THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO. 1808344

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents

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RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND'S RETURN TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, the Respondent, South Carolina Workers' Compensation Uninsured Employers' Fund (Respondent), hereby files this Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. Appellant filed her Petition for Rehearing on or about July 30, 2024. This Court requested that this Return be filed by letter dated August 28, 2024.

This matter was heard by this Court on April 3, 2024, and its unpublished opinion (Opinion No. 2024-UP-258) was issued on July 17, 2024. The opinion affirmed the Decision and Order of the South Carolina Workers' Compensation Commission (Commission), finding that Claimant's alleged injuries are not compensable under the South Carolina Workers' Compensation Act (the Act).

Appellant has petitioned this Court to rehear the matter, alleging that the Court has "inject[ed] fault or negligence in a workers' compensation scheme . . . ." Petition for Rehearing, p. 1.[1] Further, Appellant alleges that substantial evidence does not support that clear and explicit instructions for the Appellant not to use a ladder on the date of alleged accident, where said use directly led to Appellant's alleged injuries. Appellant also asserts that this Court has erred by requiring a Claimant to prove her injuries arose from and were suffered in the course of her employment. Appellant additionally asserts that Respondents' defense that Claimant's injuries did not arise from and were not suffered in the course of employment is an affirmative defense, an issue the Court deemed abandoned on appeal by this Court.

Lastly, Appellant asserts that the Court "has reached the opposite conclusion in a case nearly factually identical to the present case," then cites an unpublished opinion where one of this Court's sitting judges represented the prevailing party. The only facts outlined in the improperly-

[1] However, after that initial reference, there is no further discussion of fault or negligence.

cited unpublished, short, *per curium* opinion are contained in this line: "Saluda's appeals, arguing the Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding Marrs' knee injury was compensable when it occurred on stairs Saluda's prohibited Marrs from using." Marrs v. 1751, LLC, No. 2013-UP-230, 2013 S.C. App. Unpub. LEXIS 313, at *1 (Ct. App. May 29, 2013). Outside of that fact, and the fact that, unlike this case, the Commission found the claim compensable, there are no other facts listed in that unpublished opinion.

Even more importantly, it is improper for Appellant to cite an unpublished case, as the same is expressly prohibited by SCRACR 268(d)(2).[2] Therefore, Respondent respectfully requests that this Court ignore Appellant's improper citation.

I. THE COURT DID NOT MISAPREHEND THE LAW OR FACTS BY FINDING SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE EMPLOYER LIMITED THE CLAIMANT'S SPHERE OF EMPLOYMENT.

This Court affirmed the Commission's findings, determining that

> Substantial evidence supports the Appellate Panel's determination Bridges left the sphere of her employment by violating specific orders not to climb the ladder. The Appellate Panel found Bridges's employer limited the scope of her employment with his instructions. Bridges's employer and coworkers testified the employer instructed her to not use the ladder on the day she fell. Accordingly, substantial evidence supports the Appellate Panel's finding that the employer limited the scope of Bridges's employment.

Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *3-4 (Ct. App. July 17, 2024).

In her Petition for Rehearing, Appellant asserts that this Court misapprehended the law by finding that the Employer limited the sphere of her employment; rather, Appellants asserts, the

[2] " . . . unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." SCACR 268(d)(2).

Employer only limited the method by which Appellant was to perform her job.[3] However, this assertion misapprehends this Court's standard of review. This Court found that substantial evidence supports the Commission's findings that the Employer limited the Appellants' sphere of employment was limited by and through the Employer's clear and explicit instructions.

Appellant argues that "80 years of legal precedent on this issue" has been turned on its head by the Court's opinion. Petition for Rehearing, pp. 4 – 5. Though she fails to discuss the specific facts of each case cited on this issue (Wright v. Bi-Lo, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994); Johnson v. Merchs. Fertilizer Co., 198 S.C. 373, 17 S.E.2d 695 (1941)), Appellant engages in sweeping generalizations about what these cases mean. However, as Professor Larson noted: "There can be no absolutes in such matters as obeying instructions." 3 Larson's Workers' Compensation Law § 33.02.

Respondent argues that the question in each case is whether the instructions were clearly given to the employee. As this Court noted, "Bridges's employer and coworkers testified the employer instructed her to not use the ladder on the day she fell." Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *3-4 (Ct. App. July 17, 2024). The Appellant herself testified that, on the day of her alleged accident, Employer told her, "'I don't want you on the ladder to climb on top of the cooler. That's what we have Zack [a co-employee] for.'"

While arguing the Court has turned 80 years of precedent on its head, Appellant ignores the case of Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). In that case, a police chief was denied benefits after falling from a fire truck, although he had work duties related

[3] "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." Petition for Rehearing, p. 3.

to fire fighting. His employer expressly prohibited him from riding on fire trucks, but he ignored those instructions. Like the Appellant here, the police chief's injuries were not compensable. Appellant does mention this case in later arguments in her Petition, however.

Therefore, for the reasons set forth herein, Appellant's Petition for Rehearing should be denied.

II. THE COURT DID NOT MISAPPREHEND THE LAW OR FACTS IN FINDING THAT SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISION'S DETERMINATION THAT THE INSTRUCTIONS NOT TO GET ON THE LADDER WERE CLEAR AND EXPLICIT.

The Appellant argues that the instructions to the Claimant were not clear and explicit. The Appellant does not actually argue that this Court misapprehended the law, but she argues that the Court "overlook[ed] the requirement that an order . . . be clear and explicit . . . ." Of course, this is not so, as the Commission found *as a fact* that the instructions were "clear and explicit." ROA p. 46. The standard of review requires that this Court determine whether substantial evidence supports this finding from the Commission. This Court determined that substantial evidence the finding that Appellant "left the sphere of her employment by violating specific orders not to climb the ladder." Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *3 (Ct. App. July 17, 2024).

Nevertheless, the factual determination of whether instructions are clear and explicit are determined on a case-by-case basis: "There can be no absolutes in such matters as obeying instructions." 3 Larson's Workers' Compensation Law § 33.02. There is a mountain of evidence that the Commission relied upon in this case to find that the Claimant was given clear and explicit instructions not to get on the ladder from which she alleges to have fallen, to wit:

(1) Zach Edri, a coworker, testified that Employer said, "He said that, you

know,[Claimant's] foot is injured, and that he doesn't want her to go on the ladder, and that if she needs to go on the ladder, to come get me to go on the ladder." ROA 1829; Tr. Vol. 1, p. 163, ll. 16 – 19;

(2) Raven Baden, a coworker, testified that Employer "told [Claimant] not to go on the ladder." ROA 1979; Tr. Vol. 2, p. 46, l. 22. She further testified, "He told her not to go on the ladder [and] that she was looking hurt . . . . If she needed any help, [she was] to ask any of us to help her." ROA 1980; Tr. Vol. 2, p. 47, ll. 7 – 10;

(3) Amir Bitton, owner of Employer, testified he instructed her, "Okay, please, no climbing, no ladder, no physical work." ROA 1997; Tr. Vol. 2, p. 64, ll. 5 – 9. He further testified 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." ROA 1997; Tr. Vol. 2, p. 64, ll. 15 – 18. He testified the instructions given to Claimant were "strict instructions". ROA 1998; Tr. Vol. 2, p. 65, l. 2. Mr. Bitton further testified he instructed her, "'Do not go on the ladder. Do not.'" ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7; and

(4) Claimant testified that Employer told her, "'*I don't want you on the ladder* to climb on top of the cooler. That's what we have Zack [a co-employee] for.'" ROA 1716; Tr. Vol. 1, p. 50, ll. 1 – 3 (emphasis added). Immediately thereafter and upon questioning from her attorney, she testified Bitton had told her, "'I do not want you on top of the cooler *using a ladder*. That's what we have Zack for.'" ROA 1716; Tr. Vol. 1, p. 50, ll. 11 – 13 (emphasis added). Upon further questioning from her attorney, she later testified that she was specifically told, "*[n]ot to be on top of the ladder* on top of the cooler." ROA 1720; Tr. Vol. 1, p. 54, l. 21 (emphasis added). Again during direct examination by her attorney, Claimant was asked what Bitton had told her about the ladder. She testified he said, "*'I don't want you on the ladder* to get on top of the cooler. That's

what we have Zack for." ROA 1739; Tr. Vol. 1, p. 73, ll. 7 – 9 (emphasis added).

Her testimony that she somehow interpreted the instructions to keep her off the cooler rather than the ladder does not lessen the substantiality of the evidence; in fact, it adds to the mountain of evidence that she was instructed not to get on the ladder. She admits that she was instructed not to get on the ladder; however, she claims the instructions to her were (1) not to get on the ladder to (2) get on the cooler. Her version of events is that she wasn't to get on the cooler, but she was told not to get on the ladder to get on the cooler (rather than simply being told not to get on the cooler). Claimant's purported unreasonable interpretation does not make the instructions any less clear and explicit.

Because Claimant's alleged injuries were suffered when she was engaged in activities that were clearly and expressly prohibited, the Single Commissioner's ruling should be affirmed. Further, the Order of the Single Commissioner should be affirmed.

Accordingly, For the reasons set forth herein, Appellant's Petition for Rehearing should be denied.

III. NEITHER A REHEARING NOR A REHAERING *EN BANC* IS APPROPRIATE.

Lastly, Appellant asserts that this Court should have a rehearing *en banc* 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 . . . ." Petition for Rehearing, p. 8. The Appellant goes on to cite an unpublished opinion where one of this Court's sitting judges represented the prevailing party. This argument should raise red flags, as there appears to be no valid or proper reason for Appellant's citation, as the only facts outlined in that short *per curium* opinion are contained in this line: "Saluda's appeals, arguing the Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding Marrs' knee injury was compensable when

it occurred on stairs Saluda's prohibited Marrs from using." Marrs v. 1751, LLC, No. 2013-UP-230, 2013 S.C. App. Unpub. LEXIS 313, at *1 (Ct. App. May 29, 2013). Outside of that fact, and the fact that, unlike the case herein, the Commission found that the case was compensable, there are no other facts listed in that unpublished, *per curium* opinion. Even more importantly, it is improper for Appellant to make such a citation, as the same is expressly prohibited by SCRACR 268(d)(2).[4] Respondent respectfully requests that this Court ignore Appellant's improper citation.

Nevertheless, Appellant references facts that do not appear in the short, *per curium* opinion. She makes reference to facts that appear only in orders from the Commission (*inter alia,* "when he stepped on a metal stair that had rusted and broken away"; "he had walked to the platform at the top of the back stairs to . . . smoke"; "[a] supervisor had dismissed a co-worker" Petition for Rehearing, p. 8.

It appears that Appellant is simply attempting to argue this case again. However, this time, Appellant is improperly citing an unpublished opinion – which is not allowed by the Appellate Court Rules – for the effect she hopes it to have on a sitting judge who argued that case. Respondent asserts that this is improper.

Nevertheless, as Respondent is forced to address the issue, Appellant glosses over the fact that it was the Commission who determined that the Claimant, in that case, suffered compensable injuries. This Court's standard of review limited it to reviewing whether the substantial evidence supported the Commission's decision.

[4] " . . . unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." SCACR 268(d)(2).

Appellant further mischaracterized what the Commission actually determined. Appellant writes: "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." Petition for Rehearing, p. 9. However, after discussing the specifics of the injury (ACL tear), the actual Finding of Fact from the Commission reads as follows:

> The Claimant's injury was sustained while he was on a permissive smoke break while working for Saluda's. The Claimant testified that he was usually allowed to take smoke breaks and that he did not have to clock out when he went on a smoke break. The Claimant knew that the stair was broken, but the mere knowledge of the defective stair did not remove him from the course and scope of his employment with Saluda's.

Marrs v. 1751, LLC, 2011 SC Wrk. Comp. LEXIS 148, *7-8 (internal citations omitted). There is a Conclusion of Law, however, where the sphere of employment is addressed by the Commission (Conclusion of Law 5). However, as you will see, there is no explanation provided by the Commission, only a conclusory summation that this action did not remove Claimant from the sphere of employment:

> The Claimant's action of walking down the back stairs did not take him outside the sphere of his employment. See *Wright v. Bi-Lo, Inc.,* 314 S.C.152, 442 S.E.2d 186 (Ct. App. 1994). Despite being told not to use the back stairs, the Claimant's action was within the scope of his employment because "not every violation of an order given to a workman will necessarily remove him from the protection of the Workmens' Compensation Act . . ."

2 Marrs v. 1751, LLC, 2011 SC Wrk. Comp. LEXIS 148, *11.

Respondent submits that what you see in that case is merely this Court respecting the standard of review. Nevertheless, any reference to that unpublished opinion should be disregarded.

There is passing mention of the burden of proof in Appellant's Petition for Rehearing ("Contrary to the Court's assertions, it is axiomatic that the burden of proving an affirmative defense is upon the party asserting it . . . ." Petition for Rehearing, p. 2). This Court deemed this argument abandoned by Appellant, as the Appellant has not and cannot provide any support for its argument that this defense is an affirmative defense.

Nevertheless, the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. *See, e.g., Clade v. Champion Labs.,* 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); *Bartley v. Allendale County Sch. Dist.,* 381 S.C. 262, 272, 672 S.E.2d 809, 814 (Ct.App. 2009). Under S.C. Code Ann. § 42-1-160(A), injury means "only injury by accident arising out of in the course of employment . . . ." S.C. Code Ann § 42-1-160(A); *see also Turner v. SAIIA Constr.*, 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016) ("For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." Thus, for an injury to be compensable, it must both arise out of and be suffered in the course of employment.

It is well-established that the Claimant bears the burden of proving compensability: "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law . . ." *Crisp v. SouthCo. Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013).

For the reasons set forth herein, Appellant's Petition for Rehearing should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent UEF respectfully requests that this Honorable Court affirm the Decision and Order of the South Carolina Workers' Compensation Commission in full.

RESPECTFULLY SUBMITTED,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1808344

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents.

PROOF OF SERVICE OF

RESPONDENTS' RETURN TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

I hereby certify that I have served Respondents' Return to Petition for Rehearing on the attorneys for Appellant and the attorney for Respondent by email on September 6, 2024, addressed as follows:

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SC Court of Appeals

September 6, 2024

VIA EMAIL – ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
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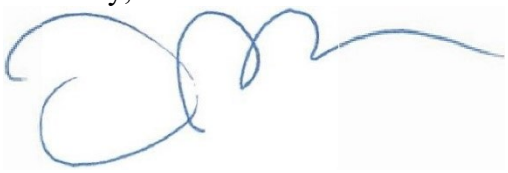
Re: Naomi L. Bridges, Appellant, v. Harbour Town Surf Shop, LLC, and SC Workers' Compensation Uninsured Employers' Fund, Respondents.
Appellate Case No. 2022-000600

Dear Ms. Kitchings:

Please find enclosed the SC Workers' Compensation Uninsured Employers' Fund's Return to Appellant's Petition for Reharing and Suggestion for Rehearing *En Banc* for filing in the above referenced case.

Sincerely,



Timothy B. Killen

TBK/maa
Enclosure
cc: Joshua R Fester, Esquire (*via* email)
Warren P. Johnson, Esquire (*via* email)
Michael W. Mogil, Esquire (*via* email)
Amanda Prentiss (*via* email)