68737

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
David W. Huffstetler, Commissioner
Andrea C. Roche, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1003812

Andrew Marrs,..... Respondent,

v.

1751, LLC d/b/a Saludas and
The South Carolina Uninsured Employer's Fund,..... Defendants,
Of Whom

1751, LLC d/b/a Saludas is the .....Appellant

PETITION FOR REHEARING

The Appellant1751, LLC d/b/a Saluda's, hereby moves the court for a Rehearing in the above referenced matter. The grounds for this Petition as set forth below are discussed in the attached memorandum:

1. The Order of the Court is not specific enough for proper review of the decision because even though the Court cites ample case law for its decision, it does not state which evidence or facts it applied to the case law in arriving at its decision.

2. The Court of Appeals erred in affirming the appellate panel decision and determining that Wright v. Bilo and Johnson v. Merchs. Fertilizer, supports a finding of the claim as compensable, the error being that the substantial evidence does not support this finding as the claimant was not in his scope and sphere of employment at the time of the accident.

3. The court of appeals erred in affirming that this claim is compensable pursuant to the Dukes, Mack and McCoy decisions, the error being that these cases are inapplicable and the personal comfort doctrine does not apply to this situation because the claimant was attempting to exercise the personal comfort (smoke break) in an area he was prohibited to be in.

Respectfully Submitted,

E. Ros Huff, Jr. #2767
Shelby H. Kellahan #74731
Huff Law Firm, LLC
Post Office Box 1935
Irmo, South Carolina 29063
(803) 252-2232
Attorney for Appellant

June 13th, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
David W. Huffstetler, Commissioner
Andrea C. Roche, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1003812

Andrew Marrs,..... Respondent,

v.

1751, LLC d/b/a Saludas and
The South Carolina Uninsured Employer's Fund,..... Defendants,
Of Whom

1751, LLC d/b/a Saluda's is the .....Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The appellant, hereby submits this Memorandum in Support of its Petition for Rehearing and the grounds are as follows:

1. The Order of the Court is not specific enough for proper review of the decision because even though the Court cites ample case law for its decision, it does not state which evidence or facts it applied to the case law in arriving at its decision.

The Order of the Court was issued per curium. While the Order quotes ample case law to support its decision of affirmation, it does not cite any facts or evidence in which it relied upon in reaching the decision. It is a long standing rule that "the findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Hill v. Jones, 255 S.C. 219, 178 S.E. (2d) 142

(1970). It reasonably follows that the Order of the Court of Appeals must be sufficiently detailed to enable a reviewing court (i.e. Supreme Court), to determine whether the factual findings were supported by the evidence and the proper law was applied. Because the Court's Order states no facts, there is no way to tell if the decision is supported by the evidence. The Administrative Procedures Act ("APA") governs this Court's review of the Appellate Panel's decision. See Lark v. Bi-Lo, Inc. 276 S.C. 130, 276 S.E.2d 304 (1981). The Court can reverse or modify the decision in this case only if substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See S.C. Code Ann. § 1-23-380(A)(6)(d)(e) (Supp. 2010). Because the Court does not state which evidence they relied upon when making their determination, there is no way to know if the substantial evidence supports the finding of the SC Appellate Panel. Therefore, the Order was erroneous and should be reconsidered

2. The Court of Appeals erred in affirming the appellate panel decision and determining that Wright v. Bilo and Johnson v. Merchs. Fertilizer, supports a finding of the claim as compensable, the error being that the substantial evidence does not support this finding as the claimant was not in his scope and sphere of employment at the time of the accident.

The Record is devoid of substantial evidence. Upon review of the Record as a whole in this matter, the Appellate Panel's determination that claimant suffered a compensable injury by accident arising out of the course and scope of his employment, was error. Although it is unclear from this Court's order what facts it relied upon when it determined that the Wright and Johnson decisions apply, the appellants contend that the decisions do not support an affirmance when compared with the facts at issue.

The employer issued a positive order of prohibition directly to the Respondent to refrain from using the known defective stairs (R. pp. 108-109). A member of the Appellate Panel of the Workers Compensation Commission even commented at the appeal hearing that "this was a direct order or prohibition" not to use the stairs (R. p. 137 lines 22-25). There is also evidence that the landlord (Richard Burts) placed tape over the stairs on multiple occasions over a three week period to specifically prohibit and restrict the use of the known dangerous staircase (R. p. 117). There is direct testimony that Steve Cook issued a direct positive order in the presence of the executive chef, Blake Farris, for the employees not to use the defective stairs (R. pp. 108-109). When the Respondent was asked a hypothetical question, he even admitted under the facts of this case that if he was the employer like Mr. Cook, he would have instructed his employees of the danger of the steps and prohibited the use of them. (R. pp. 144-145). Because the substantial evidence supports a finding of non compensability, the determination to affirm the appellate panel is erroneous.

It is erroneous for the court to rely upon Wright v. Bilo to support a finding of compensability. In Wright v. Bi-Lo 442 S.E.2d 186, 314 S.C. 152 (Ct. App. 1994), the court states that:

> when an employer limits sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in scope of employment and, therefore, not compensable under workers' compensation law.

Mr. Marrs received direct instructions from the employer not to use the stairs. The employer issued a specific prohibition and any injury incurred while violating this prohibition is not compensable and in the sphere of his employment pursuant to the Wright v. Bi-Lo decision.

Johnson v. Merchs. Fertilizer is distinguishable from the instant matter. Commissioner Beck, the Single Commissioner, determined that instructions were given and that the stairs were an area of the premises that were off limits and prohibited, much the same as in the Johnson v. Merchs. Fertilizer Co. 17 S.E.2d 695, 198 S.C. 373 (1941):

> Where employer and insurance carrier denied liability for compensation for death of employee upon ground that employee's death did not arise out of and in the course of employment, in that employee at time of his death was in a place where he was forbidden to go, burden was upon employer and insurance carrier of establishing that at time of employee's death he had gone into a prohibited place in violation of a positive order.

However, in our case, unlike Johnson Merchs. Fertilizer, the employee was not warned but the respondent was **specifically instructed** on repeated occasions by Mr. Cook (the owner) and the landlord that the back stairs were dangerous and off limits. In Johnson Merchs. Fertilizer, the Court held that the warning given by the foreman to the deceased employee amounted to no more than a general admonition to exercise "due care" when he reached the vicinity of the shaft. In our case, a warning was not given but a **positive direct order of prohibition.** It was abundantly clear that: the stairs were dangerous; two employees had been previously injured; and that tape to bar the use of the steps was put on the stairs. Thus this was a prohibited dangerous area that was outside the scope/sphere of Mr. Marr's employment. Over the course of three to four weeks prior to Mr. Marr's incident the employer put tape on the stairs and tried to block them for use by the respondent (R. 107). After Mr. Marr's incident the employer remembers telling the Respondent that he was told not to go on the steps and Mr. Marr's didn't refute that (R. 121-122). In fact, the Appellate Panel specifically states in its conclusions of law and no one disputes that the claimant was not to use the stairs. (R. 22).

In our case, the employer established that the location of the Respondent's alleged injury was forbidden as evidenced by verbal instruction and by blocking the stairs with duct tape. Therefore, the Johnson case is actually supports the finding that this claim is not compensable as the injury did not arise out of an in the course and scope of employment.

3. The court of appeals erred in affirming that this claim is compensable pursuant to the Dukes, Mack and McCoy decisions, the error being that these cases are inapplicable and the personal comfort doctrine does not apply to this situation because the claimant was attempting to exercise the personal comfort (smoke break) in an area he was prohibited to be in.

While the court correctly states the case law which establishes the personal comfort doctrine, the doctrine does not apply in this situation because the claimant was attempting to exercise the personal comfort (smoke break) in an area he was prohibited to be in.

Mr. Marrs was a cook. His job duties did not encompass using the back stairs and he was specifically prohibited from doing so. Mr. Marrs was on a smoke break at the time of the alleged accident. (R. 133). The stairs where Mr. Marr's was taking his smoke break were defective, and this was known by the Respondent (R. 86). On cross-examination, the Respondent admitted that a co-employee (Ali), his boss (Steven Cook) and the landlord (Richard Burts) all told him that the step on the back stairs was broken (R. pp. 91-92). Mr. Marrs also agreed that tape was placed on the stairs as a warning that the step was defective (R. 92). Two fellow employees had already been hurt on those stairs, and Mr. Marrs knew of those incidents. (R. p. 136). Therefore it is clear that the Appellant act was outside the scope of his employment.

The Dukes case, which was relied upon the court is not applicable to this situation because the claimant in that case took a smoke break "in a **designated** area outside the building." Dukes v. Rural Metro Corp., 552 SE 2d 39, 346 S.C. 369, 372 (Ct. App. 2001). Mr. Marrs took a smoke break in an area that he was **not authorized** to even enter.

The court's reliance on the McCoy decision was also in error. In McCoy v. Easley Cotton Mills, 218 S.C. 350, 62 S.E.2d 772 (1950), the court again addressed the question of whether an employee's injury occurring during a smoking break was compensable. The Court stated that it was "well settled that an employee, in order to be entitled to compensation, need not necessarily be engaged in the actual performance of work at the time of injury; it is enough if he is upon his employer's premises, occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment." *Id.* at 355-56, 62 S.E.2d at 774. There is no causal connection between Mr. Marrs' employment as a cook and his injury on the smoke break in the prohibited and dangerous area.

Although the order again does not state which facts in which it relied upon in applying the personal comfort doctrine, the simple act of Mr. Marrs' smoking at the time of the injury does not automatically entitle him to protection under the personal comfort doctrine. It is clear that the claimant was not "occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment" because his employer specifically instructed him not to be in that area he could in no way be acting consistently with his contract of hire or in a manner pertaining to his employment. As such, the court's ruling that the personal doctrine is applicable is erroneous.

CONCLUSION

Based upon the above cited arguments, Appellant Saluda's would respectfully request that the court grant its Petition for Rehearing.

E. Ros Huff, Jr., Esquire Bar # 2767
Shelby H. Kellahan, Esquire Bar # 74731
HUFF LAW FIRM, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232
Attorneys for Employer

June ___, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
David W. Huffstetler, Commissioner
Andrea C. Roche, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1003812

Andrew Marrs,..... Respondent,

v.

1751, LLC d/b/a Saludas and
The South Carolina Uninsured Employer's Fund,..... Defendants,
Of Whom
1751, LLC d/b/a Saludas is the .....Appellant.

PROOF OF SERVICE

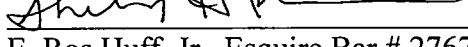
I certify that I have served the Petition for Rehearing and Memorandum in Support of Petition by depositing a copy of the same in the United States Mail, postage prepaid, on June __, 2013 to the following parties, and or their representatives:

Blake A. Hewitt, Esquire and Allison Sullivan, Esquire
Bluestein, Nichols, Thompson and Delgado, LLC,
PO Box 7965
Columbia, SC 29202
Attorneys for Andrew Marrs

Virginia Crocker , Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

Lisa Glover, Esquire
100 Executive Center, Drive, Santee Building Suite 101
Columbia, SC 29210
Attorney for SC Uninsured Employer's Fund

June 13 2013



E. Ros Huff, Jr., Esquire Bar # 2767
Shelby H. Kellahan, Esquire Bar # 74731
HUFF LAW FIRM, LLC, Attorneys for Appellant.
Post Office Box 1935, 7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232