THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-20-436

Case Tracking No. 2012-212898

James Clark, Jr., Respondent,

v.

Pyramid Masonry Contractors, Inc., and
Hartford Accident Insurance Company, Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE COMMISSION'S FINDING THAT MARK HINSON HAD APPARENT AUTHORITY TO OFFER RESPONDENT COMPANY-PROVIDED TRANSPORTATION DESPITE WRITTEN COMPANY POLICY TO THE CONTRARY?

II. DID THE COMMISSION COMMIT AN ERROR OF LAW BY FINDING THAT MARK HINSON HAD APPARENT AUTHORITY TO OFFER COMPANY-PROVIDED TRANSPORTATION DESPITE WRITTEN COMPANY POLICY TO THE CONTRARY?

STATEMENT OF THE CASE

James Clark, Jr. ("Respondent") filed a workers' compensation claim alleging that on November 17, 2004, he was seriously injured in a motor vehicle accident arising out of and in the course of his employment. Appellants Pyramid Masonry Contractors, Inc. ("Pyramid") and Hartford Fire Insurance Company denied that Respondent's motor vehicle accident arose out of and in the course of his employment.

A hearing was held before a single Commissioner on October 11, 2006. It was undisputed that the Respondent was injured in a motor vehicle accident that occurred in the very early morning hours of November 17, 2004, on Interstate Highway I-77. At the time, Respondent and a co-worker, Joey J. Horton ("Horton"), were riding in the personal vehicle of Mark Hinson ("Hinson"), a foreman at Pyramid Masonry Contractors, Inc. Hinson died as a result of the injuries he received in the motor vehicle accident. Respondent contended that Pyramid, through Hinson, was providing him transportation to and from the worksite. Therefore, he argued that the case fell within an exception to the "going and coming" rule.

Appellants denied that Respondent's injuries arose out of and in the course of his employment, since he was traveling to work at the time of the accident. Appellants specifically denied that Pyramid provided transportation to the Respondent while going to and from work. Appellants further denied that Pyramid paid travel time or mileage to either Respondent or to foreman Hinson.

On January 25, 2007, the single Commissioner issued his Decision and Order finding, inter alia, that Respondent's motor vehicle accident did not arise out of and in the course of his employment. The case was reviewed by an Appellate Panel of the

Commission, and on May 18, 2007, the Appellate Panel issued an Order affirming the single Commissioner's Order. Respondent filed an appeal with the Court of Common Pleas for Fairfield County, and the appeal was heard by The Honorable Brooks P. Goldsmith. On February 22, 2008, Judge Goldsmith filed his Order affirming the Appellate Panel. On March 19, 2008, Respondent filed his Notice of Appeal with the South Carolina Court of Appeals.

By way of Order from the Court of Appeals, dated July 14, 2010, the case was remanded to the South Carolina Workers' Compensation Commission for additional consideration, findings of fact, and conclusions of law on two issues. Specifically, the case was remanded to allow the Commission to consider Horton v. Pyramid Masonry Contractors, Inc., Op. No. 2008-UP-208 (S.C. Ct. App. filed March 27, 2008), which was on appeal at the time that the instant case was heard by the South Carolina Workers' Compensation Commission. Additionally, the Commission was also instructed to make findings of fact and conclusions of law with regard to the legal issues of "actual authority" and "apparent authority," and their effect on the case, if any.

Following remand, a hearing was held in front of Commissioner G. Bryan Lyndon on October 25, 2010. At the hearing, the parties presented oral arguments regarding the issues of collateral estoppel, actual authority, and apparent authority. No additional testimony or documentary evidence was submitted.

On March 7, 2011, Commissioner Lyndon issued a Decision and Order finding that Hinson had actual authority to discuss the conditions of employment and to answer any questions prospective employees may have concerning employment. Commissioner Lyndon further found that Hinson had *apparent* authority to offer and provide

transportation to and from the job sites *on behalf of Pyramid.* Commissioner Lyndon concluded that Hinson, acting with apparent authority, offered Respondent transportation on behalf of Pyramid and that Respondent accepted the offer and went to work for Pyramid. Commissioner Lyndon further concluded that Respondent's accident came within an exception to the "going and coming" rule and that Respondent was entitled to temporary total disability benefits from the date of his accident, to the present and continuing. Commissioner Lyndon also concluded that Appellants were responsible for all causally related medical expenses.

On March 18, 2011, Appellants filed a Form 30, Request for Commission Review. By Decision and Order dated October 15, 2011, an Appellate Panel of the South Carolina Workers' Compensation Commission affirmed Commissioner Lyndon's Order. On November 3, 2011, Appellants appealed the Appellate Panel's Decision and Order to the Court of Common Pleas, Fairfield County, State of South Carolina. Oral arguments were held before The Honorable Brooks P. Goldsmith on June 7, 2012. Judge Goldsmith affirmed the decision of the Commission by Order dated July 5, 2012. Judge Goldsmith found that Hinson had apparent authority to bind Pyramid with regard to the provision of transportation. Judge Goldsmith remanded the claim to the Commission to issue additional findings related to Respondent's entitlement to temporary total disability compensation. By Order dated August 3, 2012, Judge Goldsmith denied Appellants' Motion to Alter or Amend Judgment. Appellants filed their Notice of Appeal with the South Carolina Court of Appeals on September 4, 2012.

STATEMENT OF THE FACTS

On January 12, 2004, Pyramid hired Mark Hinson as a masonry foreman. (R. p. 546, ll. 24-25). Several weeks later, Hinson went to Joey Horton's home and offered him a job as a brick mason. (R. p. 526, ll. 20-25). Prior to this, Horton had worked for 10-15 years as a brick mason for Hinson's father, who owned a masonry company. (R. p. 535, ll. 12-20).

In October 2004, Hinson, accompanied by Horton, went to the home of the Respondent. At the time, Respondent was living at 1401 Phil Thurman Drive in Lancaster, South Carolina. (R. p. 499, ll. 22-25). According to Kimberly Ingram ("Ingram"), Respondent's purported common-law wife, Hinson came to their house twice. (R. p. 538, l. 19; p. 539, l. 19). The first time, Hinson came with Horton and told Respondent and Ingram's cousin about two job positions coming open at Pyramid and asked if they would be interested in the jobs. (R. p. 538, ll. 19-23). Then, Hinson returned another day and advised Respondent that the job position was available, and if the Respondent wanted to work, he should go ahead and fill out the paperwork. (R. pp. 538, l. 23- p. 539, l. 2, p. 540, ll. 2-3).

Respondent filled out the paperwork at that time. (R. p. 507, ll. 13-16, p. 540, ll. 2-3). He completed a 2004 Internal Revenue W-4 Form, a North Carolina Department of Revenue Form NC-4, an Immigration and Naturalization Service Form I-9, a job placement information form, and a statement acknowledging that he had read his job description which was also enclosed (R. pp. 598-603). **Respondent acknowledged that he had signed these forms.** (R. pp. 507, l. 16- p. 508, l. 3). When questioned by his counsel, Respondent denied reading the documents before signing. (R. p. 518, ll 10-14).

However, the forms required Respondent to provide information in addition to his signature. On the W-4 Form, Respondent was required to print his name, address, Social Security number, marital status, and the number of allowances he was claiming. (R. p. 600). On the Form NC-4, Respondent was also required to print his name, address, Social Security number, marital status, and the number of allowances he was claiming. (R. p. 601). On the INS Form I-9, Respondent was required to print his name, address, date of birth, and Social Security number. (R. p. 602). On the job placement information form, the Respondent was required to give his telephone number, date of birth, three previous employers and the dates worked, a past medical history, and the name and address of persons to contact in case of emergency. (R. p. 603). Finally, Respondent was required to sign and date a form acknowledging that he had read his job description. (R. p. 598). The Respondent's job description contained a provision that required him to "have means of transportation to and from project." (R. p. 599).

After completing the paperwork, Hinson offered Respondent a job as a laborer. (R. p. 501, ll. 3-10). Since Respondent did not own a car or have a driver's license at the time (R. p. 500, ll. 5-10), Hinson offered to let Respondent ride with him to and from work. (R. p. 501, ll. 23-24). Respondent testified that Hinson would transport him to work, and if Hinson had not taken him, he would have had no way to get there. (R. p. 502, ll. 11-13). Specifically, Respondent testified:

> I told him, "I ain't got no license. **The only way is you come and get me. If you'll take me to work, that's the only way - - I don't have any other transportation to go to work - - get to work."**

(R. p. 502, ll. 16-19) (emphasis added). According to Respondent, Hinson responded:

> **He said, "I have transportation. I'll provide transportation for you to go to work."** I said, "Well I'll take the job."

(R. p. 519, ll. 1-3) (emphasis added). Respondent testified that when he first went to work, Hinson drove him to and from a job site in Charlotte, North Carolina. (R. p. 503, ll. 14-15). Hinson also supervised him on the job. (R. p. 499, ll. 12-13). Respondent had only worked three to four weeks for Pyramid when the motor vehicle accident occurred (R. p. 499, ll. 7-9; pp. 504, l. 25- p. 505, l. 9), while Hinson, Horton and Respondent were on their way to a job site in Columbia, South Carolina. (R. p. 498, ll. 15-23). Respondent testified that he never had contact with anyone at Pyramid, other than Hinson, about his employment. (R. p. 499, ll. 14-17).

On cross-examination, Respondent admitted that, in order to fill out the forms with the information requested, he had to read those forms. (R. pp. 519, l. 20- p. 521, l. 7). Initially, Respondent tried to contend that he completed and signed the W-4, NC-4, and I-9 on a different date than the Pyramid job description memo. (R. p. 521, ll. 15-22). However, he subsequently admitted that all forms were dated the same date, November 1, 2004. (R. p. 522, ll. 10-12).

At the hearing, Respondent admitted that, if an employer gives a job description to a prospective employee indicating that the employee must have a means of transportation, then that would be an indication that the company was *not* going to provide the employee transportation. (R. pp. 511, l. 19- p. 512, l. 1). Respondent testified that Pyramid did not pay him anything for traveling back and forth to work, and that he did not go on the clock until he reached the job site. (R. p. 512, ll. 5-7). He admitted that his workday started when he arrived at the project. (R. p. 512, ll. 8-15).

Respondent's hire date was November 1, 2004, and the accident took place on November 17, 2004. (R. pp. 504, l. 1- p. 505, l. 6). At the time of the accident, Respondent was riding in Hinson's Honda automobile (R. pp. 506, l 18- p. 507, l) on the way to Columbia. Respondent testified that Hinson always provided Respondent with transportation to the work site using Hinson's personal truck or car. (R. p. 506, ll. 14-21). Respondent acknowledged that he and Hinson, who also lived in Lancaster, would have to travel the same route to the job site each day. (R. p. 513, ll. 8-10; p. 515, ll. 3-4).

Respondent testified that his driver's license was suspended in 2000 because he was in a wreck and did not have insurance on his car. (R. p. 61, ll. 9-15). Prior to working for Pyramid, Respondent had worked at the Wal-Mart Distribution Center in Pageland, South Carolina. (R. p. 515, ll. 16-20). Respondent testified that the Distribution Center was approximately 22 miles from his home in Lancaster and that he had to get a ride to work each day with a friend. (R. pp. 515, l. 23- p. 516, l. 3). Respondent also testified that when he worked for Tyson Foods in Monroe, North Carolina, he also had caught rides to work with friends. (R. pp. 516, l. 8- p. 517, l. 9). He admitted that neither of these companies provided him with transportation to and from work. (R. p. 517, ll. 2-4).

At the hearing, Respondent called Joey Horton as a witness. Horton had known Respondent for 8-10 years. (R. p. 525, ll. 6-7). Horton was also a passenger in Hinson's car on November 17, 2004, when the motor vehicle accident occurred. (R. p. 525, ll. 10-13). Horton was hired by Hinson as a brick mason in January 2004. (R. p. 526, ll. 20-24). At the time, Horton did not have a car or driver's license. (R. p. 527, ll. 5-8). He testified that Pyramid was going to provide him with transportation and that Hinson was paid $150.00 to carry him to work. (R. pp. 527, l. 9- p. 528, l. 18).

Horton further testified that approximately nine (9) months after he had been hired by Pyramid, in October 2004, he became aware that Hinson needed another laborer. (R. p. 530, ll. 7-8). Horton knew Respondent from previous jobs and told Hinson about Respondent. (R. p. 530, ll. 9-10). Horton and Hinson drove to Respondent's house to offer him a job. (R. p. 530, ll. 4-10). In addition to Respondent, Respondent's "girlfriend or wife" was also present. (R. p. 529, ll. 23-24). According to Horton, Respondent told Hinson that he did not have any way to get to work, and Hinson replied "Don't worry about it. The company provides it." (R. p. 530, ll. 19-25). Horton testified that, after Respondent was hired Horton, Respondent, and Hinson would ride everyday to work together. (R. p. 532, ll. 1-5). Horton further testified that the mileage from Lancaster to Columbia was approximately 140 miles round trip. (R. pp. 534, l. 24- p. 535, l. 2).

Horton also testified that, when they would ride with Hinson to work, they would ride in Hinson's personal truck or his wife's Honda. (R. pp. 533, ll. 20-24; p. 536, ll. 2-5). He testified that the week of the accident, Hinson was driving his wife's car, because Hinson's personal truck had been "tore up." (R. p. 534). Horton admitted that Pyramid did not provide a company truck for their transportation, but he claimed that Hinson was paid $150.00 to transport them to work. (R. p. 534, ll. 1-4). Horton admitted that he never discussed the $150.00 payment with anyone other than Hinson. (R. p. 534, ll. 11-13). He testified that his only knowledge about the $150.00 payment came from Hinson, although he had seen a check. (R. p. 534, ll. 14-17).

Horton had known Hinson for many years, because Horton had worked for Hinson's father. (R. p. 535, ll. 12-13). He testified that Hinson had provided him transportation to work plenty of times in other employments. (R. p. 535, ll. 21-23).

Horton admitted that, if Hinson did not work, Pyramid did not send a truck out to transport him to the job site. (R. pp. 535, l. 24- p. 536, l. 1). He also admitted that no one at Pyramid (other than Hinson) ever told him that the company was providing transportation. (R. p. 536, ll. 6-11).

Respondent called Kimberly Ingram as a witness. Ingram testified that she and Respondent were married under common law. (R. p. 537, ll. 17-18). Ingram testified that she was present when Horton and Hinson came to her house. (R. p. 538, ll. 1-16). She testified that Hinson told Respondent and Ingram's cousin about two job positions coming open and asked if they would be interested in the job positions. (R. p. 538, ll. 19-22). Respondent told Hinson he would be interested whenever it came open. (R. p. 538, l. 23). Hinson then returned another day with the paperwork and told Respondent that the job was available, and if he wanted to take the job he needed to fill out the paperwork. (R. pp. 538, l. 23- p. 539, l. 3). Respondent then filled out the paperwork. (R. p. 539). According to Ingram, Respondent then asked Hinson how he was supposed to get to and from work, and Hinson told him "not to worry about that; he was going to come and get him and the company was gonna furnish it." (R. p. 539, ll. 3-7). Thereafter, Hinson would come to Respondent's house every morning around 5:00 a.m. and take him to work. (R. p. 540, ll. 9-14). Ingram testified that Respondent did not have a driver's license and did not have any other means of getting to work. (R. p. 540, ll. 17-20).

Ingram further testified that she did not believe Respondent read any of the forms that he signed. (R. p. 541, ll. 5-8). However, she was unable to explain how Respondent would be able to answer questions about his medical history without reading the

questions. (R. p. 542, ll. 1-25). Ingram also testified that when Hinson came to pick up Respondent he was either in a truck or a car. Neither of these vehicles had signs indicating they belonged to Pyramid. (R. p. 543, ll. 14-25). Ingram further admitted that Respondent had received rides to work even before working with Pyramid, because he did not have a driver's license. (R. p. 540, ll. 6-8).

David G. Mauney ("Mauney"), Regional Vice-President for Pyramid, testified that Hinson was hired as a foreman by Pyramid on January 12, 2004. (R. p. 546, ll. 23-24). Hinson's job was to supervise brick masons and laborers on the job sites. (R. p. 547, ll. 2-5). Mauney testified that Hinson was not a part of the management of Pyramid. (R. p. 547, ll. 6-8). Hinson was paid an hourly wage of $23.00 per hour. (R. p. 547, ll. 9-10). In addition, he was paid $150.00 per month as a truck allowance for the use of his personal vehicle during the course of the workday. (R. p. 547, ll. 11-17). Mauney testified that the truck allowance was in effect at the time he began working at Pyramid in 1981. (R. p. 547, ll. 18-22). He identified Respondents' Exhibit #2 which was a written policy explaining the truck allowance:

> This expense is paid monthly. It is for the intended use of reimbursement for the use of personal vehicles on the job site. This pertains only for picking up or delivering incidentals and not to be interpreted as mileage.

(R. p. 604; p. 548, ll. 5-10). Mauney testified that Pyramid did not provide transportation to its employees (R. p. 548, ll. 23-25), and did not provide trucks to its foremen. (R. p. 549, ll. 1-2). He testified that <u>all</u> of the company's job descriptions contain the provision "Must have means of transportation to and from project." (R. p. 549, ll. 5-13).

Mauney testified that Hinson did have authority to hire Respondent. (R. p. 551, ll. 20-21). However, there were company guidelines as to the amount that Hinson could

offer to pay Respondent. (R. p. 551, ll. 22-25). For a laborer at the Columbia job site, Hinson could offer between $8.50 and $10.00 per hour, depending upon experience. (R. p. 552, ll. 1-5). Mauney testified that Hinson did not have authority to offer Respondent a job making $50.00 per hour. (R. p. 98, ll. 11-12). Likewise, Hinson did not have authority to offer transportation, because Pyramid did not provide transportation to its employees. (R. p. 552, ll. 13-17).

Mauney testified that, when Hinson was hired, there had been an extensive discussion about the truck allowance that Hinson would receive. (R. p. 556, ll. 13-16). Pyramid had been very specific as to what the truck allowance was for, and Hinson understood that the $150.00 was paid for the use of his vehicle during the course of the workday to pick up ice, water, gasoline, or small tools. (R. pp. 556, l. 17- p. 557, l. 6). Mauney admitted that Hinson had authority to tell Respondent what his job would be and how much money he would make. (R. pp. 554, l. 21- p. 555, l. 1). Mauney testified that it was reasonable that Hinson would offer a ride to Respondent as a personal courtesy, but not as a part of his employment. (R. p. 555, ll. 7-17). .

Mauney further testified that Hinson was not paid to take Respondent or Horton to work. (R. p. 556, ll. 9-11). He testified that it was not uncommon for employees to catch rides to work with friends and co-workers. (R. p. 557, ll. 14-16). Mauney testified that it was a common practice in the construction industry to pay an allowance for people who have to go out and get incidental parts, etc. (R. p. 561, ll. 14-16). He also testified that, if Hinson was not able to pick up Respondent or Horton for 2-3 weeks, they would not have gotten to work. (R. p. 561, ll. 11-16). He testified that Pyramid would not send

out a truck to pick up Respondent or Horton if Hinson was not available. (R. p. 561, ll. 20-21).

Appellants also called Donald G. Williams ("Williams") to testify. Williams had been a foreman for Pyramid for 19 years. (R. p. 562, ll. 21-24). He testified that Pyramid did not provide its foremen with company trucks and he had always driven his personal truck to work. (R. p. 563, ll. 2-5). Williams testified that he has been receiving a truck allowance for approximately 18 years and has never transported any of Pyramid's workers to the job site. (R. pp. 563, l. 22- p. 564, l. 5). Williams further testified that the $150.00 allowance was paid to the foremen to pick up miscellaneous things for the job such as ice, gas, wall tires, or anything that the job required. (R. p. 563, ll. 11-14). The $150.00 was paid for his using his own truck to pick up these incidentals. (R. pp. 565, l. 22- p. 567, l. 5). Williams testified that Pyramid did not provide transportation to and from work to its employees. (R. p. 565, ll. 12-13).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> * * * * *

(d) affected by other error of law; [or]

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

S.C. Code Ann. §1-23-380(A)(6)(1976) An appellate court in workers' compensation appeals may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission, if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (S.C. App. 1984). An award cannot be based on surmise, conjecture or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). See also, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (testimony that is based on surmise, conjecture and speculation has no probative value). 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. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754

(1979). Furthermore, a court "may reverse where the decision is affected by an error of law." Stephens v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

ARGUMENTS

I.

THE DETERMINATIVE FACTS OF THE INSTANT CASE ARE NOT "VERY SIMILAR" TO THE DETERMINATIVE FACTS OF HORTON V. PYRAMID MASONRY CONTRACTORS, INC.

This is not a case which turns on whether an accident happened; clearly, the car wreck that claimed Hinson's life occurred on November 17, 2004. The compensability of this claim is unrelated to the circumstances of the accident itself. Rather, the compensability of this claim turns on the factual circumstances related to the hiring of Respondent by Hinson, and whether Hinson had actual and/or apparent authority to provide Respondent with transportation to and from work on behalf of Pyramid.

The facts of the present case differ significantly from the facts of Horton v. Pyramid Masonry Contractors, Inc., Op. No. 2008 UP-208 (S.C. Ct. App. Filed March 27, 2008). The fact that Respondent and Horton were riding in the same car at the time of the incident does not make the determinative facts of these cases "very similar." Instead, there are very significant differences between the hiring of Respondent and the hiring of Horton. Those differences are not only relevant, but are also critical to the determination of the legal issues before this Court.

Horton was hired at the end of January 2004. Respondent in this case was hired on November 1, 2004. The hiring of each employee was done separately and at different times. The resulting operative facts surrounding the terms of Respondent's hire and the terms of Horton's hire were not the same and were, in fact, very different. Most

importantly, Respondent in the present case was aware that Pyramid had a "no transportation" policy in its job descriptions and in actual practice.

At the time he was hired, Respondent was given various employment-related documents to review and complete. He completed a 2004 Internal Revenue W-4 Form, a North Carolina Department of Revenue Form NC-4, an Immigration and Naturalization Service Form I-9, a job placement information form, and a job description for labor-tender with a statement acknowledging that he had read his job description. (R. pp. 598-603). At the hearing, Respondent acknowledged that he had signed these forms. (R. pp. 507-508).

Although he attempted to deny that he read these documents prior to signing them, the forms required Respondent to provide information in addition to his signature. On the W-4 Form, Respondent was required to print his name, address, Social Security number, marital status, and the number of allowances he was claiming. (R. p. 600). On the Form NC-4, Respondent was also required to print his name, address, Social Security number, marital status, and the number of allowances he was claiming. (R. p. 601). On the INS Form I-9, Respondent was required to print his name, address, date of birth, and Social Security number. (R. p. 602). On the job placement information form, Respondent was required to provide his telephone number, date of birth, three previous employers and the dates worked, a past medical history, and the name and address of persons to contact in case of emergency. (R. p. 603).

Finally, Respondent was required to sign and date a form acknowledging that he had read his job description. (R. p. 605). **Respondent provided all of the above required information and signed the form acknowledging that he had read the job**

description. There is no evidence in the record that Respondent misunderstood the "no transportation" provision in his job description. To the contrary, Respondent testified that a company job description which says that a prospective employee "must have means of transportation to and from project" is a good indication that a company is not going to provide transportation. (R. p. 511).

While Respondent/Employee in the present case reviewed the job description and signed a form indicating that he had read the job description, the Employee in Horton alleged that he never received a job description from Pyramid. The Horton Court noted:

> David Mauney...testified Employer does not provide transportation to its employees....He stated Employer's job description...specifically states the employee "must have means of transportation to and from project." However, Employee testified he had not seen the job description prior to the hearing.

Horton, at p.8. In the instant case, Respondent's testimony was quite different from the testimony given in the Horton case. Respondent consistently testified that *he asked Hinson* to give him a ride to work:

> Q. And when Mark Hinson came and offered you the job, did you tell him you didn't have a car?
>
> A. I told him I didn't have no car. I said, 'You'll be my transportation if I go."
>
> Q. What did he say?
>
> A. He said, "I have transportation. I'll provide transportation for you to go to work." I said, "Well, I'll take the job."

(R. pp. 518, l. 21- p. 519, l. 3). Respondent specifically asked Hinson if he could ride to work with him, and Hinson agreed. This differs from the Horton case, where Horton alleged that Hinson specifically told him that *Pyramid* would provide the transportation.

(R. p. 163). In the instant case, the above testimony shows that Respondent asked *Hinson* to give him a ride to work, not that Pyramid would provide transportation.

Horton and Respondent were hired on two separate dates, and the facts surrounding the separate hirings of Horton and Respondent are substantially different. Hinson's prior relationship with Horton was vastly different and far more longstanding than his relationship with Respondent. This fact was recognized by the Horton Court in Footnote 3 of the Opinion:

> Foreman and Employee lived in Lancaster and had known each other for many years prior to Foreman offering Employee a job with Employer. Employee testified he had worked for ten to fifteen years with Foreman in Foreman's father's construction company. Later, Foreman started his own business, and Employee worked for him. Employee did not have a car or a driver's license the entire time he worked for Foreman's family. Consequently, Foreman or Foreman's father drove Employee to and from the job sites during the ten to fifteen year period that preceded Employer's hiring of Employee in January 2004.

Horton at Footnote 3 (emphasis added). This longstanding, fifteen-year relationship had an impact on the Court's decision in Horton. Respondent in the instant case did not have such a relationship with Hinson. In fact, Respondent testified that he did not even know Hinson prior to being hired by Pyramid:

> Q: [Counsel for Appellant] Now, did you know Mark Hinson prior to being hired?
>
> A: [Respondent] No.

(R. p. 505, ll. 10-11).

The determinative facts of the present case differ significantly from the facts of Horton. There is no substantial evidence to support the Commission's finding that the facts of the present case are "very similar" to the facts of Horton with regard to the facts that are actually critical to the determination of compensability based on the legal

principle of "apparent" agency. Defendants contend that the Commission erred to the extent that any portion of their decision is based on the allegedly "very similar" facts between the present case and the Horton case.

II.

PYRAMID DID NOT PROVIDE RESPONDENT TRANSPORTATION TO AND FROM WORK.

The compensability of this claim is unrelated to the circumstances of the accident itself. The compensability of this claim turns on whether Hinson had actual and/or apparent authority to provide Respondent with transportation to and from work on behalf of Pyramid.

A claimant has the burden to show such facts as will render an injury compensable under the Workers' Compensation Act. Holmon v. Bulldog Trucking Co., 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). The workers' compensation Claimant must prove his or her right to benefits by the greater weight or preponderance of the evidence. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965). The Commission cannot base an award on surmise, conjecture, or speculation. Lorick v. S.C. Elec. & Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965).

In the present case, it was error to find that Pyramid provided Respondent transportation to and from work. The Commission determined that Hinson, Respondent's foreman, had *apparent* authority to provide transportation to Respondent and that Hinson, acting with apparent authority, offered Respondent transportation on behalf of Pyramid. **This determination is the sole basis for the award of benefits to the Respondent.** This was not only legal error, but it is also unsupported by substantial evidence. The substantial evidence not only supports but actually proves that Hinson did not have actual

or apparent authority to offer or provide Respondent transportation on behalf of Pyramid, and the Commission erred in determining that Pyramid provided Respondent transportation to and from work.

A. Mark Hinson did not have *actual* authority to offer Respondent transportation to and from the job site on behalf of Pyramid.

Respondent presented no evidence that Hinson ever had the actual authority to bind Pyramid in an agreement to provide Respondent with transportation to and from work. On the contrary, Appellants presented testimony from David Mauney, Regional Vice President of Pyramid, that Hinson had no authority to bind Pyramid into providing transportation for an employee. (R. p. 552, ll. 13-18). When asked by Respondent's attorney on cross-examination whether it would have been reasonable for Respondent to believe that Hinson had authority to say Pyramid was going to provide him transportation, Mauney answered that it would have been reasonable for Hinson to offer a ride as a personal courtesy, but not in the scope of employment. (R. p. 555, ll. 15-17). In fact, Respondent's testimony indicates that Hinson did, in fact, provide him a ride as a personal courtesy, but not on behalf of Pyramid:

> Q: [Counsel For Respondent] And when Mark Hinson came and offered you the job, did you tell him you didn't have a car?
>
> A: [Respondent] I told him I didn't have no car. I said, "you'll be my only transportation if I go."
>
> Q: What did he say?
>
> A: He said, "I have transportation. **I'll provide transportation** for you to go to work." I said, "well, I'll take the job."

(R. pp. 518, l. 21- p. 519, l. 3) (emphasis added). Respondent's own testimony indicates that Mr. Hinson would provide transportation as a personal favor. Respondent's

testimony does not indicate that Mr. Hinson was providing transportation *on behalf of Pyramid.*

Moreover, Defendants introduced an exhibit titled "Labor-tender Job Description" at the hearing. (R. p. 599). The job description specifically provided that the employee "must have means of transportation to and from projects." (R. p. 599). This job description was included in the employment packet that contained the W-4 and the job safety rules and regulations. Respondent signed a statement acknowledging that he had read his job description. (R. p. 598).

As further evidence of Hinson's lack of actual authority to negotiate transportation terms on behalf of Pyramid, Donald Williams, a foreman for Pyramid for approximately 18 years, testified that Pyramid did not provide transportation for employees to and from work. (R. p. 565, ll. 9-11). He further confirmed that Pyramid did not provide its foremen with trucks to drive. (R. p. 563, ll. 2-3). Williams has received the monthly truck allowance for 18 years but has never transported employees to the job site. (R. pp. 563, l. 22- p. 564, ll. 7).

The evidence in the record establishes that Hinson did not have actual authority to offer transportation to Respondent on behalf of Pyramid. There is no Commission finding that Hinson had actual authority to offer transportation on behalf of Pyramid. Instead, the Commission found that Hinson had apparent authority to offer transportation. This was error, because Hinson did not have apparent authority to offer Respondent transportation on behalf of Pyramid.

B. Mark Hinson did not have *apparent* authority to offer Respondent transportation to and from the job site on behalf of Pyramid.

The Commission's finding that Hinson, who died in the accident on November 17, 2004, had *apparent* authority to offer Respondent transportation to and from the job site on behalf of Pyramid, is not supported by substantial evidence. The determinative and substantial evidence actually supports the Commission's (and Circuit Court's) original finding that Hinson did not have apparent authority to bind Pyramid to provide transportation to Respondent, and the Commission should be reversed.

Generally, agency is a question of fact. Gathers v. Harris Teeter Supermarket, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984). Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982). If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury. A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts. Orphan Aid Society v. Jenkins, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting McCall v. Finley, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) (emphasis added). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. (Id.)

The doctrine of apparent authority provides that the principal is bound by acts of his agent when he has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom, is led to believe the agent has certain authority and in turn deals with the agent based on that assumption. *See* Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), rev'd on other grounds, 313 S.C. 412, 438 S.E.2d 248 (1993). Apparent authority

to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. *See* Restatement (Second) of Agency § 27 (1958); Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. at 142, 399 S.E.2d at 433. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief. (*See* Id.) **Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent.** *See* Muller at 142-43, 399 S.E.2d at 433.

To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. *See* Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986). In order for a third party to recover against the principal based upon this theory, it must be shown that he reasonably relied on the indicia of authority **originated by the principal** and such reliance must have effected a change of position by the third party. *See* Beasley v. Kerr-McGee Chem. Corp., Inc., 273 S.C. 523, 257 S.E.2d 726 (1979).

In the instant case, there is no evidence to suggest that Pyramid engaged in any conduct that would lead Respondent to believe that Hinson had authority, either actual or apparent, to offer employer-provided transportation to Respondent as a part of the terms of his employment. To the contrary, Pyramid's job descriptions affirmatively indicate that the company does not provide employees with rides to transportation to and from work. (R. p. 599, pp. 604-605). Respondent signed an acknowledgement that he had read

his job description. (R. p. 599, pp. 604-605). Respondent had actual notice of the company's written policy stating that Pyramid did not provide transportation to its employees.

Respondent's entire argument for compensability is based upon the notion that he was reasonably led to believe that Hinson had the power to offer and provide transportation on behalf of the company, to Respondent, who had no driver's license, as part of the terms and conditions of Respondent's employment. Substantial evidence does not support this position. In fact, the determinative evidence in the record indicates that it would be absolutely unreasonable for Respondent to believe that Hinson had apparent authority to provide transportation to Respondent on behalf of Pyramid.

When asked about the job description which indicated that he must provide his own means of transportation to the jobsite, Respondent admitted that the job description was a good indication that Pyramid was not going to provide transportation:

> Q: [Counsel for Appellants] . . . I'm saying when a company gives you a job description and you sign that you have read it and the job description says you must have the means of transportation to and from the project, that's a pretty good indication the company isn't going to provide you transportation, isn't it?
>
> A: [Respondent] I guess.

(R. pp. 511, l. 15- p. 512, l. 1). It is unreasonable for Respondent to admit this at the hearing but still maintain the position that he "reasonably" believed that Hinson had the authority to offer him transportation to and from work, to be provided by Pyramid. The Respondent's own job description specifically provided that the employee "must have means of transportation to and from projects," and Respondent acknowledged in writing that he had read the job description. It is unreasonable for Respondent to make such

acknowledgements and then proceed forward as if those acknowledgements are meaningless. To argue otherwise is for Respondent to argue that his own word means nothing. Respondent knew that Pyramid did not provide transportation for its employees.

Furthermore, even if Hinson *had* offered the Respondent employer-provided transportation, an agency may not be established solely by the declarations and conduct of an alleged agent. *See* Muller at 142-43, 399 S.E.2d at 433. Respondent had the burden of proving that he reasonably relied on indicia of authority originated by Pyramid. *See* Beasley v. Kerr-McGee Chem. Corp., Inc., 273 S.C. 523, 257 S.E.2d 726 (1979). Simply showing that Hinson was employed as an agent of Pyramid is insufficient. There is no substantial evidence to support the Commission's finding, to whatever extent, that Pyramid acted in some manner that would lead Respondent to reasonably believe that that Hinson had the authority to offer employer-provided transportation. In fact, there is nothing contained in the Pyramid hiring materials, which Respondent signed and acknowledged that he read, that could be reasonably interpreted as Pyramid giving authority to Hinson to provide transportation to Respondent on behalf of Pyramid.

The Pyramid job description, which also includes a cover letter with language instructing Respondent to ask the foreman or superintendent for an explanation if there are items that Respondent did not understand, does not represent substantial evidence supporting the Commission's findings on apparent authority. This language does nothing more than to instruct a potential employee to address any questions about the terms of employment with the supervisor or foreman. It is not, in any way, in conflict with the express written provisions found in Respondent's job description, including the portion about employees providing their own means of transportation. Appellants would submit

that this language is actually intended to clear up any possible confusion over the terms and conditions of employment *prior* to the hiring of the employee. To characterize this language as "indicia of authority" that Hinson had the apparent authority to disregard Pyramid's written terms and conditions of employment would be unreasonable and does not represent substantial evidence.

In further support of the fact that Hinson did not have apparent authority to offer transportation to Respondent on behalf of Pyramid, David G. Mauney testified that Pyramid did not furnish its employees rides to work. Mauney testified that employees would either have to drive their own vehicle or get rides with whomever they could get a ride. It was the employee's responsibility to find his own way to work. The job descriptions for the positions of mason and labor-tender contain a provision that the employee "must have means of transportation to and from project." Additionally, Donald G. Williams, a foreman for Pyramid for 18 years, also testified that Pyramid did not provide transportation for employees to the job site. He further testified that Pyramid does not provide its foremen with company trucks to drive. Williams testified that he drives his own personal truck to work. It is undisputed that Hinson was also driving his own personal Honda automobile at the time of the accident that gives rise to this claim.

At the hearing, Respondent's counsel also questioned Mauney regarding Hinson's authority to hire Respondent and to tell him the wages he would receive. Mauney testified that Hinson had authority to hire Respondent and to tell him what his hourly pay rate would be within the company wage guidelines. (R. p. 551, ll. 20-25), but Hinson did not have authority to tell Respondent that Pyramid would provide him transportation. (R. p. 552, ll. 13-15). That would have been outside the scope of Hinson's authority.

Mauney's testimony regarding the company's policy of not providing transportation was corroborated by the company's written job descriptions which indicated that the employee must have his own means of transportation to the job site. Moreover, Respondent presented no evidence that Hinson had been given authority, either actual or apparent, to go against (written) company policy. Pyramid had not provided Hinson with a company vehicle or even agreed to pay Hinson's transportation costs or mileage to and from work. Since Pyramid manifested its "no transportation" policy in its written job descriptions and in actual practice, Pyramid cannot be said to have given Hinson apparent authority to negotiate transportation (and disregard written company policy) with Respondent.

The evidence in the record establishes that Respondent had always been given rides to work by friends, even before his employment with Pyramid. Simply put, it is commonplace that people often ride with friends and co-workers to their jobs. The provision of transportation to Respondent by Hinson was strictly a personal favor by Hinson and does not equate to employer-provided transportation based on *apparent* authority to offer the same.

The determinative evidence establishes that Hinson did not have apparent authority to offer Respondent transportation on behalf of Pyramid. As a result, Appellants respectfully request that the Commission's finding that Hinson had apparent authority to offer Respondent transportation to and from the jobsite on behalf of Pyramid be reversed for a lack of supporting substantial evidence.

C. Mark Hinson never offered Respondent transportation to and from the jobsite on behalf of Pyramid.

Even assuming, *arguendo,* that Hinson did have apparent authority to offer Respondent transportation to and from the jobsite on behalf of Pyramid, which Appellants adamantly deny, the evidence still does not support a finding that Hinson actually offered Respondent transportation to and from the jobsite on behalf of Pyramid. Instead, the substantial evidence, including Respondent's own testimony, indicates that any offer of transportation Hinson may have made was purely a personal courtesy.

While Mauney testified that Hinson had no authority to bind Pyramid into providing transportation for an employee, he testified that Hinson could have offered a ride to Respondent as a personal courtesy. (R. p. 555, ll. 15-17). The evidence demonstrates that this is what happened in the instant case. In fact, Respondent testified that, when Hinson offered to transport Respondent to the jobsite, it was not on behalf of Pyramid, but was rather a personal favor on behalf of Hinson. When asked by his attorney at the hearing about the discussion he had with Hinson regarding transportation to the jobsite, Respondent testified that Hinson was *personally* providing him transportation:

> Q: [Counsel for Respondent] And when Mark Hinson came and offered you the job, did you tell him you didn't have a car?
>
> A: [Respondent] I told him I didn't have no car. I said, "you'll be my only transportation if I go."
>
> Q: What did he say?
>
> A: He said, "I have transportation. **I'll provide transportation** for you to go to work." I said, "well, I'll take the job."

(R. pp. 518, l. 21- p. 519, l. 3) (emphasis added). It is Respondent's testimony that he informed Hinson that he did not have transportation and that Respondent was asking Hinson for a ride to work. Respondent's own testimony further indicates that Hinson agreed to drive Respondent to and from the jobsite as a personal favor. Additionally, while Respondent's attorney attempted to lead Respondent on multiple occasions into testifying that the company was providing him transportation, Respondent did not testify as such; rather, Respondent repeatedly testified that Hinson personally provided him transportation:

Q: [Counsel for Respondent] How were you going to get to work?

A: [Respondent] He was gonna take me. He was gonna drive me to work.

Q: Did he tell you that Pyramid Construction ---

[Counsel for Appellants] Object to the leading, your Honor.

Q: How were you supposed to get to work?

A: **Through Mark.**

Q: Through Mark?

A: Right.

Q: And is that how you got to work?

A: That's how I got to work.

Q: And if he hadn't taken you, you had no way to get there?

A: I didn't have no way.

Q: And when he came and you talked about the job, what did you tell him? What did you tell him?

A: I told him, "I ain't got no license. The only way is you come and get me. If you'll take me to work, that's the only way -- I don't have any transportation to go to work -- get to work."

Q: You couldn't get there unless the company provided ---

[Counsel for Appellants] Object, your Honor, to the leading.

[Commissioner Lyndon] All right. Please don't suggest the answer.

[Counsel for Respondent] I'm sorry.

Q: So how were you to get to work?

A: Through Mark.

Q: Now, is that how you did get to work?

A: That's how I got to work.

Q: You got to work every day like that?

A: Right.

(R. pp. 501, l. 23- p. 503, l. 9). Respondent's attorney tried to lead Respondent into testifying that Hinson offered him transportation on behalf of Pyramid. However, Respondent did not testify that his transportation to and from the jobsite was on behalf of Pyramid. **Respondent's testimony was that the rides to and from the jobsite were made by Hinson as a personal favor to Respondent.**

Even further assuming, *arguendo,* that Hinson had apparent authority to provide transportation to Respondent, Hinson never used that apparent authority to provide Respondent transportation on behalf on Pyramid. There is no substantial evidence in the record to support such a proposition. As a result, Appellants respectfully request that any finding or portion of the Commission's decision that is based on the idea that Hinson,

acting with apparent authority, offered Respondent transportation on behalf of Pyramid, be reversed.

III.

RESPONDENT'S RELIANCE ON MEDLIN V. UPSTATE PLASTER SERVICES AND EADIE V. H.A. SACK CO. IS MISPLACED.

Respondent will likely cite for support of his position the cases of Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (1998) and Eadie v. H.A. Sack Co., 322 S.C. 164, 470 S.E.2d 397 (1996). Respondent will also likely describe Medlin as being factually identical to this case; this is incorrect. In Medlin, the employer hired the employee to install stucco. At the time of employment, the employee advised the employer that he did not have a driver's license. The employer told the employee that if employee could manage to get to the employer's office, then the employer would provide transportation to the job site. *See* Medlin v. Upstate Plaster Service, 329 S.C. at 94, 495 S.E.2d at 448-9. The employee was subsequently injured while riding with the employer from the office to the job site.

Medlin is distinguishable from the instant case. At the time of his accident, Respondent was riding in Hinson's personal vehicle and the ride to and from work that was provided by Hinson was a gratuitous act. Moreover, Respondent was undeniably aware that Pyramid had an established policy not to provide transportation for employees to and from work. Furthermore, at the time of the accident, Respondent was not riding from Pyramid's office to the job site; rather, Respondent was riding from his own home in Lancaster, SC to the job site. In other words, in Medlin, the employee's "going to and coming from" work was his travel from his home to the employer's office. However, in

the instant case, Respondent's "going to and coming from" work was catching a ride with Hinson from Respondent's home in Lancaster, SC to the job site.

Finally, and perhaps most importantly, in Medlin, the employer testified that the employee could not provide his own transportation, so "we had to furnish him a ride." Id. No such testimony exists in this case. In fact, just the opposite is true for the instant case. Pyramid has always denied that it provided transportation to any of its employees, including Respondent. (R. p. 548, ll. 23-25; p. 565, ll. 9-11).

The case of Eadie v. H.A. Sack Co., 322 S.C. 164, 470 S.E.2d 397 (S.C. App. 1996) is also distinguishable. In that case, Eadie was hired as a project superintendent for H.A. Sack Co. Normally, project superintendents were given company vehicles to drive back and forth to work. However, there was no company vehicle available for that particular project. Therefore, the company agreed to pay 22 cents per mile to Eadie for using his personal vehicle to drive to the worksite. This was an admitted fact and there was no dispute that 22 cents per mile would pay for substantially all of the costs of Eadie's travel. The South Carolina Court of Appeals concluded that the payment of mileage was "deliberate and substantial," because it was intended to defray all the cost of travel.

Additionally, the Eadie Court found that the employer was estopped from denying that Eadie, as their agent, had the authority to offer employer-provided transportation to other employees whom he hired to work on his crew. Eadie had already hired two other employees, Stanley and Nix, and Eadie himself testified that he agreed to provide them transportation to and from work *on behalf of the employer*. All three employees (Eadie, Stanley, and Nix) were involved in the same motor vehicle accident on the way to the

jobsite. In an examination of the principle of "apparent authority," the Court of Appeals found that the actions of the employer's project manager, Garrick, impliedly manifested to Stanley and Nix that Eadie had the authority to offer them employer provided transportation as part of their jobs.

The facts in this case, however, are quite different. First, Pyramid did not provide company vehicles for its foremen. This is a significant difference, because H.A. Sack Co. routinely provided company vehicles. Second, even assuming, *arguendo,* that Hinson's $150.00 monthly allowance was payment of travel money, it did not defray substantially all the travel costs. In fact, the evidence establishes that $150.00 would pay less than three days of travel expenses from Lancaster to Columbia. This is quite different from the facts in Eadie.

More importantly, the facts in Eadie that led to the Court of Appeals' decision on the issue of "apparent authority" are substantially different from the facts in the instant case. In Eadie, H.A. Sack Co. routinely provided transportation to its employees as part of the normal course of business. Garrick testified that he would have given Eadie a company truck, had one been available, and Garrick had actual knowledge that Stanley was riding to and from the job site with Eadie. Garrick's involvement went far beyond simply authorizing Eadie to hire his own crew and set their wages. It was this type of entrenched, overt employer action that demonstrated that H.A. Sack Co. had impliedly manifested to Stanley and Nix that Eadie had the authority to offer them employer-provided transportation as part of their jobs, in addition to setting their other terms of employment.

Those same types of overt employer actions do not exist in the instant case. There is no evidence that Mauney was aware that Respondent or Horton were riding to and from work with Hinson (or that Mauney actually consented to the same). Pyramid never offered Hinson a company vehicle or paid him an equivalent amount in mileage to drive his own personal vehicle. Unlike the employer in Eadie, Pyramid did not provide transportation to any of its employees.

Still, even setting all of the above factual differences aside, one paramount difference between Eadie and the instant case remains. This difference has been continually disregarded by Respondent. **The Respondent in this case had actual notice, in writing, that Pyramid did not provide transportation to and from the jobsite for any of its employees.** (R. p. 599). No such facts exist in the Eadie case. While it may have been reasonable for Stanley and Nix to believe that Eadie had authority to offer transportation based on the actions of H.A. Sack Co., the same cannot be said for the Respondent in this case.

Pyramid did nothing that impliedly manifested to Respondent that Hinson had the authority to offer employer-provided transportation, to and from work, as part of Respondent's terms of employment. In fact, Pyramid overtly manifested to Respondent that they would not be providing him, or any other employee, transportation to and from work. (R. p. 599).

It is unreasonable for Respondent to argue that Pyramid engaged in conduct that led him to believe that Hinson had the authority to offer employer-provided transportation when it was Hinson himself who handed Respondent the Pyramid

documents, which Respondent read and signed, clearly stating that Respondent would need his own means of transportation to and from work.

Lastly, Respondent alleges that Pyramid expressly authorized Hinson to answer any questions that Respondent had concerning any terms of employment. However, this is not the actual language that was used in the cover letter accompanying Respondent's job description (and upon which Respondent relies). The actual language used in the cover letter cannot reasonably be construed as substantial evidence supporting a finding that Hinson had apparent authority to offer employer-provided transportation. The cover letter directs the applicant to read the job descriptions and states that "[t]hey are the minimum standards for your acceptability as an employee of Pyramid Masonry. If there is any item you do not understand, please ask the foreman or superintendent that you are making this application to for an explanation." (R. p. 598).

It stretches the imagination to construe this statement as an act by Pyramid that would lead Respondent to reasonably believe that Hinson had the authority to completely disregard the clearly stated "minimum standards" for Respondent's acceptability as a Pyramid employee. It is not reasonable for Respondent to have believed that Hinson had the authority to disregard Pyramid policy (written and in practice) and offer Respondent employer-provided transportation. If anything, it is a total disregard on Respondent's part of his obligation to use due care when dealing with the agent of a third party. Orphan Aid Society v. Jenkins, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting McCall v. Finley, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987).

Respondent cannot have it both ways. Assuming, *arguendo,* that Hinson did tell Respondent that Pyramid would provide transportation, then Respondent used absolutely

no due care whatsoever in dealing with Hinson, a person whom he did not know and who was offering employment terms that blatantly disregarded written company policy. Appellants submit that reliance on Medlin and Eadie is not well founded.[1]

IV.

THE COMMISSION ERRED IN FINDING THAT RESPONDENT IS ENTITLED TO ALL RELATED MEDICAL EXPENSES AND TO TEMPORARY TOTAL DISABILITY BENEFITS FROM NOVEMBER 17, 2004 TO THE PRESENT AND CONTINUING.

The Commission erred in ordering Appellants to pay related medical expenses incurred by Respondent and in ordering Appellants to pay Respondent temporary total disability benefits from November 17, 2004 to the present and continuing. This was recognized by the Circuit Court in its July 5, 2012 Order, but the Circuit Court compounded this error and remanded the issue of whether Respondent has been temporarily totally disabled since the accident to the Commission to add a finding to the Commission's prior Order concerning the duration and extent of Respondent's temporary total disability. However, the Circuit Court's remand still obligates Appellants to pay ongoing temporary total disability payments to Respondent despite the fact that the only issue that has ever been litigated, to date, is the issue of compensability, and there is no finding in the record that Respondent is actually disabled. The Circuit Court's action

[1] Appellants pose a hypothetical scenario where, rather than transportation, Hinson allegedly offers Respondent $100 per hour for the same laborer job. Respondent reads and signs a job description that clearly states the laborer job pays a maximum of $12 per hour. Again, Respondent has never met Hinson. All other laborers are currently being paid $12 per hour. Respondent makes no phone call to Pyramid to inquire whether the job really pays $100 per hour or whether Hinson has authority to offer the same. Appellants submit that this simple change in operative facts highlights that it would be unreasonable for Respondent to contend that he is entitled to be paid $100 per hour *based on some action on the part of Pyramid.* In this hypothetical, as well as in the actual instant case, Pyramid's written policies and actual practices show no conduct or other manifestations of consent to allow Hinson, acting as agent, to bind Pyramid with regard to providing transportation to Respondent or any other employee.

implicates a significant property interest in the monies paid by the Appellants that demands immediate, meaningful judicial review.

As properly found by the Circuit Court, the Commission made no finding that Claimant was disabled. "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120. "When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages." S.C. Code Ann. § 42-9-30.

Therefore, the condition precedent to payment is incapacity for work, or, disability. In its Decision and Order, rather than simply making a decision on the only issue that had ever been litigated -- compensability – the Commission *sua sponte* ordered payment of monetary benefits to claimant without determining whether there was incapacity for work. This was legal error. Although the Circuit Court recognized this legal error, it did not order a stoppage of the payment of benefits to claimant, and this further compounded error now persists.

First, the only litigated at the original hearing on October 11, 2006 was the compensability of Respondent's claim. In fact, Respondent's attorney and the Hearing Commissioner agreed on the record that Respondent's testimony did not need to go into his alleged injuries because the hearing was solely to determine compensability:

> [Counsel for Respondent] Your Honor, on the injuries and everything, I think since it's part of the record, I don't think we need to go into –

> [Commissioner Lyndon] Right. I think the primary focus of this hearing is going to be compensability. I did read into the record what he had pled as far as body parts, and I think that will shake itself out further down the road, the first thing being to see whether or not I find it a compensable accident or whether it is or is not an exception to the going and coming rule. Suffice to say he has multiple body parts.
>
> [Counsel for Respondent] Okay. That's good . . . .

(R. pp. 503, l. 22- p. 504, l. 11). The claim was essentially bifurcated at the original hearing, such that the only issue litigated at the original hearing was the compensability of Respondent's alleged claim. Since the parties did not present evidence or testimony on Respondent's alleged condition, the Commission erred when it later ordered Appellants to pay for related medical expenses and temporary total disability benefits given that there was no actual basis, nor any findings of fact or conclusions of law, upon which to make such an order.

Additionally, with regards to Respondent's "related medical expenses," the issue of what body parts are compensable has never been litigated, and there have never been any specific findings of fact made regarding which, if any, of Respondent's allegedly injured body parts are compensable. Thus, there is no way to determine what medical treatment and expenses are related to the November 17, 2004 motor vehicle accident.

Finally, with regard to Respondent's entitlement to temporary total disability benefits, the original hearing was held on October 11, 2006, over six years ago. There is no medical evidence or testimony in the record that Respondent has been permanently disabled since either the November 17, 2004 work accident or since the October 11, 2006 hearing. Additionally, because the October 11, 2006 hearing was held solely to determine compensability, the parties have never litigated the issue of Respondent's entitlement to temporary total disability benefits. Thus, the Commission committed legal and factual

error in awarding Respondent related medical expenses and temporary total disability benefits from the date of the accident and continuing.

Appellants assert that continued payment of benefits, in this case, represents a significant due process issue. Appellants are under order to pay disability benefits. However, Respondent is not disabled because there is no finding of disability. Assuming, *arguendo,* that the Commission finds that Respondent was not or is not disabled, then the Commission and Circuit Court have compelled payment of money to Respondent, when there is no recourse under Title 42 for the Appellants to recover monies paid in excess of disability.[2] Article I, Section 22 of the South Carolina Constitution provides certain rights regarding procedures before administrative bodies:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

(emphasis added). Judicial review of a workers compensation proceeding is a constitutional right in South Carolina. The rights provided under Article I, Section 22 extend to the limits of due process.

> [W]hen discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.

[2] While there is a "credit" for monies paid, that credit, to the amount it exceeds any future assessment of disability, represents monies paid pursuant to Order but without legal basis. It's questionable whether any civil cause of action would lie against the Respondent, since his receipt of the money is not due to his conduct but rather judicial fiat.

S.C. Coastal Conservation League v. S.C. Dep't. of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). Due process necessarily includes the right to meaningful judicial review.

> The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008) (emphasis added).

Defendants acknowledge the Supreme Court's recent decision in Bone v. U.S. Food Service, No. 27153 (S.C. Sup. Ct. August 1, 2012).[3] However, given the facts of this case, the Supreme Court's statement that "a circuit court order remanding a matter to an agency is not a final judgment and it is not immediately appealable" deprives the Defendants of their constitutional right to meaningful judicial review.[4]

In this case, given the payment of money despite the Circuit Court's acknowledgment that there has been no finding of disability, Appellants assert that meaningful judicial review necessarily includes a temporal component because benefits have been paid and continue to be paid, absent any legal grounds therefore. Practically, even assuming that there is a mechanism for capturing any credit monetarily, Appellants have still been temporarily deprived of property by court action. Plus, by remanding the case to the Commission, the Circuit Court has essentially instructed the Commission to commit further legal error. The Circuit Court did not remand the claim for further proceedings, additional evidence, or to litigate the issue of disability. Instead, the Circuit

[3] Appellants now await the decision on Rehearing.

[4] Defendants do not assert that the Bone rule is per se unconstitutional, but that it operates in this particular circumstance to infringe on Appellants' due process rights.

Court instructed the Commission to add to its prior Order a finding related to a topic that never been litigated and upon which Respondent has never given any testimony. This is extremely prejudicial to the Appellants because Appellants have never had any opportunity to be heard on any issues other than compensability. Appellants submit that any additional finding regarding the period of temporary total disability that the Commission might make on remand from the Circuit Court would necessarily be based on speculation, surmise, or conjecture because there is no factual basis in the record upon which to make the finding that the Circuit Court has so instructed the Commission to make. This case is distinguishable from Bone because the Order of the Circuit Court *is* final and enforceable. It would effectively allow Respondent to return to the Commission to prosecute the as of yet un-litigated issues in this claim *in light of a final decision on compensability.* This is a significant difference from the Bone case, where it appears that the original hearing was not limited to one issue only (compensability), as it was in the instant case.

In sum, the sole original issue before the Commission was compensability, and the Commission erred in finding the accident compensable. Plus, the orders to pay medical and disability benefits were legal error because that issue was not properly before the Commission upon the original remand from the Court of Appeals. Finally, through further remand, the Circuit Court's decision may immunize continuing payment of benefits from judicial review, depriving the Appellants of a property interest without timely or meaningful legal recourse. Appellants are "trapped in a cycle of remands" and need meaningful, immediate judicial review. Bone v. U.S. Food Service, Opinion No. 27153, Dissenting Opinion at p. 7, filed August 1, 2012.

CONCLUSION

The Commission has erred in finding this claim compensable. This case does not fall within any exception to the "going and coming" rule because Hinson did not have apparent authority to bind Pyramid to terms outside of Pyramid's written job description. Pyramid did not show conduct or manifest consent to allow Hinson, acting as agent, to bind Pyramid with regard to providing transportation to Respondent or any other employee. The only issue that has ever been taken up before the Commission is the issue of compensability. As such, the Order of the Commission finding this claim compensable and the Order of the Circuit Court affirming compensability should be reversed.

Respectfully submitted,

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June 6, 2013

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-20-436

Case Tracking No. 2012-212898

James Clark, Jr., Respondent,

v.

Pyramid Masonry Contractors, Inc., and
Hartford Accident Insurance Company, Appellants.

PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief of Appellants on James Clark, Jr. by depositing a copy of it in the United States Mail, postage prepaid on June 7, 2013, addressed to his attorney of record, Gary W. Popwell, Esq., Lee, Eadon, Isgett, Popwell and Reardon, P.A., 1314 Lincoln Street, PO Box 1505, Columbia, SC 29202.

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CERTIFICATE

I certify that the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

June 6, 2013

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