THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James Avery B. Wilkerson, Jr., Commissioners

---

WCC File No. 1110704

---

Claudia Bryant-Perreira, Employee, ..... Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier ..... Respondents.

---

# INITIAL BRIEF OF RESPONDENTS

---

McANGUS GOUDELOCK & COURIE, L.L.C.

Weston Adams, III
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300



Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE Logistics Group and Zurich American Insurance Company*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES
### CASES

**STATUTES, REGULATIONS, RULES**

## STATEMENT OF ISSUES ON APPEAL

I. Whether Claimant bears the burden of proving her injuries arose out of and in the course of her employment?

II. Whether TFE's safety policy limited the scope of Claimant's employment?

III. Whether TFE's policy regarding use of walkie-riders was clear and explicit, and the existence of conflicting evidence does not change the outcome?

IV. Whether the Commission properly found that Claimant violated TFE's safety policy by operating the walkie-rider?

V. Whether Respondents are not estopped from asserting Claimant's conduct removed her from the scope of her employment?

VI. Whether the Commission applied the correct legal standard in its Decision?

VII. Whether the Commission's Decision is sufficiently definite and detailed for appellate review?

VIII. Whether the Commission's Decision did not need to include all of the stipulations contained in the Single Commissioner's Decision?

## STATEMENT OF THE CASE[1]

Appellant Claudia Bryant-Perreira ("Claimant") filed a workers' compensation claim, alleging she sustained injuries as a result of a work-related incident that occurred on July 15, 2011. (Claimant's Form 50, dated November 7, 2011). On that date, she was employed by IMSCO/TFE Logistics Group, Inc. ("TFE"), whose workers' compensation coverage was with Zurich American Insurance Company (jointly "Respondents"). Respondents denied that any injuries incurred by Claimant arose out of and in the course of her employment and argued that her injuries, therefore, were not compensable. (TFE's Form 51, dated December 6, 2011).

The parties were heard by Single Commissioner Andrea C. Roche on February 19, 2012. The Single Commissioner issued an Order on June 15, 2012, finding on the greater weight of the evidence that Claimant injured her shoulder "when she turned the handle on a walkie-rider, which made the walkie-rider move and become operational." The Single Commissioner also found that Claimant "had knowledge of the specific instructions not to operate the walkie-rider," that when she "turned the handle of the walkie-rider, which then lurched forward, this was in direct contravention of company policy and specific instructions to not operate the walkie-rider," and that "Claimant also knew that she was not permitted to operate the walkie-rider because she failed the training class to operate the walkie-rider two times." The Single Commissioner also

---

[1] Parts of Claimant's Statement of the Case are argumentative, in violation of Rule 208(b)(a)(C), SCACR (the statement of the case "shall not contain contested matters ..."), as well as inaccurate. For example, Claimant asserts that Respondents accepted the claim and paid for medical treatment, citing two medical records, APA pp. 1-12. (App. Br. p. 2). However, paying for initial medical treatment does not constitute accepting a workers' compensation claim. Instead, in response to Claimant's Form 50 request for hearing, Respondents properly and timely filed a Form 51 denying her claim. *See* S.C. Code Reg. § 67-603. Claimant also argues in her Statement of the Case that, "[i]n short, the Appellate Panel focused at [sic] the negligence or fault of the Claimant in a no-fault workers' compensation system." (App. Br. p. 2). This assertion is part of Claimant's theory of the case and, as such, is inappropriate in her Statement of the Case.

held that Claimant "evidenced her knowledge of the policy that un-certified personnel could not operate the walkie-rider when she first requested that a co-worker, Matt Cox, who was trained to operate the rider, moved the rider for her." Finally, the Single Commissioner concluded that Claimant "operated the walkie-rider in direct violation of the employer's directions/instructions. This took her injury out of the sphere of her employment." (Decision and Order of the Single Commissioner, pp. 7-8). Claimant timely appealed this decision to the Full Commission. (Claimant's Form 30). An Appellate Panel of the Full Commission heard oral argument on November 14, 2012 and issued an order dated February 5, 2013, affirming the Single Commissioner in all respects. (Decision and Order of the Full Commission).

Claimant timely appealed to this Court.

## STATEMENT OF THE FACTS

On July 15, 2011, the date of the alleged accident, Claimant was working for TFE as a Quality Assurance Warehouse Associate, a job she had held for approximately two and a half years. (Tr. 6, lines 8-19). Her job required her to take boxes of apparel, put them on a pallet and then use a manual pallet jack to put them on a table, where she would check to make sure all the codes matched and the apparel was in good condition. (Tr. 6, line 20 – 7, line 22) (Tr. 15, lines 2-7). Claimant agreed that her job duties did not include operating power equipment such as a walkie-rider. (Tr. 15, lines 10-13).

Claimant testified that, on the date of the alleged accident a walkie-rider, was in the way of where she needed to guide her pallet in order to put her boxes on a table. The walkie-rider, an automated pallet jack, has a "[t]hrottle, accelerator – it's like a motorcycle." (Tr. 39, lines 8-10). Claimant first asked Mr. Cox, who was certified to

operate the walkie-rider, to move it out of her way, which he did. (Tr. 8, lines 3-23) (Tr. 18, lines 1-5). Apparently, the walkie-rider was still in Claimant's way. (Tr. 9, line 12 – 10, line 9). Instead of asking Mr. Cox to move the walkie-rider again, Claimant "reached over and took the handle just to make it where it would roll a couple of feet." (Tr. 10, lines 10-12). In order to do this, she turned the throttle on the walkie-rider, (Tr. 10, line 13 – 11, line 13), which "pulled forward and I heard Matt yell to let it go. And when I did like that it threw me to the floor and I fell and then the last thing I remember my key associate was coming over to help me up and helping me to get cleaned up." (Tr. 13, lines 2-6). Leslie Roberson, a co-worker, testified that she was at her desk and, "when I turned back around I saw [Claimant] operating the walkie and more or less it drug her across the floor. I heard Matt say 'Claudia, let go' and that's when she let go and she tumbled across the floor a couple of times after she let go." (Tr. 31, lines 18-25) (*see also* APA 71-72). Claimant testified that Ms. Roberson took her to the bathroom to clean her up.

Q: And you told her don't report this to safety, didn't you?

A: I told her I said "Please, not right now. Just leave me alone."

(Tr. 19, lines 17-20) (Tr. 33, lines 8-13) (APA 72). In addition, Claimant acknowledged signing a statement admitting that she did not want to be questioned by the safety department about the incident. (Tr. 19, line 24 – 20, line 5) (APA 70).

Q: And the reason you didn't want to be questioned by safety is because you knew you weren't supposed to operate that machine; isn't that right?

A: True, but I didn't feel like I was operating the machinery just by turning my hand because I didn't get up on it.

(Tr. 19, lines 6-11).

Prior to the date of the alleged accident, Claimant had attended a class in an attempt to become certified to use and operate the walkie-rider. (Tr. 13, line 12 – 14, line 6).[2] Claimant testified that she "didn't do that good in it ..." (Tr. 14, line 2). She failed the certification course twice and admitted that she knew how dangerous that equipment could be. (Tr. 16, line 23 – 17, line 6). In fact, she "struggled greatly" with the walkie-rider and had been instructed never to operate one. (Tr. 21, lines 5-9) (APA 73 (form signed by Claimant acknowledging the rule)) (Video of Claimant's walkie-rider training).

Claimant readily acknowledged that, "it's TFE policy actually that in order to operate a walkie-rider you not only had to be certified but you also had to have authorization ..." (Tr. 15, lines 14-18). Claimant also agreed that she had been instructed on this policy when she was hired. (Tr. 15, line 19 – 16, line 7). TFE's employee handbook, which included a Safety Policy stated: "Never operate any machinery or equipment without express authority and the required training and necessary certification to do so." (APA 67-69). Claimant signed a 2009 Memorandum that included the statement that only authorized personnel are allowed to operate power equipment. (APA 66).[3] Claimant also agreed that she participated in routine safety updates, and understood that if she violated the safety policy she would be disciplined. (Tr. 16, lines 8-22).

Claimant demonstrated her understanding of this policy when she initially asked

---

[2] Claimant's statement that she operated a walkie-rider on "several occasions in the presence of her Employer ..." (App. Br. p. 3), is somewhat of an exaggeration. As noted herein, she attempted the certification course twice.

[3] Claimant's assertion that the 2009 Memorandum "radically changed the Safety Policy," (App. Br. p. 6; *see also* at p. 8), is unsupported and based solely on an exaggerated and hyper-technical reading of the two documents. In the end, Claimant herself acknowledged the rule regarding operation of walkie-riders without certification and authorization, making any alleged discrepancy between the terms "machinery or equipment" in the Safety Policy and "power equipment" in the 2009 Memorandum irrelevant to the analysis of her claim.

Mr. Cox, a certified operator, to move the walkie-rider for her. (Tr. 8, lines 13-20) (Tr. 18, lines 1-22). Although Claimant said she did not know where Mr. Cox was when she needed the walkie-rider moved for the second time, (Tr. 18, line 17 – 19, line 2), he evidently was close enough to see her attempt to operate the walkie-rider, as he was the person who yelled for her to let go of the handle. (Tr. 13, lines 2-3). Mr. Cox testified, "I heard her talking behind me and I turned around and I witnessed her hand on the accelerator and when I was ... getting ready to say something, she had pulled down and she had taken off." (Tr. 37, lines 21-25). In addition, Ms. Roberson, who was also certified to operate the walkie-rider, was just a "table's width" away from Claimant when Claimant started to operate the walkie-rider. (Tr. 32, lines 2-7) (Tr. 33, lines 20-21). In fact, of the nine people in Claimant's work group, five are certified to operate a walkie-rider, any of whom would have moved it for her had she asked. (Tr. 34, lines 8-16).

TFE's Human Resources Manager, Janice Kutkus, testified that the purpose of the certification process is to protect the individual employee as well as others. Once an employee has been certified on a piece of equipment, a power equipment license is issued that they wear under their vest. (Tr. 25, line 6 – 26, line 17). Employees are advised of the prohibition against operating power equipment without authorization and certification during new hire orientation, through the employee handbook, during the training and certification process for power equipment, and during "Toolbox Topics, which are meetings before the shift starts." In addition, "a classroom safety memo ... was issued to all employees and signed by all employees," which states that only certified individuals can operate power equipment. (Tr. 26, line 13 – 27, line 11). Both Mr. Cox and Ms. Roberson acknowledged they knew the policy and were certified to operate a walkie-

rider. (Tr. 37, lines 1-3) (Tr. 33, lines 14-21). Ms. Kutkus explained that, although Claimant was allowed to operate the walkie-rider during the training/certification session, those sessions were conducted by the safety coordinators themselves. (Tr. 28, line 7 – 29, line 13). Ms. Roberson confirmed that, during the certification class, employees are instructed about when they are and are not allowed to operate a machine. (Tr. 33, line 22 – 34, line 3). Mr. Cox confirmed that, during the certification course, employees are instructed that if they do not have a license for the walkie-rider, they are "not allowed to touch it or operate it." (Tr. 38, lines 15-21). Claimant agreed that, when she failed the walkie-rider certification course, she was "instructed never to operate one." (Tr. 21, lines 5-9) (APA 73).[4] Both Mr. Cox and Ms. Roberson testified that, other than Claimant's attempt on July 15, 2011, they have never seen anyone operate a walkie-rider (outside of the certification course) who was not licensed or certified. (Tr. 38, lines 22-25) (Tr. 34, lines 4-7).

## STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. 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 errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative

[4] Apparently Claimant attended the certification course in January 2011. (*See* APA 73). Therefore, her assertion that she had had no warnings or restrictions during the approximately two and a half years prior to her injury, (App. Br. p. 7), is simply incorrect.

Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The determination of whether a claimant's injuries arose out of and in the course of employment is largely a factual question, subject to the substantial evidence standard of review. *See, e.g.*, Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). Substantial evidence is 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 same conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679,681-82 (Ct. App. 2002). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). The possibility of drawing two inconsistent conclusions

from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Hall, 376 S.C. at 348, 656 S.E.2d at 758.

## ARGUMENT

### I. The Commission correctly determined that Claimant's actions leading to her injuries were not within the course and scope of her employment.

The Commission both applied the correct legal standard and correctly determined that Claimant failed to prove that her injuries arose out of and in the course of her employment with TFE. Although Claimant attempts to frame this as a jurisdictional issue, whether a claimant's injuries arose out of and in the course of employment is a factual issue to be determined, in the first instance, by the Commission. Hall, 376 S.C. at 348, 656 S.E.2d at 758. "[T]he burden is upon the claimants to prove such facts as will render the injury ... compensable within the provisions of the Workmen's Compensation Act, and such award must not be based on surmise, conjecture or speculation." Sola v. Sunny Slope Farms, 244 S.C. 6, 9, 135 S.E.2d 321, 323 (1964); Broughton, 336 S.C. at 53, 496, 520 S.E.2d at 154 (a claimant asserting the right to compensation bears the burden of proving the facts necessary to entitle her to such compensation). Part of Claimant's burden of proving her injuries are compensable is proving that they arose out of and in the course of her employment. *E.g.*, Hall, 376 S.C. at 349, 656 S.E.2d at 759. Where, as is the case here, an "employer limits the scope of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable." Pratt v. Morris Roofing, Inc., 357 S.C. 619, 623, 594 S.E.2d 272, 274 (2004). Claimant presents a number of arguments concerning the appropriate posture and standard of review of this case, sometimes contradicting her own position, which Respondents address in turn below.

Because Claimant is incorrect that the inquiry before this Court involves a jurisdictional legal question, her reliance on Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009), Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998), and White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720 (1964) is wholly misplaced. (App. Br. pp. 10-12). In Wilkinson, the jurisdictional question was whether the claimant was an employee or an independent contractor. 382 S.C. at 299, 676 S.E.2d at 702. In Lake, the question was whether the employment relationship between the claimant and the employer had been terminated prior to the accident. 330 S.C. at 246, 498 S.E.2d at 653. In White, the issue was whether the deceased was considered an employee of a pulpwood producer and, therefore, covered under the terms of a separate pulpwood broker/dealer's workers' compensation policy. 244 S.C. at 721-22, 135 S.E.2d at 123. Here, there is no question that Claimant was an employee of TFE at the time of her alleged accident and there are no jurisdictional questions to be resolved by this Court. (*See* Commission Decision p. 5 ("An employer/employee relationship existed on July 15, 2011 between the Claimant and the Employer. We base this finding upon the stipulation of the parties"). Claimant acknowledges this stipulation, (App. Br. p. 13), making her arguments regarding jurisdictional questions somewhat perplexing.

Given that the Commission was not resolving any jurisdictional issues, its Decision is not deficient because it fails to mention "that it is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion." (App. Br. p. 14). Claimant appears to confuse the Commission's role in resolving jurisdictional issues with its role in resolving conflicts over the facts. The Commission's resolution of jurisdictional issues is reviewed on appeal under a preponderance of the evidence

standard, with the appellate court taking its own view of the facts and resolving reasonable doubts in favor of coverage, *e.g.*, Wilkinson, 382 S.C. at 299, 676 S.E.2d at 702; Lake, 330 S.C. at 249, 498 S.E.2d at 654, whereas the Commission's resolution of conflicting facts and testimony is reviewed on appeal under the substantial evidence standard. "It is not the task of courts to weigh the evidence as found by the Commission." Ross, 298 S.C. at 492, 381 S.E.2d at 730; *see also* Hall, 376 S.C. at 347, 656 S.E.2d at 758-759 (it is not within a reviewing court's province "to reverse findings of the Appellate Panel which are supported by substantial evidence. [citation omitted] The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence").

Because the Commission's resolution this case did not involve any jurisdictional issues, the Commission was under no duty to resolve all doubts in favor of one party or the other, as Claimant suggests. (App. Br. p. 14). Instead, the Commission's role was to review and weigh all the evidence and testimony, and to fairly resolve those conflicts in a manner that is supported by substantial evidence. *See* Lark, 276 S.C. at 136, 276 S.E.2d at 307 (admonishing that courts "shall not substitute [their] judgment for that of the agency as to the weight of the evidence on questions of fact"); Lockridge v. Santens of America, Inc., 344 S.C. 511, 516, 544 S.E.2d 842, 845 (Ct. App. 2001) (explaining that, "[u]nder our workmen's compensation law the Commission sits in lieu of a jury and ... this Court may [not] interfere with its findings of fact unless there is an absence of evidence to sustain the findings of the Commission").

In her suggestion that the Commission should have "strictly construed the Employer's defense and policy language," (App. Br. p. 14), and other places in her Brief

where she urges this Court to strictly construe TFE's safety policy, (*see* App. Br. p. 26), Claimant appears to be suggesting that the analysis applied in insurance coverage disputes – between an insurer and the insured – should apply in this context. TFE is not an insurer and its safety policies are not insurance policies. Claimant's attempt to meld general insurance concepts into this workers' compensation factual dispute should be roundly rejected.

Claimant's lengthy quote from James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010) is taken out of context. (App. Br. pp. 12-13). The quote from James was part of the Court's discussion of whether the Commission had statutory authority to allocate a lump sum payment over a claimant's life expectancy absent consent of the parties. The Supreme Court's opinion in James does not deal in any way with the question of whether the claimant had proven she was entitled to workers' compensation benefits in the first place and is of limited use, at best, in this case. For example, James cites Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993), for the phrase Claimant has highlighted regarding exceptions to converge. Peay dealt with the statutory exception for intentional infliction of harm which, as is discussed in more detail below, is not at issue here.

Claimant also mistakenly asserts that there are no material facts in dispute in this case, and that, therefore, the determination of whether her injuries are compensable is a question of law. (App. Br. p. 9). However, there is a sharp dispute with regard to a number of key facts in this case, including, among other things: 1) whether Claimant was prohibited from operating the walkie-rider; 2) whether she was aware that she was prohibited from operating the walkie-rider; 3) whether she operated the walkie-rider on July 15, 2011; 4) whether she asked her co-worker to not report the incident to the safety

department and/or her supervisor, and 5) whether TFE had allowed her to operate the walkie-rider in the past under circumstances that would lead Claimant to believe she was authorized to operate it on July 15, 2011. The Commission resolved these factual disputes in Respondents' favor, (Commission Decision, p. 5-6), and those factual findings are supported by substantial evidence in the record. At the same time that Claimant argues that there are no material facts in dispute such that this Court can decide the facts for itself, (App. Br. pp. 9), she also argues that she should be awarded compensation because there is conflicting testimony regarding TFE's rule against operating walkie-riders without certification and authorization. (App. Br. pp. 14). Claimant's positions are both internally inconsistent and incorrect.

Contrary to Claimant's assertions, the Commission did not improperly insert the concept of fault into its analysis of whether Claimant was acting within the scope of her employment when she was injured. (App. Br. pp. 11, 27).[5] Zeigler v. S.C. Law Enforcement Div., 250 S.C. 326, 157 S.E.2d 598 (1967), relied on by Claimant for this assertion, dealt with the specific affirmative defense provided under what is now codified as Section 42-9-60. That section provides that:

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. In the event that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

S.C. Code Ann. § 42-9-60. The burden shifting that Claimant argues should apply to this case is specific to Section 42-9-60 and there has been no allegation in this case that Claimant was either intoxicated or willfully attempting to injure or kill herself or another.

[5] She also erroneously asserts in her Statement of Facts that TFE "inserted the concept of fault into the no-fault structure of the worker's compensation system." (App. Br. p. 5).

Simply put, Claimant's failure to meet her burden of proving her injuries were incurred in the scope and course of her employment does not transform this issue into whether or not a statutory exception to coverage exists.

Claimant's argument that the Commission required her to prove a negative – that she was not in violation of ***any*** rule or, stated otherwise, that she was in compliance with every single work place rule – is both misplaced and incorrect. The Commission did not find that she had violated some unknown or unspecified rule; instead, the Commission held that, "[w]hen the claimant turned the handle of the walkie-rider, which then lurched forward, this was in direct contravention of company policy and specific instructions to not operate the walkie-rider," that she had knowledge of this prohibition, and that her operation of the walkie-rider in violation of this rule "took her injury out of the sphere of her employment." (Commission Decision pp. 5-6). Thus, Claimant has not been placed in the untenable position of attempting to prove a negative. She simply could not prove that she was within the scope of her employment when she operated the walkie-rider and was injured as a result. Not only was she in violation of the more general rule to not operate power equipment without proper certification and authorization, but she was in knowing violation of the specific rule to not operate the walkie-rider, because she was not certified or authorized, having failed the certification course twice. Because she was injured as a direct result of this violation, her injuries did not arise out of her employment. (*See also* discussion below in Section VI).

Even if, for the sake of argument, Respondents bore the burden of proving Claimant's injuries arose out of conduct that was in violation of a workplace rule that limited the scope of her employment, as is discussed more fully below, Respondents

presented abundant evidence on this issue and more than met any such burden of proof. The only evidence to the contrary is Claimant's self-serving statement that she did not "feel like" she was operating the walkie-rider because she only intended to move it two feet and because she did not place her feet on it. As the evidence overwhelmingly supports the conclusion that she knew she was not allowed to operate the walkie-rider and that she operated it when she turned the throttle in order to make it move out of her way, the burden of proof becomes a non-issue. There can be no serious question that whatever burden the Respondents may have borne, if any, they more than met it.

As a result, this Court should affirm the Commission Decision.

## II. TFE's safety policy limited the scope of Claimant's employment.

Claimant argues that the rule against operating power equipment generally, and walkie-riders specifically, concerned the Claimant's conduct within the sphere of her employment as opposed to the scope of her employment. None of the reasons put forth by Claimant are persuasive and all should be rejected.

First, somewhat disingenuously, Claimant asserts that, because management had allowed her to operate the walkie-rider in the past without disciplining her, operating the walkie-rider on July 15, 2011 somehow was part of her job. (App. Br. pp. 15-16). What Claimant fails to mention, but what is irrefutable from the record, is that the only time Claimant ever operated the walkie-rider was during the training and certification course, which was conducted by the safety instructor and which she failed twice. During the certification course, it was made clear to the participants that no one who was not certified and authorized was allowed to operate the walkie-riders. Claimant acknowledged that she was not certified and, therefore not allowed to operate the walkie-

rider. (Tr. 15, line 14 – 17, line 3).

Equally disingenuous is her argument that, since she was trained on the walkie-rider, any restrictions or instruction on her use of the walkie-rider must have concerned her employment. (App. Br. p. 16). It cannot seriously be disputed that Claimant took training in order to attempt to be certified to operate the walkie-rider. Because she failed the certification test twice, she was specifically prohibited from operating that piece of equipment, both for her own safety and for the safety of her fellow employees. A review of the video of her training session amply demonstrates why this is so – when Claimant loses control of the walkie-rider, it swings around in an alarming fashion. In addition, the statement that "she had training on how to operate a walkie-rider as part of her job duties ..." (App. Br. p. 16), is contradicted by Claimant's own admission that her job duties did not include operating power equipment such as a walkie-rider. (Tr. 15, lines 10-18).

Claimant also suggests that because she theoretically ***could*** have obtained her certification to operate a walkie-rider, the prohibition against her doing so without proper certification and authorization simply limited how she did her job and did not place her outside the scope of her job. Her argument is equivalent to saying that an individual who trained to become a police officer but failed the qualifying exam could nonetheless carry a gun and ride in a patrol car and arrest people because she theoretically ***could*** have passed the exam. Claimant's argument here is equally fatuous. The scope of her job was clearly limited by the safety rule against operating power equipment generally, and walkie-riders in particular, without certification and authorization.

Claimant then argues that, because other employees in her group had been certified and authorized to operate the walkie-riders, doing so must be within the scope of

her employment. (App. Br. pp. 16-17). Claimant's logic might make sense if there was no prohibition against her operating the walkie-rider without the proper certification and authorization. Under the facts of this case, however, it does not. Wright v. Bi-Lo, Inc., 314 S.C. 152, 422 S.E.2d 186 (Ct. App. 1994), and Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950), do not stand for the proposition that, in order for a rule to take an employee out of her scope of work, ***all*** employees must be prohibited under ***all*** circumstances or at ***all*** times from performing the particular action, as Claimant suggests. Claimant's position would prevent employers from certifying some employees to use potentially dangerous equipment unless the employer could certify all employees. Claimant's reasoning would strip employers of the ability to assign different jobs, roles and responsibilities to employees, or to impose any workplace rules that do not apply across the board to all employees, regardless of their job duties and/or certifications. Such a result is as absurd as it is unworkable and should be flatly rejected.

Next, Claimant unsuccessfully attempts to pull her situation within the ruling of Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975), which stands for the proposition that, "[a]n 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." 264 S.C. at 301, 214 S.E.2d at 822. However, several key facts distinguish Howell from the instant case and make it inapplicable to Claimant's claim. First, there is no indication in Howell that the activity giving rise to the injury – chasing the purse snatcher – was in any way prohibited by the employer. Where, as is the case here, an action is specifically prohibited by an employer, compensation will be denied, "even where the employee's act

arguably furthers the employer's interest and fulfills the duties of a fellow employee." Wright, 314 S.C. at 157 n.8, 442 S.E.2d at 190 n.8. Second, Claimant has not shown how operating walkie-riders without proper certification and authorization benefits TFE. In fact, given the danger to Claimant and to her co-workers, the only evidence in this case is that there is no benefit to TFE in having uncertified and unauthorized employees operate walkie-riders. To the extent she is arguing that moving the walkie-rider out of her way benefitted TFE by allowing her to continue on with her assigned job, that task could and should have been performed by someone who was certified to do it, a fact Claimant herself recognized when she first asked Mr. Cox to move the walkie-rider for her. There was no benefit whatsoever to TFE in having an uncertified employee operate power equipment. Third, Claimant cannot demonstrate that she performed a task outside her sphere of employment in a good faith effort to benefit TFE precisely because she was in violation of the prohibition against using power equipment such as the walkie-rider without certification and authorization. In fact, the very argument Claimant makes here was specifically rejected in Wright: "Wright's act was not in 'good faith' because it was an act in direct violation of specific orders from the employer." Wright, 314 S.C. at 158, 442 S.E.2d at 190. In short, the benefit-to-the-employer test embodied in Howell and relied on by Claimant is not relevant when the employee is in violation of a specific order or prohibition from the employer. It is not an avenue for absolving or excusing an employee's violation of a workplace rule that removes her from her scope of employment.

Claimant's reliance on Portee v. S.C. State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959) does not alter the analysis. The claimant's action there – seeking medical care –

was not an act prohibited by his employer. Although there was testimony that the co-worker who gave the claimant a penicillin injection had violated a workplace rule, the Commission found that, "it was common practice at this State Hospital for the employees to administer medications to each other as the occasions arose." 234 S.C. at 52-53, 106 S.E.2d at 671. Although the employer claimed that the claimant violated the rules of the hospital when he left his post to seek medical attention and "prevailed upon another employee to give him an injection of penicillin ...," 234 S.C. at 53, 106 S.E.2d at 671, the Commission determined that there was "no evidence that any such rule was known to the [claimant]." 234 S.C. at 58, 106 S.E.2d at 674. Here, in contrast, the rule she violated was well-known to Claimant. (Tr. 15, line 14 – 16, line 22).

Next, Claimant argues erroneously that the proper test is whether her conduct was reasonably related to the accomplishment of the task for which she was hired, (App. Br. pp. 18-19), citing this Court's opinion in Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003). In Pratt, this Court upheld, under the substantial evidence standard, the Commission's factual finding that the claimant was outside the scope of his employment at the time of his injury because the claimant's actions were in violation of his employer's prohibition against taking the company truck home. 353 S.C. at 350, 577 S.E.2d at 481. Although this Court discussed Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (N.C. 1982) and the issue of whether the claimant's actions furthered his employer's business, that test has not been adopted in South Carolina as a way of absolving a claimant's violation of a workplace rule. First, in considering this Court's opinion on appeal, the South Carolina Supreme Court did ***not*** adopt the reasoning from Hoyle but simply held that, "the substantial evidence establishes petitioner left the

scope of his employment by violating the specific order not to drive the company vehicle home." Pratt, 357 S.C. at 623, 594 S.E.2d at 274. Second, "although North Carolina workers' compensation case law retains a special significance in this state, our own Legislature's pronouncements of the law must necessarily prevail." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 114, 580 S.E.2d 100, 107 (2003); *see also* Peay, 313 S.C. at 94, 437 S.E.2d at 66 (declining to follow North Carolina's interpretation of its workers' compensation act). Third, and related to the point made in Wigfall, Hoyle relies on a specific section of the North Carolina General Statutes, which provides, in pertinent part, that:

> When the injury or death is caused by ... the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent (10%). The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

N.C.G.S. § 97-12(3); *see* Hoyle, 306 N.C. at 257, 293 S.E.2d at 201. There is no corresponding language in the South Carolina Workers' Compensation Act and, therefore, neither the North Carolina statutory provision nor case law construing it has any persuasive value in this state.[6] *See* Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434-435, 4214 S.E.2d 489, 490 (1992) (noting differences in North Carolina's counterpart to Section 42-9-60 and, consequently, declining to defer to North Carolina precedent). In fact, the rule enunciated in Hines v. Hendricks Canning Co., that, "[w]here the language incorporated into a statute is identical or substantially identical with that appearing in similar statutes of other states, ... it will be presumed that the subsequently enacted statute was intended to be understood and applied in accordance with the

[6] This may explain why this Court's opinion in Pratt is the only South Carolina case that has ever cited Hoyle.

construction given it by the courts of the states which had first adopted it," 263 S.C. 399, 405, 211 S.E.2d 220, 223 (1975), simply does not apply where the statute of another state is substantively different, as is the case with the statute under consideration in Hoyle. Claimant simply cannot cite to any South Carolina authority for the proposition that, where a claimant's actions are in knowing violation of a specific safety rule that she is nonetheless entitled to compensation if her conduct was somehow reasonably related to the accomplishment of a task for which she was hired.

Claimant argues that, because some of the items listed in the 2008 Safety Policy and 2009 Memorandum "contain orders that do not remove the Claimant from her sphere of employment," that the violation of the rule against operating walkie-riders without proper certification and authorization did not remove her from the scope of employment. This argument fails for a number of reasons. First, there has been no evidence presented in this case whether violation of the other listed rules in either the 2008 Safety Policy or the 2009 Memorandum would or would not remove Claimant from the scope of her employment. The Commission did not make any factual finding regarding any rule other than whether Claimant was prohibited from operating the walkie-rider. Second, even if, solely for the sake of argument, there might be some rules in the 2008 Safety Policy and/or the 2009 Memorandum that a claimant might violate without removing herself from the scope of employment, that does not mean that violation of TFE's rule with regard to power equipment generally, and the walkie-rider specifically, did not remove Claimant from the scope of her employment. Common sense indicates that dropping a piece of trash or stepping outside a designated walkway might not have the same dire consequences as an employee operating a piece of power equipment, such as the walkie-

rider, for which she has not been certified or authorized. As noted above, doing so presented a high degree of risk to both Claimant and her coworkers, and took her outside the scope of her employment. A key distinction is that there is no evidence that Claimant ever attended training and certification sessions regarding trash, or neat workspaces or walking within designated areas. She did attend the certification course for the walkie-ride – which she failed twice – during which employees were reminded that they were not to operate or touch power equipment without the proper certification and authorization. (Tr. 21, lines 5-9) (Tr. 33, line 22 – 34, line 3) (Tr. 38, lines 15-21). She also signed a form indicating she knew she was not allowed to operate power equipment. (Tr. 16, lines 8-18).

Finally, Claimant asserts that the safety Policy could not limit the scope of her employment because it states that it is only a "guide" and that it is "subject to change." The full preamble to the Safety Policy is as follows:

> At TFE, **safety is a paramount concern**. In order to provide a safe workplace for everyone, a list of rules **each employee is expected to follow** is provided below. **This list is by no means all inclusive and is intended to serve as a guide**. It is subject to change. **Employees who violate any of TFE's safety rules, included on this list or not, will face disciplinary action, up to and including termination**.

(APA 69) (emphasis added). The fact that violation of the Safety Policy subjects an employee to disciplinary action, "up to and including termination," recognizes that some safety violations are more serious than others. The fact that the Safety Policy unambiguously states "Never operate any machinery or equipment without express authority and the required training and necessary certification to do so," sets it apart from some of the more general policies, such as "Always use common sense." More importantly, Claimant acknowledged that she knew she could not operate a walkie-rider

without certification and authorization. (Tr. 15, line 14 – 16, line 7). She knew that if she violated the safety policy, she would be disciplined. (Tr. 16, lines 8-22). She, along with her co-workers confirmed that, during the certification class, employees were specifically instructed that they are not allowed to operate walkie-riders without proper certification. (Tr. 21, lines 5-9) (Tr. 33, line 22 – 34, line 3) (Tr. 38, lines 15-21).

The Commission properly found that TFE's safety policy prohibiting her from using a walkie -rider without certification and authorization limited the scope of her employment, and that Claimant's violation of the policy took her out of the scope of her employment. That finding is supported by substantial, and even a preponderance of evidence in the record. Therefore, this Court should affirm the Commission Decision.

## III. TFE's policy regarding use of walkie-riders was clear and explicit, and the existence of conflicting evidence does not change the outcome.

Despite Claimant's protestations otherwise, TFE's rule that walkie-riders could only be operated by employees who were certified and authorized was clear and explicit. Even more importantly, Claimant was well aware of the rule when she violated it, which is the key determination in a case such as this. "[T]he employee's knowledge of work rules continues to be a critical factor in these types of cases." Wright, 314 S.C. at 157 n.7, 442 S.E.2d at 189 n.7. This knowledge can be imparted to employees through written policies, which may or may not have been the case in Black and/or Wright, or verbal admonitions, which was clearly the case in Pratt. In both Black and Wright, there is some indication that a written policy existed but, even if one did, the Court did not rely on it. In Black, the minutes of a town council meeting reflected the resolution "[o]nly firemen to ride the truck," 217 S.C. at 421, 60 S.E.2d at 858; however, there was no indication that the claimant ever received anything other than a verbal admonition. In

Wright, this Court noted that, "Bi-Lo had a specific policy regarding employee involvement in the detection and prevention of shoplifting," 314 S.C. at 153, 442 S.E.2d at 187; however, it is unclear whether this policy was written and, if so, whether the claimant received a copy of any such written policy. Again, the warnings this Court found significant were verbal. In Pratt, there was no written policy against driving the company truck home at night and, in fact, the claimant had been allowed to do it in the past. The Commission based its decision the fact that the employer verbally instructed the claimant the night before his accident to not take the truck home.

What these cases, as well as Johnson v. Merchant's Fert. Co., 198 S.C. 373, 17 S.E.2d 695 (1941), and Portee, stand for is that the key determination is whether the claimant understood the rule prior to violating it. In Black, Pratt and Wright, the Commission determined, as a factual matter, that the claimant was aware of the rule and violated it. The records in Johnson and Portee supported the Commission's factual conclusion in each case that the claimant was not aware of the rule.[7] As noted above, Claimant was well aware of the prohibition against operating walkie-riders without certification and authorization. (Tr. 15, line 14 – 16, line 22) (Tr. 21, lines 5-9).

Claimant's assertion that courts "will not deny compensation to an employee if there is conflicting evidence on the applicability of the order," (App. Br. p. 22), is as perplexing and as it is incorrect. Claimant mis-reads the cases on which she relies. On appeal, the key determination is not simply whether there is a conflict in the evidence but,

[7] Claimant apparently misapprehends the holding in Portee. In Portee, the claimant did not administer the injection to himself and, therefore, was not in violation of the rule against administering penicillin to patients without a physician's order. In ruling in the claimant's favor, the court pointed out that the claimant was unaware of any rule prohibiting his coworker from giving him injections, and that "[t]he disobedience by fellow workmen of orders is as much one of the risks of a man's employment as a defect in the mechanical appliances." 234 S.C. at 58, 106 S.E.2d at 674.

rather, in cases where there ***is*** a conflict in evidence, whether substantial supports the Commission's factual finding. *See* Wright, 314 S.C. at 157, 442 S.E.2d at 189 (noting that, "[h]ere, the Commission found the injury was *not* compensable, and substantial evidence supports its conclusion"); Johnson, 198 S.C. at 377, 17 S.E.2d at 697 (there was ***no*** evidence that the claimant "was ever clearly and specifically told not to enter the area between the brick wall and rock bin No. 2 ..." In Black, compensation was ***not*** denied "because ... there was a lack of substantial conflict in the testimony," as Claimant suggests. (App. Br. p. 22). Instead, the full quote is as follows: "The lack of substantial conflict in the testimony renders the question of whether [the claimant's] injuries arose out of his employment, which is ordinarily one of fact for the Industrial Commission, a question of law to be determined by the Court." 217 S.C. at 422, 60 S.E.2d at 858. As stated above, because there is conflicting evidence in this case, the Commission's findings of fact resolving those conflicts must be upheld on appeal because they are supported by substantial evidence. *See, e.g.*, Ross, 298 S.C. at 492, 381 S.E.2d at 730; Hall, 376 S.C. at 347, 656 S.E.2d at 758-759.

Claimant's attempt to create a "conflict" between the 2008 Safety Policy and the 2009 Memorandum is both misguided and fruitless. There is no "conflict" between the two documents, beyond Claimant's strained and hyper-technical reading of them. More importantly, Claimant admitted she knew that, in order to operate the walkie-rider she had to be certified and authorized, that she was not certified and authorized, and that operating walkie-riders can be very dangerous. (Tr. 15, line 14 – 17, line 6). She demonstrated her awareness of this policy by first asking an employee who was certified to move the walkie-rider for her. (Tr. 18, lines 1-5). Although Claimant, like the other

employees who went through the certification course, was allowed to operate the walkie-rider during the certification course and test, it was made clear to employees that they were not allowed to operate the walkie-rider without the proper certification and authorization. (Tr. 21, lines 5-9) (Tr. 33, line 22 – 34, line 3) (Tr. 38, lines 15-21). Clearly, in Pratt, the fact that the claimant had been allowed to take the truck home on previous occasions did not create "conflicting evidence on the applicability of the order," so that he was entitled to workers' compensation benefits. In fact, in Pratt, the precise rule was hotly debated: this Court noted that the claimant, "testified that he was not forbidden to take the truck home, but merely instructed not to take it home if he could not arrive at the job site on time," 353 S.C. at 343, 577 S.E.2d at 477, whereas the employer testified that he had been forbidden to take the truck that day period. 353 S.C. at 348, 577 S.E.2d at 479. On further appeal, the Supreme Court upheld the Commission's resolution of this conflict in testimony under the substantial evidence standard. 357 S.C. at 623, 594 S.E.2d at 274.

This Court should do the same in this case.

## IV. The Commission properly found that Claimant violated TFE's safety policy by operating the walkie-rider.

Claimant argues that, because of an alleged "lack of definitions and specificity within the 2008 Safety Policy or 2009 Memorandum," as well as her insistence that they contain conflicting language, there is insufficient evidence that she violated any order by TFE. (App. Br. p. 23). The Commission found that Claimant was injured "when she turned the handle on a walkie-rider, which made the walkie-rider move and become operational." (Commission Decision p. 5). Based on its consideration of all of the testimony and evidence, the Commission also found that Claimant "operated the walkie-

rider in direct violation of the employer's directions/instructions. This took her injury out of the sphere of her employment." (Commission Decision p. 6). Contrary to Claimant's assertion, neither the Commission nor Respondents are "uncertain" about the exact order or rule that Claimant violated. Claimant herself cannot credibly claim that she does not know what rule she violated. Claimant admitted that she knew that, in order to operate a walkie-rider, she had to be certified and authorized, (Tr. 15, lines 14-18), and that after failing the course twice, she had been instructed never to operate a walkie-rider. (Tr. 21, lines 5-9).

Although Claimant insists she didn't "feel like [she] was operating [the walkie-rider] just by turning my hand – just by turning the handle to get it to move up," the determination of whether she actually was operating it is not dependent on what Claimant felt she was or was not doing. In fact, when asked, "but you understand operating it means turning the handle?", her revealing answer was: "I didn't think about it." (Tr. 17, lines 7-12). Claimant did more than just "touch" the walkie-rider – she testified that she turned the throttle in order to cause the walkie-ride to move a couple of feet. (Tr. 10, line 11 – 11, line13). The fact that you can stand on the walkie-rider to operate it and that she did not actually put her feet on it is irrelevant; it does not change the fact that she turned the throttle and was operating it in order to move it out of her way.

As explained above, the fact that Claimant had operated the walkie-rider in the certification class, which she failed twice, does not mean she had any authority to operate the walkie-rider on July 15, 2011. Claimant's position is in direct conflict with Pratt, where the claimant had had full authority to drive the company truck home until he was told not to. The clear and explicit message Claimant received, as acknowledged by

Claimant herself, was that employees are not authorized to use power equipment such as the walkie-rider unless they were certified and authorized. (Tr. 15, line 14 – 16, line 22) (Tr. 21, lines 5-9). Claimant had failed the certification course twice, (Tr. 16, line 23 – 17, line 6), during which she "struggled greatly" with the walkie-rider. (APA 73) (Video of Claimant's walkie-rider training). Thus, Claimant was not authorized to operate the walkie-rider on July 15, 2011 and she further demonstrated her knowledge of this fact when she initially asked Mr. Cox to move the walkie-rider for her. (Tr. 18, lines 1-5).

Claimant's argument that the walkie-rider was not covered by TFE's safety policies, (App. Br. p. 25), is yet another disingenuous argument and reveals the underlying flaws in Claimant's position. In fact, when asked whether her job duties included "operating power equipment such as a walkie-rider," Claimant readily agreed that they did not, (Tr. 15, lines 10-13), demonstrating that she understood the walkie-rider to be a piece of power equipment.[8] Even Claimant's counsel tacitly acknowledged the walkie-rider is a piece of power equipment: after Ms. Kutkus testified regarding the requirement to be certified to operate power equipment, and that Claimant attended but failed such a class, (Tr. 25, lines 6-25), Claimant's counsel asked her, "You testified that the Claimant never was certified to operate the walkie-rider; is that correct?" (Tr. 27, line 24 – 28, line 6). Mr. Cox also indicated he understood the walkie-rider to be a piece of power equipment. (Tr. 36, line 19 – 37, line 3). Thus, TFE's policy clearly covered the walkie-rider, Claimant fully understood the policy and understood that it applied to the walkie-rider.

[8] Claimant's attempt to equate operation of a walkie-rider with the use of dollies, scissors and even a lamp or a desktop computer toes at the line of frivolous argument, if it does not step completely over the line. There cannot be any honest doubt that Claimant understood that, when she turned the throttle of the walkie-rider, she was operating or "using" a piece of power equipment that is fundamentally different from a pair of scissors or a lamp.

## V. Respondents are not estopped from asserting Claimant's conduct removed her from the scope of her employment.

For many of the same reasons set out above, Respondents are not "estopped" from arguing that she was outside the scope of her employment when she operated the walkie-rider on July 15, 2011. First, this case is fundamentally distinguishable from Clements v. Greenville Cnty, 246 S.C. 20, 142 S.E.2d 212 (1965). In Clements, a statute of limitations case, the Court explained that "estoppel "will arise from conduct on the part of the employer or carrier from which it may be reasonably inferred that the claimant was misled or deceived, whether intentionally or not, to believe that the claim is compensable and will be taken care of without its being filed with the Commission within the period limited." 246 S.C. at 23, 142 S.E.2d at 213. After the claimant, who had only a 7th grade education, was injured, the county supervisor visited him at home and offered to help him in any way. The employer later sent a truck to take the claimant to and from his home so that he could be at work, even though he was unable to fully perform his prior job. The Court held that the employer was estopped from raising a statute of limitations defense because, "the only reasonable inference to be drawn is that the claimant was led to believe that his injury was compensable and that his claim would be taken care of by his employer." 246 S.C. at 25, 142 S.E.2d at 214.

Claimant presents the implausible argument that TFE violated its own policy by providing training and certification sessions,[9] because they did not craft an "exception" to the rule that employees must not operate power equipment unless they are certified. (App. Br. p. 26). First, as noted above, the only time Claimant operated the walkie-rider with TFE's permission was during the training/certification sessions. Thus, had Claimant

[9] For the record, Respondents have not and do not admit that they violated their own company policies.

been injured during the training session, her injuries very well may have been compensable.[10] This is because she had permission to attempt to operate the walkie-rider during the training and certification sessions, which were conducted by TFE's safety coordinators. (Tr. 29, lines 11-13). In contrast, Claimant clearly understood that, because she did not pass the certification test, she was not certified and was prohibited from operating the walkie-rider. (Tr. 21, lines 5-9).

Under Pratt, even if TFE gave her permission to operate the walkie-rider during the training/certification class, the fact that after failing the certification she was instructed that she was never to operate the walkie-rider constitutes clear and explicit notice of this rule. Thus, Claimant was not misled and Respondents are not estopped from arguing she knowingly violated a safety rule which took her out of the sphere of her employment.

## VI. The Commission applied the correct legal standard in its Decision.

Claimant alleges that the Commission's Decision "essentially held that **any violation** of a company policy/instruction removed the Claimant from the course of her employment." (App. Br. p. 27). The Commission held no such thing. In Finding of Fact No. 8, highlighted by Claimant, the Commission found specifically that, "[w]**hen the claimant turned the handle of the walkie-rider, which then lurched forward, this was** in direct contravention of company policy **and specific instructions to not operate the walkie-rider**." (Commission Decision p. 5) (emphasis added). After explaining in detail that Claimant knew of the rule against operating the walkie-rider without proper

[10] As noted above, the burden is on the claimant to prove she is entitled to benefits. Sola, 244 S.C. at 9, 135 S.E.2d at 323. Whether she could meet her burden under this hypothetical situation is unknowable; however, under this scenario it is likely that her actions would not have taken her outside the scope of her employment.

certification and authorization, Finding of Fact No. 11 states: "**The claimant operated the walkie-rider** in direct violation of the employer's directions/instructions. This took her injury out of the sphere of her employment." (Commission Decision p. 6) (emphasis added). Conclusion of Law No. 9 references not only company policy but also "company training, and instruction by her safety manager." (Commission Decision p. 7). Thus, there is no room for doubt as to which policy Claimant violated (operating a walkie-rider without proper certification and authorization) and/or that she knew she was violating a strict rule.

The Commission has not "inserted fault into a no-fault system," any more than the Commission did in Black, Wright or Pratt. Employers must be able to establish workplace rules for the safety of their employees and/or in the interest of their business.[11] As noted above, the prohibition against operating power equipment such as the walkie-rider is different from the admonition to use common sense, be neat or walk in designated areas. As far as this record reveals, TFE did not hold training and certification courses on using common sense or dropping trash or walking in designated areas.[12]

As to the assertion that "fault" is an element of the Commission's Decision, the Commission did not find that she was outside of the scope of her employment because she operated the walkie-rider negligently, but because she operated it in direct violation of a known safety rule. The Commission applied the correct legal standard to find that Claimant violated, not just any rule, but a specific rule, which took her outside of the

[11] For example, this Court cited testimony in Pratt that indicated the reason the claimant was told not to drive the truck home on that particular occasion was not for safety reasons, but for the business purpose of keeping employer's customers happy and getting the claimant to work on time. 353 S.C. at 348, 577 S.E.2d at 479.

[12] Respondents do not concede that violations of these other rules could ***never*** take an employee outside the scope of their employment but only note that this record does not reveal that training and certification was provided or required for any of these other activities Claimant raises in her Brief.

scope of her employment and this Court should affirm.

## VII. The Commission's Decision is sufficiently definite and detailed for appellate review.

Claimant's assertion that the Commission failed to make sufficiently detailed findings of fact echoes many of her other arguments and is equally baseless. First, the case law cited by Claimant is inapplicable here. For example, in Shealy v Algernon Blaire, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967), the Commission's decision was deficient because it failed to determine the extent of the claimant's disability, if any, and it failed to determine the average weekly wage the claimant was able to earn after his injury. Both of these were essential but missing findings necessary to support the Commission's award of benefits. 250 S.C. at 109, 156 S.E.2d at 648. No such infirmity exists here. Although Claimant concocts some questions she might like to have answered, and insists certain terms need to be defined, (App. Br. pp. 8-9, 29), these issues are either irrelevant or were in fact decided by the Commission in Respondents' favor.

For example, there is no need for any Findings of Fact regarding the source and date of the "order," the 2008 Safety Policy, or the 2009 Memorandum where the Commission's findings clearly state that, "[t]he company policy that you must be certified to operate the walkie-rider, was discussed in the claimant's new hire orientation as well as during the claimant's training. The claimant also signed a safety memo evidencing her knowledge of this policy. Moreover, she signed a safety updates form that stated that she's not allowed to operate power equipment, which includes the walkie-rider." The Commission found that, "Claimant also knew that she was not permitted to operate the walkie-rider because she failed the training class to operate the walkie-rider

two times." (Commission Decision p. 6).[13] Furthermore, the Commission states its Findings of Fact are based on its consideration of all of the testimony and evidence. (Commission Decision pp. 5-6). Thus, Claimant's attempt to fabricate issues out of the terminology used in the 2008 Safety Policy and/or the 2009 Memorandum are meaningless in face of the specific findings that Claimant knew she was prohibited from doing the very act she was doing when she was injured.

As to the other purported shortcomings in the Commission Decision – that there are no findings of the exact violation, or Claimant's argument that she was not "operating" the walkie-rider – these were addressed by the Commission. The Commission specifically found that Claimant "suffered an injury to her shoulder on July 15, 2001 when she turned the handle on a walkie-rider, which made the walkie-rider move and become operational. ... When the claimant turned the handle of the walkie-rider, which then lurched forward, this was in direct contravention of company policy and specific instructions to not operate the walkie-rider." (Commission Decision p. 5). There is no doubt as to what the Commission ruled and the basis for its ruling. Clearly the Commission rejected Claimant's arguments that she was not "operating" the walkie-rider because she did not stand on it or use it to move merchandise. "The claimant operated the walkie-rider in direct violation of the employer's directions/instructions." (Commission Decision p. 6). A Commission Decision is not deficient simply because it does not explain in detail why it rejects every argument or concocted theory of the case.

In Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), the Commission decision

[13] Claimant's assertion that, at oral argument before the Appellate Panel, Defense counsel "was not able to identify the wording of the safety policy," (App. Br. p. 9), is as absurd as it is incorrect. First, the pages of the transcript she cites, (App. Tr. pp. 18-19) consist primarily of the testimony of her own counsel. Second, Defense counsel quite ably and concisely pointed out the safety policy that Claimant violated. (App. Tr. 11, line 15 – 18, line 7).

contained no stated reasons for the factual finding that the claimant's injuries were compensable but, instead, rested on the rather startling conclusion that:

> In the absence of any medical testimony to the effect that claimant had a history of suffering from physical seizures and since there is so much controversy as to how claimant fell, it is the opinion of the Majority Commission that the basic purpose of the Workmen's Compensation Act is to include injured workmen within its protection rather than exclude them.

255 S.C. at 224, 178 S.E.2d at 145. The Court could not determine whether the Commission's award was based on an inference of compensability because of the conflict in evidence or because the claimant had actually established his right to recover.[14] Note that the reasoning rejected in Hill is eerily similar to the position Claimant would have this Court adopt here. (*See* App. Br. p. 14 (arguing that the Commission should have resolved "all doubts" regarding her entitlement to benefits in favor of Claimant)). This is not the law in South Carolina. Instead, "a claimant has the burden of proving the facts essential to his right to compensation and an award may not be based upon conjecture or speculation." Shealy, 250 S.C. at 110, 156 S.E.2d at 648.

In the end, the Commission's Decision is sufficiently definite and detailed to enable appellate review and does not need to be remanded for further findings.

## VIII. The Commission's Decision did not need to include all of the stipulations contained in the Single Commissioner's Decision.

Claimant's final argument – that the Commission Decision is deficient because it does not contain all of the stipulations contained in the Single Commissioner Decision – does not provide any reason for reversing and remanding the Commission Decision. The Commission found "a FULL AFFIRMATION of the Single Commissioner's Decision

[14] Neither Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) or Campbell v. La-Z-Boy, 295 S.C. 384, 368 S.E.2d 679 (Ct. App. 1988) specify what essential findings of fact were either missing or conclusory and are, therefore, of little assistance in analyzing the instant case.

and Order." (Commission Decision pp. 4, 8). Furthermore, Respondents did not appeal any of the stipulations contained in the Single Commissioner Decision and, as such, they become the law of the case. "The findings of fact and law by the hearing commissioner became and are the law of the case, unless within the scope of the appellant's exception to the full commission and its notice to the respondent of the issues the respondent would be required to meet." Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 19093), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). Finally, stipulations by a party are binding on that party in later proceedings. Porter v. S.C. Service Comm'n, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998) (explaining that a "stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them"). Thus, there was no need for the Commission to repeat all of the stipulations contained in the Single Commissioner Decision and there is no reason to remand the Commission Decision.

## CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision and dismiss Claimant's appeal.

Respectfully submitted,

June 17, 2013

McANGUS GOUDELOCK & COURIE, LLC

Weston Adams, III
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE Logistics Group and Zurich American Insurance Company*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James Avery B. Wilkerson, Jr., Commissioners

WCC File No. 1110704

Claudia Bryant-Perreira, Employee, ..... Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier..... Respondents.

## DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following be included in the Record on Appeal:

1. Decision and Order of Single Commissioner Andrea C. Roche, dated June 15, 2012;
2. Decision and Order of the Appellate Panel of the Full Commission dated February 5, 2013;
3. Claimant's Form 50, dated November 7, 2011;
4. TFE's Form 51, dated December 6, 2011;
5. Claimant's Form 30;
6. Transcript of Hearing before the Single Commissioner, dated February 19, 2012, pp. 6-11, 13-21, 25-29, 31-34, 36-39, ;
7. Transcript of Hearing before the Appellate Panel of the Full Commission, dated November 14, 2012, pp. 11-19;
8. APA pp. 66-69, 70-73; and

9. Video of Claimant's walkie-rider training.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 17, 2013

Weston Adams, III
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE Logistics Group and Zurich American Insurance Company*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James Avery B. Wilkerson, Jr., Commissioners

---

WCC File No. 1110704

---

Claudia Bryant-Perreira, Employee, ..... Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier ..... Respondents.

---

**PROOF OF SERVICE**

---

I certify that I have served the **Initial Brief of Respondents** and **Designation of Matter** on Claudia Bryant-Perreira, by depositing a copy of it in the United States Mail, postage prepaid, on June 17, 2013 addressed to her attorney of record:

Samuel D. Harms, Esquire
Harms Law Firm, P.A.
33 Market Point Drive
Greenville, South Carolina 29607

Gayle McDaniel /sbm
Gayle McDaniel
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE Logistics Group and Zurich American Insurance Company*