THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from the Workers' Compensation Commission

Appellate Case No. 2022-000600
Unpublished Opinion No. 2024-UP-258
(S.C. Ct. App. Filed July 17, 2024)

Naomi Lynn Bridges, Appellant ..... Petitioner

v.

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

RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Pursuant to Rule 242(f) of the South Carolina Rules of Appellate Procedure, the Respondent, South Carolina Workers' Compensation Uninsured Employers' Fund (Respondent), respectfully submits this Return to Petitioner's Petition for Writ of Certiorari. Petitioner filed her Petition for Writ of Certiorari on or about October 18, 2024. The South Carolina Court of Appeals, in its unpublished opinion (Opinion No. 2024-UP-258, issued July 17, 2024), affirmed the Decision and Order of the South Carolina Workers' Compensation Commission, finding that Claimant's alleged injuries are not compensable under the South Carolina Workers' Compensation Act.

In her Petition for Writ of Certiorari, Petitioner alleges that the Court of Appeals erred by misapplying nearly a century of precedent and by finding that the substantial evidence supported that Petitioner was given clear and explicit instructions not to use a ladder on the date of alleged accident (an alleged fall from said ladder). Petitioner also asserts that the Court of Appeals erroneously required her to prove that her injuries arose out of and in the course of her employment, rather than placing the burden on Respondents to establish their affirmative defense. The Court of Appeals deemed this argument abandoned, as Petitioner failed to offer support for this argument. on appeal by the Court of Appeals.

Petitioner further asserts that the Court of Appeals decision "is in stark contrast to the Commission's and the Court's decision 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issue of whether a violation of a workplace order removed an injury from the scope of employment," then she cites an unpublished opinion from the Court of Appeals. Petition for Writ of Certiorari, pp. 6 – 7. However, the only facts outlined in the improperly-cited unpublished, *per curium* opinion are contained in this line: "Saluda's appeals, arguing the Appellate Panel of the South Carolina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 other claim compensable, there are no facts outlined in that unpublished opinion.

Importantly, Petitioner's reliance on an unpublished opinion, which is expressly prohibited by SCRACR 268(d)(2), is misplaced. The cited case is factually distinct and lacks sufficient detail to support Petitioner's arguments.

QUESTIONS PRESENTED

I. THE COURT OF APPEALS CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE EMPLOYER LIMITED PETITIONER'S SPHERE OF EMPLOYMENT.

II. THE COURT OF APPEALS CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTING THE COMMISION'S DETERMINATION THAT THE INSTRUCTIONS TO AVOID THE LADDER WERE CLEAR AND EXPLICIT.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE PETITIONER BEARS THE BURDEN OF PROVING THAT AN ALLEGED INJURY AROSE OUT OF AND IN THE COURSE OF EMPLOYEMENT TO BE ENTITLED TO WORKERS' COMPENSATION BENEFITS.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE EMPLOYER LIMITED PETITIONER'S SPHERE OF EMPLOYMENT.

The Court of Appeals 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 Writ of Certiorari, while trying to create an issue of law on a factual matter, Petitioner argues that the Court of Appeals made an error of law by finding that the Employer limited the sphere of her employment; rather, Petitioner asserts, the Employer merely limited the method by which Petitioner was to perform her job.[1] However, this argument misapprehends the Court of Appeals' standard of review. The Court of Appeals found that substantial evidence supports the Commission's findings that the Employer limited the Petitioners' sphere of employment was limited by and through the Employer's clear and explicit instructions.

Petitioner argues that "80 years of well-established precedent on this issue" has been turned on its head by the unpublished opinion below. Petition for Writ of Certiorari, pp. 3, 6. Petitioner cites cases 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); and Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)) which have gone both ways, and then she engages in sweeping generalizations about what these cases mean. Nevertheless, as Professor Larson noted: "There can be no absolutes in such matters as obeying instructions." 3 Larson's Workers' Compensation Law § 33.02.

While arguing the Court has turned 80 years of precedent on its head, Petitioner glosses over two of the very cases she cited: Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854

[1] "The Opinion simply concludes that because Ms. Bridges violated specific orders not to climb a ladder at work, her workplace injury fell outside of the scope [of employment]." Petition for Writ of Certiorari, p. 4.

(1950) and Wright v. Bi-Lo, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). In Black, a police chief was denied benefits after falling from a fire truck, although he had work duties related to fire fighting. His employer expressly prohibited him from riding on fire trucks, but he ignored those instructions. Like the Respondent here, the police chief's injuries were not compensable under the Workers' Compensation Act.. The Claimant in Wright v. Bi-Lo was also denied benefits for engaging in behavior that was prohibited by the Employer's instructions. The Court of Appeals, here, simply found that substantial evidence supports the Commission's finding, leaving no option but to affirm.

Petitioner argues that the question in each case is whether the instructions were clearly given to the employee. As the Court of Appeals 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 Petitioner 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.'"

Petitioner makes arguments that the Court of Appeals' decision was an error of law because "our courts must discern whether the violation pertained to an order by the employer limiting the sphere or employment rather than an order concerning the conduct or methods of performing work within the sphere of employment." Petition for Writ of Certiorari, p. 4. However, the Court of Appeals did, in fact, affirm the Commission's findings that the sphere of employment was limited by the Employer's instructions: "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 v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *3 (Ct. App. July 17, 2024) (emphasis added). The Court of Appeals then cited several cases on this issue, including Pratt v. Morris Roofing, Inc., 357 S.C. 619, 623, 594 S.E.2d 272, 274 (2004); Wright v. Bi-Lo, Inc., 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) Johnson v. Merchs. Fertilizer Co., 198 S.C. 373, 378-79, 17 S.E.2d 695, 697-98 (1941))); Davaut v. Univ. of S.C., 418 S.C. 627, 640, 795 S.E.2d 678, 685 (2016), Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); and Crisp v. SouthCo., Inc., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *2 - 4 (Ct. App. July 17, 2024).

Importantly, the Court of Appeals noted that, "Determining whether an injury occurs in the course of employment remains an inherently fact-specific inquiry." Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *4 (Ct. App. July 17, 2024) (internal citations omitted). The Court of Appeals also noted that, "The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Appellate Panel." Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *2 (Ct. App. July 17, 2024) (internal citations omitted).

Petitioner asks this Court to grant a Writ of Certiorari because the Court of Appeals' decision "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." Petition for Writ of Certiorari, pp. 6 – 7. Petitioner goes on to cite an unpublished opinion of the Court of Appeals as precedent. Not only is the case unpublished, it can be distinguished from the facts and procedural posture of this case. 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, and that the Commission's found compensability in that case, no other facts are detailed in the unpublished order. Furthermore, Petitioner's citation to this unpublished order is improper under SCACR 268(d)(2), which prohibits such citations except in directly related proceedings.[2] Respondent respectfully requests that this Court ignore Petitioner's improper citation.

Nevertheless, Petitioner references facts that do not actually appear in the *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 been given permission by his employer to go on a smoke break"; "[a] supervisor had dismissed a co-worker . . . ." Petition for Writ of Certiorari, p. 7. Petitioner goes on with these. Nevertheless, as Respondent is forced to address the issue out of an abundance of caution, Petitioner ignores that it was the Commission which determined that the Claimant had suffered compensable injuries in that case. The Commission, of course, is the ultimate finder of fact. The Court of Appeals' standard of review limited it to determining whether the substantial evidence supported the Commission's decision.

Petitioner further mischaracterized what the Commission actually determined in its Order. Petitioner writes: "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." Petition for Writ of Certiorari, p. 8. However, after discussing the specifics of the injury (ACL

[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).

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). If the issue on appeal herein were one related to the personal comfort doctrine, this case *may* have some relevance (albeit unpublished). In Conclusion of Law Five (5), however, the Commission mentions the "sphere of employment." However, there is no discussion or substantive explanation provided by the Commission, only a conclusory summation that this particular 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 . . ."

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

Respondent submits that what you see in that case is the Court respecting the standard of review. The Finding of Fact in that case notes that "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, *8, 2011 SC Wrk. Comp. LEXIS 148. *Mere knowledge* is a far cry from the facts in this case, which evidence clear and explicit instructions not to engage in a certain behavior.

Nevertheless, any reference to that unpublished opinion should be disregarded.

Therefore, for the reasons set forth herein, Petitioner's Petition for Writ of Certiorari should

be denied.

II. THE COURT OF APPEALS CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTING THE COMMISION'S DETERMINATION THAT THE INSTRUCTIONS TO AVOID THE LADDER WERE CLEAR AND EXPLICIT.

The Petitioner argues that the instructions to the Claimant were not clear and explicit. The Commission found *as a fact* that the instructions were "clear and explicit." ROA p. 46. The standard of review requires that the Court of Appeals determine whether substantial evidence supports this finding from the Commission. This Court determined that substantial evidence the finding that Petitioner "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. The Court of Appeals acknowledged this in the Order (Determining whether an injury occurs in the course of employment remains an inherently fact-specific inquiry." Bridges v. Harbour Town Surf Shop, LLC, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *4 (Ct. App. July 17, 2024) (internal citations omitted)). 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

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). Petitioner's purported unreasonable interpretation does not make the instructions any less clear and explicit. The co-workers understood the instructions.

Petitioner argues that "our courts have looked at the frequency of the orders to the employee . . . ." Petition for Writ of Certiorari, p. 9. Petitioner argues that because this was the first day the prohibition was in place (because this was Claimant's first day of work after suffering the prior leg injury – which was also a finding of fact made by the Commission), that the instructions were not clear and explicit. See Petition for Writ of Certiorari, p. 10 (Footnote 1). This argument must fail. Simply because the prohibition

Because Claimant's alleged injuries were suffered when she was engaged in activities that were clearly and expressly prohibited, the Petition for Writ of Certiorari should be denied.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE PETITIONER BEARS THE BURDEN OF PROVING THAT AN ALLEGED INJURY AROSE OUT OF AND IN THE COURSE OF EMPLOYEMENT TO BE ENTITLED TO WORKERS' COMPENSATION BENEFITS

Petitioner argues that the Court of Appeals erred on the burden of proof. Petitioner argues that Respondents were asserting an affirmative defense, and that Respondents bear the burden of proving that affirmative defense. However, Respondents did not assert any affirmative defenses below. Further, the Court of Appeals deemed this argument abandoned by Petitioner, as the Petitioner 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).

A denial of liability does not equate to an affirmative defense ("An employer who has failed to respond to a claimant's workers' compensation action is therefore precluded only from raising affirmative defenses and may still deny liability." Hargrove v. Carolina Orthopaedic Surgery Assocs., PA, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010)). Respondents herein only denied liability. Respondents did not assert an affirmative defense. However, even if they had asserted an affirmative defense, the Commission made specific findings that Respondents proved that Claimant was outside the course and scope of employment:

> "That Mr. Britton, as owner of Employer, gave clear and explicit instructions to Claimant not to climb the ladder on June 16, 2018. The testimony of Christine Sweeting, Leticia Rodriguez, Zachary Edri, Raven Baden, and Amir Bitton support this finding. Even the testimony of the Claimant's supports this finding, though she qualified the instruction in her testimony . . . ."

Finding of Fact Thirteen (13), Order of the Full Commission dated 4/19/2022, ROA p. 46;

> "When an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable. Here, the greater weight of the evidence establishes Claimant left the sphere of employment by violating the specific orders not to climb the ladder."

Finding of Fact Fourteen (14), Order of the Full Commission dated 4/19/2022, ROA p. 46;

> "Because Claimant's alleged injuries were not suffered in the scope of her employment, the Claimant was not injured by accident arising out of and in the course of here employment on June 16, 2018."

Finding of Fact Fifteen (15), Order of the Full Commission dated 4/19/2022, ROA p. 46; and

> "Under Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), the Claimant was outside of the scope of her employment at the time she alleges to have suffered her injuries."

Conclusion of Law Thirteen (13), Order of the Full Commission dated 4/19/2022, ROA p. 49.

Clearly, the Commission and the Court of Appeals, by affirming the Commission's Order, determined that Respondents had proven that Claimant was no longer in the sphere of employment when she got on the ladder. By necessity, it is also true that Claimant failed to prove her injuries arose out of and were suffered in the course of employment.

Because Claimant's alleged injuries were suffered when she was engaged in activities that were clearly and expressly prohibited, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent UEF respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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