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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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arose out of a workplace incident in which the Claimant (hereinafter, "Ms. Bridges") sustained a tibial plateau fracture of the left leg after falling from a ladder at work on June 16, 2018. Ms. Bridges filed a Form 50 claiming injury to her left leg and her employer denied the claim. The claim was set for a hearing before the hearing Commissioner in Yemassee, South Carolina on July 24, 2019, and in Port Royal, South Carolina on July 26, 2019. At the hearing, the Claimant sought a determination of compensability for the injury to her left leg, which occurred as a result of her workplace accident. Claimant sought payment for past medical treatment, additional medical treatment and temporary total disability benefits from June 16, 2018, until such time as she reached maximum medical improvement.

At the hearing, the parties stipulated that the Employer was at all times relevant to this action, subject to the terms and provisions of the South Carolina Workers' Compensation Act (hereinafter, "the Act"). Employer admitted that the Claimant was, at all times relevant to this

action, an employee for purposes of the Act. The South Carolina Uninsured Employer's Fund (hereinafter, "UEF") was added as a party to this action because the Employer was not insured at the time of the Claimant's workplace accident. The employer and UEF asserted that the Claimant was acting outside the scope of her employment at the time of her workplace injury and in the alternative that her injuries did not arise out of her employment or were related to her employment.

The Employer and UEF contended that the Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) were $354.62 and $236.43, respectively. The Claimant asserted that her AWW and CR should include all amounts paid to her by her employer, including payments by check and cash, and taking into account her full schedule as listed in Claimant's Exhibit 1, resulting in a much higher AWW and CR.

In her Decision and Order, dated January 27, 2021, the Commissioner found and ordered *inter alia* as follows:

> 1. The Employer, Harbour Town Surf Shop, LLC was subject to the terms and provisions of the Act by stipulation and by regularly employing four (4) or more employees in South Carolina.
>
> 2. The Claimant was an employee of Employer, Harbour Town Surf Shop, LLC;
>
> 3. 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.
>
> 4. Claimant did not articulate a clear way to calculate her AWW and CR: Claimant failed to produce her income tax records; during the year preceding the quarter in which the injury allegedly occurred, 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 did place a significant emphasis on the schedule (Claimant's Ex. 1). However, the greater weight of the evidence is that Employer did not pay Claimant or any other party with payments under the table. This finding is supported by the testimony.

5. Claimant's Average Weekly Wage and Compensation Rate shall be based on the actual numbers as reflected in Employer's APA Submissions. This finding is supported by the testimony, the APA Submissions, and the witnesses, including Sweeting and Rodriguez, whom I find to be the most impartial witnesses.

6. The Claimant's Average Weekly Wage and Compensation Rate are $368.80 and $245.88, respectively.

7. 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.

8. That Claimants Exhibits No. 3 and 5 are not dispositive of anything and do not lend credibility to Claimant's arguments. The picture of Claimant and her grandson at his graduation is, by all accounts, temporarily prior to either the table incident and the alleged ladder incident. The picture of Claimant at the beach is blurry and doesn't show anything instructive on the issues.

9. That the greater weight of the evidence supports a finding that Claimant did not fall from the top step of the ladder, as she testified. The evidence provides that the Claimant would not need to be standing on the top step of the ladder to reach the items for which she claimed to be reaching. The EMS report reflects that, at the time of the alleged accident, Claimant reported she fell from a lower step.

10. Whether the Claimant suffered an injury in the scope of employment is the burden of the Claimant, and it must be proven by the greater weight of the evidence. Here, Claimant failed to meet her evidentiary burden.

11. Mr. Bitton, as owner of Employer, gave clear and explicit instructions to Claimant not to climb on the ladder on June 16, 2018. The testimony of Christine Sweeting, Leticia Rodriguez, Zachary Edri, Raven Baden, and Amir Bitton support this finding. Even the testimony of the Claimant supports this finding, though she qualified the instruction in her testimony as instructions not to climb the ladder to get on top of the cooler.

12. 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. Here, the greater weight of the evidence establishes Clamant left the sphere of her employment by violating the specific orders not to climb the ladder.

13. Because Claimant's alleged injuries were not suffered in the scope of her employment, the Claimant was not injured by accident arising out of and in the course and scope of her employment on June 16, 2018.

14. The Fund timely filed a Form 51 in this matter, preserving its opportunity to plead and argue affirmative defenses.

15. Regardless of the foregoing Finding that the Fund timely filed a Form 51, preserving its opportunity to plead and argue affirmative defenses, whether the Claimant was injured in the course of employment is Claimant's burden to prove by the preponderance of the evidence and is not an affirmative defense.

16. Under 42-1-40, the Claimant's average weekly wage is $747.60 with a corresponding compensation rate of $491.76 per week.

17. Under *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), the Claimant was outside of the scope of her employment at the time she alleges to have suffered her injuries.

Based upon these findings, the Commissioner concluded that the Claimant's claim for benefits under the Workers' Compensation Act based on the alleged injury by accident was denied and the Commissioner assessed no hearing costs. The Claimant timely filed a Form 30 appealing the Decision and Order of the Single Commissioner. A hearing was held before the Appellate Panel of the Full Commission on January 24, 2022, and thereafter, the Appellate Panel issued a Decision and Order, on April 19, 2022, fully affirming the decision of the Single Commissioner. Claimant timely filed a notice of appeal.

STATEMENT OF THE FACTS

This claim arose out of Claimant's workplace accident with Employer on June 16, 2018. The Claimant, Ms. Naomi Lynn Bridges, was employed with the Employer's predecessor company since 2012 and had worked at the business until January 2018, when she quit working due to her health issues unrelated to her employment. R at 1754 - 1755. She testified that she returned working for the Employer in March 2018 until the date of her accident. R. at 1760. Ms. Bridges

testified that her job duties with the employer, the Harbour Town Surf Shop, were to "wait on customers, keep the store clean, put out inventor, price inventory . . . [and] assist with the employees." R. at 1683, ln. 20 - 21. Ms. Bridges further testified that she would typically work from 7:30 a.m. to 10:00 p.m. R. at 1684, ln. 1 – 9. It was her testimony that she worked as much as fourteen to sixteen hours per day and that she worked up to seven days per week. R. at 1685, ln. 6 – 15. Ms. Bridges testified that she would work "80 hours per week plus." R. at 1685, ln. 10. At the hearing, Claimant's attorney submitted Claimant's Exhibit 1, which Ms. Bridges testified was the work schedule for the week, April 9, 2018, to April 15, 2018, and that being the week of the Heritage Golf Tournament, she would have been there the entire week and worked 98 hours. R. at 22 – 23. Ms. Bridges further testified that per Claimant's Exhibit 2, a pay stub for the period between April 5, 2018, and April 18, 2018, that she was paid $960.00. R. at 1702, ln. 15 – 21. However, Ms. Bridges testified she actually worked around one hundred and sixty-eight (168) hours over that two (2) week period. And that she was paid $960 by check and an additional $1,056.00 in cash from her employers. R. at 1703 – 1704.. At the time of her accident, Ms. Bridges testified that she was being paid $13.00 per hour. R. at 1694, ln. 13 – 16.

Ms. Bridges testified that on the date of the accident, June 16, 2018, she began her normal work routine, which consisted of getting the newspapers, starting the coffee, counting the safe, icing down the coke machine, and making sure "everything is done before the store is ready to go" before the shop was open for customers. R. at 1714, ln. 10 – 22. She testified that on the date of her accident she was walking around bringing out inventory, cleaning and getting prepared for the following week. R. at 1715. She then stated that she saw Amir Bitton, one of the owners of the Employer, who told her "I don't want you on the ladder to climb on top of the cooler. That's what we have Zack for." R. at 1716. Ms. Bridges testified that sometime later, she noticed that the

candy bins were low on candy, and that the store kept some in wicker baskets above where she could reach. R. at 1717, ln. 10 – 12. She further testified that because "I'm the type of person, if I see something that needs to be done, I'll do it and forget eating lunch or water" and because she "noticed that Zack was already back in the Surf Shop" she got the ladder like she had "always" done to "bring a box of candy down, put it on the cart." *Id.*, ln. 12 – 22. She testified that as she was coming down the ladder, she slipped or missed a step, falling and injuring her leg. R. at 1718. Per Claimant's Exhibit 4, a photo of the ladder she climbed and the area where she fell, Ms. Bridges testified that candies that she was reaching for were on the top shelf and that she fell on her way down the ladder. R. at 1718 - 1719. Ms. Bridges further testified that she would typically get candy form that shelf to put onto the candy rack at least once a week. R. at 1719, ln. 20 – 25. On cross examination, Ms. Bridges testified and indicated referring to the Claimant's Exhibit 4, that she fell from the second step from the top of the ladder. R. at 1719, ln. 13 – 18.

Later in her testimony, referring to Claimant's Exhibit 5, Ms. Bridges identified the exhibit as a picture of her at the beach, dated June 15, 2018, the day immediately before her injury, with her legs shown with no wraps or bandages. R. at 1769. She also testified that she walked on the beach that day. R. at 1770. She previously stated that despite employer allegations, she had not been injured the weekend immediately prior to her workplace injury, while visiting family and attending her grandson's graduation in North Carolina. R. at 1710 - 1712. She also testified that her leg was not injured prior to her workplace injury on June 16, 2018. R. at 1724, ln. 10 – 13. In further cross-examination, Ms. Bridges clarified that she never told the EMS that she fell from the last wrung of the ladder, and that she was trying to tell them she fell from near the top of the ladder. R. at 1772, ln. 1 – 8.

Leticia Rodriguez

Leticia Rodriguez testified that she was the manager of the store in June 2018 and was in the store when Ms. Bridges was injured. R. at 1778 - 1779. Ms. Rodriguez testified that "[Ms. Bridges had] actually gone on vacation before [her workplace injury] to visit family and when she came back, she came back with like an injured, you know, foot. She had told us that she had dropped a table on it, and that's the injury she did have." R. at 1780, ln. 10 – 14. Ms. Rodriguez also testified that Ms. Bridges "had something wrapped around her foot, and that's all I remember" *Id.*, ln. 16-17.

Ms. Rodriguez testified that she was present when Mr. Bitton had a discussion with Ms. Bridges, that he overheard him talking to her and that he told her not to use the ladder. R. at 1781. She further testified that she overheard him say "Do not use the ladder. If you need to get something, tell someone else to get it for you." *Id.*, ln. 15 – 17. She also claimed that Mr. Bitton told her that "If Lynn needs to get anything, you get it for her." R. at 1782, ln. 1 – 5. Oddly, Ms. Rodriguez testified in response to questions by attorney for the Employer that she had spoken to counsel for Claimant on a prior occasion but told him that she "was already a witness for someone else." R. at 1783, ln. 19 – 20. Ms. Rodriguez further testified that it was her foot that was wrapped and could not remember which foot. R. at 1803, ln. 14 – 21. Ms. Rodriguez testimony was that Ms. Bridges was prohibited from using the ladder just that one day of her accident and that it was just Ms. Bridges that was allegedly prohibited from using the ladder. R. at 1812 - 1813.

Zach Edri

Zachary Edri, a co-employee of the Claimant's, testified that he was paid by the hour, that he worked about 30 hours per week for Mr. Bitton, that he received cash under the table, or out of Mr. Bitton's pocket for the work he performed, and that Mr. Bitton was like family to him. R. at

1819. He also testified that he was paid in merchandise from the store for his work there. R. at 1820. When questioned about his work hours and pay and responding to a subpoena for his pay stubs, Mr. Edri stated that he did not bring them to the hearing pursuant to subpoena by Claimant's counsel. R. at 1846 - 1847. Mr. Edri testified that he worked fewer hours than shown on the schedule. R. at 1854, ln. 17-19.

Mr. Edri further testified that Claimant told him she injured her foot in North Carolina and that she dropped a table on her foot. R. at 1821. He testified that he was told that it was a plastic folding table that fell on her. R. at 1822, ln. 23 – 25. Mr. Edri testified that he was working on the date of Ms. Bridges' workplace accident. R. at 1828, ln. 22 – 25. He further testified that Mr. Bitton said that "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." R. at 1829, ln. 16 – 19. He also stated that Mr. Bitton only instructed him to do that for that day only. *Id* ln. 20 – 25.

Jamie Willard Hudson

Jamie Hudson testified that she worked for the employer for about a year. R. at 1870, ln. 8. She testified when asked by Claimant's counsel about her Employer withholding funds from her last paycheck, she stated that it was because she had taken money out of the register and taken chips and drinks from the store. R. at 1891, ln. 17. She admitted that she was fired for stealing.

However, Ms. Hudson testified that she worked forty hours per week and was paid half of her earnings, in cash and half by check. R. at 1871 - 1872. She testified that her employer did not pay her over time. While she testified that she worked for Employer when Claimant was injured, she stated that she was on the beach when she was informed of the incident via telephone R. at 1872, ln. 20. She also testified that she never spoke with Claimant about how the accident took place. R. at 1887, ln. 21 – 23. She further testified that others at the Claimant's workplace such

as Raven Baden and another employee named "Patricia" were telling rumors that Ms. Bridges was injured on purpose to get money, but that she didn't believe these stories had any basis in fact because of the severity of Ms. Bridges injury. R. at 1873. She further attested to Ms. Bridges' honesty among other workers of Employers, especially considering that the other employees would steal from Employer and she would not. R. at 1874. Ms. Hudson also testified that Zack told her he was going to lie in his testimony. R. at 1881, ln. 15. She also testified that Zack told her that if she knew what was good for her, she would not "get up there [in court] and say those things," and that "Amir said he was going to make your [her] life a living hell." R. at 1882, ln. 19 – 24.

Elizabeth Anne McAldine

Ms. McAldine testified that she was the daughter of Ms. Bridges' longtime companion Chuck early. R. at 1901, ln. 17 – 21; R. at 1908, ln. 21 – 23. Ms. McAldine testified that she spent the week prior to the alleged accident, from June 8, 2018, to June 16, 2018, with Ms. Bridges, and that she was in good physical condition at that time and did not have any kind of impediment when walking. R. at 1902, ln. 7 – 22. Ms. McAldine testified that she took the photograph of Claimant dated June 15, 2018, submitted as Claimant's Exhibit 5, which she stated shows Claimant "laying on her beach chair." R. at 1903, ln. 21; ln. 4.

Christine Sweeting

In Employer's case in chief, Employer called Christine Sweeting to testify, who stated that she was a co-worker with Claimant for Employer, but that she no longer worked for Employer. R. at 1911. She testified that Ms. Bridges took a vacation to North Carolina for almost a week and that when she returned from vacation she was injured and "had a black boot on her foot . . . and an Ace bandage." R. at 1912, ln. 19 – 21. Ms. Sweeting testified that Claimant told her "that while

she was in North Carolina, they were moving a table . . . and it fell on her foot" R. at 1912 – 1913. She testified that she was not at the store the day the accident happened. R. at 1913, ln. 15.

Zach Edri (Rebuttal)

The Employer recalled Zach Edri to testify. Mr. Edri testified that he never threatened Ms. Hudson or attempted to influence her testimony.

Raven Baden

At the beginning of the second day of hearing in this matter, the Employer called Raven Baden who testified that she worked for employer from March of 2017 to February of 2019, and that she was working at the time of Ms. Bridges workplace accident. R. at 1939. Ms. Baden testified that during the week that she was injured, Ms. Bridges "came back on that Monday from North Carolina, and she was limping. She had a black boot on. She took it off every once in a while and she had like an Ace bandage around her foot." R. at 1950 - 1953, ln. 17 – 20. She further stated that Ms. Bridges was limping during the morning before her alleged accident. R. at 1942, Ln. 18 – 21. While she testified that she did not see Ms. Bridges fall, she stated that after the fall, she asked Ms. Bridges how far she fell, and she testified that Ms. Bridges pointed to the bottom step. R. at 1947.

On cross examination by Claimant's counsel, Ms. Baden testified she was paid by check every two weeks for thirty (30) hours of work per week. R. at 1954, ln. 22 – 23; R. at 1963, ln 2 – 8. She testified that she never worked "40, 50, 60 hours," for Employer. R. at 1955, ln. 6 – 7. Upon cross-examination by counsel for the UEF, Ms. Baden testified that Mr. Bitton told Ms. Bridges not to go on the ladder, "she just needed to be behind the counter. If she needed any help, to ask us to help her." R. at 1980, ln 7 – 10. She also 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 she was not supposed to go on the ladders at all." *Id.*, ln. 12 – 16. She further testified that those instructions were given to her because Claimant was already injured. *Id.*

Amir Bitton

Amir Bitton, along with Alon Mentz, is an owner of the Employer. Mr. Bitton testified that he and Alon Mentz had several businesses under one umbrella – Island Republic, Harbour town, Harbour Town Two, Treasure Island, Neptune Beach, and a tattoo shop. R. at 2017 - 2018. He testified that the Harbour Town Surf Shop usually closes for two months during the winter. Tr. R. at 1988, ln. 23. He testified that in July 2016, he and his business partner purchased the "general store facility . . . and in 2017, actually, we operated as one big entity." R. at 1987. Mr. Bitton testified that Claimant quit in January of 2018 for personal health reasons but that she came back to work for Employer, two months later. He further testified that Ms. Bridges did not work as much as she claimed in 2017, and that the Employer did not ever pay its employees in cash. R. at 1993.

Mr. Bitton testified that he was present in the store after Claimant returned from her trip to North Carolina, that her foot was wrapped, and she told him "I hurt myself." R. at 1995. He testified that he "saw her a few times that week" prior to the accident. R. at 1996, ln. 8 – 9. He testified that on the date of the accident he heard her "making noise from hurting" and told her "Okay, Please, no climbing, no ladder, no physical work." R. at 1997, ln. 5 – 9. He further testified that 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." *Id.*, ln. 15 – 18. Mr. Bitton testified that he told Letitia, Zach, and Raven not to allow Claimant to get on the ladder, telling Zach that if Ms. Bridges needed anything that he should do it." R. at 1998 - 1999. After Ms. Bridges workplace accident Mr. Bitton testified that Raven or Letitia called him and

said that one of them told him "we were busy. We didn't pay attention. She just went ahead and did it." R. at 2000, ln. 1 -2.

When asked regarding the schedules and number of hours worked, Mr. Bitton testified that the employees do not work all of the hours shown on the schedules, testifying that the schedules are only times that the employees should be available to work. R. at 2007 - 2008. When asked by Claimant's counsel whether Mr. Bitton believed that Ms. Bridges' injuries that she sustained took place on the Saturday when she fell from the ladder or if they took place the week before when she was in North Carolina, Mr. Bitton stated "I'm not sure where they took, but I don't think it happened at my place." R. at 2019, ln. 5 – 12. Mr. Bitton agreed that there was "speculation . . . that Ms. Bridges hurt her leg when she was in North Carolina." R. at 2038, ln. 20 – 23.

In cross-examination by counsel for Claimant, Mr. Bitton admitted that he did not have workers' compensation insurance at the time of Ms. Bridges accident and claimed that "the majority of his businesses" weren't subject to the act. R. at 2036. In further cross examination, by Claimant's counsel, Mr. Bitton was asked if Mr. Bitton had said or testified in his deposition "Zack, you're the guy here. You're my family. Make sure no girls go on the ladder. Especially, Lynn," to which Mr. Bitton agreed. R. at 2101. He also later agreed that he stated on the date of Ms. Bridges workplace accident that he told his employees "no girls go on the ladder" and only for that date. R. at 2102. Despite his testimony that he specifically told Ms. Bridges not to get on the ladder, Mr. Bitton told Claimant's counsel during the hearing that he never saw her on the ladder. Tr. R. at 2103, ln. 9.

Charles "Chuck" Earley

Claimant called Chuck Earley as a rebuttal witness, who testified that he was Claimant's "significant other." Mr. Earley testified that Claimant worked close to 80 hours per week. Vol.

2120, ln. 7. He also testified that Claimant "[r]arely if ever" took time off from work. R. at 2121, ln. 9. He further testified that he had no knowledge of Ms. Bridges missing work due to her eye illness, as he did not keep her schedule and they were both working. R. at 2125, ln. 16 – 24.

Medical Evidence

Claimant submitted nearly 1500 pages of medical records as part of her APA Submissions. EMS arrived at the scene on June 16, 2018, at 15:27:55. R. at 67. EMS noted "Pt. states she was on a step ladder and while coming down she missed the last step and fell to the ground." R. at 75. Ms. Bridges was thereafter taken to Hilton Head Hospital, where she would be under in-patient care until June 26, 2018. Notes from the Emergency Department state that Ms. Bridges presented with a "***Knee Injury – Major***" and state that she "developed sudden onset of dull constant nonradiating severe pain to her ***left knee*** after she fell coming off of a ladder at work just prior to arrival." (emphasis added) R. at 436. Notes from her Hilton Head Hospital June 17, 2018, state that her chief complaint was "***Left knee***, lower leg pain" (emphasis added). R. at 363. They further note:

> Patient is a 58-year-old woman who was at work on a ladder bringing something down, thought she was on the last rung of the ladder, but was not, fell injuring her left lower extremity. She was brought through EMS to the Emergency Room and she was found to have a tibial plateau fracture. She is complaining of significant pain of the left lower extremity. Denies any other injuries. R. at 363.

X-rays revealed a displaced comminuted proximal tibia plateau fracture with involvement of both the lateral and medial condyle with displacement. R. at 364. An x-ray of the knee also revealed a fracture of the fibular neck. R. at 535. J. Robert Gavin, MD, provided a diagnosis of bicondylar comminuted depressed left tibial plateau fracture. R. at 364. Dr. Gavin later noted that Ms. Bridges suffered from a Schatzker type 5 tibial plateau fracture. On June 20, 2018, Ms. Bridges

underwent a complex open reduction and internal fixation of Schatzker type 5 extremely comminuted bicondylar left tibial fracture, which was performed by Joseph Tobin, MD. R. at 454.

Upon discharge from Hilton Head Hospital on June 26, 2018, she was transferred to a skilled nursing facility, Encompass Health, where she remained for physical rehab until July 4, 2018. Ms. Bridges established care with Dr. Tobin on July 5, 2018, after her discharge from Encompass. She was also provided home health care by Kindred at Home from July 7, 2018, through August 31, 2018.

Notes from Dr. Tobin's Office dated September 6, 2018, state she was complaining of swelling in her left foot and was concerned whether there had been some fractures in her foot or ankle. However, x-rays taken of the left foot and ankle were negative for any fractures. R. at 1279. September 11, 2018, notes from Dr. Tobin's office state that she had an open wound from her operation site, that may require a wound vac. He also recommended that once the tibia healed, that she should plan for a total knee replacement. R. at 1214.

Pay Records

Employer submitted Claimant's 2018 W-2, which shows that she earned $6,450.00 from Employer, and submitted paystubs into evidence. The paystubs only note what was paid by check to Ms. Bridges and not the cash that she testified she was paid.

STANDARD OF REVIEW

The standard for judicial review of decisions rendered by the South Carolina Workers' Compensation Commission is provided by the Administrative Procedures Act ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, an appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant 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 within the entire record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010)(citing S.C. Code Ann. § 1-23-380(5)(d),(e)). The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact but may reverse if the decision is affected by an error of law. Moreover, the general policy is to construe the Workers' Compensation Act in favor of coverage rather than exclusion. *Fox v. Newberry County Memorial Hospital*, 316 S.C. 537, 451 S.E.2d 28 (Ct. App. 1994) (citing *Davis v. South Carolina Dept. of Corrections*, 289 S.C. 123, 345 S.E.2d 245 (1986)).

"'Substantial evidence' is not a mere scintilla of evidence nor the evidence reviewed 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 that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.* 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) (Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached."). Applying the scope of review correctly, this Court should reverse the decision of the Appellate Panel of the Full Commission.

ARGUMENTS

I. THE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO FIND AND CONCLUDE THAT IT WAS DEFENDANTS' BURDEN OF SHOWING THAT THE CLAIMANT WAS REMOVED FROM THE SCOPE OF HER EMPLOYMENT DURING HER WORKPLACE ACCIDENT

The Single Commissioner and the Appellate Panel of the Full Commission erred in finding and concluding Ms. Bridges had failed to meet her burden of proving that her workplace injury occurred in the scope of her employment instead of determining whether Defendants had met their

burden of proving that she removed herself form the scope of employment at the time of her workplace injury, applying the wrong legal standard throughout their Orders. In South Carolina, jurisdictional doubts, such as whether an injury occurred within the scope of a Claimant's employment, are resolved in favor of inclusion rather than exclusion. *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720, 723 (1964). In addition, as stated in *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010):

> [The] general rule [is] that ***workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage in are to be strictly construed.*** See *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("[W]orkers' compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed." (internal citation omitted)). (emphasis added).

In the present case, Defendants argued an exception to coverage, that Ms. Bridges was outside the scope of her employment at the time of her workplace injury, which is to be narrowly construed by the Commission and our courts. The Defendants were, therefore, arguing an affirmative defense and the burden was on the Defendants in this case to establish that Claimant violated an express prohibition that removed her from the scope of her employment at the time of her workplace accident. See *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. 373, 377, 17 S.E.2d 695 (1941)("[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."). In failing to hold Defendants to the burden of establishing this defense and proving the facts of the defense, the Commission has essentially required Ms. Bridges to prove a negative, that she was not removed from the scope of her employment at the time of her workplace injury. The Commission, therefore, erred as a matter of law in finding and concluding that the burden of proving that the Claimant was removed from the scope of her employment due to an alleged express prohibition was on the

Claimant, without adequately determining whether Defendant had met their burden of showing an exclusion to coverage under the Act.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT LEFT THE SPHERE OF HER EMPLOYMENT BY VIOLATING SPECIFIC ORDERS FROM HER EMPLOYER AND THE COMMISSION ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE CLAIMANT LEFT THE SPHERE OF EMPLOYMENT.

Assuming *arguendo* the Commission had applied the proper legal standards in this case and held Defendants to their burden of proving that Claimant's injury was excluded under the Act, the Commission erred in finding and concluding that the Claimant left the scope of her employment at the time of her workplace accident pursuant to *Wright v. Bi-Lo, Inc.*, 314, S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). 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. *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950). However, in determining whether an employee steps out of the scope of his employment by violating an employer's order, our courts have held:

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act . . . "Certain rules concern the conduct of the workmen within the sphere of his employment, while others limit the sphere itself. A transgression leaves the scope of his employment unchanged, and will not prevent 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 at 155 (quoting *Johnson v. Merchants Fertilizer Co.*, 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941) (citations omitted).[1]

[1] This principle is succinctly stated by Professor Larson:
"When misconduct involves a prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the method of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment." 3 Larson's Workers' Compensation Law, Ch. 33 Syn.

Stated in a different fashion, by Larson's Workers' Compensation Law, there exists a distinction between prohibited things and prohibited methods:

> Rules and prohibitions may define the ultimate "thing" which the claimant is employed to do, or they may describe the methods which he may mor may not employ in accomplishing that ultimate "thing." The only tricky feature of this distinction is that it can, by a play upon words, be converted into a contradiction of itself. For example, it seems clear enough that if the claimant's main job is to lift flour sacks, the raising of the flour sacks is the "thing" for which he is employed. If, in violation of instruction, he rigs up a rope hoist to do the job, it should be clear enough that his departure is merely from the method prescribed.
>
> Yet the argument will sometimes be seen that the violation is one of a rule limiting the "thing," because the "thing" for which the claimant is employed is "to lift flour sacks by hand and not by hoist." Of course, by so blending ultimate object and method one can convert all instructions on method into delimitations of scope of employment, and end by reducing the distinction to absurdity. One can say that a lineman is employed only to repair lines while he has his gloves on, that an errand boy is employed to deliver a message by way of Street A and not by way of Street B, and that an oiler is employed to oil only machines that are standing still and not those that are in motion.

3 Larson's Workers' Compensation § 33.02(1).

Larson's further provides a brief catalog of the kinds of forbidden misconduct which "since they related only to method have not blocked compensation . . . [and] serve to show better than anything else the extent to which modern compensation law has eliminated the employee-fault compensation from the test of compensability." 3 Larson's Workers' Compensation §33.02(2). Those instances of forbidden misconduct include: sitting upon a fender to operate a dangerous machine instead of standing as ordered, climbing onto a basketball goal to paint the roof of a gymnasium, . . . operating a meat-grinding machine with the guard removed, oiling machinery in motion . . . jumping a railing instead of climbing a stairway . . . etc. *Id.*

In *Johnson v. Merchants Fertilizer,* and each and every time the issue of exceeding the scope of employment due to an express prohibition has arisen, our courts have expressed that it is the burden of Defendants to establish the fact that: (1) at the time of the employee's injury he/she

had violated an express order, and (2), that the order or prohibition was clear and explicit. The courts emphasized this "clear and explicit" requirement in *Wright v. Bi-Lo* (Claimant, a grocery store courtesy clerk, had been told not to attempt to apprehend shoplifters on multiple occasions and on the day of the accident his manager told him to "get back in the store"), and in *Black v. Town of Springfield* (police chief was told on numerous occasions to not ride on the back of fire trucks). These examples of "clear and explicit" prohibitions are opposed to the one in *Johnson v. Merchant's Fertilizer Co.*, wherein the Court held compensable the death of an employee, who was a laborer tasked with sweeping the floor and prior to his death was told "not to go close to the line shaft or belt" because "close" was a relative term and there was evidence that the places he was forbidden to go on the premises of his employer were not sufficiently specified by his employer. *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. 373, 377, 17 S.E.2d 695 (1941).

Furthermore, in the analysis of whether an employee's conduct takes them out of the scope of their employment, the Court looks to whether the conduct could be for the benefit of their employer. See *Howell v. Kash & Karry*, 264 S.C. 298, 214, S.E.2d 821 (1975) (The Court recognized that where the checking clerk and stock boy of employer retailer injured himself while attempting to retrieve a purse from two boys that snatched a purse from a potential customer of employer, that the Claimant's actions were within the scope of his employment as benefiting the employer, through "increasing goodwill" in the community); *Portee v. South Carolina State Hospital*, 234 S.C. 50, 106 S.E.2d 670 (1959) (the Court found compensable the death of an employee when a co-worker, in violation of hospital policy, gave the employee an injection causing him acute anaphylactic shock, noting the benefit of the employer of "ward[ing] off any possibility of passing the infection on to the patients.").

In the present case, there is conflicting testimony regarding the instruction or prohibition given to Ms. Bridges and substantial evidence does not support that there was a "clear and explicit" prohibition to Ms. Bridges. Ms. Bridges testified that as an employee, her job duties entailed various tasks related to her maintaining her employer's retail store, including "bringing out inventory," cleaning, attending to customers, and getting the store ready for customers in the morning. R. at 1714 – 1715. She further testified that it was part of her job to replenish inventory on store shelves something she would do regularly. This entailed getting on a ladder from time to time. She testified that on the date of the accident, one of the owners of the employer, Amir Bitton, told her "I don't want you on the ladder to climb on top of the cooler. That's what we have Zack for." R. at 1716, ln. 1 – 4. Mr. Bitton provides self-conflicting and self-contradicting testimony, claiming that he told her "please, no climbing, no ladder, no physical work" R. at 1997, ln. 5 – 9. He further testified that 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." *Id.*, ln. 15 – 18. Despite saying there's "the rest of the girls for any other chores" he testified that he said "no girls on the ladder," and for that date only. R. at 2102. While others testify that they heard Mr. Bitton tell Ms. Bridges not to climb the ladder, this testimony should have been given much less weight and afforded much less probative value as it is hearsay and does nothing to help any fact finder understand what Ms. Bridges understood her instructions to be. Thus, because of the conflicting testimony, especially the self-contradictory testimony from the person supposedly giving Ms. Bridges the prohibition, substantial evidence does not support that there was a "clear and explicit" prohibition to climb the ladder at all on that day only. From Ms. Bridge's perspective she understood her instruction to be "not to climb the ladder to get on top of a cooler," or climbing the ladder for that specific reason. Substantial evidence does not support that she

understood the order to be not to climb the ladder at all because it was a regular and necessary part of her job. Moreover, the burden of proving that there was a "clear and explicit" prohibition that was violated by the employee and led to the Claimant's injury, was not met by the employer given the owner's conflicting testimony.

While Claimant certainly does not concede this point, assuming that the substantial evidence supports one of Mr. Bitton's versions of his testimony, that he told Ms. Bridges not to get on the ladder at all, and to let a male coworker do any climbing for that day only, this instruction does not pull Ms. Bridges out of the scope of her employment at the time of her workplace injury. Climbing the ladder to grab inventory to place on shelves was a normal part of her job, and not simply an incidental benefit to her employer. In the words of our Courts in *Johnson v. Merchants Fertilizer* and *Wright v. Bi-Lo, Inc.*, this was a rule (which was allegedly for one day only), that concerned "the conduct of the work[er] within the sphere of [her] employment" and not a limitation of the sphere itself. In the words of Professor Larson on Workers' Compensation, this alleged prohibition concerned the "method" of the work being done, and not the "thing" required to be done. The only evidence of record is that Ms. Bridges was still required to perform her daily tasks on the date of the injury, which included putting inventory on shelves when necessary. Moreover, and while this may lend itself more to the issue of whether the prohibition was "clear and explicit," the present case is not analogous to *Black v. Town of Springfield* or *Wright v. Bi-Lo, Inc.*, because in both of those cases, although there was arguably a benefit to the employer, the claimants were told on multiple occasions not to engage in the prohibited behavior, which led to their injuries. Thus, even assuming *arguendo* that substantial evidence supported the Commission's factual finding of an express prohibition, the Commission made a clear error of law in concluding that Ms. Bridges' actions removed her from the scope of employment.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUFFERED FROM A PRE-EXISTING INJURY OR CONDITION AND THE COMMISSION ERRED IN FINDING THAT THE CLAIMANT FAILED TO MEET HER BURDEN OF PROVING THAT SHE SUFFERED AN INJURY IN THE COURSE AND SCOPE OF HER EMPLOYMENT

The Commission erred in finding that Ms. Bridges suffered a pre-existing left leg injury, as there is absolutely no evidence of record, let alone substantial evidence, about a prior injury beyond mere conjecture by the Commission, based on testimony from employer and employer's representatives. While a "finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Burnette v. City of Greenville,* 401 S.C. 417, 428, 737 S.E.2d 200, 206 (2013). In *Burnette v. City of Greenville*, substantial evidence did not support the Commission's findings of a preexisting injury that was neither injured nor aggravated or that such pre-existing injury "returned to baseline," when the only evidence of record supporting the finding was an MRI that showed "a minimal protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004," with "no evidence indicat[ing] this opinion originated from a medical provider, yet appear[ed] in the single commissioner's order . . . forc[ing] [the court] to conclude that it is the medical opinion of the single commissioner." *Id.*

There is no daylight between the erroneous findings of the Single Commissioner and Appellate Panel in the present case, and the Commissioner's findings in *Burnette.* Finding that there was an injury of the magnitude suffered by Ms. Bridges prior to her workplace injury is, in a sense, more egregious than the findings by the Commission in *Burnette*, because there is not a single document of a diagnostic or medical nature or anything from a medical provider stating or in any way indicating that Ms. Bridges had an injury to her left leg or knee prior to her June 16,

2018, workplace injury. The Orders of the Single Commissioner and Appellate Panel state that the Commission's "finding is supported by the witness testimony and comports with the admitted instructions given to her not to climb the ladder." R. at 29. No other medical evidence is provided in support of this finding. The employer submitted no medical evidence of an injury to Ms. Bridges' left leg prior to her workplace injury on June 16, 2018, and the record is completely devoid of ***any*** medical evidence of a pre-existing left knee or left lower extremity injury. The only evidence presented by the employer is, at best, conflicting testimony that Ms. Bridges was wearing a boot or a wrap around her left foot and or ankle on the day of the injury. Even throughout all of the testimony provided by employer's representatives and witnesses, there is no testimony Ms. Bridges had a left knee injury, only that she may or may not have been limping on the day of her workplace injury and she may have had a wrap or boot around her ***foot*** or ***ankle***. At one point in the trial testimony, Mr. Bitton, perhaps unwittingly, agreed that the assertion that she had a foot injury the week prior to her workplace injury was speculation. R. at 2038, ln. 20 – 25. The accounts from the witnesses called by Defendants vary and are disputed by Ms. Bridges, her significant other, Mr. Earley, and by Elizabeth McAldine, the daughter of Mr. Earley, who were both with Ms. Bridges that week prior to the accident and also testify that her foot or leg was not injured prior to June 16, 2018. Importantly, and while Claimant's Exhibit 3 and 5 were glossed over by the Commissioner as not being "dispositive of anything" and not lending "credibility to Claimant's arguments." R. at 30, ¶ 9. Ms. McAldine testified that she took the picture date stamped June 15, 2018, testified that she took it on that date, and identified Ms. Bridges on the beach in the picture without any leg brace or wrap. She further testified that she walked on the beach and was not limping on the day prior to the accident. Accordingly, the finding that Ms. Bridges suffered an

unspecified injury to her left leg prior to her workplace injury is not supported by substantial evidence as it is based upon conjecture, speculation, and conflicting testimony from lay witnesses.

While it is unclear from the Orders of the Single Commissioner and Appellate Panel whether their Finding No. 11 (finding that Claimant failed to meet her burden of proving that she suffered an injury in the scope of employment by the greater weight of the evidence) was made because of the other findings by the Commission that she exceeded the scope of her employment at the time of the injury or that she injured her left leg outside of work prior to June 16, 2018, Finding No. 11 is also erroneous. The Commission erred in finding that Ms. Bridges had not met her burden of showing that she suffered an injury arising out of and in the course and scope of her employment on June 16, 2018, as the only medical evidence submitted indicates that she suffered a very severe knee injury requiring an extended hospital stay, a surgery, and months of in-patient rehabilitation and home health care, and all of the medical evidence of record states that it was due to a fall from a ladder at her workplace.

The findings of the Commission are based so much on speculation that the Claimant can only begin to guess or speculate herself as to how the Single Commissioner and Appellate Panel came to those findings and conclusions that Ms. Bridges' left knee and leg injury did not occur as a result of her workplace accident. While the Order does note a discrepancy in the testimony and medical records about which rung of the ladder Ms. Bridges fell from, the discrepancy appears to be the basis of speculation and conjecture regarding whether this sort of injury could have come from a fall from one of the lower rungs. The notes from the EMS state that she was on a step ladder and while coming down missed the last step and fell to the ground. R. at 75. Notes from the emergency department note a major knee injury and state that she "developed sudden onset of dull constant non-radiating severe pain to her ***left knee*** after she fell coming off of a ladder at work

just prior to arrival." (emphasis added) R. at 436. As summarized above, she underwent a complex open reduction, internal fixation of the left tibial plateau (near the knee), which was performed by Dr. Tobin, who later undertook care.

While, as discussed above, there was speculation about a previous left foot or ankle injury based on conflicting testimony among the trial witnesses, there is no medical evidence of a prior foot or ankle injury, let alone a previous leg or knee injury in the nearly 1500 pages of medical records submitted by the Claimant in her APAs. In an attempt to point to *any* medical evidence of a prior foot or ankle injury, the Commission's Orders make a point in summarizing the medical evidence to discuss a September 6, 2018, office note from Dr. Tobin, who states that there was some swelling in the left foot and he was concerned whether there had been some fractures in her left foot or ankle. However, what the Commission fails to note is that x-rays taken of the left foot and ankle were negative for any fractures. R. at 1279.

Pursuant to S.C. Code Ann. § 42-9-35, a pre-existing injury must be established by a preponderance of the evidence "including medical evidence," which is defined as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records or other material that is offered by a licensed health care provider." Establishing the existence of a preexisting injury also presupposes the existence of a diagnosis from a licensed healthcare provider. Moreover, while it is Defendants' burden of proving a pre-existing condition or injury, and not the Claimant's, there is simply no evidence of a foot, ankle, or lower left extremity injury prior to June 16, 2018, and it would stand to reason that if she had suffered an ankle or foot injury that this would have been addressed at some point in her more than 10 day in-patient stay at the hospital, and by the doctors that performed a major surgery upon that same left leg. Thus, for the foregoing reasons, and because the only medical evidence of record is that Ms. Bridges suffered a

workplace injury to her left knee when she fell from a ladder at work, the finding that Ms. Bridges failed to meet her burden of showing by the greater weight of the evidence that she suffered an injury arising out of and in the scope of her employment is erroneous, and the finding that she suffered a pre-existing injury is not supported by substantial evidence, or any real evidence for that matter.

IV. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT MS. BRIDGES' AVERAGE WEEKLY WAGE AND COMPENSATION RATE WERE $368.80 AND $245.88, RESPECTIVELY, AND IT ALSO DISREGARDED SUBSTANTIAL EVIDENCE OF RECORD OF THE CLAIMANT'S PAY OUTSIDE OF HER PAYCHECKS AND 2018 W-2.

The Commission erred in its findings concerning the calculation of Ms. Bridges' Average Weekly Wage (AWW) and resulting Compensation Rate (CR) and in finding that the Claimant did not articulate a clear way to calculate her AWW and CR. While it is not completely clear from the Order the AWW and CR found by the Single Commissioner, as Finding Number 7, provides an Average Weekly Wage and Compensation Rate of $368.80 and $245.88, respectively, and Conclusion of Law Number 10 provides an average weekly wage of $737.60 with a corresponding compensation rate of $491.76, Claimant presumes for her argument that the latter AWW and CR were typographical or clerical errors.[2] The AWW and CR provided in Finding Number 7 appears to be based upon the pay stubs submitted by Employer in their APA's. In basing Ms. Bridges AWW and CR solely upon pay stubs, the Commissioner disregarded substantial evidence that the amounts on her pay stubs did not accurately reflect the amount she earned from employer and hours worked for her employer. Ms. Bridges testified that a typical workday started at 7:30 a.m. and frequently did not end until 10:00 p.m., and that she would frequently work as much as 80

[2] Claimant's position is that the second AWW and CR are closer to representing her actual AWW and CR than the AWW and CR in Finding Number 7.

hours per week or more during her employer's busy season. R. at 1683 - 1689. She further testified that she was paid under the table in cash for hours worked outside of what was reported on her pay stub. *Id.* Her testimony of working more than the hours worked on her pay stub was supported by Claimant's Exhibit 1, a schedule, which she testified showed her work hours. The work schedule for the week she was injured showed her hours from 8 – 10 every day on that week but except Friday, the day she was off and at the beach with her loved ones, which was corroborated by testimony of Mr. Earley and Ms. McAldine. Her testimony that she was paid cash for additional hours worked, outside of the 80 per two-week period shown on her paystub, Claimant's Exhibit 2, was further supported by testimony from Jamie Willard Hudson, a coworker who testified that she was also paid half of her earnings in cash, and who admitting that she engaged in theft with the employer on the record, testified to Ms. Bridges honesty and credibility. Additionally, Ms. Bridges' co-worker Zach also testified that he was paid in cash by Mr. Bitton, under the table, lending credibility to Ms. Bridges testimony, such that the greater weight of the evidence supports that Ms. Bridges worked more time and earned more money than was shown on her paystubs.

However, in rejecting substantial evidence submitted by the Claimant, the Commission erred in finding that the greater weight of the evidence established that the schedules in Claimant's Exhibit 1, which were created by the employer "did not actually reflect the number of hours worked by any employee" and erred in finding that the greater weight to the evidence was that the employer did not pay Claimant or any other party with payments "under the table." R. at 29, ¶ 5. These findings touch on the credibility of the witnesses, and in the present case, the Commissioner found the Employer to have greater credibility, and accordingly placed greater weight with the testimony of Mr. Bitton than Ms. Bridges. This implicit finding that Mr. Bitton's testimony is somehow more credible is misplaced and unfounded, considering that he is the owner of the

employer, which he testified runs several local retail shops, has anywhere between 16 and 21 employees at any one time, according to his roster of employees shown on the schedule (Cl's Exhibit 1), and claims not to have workers' compensation insurance and not to need it. R. at 2036. Mr. Bitton is more incentivized than the Claimant toward mistruth or misrepresentation to save himself and his business from paying the Claimant's workers' compensation benefits and fines and penalties for willfully violating the Act, and to keep himself and his business out of potential legal trouble stemming from the issue of illegal payment of wages (paying the Claimant under the table without reporting such payments, violating the South Carolina Payment of Wages Act, and illegally avoiding federal overtime requirements). Moreover, the South Carolina Payment of Wages Act requires the employer to keep records of all wages and deductions taken for a period of three years. S.C. Code Ann. § 41-10-30. It was Employer's burden to show all payments including any cash payments to his employees.[3] There is no indication that he kept any record of cash payments with Ms. Bridges or with her co-worker Zachary Edri, who was regularly paid in cash by Mr. Bitton, per Mr. Bitton's and per Mr. Edri's admissions.

Thus, for the foregoing reasons, the Commission erred in finding that the greater weight of the evidence established that the schedule did not actually reflect the number of hours worked by Ms. Bridges and that she was not paid under the table, or in cash. The Commission also erred in finding that the claimant failed to articulate a way to calculate her AWW and CR, considering that the Claimant provided substantial evidence in the way of testimony regarding her normal work hours and rate of pay, *inter alia.* Therefore, substantial evidence does not support the

[3] It is also noteworthy that Employer failed to produce any timecards reflecting the basis of the paycheck which further supports the conclusion that the schedule was a work schedule instead of a "on call" schedule. Additionally, the failure to produce such records which are required to be kept by SC Law, should to an adverse inference against the Employer. See *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 200 S.E.2d 681 (S.C. 1973).

Commission's findings and conclusions concerning the Claimant's Average Weekly Wage and Compensation rate.

CONCLUSION

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

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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,

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CERTIFICATE OF COUNSEL

Counsel for Claimant/Appellant certifies that the Final Brief of Appellant complies with Rule 210(g), SCACR.

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