-101). It was only until Petitioner elected to retain an attorney and file a Workers' Compensation claim against the program was he asked to leave. (JA 99-101). Mr. Simmons was not provided these services as a condition of the work he performed, but as a condition of his participation in the program. (JA. 62).

The facts of this case are similar to those of Schuler, Doe, McCreedy and Kirksey. *See* Schuler, Doe, McCreedy and Kirksey, *supra*. In all four cases, the Claimant did not recover Worker's Compensation benefits because there was no contract of hire found between the volunteer and the Employer. In all four cases there was no payment, expectation of payment, nor right to demand payment for

work performed. Mr. Simmons was not paid for his work, had no right to demand payment for the work he performed, and admitted he was a volunteer.

Petitioner received room and board as a condition of his participation in the program, and not as compensation for work performed. The court in Schuler found that although the by-laws permitted compensation on a per diem basis, reimbursement for expenses, and other benefits, the Claimant was a volunteer. Similarly, in Doe, the Claimant was found to be a volunteer even though she received classroom and on the job training, as well as free lunch and uniforms. In both of these cases, these benefits were not found to be compensation for the work performed. Mr. Simmons was given room and board, but it does not necessarily mean that it was compensation for his work.

This case is clearly distinguishable from Wilson v. Georgetown County, 315 S.C. 92, 447 S.E.2d 841 (1994). In Wilson, the circuit court required Mr. Wilson to perform janitorial services in lieu of jury duty. The Supreme Court reasoned that Wilson was an employee because the work he was performing was for the benefit of the County. In this case, Petitioner was not required to go to SC Strong, but was given an opportunity to change his life in lieu of a prison sentence. In addition, the work Petitioner was performing was for the benefit of the Petitioner, not SC Strong. It is the position of the Respondent that SC Strong's interest, as a non-profit organization, is not the quality of work performed, but in quality of life improved. The case at hand and Wilson are clearly distinguishable because Wilson was washing windows because he was required to do so by the court, whereas Petitioner

voluntarily chose to join SC Strong in an effort to turn his life around, and avoid prison.

The issue of whether the residents are employees arose in the state of California with the Delancey Street Foundation, of which SC Strong is modeled after and receives assistance from. According to the Order in Case No. SFO 0351419, the privilege of enrolling in Delancey Street rather than being confined in State prison does not amount to an employment relationship in California. (JA. 282-286). Because there was no employment relationship, Delancey Street was not considered an Employer by the State of California, Department of Industrial Relations Workers' Compensation Appeals Board. (JA. 282-286).

A letter to SC Strong from Betty McZorn of Charleston County's Grants Administration was also submitted in the record. (JA. 280). The letter sets forth that the United States Department of Labor has classified the residents of South Carolina Strong assisting in the renovations of 1300 Navy Way, North Charleston, South Carolina as volunteer workers. (JA. 280). The letter also sets forth that Bill Poythress, Senior Labor Relations Specialist, opined that the residents of South Carolina Strong are not employees, but are volunteers for the purpose of Section 110(a)(b) which describes the enactment or exemption of the Davis-Bacon wage requirements. (JA. 280). Further, this letter sets forth that the training agreement between the residents and SC Strong supports that this is a mutual relationship. (JA. 280). The California case and the Department of Labor opinions are persuasive in finding that the residents of SC Strong are not employees but rather volunteers.

c. Petitioner was not an apprentice.

Petitioner was clearly not acting as an apprentice. Black's Law Dictionary defines an apprentice as:

> A person, usually a minor, bound in due form of law to a master to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. *Citing* 1 Bl. Comm. 420 ; 2 Kent, Comm. 211 ; 4 Term, 735. Altemus v. Ely, 3 Rawle (Pa.) 307; In re Goodenough, 19 Wis. 274; *Phelps v. Railroad Co.*, 99 Pa. 113; Lyon v. Whitemore, 3 N. J. Law, 845.

Here, Petitioner was an adult who entered into a rehabilitation program to improve his life. Under this definition, the Petitioner would have been learning how to operate a non-profit rehabilitation organization. There is no master-apprentice relationship because Petitioner did not bind in due form of law to a master. The Petitioner was learning a construction skill on the date in question as a court ordered participant in SC Strong, not as an apprentice. SC Strong is not a construction company, and Petitioner did not join SC Strong because he wanted to make money as a construction worker. According to his testimony, Mr. Simmons went to SC Strong because he wanted to "be the man that I know I can be." (JA. 108). Mr. Simmons joined SC Strong to change his life, not to be an apprentice.

II. The Court of Appeals did not fail to liberally construe the law and facts in favor of coverage.

The existence of an employer-employee relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002). When an issue involves jurisdiction, the appellate court can take its own view of the preponderance

of the evidence. Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). "In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994). In Shuler, two factors were used to analyze if an employment relationship existed: (1) whether the parties recognize each other as employer and employee and (2) whether the employee had a right to demand payment. The resident Agreement clearly establishes that the parties did not recognize each other as an employer and employee and, further, that the Claimant had no expectation of payment. (JA. 278). The Commissioner, Appellate Panel, and Court of Appeals could have easily found that, by the preponderance of the evidence, Petitioner was not an employee.

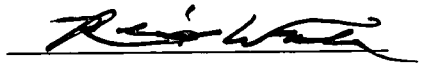
CONCLUSION

Mr. Simmons was a volunteer resident of a non-profit organization that takes a holistic approach to helping people learn how to change their lives. The test for determining whether or not Mr. Simmons is a volunteer is to determine if the parties recognized each other as employer and employee, and whether or not the employee had the right to demand payment. Here, there is no contract of hire because Mr. Simmons signed a Resident Agreement which states that he was a volunteer, and did not receive payment for work and had no right to demand payment. Mr. Simmons was not provided room and board in lieu of wages, but as a

participant in the program. Because he did not obtain compensation for his work, Mr. Simmons was acting as a volunteer.

For the reasons above, Respondent respectfully requests this court deny the writ of certiorari and affirm the findings of the Court of Appeals opinion.

Respectfully submitted,



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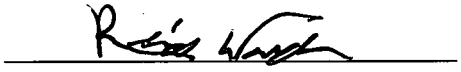
PROOF OF SERVICE

I certify that a copy of Respondent's Return to Petitioner's Petition for Writ of Certiorari was served this day on Petitioner by depositing a copy in the United States Postal Service, first class to Petitioner's attorneys of record: D. Dusty Rhoades, 828 St. Andrews Blvd., Charleston, SC 29407; and Cynthia Patterson, P.O. Box 6786, Columbia, SC 29260.



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