

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

SC Court of Appeals

Opinion No. 2011-UP-131 (S.C. Ct. App. Refiled June 3, 2011)

Ricky Burton, ... Petitioner,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance,. Respondents.

APPENDIX

John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Michael Burkett
WILLSON JONES CARTER &
BAXLEY, PA
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2884
(803) 782-2527 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorney for Respondents

Attorneys for PETITIONER

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ricky Burton,

Appellant,

v.

Hardaway Concrete Co., Inc.,
and Liberty Mutual Fire
Insurance,

Respondents.

Appeal From the Appellate Panel

Unpublished Opinion No. 2011-UP-131
Submitted March 1, 2011 – Filed march 29, 2011

AFFIRMED

John S. Nichols, Luther J. Battiste, III, and William
T. Toal, all of Columbia, for Appellant.

Michael W. Burkett, of Columbia, for Respondents.

PER CURIAM: Ricky Burton appeals his denial of workers' compensation benefits by the Appellate Panel of the Workers' Compensation

Commission (the Appellate Panel), arguing the Appellate Panel erred in finding his injury was not compensable because Hardaway Concrete Co., Inc., did not benefit from Burton's activity. We affirm.¹

The Appellate Panel did not err in finding Burton's injury did not arise out of and in the course of employment. See S.C. Code Ann. § 42-1-160(A) (Supp. 2010) (noting the South Carolina Workers' Compensation Act (the Act) allows for compensation for an "injury by accident arising out of and in the course of employment"). We find substantial evidence supports the Appellate Panel's finding the injury was not compensable under the Act because the injury did not occur during the course of employment. See West v. Alliance Capital, 368 S.C. 246, 253, 628 S.E.2d 279, 283 (Ct. App. 2006) ("The phrase 'in the course of the employment' refers to the time, place, and circumstances under which the accident occurred."). Specifically, Burton failed to show Hardaway received some benefit from the removal of debris at a private residence. See id. at 254, 628 S.E.2d at 283 ("A key factor in determining entitlement to compensation under this prong is whether an employee's activity benefited the employer."). Although Burton argues Hardaway received a direct benefit of a clean truck and an indirect benefit of goodwill, no evidence in the record indicated Hardaway benefited from Burton's activity. Furthermore, Burton's supervisor testified the work had no connection to Hardaway's concrete business and Hardaway did not benefit from this activity.

Accordingly, the decision of the Appellate Panel is

AFFIRMED.

FEW, C.J., and THOMAS and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission Appellate Panel
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0717674
2011-UP-131 (S.C. Ct. App. filed March 29, 2011)

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondent.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Appellant Ricky Burton (Claimant) hereby Petitions this Court for Rehearing in *Burton v. Hardaway Concrete Co.*, 2011-UP-131 (S.C. Ct. App. filed March 29, 2011). Claimant contends the Court overlooked or misapprehended the following points in modifying and affirming the trial court's decision:

- A. The Court overlooked and failed to address Claimant's argument that the Commission's decision resulted from a misapplication of *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999). Claimant primarily argued in

his brief that the Commission misapplied *Hicks* once the facts of each case were analyzed side-by-side. (App. Br. pp. 12-14). Claimant also argued that, as set forth by Justice Toal in her dissent in *Hicks*, the holding of the majority in that case did not accord with the modern trend toward awarding compensation in these cases. (App. Br. pp. 14-15). As Justice Toal pointed out, even North Carolina has retreated from the cases upon which the majority in *Hicks* founded its decision. (App. Br. pp. 15-16). Claimant acknowledges that this Court is bound by the majority decision in *Hicks*, but contended that the Court should find *Hicks* meaningfully distinguishable from the facts of this case.

B. The Court also overlooked and failed to address Appellant's contention that under the "private errand" rule as outlined by Professor Larson and the cases cited, Appellant's injury grew out of his employment and was, in fact, compensable. (App. Br. pp. 16-19). In fact, this Court did not mention this argument at all in its opinion.

C. In its opinion, the Court stated there was "no evidence" in the record on appeal indicating Hardway (the Employer) benefitted from Claimant's activity on the day he was injured. This statement overlooks the following testimony:

1. Claimant was on the clock throughout the period in question and was available to drive loads of concrete to jobs for Employer. Claimant testified that after he took one load to Amick's Farm he asked his supervisor, Scott Jones, if they were finished, and Jones told him "hold tight." (R. p. 24, line 15 - p. 25, line 2). Claimant also testified that he

could not leave work until they knew that enough concrete had been delivered to the job. (R. p. 46, lines 22-24). The supervisor, Mr. Jones, testified he held Claimant at work to make certain enough concrete had been delivered to the job. (R. p. 69, lines 5-24). The other driver, Mr. Butler, testified that they never know how long a job will take (R. p. 72, lines 20-24) and if more concrete was needed the Employer would send the next driver who was at the plant. (R. p. 73, line 25 - p. 74, line 9). Thus, having Claimant available to take another run of concrete the job site benefitted the Employer.

2. The landowner who had the wood removed was a family friend of Mr. Jones. (R. p. 79, line 17 - p. 24). Doing this "favor" for him created goodwill and improved Employer's image with potential customers, thus the Employer benefitted from the activity.
3. Claimant's injury occurred while the debris was being removed from Employer's truck. Without the removal of the debris, Employer could not have used the truck. Since Employer permitted the use of the truck to help with the debris removal (R. p. 54, ll. 19-25; R. p. 84, ll. 4-18), the readying of the truck for company use by unloading the debris from it was a direct benefit to the Employer.

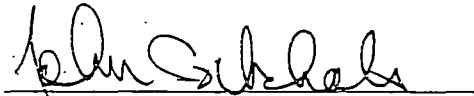
- D. The Court also noted that Claimant's "supervisor testified the work had no connection to [Employer's] concrete business and [Employer] did not benefit from this activity." This statement overlooks that the Hearing Commissioner

found “Claimant’s testimony to be credible” and hand wrote on the order “Kevin Jones [the supervisor] is less so.” (App. Br. p. 8, ¶ 5; R. p. 7, ¶ 5). The Appellate Panel noted this finding (R. p. 12, ¶ 5) and affirmed that finding. As Claimant pointed out (App. Br. p. 14, footnote 1), in South Carolina, the final determination of witness credibility is specifically reserved to the Commission’s Appellate Panel. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); *Foggie v. General Elec. Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008). Thus, the Court of Appeals should not have relied upon the testimony of a witness whom the Commission found was not credible.

- E. In affirming solely on the basis of the substantial evidence test, the Court overlooked Claimant’s argument that the Commission’s ruling was controlled by an error of law (a misapplication of the “private errand” rule and *Hicks*). (App. Br. pp. 12-19). As noted in Claimant’s brief, the appellate court may reverse the full commission’s decision if it is based on an error of law. *Therrell v. Jerry’s Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-95 (2006). (App. Br. p. 10). This Court did not address this argument in its opinion.

For the reasons stated, this Court should grant this Petition for Rehearing, withdraw its previous opinion, and issue a new opinion addressing these arguments that the Court overlooked or misapprehended in its opinion. Further, the Court should reverse the decision of the Workers' Compensation Commission and remand this matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,



John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

April 13, 2011

The South Carolina Court of Appeals

Ricky Burton,

Appellant

v.

Hardaway Concrete Co., Inc., and
Liberty Mutual Fire Insurance,

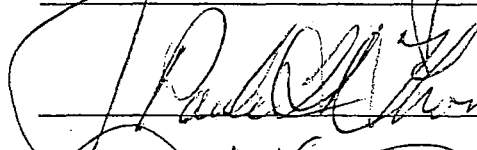
Respondents

Appellate Panel
Trial Court Case No. 2009-WC-40-17674

ORDER DENYING PETITION FOR REHEARING

After a careful consideration of the Petition for Rehearing, we substitute the attached opinion for Opinion No. 2011-UP-131, filed March 29, 2011. The Petition for Rehearing is otherwise denied.



C. J.


J.


Columbia, South Carolina

FILED

June 3, 2011

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ricky Burton,

Appellant,

v.

Hardaway Concrete Co., Inc.,
and Liberty Mutual Fire
Insurance,

Respondents.

Appeal From the Appellate Panel

Unpublished Opinion No. 2011-UP-131
Submitted March 1, 2011 – Filed March 29, 2011
Withdrawn, Substituted, and Refiled on June 3, 2011

AFFIRMED

John S. Nichols, Luther J. Battiste, III, and William
T. Toal, all of Columbia, for Appellant.

Michael W. Burkett, of Columbia, for Respondents.

PER CURIAM: The Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) denied Ricky Burton's claim for workers' compensation benefits. Burton appeals, arguing the Appellate Panel erred in finding his injury was not compensable because Hardaway Concrete Co., Inc. (Employer) did not benefit from Burton's activity. We affirm.¹

This court will affirm the decision of the Appellate Panel if it is supported by substantial evidence. S.C. Code Ann. § 1-23-380(5) (Supp. 2010). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002). However, this court "may reverse or modify [the Appellate Panel's decision] if such decision is affected by errors of law [or] characterized by an abuse of discretion" Floyd v. City of Charleston, 287 S.C. 474, 478, 339 S.E.2d 166, 168 (Ct. App. 1986) (citations omitted); see also S.C. Code Ann. § 1-23-380(5)(d), (f) (providing the reviewing court can reverse or modify a decision by the Appellate Panel if the decision is affected by an error of law or characterized by an abuse of discretion).

"An injury occurs 'in the course of' employment within the meaning of [the Act] when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." West v. Alliance Capital, 368 S.C. 246, 253, 628 S.E.2d 279, 283 (Ct. App. 2006). "A key factor in determining entitlement to compensation under [the course of employment prong] is whether an employee's activity benefited the employer." Id. at 254, 628 S.E.2d at 283.

We find the Appellate Panel did not err in finding Burton's injury did not arise out of and in the course of employment.² Although Burton

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² We decline to address Burton's argument concerning the private errand rule because it is unpreserved for our review. Burton failed to raise the argument to the Appellate Panel. See Rodney v. Michelin Tire Corp., 320 S.C. 515,

presented evidence that Employer benefited from Burton's activity, evidence also exists supporting the Appellate Panel's factual findings that Employer did not benefit from Burton's activity even though the Appellate Panel noted that Burton was credible and his supervisor "less so."³ See Jeffrey v. Sunshine Recycling, 386 S.C. 174, 178, 687 S.E.2d 332, 335 (Ct. App. 2009) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent [the Appellate Panel's] findings from being supported by substantial evidence."); see also Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006) (noting because the Appellate Panel is the ultimate fact finder, the final determination of witness credibility and the weight it is given is reserved for the Appellate Panel). Here, the supervisor's friend who owned the property had no connection with Employer, and Employer's business did not provide debris removal services. Although Burton argues Hardaway received a direct benefit of a clean truck and an indirect benefit of goodwill, no evidence in the record established these benefits.

Accordingly, the decision of the Appellate Panel is

AFFIRMED.

FEW, C.J., THOMAS and KONDUROS, JJ., concur.

517, 466 S.E.2d 357, 358 (1996) (noting arguments must be raised to the Appellate Panel in order to be preserved for review on appeal).

³ We find Burton's argument that the Appellate Panel made an error of law by misapplying Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46; 515 S.E.2d 532 (1999), is without merit. The Appellate Panel applied the correct proposition of law from Hicks that the employee's activity must benefit employer in order to be compensable. See Hicks, 335 S.C. at 49, 515 S.E.2d at 533; see also West, 368 S.C. at 254, 628 S.E.2d at 283.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission Appellate Panel

G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0717674
Op. No. 2011-UP-131 (Refiled June 3, 2011)

RECEIVED
JUN 15 2011
SC Court of Appeals

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondent.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Ricky Burton (Appellant) hereby
Petitions this Court for Rehearing of the substituted opinion in *Burton v. Hardaway
Concrete Co., Inc.*, Op. No. 2011-UP-131 (S.C. Ct. App. Re-filed June 3, 2011).

Appellant contends the Court overlooked or misapprehended the following points in
affirming the commission's decision:

- A. The Court misapprehended Claimant's argument regarding the Commission's
misapplication of *Hicks v. Piedmont Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532
(1999). The Court overlooked Claimant's argument that the Commission
misapplied *Hicks* and should have found *Hicks* meaningfully distinguishable from

the case *sub judice*. Claimant argued that *Hicks* was distinguishable from the facts of this case once a side-by-side comparison of the two cases was undertaken.

(App. Br. pp. 12-14). The Court noted that the Appellate Panel “applied the correct proposition of law from *Hicks* that the employee’s activity must benefit employer in order to be compensable,” but did not address Claimant’s argument that even applying the rule from *Hicks*, the Commission reached the wrong result as a matter of law.

- B. The Court overlooked Claimant’s argument that the rule the Commission divined from *Hicks* should not have precluded recovery in this case. Furthermore, the Court overlooked Claimant’s argument that the majority holding in *Hicks* does not accord with the modern trend of finding the type of activity in this case is compensable. (App. Br. pp. 20-24). That is, even a slight, indirect benefit to the employer will suffice where the employee is acting pursuant to instructions by his superior. *See* cases cited in dissent in *Hicks*: *Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E.2d 821 (1975) (holding that the injury was compensable where the employee was injured while chasing two boys who had stolen a customer’s purse); *Sexton v. Freeman Gas Co.*, 258 S.C. 15, 187 S.E.2d 128 (1972) (holding that the injury was compensable where employee was injured while driving company truck to help put out brush fire); *Cauley v. Ross Builders Supplies, Inc.*, 238 S.C. 38, 118 S.E.2d 879 (1961) (holding that the injury was compensable where employee was injured while using the company’s table saw to fashion a table leg for a fellow employee); *Portee v. South Carolina State Hosp.*, 234 S.C. 50, 106

S.E.2d 670 (1959) (holding that the injury was compensable under the employer benefit doctrine where employee died after receiving a penicillin injection from a co-employee as medication for a sore throat). *See also West v. Alliance Capital*, 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006) (Court of Appeals held an injury claimant sustained while he performed repairs on his own truck during working hours for which he was paid, and while using tools furnished by his employer “arose out of” his employment); *Moore v. Family Service of Charleston County*, 269 S.C. 275, 237 S.E.2d 84 (1977) (Supreme Court found an injury arose out of and in the course of employment and was thus compensable when the injury occurred off company property but while claimant was carrying books that the claimant’s supervisor required her to take home “for a particular task required by the employer.”). Claimant understands this Court is bound by Supreme Court precedent but raises this point to preserve it for that Court’s review by way of writ of certiorari.

- C. The Court declined to address Claimant’s argument concerning the “private errand” rule (App. Br. pp. 16-19). The Court noted it viewed the issue as not preserved for appellate review, declaring that this argument was not raised to the Appellate Panel for its consideration. Slip p. 2, n. 2. Under the “private errand rule,” if a person in authority over the employee asks the employee to perform a service for the personal benefit of the employer or the employee’s superior, and the employee is injured during the performance of the task, his injury is one that grew out of and was incidental to his employment unless the request is “clearly

unauthorized.” (App. Br. p. 16). The Court overlooked that Claimant made this argument to the hearing commissioner, who addressed it in his order. (R. p. 3, ¶ 3, noting “Claimant contends he was instructed by his manager to leave the work premises while still ‘on the clock’ to assist his manager in the removal and disposal of leftover tree debris.”). The hearing commissioner also made a finding that the supervisor “instructed the Claimant to accompany him in a company owned vehicle to Pickens Hare’s property to assist in removing and disposing of tree debris.” (R. 7, Finding of Fact No. 1). The hearing commissioner ruled this was not a sufficient basis for coverage under the Act. The majority of the Appellate Panel adopted the hearing commissioner’s findings of fact in their entirety. (R. pp. 11-12, Finding of Fact No. 1). Furthermore, the Employer addressed the merits of Claimant’s argument regarding the “private errand rule” without contending the argument had not been raised to the Commission. (Resp. Br. pp. 12-16). The “private errand rule” is discussed in the dissent in *Hicks*, and is another way of describing the result in the more modern view of this doctrine. Claimant raised this point to the hearing commissioner and to the appellate panel so that it was preserved for appellate review.

D. The Court found the evidence conflicted on whether the Employer received any benefit from Claimant’s activities in this case, so that under the substantial evidence rule, the Court must affirm. In doing so, the Court overlooked or misapprehended the following points:

1. The only evidence the Commission found credible established that

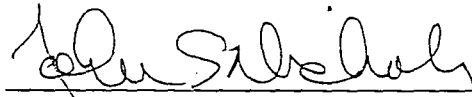
Claimant was on the clock throughout the period in question and was available to drive loads of concrete to jobs for Employer. (R. p. 24, line 15 - p. 25, line 2; p. 46, lines 22-24; p. 69, lines 5-24; p. 72, lines 20-24; p. 73, line 25 - p. 74, line 9). Having Claimant available to take another load of concrete benefitted the Employer. There was no conflict in the evidence that Claimant's was present and available to drive more cement to the job.

2. Claimant's injury occurred while the debris was being removed from Employer's truck. Without the removal of the debris, Employer could not have used the truck. Since Employer permitted the use of the truck to help with the debris removal (R. p. 54, ll. 19-25; R. p. 84, ll. 4-18), the readying of the truck for company use by unloading the debris from it was a direct benefit to the company. The Court stated there was "no evidence in the record" to establish this benefit, but such benefit is at least self-evident. The Employer's truck could not be used unless the debris was removed from the truck. Claimant unloaded the truck onto the waste pile on Employer's property because he was instructed by his supervisor to do so.

CONCLUSION

For the reasons stated this Court should grant this Petition for Rehearing, withdraw its prior opinion, and issue a new opinion reversing the decision of the Workers' Compensation Commission and remanding this matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,



John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

June 15, 2011.

The South Carolina Court of Appeals

Ricky Burton,

Appellant,

v.

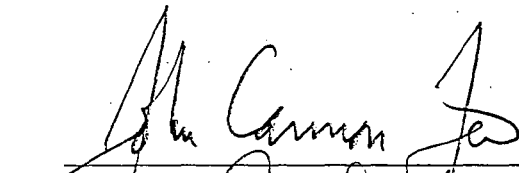
Hardaway Concrete Co., Inc. and
Liberty Mutual Fire Insurance,

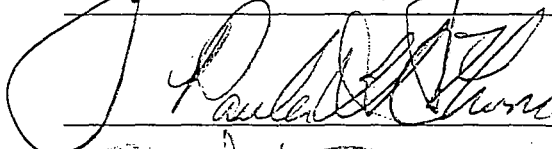
Respondents.

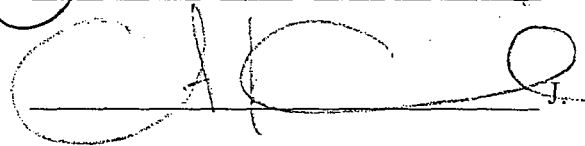
Appellate Panel
Richland County
Trial Court Case No. 2009-WC-40-17674

ORDER DENYING PETITION FOR REHEARING

After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.



C. J.


J.


Columbia, South Carolina

FILED

August 24, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

South Carolina Workers' Compensation Commission Appellate Panel

G. Bryan Lyndon, Commissioner

Derrick L. Williams, Commissioner

Andrea C. Roche, Commissioner

W.C.C. File No. 0717674

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and

Liberty Mutual Fire Insurance, ... Respondent.

FINAL BRIEF OF APPELLANT

John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN HOLDING CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF CLAIMANT'S EMPLOYMENT?
 - A. DID THE WORKERS' COMPENSATION COMMISSION MISAPPLY THE HOLDING IN *HICKS V. PIEDMONT COLD STORAGE, INC.*, 335 S.C. 46, 515 S.E.2D 532 (1999) TO THIS MATTER?
 - B. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT EMPLOYER RECEIVED NO DIRECT OR INDIRECT BENEFIT FROM CLAIMANT'S ACTIVITIES SO AS TO PRECLUDE THE COMPENSABILITY OF HIS INJURY?

STATEMENT OF THE CASE

Ricky Burton (Claimant) filed a claim on November 21, 2007, before the South Carolina Workers' Compensation Commission asserting he sustained a work-related injury when removing debris with his supervisor on August 18, 2007, while working for his employer, Hardaway Concrete Company, Inc. (Employer). Employer denied Claimant suffered a compensable injury by accident arising out of and in the course of his employment contending Employer received no direct or indirect benefit in the debris removal, relying on *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999).

The matter was heard before a hearing commissioner on March 19, 2008. The commissioner held Claimant's injury was not compensable under *Hicks v. Piedmont Cold Storage, Inc.* and denied the claim. Claimant sought review of the decision and the matter was heard by an appellate panel of the Workers' Compensation Commission on October 29, 2008. On January 30, 2009, the appellate panel entered an order sustaining the hearing commissioner's decision with one commissioner dissenting.

On February 6, 2009, Claimant served a notice of appeal to this Court.

FACTS

Claimant was forty-three (43) years old at the time of the hearing and has a high school education. (R.p. 19, ll. 8-14). He worked for Employer for almost eleven (11) years. (R.p. 20, ll. 20-22). He was a truck driver for Employer, driving and operating a cement mixer truck (R.p. 21, ll. 12-19; R. p. 45, l. 2) and worked for the same supervisor, Scott Jones the entire time. (R.p. 21, l. 20 - p. 22, l. 7). Claimant stated, "Well, [Mr. Jones] gives us our orders, you know, where we're to go every day, and where to run, and take deliveries at." (R.p. 22, ll. 13-14; R.p. 50, ll. 22-24). Mr. Jones also had the ability to fire Claimant. (R.p. 23, lines 18-21).

Claimant had a previous workers' compensation claim against Employer that the company denied and which the Commission ultimately found to be compensable. (R.p. 20, l. 23 - p. 21, line 10; R.p. 41, ll. 9-18). When Claimant's supervisor, Scott Jones, directed Claimant to load and unload the debris from the company vehicle, Mr. Jones knew of Claimant's previous work-related injury.

The Claimant reported to work on the afternoon of Saturday, August 18, 2008, and he first took one load of concrete to a job site at Amick Farms, then returned to the company premises. (R.p. 24, ll. 2-22; R.p. 36, ll. 20-22; R.p. 51, ll. 9-11; R.p. 52, ll. 9-13). Upon his return to Employer's premises, Claimant asked Mr. Jones for ten (\$10.00) dollars in gas money, but Mr. Jones told Claimant he did not have any money. (R.p. 25, ll. 3-6; R.p. 42, ll. 18-24). Mr. Jones then told the Claimant to "come on and go with him." (R.p. 25, ll. 6-7; R.p. 43, ll. 2-4, 16). They both got into the company pickup truck. (R.p. 25, ll. 8-10; R.p. 89, l. 25 - p. 90, l. 3). When Claimant asked Mr. Jones where they were

going, Mr. Jones replied "I got a little job I want to do." (R.p. 25, ll. 14-16).

Claimant was still on the clock when Mr. Jones took Claimant off the premises in Employer's truck. (R.p. 25, ll. 18). When asked why he went with Mr. Jones, Claimant answered, "He was my boss and I felt like what he told me to do, I did what he asked me to do; he's my supervisor." (R.p. 25, ll. 19-22). They drove a couple of blocks to the house of Pickens Hare "and worked out there loading debris from a big tree into the company truck and took the debris back to the company premises and we dumped it back there in the back back there." (R.p. 25, l. 24 - p. 26, l. 7; R.p. 44, ll. 3-23; R.p. 45, ll. 3-10). They used a company shovel and a pitchfork provided by Mr. Hare, the third party. (R.p. 26, lines 21-25). Claimant stated Mr. Jones and he made two trips to Mr. Hare's property. (R.p. 27, lines 4-8).

Claimant testified that while unloading the debris from the company truck on the Employer's premises after the second trip:

I said, Scott, I said, look I've got to take a break, man. I said, man, I've got pain man, running down in both of my legs and in my back. . . . [t]hen I started back working on and the more I kept turning and shoveling and unloading the truck, and I kept feeling the pain running down my legs and my back."

(R.p. 27, ll. 13-20).

Mr. Jones gave Claimant twenty-five (\$25.00) dollars after the debris-moving job was complete. (R.p. 32, ll. 13-17; R.p. 47, ll. 1-3). **The Claimant did not know in advance of performing the work that he would receive any money other than his normal wages.** (R.p. 33, ll. 12-17; R.p. 34, ll. 2-16; R.p. 34, l. 25 - p. 35 l. 1; R.p. 43, ll. 22-23). This was something Mr. Jones gave him "after the fact." (R.p. 33, ll. 20-22).

After Claimant and Mr. Jones finished unloading the company truck at the back of the company property, Claimant clocked out at 4:54 p.m. (R.p. 27, ll. 21-23; R.p. 30, l. 19 - p. 31, l. 1; R.p. 34, ll. 17-23; R.p. 45, l. 11 - p. 46, l. 11; R.p. 48, ll. 4-21; R.p. 90, ll. 7-9).

When asked why he did the work, the Claimant answer, "[b]ecause I was instructed by my boss to go with him... I did what he told me to do." (R.p. 32, l. 23 - p. 33, l. 2; R.p. 43, ll. 7-8; R.p. 43, l. 24 - p. 44, l. 2).

Claimant called his supervisor, Mr. Jones, on the following Monday and notified Mr. Jones, "I hurt myself back there in the back when I was unloading that truck." (R.p. 28, ll. 14-16; R.p. 38, ll. 21-24). Claimant went to the Batesburg-Leesville Family Practice, where he was scheduled for an MRI after being examined. (R.p. 28, lines 17-24).

Claimant called Mr. Jones back to let him know what was going on and why he was not at work and Mr. Jones told him to "just be quiet." (R.p. 29, lines 5-11). Claimant added, "He said don't say nothing about it. He said the company ain't got a damn thing to do with it. He told me don't say nothing." (R.p. 29, ll. 11-14). Claimant further testified that Mr. Jones, his supervisor, told him that if he was not quiet about how he was injured, that he would lose his job, and that if he kept "messaging with Hardaway and Workman's Comp, you're going to lose your job." (R.p. 30, ll. 9-12). Thereafter Jay Metts, who handles benefits for the company (R.p. 37, ll. 1-3), met with Claimant and accused him of attempting insurance fraud. (R.p. 39, l. 1 - p. 40, line 7).

Mr. Jones testified Claimant asked for twenty (\$20.00) dollars, and Mr. Jones offered to let Claimant help haul the wood shavings and earn twenty-five (\$25.00) dollars. (R.p. 53, lines 3-9). He also stated Claimant had clocked out before they went to

haul the wood, and they left around 5:00 to go to Mr. Hare's home to do the hauling.

(R.p. 53, ll. 10-23). He agreed they were in a company truck. (R.p. 54, lines 8-18; R.p. 60, ll. 20-23). Mr. Jones denied Claimant complained to him about injuring himself during the two trips to haul the wood chips. (R.p. 55, ll. 10-15; R.p. 56, ll. 14-15; R.p. 61, l. 18 - p. 62, l. 3). Mr. Jones stated Employer did not benefit in any way from Claimant's activity in moving the wood chips. (R.p. 63, l. 21 - p. 64, l. 1).

Mr. Jones denied he had the right to hire or fire employees. (R.p. 56, l. 19 - p. 57, l. 3). He agreed he was the manager of the Batesburg-Leesville plant, supervising five (5) employees. (R.p. 58, ll. 14-25; R.p. 64, l. 16 - p. 65, l. 4). He also agreed he could communicate information to Mr. Metts that would result in an employee's termination. (R.p. 59, l. 1 - p. 60, l. 6). As the person in charge of the plant Mr. Jones expects the employees to do what he tells them to do, and he has made that clear to them. (R.p. 65, ll. 12-18).

Joe Butler, the other driver on August 18, 2007, stated he finished the main job at Amick Farms at 4:00 p.m. and told Mr. Jones he was finished when Mr. Jones called him. (R.p. 69, ll. 2-24; R.p. 72, l. 25 - p. 73, l. 7; R.p. 74, ll. 14-18; R.p. 75, l. 1 - p. 76, l. 5). Mr. Jones then told Mr. Butler he was taking Claimant with him to do the job at Mr. Hare's property. (R.p. 70, ll. 14-16). When Mr. Butler returned to the plant sometime after 5:00 p.m. neither Mr. Jones nor Claimant were there, and Mr. Jones's truck was gone. (R.p. 71, ll. 12-19). Mr. Butler cleaned out his truck, parked it, punched out and went home. (R.p. 71, ll. 20-22). When Mr. Butler called Mr. Jones at 4:00 p.m., Mr. Jones could have released Claimant because he did not need Claimant to return to the job site. (R.p. 76, ll.

2-5).

Pickens Hare testified he asked Mr. Jones to remove the wood shavings from his property and would pay Mr. Jones fifty (\$50.00) dollars to do the job. (R.p. 77, l. 15 - p. 78, l. 6). Mr. Hare claimed they arrived after 5:00 p.m. on that day. (R.p. 78, l. 21 - p. 79, l. 2). He agreed he had no reason to recall that time until Mr. Jones called him and told him Claimant had been hurt. (R.p. 81, l. 11 - p. 82, l. 5). Mr. Hare paid the money to Mr. Jones and not to Employer. (R.p. 79, ll. 7-11).

Jay Matts is Employer's human resources manager. (R.p. 83, ll. 22-24). Mr. Matts stated that Mr. Jones is allowed to use his company vehicle to load up trash. (R.p. 84, ll. 1-6). He stated Claimant told him the back pain was from "old age." (R.p. 84, ll. 22-24; R.p. 85, ll. 21-25). Mr. Matts confronted Claimant and accused Claimant of trying to perpetrate a fraud. (R.p. 86, ll. 12-20). Mr. Matts added that Claimant told him he did not report the accident because Mr. Jones had threatened Claimant. (R.p. 87, ll. 2-8).

Mr. Matts agreed that Employer had unsuccessfully contested Claimant's prior workers' compensation claim. (R.p. 88, ll. 11-17).

Hearing Commissioner's Ruling

The hearing commissioner reviewed the testimony and made the following findings of fact:

- I. On August 18, 2007, Mr. Jones instructed Claimant to accompany him in a company-owned vehicle to Mr. Hare's property to assist in removing and disposing of tree debris.

2. The debris was loaded in Employer's company-owned vehicle and transported back to and disposed of at the Employer's premises.
3. While removing the debris, Claimant sustained injuries to his back, and Claimant informed Mr. Jones of his back pain.
4. Mr. Hare compensated Claimant and Mr. Jones twenty-five (\$25.00) dollars each for removing and disposing of the tree debris from the property. Mr. Hare owned the property and had no connection with Employer.
5. Claimant's testimony was credible. "Kevin Jones is less so."
6. Employer is a concrete operation that does not nor ever has partaken in the business of tree and/or tree debris removal.
7. Pursuant to *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999), Claimant's injury was outside the scope of his employment "because the Employer was neither directly nor indirectly [benefitted] by the debris removal work performed by the Claimant and his manager."
8. Employer is not liable to Claimant for any injury that may have occurred while Claimant was performing the tree debris removal and disposal.
9. Mr. Hare paid Claimant twenty-five (\$25.00) dollars at the completion of the debris removal. Claimant did not expect to be given additional payment for this task outside of his normal employment compensation.

(R.pp. 7-8, ¶¶ 1-9): The hearing commissioner concluded that Claimant did not sustain an injury arising out of and in the course of his employment pursuant to S.C. Code Ann. §

42-1-160 (Supp. 2009) because under *Hicks v. Piedmont Cold Storage*, Employer did not receive a direct or indirect benefit by the tree removal and disposal. (R.p. 8).

Appellate Panel Decision

Claimant sought review by an appellate panel of the Commission. Following a hearing, a majority of the appellate panel adopted the findings of the hearing commissioner and affirmed. Commissioner Andrea C. Roche dissented, stating "I would find the case compensable. I would find the activities of the Claimant did benefit the Employer." (R.p. 14).

Because the injury in the case occurred after July 1, 2007, Claimant appealed to this Court: S.C. Code Ann. § 1-23-600(D) (Supp. 2009); S.C. Code Ann. § 14-8-200(a) (Supp. 2009); S.C. Code Ann. § 42-17-60 (Supp. 2009); Act No. 111, 2007 S.C. Acts, Part IV, § 2.

ARGUMENTS

Scope of Appellate Review

An appellate court must affirm the findings of fact made by the Workers' Compensation Commission if they are supported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). However, the appellate court may reverse the full commission's decision if it is based on an error of law. *Therrell v. Jerry's Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-95 (2006). The Court may also reverse the decision if the administrative findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Tiller v. National Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999); S.C. Code Ann. § 1-23-380(A)(6) (Supp.2008). See also *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002) (Court reversed commission finding the Court found was clearly erroneous and not supported by substantial evidence); *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1995) (holding there was no evidence to support commission's finding in upholding reversal of commission); *Anderson v. Baptist Medical Center*, 343 S.C. 487, 541 S.E.2d 526 (2001) (upholding Court of Appeals' reversal of commission's finding where the only substantial evidence in the record clearly showed finding incorrect); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) (reversing commission finding that had no evidentiary support).

I. THE WORKERS' COMPENSATION COMMISSION ERRED IN HOLDING CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF HIS EMPLOYMENT

The Commission held that pursuant to *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999), the injury in this matter was outside the scope of Claimant's employment "because the Employer was neither directly nor indirectly benefit[t]ed by the debris removal work performed by the Claimant and his manager." This ruling misapplied *Hicks* and was erroneous as a matter of law, and further lacked support in the evidence.

The basic purpose of the Workers' Compensation Act is inclusion of employers and employees and not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. *Horton v. Baruch*, 217 S.C. 48, 59 S.E.2d 545 (1950); *DeBerry v. Coker Freight Lines*, 234 S.C. 304, 108 S.E.2d 114 (1959); *Brown v. Morehead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962); *Pyett v. Marsh Plywood Corp.*, 240 S.C. 56, 124 S.E.2d 617 (1962). South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employees within Workers' Compensation coverage. *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241 (1983); *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720 (1964); *Pyett v. Marsh Plywood Corp.*; *Horton v. Baruch*.

The words "arose out of" refer to the origin or the cause of the accident while the words, "in the course of employment" refer to the time, place and circumstances under which the accident occurs. Even though the injury is not one that could have been foreseen or expected, it may be that after the event, it may be seen to have had its origin the nature of the employment. *Thompson v. J.A. Jones Constr. Co.*, 199 S.C. 304, 19 S.E.2d

226 (1942); *Dicks v. Brooklyn Cooperage Co.*, 208 S.C. 139, 37 S.E.2d 286 (1946).

To be entitled to workers' compensation, an employee need not necessarily be engaged at the time of injury in the actual performance of his work; it is sufficient if he is upon the employer's premises, occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment. *Simmons v. City of Charleston*, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002).

A. THE WORKERS' COMPENSATION COMMISSION MISAPPLIED THE HOLDING IN *HICKS V. PIEDMONT COLD STORAGE, INC.*, 335 S.C. 46, 515 S.E.2D 532 (1999) TO THIS MATTER

As noted above, the Commission purportedly applied the holding of *Hicks v. Piedmont Cold Storage, Inc.* in denying benefits in this matter. This was a misapplication of the law as set forth in *Hicks* and the law of this State.

In *Hicks*, Mr. Hicks was killed while repairing the personal vehicle of the plant manager on a Saturday at Piedmont Cold Storage. The commission denied the claim, finding: (1) Hicks did not work regularly on Saturdays; (2) Hicks did not clock in on the date of the accident; (3) Hicks did not benefit Piedmont in any way on the day of the accident; and (4) Hicks worked for the personal benefit of his supervisor and therefore his death did not result from an injury by accident arising out of and in the course of his employment with Piedmont. The circuit court reversed, finding the tasks Hicks performed at the time of his death were incidental to his employment. The court also found the accident occurred (1) on Piedmont premises; (2) with Piedmont tools; and (3) while Hicks performed tasks under the direction and supervision of his superior. The

Court of Appeals affirmed the circuit court's decision.

The Supreme Court reversed. The Court noted the "key factor in determining the children's entitlement to compensation here is whether the work benefitted the employer." *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. at 49, 515 S.E.2d at 533. The Court stated:

* * * Here, the decedent was being paid by his supervisor for work done on the supervisor's personal vehicle on a non-work day at the employer's business. The record shows that Hicks did not regularly work on Saturdays and did not clock in on the day of the accident.

There is substantial evidence in the record supporting the commission's finding that the work performed by Hicks did not benefit Piedmont and was for the personal benefit of the plant manager.

Id. The Court held the accident was outside the course of Hicks's employment, and that the circuit court and Court of Appeals substituted their judgment for the commission in finding that Hicks conferred some benefit on Piedmont, adding "[t]he supervisor did not lose any time from work as the repair was being done on a Saturday."

The facts of *Hicks* are readily distinguishable from the case *sub judice*:

- I. Mr. Hicks was paid by his supervisor for the work on the car. In this case, however, although Mr. Hare paid Claimant \$25.00, the hearing commissioner found "Claimant did not expect to be given additional payment for this task outside his normal employment compensation." which Claimant received since he did not clock out until after the removing the debris from the company truck. (R.p. 8, ¶ 9). The appellate panel concurred. (R.p. 13, ¶ 9).

2. Mr. Hicks was injured on a "non-work day." Claimant was injured on a work day.
3. Mr. Hicks did not clock in on the day of his injury. Claimant clocked in and was still on the clock at the time of his injury.¹
4. The only evidence in *Hicks* was that the work done was for the personal benefit of the supervisor, whereas in this case, Claimant's presence on the Employer's premises and availability to take a second load to Amick Farms, if needed, directly benefitted Employer, and his assistance of Mr. Jones in performing the task on Mr. Hare's property and completing it at Employer's premises by cleaning out the Employer's vehicle they used indirectly, if not directly, benefitted Employer.

Hicks simply does not mandate denial of benefits in this matter, as the Commission held.

Furthermore, in her dissent in *Hicks*, Justice Toal noted the majority relied almost exclusively on the 1945 case of *Fountain v. Hartsville*, 207 S.C. 119, 32 S.E.2d 11 (1945), while ignoring the Court's trend toward awarding compensation. Justice Toal stated:

In *Fountain*, this Court relied heavily on, and quoted extensively from, the North Carolina Supreme Court's decision in *Burnett v. Palmer-Lipe Paint Co.*, 216 N.C. 204, 4 S.E.2d 507 (1939). Since *Burnett*, however, North Carolina courts have recognized the impossible situation in which an employee is placed when a superior asks the employee to

¹ Although Mr. Jones testified contrary to Claimant on this point, both the hearing commissioner and appellate panel found Claimant to be credible and Mr. Jones "less so." (R.p. 7, ¶ 5; R.p. 12, ¶ 5). In South Carolina, the final determination of witness credibility is specifically reserved to the Commission's Appellate Panel. E.g., *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); *Foggie v. General Elec. Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008).

perform personal work for the superior. In *Pollock v. Reeves Brothers, Inc.*, 313 N.C. 287, 328 S.E.2d 282 (1985), the North Carolina Supreme Court, in reversing its court of appeals, stated that an employee is "entitled to recover under the workers' compensation principle that when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable." *Pollock*, 328 S.E.2d at 287. One of the cases relied upon by *Pollock* was *Stewart v. North Carolina Dep't of Corrections*, 29 N.C. App. 735, 225 S.E.2d 336 (1976), the same case cited by our Court of Appeals in the instant case. While these North Carolina decisions do not totally jettison the "employer benefit" requirement, they do hold that even a slight, indirect benefit to the employer will suffice where the employee is acting pursuant to instructions by his superior. See *Stewart*, supra (noting that the employer would benefit indirectly because it was anticipated the morale of the employees would improve).

Hicks v. Piedmont Cold Storage, Inc., 335 S.C. at 50, 515 S.E.2d at 533-534 (Toal, J., dissenting).

While this language is from a dissent, Justice Toal's discussion finds support in more recent authority from North Carolina. See *Pollock* (when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable); *Stewart v. North Carolina Dept. of Corrections*, 29 N.C. App. 735, 738, 225 S.E.2d 336, 338 (Ct. App. 1976) (when a superior directs a subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Workers' Compensation Act expands to encompass injuries sustained in the course of such labor; were the rule otherwise, employees would be compelled to determine in each instance and, no doubt at their peril, whether a requested activity was beyond the ambit of the act).

Our Workers' Compensation Act was fashioned upon that of North Carolina and the opinions of the Supreme Court of North Carolina construing the Act are entitled to

great weight. *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 405, 211 S.E.2d 220, 222-223 (1975); *Carter v. Penney Tire & Recapping Co.*, 261 S.C. 341, 200 S.E.2d 64 (1973). See also *Curiel v. Environmental Management Services (MS)*, 376 S.C. 23, 655 S.E.2d 482 (2007) (Court noted North Carolina workers' compensation statute contained same language as South Carolina's Act and held North Carolina decision persuasive).

The rule discussed in *Stewart* is sometimes referred to as the "private errand" rule. Under this doctrine, if a person in authority over the employee asks the employee to perform a service for the personal benefit of the employer or the employee's superior, and the employee is injured during the performance of the task, his injury is one that grew out of and was incidental to his employment unless the request is "clearly unauthorized." *Begel v. Wisconsin Labor and Industry Review Com'n*, 246 Wis.2d 345, 631 N.W.2d 220, 2001 WI App 134 (Ct. App. 2001). Compare *Nugent Sand Co. v. Hargesheimer*, 254 Ky. 358, 71 S.W.2d 647 (1934) (employee of sand and gravel company sent by company president to do work on the furnace in the president's home was covered for resulting injury); *Ferragino v. McCue's Dairy*, 128 N.J.L. 525, 26 A.2d 730 (Sup. 1942) (dairy employee instructed to help move a piano in a church that was a customer of the dairy was covered when injured); *Zapos v. Demas*, 106 Pa.Super. 183, 161 A. 753 (1932) (waiter injured when he was sent to deliver groceries to the employer's home was covered); *Nichols v. Davidson Hotel Co.*, 333 S.W.2d 536, 546 (Mo. Ct. App. 1960) (holding that a bellhop's driving several girls who were friends of the hotel owner's wife to a party suffered an injury compensable under worker's compensation when he was killed in an automobile accident on his return trip). Accord *Arthur Larson &*

Lex K Larson, 2 *Larson's Workers' Compensation Law* § 27.04[1] at 27-39 (2004) ("when any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable"). As Professor Larson's treatise notes:

The technical reason for these holdings is that, whatever the normal course of employment may be, the employer and his supervisory staff have it within their power to enlarge that course by assigning tasks outside the usual area. If they do not assign these tasks on the strength of the employer-employee relation on which compensability depends, then what is the source of authority by which the task is assigned?

The practical reason for the rule is that any other view places the employee in an intolerable dilemma: if he complies with the order, he forfeits compensation protection; if he does not comply, he gets fired.

Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law* § 27.04[5] at 27-42 through 27-43 (2004). See also *Cook v. A.H. Davis & Son, Inc.*, 567 A.2d 29, 33 (Del. Sup. Ct. 1989) (applying the rule despite an argument that the supervisor of home siding crew exceeded his own authority in ordering the employee to repair the supervisor's truck, noting "even where the order is a gross excess or even abuse of authority, surely the employee, who has no choice but to comply, should not be made to pay the price of his superior's wrong"); *Pridgen v. Industrial Commission*, 70 Ariz. 149, 217 P.2d 592 (1950) (where an employee is injured or killed while performing an act beyond the usual scope of his employment, which act is being done at the direction or request of his employer, then any resultant injury or death from an accident while so performing such act arises out of and in the course of his employment); *Wilson & Co., Inc. v. Curry*, 259 Ala. 685, 68 So.2d 548 (1953) (in case where employee injured while carrying out task for private

benefit of supervisor but not for employer Alabama Supreme Court noted "the trend of the recent cases seems to be to uphold awards made in cases of this kind" and quoting Larson that "the cases denying compensation seem wrong"). As the Maryland Court of Appeals stated in *Keene v. Insley*, 26 Md.App. 11, 12, 337 A2d 168, 174-175 (Ct. App. 1975):

* * * [W]e now hold that whenever, by virtue of a contract express or implied, an employer-employee relationship exists between two parties, and the employer, or his agent as the employee's supervisor, directs the employee to perform services outside of or beyond his customary or usual duties and/or of a nature not ordinarily required in the employer's business for the private benefit of the employer or his agent, rather than for the benefit of the business, the order constitutes a permissible exercise of the employer's authority to enlarge or extend the scope of employment and expands the existing employment contract. It does not create a new employment contract. Because the existing employer-employee relationship is not terminated but continues to exist while the employee is performing such work, any injury resulting from the performance of such work is compensable under the act. It would be inconsistent with the purposes of the act to relieve an employer, who directs an employee to perform an unusual task, from liability for injuries incurred while the employee was performing that task. Nor would it be consistent with the policies of the act to compel an employee to ascertain whether the task assigned lies within the scope of his customary duties and, if not, to risk being fired if he refuses to perform, or to lose the benefit of insurance coverage if he does perform.

The Maryland Court noted "had he not obeyed...(the) claim would have been for unemployment rather than for workers' compensation benefits." *Id.*, at footnote 8.

In this case, Claimant was on the clock and on the Employer's premises when his direct supervisor, who had the right to recommend hiring and firing of employees and to direct their work, directed Claimant to get into the company truck and accompany him to Mr. Hare's property. He was also instructed to unload the debris on the Employer's

premises and clean the truck out before he clocked out. As Claimant stated, he did as he was told because Mr. Jones was his supervisor. He did not expect payment beyond his salary, and the fact of the payment from Mr. Hare does not change the nature of the task. Claimant was, in fact, paid his regular pay and there is no evidence he was docked for the time they spent on the task clearing the debris from Mr. Hare's property, transporting it to Employer's premises, dumping it on the premises, and cleaning out Employer's truck. Mr. Jones even stated that there was no prohibition from employees performing tasks for third parties and using company equipment to do so.

Furthermore, it makes no difference that Mr. Jones instructed Claimant to perform a private task for a third party. As Larson's treatise notes, "when assistance is given to a third party at the direction of the employee's own supervisor, the course of employment is obviously expanded to include the directed act." Arthur Larson & Lex K Larson, *2 Larson's Workers' Compensation Law* § 27.02[1] at 27-12 (2004).

Accordingly, *Hicks* does not preclude coverage for Claimant's injury in this matter. This Court should reverse the Commission's ruling that Claimant could not recover as a matter of law under the facts of this case, and should remand for further proceedings consistent with this Court's mandate.

B. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT EMPLOYER RECEIVED NO DIRECT OR INDIRECT BENEFIT FROM CLAIMANT'S ACTIVITIES SO AS TO PRECLUDE THE COMPENSABILITY OF HIS INJURY

The Commission found that Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant and his manager, Mr. Jones. (R.p. 7-8, ¶¶ 1-9). This was error.

In relying on the old *Fountain* decision, the Supreme Court in *Hicks* stated the "key factor in determining the children's entitlement to compensation here is whether the work benefitted the employer." *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. at 49, 515 S.E.2d at 533 (emphasis added). Claimant contends the modern trend set forth in Part A, above, is to permit recovery regardless of some direct or indirect benefit to the Employer where the supervisor directs the employee to engage in the task. However, even in light of this "key factor," the only reliable, probative and substantial evidence in this record as a whole is that Employer benefitted directly and indirectly from the task supervisor Jones directed Claimant to perform.

Employer, through the direction of supervisor Jones, used its company truck, employees and equipment to perform a job for a potential customer and respected member of the community. Mr. Hare, the landowner whose debris Employer's employees removed, testified to the fact that he had injured his back, was unable to remove the debris, and had been unsuccessful in having it removed. (R.p. 77, ll. 18-25; R.p. 78, ll. 1-6). Mr. Jones volunteered (according to his testimony) or was hired (according to Mr. Hare's testimony) to remove the debris. Mr. Hare's property was only

a few blocks from Employer's facility. Moreover, the injury to the Claimant occurred while the debris was being removed from Employer's truck. Without the removal of the debris, Employer could not have used the truck. Since Employer permitted the use of the truck to help with the debris removal (R.p. 54, ll. 19-25; R.p. 84, ll. 4-18), the readying of the truck for company use by unloading the debris from it was a direct benefit to the company.

Furthermore, the task performed by Employer's employees had an indirect benefit in the same way as sponsoring a Little League team or making a donation to a community charity. Companies like Employer use company equipment and donations of time and money to promote a positive image, to generate goodwill within the community, and to improve their image with potential customers.

Next, by assisting Mr. Jones, Claimant's efforts reduced the time Mr. Jones had to spend away from Employer's premises while another driver was on the Amick Farms job. This enabled Mr. Jones to return to Employer's business more quickly in the event that other driver needed assistance or the customer called for more cement.

The Commission's finding that there was no direct or indirect benefit to Employer has no support in the record, as the only evidence is that Employer benefitted both directly and indirectly from the activity. The finding is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Tiller v. National Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999); S.C. Code Ann. § 1-23-380(A)(6) (Supp.2008). See also *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002) (Court reversed commission finding the Court found was clearly

erroneous and not supported by substantial evidence); *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1995) (holding there was no evidence to support commission's finding in upholding reversal of commission); *Anderson v. Baptist Medical Center*, 343 S.C. 487, 541 S.E.2d 526 (2001) (upholding Court of Appeals' reversal of commission's finding where the only substantial evidence in the record clearly showed finding incorrect); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) (reversing commission finding that had no evidentiary support).

There is simply no evidence that Claimant was not under Mr. Jones's instruction, even command, at the time the two of them performed the tasks for Mr. Hare, and that Claimant's direct supervisor, Mr. Jones, and his Employer benefitted directly and indirectly from those acts. Hence, the only reliable, probative and substantial evidence in this record as a whole is that Employer benefitted directly and indirectly from the task supervisor Jones directed Claimant to perform.

Lastly, as Justice Toal noted in her dissent in *Hicks*, the Supreme Court of South Carolina has awarded compensation in circumstances where an employee acted outside the scope of his normal duties and the benefit to the employer was only slight or indirect. See, e.g., *Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E.2d 821 (1975) (holding that the injury was compensable where the employee was injured while chasing two boys who had stolen a customer's purse); *Sexton v. Freeman Gas Co.*, 258 S.C. 15, 187 S.E.2d 128 (1972) (holding that the injury was compensable where employee was injured while driving company truck to help put out brush fire); *Cauley v. Ross Builders Supplies, Inc.*, 238 S.C. 38, 118 S.E.2d 879 (1961) (holding that the injury was compensable where

employee was injured while using the company's table saw to fashion a table leg for a fellow employee)" *Hicks*, 335 S.C. at 50-51, 515 S.E.2d at 534 (Toal, J, dissenting).

Other recent South Carolina cases are instructive. For instance, in *West v. Alliance Capital*, 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006), the South Carolina Court of Appeals held an injury the claimant sustained while he performed repairs on his own truck during working hours for which he was paid, and while using tools furnished by his employer "arose out of" his employment. In *Moore v. Family Service of Charleston County*, 269 S.C. 275, 237 S.E.2d 84 (1977), the Supreme Court found an injury arose out of and in the course of employment and thus compensable when the injury occurred off company property but while the claimant was carrying books that the claimant's supervisor required her to take home "for a particular task required by the employer." In the case *sub judice*, at the time of his injury, Claimant was on the clock, on company property, using company tools to unload a company truck at the direction of his direct supervisor.

In *Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (2007), the Supreme Court found the claimant's injury from collision with a truck while removing debris from the road outside the entrance to property to be used for a meeting with customers arose out of and in course of his employment as vice president in charge of sales. The Court recognized claimant chose in good faith to remove the hazard to advance employer's interest, and the accident would not have happened but for claimant's business trip to the property to meet customers. The Court acknowledged that the employee in *Grant* was acting outside of his normal scope of employment and not under

supervision by a supervisor when he was injured while moving debris, but the injury was found to be compensable. The *Grant* Court observed that there are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable, and these circumstances have been applied to: (1) acts benefitting co-employees; (2) acts benefitting customers or strangers; (3) acts benefitting the claimant; and (4) acts benefitting the employer privately.

In this case, the only evidence is that the acts, though outside the scope of Claimant's regular duties, benefitted a co-employee (Mr. Jones) as well as a stranger (Mr. Hare) and the Employer itself, though privately. Thus, under South Carolina law, Claimant's injury was, in fact, compensable.

Accordingly, this Court should reverse the Commission's decision and remand the matter for further proceedings consistent with this Court's direction.

CONCLUSION

For the reasons stated this Court should reverse the decision of the Workers' Compensation Commission and remand this matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,



John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

January 14, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission Appellate Panel
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0717674

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondents

FINAL BRIEF OF RESPONDENTS

Michael Burkett
Willson Jones Carter & Baxley, PA
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2884
(803) 782-2527 facsimile

Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY HOLD THAT CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF HIS EMPLOYMENT?

1. Did the Workers' Compensation Commission correctly apply Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999), to the present case?
2. Did the Workers' Compensation Commission correctly find the employer received no benefit from Claimant's activities so as to preclude compensability of his injury?

STATEMENT OF THE CASE

The Claimant alleged he sustained a work-related injury on August 18, 2007. The Claimant is employed by the Defendant, Hardaway Concrete. After completing a job on August 18, 2007, the Claimant and his supervisor left Hardaway Concrete to remove debris from a private individual's property. The Claimant sustained a back injury while removing and disposing of the debris.

It is the Defendants' position the alleged injury did not arise out of and in the course of the Claimant's employment because the Claimant's assistance in debris removal and disposal provided the Employer no direct or indirect benefit pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

A hearing was held on March 19, 2008 in Columbia, South Carolina. The Hearing Commissioner found that Hardaway Concrete is a concrete operation and is not in the business of debris removal or disposal. The Commissioner determined the alleged injury was outside the scope of employment because the Employer did not directly or indirectly benefit from Claimant's work of moving and disposing of debris.

An Appellate Panel Review was held on October 29, 2008 in Columbia, South Carolina. The Appellate Panel affirmed the Hearing Commissioner's Findings of Fact and Conclusions of Law.

FACTS

The Claimant was forty-three years old at the time of the hearing and has a high school diploma (R. p. 19, lines 5-19). At the hearing, he testified he had been employed with the Employer as a cement truck driver for the past eleven years (R. pp. 20, lines 20-22). On August 18, 2007, the Claimant alleged that after he returned to the Employer's facility from a jobsite, he asked his supervisor, Scott Jones, for gas money (R. p. 25, lines 2-7). Rather than give the Claimant money, the Claimant testified Mr. Jones asked the Claimant to accompany him to the home of a third-party to remove some tree debris (R. p. 25, line 5-p. 26, line 7). The Claimant testified he and Mr. Jones then drove to a third party's property in the company vehicle and loaded tree debris with a shovel and pitchfork (R. p. 25, line 24-p. 26, line 23). Upon loading the vehicle with debris, the Claimant and Mr. Jones returned to the Employer's place of business and discarded the debris behind the company premises (R. p. 26, lines 1-7). The Claimant testified he and Mr. Jones made two trips to the third party's property to load debris and then returned to the Employer's place of business to discard the debris (R. p. 27, lines 4-7). The Claimant added that while loading and unloading the truck, he informed Mr. Jones that he felt pain in his legs and back, but he continued to work until the job was complete (R. p. 27, lines 8-20).

The Claimant testified he clocked out at 4:54 P.M. on August 18, 2007, after he completed the tree removal and disposal (R. p. 27, lines 21-23). The Claimant testified he received a cash payment of twenty-five dollars (\$25.00) for helping with the removal (R. p. 32, lines 13-16). He also testified he received his normal pay from the Employer consistent with his time records (R. p. 32, lines 18-22). The Claimant testified this work, which entailed "shoveling wood chips on the company pickup truck," had nothing to do with his usual employment, in which he performed the work of a cement truck driver (R. p. 44, line 19-p. 45, line 2). In describing his typical daily work

duties, the Claimant stated that after he takes the truck back to the plant, if he does not have anything left to do, he clocks out and goes home (R. p. 23, lines 3-17).

On August 20, 2007, the Claimant was unable to report to work as a result of his back being "stiff and sore". The Claimant was out of work on August 21, 2007, but he reported back to work on August 22, 23, and 24, 2007. The Claimant's last day of work was August 24, 2007.

The Defendants called Scott Jones, Joe Butler, Pickens Hare, and Jay Metts as Employer witnesses. Scott Jones testified he had worked for the Defendant for the past twelve years at the Batesburg plant and is the Claimant's supervisor. (R. p. 49, line 11). Mr. Jones testified that on August 18, 2007, the Claimant and Joe Butler were pouring concrete for a job contracted at Amick's Poultry. (R. p. 49, lines 22-25; p. 52, lines 1-2). Mr. Jones testified he originally asked Mr. Butler if he would like to accompany him to remove tree debris from Mr. Pickens Hare's residence. (R. p. 53, lines 12-20). However, after the Claimant asked Mr. Jones to borrow money and because Mr. Butler had not returned from his last concrete pour at the Amick's Poultry work site, Mr. Jones decided to ask the Claimant whether he would be interested in the debris removal job. (R. p. 53, lines 6-9). At approximately 4:45 P.M., Mr. Jones spoke with Mr. Butler and informed him that he and the Claimant were going to travel to Mr. Hare's residence to remove the debris. (R. p. 70, lines 2-16). Mr. Jones and the Claimant clocked out at approximately 5:00 P.M. (R. p. 53 lines 10-23). At the hearing, there was a dispute as to whether the Claimant clocked-out before removing the debris. However, the Hearing Commissioner determined that although the Claimant was on the clock when he removed the debris, such a finding was not outcome determinative.

Mr. Jones testified he and the Claimant used the company vehicle to transport the tree debris. (R. p. 54, lines 8-21). Mr. Jones confirmed he and the Claimant made two trips back and

forth from the company premises to Mr. Hare's residence. (R. p. 55, line 11). The tree debris was loaded onto the company vehicle, transported back to and discarded behind the company premises. (R. p. 28, lines 1-7). Mr. Jones testified he and the Claimant completed the tree debris removal and were each paid twenty-five dollars by Mr. Hare. (R. p. 57, lines 4-11).

Joe Butler testified he had worked for the Employer for approximately six years as Mr. Jones' assistant and at times, as a cement truck driver (R. p. 66, lines 21-25). Mr. Butler testified that on August 18, 2007, he and the Claimant were delivering cement to Amick's Poultry. (R. p. 67, lines 5-7). According to Mr. Butler, the job consisted of three trips to Amick's Poultry, of which, he personally made the first and third trips while the Claimant made the second trip. (R. p. 68, lines 1-3). At 4:40 P.M., Mr. Butler placed a telephone call to Mr. Jones confirming he had not completed the job, but was close to completion. During that telephone conversation, Mr. Jones told Mr. Butler that he and the Claimant were leaving shortly to remove tree debris. (R. p. 70, lines 2-19). When Mr. Butler arrived back to the company premises after 5:00 P.M., neither Mr. Jones nor the Claimant was present. (R. p. 71, lines 15-17).

Pickens Hare testified he owns the property at which the tree debris was removed. (R. p. 77, lines 15-19). Mr. Hare testified he is not an employee of the Defendant, but that he is a personal acquaintance of Mr. Jones. (R. p. 77, lines 11-12; p. 79, line 25; p. 80, lines 1-5). Mr. Hare testified that Mr. Jones and the Claimant arrived at his property after 5:00 P.M. (R. p. 78, line 21). Upon completion of the work, he testified he paid Fifty dollars for the debris removal. (R. p. 79, lines 6-8).

Jay Metts testified he is the Manager of Human Resources, Safety, and Environment Affairs for the Defendant. (R. p. 83, lines 23-24). Mr. Metts testified that following August 18, 2007, the Claimant approached him to report a back injury. When asked how the Claimant injured

his back, the Claimant reported that the back injury was attributed to "old age." (R. p. 84, lines 22-24). Mr. Metts testified he was later made aware of the events that took place on August 18, 2007 after the Claimant filed the workers' compensation. (R. p. 86, lines 21-23).

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, S.C. Code Ann. §1-23-380(A)(6)(1976), 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.

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 (Ct. 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) (holding 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). Finally, the question of whether an accident arises out of and in the course and scope of employment is largely a question of fact for the Appellate Panel. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999).

ARGUMENTS

I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY HELD THAT CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF HIS EMPLOYMENT.

- a. The Workers' Compensation Commission correctly applied *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999), to the present case.

The Commission correctly held that pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 525 S.E.2d 532 (1999), "the injury sustained on August 22, 2007 is outside the scope of employment because the Employer was neither directly nor indirectly benefited by the debris removal work performed by the Claimant and his manager." (R. p. 7). Pursuant to Hicks, the "key factor in determining the [Claimant's] entitlement to compensation . . . is whether the work benefitted the employer." Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)). Therefore, because the evidence did not establish any benefit conferred upon the Employer, the injury was correctly found not to be compensable, and the Court of Appeals should affirm this conclusion.

The Claimant distinguished the facts of Hicks from the facts of the present case in an attempt to support his argument that the Commission should have found his injury to be compensable. Respondents have addressed those distinguishing facts below, but assert that regardless of factual differences, the rule in South Carolina with regard to whether an injury is compensable remains the same: the injury is compensable as within the scope of employment if the work benefitted the employer. Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)). Thus, regardless of the distinguishing facts noted by the Claimant, unless the Commission's findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," the Court of Appeals should affirm the Commission's original decision, finding no benefit to the Employer and thus

no compensable injury. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

To show the present case differs from Hicks, the Claimant emphasized the Commission's finding that he was paid twenty-five dollars (\$25.00) for removing debris, payment the Claimant did not anticipate receiving (R. p. 8). It is important to note that both the Claimant and his supervisor received this payment from Pickens Hare, the property owner who "had no connection with the Employer" (R. p. 7). Both the Claimant and his supervisor's actions function to benefit themselves as individuals, not each other, and not the Employer. The Claimant also noted that unlike the claimant in Hicks, he was injured on a work day and clocked in before he was injured. The Respondents do not argue with these distinctions, but the Respondents posit that these differences do not change the Commission's findings that the work the Claimant performed did not benefit the employer. The fourth difference the Claimant attempted to show is not supported by the evidence. In fact, the Claimant introduced for the first time, **without citing any support in the Record**, the idea that he benefitted the employer by being present on the premises and by assisting his supervisor. This assertion directly contradicts the Commission's findings that "the Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant and his manager" (R. p. 7). More importantly though, the argument amounts to nothing more than speculation since there is no basis in the record for the argument. By making such blind assertions at this stage without any factual support in the Record, the Claimant did nothing more than ask this Court to make findings without any foundation in the Record and substitute its judgment for that of the Workers' Compensation Commission.

The Claimant cited Justice Toal's dissent in Hicks in which she noted the majority relied on Fountain, an opinion in which North Carolina courts were heavily cited. In this dissent,

Justice Toal states, “[w]hile these North Carolina decisions do not totally jettison the ‘employer benefit’ requirement, they do hold that even a slight, indirect benefit to the employer will suffice where the employee is acting pursuant to instructions by his superior.” Hicks, 335 S.C. at 50, 515 S.E.2d at 534 (Toal, J., dissenting). Although Appellant relies on this dissent, the dissent acknowledges the employer benefit requirement remains the key to the finding of compensability. In the present case, the Commission did not find a benefit; in fact, it expressly found no benefit was conferred, either direct or indirect (R. p. 7). Because the Claimant failed to establish any benefit to the employer, the Court should affirm the Commission’s decision.

The Appellant cited two cases from North Carolina in order to reason that because these cases were found to be compensable, the present case should also be found compensable. The Appellant failed to note, however, that in each of these cited cases, the Court found the evidence reflected *some* benefit was conferred upon the Employer in order to justify compensability. Additionally, the argument that North Carolina opinions should be persuasive in South Carolina does not change the well-established law in South Carolina that compensability depends on whether the work benefitted the employer. Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)).

In Pollock v. Reeves Brothers, Inc., 335 N.C. 287, 291, 328 S.E.2d 282, 285 (1985), where a North Carolina employee died during a plane trip in which he was returning from having new numbers put on an aircraft used primarily for Employer’s business, the North Carolina Industrial Commission made the following finding of fact: “[a]t the time complained of, [the Claimants] were engaged in the discharge of a function which was calculated [to] further indirectly the employer’s business.” The North Carolina Supreme Court found a benefit was conferred upon the Employer, and thus an award of workers’ compensation benefits was

appropriate, basing the decision on the “well-settled rule” that “compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer ‘to any appreciable extent’ when the accident occurred.” Id. at 292, 328 S.E.2d at 285 (citing Guest v. Iron & Metal Co., 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955)).

In Stewart v. N.C. Dept. of Corrections, 29 N.C.App. 735, 737, 225 S.E.2d 336, 337 (1976), where a correctional officer helped build a shelter for a picnic area during off hours, the North Carolina Industrial Commission found “the State would . . . benefit indirectly by the completion of this project.” The North Carolina Court of Appeals affirmed the finding of an injury by accident arising out of and in the course of Plaintiff’s employment with Defendant based on the rule that “[w]here the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation.” Stewart, 29 N.C.App. at 737, 225 S.E.2d at 338 (citing Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968)). The Court of Appeals further reasoned, “[s]o long as ordered to perform by a superior, acts beneficial to the employer which result in injury to performing employees are within the ambit of the act. Stewart, 29 N.C.App. at 738, 225 S.E.2d at 338 (citing Aldridge v. Foil Mtr. Co., 262 N.C. 248, 136 S.E.2d 591 (1964)). Both Pollock and Stewart involve awards of compensation based on the finding of a *benefit* conferred upon the Employer. Once again, the findings in the present case that there was no benefit to the employer are supported by the substantial evidence in the record.

The Claimant also cited several cases from other jurisdictions that base the award of compensation on the private errand rule. South Carolina has not adopted this rule, and regardless of the legal concept followed in the jurisdictions the Claimant cited, the opinions still align with South Carolina’s benefit rule. Specifically, even in these cases, the Court found some benefit to

the employer, indicating these cases would be compensable in South Carolina.

In Begel v. Wisconsin Labor and Industry Review Comm'n, 246 Wis.2d 345, 362, 631 N.W.2d 220, 228 (2001), the Court of Appeals of Wisconsin reversed the Labor and Industry Review Commission's denial of benefits, reasoning that "the service rendered benefitted [the Claimant's] supervisor." The Court acknowledged the rule that "[g]enerally, service is incidental to employment when its performance inured to the benefit of the employer." Id. at 356, 631 N.W.2d at 225. Although the Court of Appeals then extended this rule to include "private errands," or "a service for the personal benefit of the employer or the employee's superior," the award of compensation was still based on a finding of a benefit. Id. at 357, 631 N.W.2d at 225. South Carolina courts have not adopted the private errand rule, but they do uphold the Hicks benefit requirement as the basis for awarding compensation. The Commission in Begel found a benefit, and thus this case did not "totally jettison the 'employer benefit' requirement." Hicks, 335 S.C. at 50, 515 S.E.2d at 534 (Toal, J., dissenting).

Similarly, in Ferragino v. McCue's Dairy, 128 N.J.L. 525, 26 A.2d 730 (1942), the Supreme Court of New Jersey affirmed the award of workers' compensation benefits to a retail milk employee injured in a car accident while on the way to move a customer's piano. The Supreme Court acknowledged the employee was benefitting the Employer by helping build good will and retaining "the customer's friendly interest." Id. at 527, 26 A.2d. at 731.

In Nichols v. Davidson Hotel Co., 333 S.W.2d 536 (1960), the Court affirmed the award of compensation to the employee of a hotel who worked as a bellhop and handyman but was killed in an automobile accident on the way to chauffeur girls to a party. The Court supported its holding by emphasizing the fact that the claimant's employer "benefitted from the errand in that he was able to remain at the hotel and work while the errand was being carried out." Id. at 545.

In Zapos v. Demas, 106 Pa.Super. 183, 189, 161 A. 753, 756 (1932), the employee of a restaurant proprietor was killed in a car accident on the way to the restaurant after purchasing groceries for both the restaurant and his own household and delivering his portion to his house. Id. at 185, 161 A. at 754. The Supreme Court noted that compensable injuries included those “sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer.” Id. at 186, 161 A. at 754. The Court further reasoned the employee left to perform “an errand, the main purpose of which . . . was most intimately connected with his employer’s business.” Id. at 188, 161 A. at 755. Such an errand seemed to fall within the purview of the benefit rule, even if the Pennsylvania court did not use the same language that is employed in Hicks.

In Nugent Sand Co. v. Hargesheimer, 254 Ky. 358, 360, 71 S.W.2d 647, 649 (1934), the Court of Appeals affirmed the award of compensation, reasoning the claimant, a mechanic who occasionally went to the home of his Employer to “do odd jobs and make minor repairs on the property,” was “working in the sphere of activity in which he was employed.” Thus, in that case there was no substantial question of whether or not the work was outside of the normal scope so as to warrant the benefit inquiry. The Court of Appeals further reasoned that “it was . . . regarded in respect both to the employer and the employee as incidental to such business, rather than as a departure or a distinct engagement.” Id.

In Cook v. A.H. Davis & Son, Inc., 567 A.2d 29 (1989), the Superior Court held injuries sustained by the claimant while repairing his supervisor’s truck had occurred within the course of employment. Where the truck was used in performing daily job functions, the Court explained that the Claimant’s injuries occurred within the course of employment because the “truck was necessary to do the job.” Id. at 31. Thus, the Claimant’s repair was recognized as a benefit by

the Court.

Three of the cases cited by the Appellant were held compensable but did not address a benefit to the employer. Respondents argue that these do not change the result that should be reached in the present case.

In Pridgen v. Industrial Comm'n, 70 Ariz. 149, 217 P.2d 592 (1950), the Supreme Court of Arizona held that where a journeyman glazier was fatally injured while helping to corral horses at a ranch owned by his employer, his injuries were compensable. In that case, the Court based its holding on Arizona's workers' compensation law which provided that an employee who performs services outside the duties of his usual employment, pursuant to the employer's instructions, "is within the protection of the act while performing such services." Id. at 152, 217 P.2d at 594. Further, the workers' compensation policy covered both the owner's glass and mirror operations and the ranch operations. Id. Because Arizona's Workers' Compensation Act does not turn on the question of whether there was a benefit to the employer, the holding of the Pridgen case is not persuasive in the present case.

In Wilson & Co., Inc. v. Curry, 259 Ala. 685, 68 So.2d 548 (1953), and Keene v. Insley, 26 Md.App. 1, 337 A.2d 168 (1975), the Courts awarded compensation solely based on the private errand rule. In Wilson, where the Claimant was injured while performing a task for the private benefit of one of his superiors, the Supreme Court held the injury was compensable. 259 Ala. at 687, 68 So.2d at 549. In Keene, the Court of Special Appeals held that where the "employee of a partnership which was engaged in pier business performed various duties for [the] partnership on Saturday," including having cut grass at one partner's garage on previous Saturdays, and was injured while cutting a third party's grass so the third party could assist the partner, the injury was compensable. Keene, 26 Md.App. 1, 337 A.2d at 168. Because South

Carolina has not adopted the private errand rule, Respondents maintain the Claimant's reliance on these cases is misguided.

The Claimant also attempted to rely on the idea that the basic purpose of the Workers' Compensation Act is inclusion of employers and employees and not their exclusion. Horton v. Baruch, 217 S.C. 48, 51, 59 S.E.2d 545, 548 (1950). Respondents note that the aforementioned policy relates to jurisdiction. In this case, however, the dispute entails compensability. Thus, the policy of inclusion noted by the Claimant does not apply to the present case. The question, instead, is whether the Claimant showed, by a preponderance of the evidence, that his activity benefited his employer. As noted above, the substantial evidence supports the Commission's finding that the activity in question did not benefit the employer, and the cases cited by the Claimant do not change the underlying employer benefit rule in South Carolina.

- b. The Workers' Compensation Commission correctly found that the employer received no benefit from Claimant's activities so as to preclude compensability of his injury.

The Claimant argued the Workers' Compensation Commission was incorrect in finding that the Employer received no benefit from the Claimant's activities. 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). Because the Claimant failed to support his argument by citing any testimony in the Record that established a benefit, this Court should affirm the Full Commission's findings.

The Claimant asserted the debris removal by the Employee conferred a direct benefit upon the Employer. Specifically, the Claimant argued that without the removal of the debris,

Employer could not have used the truck. The Claimant, however, failed to cite testimony evidencing that the Employer needed debris to be removed in order to use the truck. In fact, the **only** hearing testimony addressing a benefit involved Mr. Jones' response when asked whether moving chips with the Claimant benefitted the Employer, to which Mr. Jones responded, "No, Sir." (R. p. 63, lines 21-23). The Claimant also argued his work benefitted the Employer indirectly by generating good will and improving its image with potential customers, and the work reduced Mr. Jones' time away from the Employer's premises. In making these arguments, however, the Claimant failed to cite any support in the record. In fact, the Claimant would be hard pressed to show where any of these issues were explored with any of the witnesses during the hearing. In making these arguments at this stage, the Claimant assumed facts that were not established at the hearing.

The Claimant also cited South Carolina cases for guidance. In West v. Alliance Capital, 368 S.C. 246, 628 S.E.2d 279 (2006), the Supreme Court held that where the Claimant sustained an injury while repairing his own truck during working hours, the injury was compensable. The Court reasoned the injury "arose out of employment because the truck was being repaired for [the Employer's] benefit." Id. at 253, 628 S.E.2d at 283. Further, this Court noted the injury occurred in the course of employment because the work was performed "for the purpose of remedying the employer's vehicle shortage." Id. at 254, 628 S.E.2d at 283.

In Moore v. Family Service of Charleston County, 269 S.C. 275, 277, 237 S.E.2d 84, 85 (1977), the Supreme Court held that where the employee was injured while trying to balance "four volumes of professional books which . . . she had taken home for a specific business purpose in furtherance of a special service to be rendered for her employer," the determination that Claimant's injuries did not arise out of and in the course of employment was contrary to and

unsupported by evidence.

In Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007), the Supreme Court held that where an Employee was injured while removing debris from a road, the injury arose out of and in the course of employment. The Court reasoned the Claimant chose to remove a hazard “to benefit himself, his co-worker father, and his customers.” Id. at 202, 641 S.E.2d at 872. Unless the Claimant can cite evidence reflecting a benefit was conferred upon the Employer in the present case without the use of speculative arguments not established during the hearing, the Claimant’s reliance on these South Carolina cases is misguided.

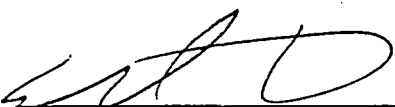
In its most basic form, the Claimant’s appeal is nothing more than frustration with the well established employer benefit rule. Every case cited by the Claimant purportedly in support of his argument either relied on the employer benefit rule to award compensability or the employer benefit rule was not a required element in the jurisdiction from which the case originated. It is important to note the underlying employer benefit rule in South Carolina is not in dispute in this appeal, and the Claimant has not asserted the Commission made a legal error. Instead, the Claimant has simply asked this Court to find the work he performed benefited the employer and was, thereby, in the course and scope of his employment. As noted above, the question of whether an accident is in the course and scope of employment is a question of fact for the Appellate Panel. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999). In the present case, the substantial evidence in the record supports the findings reached by the Commission.

CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court affirm the judgment of the Full Commission and find that Appellant's injury, sustained on August 22, 2007, is outside the scope of employment because the Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY: 

Michael W. Burkett, Esquire
4500 Fort Jackson Boulevard
Columbia, SC 29209
Attorneys for Respondents

January 15, 2010

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 2 4 2009
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission Appellate Panel
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0717674

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondents.

RECORD ON APPEAL

John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

Michael Burkett
WILLSON JONES CARTER &
BAXLEY, PA
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2884
(803) 782-2527 facsimile

Attorney for Respondents

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DECISION AND ORDER OF THE
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0717674

Ricky Burton,

Employee,
Claimant,

vs.

Hardaway Concrete Company, Inc.,

Employer,

and

Liberty Mutual Fire Insurance Company,

Carrier,
Defendants.

ORDER

HEARING:

Held in Columbia, South Carolina on March 19,
2008.

APPEARANCES:

Claimant represented by Luther J. Battiste, III,
Esquire of Columbia, South Carolina.

Defendants represented by Michael W. Burkett,
Esquire of Willson Jones Carter & Baxley, P.A.,
Columbia, South Carolina.

PURPOSE OF HEARING:

DECISION AND ORDER:

By J. Alan Bass, Commissioner

FILED:

_____, 2008.

I. APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

APA #1. Dr. William T. Felmly, Moore Orthopaedic Clinic, dated 09/18/07, 10/09/07, 10/02/07, 1/3/08, Pages 1-10.

APA #2. Dr. Jan Hossler, Lexington Medical Center, dated 08/20/07, 08/21/07, 08/28/07, 10/03/07, 02/05/08, Pages 11-23.

APA #3. Medical Records from Moore Orthopaedics, dated 09/18/07, Pages 24-25.

Claimant's Exhibit #1. B&B Loans, loan application

Claimant's Exhibit #2. Medical Report - Moore Orthopaedic Clinic

II. STIPULATIONS

Counsel for the respective parties stipulated at the time of the hearing to the following issues:

1. The purpose of the hearing is to determine the issues as set forth in the Form 50 and Form 51 and any other issues which may timely come before the Commission;
2. Notices were properly served upon all parties of interest;
3. Venue, set in Richland County, is proper as agreed by all parties;
4. The South Carolina Workers' Compensation Commission has Jurisdiction over the parties and issues involved;
5. The Claimant's average weekly wage is \$604.38, yielding a compensation rate of \$402.94.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declaration or unstipulated medical reports.

III. STATEMENT OF THE CASE

1. Did the Claimant sustain an injury by accident arising out of and in the course of his employment?

2. Should the Defendants be ordered to pay the Claimant temporary disability benefits from August 28, 2007 and continuing until such time that the Claimant reaches maximum medical improvement?

3. Is Claimant entitled to additional medical treatment which would tend to lessen any period of disability?

It is the Claimant's position in this matter that the injuries sustained on August 18, 2007 were by accident arising out of and in the course of his employment. The Claimant contends he was instructed by his manager to leave the work premises while still "on the clock" to assist his manager in the removal and disposal of leftover tree debris. The Claimant contends the aforementioned facts in addition to the fact that the debris was transported in the Defendant's company vehicle and discarded on the Defendant's premises tends to show that his injury did arise out of and was in the course of his employment. Accordingly, the Claimant contends he is entitled to temporary total disability benefits from August 28, 2007 and continuing until the Claimant has reached maximum medical improvement. Additionally, Claimant also contends he is entitled to additional medical treatment.

It is the Defendants' position in this matter that the alleged injury did not arise out of and in the course of the Claimant's employment because the Claimant's assistance in debris removal and disposal provided the Employer no direct or indirect benefit pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). The Defendants contend this position is supported because (1) the Employer does not engage in tree removal or debris disposal work; (2)

the debris removal was performed after the Claimant "clocked out" of work for the Defendant's business; (3) the debris removal was conducted on an independent party's personal property; (4) and the Claimant and his supervisor were provided separate compensation for the debris removal by the independent party.

IV. EVIDENCE OF THE CASE

The Claimant is a 43 year old male with a high school diploma. At the hearing, he testified he has been employed with the Employer as a cement truck driver for the past eleven years. On August 18, 2007, the Claimant alleged that after he returned to the Employer's facility from a jobsite, he asked his supervisor Scott Jones for gas money. Rather than give the Claimant money, the Claimant testified Scott Jones asked him to accompany him to the home of a third-party to remove some tree debris. The Claimant testified that he and Mr. Jones then drove to a third party's property in the company vehicle and loaded tree debris with a shovel and pitchfork. Upon loading the vehicle with debris, the Claimant and Mr. Jones returned to the Employer's place of business, at which time, the debris was discarded behind the company premises. The Claimant testified he and Mr. Jones made two trips to the third party's property, loading debris and then returning to the Employer's place of business to discard the debris. The Claimant added, while loading and unloading the truck, he informed Mr. Jones that he was feeling pain in his legs and back, but continued to work until the job was complete. The Claimant testified he clocked out at 4:54 P.M. on August 18, 2007, after he had completed the debris removal and disposal. The Claimant testified he received a cash payment of Twenty-five and 00/10 dollars (\$25.00) for helping with the removal. He also testified he received his normal pay from the Employer consistent with his time records. On August 20, 2007 he was unable to report to work as a result of

his back being "stiff and sore". The Claimant was out of work on August 21, 2007, but reported back to work on August 22, 23 and 24, 2007. The Claimant's last day of work was August 24, 2007.

The Defendant called Scott Jones, Joe Butler, Pickens Hare, and Jay Metts as employer witnesses. Scott Jones testified that he has worked for the Defendant for the past twelve years at the Batesburg plant, and is the Claimant's supervisor. Mr. Jones testified that on August 18, 2007, the Claimant and Joe Butler were pouring concrete for a job contracted at Amick's Poultry. Mr. Jones testified that he had originally asked Mr. Butler if he would like to accompany him to remove tree debris from Mr. Pickens Hare's residence. However, after the Claimant had asked Mr. Jones to borrow money and because Mr. Butler had not returned from his last concrete pour at the Amick's Poultry worksite, he decided to ask the Claimant whether he would be interested in assisting him in the tree debris removal job at Mr. Hare's residence. Mr. Jones testified that the Claimant arrived back from his concrete pour at approximately 4:00 P.M. At approximately 4:45 P.M., Mr. Jones spoke with Mr. Butler and informed him that he and the Claimant were going to travel to Mr. Hare's residence to remove the debris. Mr. Jones and the Claimant clocked out at approximately 5:00 P.M.

Mr. Jones testified he and the Claimant used the company vehicle to transport the tree debris. Mr. Jones confirmed he and the Claimant made two trips back and forth from the company premises to Mr. Hare's residence. The tree debris was loaded onto the company vehicle, transported back to and discarded behind the company premises. Mr. Jones testified he and Claimant completed the tree debris removal work within thirty-five minutes to an hour, at which time he and the Claimant were paid Twenty-Five dollars each by Mr. Hare.

Joe Butler testified he has worked for the Employer for approximately six years as an assistant to Mr. Jones, and at times as a cement truck driver. Mr. Butler testified that on August 18, 2007 he and the Claimant were delivering cement to Amick's Poultry. According to Mr. Butler, the job consisted of three trips to Amick's Poultry, of which, he personally made the first and third trips while the Claimant made the second trip. Mr. Butler added, at 4:40 P.M., he placed a telephone call to Mr. Jones confirming that he had not completed the job, but was close to completion. During that telephone conversation, Mr. Jones told Mr. Butler that he and the Claimant were leaving shortly to remove tree debris. When Mr. Butler arrived back to the company premises after 5:00 P.M., neither Mr. Jones nor the Claimant were present.

Pickens Hare testified he owns the property at which the tree debris was removed. Mr. Hare testified he is not an employee of the Defendant, but that he is a personal acquaintance of Mr. Jones. Mr. Hare testified that Mr. Jones and the Claimant arrived at his property after 5:00 P.M. Upon completion, he testified that he paid each person Twenty-Five Dollars.

Jay Metts testified he is the Manager of Human Resources, Safety and Environment Affairs for the Defendant. Mr. Metts testified that following August 18, 2007 the Claimant approached him to report a back injury. When asked how the Claimant had injured his back, the Claimant reported that the back injury was attributed to "old age." Mr. Metts testified he was later made aware of the events that took place on August 18, 2007 after the workers' compensation claim was filed.

The Claimant's medical records indicate he first reported to Lexington Medical Center on August 20, 2007 with complaints of lower back pain radiating down his right leg (APA #2, Pages 12-13). The Claimant returned to Lexington Medical Center on August 21, 2007 for an MRI which exhibited disk abnormalities at the L4-L5 level (APA #2, Pages 14-15). On August 28,

2007, the Claimant was ordered out of work for four weeks (APA, #2, Page 16). The Claimant has not reached maximum medical improvement and has not been issued an impairment rating.

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

V. FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. On August 18, 2007, Scott Jones instructed the Claimant to accompany him in a company owned vehicle to Pickens Hare's property to assist in removing and disposing of tree debris.

2. The debris was loaded in the Employer's company owned vehicle and transported back to and disposed of at the Employer's premises.

3. While removing the debris, the Claimant sustained injuries to his back, and the Claimant informed Scott Jones of his back pain.

4. Pickens Hare compensated the Claimant and Scott Jones twenty-five and no/100 (\$25.00) dollars each for removing and disposing of the tree debris from the property. Pickens Hare owned the property and had no connection with the Employer.

5. The Claimant's testimony to be credible. *Kevin Jones less so.*

6. The Employer is a concrete operation that does not nor ever has partaken in the business of tree and/or tree debris removal.

7. Pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999), the injury sustained on August 22, 2007 is outside the scope of employment because the Employer was neither directly nor indirectly benefited by the debris removal work performed by the Claimant and his manager.

8. The Defendants are not liable to the Claimant for any injury that may have occurred while the Claimant was performing tree debris removal and disposal on August 18, 2007.

9. On August 18, 2007, Claimant was paid Twenty- five 00/100s (\$25.00) dollars from Pickens Hare at the completion of the debris removal. Claimant did not expect to be given additional payment for this task outside of his normal employment compensation:

~~10. Kevin Scott Jones, Claimant's supervisor, testified the hearing on March 19, 2008 that there was one hour and thirty minutes where there is a gap in time where the Claimant and himself would have had the opportunity to remove the tree debris while they were both still "on the clock."~~

~~11. Kevin Scott Jones testified that, to his knowledge, it was not against any company rule to remove the tree debris as a personal task, using company property, and instructing a company employee to complete the removal of the debris.~~

VI. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Pursuant to S.C. Code Ann. §42-1-130 (1976), Claimant was a covered employee at the time in question, and pursuant to S.C. Code Ann. §42-1-140 (1976), Employer was a covered Employer.

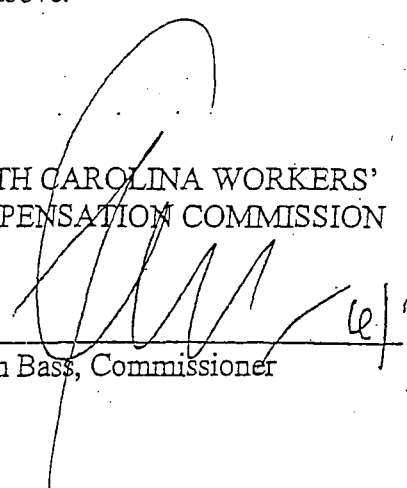
2. Pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999), the Employer did not receive a direct or indirect benefit by the tree debris removal and disposal work performed by the Claimant on August 18, 2007. As such, the Claimant did not sustain an injury arising out of and in the course of his employment pursuant to S.C. Code Ann. §42-1-160 (1976).

VII. ORDER/AWARD

IT IS HEREBY ORDERED, the Claimant is not entitled to benefits pursuant to the South Carolina Workers' Compensation Act as set forth above.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


J. Alan Bass, Commissioner

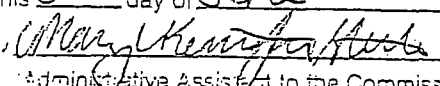
6/20/08

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereto, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

WJB
MJB

This 03 day of June, 2008.

3. 
Administrative Assistant to the Commissioner

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0717674

RICKY BURTON,

EMPLOYEE,
CLAIMANT/APPELLANT,

- V -

HARDAWAY CONCRETE CO., INC.,

EMPLOYER,

AND

LIBERTY MUTUAL FIRE INSURANCE,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia,
South Carolina on October 29, 2008 per
notices timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed

January 30, 2009.

APPEARANCES:

Claimant/Appellant represented by Luther J.
Battiste, III, Esquire, of Columbia, South
Carolina.

Defendants/Respondents represented by
Michael W. Burkett, Esquire, of Columbia,
South Carolina.

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STATEMENT OF CASE

The parties were heard by Commissioner J. Alan Bass on March 19, 2008 in Columbia, South Carolina. On June 23, 2008, he issued the following Order:

IT IS HEREBY ORDERED, the Claimant is not entitled to benefits pursuant to the South Carolina Workers' Compensation Act as set forth above.

IT IS SO ORDERED.

Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on October 29, 2008. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Claimant respectfully submits the following:

1. Did the single commissioner err in finding Claimant was injured outside the scope of his employment for any injury that was sustained while Claimant was performing tree debris removal and disposal at the direction of his supervisor on August 18, 2007?

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Commission, by majority vote, has determined all of the Hearing Commissioner's Findings of Fact and

Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and; therefore, the Order is sustained in its entirety.

FINDINGS OF FACT

1. On August 18, 2007, Scott Jones instructed Claimant to accompany him in a company owned vehicle to Pickens Hare's property to assist in removing and disposing of tree debris.
2. The debris was loaded in the Employer's company owned vehicle and transported back to and disposed of at the Employer's premises.
3. While removing the debris, Claimant sustained injuries to his back, and the Claimant informed Scott Jones of his back pain.
4. Pickens Hare compensated Claimant and Scott Jones \$25.00 each for removing and disposing of the tree debris from the property. Pickens Hare owned the property and had no connection with the Employer.
5. The hearing commissioner found Claimant's testimony to be credible. He found Kevin Jones' testimony less so.
6. The Employer is a concrete operation that does not nor ever has partaken in the business of tree and/or tree debris removal.
7. Pursuant to *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999), the injury sustained on August 22, 2007 is outside the scope of employment because the Employer was neither directly nor indirectly benefited by the debris removal performed by the Claimant and his manager.

8. Defendants are not liable to Claimant for any injury that may have occurred while Claimant was performing tree debris removal and disposal on August 18, 2007.

9. On August 18, 2007, Claimant was paid \$25.00 from Pickens Hare at the completion of the debris removal. Claimant did not expect to be given additional payment for this task outside of his normal employment compensation.

CONCLUSIONS OF LAW

1. Pursuant to S. C. Code Ann. § 42-1-130, Claimant was a covered employee at the time in question, and pursuant to S. C. Code Ann. § 42-1-140, Employer was a covered employer.

2. Pursuant to *Hicks v. Piedmont Cold Storage, Inc*, 335 S.C. 46, 515 S.E.2d 532 (1999), the Employer did not receive a direct or indirect benefit by the tree debris removal and disposal work performed by Claimant on August 18, 2007. As such, Claimant did not sustain an injury arising out of and in the course of his employment pursuant to S. C. Code Ann. § 42-1-160.

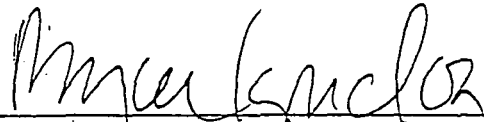
ORDER

IT IS, THEREFORE, ORDERED the Order of the Single Commissioner filed in the above-captioned matter on June 23, 2008 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS FURTHER ORDERED Claimant is not entitled to benefits pursuant to the S. C. Workers' Compensation Act.

AND IT IS SO ORDERED.

S. C. WORKERS' COMPENSATION COMMISSION

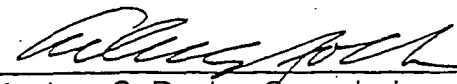

G. Bryan Lyndon, Commissioner

MAJORITY AFFIRMATION

CONCUR:


Derrick L. Williams, Commissioner

DISSENT:


Andrea C. Roche, Commissioner
I would find the case compensable. I would find the activities of the Claimant did benefit the Employer.

(L:\0717674.gbl.app.)

LOB III
MNB

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy herof,
post paid, in the United States mail addressed to
the attorney or attorneys for said parties.

This 30 day of January, 2009
By Robert Gregory Briggs
Administrative Assistant to the Commissioner

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #0717674

RICKY BURTON

CLAIMANT,

VS.

HARDAWAY CONCRETE CO
EMPLOYER,

AND

LIBERTY MUTUAL
CARRIER.

SC WORKERS' COMPENSATION COMMISSION

HEARING OF

RICKY BURTON

VS

HARDAWAY CONCRETE COMPANY, INC.

This is the Transcript of the South Carolina Workers' Compensation Hearing of Ricky Burton versus Hardaway Concrete Company, Inc, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:30 P.M., Wednesday, March 19, 2008, at SC Workers' Compensation Commission 1612 Marion Street Columbia, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

PALMETTO COURT REPORTING
321 Mac Circle Lexington, SC 29073
(803) 358-0515
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APPEARANCES

FOR THE Claimant:
Luther J. Battiste, III, Esquire
Johnson, Toal & Battiste
1615 Barnwell Street
P.O. Box 1431
Columbia, SC 29202

FOR THE Employer/carrier:
Michael W. Burkett, Esquire
Jared M. Pretulak, Esquire
Willson Jones Carter & Baxley
4500 Fort Jackson Boulevard
Columbia, SC 29209

ALSO PRESENT:

Jay Metts, Company Representative

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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EXHIBITS

C-1 (Claimant's Exhibit Number One was marked for Identification) Received	@35@:8
C-2 (Claimant's Exhibit Number Two was marked for Identification) Received	@37@:11

For Defendant:

D-1 (Defendant's Exhibit Number One was
marked for Identification)
Received

@60@:20

Certificate

136

1 WITNESS: Yes, sir.

2 COMMISSIONER BASS: Thank you. All right.

3 DIRECT EXAMINATION

4 By Mr. Battiste:

5 Q Good afternoon, Mr. Burton, how are you?

6 A Fine. Thank you, sir.

7 Q Mr. Burton, how old are you now?

8 A I'm forty-three (43).

9 Q Okay. And where did you grow up?

10 A In Ridge Springs.

11 Q Okay. And tell me where you went to school growing up?

12 A Ridge Springs Monetta.

13 Q That's a high school?

14 A High school, uh-huh.

15 Q Okay. Did you finish?

16 A Yes, sir.

17 Q And when was that?

18 A '83.

19 Q Okay. And what have you done since 1983? Where have
20 you worked other than for Hardaway since 1983.

21 A I worked at Owens-Corning Fiberglass.

22 Q What did you do there?

23 COMMISSIONER BASS: Where is that?

24 MR. BATTISTE: Owens-Corning Fiberglass.

25 COMMISSIONER BASS: Is that correct?

1 A Yes, sir.

2 COMMISSIONER BASS: Okay. Thank you.

3 A And that was in Aiken, South Carolina.

4 Q Okay. And how long did you work for them?

5 A I worked there about a couple of years.

6 Q And what were you doing there?

7 A I was a doffer.

8 Q Okay. And what did you do after that?

9 A I worked on the farm.

10 Q And what did you do on the farm?

11 A Well, we did numerous of things on the farm there. I
12 drove tractors on the farm, picked peaches on the farm,
13 bailed hay on the farm.

14 Q Okay. And about how long did you do that?

15 A I did that for some years, too.

16 Q Okay. What did you do after that?

17 A I worked for Aiken County Public School District.

18 Q What did you do for them?

19 A I was a janitor.

20 Q Okay. Now, you've worked for Hardaway about how long?

21 A If I had made it to November of this year it would have
22 been eleven (11) years, If I ain't mistaken.

23 Q Okay. And you hurt -- you had a back injury for
24 Hardaway before, right?

25 A Yes, sir.

1 Q And they -- and they denied your case, right?

2 A That's right.

3 Q And -- and you had to fight it, right?

4 A Yes, sir.

5 Q Okay. And -- and then you had surgery on your back?

6 A Yes, sir.

7 Q Okay. And you were out of work for a while?

8 A Yes, sir.

9 Q And you went back to work at Hardaway?

10 A Yes, sir.

11 Q Now, tell us what you do for Hardaway?

12 A I'm a truck driver.

13 Q Okay. And when you go to the -- which site do you --
14 which Hardaway site do you work at?

15 A Well, I report everyday at Batesburg, but if we're
16 needed somewhere else they will dispatch us to go
17 somewhere else but that's my location I work.

18 Q Okay. And what kind of truck do you drive?

19 A It's a Mack truck, a cement mixer truck.

20 Q Okay. And who is your supervisor?

21 A Scott Jones.

22 Q And how long has Scott Jones been your supervisor?

23 COMMISSIONER BASS: All right. What was his name
24 again?

25 A Scott Jones.

1 COMMISSIONER BASS: Jones?

2 A Yes, sir.

3 COMMISSIONER BASS: Thank you.

4 Q And how long -- how long has Mr. Jones been your
5 supervisor?

6 A He's been there as long as I've been there. I say
7 about eleven (11) years, if I'd made it.

8 Q Okay. And when you report to work did you have to go
9 see Scott?

10 A Yes sir, I see Scott.

11 Q And -- and what does Scott -- how does Scott control
12 what you do?

13 A Well, he gives us our orders, you know, where we're to
14 go everyday, and where to run, and take deliveries at.

15 Q Okay. And during a weekday what -- what is a typical
16 day like for you? You go see Scott and he gives your
17 orders and then what do you do?

18 A You mean, like, as far as what time we get off?

19 Q Well, tell me what you do during the day in terms of --

20 A Oh, we hauls --

21 Q -- what do you do on the job?

22 A -- we haul cement, concrete.

23 Q Okay. If you -- so, you take a load someplace?

24 A Yes, sir.

25 Q And what do you have to do to -- to unload it?

1 A If they have enough concrete there we don't -- we don't
2 go back there.

3 Q Do you take the truck home?

4 A No, we take the truck back there to the plant.

5 Q That's what I meant?

6 A Yes, sir.

7 Q I said jobsite but you take it back to the plant?

8 A Yes.

9 Q When you take it back to the plant what do you have to
10 do after that?

11 A Well, if we ain't got nothing else to do, that's it and
12 he normally sends us home; we clock out and we go home.

13 Q Okay. And if you have another job then you just do the
14 same thing all over again?

15 A All -- all through the day, you know, if we've got
16 orders we -- that's how we run, like that, through the
17 day.

18 Q Okay. Now does Scott have -- does Scott have the
19 ability to hire -- I mean, fire you if you don't do
20 your job?

21 A Yes, sir. He's my supervisor; I think so.

22 Q Okay. Now, I want to call your attention to August the
23 18th. What day of the week was that?

24 A That was on a Saturday.

25 Q Okay. And what time did you go in to work that day?

1 A I went to work; I clocked in at 2:11.

2 Q Okay. And -- so, that was a -- do you -- what -- what
3 time do you normally go in during a weekday? What time
4 do you normally go in?

5 A Well, we normally go in at different times but normally
6 we go in at 7:00 in the morning.

7 Q Okay. And do you remember what job they had for you to
8 do that day?

9 A I went in that Saturday and I took a load to Amick's
10 Poultry.

11 Q And how far is that from the jobsite?

12 A Maybe about five (5) miles, six (6) miles at the most.

13 Q Okay. What did you have to do once you got to Amick's
14 Poultry?

15 A When I got there to Amick's Poultry, I got out, put my
16 chutes on, poured out the concrete, washed out, put the
17 chutes back on the truck, and I got back to the plant.

18 Q Okay. Do you know about how long that took you that
19 particular day? How long it took you to go to Amick's
20 and come back?

21 A Probably an hour and a half, an hour and forty-five
22 minutes, roughly.

23 Q Okay. So, you came back to the site and what happened
24 after that once you got back?

25 A When I got back to the -- to the plant I went to Scott

1 and I said, boss, I said, have we finished? He said,
2 hold tight, you know, just like that. And I said okay.
3 I said, listen, I said, I want -- I might want to
4 borrow ten dollars (\$10.00) from you, you know, to put
5 a little gas in my car. And he told me, you know, he
6 ain't got no money. Then after that he told me to come
7 on and go with him.

8 Q Okay. And let me stop you. Now, when you went with
9 him, how did -- what vehicle did you get in?

10 A We got in the company pickup truck.

11 Q Okay. And did he tell you where you were going when he
12 -- when he first said come go with me, come get in?

13 A Well, when we got in the truck -- you know, at first he
14 told me to come on and go with him. And when I got in
15 the truck, I said where are we going? He said I got a
16 little job I want to do.

17 Q Okay. Had you clocked out at this time?

18 A No sir, I was still on the clock.

19 Q Okay. And why did you go with Scott under those
20 circumstances?

21 A He was my boss and I felt like what he told me to do, I
22 did what he asked me to do; he's my supervisor.

23 Q So, what did you all do after that?

24 A After we gets in the truck we go a couple of blocks to
25 this gentleman's house, and we worked out there in the

1 yard where they had -- it looked like they had sawed a
2 big old tree down and they had all kind of bark, and
3 limbs, and all kind of sawdust, and debris on the
4 ground. And we load the company pickup truck up. And
5 then when we loaded the truck up we took that load back
6 to the company premises and we dumped it back there in
7 the back back there.

8 Q Now, what did -- what did they -- what did they also
9 what else do they dump in the back back there?

10 A Back there in the back they have where we have left
11 over concrete when we bring it back from off of the
12 other jobs and then we dump it back there in the back.
13 That's what we call using his waste spot.

14 Q Okay. And what kind -- what did you use to dump it
15 with?

16 A You talking about the concrete or the debris?

17 Q The concrete?

18 A Well, if we had left over concrete we're normally
19 driving the big truck, with the chute on --

20 Q Okay. No -- no -- let me -- let me ask the question a
21 different way. Did -- did you have a shovel that you
22 used?

23 A Oh, yes sir. Yeah, we used a shovel and a pitchfork.

24 Q Okay. Where did you get the shovel from?

25 A We had a company shovel and the gentleman at the house,

1 he went up the street and got a pitchfork from one of
2 his friends.

3 Q Okay.

4 A And he brung it back down there and we used it and we
5 loaded the truck up again. And on the second trip --
6 and on the second load we went back to the company,
7 back there in the back back there, and we was unloading
8 the truck. And as I was unloading the truck I was
9 twisting, standing up on the bed of the truck on top of
10 the pile where we had loaded the truck, and I was
11 standing up on top of the pile and I was -- I was
12 shoveling and twisting, unloading the truck like that.
13 And I told Scott, I said, Scott, I said, look I've got
14 to take a break, man. I said, man, I've got pain, man,
15 running down in both of my legs and in my back. And I
16 said I'm going to take a break, you know. And I took
17 me a little break and he worked on. Then I started
18 back working on and the more I kept turning and
19 shoveling and unloading the truck, and I kept feeling
20 the pain running down my legs and my back.

21 Q Now, after you got finished what time did you clock
22 out?

23 A I clocked out at six minutes to 5:00.

24 Q Okay. And how did you feel the rest of the day?

25 A I mean, I really didn't think anything about it. I

1 mean, I went home when I clocked out and I sat around
2 there to the house a little bit. Then all of a sudden,
3 you know, I was feeling stiff and sore; that's how I
4 felt.

5 Q Now, I'm going to call your attention to August the
6 20th, which was Monday.

7 A Okay.

8 Q You've got your little calendar there you can look at.

9 A Okay.

10 Q And -- and what did you do on Monday? How did you feel
11 on Monday and as a result of that what did you do?

12 A Monday, I -- I couldn't half get out of the bed I was
13 so stiff and sore. So, I called in Monday and I said,
14 Scott, I said, I hurt myself back there in the back
15 when we was unloading that truck and I said I'm going
16 to the doctor.

17 Q Okay. And which doctor did you go to?

18 A I went to Batesburg-Leesville Family Practice.

19 Q Okay. And did they check you there?

20 A Yes, sir.

21 Q Okay. And that was on the 20th?

22 A Yes sir, that was that Monday.

23 Q Did they say anything to you about doing an MRI?

24 A Yeah, they did schedule me for -- for that MRI.

25 Q And that was the next day?

1 A well, it was during -- I -- I -- I can't actually
2 remember whether it was the next day --

3 Q Okay.

4 A -- that I followed up with a MRI.

5 Q Okay. Now, after that did you call Scott back?

6 A Yes sir, I tried to call him and let him know what the
7 status was, why I was out of work and what was going
8 on. And so --

9 Q What was his reaction to what you told him?

10 A -- well, I went to him and told him that I hurt myself
11 and he told me -- he told me just be quiet. He said
12 don't say nothing about it. He said the company ain't
13 got a damn thing to do with it. He told me don't say
14 nothing.

15 Q Did he say anything to you -- did he use any --

16 A He told me BS.

17 Q -- he said what about BS?

18 A He said -- when I told him I hurt myself he said BS;
19 that's what he told me.

20 Q Okay. -

21 COMMISSIONER BASS: Did he use the -- did he use
22 the letters or did he use the words?

23 A He used the words. He actually said the words, so.

24 Q Well, say the words.

25 A He said bullshit.

1 Q Okay.

2 A That's what he said, excuse me.

3 Q Okay. And how did you feel about the way he reacted to
4 what you told him?

5 A I mean, I was -- I was -- I mean, I was all -- I was
6 surprised and I was shocked that he would tell me that
7 by him being my supervisor, and I done told him I done
8 got hurt out there. And he told me don't say nothing
9 about it. He told me to be quiet. If not, you're
10 going to lose your job. You don't want to mess with
11 Hardaway. You keep messing with Hardaway and Workman's
12 Comp you're going to lose your job. I said, man, I
13 said what you talking about? I done got hurt out
14 there, me and you working, and now you talking about be
15 quiet; that's what he told me.

16 Q Okay. Now, they're going to come in here and say, Mr.
17 Burton, that all of this work took place after five
18 o'clock. What is your response to that?

19 A No, I was on the clock. I was on the company time. I
20 clocked in at 2:11. I clocked out at six minutes to
21 five.

22 COMMISSIONER BASS: What time?

23 A Four (4) minutes, I mean, six minutes to five; if I
24 ain't mistaken.

25 COMMISSIONER BASS: 4:54?

1 A Yes, sir.

2 COMMISSIONER BASS: Okay. All right.

3 Q And then did you go -- after he told you you were going
4 to lose your job and all of that did you try to go back
5 to work?

6 A Yes sir, I did go back to work. I called him on the
7 21st and -- and told him. I talked to him and he told
8 me, he said, Rick, you need to come on to work. It
9 ain't fair and right for the other drivers you laying
10 out and they doing all the work. I've got a big pour
11 going on and I need you to come to work. And I said,
12 okay, boss, I'll try to, you know, come on in. But I
13 wasn't paying to attention to my -- to my doctor's
14 slip. So, I ended up getting up and going on back to
15 work because he said he had a big pour and all this
16 stuff going on, and I still tried to go back to work.

17 Q And so, you worked Wednesday, Thursday, and Friday?

18 A I worked -- worked the 22nd, the 23rd and the 24th.
19 One of them days I ended up going to Columbia and
20 taking the pickup truck -- I mean, taking the cement
21 truck to the shop; he told me to go over there.

22 Q Okay. Now, after that -- who's your -- who's your
23 family doctor? What's her name?

24 COMMISSIONER BASS: Excuse me just a second.

25 MR. BATTISTE: Okay. I'm sorry.

1 COMMISSIONER BASS: I think I missed something
2 when I was reading one of these cases.

3 MR. BATTISTE: Okay.

4 COMMISSIONER BASS: Did you discuss the money that
5 he was paid?

6 MR. BATTISTE: Okay. I'll -- he -- he mentioned
7 that but I'll go back and make --

8 COMMISSIONER BASS: Okay.

9 MR. BATTISTE: -- make it clear.

10 COMMISSIONER BASS: All right.

11 Q Now, I'm going to go back for a second?

12 A Yes, sir.

13 Q Okay. Now, did -- did Scott end up giving you some
14 money?

15 A Yes, sir.

16 Q And how much did he give you?

17 A He give me twenty-five dollars (\$25.00).

18 Q Okay. And did you also get paid on Hardaway's clock
19 for the time period you were doing the -- doing the
20 work?

21 A Yes sir, I was -- I was still on the company's time. I
22 never did clock out.

23 Q And the reason you stayed there and did the work was --
24 was what reason?

25 A Because I was instructed by my boss to go with him. He

1 had a job on his -- across town and I went with him. I
2 did what he told me to do.

3 Q Okay. Now, you had -- you first -- you went to the
4 hospital, it was on August 20th?

5 COMMISSIONER BASS: Hold on just a second.

6 MR. BATTISTE: I'm sorry.

7 COMMISSIONER BASS: I --

8 MR. BATTISTE: I'm sorry.

9 COMMISSIONER BASS: -- the one question I wanted
10 to ask --

11 MR. BATTISTE: Okay.

12 COMMISSIONER BASS: -- and the reason I wanted to
13 go back to this. The twenty-five dollars (\$25.00)
14 that he paid you, did he tell you in advance of
15 telling you to get in the truck that I'm going to
16 pay you twenty-five dollars (\$25.00) --

17 A No, sir.

18 COMMISSIONER BASS: -- to do this?

19 A No, sir.

20 COMMISSIONER BASS: This is something he just gave
21 you after the fact?

22 A Yes, sir.

23 COMMISSIONER BASS: The first time you heard of
24 the money?

25 A That's right.

COMMISSIONER BASS: All right.

1
2 A And what you're saying is that when he told me to get
3 in the company truck and I got in the company pickup
4 truck with him and we went across town. When
5 everything was over that's when he gave me the
6 twenty-five dollars (\$25.00) and I clocked out and
7 went home.

8 COMMISSIONER BASS: All right. I guess a
9 different way. When you got in the truck did you
10 expect to be paid anything other than your normal
11 hourly wage?

12 A Well, I mean, I didn't -- I mean, I expected that I
13 probably was going to get something but I didn't expect
14 it, like, knowing that I was going around there to do a
15 job to get paid for. I mean, I -- I just went with
16 him.

17 COMMISSIONER BASS: Well, you were on the clock
18 though?

19 A Yes, sir.

20 COMMISSIONER BASS: That's what you expected --

21 A Yes, I was still on --

22 COMMISSIONER BASS: -- to be paid?

23 A -- I was still on company time and I was --

24 COMMISSIONER BASS: All right. Fair enough.

25 A I was thinking I'm getting paid on company time but he

1 did give me twenty-five dollars (\$25.00).

2 COMMISSIONER BASS: I understand.

3 MR. BATTISTE: Okay.

4 COMMISSIONER BASS: I understand.

5 A If I'm saying that right?

6 COMMISSIONER BASS: Yes.

7 A I mean, I don't want to be confusing myself.

8 COMMISSIONER BASS: All right. That's fine.

9 MR. BATTISTE: Okay.

10 COMMISSIONER BASS: Go ahead.

11 MR. BATTISTE: All right.

12 COMMISSIONER BASS: Now, we can get to the doctors
13 and stuff.

14 Q Now, on August the 28th you went to see Dr. Hossler; is
15 that correct?

16 A Yes, sir.

17 Q And in Dr. Hossler's notes, in the second sentence, it
18 indicates that about a week and a half before that you
19 started having low back pain which -- which went into
20 your thighs --

21 A Yes.

22 Q -- is that what you told Dr. Hossler?

23 A That's right.

24 Q Okay. And -- and Dr. Hossler indicated at that time,
25 the 28th, that you should stay out of work for four (4)

1 Dr. Felmly for the first time.

2 MR. BATTISTE: Yes. Okay.

3 COMMISSIONER BASS: Okay. Fair enough. All
4 right. Well, go ahead.

5 MR. BATTISTE: All right.

6 Q I'm -- I'm going to show you Dr. Felmly's report and I
7 want you just to read the part that's in yellow for me?

8 A It says that -- it says the -- "The patient states,
9 roughly, a month or so ago he was working on s Saturday
10 doing a fair amount of lifting. The next Monday he
11 noticed increased pain and discomfort in his leg and
12 there was an internable <sic> period" --

13 Q Well, that's all I need you to go.

14 A -- whatever that is.

15 Q So -- that's all right. Okay. When -- when you went
16 to see Dr. Felmly, this was on September the 18th, his
17 records indicate that you said about a month ago, and
18 this was September 18th and your injury was August 18?

19 A Yes, sir.

20 Q That you were working on a Saturday, and August 18th
21 was a Saturday?

22 A Yes, sir.

23 Q And that you were doing a fair amount of lifting?

24 A Yes, sir.

25 Q And you did do a fair amount of lifting with the

1 Q And Mr. Metts is the person that handles benefits for
2 the company.

3 A Yes, sir.

4 Q And did you have -- at some point in time did you talk
5 to Mr. Metts, or anyone at Hardaway other than Scott
6 Jones, to tell them about what happened? Did they do
7 sort of an investigation at some point --

8 A Oh.

9 Q -- and talk to you about what happened?

10 A I had -- I had told Scott what happened and by me
11 telling Scott what happened I was thinking that Scott
12 had done informed Jay Meets about what happened. And
13 --

14 COMMISSIONER BASS: Excuse me just a second. Your
15 question was, did the company do an investigation?

16 MR. BATTISTE: Yes.

17 COMMISSIONER BASS: Well, did they?

18 MR. BATTISTE: And that's what he's -- and that's
19 what he's -- that's what he's, kind of, about to
20 explain, what happened.

21 COMMISSIONER BASS: I -- I lost you though --

22 MR. BATTISTE: Okay.

23 COMMISSIONER BASS: -- when you started --

24 MR. BATTISTE: All right.

25 COMMISSIONER BASS: -- that's why I was asking.

1 MR. BATTISTE: All right.

2 Q Were you -- first of all, let me just ask you this.

3 Were you aware that Scott Jones never told Mr. Metts --

4 MR. BURKETT: Objection. He doesn't know what
5 Scott Jones would do.

6 COMMISSIONER BASS: He wouldn't know that.

7 MR. BATTISTE: -- well, he's -- he's about -- he
8 -- he can explain that, based on where he's going
9 he -- he can explain it.

10 COMMISSIONER BASS: All right. Well, rephrase --

11 MR. BATTISTE: Well, let me ask it a different --

12 COMMISSIONER BASS: -- your question.

13 MR. BATTISTE: -- let me ask it a different way.

14 COMMISSIONER BASS: Yes.

15 Q When you reported the accident -- Scott Jones was there
16 with you first got hurt --

17 A Yes, sir.

18 Q -- on Saturday? And you mentioned then you got hurt,
19 correct?

20 A Yes, sir.

21 Q You called Scott Jones on Monday and told him you were
22 going to the doctor and told him again about being
23 hurt; is that correct?

24 A Yes sir, that's what I told him.

25 Q Then you talked to him again and came back to work and

1 over Mr. Jay Metts said that, you know, he needed to
2 see me. He said he had a -- a check that, you know, he
3 wanted to give me and I told him okay. And so, we went
4 in the office. And when we were in the office there
5 was myself and Mr. Jay Metts, and Ms. Kathy; she was in
6 there. And -- and we got to talking and it led up to
7 -- to what happened. And he said, Ricky, he said, what
8 are you trying to do; are you trying to pull a fraud or
9 something? I said, no, sir. I said I'm not trying to
10 do anything like that. He said, well, you signed the
11 -- the short term disability. I said, yes sir. I said
12 it's workman Comp related. I said I told Scott and I
13 thought Scott had told Mr. Jay Metts what happened but
14 apparently Scott didn't inform Mr. Jay Metts what went
15 on. And so, Mr. Jay Metts said well, you know, I don't
16 believe you; you're lying. And I said, no, sir, I said
17 I'm not lying. I mean, I don't have no reason to lie.
18 I mean, if I have to lie, I have to try to cover up
19 this lie then I have to turn around and try to cover up
20 another lie. And when I told Mr. Jay Metts, and I said
21 I wouldn't lie to you; I said I got hurt around where
22 we went at that Saturday, me and Scott, to the man's
23 house. And -- and I told him, I said I told Scott and
24 Scott told me BS. You know, I'd better be quiet and
25 don't say nothing about it. He said the company ain't

1 got a damn thing to do with. That's what I told Mr.
2 Jay Metts. And so, he told me, he said, well, Ricky,
3 he said that's over there. He said now, we got to --
4 to do everything, all the paperwork back over. We've
5 got to file it up under -- under --

6 Q workers' Comp?

7 A -- Workman's Comp. That's what Mr. Jay Metts said.
8 And then he said something, you know, about my doctor.
9 You know, and, I mean --

10 Q Did you understand the difference between short term
11 and long term disability and workers' Comp and how all
12 that works?

13 A -- well, see the paper -- no sir, not really. The --
14 the paper that I was signing I'm thinking that it's the
15 -- the workman Comp paper but it was the -- the short
16 term disability paper. That's what apparently I was
17 signing because I had called and talked to Ms. Kathy on
18 the phone and she was trying, you know, to tell me
19 where to sign at but I didn't know what it was, which
20 part was for -- for -- for which. You know, I didn't
21 know what was what. And I thought Scott had informed
22 Mr. Jay Metts knows and I thought everything was -- was
23 going right. I mean, I didn't know all of this was
24 coming up because I didn't never start to get nothing.
25 A couple of weeks started going by-- started going by.

1 really how it all works?

2 A Right. But what I'm saying, I was filling -- I did
3 fill the form out but by me going to Scott and telling
4 him I hurt myself when I was around there working, and
5 I came and told him, then I'm thinking he's doing his
6 part right by giving me the right forms and everything
7 to fill out right. But apparently I -- I didn't fill
8 out no Workers' Comp form.

9 Q You -- you had the prior claim with Hardaway about four
10 (4) years ago, right?

11 A I had what now?

12 Q You had -- you had the claim about four (4) years ago
13 with Hardaway, correct?

14 A Yes, sir.

15 Q Okay. And you went through this whole process, denied
16 claim, challenged it, and found it compensable,
17 correct?

18 A I mean, yes sir. I --

19 Q So -- so you know how the process works?

20 A -- well, somewhat, but I don't know -- you know, I --
21 the only thing I know, when I report something, you
22 know, it still should be done the right way.

23 Q All right. And you didn't officially file a Workers'
24 Compensation claim until November 21st, 2007, is the
25 date of your Form 50; are you aware of that? Well, you

Defense?

MR. BURKETT: And I believe that letter was copied to the insurer without the Employer; that's what I saw.

MR. BATTISTE: It was copied to Liberty Mutual.

COMMISSIONER BASS: Liberty Mutual?

MR. BATTISTE: Yes, sir.

COMMISSIONER BASS: Yes. Okay. Notice of Defense withdrawn. Go ahead, sir.

Q Mr. Burton --

A Yes, sir.

Q -- let's go back to your situation that afternoon. There were some questions from Commissioner Bass --

A Yes, sir.

Q -- about whether or not you knew you would get paid when you were asked to go do this work; is that right?

A Oh, yes sir.

Q Okay. And to -- to make sure we all understand it. You went to Scott Jones and said I need to borrow some money for gas; is that right?

A Yes sir, I did.

Q You needed some money for gas and he said I don't have any money?

A Yes, sir.

Q And so, and that's when he said why don't you come with

1 me and you'll get paid to do this job; is that right?

2 A: He said come and go with him.

3 Q: Come and go with you?

4 A: Uh-huh.

5 Q: And so - and so, you knew you'd get paid for that job
6 because you needed gas money?

7 A: Well, I mean, I did what he asked me to do. He told me
8 to come and go with him.

9 Q: But I just want to establish, you went to him looking
10 for some gas money, correct?

11 A: Yes, sir. I did ask him, yes sir.

12 Q: And he didn't have any money for you?

13 A: That's right.

14 Q: And told you to come and do -- he had a job that you
15 could do to get paid, right?

16 A: He told me to come and go with him.

17 Q: All right. And you knew you would get paid to go do
18 that job?

19 COMMISSIONER BASS: This is the third you've asked
20 him, Mr. Burkett. You ain't getting it out of
21 him.

22 Q: Did you know you were going to get paid?

23 A: No, I was on the company time.

24 Q: Well, why would you go with him if you didn't think you
25 were going to get paid and you needed gas money?

1 A I did what he told me to do. He's my supervisor, and I
2 did what he asked me what to do.

3 Q And the job you went to go do, was it a vacant lot -- I
4 mean, over at somebody's house, right?

5 A Yes, sir.

6 Q And the tree had been cut down?

7 A Yes, sir.

8 Q And at Hardaway Construction, you all don't deal with
9 trees do you?

10 A I mean, all I know -- the only thing that I know
11 Hardaway deals with is concrete.

12 COMMISSIONER BASS: Let's go -- let's go --

13 Q And you all don't clean up --

14 COMMISSIONER BASS: Let's go off the record a
15 second.

16 (OFF THE RECORD)

17 COMMISSIONER BASS: All right. Let's go back on
18 the record.

19 Q Mr. Burton, you all were removing wood chips?

20 A Sir?

21 Q You all -- you all were removing wood chips?

22 A We were shoveling wood chips on the company pickup
23 truck.

24 Q And as a -- from your experience based on Hardaway,
25 wood chips and wood savings have nothing to do with

1 your job at Hardaway Construction, correct?

2 A Yes, sir. I'm -- I'm a cement driver, a truck driver.

3 Q And then when you went to go dump them at the plant,
4 you all went to go dump them in the trash pile where
5 you keep all the old discarded concrete, correct?

6 A Yes sir, back there where the waste -- in the back
7 that's where we dumped the -- all the chips and stuff
8 in the back back there.

9 Q So, it's just a waste pile?

10 A Yes, sir.

11 Q All right. Now, you clocked out at exactly 4:54,
12 right?

13 A Yes, sir.

14 Q And that's your -- and you knew that at your deposition
15 didn't you?

16 A Yes, sir.

17 Q How did you remember that exact time? You -- you said
18 you get confused filling out papers and stuff, yet you
19 knew exactly it was 4:54 didn't you?

20 A Yes, sir.

21 Q And that was before you ever saw your time records that
22 I've produced since then?

23 A I mean, I looked at the time clock --

24 Q So, you remember back --

25 A -- whenever I clocked in and I remember when I clocked

1 out.

2 Q -- back to August 20th, you remember that?

3 A Yes sir, I remember that.

4 Q Okay. And you're saying that you went -- you went
5 after five o'clock --

6 A Yes.

7 Q -- I mean, before five o'clock?

8 A It was six (6) minutes to 5:00 when I clocked out.

9 Q And you had done all the work at the -- the wood chips
10 before then, correct?

11 A Yes sir, we had already done the job.

12 Q Now, when you -- when you do these concrete jobs, you
13 and Mr. Burton, is that his name, Joe Burton?

14 MR. BATTISTE: He's Mr. Burton.

15 Q I'm sorry, Mr. -- Mr. Butler?

16 A Yes, sir.

17 Q Mr. Butler, Joe Butler. You -- you take a load and
18 while you're dumping your load he's filling up his
19 cement truck again to go do another -- to go back to
20 the same place, right?

21 A Yes, sir. Uh-huh.

22 Q And you can't leave until you know that enough concrete
23 has been delivered to that job; isn't that right?

24 A Yes, sir.

25 Q All right. So, even though you came back around four

1 Q Okay. And you did get twenty-five dollars (\$25.00),
2 correct?

3 A Yes, sir.

4 Q Now, you said that you were worried about, you know,
5 that when you called Scott Jones to tell him that you
6 had to miss some work, you said earlier you were
7 written out for four (4) weeks but he made you come
8 back to work because you were -- it wasn't fair to the
9 other drivers; is that right?

10 A When I called in letting him know the status for my
11 situation; when I was out of work and I called in and
12 Scott told me, huh-uh, it ain't fair for the other
13 drivers because he's got a big pour going on and he
14 told me he needed my help; he needed me to come on in
15 and help him. I said, okay, Boss, I said, I'll try to
16 come on in. And I wasn't paying no attention to the
17 doctor's statement and I went on back to work.

18 Q Do you feel like he coerced you to come back to work?
19 Did you feel under pressure to come back to work for
20 Scott Jones?

21 A Well, you know --

22 COMMISSIONER BASS: If you did, tell us.

23 A Yes, sir. I mean --

24 COMMISSIONER BASS: All right. Go ahead.

25 A -- I was -- I was -- I was afraid I might lose my job

1 MR. BURKETT: How he knew the time?

2 MR. BATTISTE: -- yes, how he knew the time.

3 A Yes, sir. How I knew the time.

4 MR. BURKETT: Your Honor, I would just note for
5 the record, I don't think there's any dispute, the
6 time clock records and that form right there that
7 Mr. Battiste just had, showed that he clocked in
8 at 2:11 --

9 A Yes, sir.

10 MR. BURKETT: -- and clocked out at 4:54.

11 A Yes sir, that's right.

12 COMMISSIONER BASS: All right, can we stipulate to
13 that then?

14 MR. BURKETT: Yes, sir.

15 MR. BATTISTE: Yes, sir.

16 COMMISSIONER BASS: 2:11, 4:54.

17 MR. BATTISTE: Right.

18 COMMISSIONER BASS: That's the period of time --

19 MR. BATTISTE: Right.

20 COMMISSIONER BASS: -- that he was clocked in.

21 MR. BATTISTE: Yes, sir.

22 Q And when you clock in there's actually a clock you look
23 at when you clock in and clock out, right?

24 A You've got to put your hand in it.

25 Q Okay.

1 SCOTT JONES, being duly sworn and cautioned to speak
2 the truth, the whole truth, and nothing but the truth,
3 testified as follows:

4 DIRECT EXAMINATION

5 By Mr. Burkett:

6 Q Mr. Jones, can you tell us what your -- what your job
7 is at -- at Hardaway?

8 A I'm a Dispatcher at the Batesburg plant.

9 Q All right. And how long have you been at -- at the
10 plant?

11 A Twelve (12) years.

12 Q All right. And did you start working there after you
13 graduated from college?

14 A Yes, sir.

15 Q Where did you go to school?

16 A Lander.

17 Q Lander?

18 COURT REPORTER: I need for him to speak up a
19 little bit.

20 Q Yes, speak up a little bit.

21 A Lander university.

22 COURT REPORTER: Thank you.

23 Q All right. And I'll -- she has a tough job. Did you
24 start out there as a driver or --

25 A Yes, sir.

1 Q -- a dispatcher?

2 A A driver.

3 Q A driver? How long -- many years did you drive?

4 A I drove for three (3) years.

5 Q Okay. And -- and -- and other than that three (3)
6 years you've been working as a dispatcher?

7 A Yes, sir.

8 Q All right.

9 COMMISSIONER BASS: Excuse me just a second.

10 MR. BURKETT: Yes, sir.

11 COMMISSIONER BASS: Do you mind if he leaves?

12 MR. BATTISTE: I do not. He has to go to the
13 bathroom.

14 COMMISSIONER BASS: All right. Fair enough. Let
15 the record reflect the claimant's leaving the room
16 and we'll proceed in his absence. Go ahead.

17 Q All right. AS -- as -- as a dispatcher do you run the
18 Batesburg-Leesville plant?

19 A Yes, sir.

20 Q All right. You've got to speak up now.

21 A Yes sir, I do.

22 Q All right. Do you assign the drivers as the orders
23 come in on where to go?

24 A I do.

25 Q All right. As just a general manner, if you have a big

1 MR. BURKETT: Okay.

2 COMMISSIONER BASS: And, sir, you're still going
3 to have to speak up a little louder and wait until
4 he finishes his question before you start your
5 answer. Thank you. Go ahead.

6 Q Okay. Let me ask this question. Are there times when
7 drivers are at the plant waiting around?

8 A Yes.

9 Q Okay. Now, let's go to -- to August 18th, 2007, that
10 was a Saturday. Do you recall that day?

11 A Yes, sir.

12 Q Do you recall the job that was being done that day?

13 A Yes, sir.

14 Q What was that job?

15 A We --

16 MR. BATTISTE: Excuse me. Did you say 17th or
17 18th?

18 MR. BURKETT: August 18th. I apologize -- I meant
19 to say August 18th.

20 MR. BATTISTE: Okay. All right.

21 Q On August 18th.

22 A -- we were pouring a job for Fitz and Goodman at
23 Amick's Poultry; it was supposed to have been like
24 thirty (30) plus yards.

25 Q All right. And who -- who was doing that? Mr. Burton

1 and was another driver doing it?

2 A Another guy, Joe -- Joe Butler.

3 Q Joe Butler. All right. Was there -- tell me how that
4 day went as far the deliveries, who was doing what?

5 A All right. Joe Butler went out first. I loaded Ricky
6 second. And Joe -- Joe got the third truck to make
7 thirty (30) and then I had him holding to make sure he
8 finished them up.

9 Q All right. When -- so, are you saying, Mr. Burton, you
10 take a load and pour a load?

11 A That's right. He poured a load and came back and he
12 sat down and waited and we waited to see if we had
13 enough to finish the job up.

14 Q All right. What time do you think Mr. Burton got back
15 that day; do you recall?

16 A Probably about four o'clock or so.

17 Q Okay. And when Mr. Burton got back is Mr. Butler; is
18 he still on the -- on the site?

19 A He's still on the -- he's still on the site pouring out
20 and I have to wait to make sure he finishes up before I
21 could send him on.

22 Q Okay. Now, when you say send him on, like send him
23 home?

24 A I mean, as far as he's finished for the day.

25 Q All right. What would happen if you released him while

1 that Friday night at a football game and then he said
2 something about it.

3 Q Now, if you had talked to Joe Butler about it why
4 didn't Joe Butler go with you to that -- to that job
5 with Pickens Hare?

6 A Because Ricky wanted to borrow twenty dollars (\$20.00)
7 and I told him, well, if you want I can just tell Joe
8 that I'll take you and you can make twenty-five (25)
9 and I can make twenty-five (25).

10 Q Okay. When did you and Ricky, Mr. Burton, when did you
11 all leave to go to -- to go to Mr. Hare's house?

12 A When my driver called and told me he had enough.

13 Q He had enough concrete?

14 A He had enough concrete, about five o'clock.

15 Q Okay. And if -- if he calls in what -- if he calls in
16 and says he has enough what does that mean?

17 A That means he's finished. That means he's on the way
18 back.

19 Q Okay. Does that mean the job is done?

20 A The job is finished.

21 Q Okay. Did Mr. Burton clock out before you went to Mr.
22 Hare's house?

23 A Yes.

24 Q Okay. When you all left from Mr. Hare's house was Mr.
25 Burton, did he arrive back at the plant or do you

1 recall?

2 A Say what now?

3 Q When you all left --

4 A Yeah.

5 Q -- did he arrive -- was -- was Mr. Burton already --

6 I'm sorry, Mr. Butler already back at the plant?

7 A No, he was on the way back when we left.

8 Q Okay. Now, were you in a company truck?

9 A We were.

10 Q Is that your company truck?

11 A Yes, sir. I mean, that's the one I'm assigned to.

12 Q All right. Speak up, please.

13 A That's the -- that's the one I'm assigned to. It goes
14 back -- I drive -- I take it back and forth to home and
15 stuff like that.

16 Q Are you allowed to use that truck to travel to and from
17 work?

18 A Yes, sir.

19 Q Okay. Did you ever get in trouble for moving Pickens
20 Hare's yard clippings or shavings -- tree shavings --

21 A No.

22 Q -- with Hardaway?

23 A No, sir.

24 Q Did you ever -- did anybody ever correct you or
25 anything for -- don't do that again?

1 A No, sir.

2 Q In your opinion, you're allowed to do that if you're
3 off the clock?

4 A Yes, sir.

5 Q In fact, are you a salaried employee or do you clock
6 in?

7 A I clock in.

8 Q And did -- and did you clock out that day also?

9 A Yes, sir.

10 Q And did you all -- how many trips was it to --

11 A Two (2).

12 Q -- two (2) trips. Did Mr. Burton ever complain to you
13 while you all were doing that that he had injured
14 himself?

15 A No, sir.

16 Q How about on that Monday morning; did you receive a
17 phone call from Mr. Burton?

18 A Yes, sir.

19 Q And what did he tell you?

20 A He just said he was down in his back and that he didn't
21 -- that he wasn't coming in and that was it.

22 Q All right. Did he tell you how he hurt his back?

23 A No, sir.

24 Q How about, did he -- as far as -- the records indicated
25 he returned to work that Wednesday; he was out Monday

1 and Tuesday, returned to work Wednesday. Did you have
2 any conversations with him prior to that Wednesday?

3 A No, sir. He just came and I told him if you're down in
4 your back just come in a couple of hours just to make a
5 little bit of time. So, he come in a couple of hours
6 and he punched out and went back home.

7 Q Did you ever receive the doctor's note, did he ever
8 bring that to you, do you recall; from the hospital?

9 A Yes, sir.

10 Q All right. At any time in this -- in this week of
11 August 20th did he tell you to file a workers' Comp
12 claim for him?

13 A No, sir.

14 Q Did he tell you how he hurt his back?

15 A No, sir.

16 Q How many -- how many -- you've been there for twelve
17 (12) years you said?

18 A Yes, sir.

19 Q How many people have you fired in twelve (12) years?

20 A None.

21 Q Why not?

22 A That's not my job.

23 Q All right. Who does -- are you allowed to hire people?

24 A No, sir.

25 Q Are you allowed to fire people?

1 A No, sir.

2 Q Who does that all that?

3 A Mr. Jay Metts.

4 Q And after you all finished the second load did you --
5 did -- the money that you gave Mr. -- Mr. Burton; was
6 that -- was that the money that Pickens Hare gave you?

7 A Yes, sir.

8 Q How much did Pickens Hare pay you?

9 A Fifty dollars (\$50.00). I made twenty-five (\$25.00)
10 and he made twenty-five (\$25.00).

11 Q And did you gave it to him that day?

12 A Yes, sir.

13 Q And what did he do after you gave him the money?

14 A We went on our way.

15 Q And what time do you think that was?

16 A Around six o'clock or so.

17 Q All right. How do you know Pickens Hare?

18 A He was a friend of my dad's for a long time.

19 Q Okay. All right.

20 A Of course, I mean, I -- he does the chain gangs, at the
21 football games.

22 Q All right. Slow down and say that -- say that a little
23 louder.

24 A He does, like, the chain gangs at football games. He's
25 been doing that for a couple of years and I've been

1 A Yeah, I think so.

2 Q She worked with your dad?

3 A Uh-uh.

4 Q And -- that's a yes?

5 COMMISSIONER BASS: You need to say yes or no.

6 A Yes, sir.

7 Q Okay. And you dad got you the job at Hardaway?

8 A Yes, sir.

9 Q And you started working there, you were how old?

10 A I started working there in '95.

11 Q Okay. And so, you've been working there how long?

12 A About twelve (12) or thirteen (13) years, thirteen (13)
13 years this year.

14 Q Now, your lawyer said to you, he said, you run the
15 Batesburg-Leesville plant and you said yes; is that
16 correct?

17 A That's correct.

18 Q And so, when you say you run it, what does that mean?

19 A That means I'm over that plant. I take all the orders
20 and send all the trucks out and stuff. I'm over that
21 plant.

22 Q And how many employees do you have working for you?

23 A Five (5).

24 Q Okay. And so, at that plant you're the man?

25 A Yes, sir.

1 Q Okay. And if I came -- if I were one (1) of your truck
2 drivers and you told me to go do -- to go take a load
3 out and I didn't do it; what would you do?

4 A I'd call Jay Metts.

5 Q And what would you tell Jay Metts?

6 A He said he wouldn't take a load out.

7 Q And if -- if that happened what do you think would
8 happen to that employee?

9 A Jay Metts, he would write him up or he might be
10 terminated.

11 Q Right. So, you have the ability to communicate
12 information to Jay Metts that will determine whether
13 they get fired or they get laid off or they get
14 suspended?

15 A That's right.

16 Q So, even though you're saying you don't have the
17 ability, yourself, to hire and fire; you have the
18 ability to communicate to the person who will make the
19 decision whether somebody is hired and fired?

20 A That's correct, yes.

21 Q So, there's not a lot of difference there is there? If
22 somebody rubs you the wrong way that's the -- that's
23 the wrong thing to happen, right?

24 A Not necessarily because usually Mr. Metts would
25 probably --

1 Q Right.

2 A -- he'd have to have the guy's side of the story too.

3 Q But -- but you communicate to Mr. Metts, as the person
4 who runs the Batesburg-Leesville plant, if you're
5 dissatisfied with the performance of someone?

6 A That's correct.

7 Q As a result of your communications with Mr. Metts, how
8 any people been fired on the job?

9 A None.

10 Q You've never recommended that anybody -- you've never
11 experienced -- talked about problems people had on the
12 job?

13 A No, sir.

14 Q Okay. Now, let me ask you this question. Is it -- on
15 the day that -- that Mr. Burton was shoveling, was he
16 using a shovel from your company?

17 A No, sir.

18 Q He didn't use a shovel from your company?

19 A No, sir.

20 Q Okay. Was he using a truck from your company?

21 A Yes, sir.

22 Q Was he riding in your truck?

23 A Yes, sir.

24 Q Now, if I understand it correctly, on this particular
25 day, you made -- he went out and he did a load and he

1 forms and I don't -- I don't hand out forms or nothing
2 like that.

3 Q I asked you if you -- if you had anything to do with
4 helping him fill out forms and what did you say?

5 A I said, no.

6 Q Okay. And did you help him fill out this form?

7 A I helped him fill out that form right there.

8 Q Okay. So, is it -- this -- so, you didn't tell the
9 truth when I asked you that earlier?

10 A No, you asked me did I have anything to do with the
11 forms and I don't have anything to do with the forms.

12 Q No, I asked you if you had anything to do with --

13 MR. BURKETT: Objection, Your Honor.

14 Q -- helping him fill out a form.

15 MR. BURKETT: The point's been made.

16 COMMISSIONER BASS: Yes, it has. I remember what
17 you asked him and I remember what he said.

18 Q And he -- he told you when you were working on that
19 site, when he was doing that shoveling, that his back
20 hurt didn't he?

21 A No.

22 Q And he told you on that Monday that when he was
23 shoveling on that site his back hurt --

24 A No.

25 Q -- didn't he? How -- how did you think on Monday he

1 hurt his back?

2 A I have no idea. He didn't tell me anything about it
3 when he left Monday -- that -- that Saturday.

4 Q Now, the truth of the matter -- let me ask -- ask you
5 this. Now, let me understand these relationships.
6 Your dad worked at the company twenty-five (25) years,
7 he was very close to Jay Metts; is that correct?

8 A Now, I don't know about all that.

9 Q You don't think -- they weren't close?

10 A I mean, I don't know. My Dad's been passed away for
11 eight (8) years.

12 Q How long did you and your dad work together there?

13 A For about five (5) years.

14 Q And you never observed his relationship with Mr. Metts?

15 A No, because Mr. Metts works in Columbia.

16 Q And they never -- they never interacted?

17 A I'm not too sure.

18 Q You're not too sure?

19 A No, because when my Dad passed -- when he got sick,
20 like, in '96 or '97; I don't know.

21 Q Well, let me ask you this. Are you supposed to use
22 company property, company trucks, and do private jobs
23 and make money on the side for your -- yourself?

24 A I mean, it's not against the rules.

25 Q So, are you saying that -- did -- did Mr. Metts -- you

1 COMMISSIONER BASS: That was slightly different;
2 I'll let him ask that one.

3 A Say that again?

4 Q I said did Mr. Metts give you permission to use a
5 company truck to do a private -- to do a job off site
6 and then bring the work back on site and dump it on
7 Hardaway's property --

8 A I ain't asked --

9 Q -- is that -- is that according to the rules?

10 A -- there's no certain rules like that, as long as it's
11 not on the clock.

12 Q And you -- and you were concerned weren't you, that
13 they were going to find out about it and you were going
14 to get in trouble; you were concerned about it weren't
15 you?

16 A No, sir.

17 MR. BATTISTE: That's all I have.

18 COMMISSIONER BASS: Re-direct.

19 RE-DIRECT EXAMINATION

20 By Mr. Burkett:

21 Q When you moved the chips with Mr. Burton did Hardaway
22 Concrete benefit in any way from that?

23 A No, sir.

24 Q Did Hardaway Concrete get paid for that -- for doing
25 that?

1 A No, sir.

2 Q Who got paid?

3 A Me and Ricky.

4 Q Okay.

5 MR. BURKETT: I have nothing further, Your Honor.

6 COMMISSIONER BASS: Anything else from you?

7 MR. BATTISTE: Nothing on re-cross.

8 COMMISSIONER BASS: All right. I've got --

9 MR. BURKETT: Oh, sorry.

10 COMMISSIONER BASS: -- I've got some.

11 MR. BURKETT: I keep doing that to you, I'm sorry.

12 COMMISSIONER BASS: That's okay. No problem. I
13 don't have that many.

14 CROSS-EXAMINATION

15 By Commissioner Bass:

16 Q All right, sir, I want to make sure I understand your
17 testimony. You -- how long have you been a supervisor
18 of the Batesburg plant?

19 A I want to say around eight (8) years.

20 Q Okay. You've been in charge of the Batesburg plant --

21 A Yes, sir.

22 Q -- for eight (8) years? How many people, total, have
23 you had working out there in that eight (8) year period
24 of time?

25 A As in how many do I usually keep there all the time?

1 Q No. How many people, total, have worked out there;
2 those that have left and those that are here now?

3 A I want to say twelve (12) or thirteen (13) in those
4 years.

5 Q Okay. Your testimony is during that eight (8) year
6 period of time you've never fired anybody directly nor
7 have you ever asked Mr. Metts to fire anybody?

8 A That's correct.

9 Q And as far as you know, no one has ever been fired from
10 the plant?

11 A That's correct.

12 Q Okay. Fair enough. Now, as the person in charge of
13 the Batesburg plant, do you expect those people who
14 work under you to do what you tell them to do?

15 A Yes, sir.

16 Q All right then, have you made that clear to everybody
17 who works there --

18 A Yes, sir.

19 Q -- that you expect them to do what you tell them to do?

20 A Yes, sir.

21 Q All right. The -- I don't think anybody asked you
22 this. What time did you clock out on that Saturday?

23 A It was a little after five o'clock.

24 Q Did you clock out at the same time as Mr. Burton?

25 A No, sir.

COMMISSIONER BASS: I got you.

A I'm serious.

COMMISSIONER BASS: Yes. We'll see you later.

MR. BURKETT: Hold on, keep your seat.

COMMISSIONER BASS: Mr. Burkett, that doesn't matter.

MR. BURKETT: Okay.

COMMISSIONER BASS: I don't care about that. This is Joe Butler?

WITNESS: Yes sir, that's right.

COMMISSIONER BASS: All right. Mr. Butler, would you raise your right hand for me, please?

WHEREUPON,

JOE BUTLER, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

COMMISSIONER BASS: All right. Go ahead, Mr. Burkett.

DIRECT EXAMINATION

By Mr. Burkett:

Q Mr. Butler, how long have you worked at Hardaway?

A The 21st of next month will be six (6) years.

Q six (6) years. And what's your job at Hardaway?

A Loader operator and I assist Scott with running the plant.

1 Q Okay. The loader operator, does that mean -- are you
2 the guy who delivers or do you load the trucks?

3 A Oh, I load the materials that goes into making of the
4 concrete.

5 Q What about Saturday, August 18th, when you delivered at
6 Amick's Poultry; did you drive that day?

7 A Yes.

8 Q Okay. Was that -- why -- why was that? Or why did you
9 have to drive that day?

10 A I -- I really don't remember how I got to be driving
11 that day.

12 Q Is it -- I mean, do you drive occasionally?

13 A Yes.

14 Q Okay. Did you and Mr. Jones have any conversations
15 that day at work about -- about doing anything that
16 night?

17 A Well, I think we had to be to work about 1:00 or two
18 o'clock that evening. And when I came in he asked me
19 did I want to do a job with him after work. And I told
20 him, yeah, I'd -- I'd help him.

21 Q Okay. And what was that job?

22 A He said it was something about some shavings off of a
23 tree that we had to go pick up.

24 Q What -- how many -- do you remember how many loads you
25 did to Amick's that day?

1 A I did two (2).

2 Q Do you know how many Mr. Burton did that day?

3 A He did one (1).

4 Q All right. And what time did you finish doing -- what
5 time did you finish up at Amick's?

6 A It was after 5:00. More like when I got in it was like
7 5:00 -- close to 5:30 when I got in.

8 Q All right. Did -- after you finished Amick's do you --
9 did you -- did you have to call in back to the plant.

10 MR. BATTISTE: Leading questions, objection to
11 leading questions.

12 Q What do you do when you finish the job?

13 COMMISSIONER BASS: Okay. I was going to overrule
14 that but --

15 MR. BURKETT: I'm sorry.

16 COMMISSIONER BASS: -- that wasn't -- that wasn't
17 that leading.

18 MR. BURKETT: Okay. Thanks.

19 Q What -- what do you do when you finish a job?

20 A I usually call back to the plant and let him know that
21 the job is completed.

22 Q And what's -- what's the purpose of calling back?

23 A Well, that way if he -- if he has somebody waiting to
24 -- to come and maybe for a recall or if I didn't have
25 enough concrete to finish the job, that other person

1 that was waiting would bring it.

2 Q All right. And -- and on that date did you have enough
3 concrete to finish the job?

4 A Yes, I did.

5 Q And what time did -- did you call? What time do you
6 think called in to let -- to let them know that you had
7 finished the job?

8 A It was about four o'clock. Scott called me about four
9 o'clock and asked me was I finished or was I near
10 getting finished, and I told him I was just about
11 finished with that pour. And maybe -- well, when I got
12 done pouring, I didn't know that the company had
13 another little pour right around the corner from where
14 I was working. So, when I left, when I was finished
15 from where I was, I moved down and started on the other
16 job.

17 Q Is this still at Amick's?

18 A Right.

19 Q Okay. So, a second pour at Amick's?

20 A Yes.

21 Q All right. So, just to make sure we understand. Scott
22 called you at 4:00 or around 4:00 and you said you were
23 just about done?

24 A Right.

25 Q You finished the first job and then what happens? Tell

1 us -- tell us again?

2 A So, I went -- I continued what I was doing on that --
3 from -- from there, from the time he called and then I
4 finished, and I moved right down the street. Well, it
5 wasn't down the street; it was right down the -- the
6 walkway from where I was working, and I started on the
7 second -- the second pour that they wanted because they
8 was just putting a little retainer wall off from where
9 -- where we was working. And Scott called me again and
10 he asked me was I done. And I told him, yes, I had
11 just finished that one (1) pour that I was on when he
12 called me a few minutes before but I didn't know that
13 they had another one (1). They wanted to pour a
14 retainer wall. So, at that time he told me, he said,
15 well, I'm just going to take Ricky with me to do that
16 job that I told you I wanted you to help me do.

17 Q What time was this second phone call from Scott?

18 A This was about -- about twenty (20) minutes to 5:00,
19 somewhere around there twenty (20) minutes.

20 Q All right. And when you -- all right, so let me make
21 sure I understand this. Did you get to go on that job
22 and make twenty-five dollars (\$25.00)?

23 A No.

24 Q Who got your twenty-five dollars (\$25.00)?

25 MR. BATTISTE: Objection.

1 MR. BURKETT: On what grounds?

2 MR. BATTISTE: He can't testify -- how could he
3 testify to something -- some money somebody else
4 received?

5 COMMISSIONER BASS: You have to lay a foundation.

6 MR. BURKETT: All right. Well, I'll withdraw that
7 question.

8 COMMISSIONER BASS: Yes.

9 Q You -- you -- just to make sure I'm understanding you.
10 Did you go on the job to move the shavings?

11 A Not at all, no.

12 Q All right. And you said earlier you got back to the
13 plant sometime after 5:00?

14 A Yes.

15 Q All right. And were Scott and -- when you got back to
16 the plant were Scott and Mr. Burton there?

17 A No.

18 Q Was Scott's truck there when you got back after 5:00?

19 A No.

20 Q And what did you do when you got back?

21 A I went out and cleaned my truck up and parked it,
22 punched out and went home.

23 Q All right.

24 MR. BURKETT: I don't have anything further.

25 CROSS-EXAMINATION

1 that correct?

2 A As far as with Hardaway, yes.

3 Q Yes, with Hardaway. Do you have another job?

4 A No.

5 Q Okay. So, your job when you went there, and you said
6 you got there about one o'clock, and your understanding
7 when Scott gave you your assignment was to take loads
8 to Amick's; is that correct?

9 A That's correct.

10 Q You -- you were not aware of any other jobs at that
11 time that you had to do that day, in the beginning of
12 the day?

13 A He asked me did I want to go with him after work and do
14 this little side job.

15 Q Okay. All right. But for -- for Hardaway, when you
16 started out in the beginning of the day the job that
17 you were told that you had to do for Hardaway with the
18 truck, with the concrete, was to go to Amick's?

19 A Yes, that's correct.

20 Q And about four o'clock -- part of what has to happen --
21 what happens in this situation is that it is not
22 totally clear sometimes how long it's going to take to
23 do what you have to do; is that correct?

24 A That's right.

25 Q And about four o'clock you called Scott and told him

1 that as far as Amick's was concerned that you were just
2 about finished?

3 A Right.

4 Q That you were finishing up; is that correct?

5 A Yes.

6 Q Is that correct?

7 A Yes, sir.

8 Q And then at that point in time Scott told you that you
9 had a very small job to do pouring a retainer wall; is
10 that correct?

11 A No. I told him that I had that to do.

12 Q Well, how did you get that job? I thought Scott passed
13 out the assignments?

14 A I mean, it was the -- it was the -- it was Amick's job.
15 It was the -- it was the customer's job.

16 Q Did the customer request it or did Scott request it?

17 A When I said I had another little job to do -- I didn't
18 -- I didn't build the wall. I didn't pour the wall. I
19 just --

20 Q But didn't you say that it was unexpected that you were
21 going to have to do that? And as a matter of fact, it
22 was just a short distance from Amick's where you had to
23 do the job; it was unexpected that you had that to do?

24 A -- yes.

25 Q Okay. And how did you -- how did you find out that you

1 enough to finish this job, do you go back and make the
2 round trip or do they send somebody else?

3 A Oh, it would be the next driver that's there at the
4 plant.

5 Q Okay. And you -- when you called in to tell them when
6 you were finished, based on your experience, does that
7 usually release the other drivers who are waiting
8 around?

9 A Yes.

10 Q Okay.

11 MR. BURKETT: I don't have anything further.

12 RE-CROSS EXAMINATION

13 By Mr. Battiste:

14 Q Okay. So, following up on that. As I understand it,
15 you called Scott about four o'clock?

16 A Yes, sir.

17 Q You told Scott you were just about finished?

18 A Yes, sir.

19 Q So, Scott would assume that he didn't need to send any
20 other driver back out there because you were just about
21 finished?

22 MR. BURKETT: Objection to what Scott assumes or
23 what Scott thinks.

24 Q No, I mean, look -- you told Scott --

25 COMMISSIONER BASS: Rephrase your question.

1 Q -- you told Scott at 4:00 you were just about finished
2 the load --

3 A Right.

4 Q -- and you would be coming back, correct? Correct?

5 A That's not -- no, and that's -- that's not correct.

6 Q You -- you didn't tell Scott at four o'clock that you
7 had finished the job that you were working on?

8 A I told him the job that I was pouring was just about
9 finished.

10 Q Right. And you didn't --

11 A That didn't --

12 Q -- tell him again --

13 MR. BURKETT: Let him -- he's still answering the
14 question, Your Honor.

15 COMMISSIONER BASS: Let him finish.

16 A -- that didn't mean that the concrete -- I didn't have
17 concrete in the truck. I had enough concrete in the
18 truck to complete the job that I was doing plus the
19 other pour that -- that they had. So, I -- he knew --
20 I knew then that I wouldn't have to call back for
21 anymore.

22 Q -- right. So -- so, you knew at that point -- when you
23 talked to Scott at that point then you knew that nobody
24 else had to come back there on the site to help you and
25 bring any concrete?

1 A Yes, sir.

2 Q Okay. So, if Scott wanted to release Mr. Burton at
3 that time then it would have been okay to do it because
4 he knew he didn't need him to come back?

5 A That's right.

6 Q Okay. Thank you.

7 RE-DIRECT EXAMINATION

8 By Mr. Burkett:

9 Q You -- when you -- when somebody calls in to dispatch
10 --

11 COMMISSIONER BASS: NO.

12 Q -- they can --

13 COMMISSIONER BASS: No. Hold -- hold on.

14 MR. BURKETT: -- I'm sorry.

15 COMMISSIONER BASS: Direct, cross, re-direct,
16 re-cross, that's it. And I have no questions of
17 this fellow.

18 MR. BURKETT: All right. Thank you, Mr. Burton.

19 I mean, Mr. Butler, I'm sorry. Can we approach
20 for one (1) second? You can go. You can go.

21 COMMISSIONER BASS: Yes. Let's go off the record.

22 (OFF THE RECORD)

23 COMMISSIONER BASS: Okay. Who's next? What's
24 your name sir?

25 WITNESS: Pickens Hare.

1 COMMISSIONER BASS: Raise your right hand.

2 WHEREUPON,

3 PICKENS HARE, being duly sworn and cautioned to speak
4 the truth, the whole truth, and nothing but the truth,
5 testified as follows:

6 COMMISSIONER BASS: Go ahead, sir.

7 DIRECT EXAMINATION

8 By Mr. Burkett:

9 Q Mr. Hare, can you state your full name for the record?

10 A Pickens Hare.

11 Q Okay. And do you work for Hardaway Concrete?

12 A No.

13 Q Do you live near the Batesburg-Leesville Plant?

14 A A couple of miles.

15 Q Okay, sir. All right. Did -- can you tell us what --
16 what happened in your front yard and what you asked
17 Scott Jones to do?

18 A I had a tree removed because lightning hit it and I'd
19 been trying to get somebody to -- to haul the shavings
20 away from where they'd ground the stump up. And I
21 could have done it myself but I had the surgery back in
22 May and I couldn't do it. So, I had talked to Scott
23 about pulling chains for the high school football team
24 one day. And he asked me how I was doing and I told
25 him and I told him about -- about my shavings in my

1 yard. I said, I've been trying to get somebody to come
2 and get them. I said, I'll even pay them to come do
3 it. And he said, well, I'll do it. I said if you'll
4 do it I'll give you fifty dollars (\$50.00) to come do
5 it. And I let it go at that. And one day he called
6 and he came and he did it.

7 Q And did you pay him fifty dollars (50.00)?

8 A Yes, I did.

9 Q Did he come with help?

10 A Yes, he did.

11 Q And what -- was this on a Saturday or do you remember
12 what day it was?

13 A I don't remember what day it was but I think he called
14 me before he came and he said it'd be after work; so, I
15 don't know what day it was.

16 Q All right. If I told you it was a Saturday would you
17 have any reason to not to believe that?

18 A No, I wouldn't have any reason not to believe that.

19 Q Okay. Now, what time did -- did Mr. Jones and his
20 helper arrive at the site?

21 A It was after five o'clock, and the reason I know it was
22 after five o'clock, we were going to have dinner with
23 my son in Lexington. I believe it was at Quincy's and
24 we were supposed to have been there around six o'clock
25 and my wife was getting antsy because it was getting,

1 you know, near the hour to leave -- time to leave and -
2 and Scott was still there; so, we didn't leave.

3 Q Okay. And do you remember the gentleman that was
4 helping him? Do you recall -- would you recognize Mr.
5 Burton?

6 A Vaguely. I mean, I didn't really pay attention to him.

7 Q All right. And -- but just to clarify, you did pay him
8 fifty dollars (\$50.00)?

9 A Yes, I did.

10 Q All right. Did you pay Hardaway Concrete any money?

11 A No, sir.

12 MR. BURKETT: I don't have anything further.

13 COMMISSIONER BASS: Cross.

14 MR. BATTISTE: Just a few questions.

15 CROSS EXAMINATION

16 By Mr. Battiste:

17 Q Mr. Hare, Scott Jones' father was your friend?

18 A I knew Scott's father real well, yes sir.

19 Q How -- how did you know him?

20 A Just -- I don't really remember. Through high school
21 football or something like that. He had a paper route
22 that I took over when he gave it up.

23 Q Took over from his dad?

24 A Yes.

25 Q Okay. And you knew -- you've known Scott since he was

a little boy?

A I didn't -- I didn't really know Scott really until I -- we started pulling chains at the high school football team. Don't get me wrong; I knew him but I didn't -- I didn't know him.

Q All right. And I understand what you're doing is that you have -- it's ten (10) yards for a first down?

A Yeah.

Q And you got two (2) ends of the chain?

A Yeah. Yeah.

Q And Scott's on one (1) end and you're on the --

A No, Scott's -- Scott's the clip man.

Q -- he's -- what -- what does the clip man do?

A He marks the ball where the ball is close to the hash mark.

Q All right. And what do you do?

A Those poles you were talking about, I hold one end of them.

Q Okay. And what was the date when they did this work?

A Oh, I have no earthly idea.

Q Okay. What -- what month was it in?

A I believe it was in August because I retired in August and I think it was sometime in August.

Q All right. What -- what was the weather like that day?

A It was hot.

COMMISSIONER BASS: You don't have a clue?

A No, sir.

COMMISSIONER BASS: All right. Fair enough.

A Anything would be speculation if I told you; I -- don't know. I don't remember.

MR. BATTISTE: That's all.

COMMISSIONER BASS: Mr. Burkett?

MR. BURKETT: Nothing further, Your Honor.

CROSS-EXAMINATION

By Commissioner Bass:

Q Sir, was the -- as far as that particular time that they showed up on that day, was the first time that you had cause to remember the time that they showed up at your house when Scott called you, whenever it was?

A I don't remember whether he called the day before or he called that day and he says -- he says I'll be there after work.

Q No, sir. What I -- you told me that they showed up after five --

A Yes, sir.

Q -- or you testified --

A Yes, sir.

Q -- that they showed up after 5:00. What I'm asking you is, did you have reason to recall or remember what day -- what time they showed up that day until Scott Jones

called you and told you what was going on with Mr.
Burton?

A No.

Q Okay.

A No.

COMMISSIONER BASS: Anything else?

MR. BATTISTE: Yes, sir.

RE-CROSS EXAMINATION

By Mr. Battiste:

Q Who asked you to come testify today?

A I don't think --

Q The lawyer?

A -- I can't remember what his name is.

Q The lawyer? Did Scott talk to you about coming today?

A No.

Q Okay.

MR. BATTISTE: That's all.

MR. BURKETT: Nothing further.

COMMISSIONER BASS: All right. Any other
witnesses?

MR. BURKETT: You can -- Mr. Hare, you're good to
go.

COMMISSIONER BASS: Yes, you're free to go.

MR. BURKETT: You can actually leave the building
if you'd like.

1 COMMISSIONER BASS: Yes, sir.

2 WITNESS: I'm fine?

3 COMMISSIONER BASS: Sure, go ahead.

4 MR. BURKETT: Your Honor, may I have a minute to
5 consult with my Employer?

6 COMMISSIONER BASS: Sure.

7 MR. BURKETT: Jay Metts, Your Honor.

8 MR. BATTISTE: This is your last witness?

9 COMMISSIONER BASS: Who?

10 MR. BURKETT: Possibly, yes. Jay Metts.

11 COMMISSIONER BASS: Raise your right hand, Mr.
12 Metts.

13 WHEREUPON,

14 JAY Metts, having been duly sworn and cautioned to
15 speak the truth, the whole truth, and nothing but the
16 truth, testified as follows:

17 COMMISSIONER BASS: Spell your last name.

18 WITNESS: Metts, M-E-T-T-S.

19 COMMISSIONER BASS: Thank you, sir.

20 DIRECT EXAMINATION

21 By Mr. Burkett:

22 Q Mr. Metts, what's your position at Hardaway?

23 A I'm the Manager of Human Resources, safety and
24 Environmental Affairs.

25 Q All right. And you've heard all the testimony today.

1 Is Scott Jones, does he have a company truck or does he
2 get to use that company truck?

3 A Yes, sir.

4 Q Is he allowed to do -- use it for, you know, loading up
5 trash or something like that if he wants to?

6 A Yes, sir.

7 Q Do you have a company truck?

8 A No, but I can use one (1).

9 Q You can use one (1)? Have you ever used one (1) for a
10 use like that?

11 A Yes, sir.

12 Q Okay. Did Scott Jones get reprimanded or fired or
13 anything else for using this company truck as described
14 here today?

15 A No, sir.

16 Q Were you aware prior to today of his using the truck in
17 that form, in that fashion?

18 A Yes, sir.

19 Q All right. Did you have any conversations with Mr.
20 Burton after August 18th, 2007?

21 A Yes, sir.

22 Q Did Mr. -- what did Mr. Burton tell you was wrong with
23 his back?

24 A He told me it was old age.

25 Q Okay. And did he tell you that he hurt it while

1 shoveling those --

2 MR. BATTISTE: Commissioner. Commissioner.

3 Commissioner.

4 COMMISSIONER BASS: That's leading.

5 MR. BATTISTE: I'd ask that -- that Mr. Metts, he
6 -- just now when he answered the question he
7 turned around and stared -- stared him down in a
8 sarcastic way and I would ask him that he not try
9 to intimidate my client in this court room.

10 COMMISSIONER BASS: Be nice, Mr. Metts. All
11 right, let's go.

12 A I saw him nod. I couldn't help but look that way.

13 Q All right.

14 COMMISSIONER BASS: That's okay.

15 A I'll try not to look that way.

16 COMMISSIONER BASS: Well, that's -- that's okay.

17 You can do it that way. Look at me. I'm the one
18 you're supposed to be looking at anyway --

19 Q He told you --

20 COMMISSIONER BASS: -- so, says some.

21 Q -- tell me again what he said about his back; I'm
22 sorry?

23 A I asked him what was wrong with his back and if he'd
24 hurt in any way. He said, no. And I said, well,
25 what's wrong? He said, it must be old age.

1 Q All right. There was some discussion earlier about a
2 meeting that was held with drivers and other folks at
3 the Columbia plant; is that correct?

4 A Yes, sir.

5 Q What was -- what was that meeting about?

6 A It was our annual open enrollment for the new
7 insurances for the upcoming year.

8 Q And do you remember when you -- you had that meeting?

9 A The same day that I received the letter from his
10 attorney saying that he was representing him for a
11 workers' compensation claim.

12 Q Did you talk to Mr. Burton about that letter, that
13 claim?

14 A I did.

15 Q And what did you tell Mr. Burton?

16 A I did ask him if he was -- why he had hired an attorney
17 and -- and how he got hurt on the job. I asked him if
18 he was committing fraud because he was receiving or
19 filed for a -- a short term disability claim, which can
20 only be filed if it did not occur at work.

21 Q Were you aware -- prior to that letter were you aware
22 that he was pursuing a workers' comp claim?

23 A No, sir.

24 Q Okay. And what did he tell you that day when you
25 talked to him? I know what you said to him; what did

1 he say to you?

2 A He told me that day that he was afraid to tell me that
3 he had had an injury at work. Because he did tell me
4 then that Scott had threatened him. And I asked him
5 why he couldn't tell me. Ricky and I go way back; I
6 see him frequently. He also makes it a point to talk
7 to me, shake my hand, I do the same. He knows that he
8 could talk to me but he obviously was -- didn't do it.

9 Q Now, other than what you've heard today about the --
10 the day in question and five o'clock and before five
11 o'clock; do you have any first hand knowledge of any of
12 that?

13 A Ask that again, please.

14 Q Other than -- other than what you've heard today and
15 then my conversations with you before this hearing
16 about the before and after five o'clock and all these
17 issues; do you have any first hand knowledge of that?
18 And I guess my question is, were you around that day
19 when all this went on?

20 A On -- on Saturday the 18th?

21 Q Yes, sir.

22 A No, sir.

23 Q Okay. And who does the hiring and firing at Hardaway?

24 A I do.

25 Q All right.

1 MR. BURKETT: I don't have anything further, Your
2 Honor.

3 CROSS-EXAMINATION

4 By Mr. Battiste:

5 Q Mr. Metts, you can turn around. You don't have to turn
6 that way. You can turn around.

7 A Stand there (indication); come over here.

8 Q You can turn around. Now, Mr. Metts, Mr. Burton is a
9 nice man isn't he?

10 A I thought so.

11 Q Okay. Now, Mr. Burton got hurt on the job before
12 didn't he?

13 A Yes sir, he did.

14 Q And when he got on hurt on the job before the company
15 denied that he got hurt on the job the last time didn't
16 they?

17 A Yes, sir.

18 Q Okay. And sometimes Mr. Burton has trouble
19 understanding the legalities of employment; is that
20 correct?

21 MR. BURKETT: Objection. He can't testify as to
22 what Mr. Burton does and does not understand.

23 COMMISSIONER BASS: That's true.

24 MR. BATTISTE: Okay.

25 Q Mr. Metts, you had a meeting -- the company has been

1 COMMISSIONER BASS: Okay.

2 MR. BATTISTE: That's all we have, Commissioner.

3 COMMISSIONER BASS: Thank you, sir. You can go
4 have a seat by Mr. Hardaway. All right, any other
5 witnesses?

6 MR. BURKETT: None, your Honor.

7 COMMISSIONER BASS: All right. I need to ask the
8 Claimant a couple of questions that I forgot to
9 ask him.

10 MR. BATTISTE: Okay. He needs you to go back up
11 there.

12 COMMISSIONER BASS: I hope they haven't --

13 MR. BATTISTE: Do you want him to go back up,
14 Commissioner?

15 COMMISSIONER BASS: -- no, he can do it from
16 there. Just talk up real loud --

17 MR. BATTISTE: Yes, Your Honor.

18 COMMISSIONER BASS: -- so she can hear you.

19 CROSS-EXAMINATION

20 By Commissioner Bass:

21 Q I don't know whether this was asked you. I take some
22 notes and I may have lost this. On that Saturday how
23 did you get to work?

24 A I drove my car.

25 Q Okay. When you went to do the -- pick up the wood

1 chippings and stuff like that, in what vehicle did you
2 get there?

3 A We went in the company pickup truck.

4 Q Okay. All right. Did you get -- did Scott take you
5 back to the plant to get your car?

6 A Yes sir, we went back to the plant in the pickup truck?

7 Q And is that when you clocked out?

8 A Yes, sir. After the last unloading the truck that's
9 when I clocked out, on the last dump.

10 Q Okay.

11 COMMISSIONER BASS: Do you have any questions as a
12 result of mine?

13 MR. BATTISTE: I do not.

14 COMMISSIONER BASS: How about you?

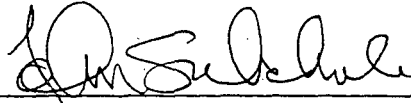
15 MR. BURKETT: None, your Honor.

16 COMMISSIONER BASS: Okay. This concludes the
17 proceeding. Let me speak to the lawyers, please.

18 (THERE BEING NO FURTHER QUESTIONS, THE HEARING CONCLUDED AT
19 4:45 P.M.)
20
21
22
23
24
25

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



John S. Nichols, Esquire
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

ATTORNEYS FOR APPELLANT

December 22, 2009

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

South Carolina Workers' Compensation Commission Appellate Panel

G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0717674

Ricky Burton, ... Appellant,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondents.

SUPPLEMENTAL RECORD ON APPEAL

John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

Attorneys for Appellant

Michael Burkett
WILLSON JONES CARTER &
BAXLEY, PA
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2884
(803) 782-2527 facsimile

Attorney for Respondents

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1 doing it for about ten (10) and I started talking to
2 him on Friday nights.

3 Q All right. So, those are high school football games?

4 A Yes, sir.

5 Q All right. And why -- do -- do you know why he -- did
6 he tell you why he needed somebody to move the yard
7 shavings?

8 A He had just had back surgery or back -- had back
9 problems and he said he couldn't get nobody to come do
10 it and I -- I told him I'd come and do it for nothing
11 but then he insisted he pay me and I just volunteered
12 to help him.

13 Q And when he insisted he pay you did you know that
14 before that Saturday that you went out there?

15 A Yes, sir.

16 Q Did you tell Joe Butler that he was going to get paid
17 that day?

18 A Yes, sir.

19 Q And did you tell Mr. Burton when he took Joe's spot
20 that he was going to get paid twenty-five dollars
21 (\$25.00)?

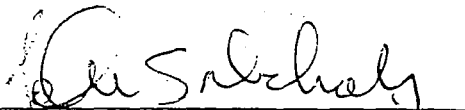
22 A Yes, sir.

23 Q Okay.

24 MR. BURKETT: I don't have anything further, Your
25 Honor.

Certificate of Counsel

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John S. Nichols, Esquire
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 facsimile

Luther J. Battiste, III
William T. Toal
JOHNSON, TOAL & BATTISTE, P.A.
Post Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700
(803) 252-9102 facsimile

ATTORNEYS FOR APPELLANT

January 14, 2010