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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

Appellate Case No. 2022-000600
W.C.C. No. 1808344

Naomi Lynn Bridges……..……Claimant, Appellant,

v.

Harbour Town Surf Shop, LLC, Employer,
and South Carolina Uninsured Employers' Fund……..Respondents

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Appellant, Naomi Lynn Bridges (hereinafter, Claimant or "Ms. Bridges"), by and through her undersigned attorney, hereby replies to the Initial Brief of Respondent South Carolina Workers' Compensation Uninsured Employers' Fund as follows:

Just as in their brief to the Appellate Panel of the Workers' Compensation Commission, the South Carolina Uninsured Employers' Fund (hereinafter "UEF") dedicates much of their Brief to this Court to mischaracterizing and misstating Appellant's position and argument, especially concerning the burden of proof and proper application thereof. In their brief, the UEF attempts to paint Claimant's argument as a ploy to "reverse her burden of compensability and to shift that to the backs of the Defendants." Brief of Respondent p. 5. The UEF also erroneously states that the Appellant is arguing that "whether an injury was suffered in the course of employment is a rebuttable presumption to be weighed in her favor." *Id.* However, nothing could be further from the truth. The Claimant has clearly argued that she met her burden of proof of showing an injury arising out of, and in the course of her employment, and that the Single Commissioner erred in applying the law and legal standard regarding Respondents' burden of proving an exception to coverage, which is an affirmative defense to be asserted by Employers/Defendants. It is so routine as to be axiomatic that the burden of proof as to any affirmative defense is on the party asserting. This was not addressed by the Commission, which failed to hold Defendants to their burden of showing an exception to coverage, or that Appellant's actions temporarily removed her from the scope of employment at the time of her injury, which otherwise arose out of her employment.

Again, as below in their brief to the Appellate Panel of the Full Commission, the UEF attempts to discount more than 80 years of unbroken precedent in referring to the Court's holding in *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. 373 (1941) simply as a "1941 case, one that was

decided before the enactment of S.C. Code Ann. § 42-1-160." Regardless of how Counsel for the UEF may feel about the *Johnson* case as it applies to the present case, it is still the law of the State of South Carolina and is consistently cited throughout relevant case law concerning Employer challenges to allegedly prohibited conduct and whether they take employees'/claimants' injuries out of the scope of their employment. The Court in *Johnson*, and our courts throughout relevant case law cited in Claimant's brief, including *Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. APP. 1994), make clear that the burden of proving an exception to coverage due to a prohibition lies upon the employer. Specifically, the Court in *Johnson* stated that "[t]he burden was upon the defendants to establish the fact that at the time of Johnson's death he had gone into a prohibited place in violation of a positive order." *Johnson v. Merchant's Fertilizer Co. et al,* 198 S.C. 373, 376, 17 S.E.2d 695 (1941). This is because our courts have recognized that this is an affirmative defense that must be proven by the Defendants, when the Claimant has asserted and met their burden of showing that the injury was otherwise within the course and scope of their employment.

Notably, in the nearly 22 pages of their brief, the UEF dedicates little more than a page addressing Respondents' burden of showing an exclusion to coverage due to an employee leaving the sphere of employment during a workplace injury, and the circumstances under which such an exclusion arises. The UEF and the Commission have completely missed the nuances involved in determining when a Defendant can prove a claimant's workplace injuries are exempted, as being outside the scope of their employment. The UEF in their brief, and the Commission in their orders, rely simply on our courts' holdings that that "[w]hen an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable." *Wright v. Bi-Lo*, 314, S.C. 152, 155, 442 S.E.2nd 186, 188 (Ct. App. 1994). While simply finding a prohibition by the employer appears to be the

end of the UEF's and the Commission's inquiry, our courts have expressed that not every prohibition or "violation of an order given to an [employee] will necessarily remove him from the protection of the [Workers'] Compensation Act." *Johnson v. Merchants,* 198 S.C. at 379. Rather, "[c]ertain rules concern the conduct of the worker within the sphere of his employment, while others limit the sphere itself.]" *Id.* A "transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied." *Id.* The prohibition must also be "clear and explicit." Thus, only a violation of a "clear and explicit" order which relates to the thing or task being done and not simply the "conduct" or method of performing a task may remove a workplace injury from the scope of employment. The Commission failed to engage in the analysis required by our courts to establish that an employee left the sphere of employment due to a prohibition and the UEF in their brief to this Court continue to ignore nuance between prohibitions related to the conduct or method of performing work tasks, and prohibitions regarding the tasks or things to be performed.

As discussed at length in the Appellant's Brief, substantial evidence does not support that there was a "clear and explicit" prohibition to Ms. Bridges. The UEF's own brief helps to further illustrate this, because it identifies at least 5 different versions of what Amir Bitton, the owner of employer LLC, claimed he instructed the Claimant to do or not do on the date of the accident: 1) "Okay please no climbing, no ladder, no physical work," Tr. Vol. 2, p. 64, ll. 5 – 9; 2) "You've got Zach if you need to climb on the ladder," Tr. Vol. 2, p. 64, ll. 15 – 18; 3) that he gave "strict instructions," Tr. Vol. 2, p. 65, l. 2.; 4) "Do not go on the ladder. Do not," Tr. Vol. 2., p. 65, ll. 6 – 7; (5) "No[t] any physical work. All I want you to do is cash people out. Be a cashier today. Don't do nothing. You've got Zack if you need to climb a ladder." Tr. Vol. 2, p. 61, ll. 13 – 16.

As noted in Appellant's brief, despite saying "there's the rest of the girls for any chores that you needed to do," (Tr. Vol. 2, p, 64, ln. 15 – 18), Mr. Bitton also claims that he told the employees that there should be "no girls on the ladder," and for that date only. Tr. Vol. 2, p. 169. The assertion that he gave all of these versions of instructions to Ms. Bridges in the "thirty minutes" he was physically present at the store on the day of the accident, strains credulity and should have been given no weight as Mr. Bitton's testimony is self-contradictory and self-serving. Tr. Vol. 2, p. 66, ll. 16 – 25. Therefore, substantial evidence does not support the finding that the Employer gave a "clear and explicit" prohibition to Mrs. Bridges. Additionally, as discussed in Appellant's Brief, the burden of proving that there was a "clear and explicit" prohibition that was violated by the employee that led to the Claimant's injury was not met by the employer given the owner's own conflicting testimony, let alone considering Mrs. Bridges testimony that she was apparently confused about the nature of the employer's order(s). This case is also factually distinguishable from *Wright v. BiLo* and *Black v. Town of Springfield*, because the Courts in those cases made a point of noting that the claimants in those cases were given a prohibition repeatedly on different occasions, establishing that the prohibition was "clear and explicit." In the present case, the Appellant testified that her understanding of the prohibition was different than what her employer claimed the prohibition was, and the expression of the prohibition by the employer allegedly occurred during a thirty-minute span, merely hours before the workplace accident.

Furthermore, while Claimant disputes that there was a "clear and explicit" prohibition, a violation of this alleged prohibition to not climb on the ladder does not, in itself, take her out of the scope of her employment. As discussed in the Brief of Appellant, pursuant to *Johnson* and its progeny, this order would not limit the sphere of employment such that a violation thereof would take the employee and her workplace injury outside of the scope of employment. This is because

such an order simply limits the "conduct" of employment within the sphere of employment, without limiting the sphere itself. This distinction, which has been entirely ignored by the Commission and the UEF in their brief, was described by Larson's Workers' Compensation Law as the ultimate "thing to be done" (sphere of job duties and employment) versus the method (or conduct) of accomplishing these duties. 3 Larson's Workers' Compensation Law, Ch. 33 Syn. In the present case, stocking shelves and bringing out inventory was a part of Ms. Bridges' normal work duties, or the ultimate "things to be done" that were within the sphere of employment. Using a ladder to do so was a common and necessary *method* of accomplishing these duties. Thus, assuming *arguendo* substantial evidence supported that there was a "clear and explicit" order not to use a ladder, Ms. Bridges utilizing this *method* or engaging in this *conduct* to perform tasks otherwise within the scope of her employment, does not create an exception to coverage for her injury under the laws of this State, as there would only be a violation of an order relating to the method or conduct, and not of the sphere of her employment.

CONCLUSION

For the reasons stated above, and those found within the Brief of Appellant, this Court should reverse the judgment, findings of fact and conclusions of law of the Appellate Panel of the Full Commission.

[Signature Block Follows]

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PROOF OF SERVICE

I certify that I have served Reply Brief of Appellant on the South Carolina Workers' Compensation Commission and on the attorney of record for the Respondents, Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Commission Uninsured Employers' Fund, by depositing a copy of it in the United States Mail, postage prepaid, on the 7th day of November, 2022, addressed as follows:

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