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S.C. Court of Appeals Addresses Exemption of Employers from Workers' Compensation Act

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Whether an Employer regularly employed four or more employees, and thus, was subject to the South Carolina Workers' Compensation Act and the Notice Requirement were fully addressed by the South Carolina Court of Appeals in *Hartzell v. Palmetto Collision, LLC, and South Carolina Worker's Compensation Uninsured Employers Fund*, Opinion No. 5176 (S.C. Ct. App. File October 9, 2013).

The Act specifically exempts from coverage any employer "who has regularly employed in service [fewer] than four employees in the same business within the State." S.C. Code Ann. § 42-1-360(2). The code defines "employee" 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 exclud[ing] 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.

An automobile body and paint technician, claimed he was injured on February 25, 2009, while moving heavy equipment, when he noticed pain in his lower back. The next day, the pain had worsened, and he mentioned to the shop's owner that he was sore and must have hurt himself. The owner suggested Claimant go to the emergency room if he continued to have problems. Claimant did not see a doctor for two weeks and only spoke to the owner about his lower back pain during the last few weeks prior to his voluntary departure from employment.

The shop was a limited liability company with a sole member, the owner. The owner testified that his uncle worked part-time for the shop during the third and fourth quarters of 2007. His nephew also began working for the shop part-time in 2007. A third employee worked for the employer through 2009 doing restoration work, and a fourth person was paid on a Form 1099 to occasionally repair heavy frame damage. During the first quarter of 2009, the quarter when Claimant was injured, the owner's uncle and nephew regularly worked part-time, as did the employee performing restoration work, and Claimant. The person hired for frame damage was maintained "as needed."

In its analysis of the exemption issue, the Court of Appeals cited *Harding v. Plumley*, 329 S.C. 580, 496 S.E.2d 29 (Ct. App. 1998), a North Carolina case, for the proposition the term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy." North Carolina employs a five-part test in determining regular employment under the Act: (1) employment of the same number of persons; (2) during the relevant period of time; (3) with some constancy; (4) not by chance or for a particular occasion; and (5) without regard to the regularity of the days or hours worked.

Using this test, the court found the shop regularly employed at least four people, and therefore was subject to the Act. The first two factors were satisfied by reliance on the owner's testimony that Claimant, owner's nephew and uncle, and the employee performing restoration work were all employed by the shop during the first quarter of 2009. The third and fourth elements were established through evidence showing that each of these men appeared on Employer's payroll during the first quarter of 2009, and all but Claimant continued to work for the shop through the remainder of that year. The court, implying reliance on the fifth factor, did not discuss the fact that several of the employees worked only part-time.

The court next addressed the Act's notice requirement. S.C. Code Ann. § 42-15-20, an employee must give his employer notice of the accident as soon as practicable, but not to exceed 90 days after the accident. Citing *Larson's Workers' Compensation Law* § 126.03, the court stated adequate notice required some knowledge of accompanying facts connected to the injury or illness with the employment, and an indication to a reasonably conscientious manager that the case might involve a potential workers' compensation claim. Applying this law to the facts of the case, the court found the only evidence presented by Claimant was that he had casually talked to the owner about his back pain, but he never indicated a connection from his injury to his work for the Employer. Finding Claimant did not comply with the statutory notice requirement, the Court of Appeals ultimately reversed the Commission's decision and denied compensation to Claimant.

This decision establishes a concrete test for the determination of whether an employer is subject to the South Carolina Workers' Compensation Act and also elaborates on the notice requirement. We encourage you to contact us when making the determinations of whether your business operation falls under the Workers' Compensation Act and whether Claimants have met all statutory notice requirements prior to being awarded benefits.

About Blakely Molitor

Blakely Molitor is an associate practicing in the area of insurance defense litigation and workers' compensation defense, an area of law in which she has several years of experience as both a Claimant's attorney and a defense attorney. Prior to joining Collins & Lacy in 2013, Blakely worked as an attorney for a Columbia-based firm practicing in the areas of insurance defense litigation and workers' compensation. She received her undergraduate degree in biology from the University of North Carolina at Chapel Hill and earned her juris doctor from the University of South Carolina School of Law. During her undergraduate career, she worked for a law firm in Raleigh as an assistant. While in law school she worked as a summer associate for Collins & Lacy.

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