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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

Appellate Case No. 2022-000600
W.C.C. No. 1808344

Naomi Lynn Bridges……..……..Appellant,

v.

Harbour Town Surf Shop, LLC, Employer,
and South Carolina Uninsured Employers' Fund……..Respondents

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Pursuant to SCACR Rule 221(a) of the South Carolina Rules of Appellate procedure, the Appellant, Naomi Lynn Bridges (hereinafter, "Ms. Bridges"), moves before this Court for Rehearing and/or for this Court to alter its unpublished Opinion No. 2024-UP-258, filed July 17, 2024, which affirmed the South Carolina Workers' Compensation Commission's Order finding that Ms. Bridges' workplace injury was not compensable under the South Carolina Workers' Compensation Act (hereinafter, "The Act"). Ms. Bridges also petitions and suggests the desirability of rehearing by the Court *en banc*, pursuant to SCACR Rule 219. Consideration by the full Court is necessary in this case to secure and maintain the uniformity of its decisions, as this opinion is in direct conflict with other holdings of this Court, and because this proceeding involves a question of exceptional importance to the law of workers' compensation in South Carolina.

The Court should rehear and reconsider the Opinion primarily because it misapprehends and, is in direct conflict with, more than 80 years of precedent on exclusions or exceptions to coverage under the Act when it has been an alleged that an employee violates a workplace prohibition. Specifically, this Court overlooks and/or misapprehends well-established and long-standing precedent used to determine whether and when violations of a workplace order leading to an injury takes that employee and their injury outside of the scope of employment. This misapprehension of the law illustrated in the Court's Opinion further injects fault or negligence in a workers' compensation scheme that is intended to explicitly exclude considerations of fault in determining compensability.

The Court should also rehear the present case and reconsider its Opinion because substantial evidence does not support a violation by Ms. Bridges of a "clear and explicit" prohibition by her employer that would render her workplace injury outside the scope of her employment and, therefore not compensable. Furthermore, this Court should reconsider its

holding that Ms. Bridges has abandoned the argument that the burden of proving an exception or exclusion to the Act is upon the Employer/Defendants. Contrary to the Court's assertions, it is axiomatic that the burden of proving an affirmative defense is upon the party asserting it, and workers' compensation law is to be liberally construed in favor of coverage, with restrictions to be strictly construed. See *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). The seminal cases on this issue which were cited by Ms. Bridges support that it is the Defendant's burden to show an exclusion to the Act when the claimant has otherwise met their burden of showing an injury arising out of and in the course and scope of employment. See *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. 373, 377, 17 S.E.2d 695 (1941)("[he burden was upon the defendants to establish the fact that at the time of Johnson's death he had gone into a prohibited place in violation of a positive order").

Because of the issues above, rehearing is appropriate and a rehearing *en banc* is necessary to secure and/or maintain uniformity of the Appellate Court's opinions as the Opinion contradicts overwhelming precedent on the primary issue of the case. This Court also previously reached the opposite conclusion in a case nearly factually identical to the present case, which examined the issue of exclusion under the Act due to a violation of a workplace prohibition, finding in favor of inclusion and coverage under the Act. See *Marrs v. 1751, LLC*, 2013-UP-230 (Ct. App. May 29, 2013).

I. BECAUSE THE OPINION OVERLOOKS AND MISAPPREHENDS LONG-STANDING PRECEDENT CONCERNING EXCLUSIONS TO COVERAGE UNDER THE ACT IN AFFIRMING THE COMMISSIONS FINDINGS OF FACT AND CONCLUSIONS OF LAW, REHEARING AND RECONSIDERATION IS NECESSARY.

On appeal Ms. Bridges contends that the Commission erred in finding and concluding that substantial evidence supported that Ms. Bridges workplace injury was removed from the scope of

her employment for violating a workplace prohibition. The primary error of law contained in the Decisions and Orders of the Commission which was overlooked and affirmed by the Opinion is in the application of the law regarding what kind of violation of a workplace prohibition. Assuming *arguendo* substantial evidence supported the Commission's findings that Ms. Bridges violated a prohibition by her employer, a point that Ms. Bridges contests, the kind of violation that the Opinion held was supported by substantial evidence is not legally the sort of workplace violation that would remove an otherwise compensable workplace injury out of the scope of employment.

A. The Opinion Misapprehends the Law Governing Which Acts by Employees May Remove Workplace Injuries Outside the Scope of Employment.

The Opinion of the Court should be reconsidered because it misapplies the law concerning which type of acts by an employee remove them from the scope of employment for purposes of determining whether their workplace injury is compensable. The Opinion states that because Ms. Bridges violated specific orders not to climb a ladder at work, her workplace injury fell outside of the scope of employment. This is the same erroneous conclusion reached by the Commission, which failed to engage in any inquiry as to whether this violation is of the kind that exceeds the scope of employment. In determining whether an employee steps out of the scope of his employment by violating an employer's order, the Commission and our courts must discern whether the violation pertained to an order by the employer limiting the sphere of employment rather than an order concerning conduct or methods of performing work within the sphere of employment. This is because "not every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act. . ." *Wright v. BiLo, Inc.*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994). Rather, "[c]ertain rules concern the conduct of the workman within the sphere of his employment, while others limit the sphere itself. A transgression of the former class leaves the scope of his employment unchanged, and will not

prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside the sphere of his employment and compensation will be denied." *Id.* (quoting *Johnson v. Merchant's Fertilizer Co.*198 S.C. 373, 378, 17 S.E.2d 695, 697 (1941)).

Because workers' compensation law is to be liberally construed in favor of coverage, with exceptions to coverage being strictly construed, this inquiry as to the sort of workplace prohibition and whether the prohibition involved the sphere of employment rather than conduct within the sphere of employment is vital. This vital inquiry was overlooked by the Commission and the Opinion, as both merely declare that a violation occurred removing Ms. Bridges' injury outside of the scope of employment and therefore excluding it from compensation. Ms. Bridges would respectfully submit that had the law been appropriately applied, the Opinion would have reached the conclusion that Ms. Bridges' violation, assuming one existed for purposes of the Act, was the kind of violation that pertained to conduct within the sphere of employment instead of a violation of a prohibition that limited the scope of her work duties.

The only evidence of record regarding Ms. Bridges' job duties, which appears to be uncontested by the Employer, was that they entailed various tasks related to maintaining her employer's retail store, including "bringing out inventory," cleaning, attending to customers, and getting the store ready for customers. R. at 1714-1715. At the time of her injury Ms. Bridges was engaged in her normal, expected duties by bringing out and replenishing inventory. Even assuming a violation of an express order from her employer not to use the ladder on the day of her workplace accident, the order that she was found to have violated is one that goes to conduct within the sphere of employment, rather than limiting the sphere itself. Therefore, the violation, if one occurred, does not meet the exclusion. Because this distinction was overlooked or misapplied, reconsideration of the Opinion is necessary to comply with more than 80 years of legal precedent

on this issue, beginning with *Johnson* and cited and applied consistently for decades to reach the same conclusions regarding compensation that Ms. Bridges is asking this Court to reach.

B. The Opinion Misapprehends the Law and Overlooks the Requirement that an Order Violated by an Employee be "Clear and Explicit" for it to Remove a Workplace Injury from the Scope of Employment

While the type of prohibition that Ms. Bridges was found to have violated does not render her workplace injury outside of the scope of employment, substantial evidence also does not support that the order was clear and explicit. In determining whether an order or prohibition by an employer meets the clear and explicit, our courts have looked at the frequency of the orders to the employee and, of course, the clarity of those orders to the employee. This requirement was emphasized in *Wright v. Bi-Lo*, Inc., wherein the claimant's death was found to be outside of the scope of his employment when he had been told not to attempt to apprehend shoplifters on multiple occasions including on the day of his death, when his supervisor told him to go "back inside" the store as he was pursuing a shoplifter out of the store. *Wright v. Bi-Lo, Inc.*, 314 S.C. at 156. See also *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950) (a police chief's death after falling from the back of a fire truck was found to be outside the scope of his employment when he was told on numerous occasions including immediately before the accident not to ride on the back of fire trucks, and the fire and police staff of the town were told that their jobs duties were not to be intermingled). These examples of "clear and explicit" prohibitions are in contrast to the one in *Johnson v. Merchant's Fertilizer Co.*, wherein the Court held compensable the death of a laborer tasked with sweeping the floor and prior to his death was told "not to go close to the line shaft or belt" because "close" was a relative term and there was evidence that the places he was forbidden to go on the premises of his employer were not sufficiently specified by his employer. *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. at 377.

In the present case, there is conflicting testimony regarding the instruction or prohibition given to Ms. Bridges and substantial evidence does not support that there was a "clear and explicit" prohibition to Ms. Bridges. Ms. Bridges testified that as an employee, her job duties entailed various tasks related to her maintaining her employer's retail store, including "bringing out inventory," cleaning, attending to customers, and getting the store ready for customers in the morning. R. at 1714 – 1715. She further testified that it was part of her job to replenish inventory on store shelves something she would do regularly. This entailed getting on a ladder from time to time. She testified that on the date of the accident, one of the owners of the employer, Amir Bitton, told her "I don't want you on the ladder to climb on top of the cooler. That's what we have Zack for." R. at 1716, ln. 1 – 4. Mr. Bitton provides self-conflicting and self-contradicting testimony, claiming that he told her "You've got Zach if you need to climb on the ladder. Go ask Zack, he'll do anything, and there's the rest of the girls for any other chores that you needed to do." *Id.*, ln. 15 – 18. Despite saying there's "the rest of the girls for any other chores" he testified that he said "no girls on the ladder," and for that date only. R. at 2102.

Because of the conflicting testimony, especially the self-contradictory testimony from the person giving Ms. Bridges the order or prohibition, substantial evidence does not support that there was a "clear and explicit" order not to climb the ladder at all and only for that one day that she just happened to get injured. Certainly from Ms. Bridges' perspective the prohibition was not clear as she understood the instruction to be "not to climb the ladder to get on top of a cooler," or climbing the ladder for that specific reason. Substantial evidence does not support that ***she understood*** the order to be not to climb the ladder at all because it was a regular and necessary part of her job. Moreover, the burden of proving that there was a "clear and explicit" prohibition that was violated

by the employee and led to the Claimant's injury, was not met by the employer given the owner's conflicting testimony.

C. The Opinion Misapprehends or Overlooks Long-Standing Precedent Supporting that the Burden of Proving an Exclusion or Exception to Coverage of an Otherwise Compensable Workplace Injury is upon the Employer.

Ms. Bridges would respectfully submit that the Opinion of this Court errs in assigning the burden of proving an exclusion or exception to coverage of a workplace injury when the Claimant meets their burden of showing that the injury otherwise arises out of, and occurs within the course and scope of, their employment. Surprisingly, the Opinion states that Ms. Bridges provides no support for her arguments "asserting an employee is acting outside her scope is an affirmative defense which would place the burden on the employer," finding that these arguments are abandoned. To the contrary, Ms. Bridges referred to *Johnson v. Merchant's Fertilizer Co.,* 198 S.C. 373, 377, 17 S.E.2d 695 (1941) ("The burden was upon the defendants to establish the fact that at the time of Johnson's death he had gone into a prohibited place in violation of a positive order.") The holding in *Johnson* is repeatedly cited throughout decisions of our courts and throughout Ms. Bridges' Final Brief. Additionally cited for this proposition is the principle that "[the] general rule [is] that workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed," placing the onus of proving an exception to coverage upon the Employer. *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) (quoting *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993)).

II. REHEARING *EN BANC* IS APPROPRIATE AND NECESSARY BECAUSE THE OPINION IS IN DIRECT CONFLICT WITH A PRIOR DECISION BY THIS COURT ON THE SAME ISSUE.

Rehearing by the full Court on this issue is necessary to maintain uniformity of its decisions, because the Opinion reaches a conclusion diametrically opposed to that of this Court's Opinion in a case with the same issue and a very similar set of facts governing the issue of whether a violation of a workplace prohibition removed an injury from the scope of employment. In *Marrs v. 1751, LLC*, 2013-UP-230 (Ct. App. May 29, 2013), this Court heard the appeal of 1751, LLC d/b/a Saluda's (hereinafter, "Saluda's") and the South Carolina Uninsured Employer's Fund (hereinafter, "UEF") (collectively "Defendants") from a determination by the Appellate Panel of the South Carolina Workers' Compensation Commission that Marrs, a restaurant employee, was injured within the course and scope of his employment. Defendants argued that the Commission erred in finding Marrs' knee injury compensable when it occurred on stairs Saluda's prohibited from using. In that case, Marrs was working as a cook for Saluda's and injured his knee when he stepped on a metal stair that had rusted and broken away. At the time of the injury, he had been given permission by his employer to go on a smoke break, and he had walked to the platform at the top of the back stairs of the restaurant to smoke. A supervisor had dismissed a co-worker to go home early and when Marrs saw the co-worker standing at the bottom of the stairs, Marrs began to talk to him to see if there were other tasks that needed to be done in the kitchen. Marrs could not understand what his co-worker was saying so he began walking down the stairs and the broken stair gave way. The Commission found that he was told not to use the stairs, much like Ms. Bridges was found to have been given an order not to climb the ladder at work. *Marrs v. 1751, LLC*, WCC No. 1003812 (S.C. Workers' Comp. Comm'n App. Panel, July 14, 2011).

In affirming Commission's decision, the Court cited *Johnson* and *Wright* for the propositions discussed above, that not every violation of a workplace violation will necessarily remove an employee from the protection of the Act and that only violations of rules pertaining to the sphere of employment itself, rather than conduct within the sphere, will remove the employee from the sphere or scope of employment. Moreover, the Commission's decision specifically found that this violation of a workplace order was not analogous to that of *Wright* because the order by Saluda's for Marrs to stay off the stairs was not a limitation of the sphere of employment. Rather, it was a violation of an order concerning conduct within the sphere as he was on a personal comfort break incidental to his work, and he was talking to another employee about his job duties when he was injured.

The only ways in which the facts of *Marrs* and the present case materially differ are 1) that it is undisputed that Ms. Bridges was directly engaged in work duties at the time of her accident, whereas Marrs was engaged in a smoke break, merely incidental to employment and within the scope due to the personal comfort doctrine and 2) that Marrs was told on multiple occasions not to use the back steps and he was informed two or three weeks prior to his workplace injury that the steps were defective, whereas Ms. Bridges was given a variety of conflicting orders and was only told the day of her injury not to use the ladder. Thus, given this Court's prior opinion in *Marrs*, Ms. Bridges' entitlement to compensation under the Act for her workplace injury is arguably clearer than Marrs'. Importantly, the two are indistinguishable factually on the issue of whether the employer limited the conduct within the sphere rather than the sphere itself.

Thus, because the Opinion is in direct conflict with prior holdings on this issue, an *en banc* review of this Opinion is necessary to maintain uniformity in its decisions. Moreover, it is noteworthy that the single commissioner in *Marrs* reached the conclusion of the Appellate Panel

of the Commission in the present case. Rehearing by the full Court in this case may be desirable as an opportunity to provide the Commission and the South Carolina Bar with guidance, given the history of misapprehensions of the law on this issue. Rehearing *en banc* is also appropriate because this matter involves a question of exceptional importance to the law of workers' compensation in South Carolina, as allowing the Opinion to stand injects fault and employee negligence into a statutory framework that was intended to be a no-fault system, undermining the purpose and spirit of the Act.

CONCLUSION

For the reasons addressed herein, rehearing of this matter is warranted. Ms. Bridges therefore requests that the Court inquire further as to these matters and grant the relief originally requested through her appeal.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* on the South Carolina Workers' Compensation Commission and on the attorney of record for the Respondents, Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Commission Uninsured Employers' Fund, sent electronically and/or by depositing a copy of it in the United States Mail, postage prepaid, on the 30th day of July, 2024, addressed as follows:

The Honorable Amy Bracy
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