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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2024-UP-258
(S.C. Ct. App. Filed July 17, 2024)

Naomi Lynn Bridges, Claimant……..Petitioner,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on September 20, 2024.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Full Commission's holding that Ms. Bridges' injury was outside the scope of her employment due to a violation of a workplace order, misapplying long-standing precedent governing which acts by employees may remove workplace injuries outside the scope of employment?

2. Did the Court of Appeals err in affirming the Full Commission's Order finding that substantial evidence supported that the order given to Ms. Bridges was "clear and explicit?"

3. Did the Court of Appeals err in affirming the Full Commission's findings which failed to hold the Defendants to their burden of proving their affirmative defense that Ms. Bridges injury fell outside of the scope of her employment due to an exclusion or exception to coverage.

STATEMENT OF THE CASE

This case arose out of a workplace accident in which the Claimant (hereinafter, "Ms. Bridges") sustained a tibial plateau fracture of the left leg after falling from a ladder at work on June 16, 2018. Ms. Bridges filed a Form 50 claiming injury to her left leg and her employer denied the claim. The claim was set for a hearing before the hearing Commissioner in Yemassee, South Carolina on July 24, 2019, and in Port Royal, South Carolina on July 26, 2019. At the hearing, Ms. Bridges sought a determination of compensability for the injury to her left leg, payment for past medical treatment, additional medical treatment, and temporary total disability benefits from June 16, 2018, until such time as she reached maximum medical improvement.

At the hearing, the parties stipulated that the Employer was subject to the terms and provisions of the South Carolina Workers' Compensation Act (hereinafter, "the Act") at all times relevant to this action. Employer admitted that the Claimant was an employee at all times relevant

to this action for purposes of the Act. The South Carolina Uninsured Employer's Fund (hereinafter, "UEF") was added as a party to this action because the Employer was not insured at the time of the Claimant's workplace accident. The employer and UEF asserted that the Claimant was acting outside the scope of her employment at the time of her workplace injury, because she violated a workplace order which led to the injury, specifically that she fell after climbing a ladder that she was purportedly told not to use.

The Employer and UEF contended that the Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) were $354.62 and $236.43, respectively based upon pay records submitted by the Employer. The Claimant asserted that her AWW and CR should include all amounts paid to her by her employer, including payments by check and cash, and taking into account her full schedule as listed as an exhibit to her prehearing brief, resulting in a much higher AWW and CR.

In the Decision and Order, dated January 27, 2021, the Single Commissioner found and ordered, *inter alia*, that the Claimant failed to meet her evidentiary burden of showing by the greater weight of the evidence that she suffered an injury within the course and scope of her employment, that she left the sphere of employment by violating a workplace prohibition by climbing a ladder, and that her AWW and CR was $368.80 and $245.88, respectively. Based upon these findings the Commissioner denied Claimant benefits under the Act.

Ms. Bridges timely filed a Form 30 appealing the Decision and Order of the Single Commissioner. A hearing was held before the Appellate Panel of the Full Commission on January 24, 2022, and thereafter, the Appellate Panel issued a Decision and Order, on April 19, 2022, fully affirming the decision of the Single Commissioner. Ms. Bridges timely filed a notice of appeal.

Ms. Bridges argued to the Appellate Panel and the Court of Appeals that the Commission erred as a matter of law in concluding that the purported violation of the employer's prohibition not to climb a ladder removed Ms. Bridges' otherwise compensable workplace injury outside of the scope of her employment. Ms. Bridges further argued that substantial evidence did not support that Ms. Bridges violated a "clear and explicit" workplace prohibition, or a prohibition of the sort required to take a workplace injury outside the scope of employment. Ms. Bridges also argued that the Commission failed to hold the Defendants to their burden of establishing the affirmative defense that Ms. Bridges' workplace injury was excluded due to the violation of the employer's order and that substantial evidence did not support the Commission's finding of the average weekly wage and compensation rate. After oral argument, the Court of Appeals erroneously affirmed the Orders of the Commission below.

In her Petition for Rehearing, Ms. Bridges again argued that the Commission's and the Court's conclusions that her purported violation of the workplace violation took her injury outside the scope of employment was clear error of law. In addition to demonstrating that the Court's conclusions contradicted 80 years of well-established precedent on this issue, Ms. Bridges also noted that the Court's finding in this case contradicted its own holdings in a factually indistinguishable case with the same legal issue. Despite being confronted with its incongruous decision in this case and requesting that Counsel for Defendants submit a return to Ms. Bridges' petition for rehearing, the Court of Appeals declined to rehear the case.

Petitioner now seeks a writ of certiorari to review the Court of Appeals' decision as the decision conflicts with prior decisions and long-standing precedent of this Court.

ARGUMENT

1. IN AFFIRMING THE ORDERS OF THE COMMISSION, THE COURT OF APPEALS MISAPPLIED THE LAW CONERNCING WHICH ACTS BY AN EMPLOYEE MAY REMOVE THEIR INJURY FROM THE SCOPE OF EMPLOYMENT

The Orders of the Commission and the Court of Appeals are tainted primarily by an error and misapprehension of the law governing which acts or omissions by an employee may remove the employee's workplace injury from the scope of employment, creating an exclusion to coverage under the Act. The Opinion simply concludes that because Ms. Bridges violated specific orders not to climb a ladder at work, her workplace injury fell outside the scope. Much like the Commission below, the Court of Appeals failed to engage in *any* inquiry as to whether Ms. Bridges' violation of a workplace prohibition is the kind of violation that may exceed the scope of employment. The oversimplified approach taken by the Commission and the Court of Appeals in examining this issue in the present case, which amounts to a conclusion that an injury stemming from a prohibited workplace act is *ipso facto* not compensable, is contrary to decades of precedent which provides that our courts may not simply end the inquiry when it is found that an employee was injured while engaging in prohibited acts. Rather, our courts must look to whether the violation is one that qualifies as narrow exclusion to coverage under the Act when an employee otherwise proves a compensable workplace injury.

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)).

Stated in a different fashion by Larson's Workers' Compensation Law, a distinction exists between prohibited things and prohibited methods:

> Rules and prohibitions may define the ultimate "thing" which the claimant is employed to do, or they may describe the methods which he may mor may not employ in accomplishing that ultimate "thing." The only tricky feature of this distinction is that it can, by a play upon words, be converted into a contradiction of itself. For example, it seems clear enough that if the claimant's main job is to lift flour sacks, the raising of the flour sacks is the "thing" for which he is employed. If, in violation of instruction, he rigs up a rope hoist to do the job, it should be clear enough that his departure is merely from the method prescribed.
>
> Yet the argument will sometimes be seen that the violation is one of a rule limiting the "thing," because the "thing" for which the claimant is employed is "to lift flour sacks by hand and not by hoist." Of course, by so blending ultimate object and method one can convert all instructions on method into delimitations of scope of employment, and end by reducing the distinction to absurdity. One can say that a lineman is employed only to repair lines while he has his gloves on, that an errand boy is employed to deliver a message by way of Street A and not by way of Street B, and that an oiler is employed to oil only machines that are standing still and not those that are in motion.

3 Larson's Workers' Compensation § 33.02(1).

Because worker's 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* as opposed *conduct within the*

sphere of employment is vital. This vital inquiry was overlooked by the Commission and the Court of Appeals, as both merely declare that a violation occurred removing Ms. Bridges' injury outside of the scope of employment and therefore exclude it from compensation. Ms. Bridges would respectfully submit that had the law been appropriately applied, the Court of Appeals would have reversed the Order of the Full Commission, reaching 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, or the ultimate work to be done, 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 has been overlooked or ignored by the Commission and the Court of Appeals, granting certiorari is necessary to rectify this clear error of law at odds with over 80 years of legal precedent, beginning with *Johnson* and applied consistently for decades.

In addition to the clear error of law on this issue, the Court of Appeals' decision in this case demonstrates confusion or misapprehension of the law within the Commission and the Court of Appeals as it is in stark contrast to the Commission's and the Court's decisions in a nearly factually

identical case involving the issue of whether a violation of a workplace order removed an injury from the scope of employment. In *Marrs v. 1751, LLC*, 2013-UP-230 (Ct. App. May 29, 2013), the Court of Appeals heard the appeal of 1751, LLC d/b/a Saluda's (hereinafter, "Saluda's") and the UEF 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 Marrs 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).

While the Single Commissioner concluded that the violation of the workplace prohibition not to walk on the stairs rendered the Marrs' claim not compensable, a majority of the Appellate Panel of the Full Commission held that violation of this order did not remove Marrs' injury from the scope of employment, concluding as follows:

> *Wright v. Bi-Lo* . . . is not applicable to the facts of this case. Wright recognizes that an employer can use prohibitions to limit the scope of a worker's employment. Mr. Wright was forbidden form chasing shoplifters, and when he chose to do so despite this prohibition, he stepped outside the role of a worker going about his employer's business. The Claimant's accident was

different. The Claimant was injured during a smoke break while talking to another chef about work. These activities fall within the course and scope of employment.

Id. Conclusion of Law No. 4.

In affirming the Commission's decision in *Marrs*, the Court of Appeals 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. The Court of Appeals affirmed the Commission's conclusion, specifically holding 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 those of 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 the prior opinion of the Court of Appeals 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.

Given that the Opinion of the Court of Appeals is at odds with decades of precedent and decisions by the Supreme Court, and that it contradicts its own prior holdings on the issue at hand, the Opinion begs review by this Court.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT SUBSTANTIAL EVIDENCE SUPPORTED THAT MS. BRIDGES VIOLATED A "CLEAR AND EXPLICIT" PROHIBITION AS TO REMOVE HER 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 as a matter of law, 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" criteria, 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 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.[1] 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. Bridge's 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

[1] The fact that the employer testified that he told Ms. Bridges to not use the ladder only on the day of the accident she just happened to fall and injure her leg not only strains credulity but is also indicative of the lack of frequency and clarity of the order or prohibition compared to those exemplified in cases like *Wright* and *Black.*

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.

III. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE BURDEN OF PROVING AN AFFIRMATIVE DEFENSE AND AN EXCLUSION OR EXCEPTION TO COVERAGE OF AN OTHERWISE COMPENSABLE WORKPLACE INJURY

The Court of Appeals erred in assigning the burden of proving an exception to coverage of a workplace injury when the Claimant otherwise meets their burden of showing that the injury arises out of, and occurs within the course and scope of, their employment. While Ms. Bridges argued below that the burden of showing an exception to coverage was upon the Defendant as an affirmative defense, the Opinion of the Court of Appeals stated that Ms. Bridges offered no support for the argument and accordingly abandoned it. However, it is so routine as to be axiomatic that the burden of proving an affirmative defense is on the party asserting it. This is even more significant when considering that the Defendants were asserting an exclusion to coverage under the Act, which are to be narrowly construed. See *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) ("[W]orkers' compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed." (internal citation omitted)).

Furthermore, the proposition that it is the Defendants' burden to show an affirmative defense of coverage exclusion due to violation of a workplace order is not novel. To the contrary, the Court in *Johnson*, a case decided in 1941 and consistently cited in cases discussing the issue

of exclusions to coverage due to violations of workplace prohibitions, held that "[t]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." *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. at 377 (1941). Thus, in ignoring this long-standing precedent, the Court of Appeals erred in its assignment and application of the burden of proof for establishing exclusions to coverage under the Act.

CONCLUSION

For the reasons addressed herein, the Petitioner would respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served Petition for Writ of Certiorari and Appendix, on the attorney of record for the Respondent, Uninsured Employers' Fund, and attorney of record for the Employer, by depositing a copy in the United States Mail, postage prepaid, on the 18th day of October, 2024, addressed as follows:

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