THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO. 1808344

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents

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FINAL BRIEF OF RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

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STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. The matter arises from the filing of the parties' Forms 50 and 51. Claimant alleged she suffered compensable injuries to her left leg in a fall from a ladder on June 16, 2018. ROA 1670; Tr. Vol. 1, pp. 4, 11 and ROA 54; Form 50. Claimant sought payment of all past medical treatment, additional medical treatment for her injuries, temporary total disability benefits from the date of accident and continuing. ROA 63 – 66; Claimant's 1/23/2019 Form 58.

The Employer agreed it was subject to the terms and provisions of the South Carolina Workers' Compensation Act, and it stipulated that Claimant was its employee. ROA 1677; Tr. Vol. 1, p. 11. However, Employer asserted that Claimant was acting outside the scope of her employment at the time she alleged to have suffered an injury. *Id*.

The South Carolina Workers' Compensation Uninsured Employers' Fund's (UEF's) position mirrored that of the Employer's. *Id*. The UEF further asserted that the case of *Wright v.*

Bi-Lo, 314 S.C. 152, 442 S.E.2d 186 (Ct.App. 1994), is controlling, and that Claimant was acting outside the course of her employment at the time she alleged to have suffered her injuries. *Id.*

Claimant took the position that Defendants' position (that Claimant was acting outside the scope of employment) amounted to an affirmative defense. ROA 1676; Tr. Vol. 1, p. 10. Claimant did so in order to allege that neither the Employer nor the UEF (despite timely filing a Form 51 with affirmative defenses) could argue that Claimant was outside the course of employment when she was injured. Oddly, Claimant apparently asserted the Employer could not even contest compensability due to "the 150-day rule."[1] ROA 2133; Tr. Vol. 2, p. 200, ll. 13 – 23.

The Employer and UEF contended that the Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) are $354.62 and $236.43, respectively. ROA 1678; Tr. Vol. 1, p. 12. The Claimant asserted only that the AWW and CR should be approximately double that asserted by Defendants. *Id*.

The hearing in this case lasted over the course of two (2) days. *See* ROA 1667 – 2136; Tr. Vol. 1 and Vol. 2. There were nine (9) live witnesses, one (1) of whom testified twice. Claimant submitted almost One Thousand, Five Hundred (1,500) pages of medical evidence, even though there was no dispute over the nature of the injuries. Claimant attempted to submit an actual x-ray film as evidence. ROA 1734 – 1735; Tr. Vol. 1, p. 68, l. 7 – p. p. 69, l. 25.

The Single Commissioner issued her Decision and Order on January 27, 2021. ROA 3. The claim was denied because Claimant failed to prove her injuries were suffered in the course of

[1] At the hearing, Claimant's attorney argued:

> The last question [in Claimant's Form 58] had to do with the hundred and fifty-day rule. I cannot tell you what the number is on that one. The idea being that the employer has a hundred and fifty days to contest whether or not they should receive any more compensation. And by the same token, in a case-called Jury, it's come up that if they don't contest within a hundred and fifty days, also they give away their right to compensation, and I have that in there. And I just wanted to make sure that was there also.

ROA 2133; Tr. Vol. 2, p. 200, ll. 13 – 23.

employment. Claimant's appeal to the Appellate Panel of the Full Workers' Compensation Commission timely followed. The Appellate Panel heard the matter on January 24, 2022, and issued an order fully affirming the Single Commissioner on April 19, 2022. ROA 35.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc*., 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co*., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp*., 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004).

The appellate panel is the ultimate fact finder in Workers' Compensation cases, and it is not bound by the single commissioner's findings of fact. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The ultimate determination of a witness' credibly and the weight of such evidence is reserved to the appellate panel. *Shealy v. Aiken County*, 341 S.C. 488, 535 S.E.2d 438 (2000). The existence of inconsistent conclusions that may be drawn from the evidence does not preclude the administrative agency's findings from being based on substantial evidence. *DuRant v. South Carolina Dep't of Health & Envtl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). When such conflicts in the evidence concerning a factual issue exist, the findings of the appellate panel are conclusive. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct.

App. 2002). However, if the factual issue before the Commission involves a jurisdictional question, this court's review is governed by the preponderance of evidence standard. *Nelson v. Yellow Cab Co.*, 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000) *aff'd* 349 S.C. 589, 564 S.E.2d 110 (2002). While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. *See Dawkins v. Jordan*, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000) (*citing Ford v. Allied Chem. Corp*., 252 S.C. 561, 167 S.E.2d 564 (1969)).

STATEMENT OF FACTS

Despite the voluminous record in the case, the facts are simple. Claimant alleged she hurt her left leg when she fell off of a ladder at work. Employer and UEF assert that Claimant was acting outside the scope of her employment when she climbed the ladder, as she had clearly and expressly been forbidden to do the same due to a pre-existing injury to her left leg.

ARGUMENTS

I. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT HAS THE BURDEN TO PROVE THAT AN INJURY AROSE FROM AND WAS SUFFERED IN THE COURSE OF HER EMPLOYMENT.

It is axiomatic that the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. *See, e.g., Clade v. Champion Labs.,* 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); *Bartley v. Allendale County Sch. Dist.,* 381 S.C. 262, 272, 672 S.E.2d 809, 814 (Ct.App. 2009). Claimant argues that the Commission "appl[ied] the wrong legal standard throughout their Orders." Brief of Appellant, p. 16. Claimant argues that a defendant bears the "burden of proving that [Claimant] removed herself from the scope of her employment . . . ." *Id*. This Court must reject this argument, as it is always Claimant's

burden to prove that her injuries are compensable.

If successful, Claimant's argument would reverse her burden of compensability and to shift that to the backs of Defendants. She is arguing that whether an injury was suffered in the course of employment is a rebuttable presumption to be weighed in her favor. Though Workers' Compensation laws are to be construed liberally in favor of inclusion, of course, the purpose of the Act would be turned on its head if Claimant's interpretation were given effect.

Under S.C. Code Ann. § 42-1-160(A), injury means "only injury by accident arising out of in the course of employment . . . ." S.C. Code Ann § 42-1-160(A); *see also Turner v. SAIIA Constr.*, 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016) ("For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." Thus, for an injury to be compensable, it must both arise out of and be suffered in the course of employment. It is well-established that the Claimant bears the burden of proving compensability: "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law . . ." *Crisp v. SouthCo. Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013).

As the Supreme Court has written,

> "It is well established, at least in this jurisdiction, that these phrases are used conjunctively and that an accident, in order to be compensable, must both 'arise out of' and 'in the course of" the employment.' In *Eargle v. South Carolina Electric & Gas Co.*, 205 S.C. 423, 32 S.E. (2d) 240, this court said:
>
> "*The two elements must co-exist*. They must be concurrent and simultaneous. One without the other will not sustain an award; yet the two are so entwined that they are usually considered together in the reported cases; and a discussion of one of them involves the other.
>
> "As is generally held, the words 'arising out of' refer to the origin of the cause of the accident, while the words 'in the course of employment,' have reference to the time, place and circumstances under which the accident occurs."

Douglas v. Spartan Mills, 245 S.C. 265, 268-69, 140 S.E.2d 173, 174-75 (1965) (emphasis added).

The Supreme Court wrote that the two elements must co-exist. Without the presence of either of those elements, there cannot be a compensable claim. The Claimant cannot ease or shift that burden by labeling Defendants' defense an "affirmative defense" or an "exception to coverage." Brief of Appellant, p. 17. In her brief, Claimant argues that "the Commission has essentially required [Claimant] to prove a negative, that she was not removed from her employment at the time of her . . . injury." *Id*. This argument fails on its face, as the Commission required only that Claimant prove her injuries arose out of her employment, an essential element of compensability.

Because Claimant failed to prove that she no longer has the burden of proof in a contested case arising under the Act, the Commission's ruling should be affirmed. Further, the Order of the Commission should be affirmed.

Therefore, for the reasons set forth herein and those that may be presented at oral arguments of this matter, the UEF respectfully requests that the Order of the Workers' Compensation Commission be affirmed.

II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT FAILED TO MEET HER BURDEN OF PROOF.

The Claimant argues that, even if she still bears the burden of proof, her injuries nevertheless were suffered in the course of employment. In making these arguments, Claimant cites a 1941 case[2], one that was decided before the enactment of S.C. Code Ann. § 42-1-160. Regardless, the Claimant appears to agree, though, that disregarding "clear and explicit" instructions from an employer may remove and employment from her employment. *See* Brief of Appellant, pp. 17 – 19.

The seminal case on this issue in the modern era is *Wright v. Bi-Lo*, 314 S.C. 152, 442

[2] *Johnson v. Merchants Fertilizer Co.*, 198 S.C. 373 (1941). This case is easily distinguishable, as the "order" or instruction therein was not as definitive as the specific instructions given to Claimant in this matter.

S.E.2d 186 (Ct. App. 1994).[3] In that case, the Court of Appeals wrote, "When 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.2d 186, 188 (Ct. App. 1994) (internal citations omitted). In *Wright*, benefits were denied when an employee of a grocery store violated an express prohibition against chasing shoplifters. Obviously, that prohibition, like the prohibition of an employee with an injured foot from climbing a ladder, was for the employee's safety and to prevent further injury. Also instructive is the case of *Black v. Town of Springfield,* 217 S.C. 413, 60 S.E.2d 854 (1950). In that case, a police chief was denied benefits after falling from a fire truck, although he had work duties related to fire fighting. His employer expressly prohibited him from riding on fire trucks, but he ignored those instructions. When he was injured, it was determined that his injuries were not compensable. As the Court of Appeals wrote in 1994,

> If a police chief's injuries from riding on a fire truck are not compensable as violative of an express prohibition, even though he has legitimate employment duties at the fire truck's ultimate destination, a courtesy clerk's specifically forbidden act of pursuing a fleeing shoplifter cannot be within the scope of his employment.

Wright v. Bi-Lo, 314 S.C. 152, 157, 442 S.E.2d 186, 189-90 (Ct. App. 1994). The same could be said in this case.

Claimant asserts that the case of *Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E.2d 821 (1975) bolsters her position. In that case, a Claimant was awarded benefits for engaging in "good Samaritan" conduct that was not part of his regular duties but was done for the benefit of his

[3] It should be noted that the Court in *Wright v. Bi-Lo* distinguished the cases on which Claimant herein relies: "*Johnson* and *Portee* are easily distinguished. . . . More importantly, the present case establishes the existence of 'clear and explicit' orders repeatedly communicated to Wright and clearly violated by him in the events leading to his death." *Wright v. Bi-Lo*, 314 S.C. 152, 156-57, 442 S.E.2d 186, 189 (Ct. App. 1994) (emphasis added). Further, the Court noted that, "The superficial similarity [in *Howell v. Kash &* Karry] to the present case is not controlling." *Wright v. Bi-Lo*, 314 S.C. 152, 158, 442 S.E.2d 186, 190 (Ct. App. 1994)

Employer ("An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." *Howell v. Kash & Karry*, 264 S.C. 298, 301, 214 S.E.2d 821, 822 (1975)). That case can be distinguished because the Employer therein had not specifically prohibited such actions, and there was no such "good Samaritan" behavior in this case.

Claimant also cites *Portee v. S.C. State Hosp.*, 234 S.C. 50, 106 S.E.2d 670 (1959). This is another pre-1976 case that is distinguishable. The holding in that case relies not on any criteria relevant to the instant analysis, but only upon what is, essentially, what we know as the Personal Comfort Doctrine. The Claimant is *Portee* left his post due to illness, and his injuries were experienced during the time away from his post ("We now turn to the cases involving the right to recover compensation where death or injury results from an effort of an employee while at work to obtain relief from illness or discomfort. *Portee v. S.C. State Hosp.*, 234 S.C. 50, 55, 106 S.E.2d 670, 672 (1959)) ("It would seem clear that the slight deviation by the deceased to obtain medication for his sore throat did not break the chain of employment." *Portee v. S.C. State Hosp.*, 234 S.C. 50, 58, 106 S.E.2d 670, 674 (1959)).

There is a mountain of evidence that the Commission relied upon in this case to find that the Claimant was given clear and explicit instructions not to get on the ladder from which she alleges to have fallen, to wit:

A. TESTIMONY OF LETICIA RODRIQUEZ

Leticia Rodriguez, a co-worker, testified. She testified she was present when Mr. Bitton addressed Claimant's limitations on the day she alleges she was injured: "He was talking to [Claimant]. I was a couple of feet away, so I heard everything. He actually told her not to use the ladder that day." ROA 1781; Tr. Vol. 1, p. 115, ll. 10 – 12. Ms. Rodriguez testified Bitton told

her not to use the ladder "because [Claimant] had the injured foot . . . ." ROA 1781; Tr. Vol. 1, p. 115, l. 15. Ms. Rodriguez testified Bitton told Claimant: "'Do not use the ladder. If you need to get something, tell someone to get it for you' . . . because she had the injured foot already." ROA 1781; Tr. Vol. 1, p. 115, ll. 16 – 19. Ms. Rodriquez testified that, before the alleged fall, Claimant told her that she was already on medication for her foot injury. ROA 1805; Tr. Vol. 1, p. 139, ll. 1 – 6.

Ms. Rodriguez further testified that Bitton did *not* limit his instructions to climbing on the cooler, and that Claimant wasn't to use the ladder for any reason. ROA 1781; Tr. Vol. 1, p. 115, ll. 20 – 23. She testified that Bitton "told me, 'If [Claimant] needs to get anything, you get it for her.' After that, he walked into the other store, and he told the other employees in there as well, 'Do not let [Claimant] use the ladder.'" ROA 1782; Tr. Vol. 1, p. 116, ll. 2 – 5. Ms. Rodriguez testified that Bitton gave clear and explicit instructions to Claimant not to get on the ladder. ROA 1785; Tr. Vol. 1, p. 119, ll. 5 – 7.

After being asked multiple times by Claimant's attorney to recount Bitton's instructions, Ms. Rodriguez further testified:

> Okay. That day Amir [Bitton] told [Claimant] to not use the ladder. He specifically said, 'Do not use the ladder' for the same reason of her foot being injured. 'If you need one of – any – anyone else to get something for you, tell them. After that, he told me 'Did you hear that? I do not want her to use the ladder at all. If she needs to get something to be pulled that involves using the ladder, get it – get it for her. Or if not, call Zach.

ROA 1811; Tr. Vol. 1, p. 145, l. 22 – p. 146, l. 6.

Clearly, Ms. Rodriguez's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

B. TESTIMONY OF ZACHARY EDRI

Claimant called Zachary Edri, a co-worker, to testify. Mr. Edri testified he was working

on Claimant's alleged date of accident. ROA 1828; Tr. Vol. 1, p. 162, ll. 22 – 25. Mr. Edri testified that Mr. Bitton said, "He said that, you know,[Claimant's] foot is injured, and that he doesn't want her to go on the ladder, and that if she needs to go on the ladder, to come get me to go on the ladder." ROA 1829; Tr. Vol. 1, p. 163, ll. 16 – 19. Mr. Edri further testified that Bitton said, "'I've already talked to [Claimant]. I told her not to go on the ladder because of her foot.' So at any point at all today, if she ever needs to go on the ladder or needs to get something up high, for her to come [to] me." ROA 1852; Tr. Vol. 1, p. 186, ll. 21 – 25. Mr. Edri later testified that Mr. Bitton instructed him that, should Claimant need to get something from a height, he was to get it for her so that she does not further injure herself. ROA 1856; Tr. Vol. 1, p. 190, ll. 19 – 23.

Mr. Edri testified that Claimant did not ask him for any assistance with climbing on the day she alleges to have been injured. ROA 1857; Tr. Vol. 1, p. 191, l. 22 – p. 192, l. 1.

Clearly, Mr. Edri's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

C. TESTIMONY OF RAVEN BADEN

Employer called Raven Baden, a co-worker, to testify. Ms. Baden testified she saw Claimant limping during the morning before her alleged accident. ROA 1942; Tr. Vol. 2, p. 9, ll. 18 – 21. Ms. Baden testified that Mr. Bitton "told [Claimant] not to go on the ladder." ROA 1979; Tr. Vol. 2, p. 46, l. 22. She further testified, "He told her not to go on the ladder [and] that she was looking hurt . . . . If she needed any help, [she was] to ask any of us to help her." ROA 1980; Tr. Vol. 2, p. 47, ll. 7 – 10. She testified that Mr. Bitton "came over and told me that if Lynn needed any help, to do it, no questions asked. Or if I needed to go on a ladder, then that's what I had to do, but [Claimant] was not supposed to go on the ladders at all." ROA 1980; Tr. Vol. 2, p. 47, ll. 12 – 16. She further testified that those instructions were given to her because Claimant

was already injured. ROA 1980; Tr. Vol. 2, p. 47, ll. 17 – 19.

Clearly, Ms. Baden's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

D. TESTIMONY OF AMIR BITTON

Employer called Amir Bitton, principal of Employer, to testify. Mr. Bitton testified he was present in the store after Claimant returned from her trip to North Carolina. ROA 1995; Tr. Vol. 2, p. 62, ll. 2 – 3. He testified her foot was wrapped and she told him, "'I hurt myself . . . at the graduation of [my] grandson.'" ROA 1995; Tr. Vol. 2, p. 62, ll. 5 – 12. He testified her observed her limping. ROA 1995; Tr. Vol. 2, p. 62, ll. 13 – 14; ROA 2038 – 2039; Tr. Vol. 2, p. 105, l. 24 – p. 106, l. 1. He testified she told him she was going to take care of the injury by seeing a doctor. ROA 1996; Tr. Vol. 2, p. 63, ll. 2 – 4.

Mr. Bitton testified that, after hearing Claimant moaning in pain while walking, he instructed her, "Okay, please, no climbing, no ladder, no physical work." ROA 1997; Tr. Vol. 2, p. 64, ll. 5 – 9. He further testified he told her, "You've got Zach if you need to climb on the ladder. Go ask Zack, he'll do anything, and there's the rest of the girls for any other chores that you needed to do." ROA 1997; Tr. Vol. 2, p. 64, ll. 15 – 18. He testified the instructions given to Claimant were "strict instructions". ROA 1998; Tr. Vol. 2, p. 65, l. 2. Mr. Bitton further testified he instructed her, "'Do not go on the ladder. Do not.'" ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7.

Mr. Bitton testified he told Letitcia, Zack, and Raven not to allow Claimant get on the ladder. ROA 1998; Tr. Vol. 2, p. 65, l. 23 – p. 66, l. 13.

On cross-examination by the attorney for Fund, Mr. Bitton testified he gave Claimant clear and explicit instructions not to get on the ladder due to the condition of her leg. ROA 2096; Tr.

Vol. 2, p. 163, ll. 3 – 12. Mr. Bitton testified that getting on the ladder that day was not part of her job. ROA 2096; Tr. Vol. 2, p. 163, ll. 13 – 15.

Clearly, Mr. Bitton's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

E. TESTIMONY OF CLAIMANT

Claimant testified. She admits that she was instructed not to get on the ladder; however, she claims the instructions to her were (1) not to get on the ladder to (2) get on the cooler. Her version of events is that she wasn't to get on the cooler, but she was told not to get on the ladder to get on the cooler (rather than simply being told not to get on the cooler). In the light most favorable to the Claimant, she did not understand the instructions. However, that does not make her alleged interpretation reasonable, nor does it make the instructions any less clear and explicit.

Claimant testified that, on the day of her accident, she began her normal work routine. ROA 1714; Tr. Vol. 1, p. 48. She testified Bitton told her, "'*I don't want you on the ladder* to climb on top of the cooler. That's what we have Zack [a co-employee] for.'" ROA 1716; Tr. Vol. 1, p. 50, ll. 1 – 3 (emphasis added). Immediately thereafter and upon questioning from her attorney, she testified Bitton had told her, "'I do not want you on top of the cooler *using a ladder*. That's what we have Zack for.'" ROA 1716; Tr. Vol. 1, p. 50, ll. 11 – 13 (emphasis added). Upon further questioning from her attorney, she later testified that she was specifically told, "*[n]ot to be on top of the ladder* on top of the cooler." ROA 1720; Tr. Vol. 1, p. 54, l. 21 (emphasis added). Again during direct examination by her attorney, Claimant was asked what Bitton had told her about the ladder. She testified he said, "*'I don't want you on the ladder* to get on top of the cooler. That's what we have Zack for." ROA 1739; Tr. Vol. 1, p. 73, ll. 7 – 9 (emphasis added).

Claimant later testified that she was told "[n]ot to be on the ladder to get on top of the

cooler." ROA 1746; Tr. Vol. 1, p. 80, l. 2. Further:

> Q. Okay. So, you could have used the ladder to do anything else but [] get on the cooler; is that right?
>
> A. That's what he told me.

ROA 1746; Tr. Vol. 1, p. 80, ll. 3 – 6.

Claimant testified that she saw some candy bins were low on candy so she (who is "the type of person, if I see something that needs to be done, I'll do it and forget eating lunch or water. Finish that up.") decided to refill them. ROA 1717; Tr. p 51, ll. 10 – 16. Though she had been told to have Zach assist her with the ladder, she "[went] ahead and [got] the ladder like I always have done." ROA 1717; Tr. Vol. 1, p. 51, ll. 18 – 19. Even her own testimony supports a finding that Claimant was prohibited from using the ladder, and that she was well aware of the prohibition.

Claimant argues that the testimony of these witnesses "should be given much less weight and afforded much less probative value as it is hearsay and does nothing to help the Commission understand *what [Claimant] understood her instructions to be*." Brief of Appellant, p. 21. First, any objections to hearsay must be made at the trial level, and no such objections were made. In fact, Claimant's attorney was actually the one who solicited much of the testimony recited above and in the Single Commissioner's Order. Second, the testimony most certainly does establish whether or not the instructions to Claimant were clear and explicit. Assuming, *arguendo*, that Claimant's understanding of the instructions were actually as she testified, her inability to grasp simple instructions should not transform this a compensable accident. Any reasonable employee would have understood that "do not go on the ladder" means "do not go on the ladder."[4] Claimant's purported confusion makes these instructions no less clear.

Claimant argues that the Employer's instructions were "conflicting." Brief of Appellant,

[4] ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7.

p. 21. However, there is not actually any conflicting testimony referenced by Claimant. The witnesses seem to agree that she was told not to get on the ladder.

Claimant's last argument is that, presuming Claimant was instructed not to get on that ladder for any reason, this prohibition only limited the "'conduct of the work[er] within the sphere of [her] employment.'" Brief of Appellant, p. 22. As set out explicitly above, Claimant was not to engage in activity involving the ladder. Thus, the sphere of employment was most certainly limited by Employer: (A) Bitton: "Okay, please, no climbing, no ladder, no physical work." ROA 1997; Tr. Vol. 2, p. 64, ll. 5 – 9. Bitton further testified, "You've got Zach if you need to climb on the ladder. Go ask Zack, he'll do anything, and there's the rest of the girls for any other chores that you needed to do." ROA 1997; Tr. Vol. 2, p. 64, ll. 15 – 18; (B) Rodriguez: "'Do not use the ladder. If you need to get something, tell someone to get it for you' . . . because she had the injured foot already." ROA 1781; Tr. Vol. 1, p. 115, ll. 16 – 19; and (C) Baden: "[Bitton] told [Claimant] not to go on the ladder." ROA 1979; Tr. Vol. 2, p. 46, l. 22. She further testified, "He told her not to go on the ladder [and] that she was looking hurt . . . . If she needed any help, [she was] to ask any of us to help her." ROA 1980; Tr. Vol. 2, p. 47, ll. 7 – 10. Further, Mr. Bitton testified that, on the day of the alleged accident, he told Claimant, "'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.'" ROA 1994; Tr. Vol. 2, p. 61, ll. 13 – 16.

Because Claimant's alleged injuries were suffered when she was engaged in activities that were clearly and expressly prohibited, the Single Commissioner's ruling should be affirmed. Further, the Order of the Single Commissioner should be affirmed.

Accordingly, Respondent UEF respectfully requests that the Commission's judgments be given great weight, and that the Order of the Commission be affirmed.

III. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT THE CLAIMANT CAME TO WORK INJURED ON THE DATE OF ACCIDENT.

Claimant argues that the Commission's Finding of Fact Eight (8)[5] is "mere conjecture" for which "there is absolutely no evidence of record". Brief of Appellant, p. 22. This argument must be rejected, as there is a plethora of evidence of record that Claimant was suffering from an injury when she came to work on the alleged date of accident. Important to this analysis is the fact that Commission did not find that the Claimant's current condition is the same injury Claimant suffered she suffered prior to the date of accident. The Commission did not find that her current condition pre-existed the date of accident; this was not the basis of the denial. The Commission made this finding simply to explain why Claimant was prohibited from getting on the ladder. Claimant's arguments citing *Burnette v. City of Greeneville*, 401 S.C. 417, 737 S.E.2d 200 (2013) are irrelevant, as the Commission did not make a finding that Claimant's current condition is a preexisting condition. The Commission's finding only reflects the fact, as it found it, that Claimant came to work on the subject date with an injured foot, in union with the reliable testimony of witnesses.

The more than substantial evidence supporting this finding is based on the testimony, to wit:

A. TESTIMONY OF LETICIA RODRIGUEZ

Ms. Rodriguez testified that, "[Claimant] has actually gone on vacation before [the day she alleged her fall] to visit family, and when she came back, she came back with like an injured, you know, foot. She told us that she had dropped a table on it, and that's the injury she did have."

[5] "That the Claimant suffered an injury to the left leg prior to June 16, 2018, and she was suffering from this injury prior to her alleged fall. This finding is supported by the witness testimony and comports with the admitted instructions given to her not to climb the ladder."

ROA 1780; Tr. Vol. 1, p. 114, ll. 10 – 14. She further testified that Claimant's foot was wrapped upon returning to work. ROA 1780; Tr. Vol. 1, p. 114, ll. 16 – 17.

B. TESTIMONY OF ZACHARY EDRI

Claimant's attorney asked Mr. Edri about his prior deposition testimony that Claimant told him she injured her foot in North Carolina. He asked Mr. Edri what Claimant told him about that, and he replied, "She told me she dropped a table on her foot." ROA 1821 – 1822; Tr. Vol. 1, p. 155, l. 24 – p. 156, l. 4. Mr. Edri testified he was working on Claimant's alleged date of accident. ROA 1828; Tr. Vol. 1, p. 162, ll. 22 – 25. Mr. Edri testified that Mr. Bitton said, "He said that, you know, Lynn's foot is injured, and that he doesn't want her to go on the ladder, and that if she needs to go on the ladder, to come get me to go on the ladder." ROA 1829; Tr. Vol. 1, p. 163, ll. 16 – 19.

C. TESTIMONY OF CHRISTINE SWEETING

Employer called Christine Sweeting, a former co-worker of Claimant's, to testify. Ms. Sweeting was no longer employed by Employer. She was asked whether she had a recollection of whether or not Claimant was injured upon returning from North Carolina. ROA 1912; Tr. Vol. 1, p. 246, ll. 17 – 18. Ms. Sweeting flatly testified:

> She was injured. She had a black boot on her foot. I asked her what happened, and she also had an ACE bandage wrap. The black boot was there for maybe a couple of days, but then she just wore her flip-flops for the ACE bandage, and I asked her what happened. She said that while she was in North Carolina, they were moving a table, a foldable table I guess, and it must have slipped or something, and it fell on her foot, so . . .

ROA 1912 – 1913; Tr. Vol. 1, p. 246, l. 19 – p. 247, l. 2.

Ms. Sweeting further testified that Claimant did not get better, and that "[s]he was hobbling around . . . and she was always limping around and stuff, and we never really wanted her to do much." ROA 1913; Tr. Vol. 1, p. 247, ll. 8 – 12.

The only apparently contrary testimony on this issue came from Elizabeth Anne McAldine and Charles "Chuck" Earley. Mr. Earley is Claimant's live-in "long-time companion" and Ms. McAldine is his daughter. ROA 1901; Tr. Vol. 1, p. 235, l. 17 – 21.

Ms. McAldine's testimony was objected to by Employer, as she was not timely listed on Claimant's Pre-Hearing Brief. ROA 1900; Tr. Vol. 1, p. 234, ll. 14 – 24; ROA 1906 – 1907; Tr. Vol. 1, p. 240, l. 4 – p. 241, l. 12. She was allowed to testify, and she testified she took the picture that became Exhibit 5. ROA 1903; Tr. Vol 1, p. 237, ll. 12 – 21. She testified, "That's [Claimant] laying on her beach chair." ROA 1904; Tr. Vol. 1, p. 238, l. 4. She testified that her father (Mr. Earley) lives with Claimant. ROA 1909; Tr. Vol. 1, p. 243, ll. 2 – 6. She testified that she is from Ohio, and she takes the opportunity to visit Hilton Head at least once a year (sometimes more) and that she visits with Claimant and her father. ROA 1909; Tr. Vol. 1, p. 243, ll. 4 – 12.

Mr. Earley was also asked about Exhibit 5 by Claimant's attorney. Initially, he testified he did not even recognize himself in the picture. ROA 2113; Tr. Vol. 2, p. 180, ll. 10 – 13. He later testified that the picture showed Claimant with "a foot pad on". ROA 2113; Tr. Vol. 2, p. 180, l. 21. He testified that a "foot pad" is "like a pill." ROA 2113; Tr. Vol. 2, p. 180, l. 23.

He testified that his income and Claimant's comprise the entirety of their household income. ROA 2123; Tr. Vol. 2, p. 190, ll. 9 – 15.

IV. THE SINGLE COMMISSIONER CORRECTLY DETERMINED THE CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

The Commission determined Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) to be $368.80 and $245.88, respectively. ROA 45; Order, Finding of Fact Seven (7), p. 11. Claimant has appealed this finding, alleging she was paid unreported cash, and citing the so-called "schedules" which did not reflect actual time worked (a point attempted to be made *ad nauseum* at the hearing) and downplaying the actual records included in Exhibit M (Pay Records).

At the hearing, Claimant failed to articulate or propose any numbers to be used for her AWW and CR. Claimant was given the opportunity after the hearing to produce her income tax records. She failed to do so despite a lawful subpoena issued to her for the same.[6] However, Claimant testified she failed to pay income taxes on any of the alleged cash payments received from Employer. ROA 1704; Tr. Vol. 1, p. 38, ll. 13 – 15; ROA 1746; Tr. Vol. 1, p. 80, ll. 14 – 17.

Further, Claimant missed work due to her unrelated eye illness and for other reasons; Claimant voluntarily quit her employment for some period of time during 2018; and the Employer's work is seasonal, as it closes for months during the off-season. The Claimant placed a significant emphasis on the schedule (Claimant's Ex. No. 1). However, the greater weight of the evidence establishes that the schedule (Claimant's Ex. No. 1) did not actually or accurately reflect the number of hours worked by any employee. Further, the greater weight of the evidence is that Employer did not pay Claimant or any other party with payments under the table.

The only corroborating evidence Claimant can cite comes from the testimony of Jamie Willard Hudson, who testified that Employer fired her stealing cash from Employer. ROA 1891;

[6] ROA 44; Order, Finding of Fact Four (4), p. 10: "The record was left open for two (2) weeks following the hearing so that Claimant could produce her 2016, 2017, and 2018 tax returns and related documentation, which was under subpoena from Employer. However, Claimant failed to timely produce this information."

Tr. Vol. 1, p. 225, l. 17. Further, *Ms. Hudson is or was a client of Claimant's attorney (Mr. Coggin) in another matter and for which Claimant's attorney did not charge her a fee.* ROA 1875; Tr. Vol. 1, p. 209, ll. 14 – 16; and ROA 1898 – 1899; Tr. Vol. 1, p. 232, l. 23 – p. 233, l. 3. While the undersigned is not accusing Mr. Coggin of anything untoward, the circumstances giving rise to Ms. Willard's testimony are elucidating. Nevertheless, Ms. Hudson testified that she only worked forty (40) hours per week, half of which was paid in cash. ROA 1871; Tr. Vol. 1, p. 205, l. 17 – p. 206, l. 4. This does not comport with Claimant's apparent theory that payments beyond forty (40) hours per week were made in cash to avoid overtime payments.

Mr. Bitton testified that Employer did not ever pay its employees in cash. ROA 1727; Tr. Vol. 2, p. 61, ll. 7 – 9. Mr. Edri, who wasn't paid by the hour, testified he received some money directly from Mr. Bitton (not from Employer) ("Like, you know, he's family to me. He gave me a little 50 bucks here and there." ROA 1819; Tr. Vol. 1, p. 153, l. 25 – p. 154, l. 1.). When asked if he paid Mr. Edri cash, Mr. Bitton testified, "I usually – [Mr. Edri] comes to my house every weekend almost with his – with his dad, and so I always give him like – you know, he goes out, I give him fifty, a hundred bucks, go to the movies, whatever. Just like – you know, like family, but I took care of him this way." ROA 1994; Tr. Vol 2., p. 61, ll. 17 – 22. Ms. Baden testified she was paid by check every two (2) weeks for thirty (30) hours of work per week. ROA 1963; Tr. Vol. 2, p. 30, ll. 2 – 8 ("I got a paper check").

Claimant relies heavily on Claimant's Exhibit 1, which she called a schedule. While Claimant testified the "schedule" showed the actual hour each employee worked, not one of the other witness testified that was the case. It was Claimant's testimony that she worked up to ninety-eight (98) hours per week. ROA 1689; Tr. Vol. 1, p. 23, ll. 9 – 11. Claimant testified she

"probably" worked eighty (80) hours per week during the tourist season. ROA 1705; Tr. Vol. 1, p. 39, l. 24 – p. 40, l. 1.

Claimant further testified she worked "maybe" a hundred and sixty-eight (168) hours over the two (2) weeks preceding April 18, 2018. ROA 1703; Tr. Vol. 1, p. 37, ll. 10 – 14.

Claimant also testified that the work was seasonal: "Now, the winter, we would cut back on our hours" and she agreed that she worked fewer hours in the winter than during the high season. ROA 1744; Tr. Vol. 1, p. 78, l. 24 – p. 79, l. 16.

Other witnesses testified about Exhibit 1. Mr. Edri was questioned by Claimant's attorney about the hours shown on the schedule.[7] See entire testimony of Mr. Edri. To wit,

> Q. Okay. Do you agree, Josh, after we've gone through this that in fact – Zack, I'm sorry. After we've gone through this that you worked a lot more than the thirty hours a week that you claimed to have worked earlier?
>
> A. *No, 'cause this is a schedule.*
>
> Q. And you agree, Zack – and *I don't believe your story* that you were paid [in merchandise] ---

ROA 1848; Tr. Vol. 1, p. 182, ll. 4 – 11 (emphasis added). Mr. Edri further testified that the hours shown on the schedule do not accurately reflect the hours worked by employees of Employer. ROA 1854; Tr. Vol. 1, p. 188, ll. 13 – 16. He testified he actually worked fewer hours than shown on the schedule. ROA 1854; Tr. Vol. 1, p. 188, ll. 17 – 19.

Ms. Baden was also asked about Claimant's Exhibit No. 1. Ms. Baden testified that she did not actually work the number of hours shown on the schedule. ROA 1956 – 1958; Tr. Vol. 2, p. 23, l. 1 – p. 25, l. 23; ROA 1961 – 1962; Tr. Vol. 2, p. 28, l. 4 – p. 29, l. 23; ROA 1963 – 1968; Tr. Vol. 2, p. 30, l. 25 – p. 35, l. 3. "The schedule's a guideline," she testified. "If we're not busy,

[7] "And according to your schedule, you would work 580 hours; is that right?" ROA 1859; Tr. Vol. 1, p. 193, ll., 19 – 20.

then some of us get to go home earlier. This is just kind of a guideline." ROA 1958; Tr. Vol. 2, p. 25, ll., 21 – 23. Nevertheless, Claimant's attorney continued the line of questioning:

Q. Okay. But this is you're scheduled to work; is that correct?

A. That is what I'm given, but it doesn't mean I work it.

ROA 1959; Tr. Vol. 2, p. 26, ll. 5 – 8.

Ultimately, Ms. Baden testified as follows:

Q. This schedule you were asked about, it's fair to say that it does not accurately and truly reflect the hours you actually worked, correct?

A. Yes.

ROA 1979; Tr. Vol. 2, p. 46, ll. 6 – 9.

Regarding the schedules and the number of hours worked, Mr. Bitton testified consistent with the others that employees do not work all of the hours shown on the schedules. ROA 2007; Tr. Vol. 2, p. 74, ll. 17 – 19. He testified the schedules are only times that the employees should be available to work. ROA 2008; Tr. Vol. 2, p. 75, ll. 3 – 6. He testified that the schedules are generally disposed of when a new schedule is posted. ROA 2008; Tr. Vol. 2, p. 75, ll. 13 – 18. On cross-examination by Claimant's attorney, Mr. Bitton testified that the schedule does not represent the hours the employees were actually supposed to work, it only represents their availability. ROA 2011; Tr. Vol. 2, p.78, ll. 10, ll. 10 – 18; ROA 2013 – 2017; Tr. Vol. 2, p. 80, l. 2 – p. 84, l. 10; ROA 2040; Tr. Vol. 2, p. 107, ll. 8 – 108, l. 1; ROA 2042 – 2043; Tr. Vol. 2, p. 109, l. 21 – p. 110, l. 10.

Claimant finally argues that there "is no indication that [Employer] kept any record of cash payments", and Claimant argues that Employer's "failure to produce such records" . . . should lead "to an adverse inference against Employer." Brief of Appellant, p. 29. However, Employer maintains that it did not pay its employees in cash; therefore, there would be no records to produce.

Because Claimant's AWW and CR were calculated in a manner that's fair and equitable to all parties and is supported by the evidence, the Single Commissioner's ruling should be affirmed. Further, the Order of the Single Commissioner should be affirmed.

Nevertheless, this Court need not address this issue because the Claimant failed to prove compensable injuries. *By Hossenlopp v. Cannon,* 285 S.C. 367, 329 S.E.2d 438 (1985).

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent UEF respectfully requests that this Honorable Court affirm the Decision and Order of the South Carolina Workers' Compensation Commission in full.

RESPECTFULLY SUBMITTED,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO. 1808344

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents

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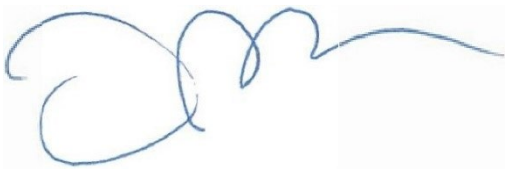
CERTIFICATE OF COUNSEL

I hereby certify that the Respondent South Carolina Workers' Compensation Uninsured Employers' Fund's Final Brief complies with Rule 211(b) of the SCACR.

January 19, 2023



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