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S.C. SUPREME COURT

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Unpublished Opinion No. 2024-UP-258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

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arose out of a workplace accident in which the Claimant/Appellant (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, which occurred as a result of her workplace accident. Ms. Bridges sought 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, at all times relevant to this action, subject to the terms and provisions of the South Carolina Workers' Compensation Act (hereinafter, "the Act"). Employer admitted that Ms. Bridges was, at all times relevant to this action, an employee 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 Ms. Bridges was acting outside the scope of her employment at the time of her workplace injury and in the alternative that her injuries did not arise out of her employment or were related to her employment.

The Employer and UEF contended that Ms. Bridges' Average Weekly Wage (AWW) and Compensation Rate (CR) were $354.62 and $236.43, respectively. Ms. Bridges 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 in Claimant's Exhibit 1 (R. 1562 – 1565), resulting in a much higher AWW and CR.

In her Decision and Order, dated January 27, 2021, the Commissioner found and ordered *inter alia* as follows:

> 1. The Employer, Harbour Town Surf Shop, LLC was subject to the terms and provisions of the Act by stipulation and by regularly employing four (4) or more employees in South Carolina.
>
> 2. The Claimant was an employee of Employer, Harbour Town Surf Shop, LLC;
>
> 3. The record was left open for two (2) weeks following the hearing so that Claimant could produce her 2016, 2017, and 2018 tax returns and related documentation, which was under subpoena from Employer; however, claimant failed to timely produce this information.
>
> 4. Claimant did not articulate a clear way to calculate her AWW and CR: Claimant failed to produce her income tax records; during the year preceding the quarter in which the injury allegedly occurred, Claimant missed work due to her unrelated eye illness and for other reasons; Claimant voluntarily

quit her Employment for some period of time during 2018; and the Employer's work is seasonal, as it closes for months during the off-season. The Claimant did place a significant emphasis on the schedule (Claimant's Ex. 1). However, the greater weight of the evidence is that Employer did not pay Claimant or any other party with payments under the table. This finding is supported by the testimony.

5. Claimant's Average Weekly Wage and Compensation Rate shall be based on the actual numbers as reflected in Employer's APA Submissions. This finding is supported by the testimony, the APA Submissions, and the witnesses, including Sweeting and Rodriguez, whom I find to be the most impartial witnesses.

6. The Claimant's Average Weekly Wage and Compensation Rate are $368.80 and $245.88, respectively.

7. That the Claimant suffered an injury to the left leg prior to June 16, 2018, and she was suffering from this injury prior to her alleged fall; this finding is supported by the witness testimony and comports with the admitted instructions given to her not to climb the ladder.

8. That Claimants Exhibits No. 3 and 5 are not dispositive of anything and do not lend credibility to Claimant's arguments. The picture of Claimant and her grandson at his graduation is, by all accounts, temporarily prior to either the table incident and the alleged ladder incident. The picture of Claimant at the beach is blurry and doesn't show anything instructive on the issues.

9. That the greater weight of the evidence supports a finding that Claimant did not fall from the top step of the ladder, as she testified. The evidence provides that the Claimant would not need to be standing on the top step of the ladder to reach the items for which she claimed to be reaching. The EMS report reflects that, at the time of the alleged accident, Claimant reported she fell from a lower step.

10. Whether the Claimant suffered an injury in the scope of employment is the burden of the Claimant, and it must be proven by the greater weight of the evidence. Here, Claimant failed to meet her evidentiary burden.

11. Mr. Bitton, as owner of Employer, gave clear and explicit instructions to Claimant not to climb on 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 supports this finding, though she qualified the instruction in her testimony as instructions not to climb the ladder to get on top of the cooler.

12. 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 Clamant left the sphere of her employment by violating the specific orders not to climb the ladder.

13. 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 and scope of her employment on June 16, 2018.

14. The Fund timely filed a Form 51 in this matter, preserving its opportunity to plead and argue affirmative defenses.

15. Regardless of the foregoing Finding that the Fund timely filed a Form 51, preserving its opportunity to plead and argue affirmative defenses, whether the Claimant was injured in the course of employment is Claimant's burden to prove by the preponderance of the evidence and is not an affirmative defense.

16. Under 42-1-40, the Claimant's average weekly wage is $747.60 with a corresponding compensation rate of $491.76 per week.

17. 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.

Based upon these findings, the Commissioner concluded that Ms. Bridges' claim for benefits under the Act based on the alleged injury by accident was denied and the Commissioner assessed no hearing costs. 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. After oral argument, the Court of Appeals affirmed the Decision and Order of the Commission by Opinion filed July 17, 2024. Ms. Bridges petitioned the Court of Appeals for Rehearing with a suggestion of Rehearing *En Banc*, which was denied after the Court of Appeals requested a return to Ms. Bridges petition from the Respondents.

STATEMENT OF THE FACTS

This claim arose out of Ms. Bridges' workplace accident with Employer on June 16, 2018. Ms. Bridges was employed with the Employer's predecessor company since 2012 and had worked at the business until January 2018, when she quit working due to her health issues unrelated to her employment. R at 1754 - 1755. She testified that she returned working for the Employer in March 2018 until the date of her accident. R. at 1760. Ms. Bridges testified that her job duties with the employer, the Harbour Town Surf Shop, were to "wait on customers, keep the store clean, put out inventor, price inventory . . . [and] assist with the employees." R. at 1683, ln. 20 - 21. Ms. Bridges further testified that she would typically work from 7:30 a.m. to 10:00 p.m. R. at 1684, ln. 1 – 9. It was her testimony that she worked as much as fourteen to sixteen hours per day and that she worked up to seven days per week. R. at 1685, ln. 6 – 15. Ms. Bridges testified that she would work "80 hours per week plus." R. at 1685, ln. 10. At the hearing, Ms. Bridges' attorney submitted Claimant's Exhibit 1, which Ms. Bridges testified was the work schedule for the week, April 9, 2018, to April 15, 2018, and that being the week of the Heritage Golf Tournament, she would have been there the entire week and worked 98 hours. R. at 22 – 23. Ms. Bridges further testified that per Claimant's Exhibit 2, a pay stub for the period between April 5, 2018, and April 18, 2018, that she was paid $960.00. R. at 1702, ln. 15 – 21. However, Ms. Bridges testified she actually worked around one hundred and sixty-eight (168) hours over that two (2) week period, and that she was paid $960 by check and an additional $1,056.00 in cash from her employers. R. at 1703 – 1704. At the time of her accident, Ms. Bridges testified that she was being paid $13.00 per hour. R. at 1694, ln. 13 – 16.

Ms. Bridges testified that on the date of the accident, June 16, 2018, she began her normal work routine, which consisted of getting the newspapers, starting the coffee, counting the safe,

icing down the coke machine, and making sure "everything is done before the store is ready to go" before the shop was open for customers. R. at 1714, ln. 10 – 22. She testified that on the date of her accident she was walking around bringing out inventory, cleaning and getting prepared for the following week. R. at 1715. She then stated that she saw Amir Bitton, one of the owners of the Employer, who 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. Ms. Bridges testified that sometime later, she noticed that the candy bins were low on candy, and that the store kept some in wicker baskets above where she could reach. R. at 1717, ln. 10 – 12. She further testified that because "I'm the type of person, if I see something that needs to be done, I'll do it and forget eating lunch or water" and because she "noticed that Zack was already back in the Surf Shop" she got the ladder like she had "always" done to "bring a box of candy down, put it on the cart." *Id.*, ln. 12 – 22. She testified that as she was coming down the ladder, she slipped or missed a step, falling and injuring her leg. R. at 1718. Per Claimant's Exhibit 4, a photo of the ladder she climbed and the area where she fell, Ms. Bridges testified that candy that she was reaching for was on the top shelf and that she fell on her way down the ladder. R. at 1718 - 1719. Ms. Bridges further testified that she would typically get candy from that shelf to put onto the candy rack at least once a week. R. at 1719, ln. 20 – 25. On cross-examination, Ms. Bridges testified and indicated referring to the Claimant's Exhibit 4, that she fell from the second step from the top of the ladder. R. at 1719, ln. 13 – 18.

Later in her testimony, referring to Claimant's Exhibit 5, Ms. Bridges identified the exhibit as a picture of her at the beach, dated June 15, 2018, the day immediately before her injury, with her legs shown with no wraps or bandages. R. at 1769. She also testified that she walked on the beach that day. R. at 1770. She previously stated that despite employer allegations, she had not been injured the weekend immediately prior to her workplace injury, while visiting family and

attending her grandson's graduation in North Carolina. R. at 1710 - 1712. She also testified that her leg was not injured prior to her workplace injury on June 16, 2018. R. at 1724, ln. 10 – 13. In further cross-examination, Ms. Bridges clarified that she never told the EMS that she fell from the last rung of the ladder, and that she was trying to tell them she fell from near the top of the ladder. R. at 1772, ln. 1 – 8.

Leticia Rodriguez

Leticia Rodriguez testified that she was the manager of the store in June 2018 and was in the store when Ms. Bridges was injured. R. at 1778 - 1779. Ms. Rodriguez testified that "[Ms. Bridges had] actually gone on vacation before [her workplace injury] to visit family and when she came back, she came back with like an injured, you know, foot. She had told us that she had dropped a table on it, and that's the injury she did have." R. at 1780, ln. 10 – 14. Ms. Rodriguez also testified that Ms. Bridges "had something wrapped around her foot, and that's all I remember" *Id.*, ln. 16-17.

Ms. Rodriguez testified that she was present when Mr. Bitton had a discussion with Ms. Bridges, that he overheard him talking to her and that he told her not to use the ladder. R. at 1781. She further testified that she overheard him say "Do not use the ladder. If you need to get something, tell someone else to get it for you." *Id.*, ln. 15 – 17. She also claimed that Mr. Bitton told her that "If Lynn needs to get anything, you get it for her." R. at 1782, ln. 1 – 5. Oddly, Ms. Rodriguez testified in response to questions by attorney for the Employer that she had spoken to counsel for Claimant on a prior occasion but told him that she "was already a witness for someone else." R. at 1783, ln. 19 – 20. Ms. Rodriguez further testified that it was her foot that was wrapped and could not remember which foot. R. at 1803, ln. 14 – 21. Ms. Rodriguez testimony was that

Ms. Bridges was prohibited from using the ladder just that one day of her accident and that it was just Ms. Bridges that was allegedly prohibited from using the ladder. R. at 1812 - 1813.

Zach Edri

Zachary Edri, a co-employee of the Claimant's, testified that he was paid by the hour, that he worked about 30 hours per week for Mr. Bitton, that he received cash under the table, or out of Mr. Bitton's pocket for the work he performed, and that Mr. Bitton was like family to him. R. at 1819. He also testified that he was paid in merchandise from the store for his work there. R. at 1820. When questioned about his work hours and pay and responding to a subpoena for his pay stubs, Mr. Edri stated that he did not bring them to the hearing pursuant to subpoena by Claimant's counsel. R. at 1846 - 1847. Mr. Edri testified that he worked fewer hours than shown on the schedule. R. at 1854, ln. 17-19.

Mr. Edri further testified that Claimant told him she injured her foot in North Carolina and that she dropped a table on her foot. R. at 1821. He testified that he was told that it was a plastic folding table that fell on her. R. at 1822, ln. 23 – 25. Mr. Edri testified that he was working on the date of Ms. Bridges' workplace accident. R. at 1828, ln. 22 – 25. He further testified that Mr. Bitton said that "Lynn'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." R. at 1829, ln. 16 – 19. He also stated that Mr. Bitton only instructed him to do that for that day only. *Id* ln. 20 – 25.

Jamie Willard Hudson

Jamie Hudson testified that she worked for the employer for about a year. R. at 1870, ln. 8. She testified when asked by Claimant's counsel about her Employer withholding funds from her last paycheck, she stated that it was because she had taken money out of the register and taken chips and drinks from the store. R. at 1891, ln. 17. She admitted that she was fired for stealing.

However, Ms. Hudson testified that she worked forty hours per week and was paid half of her earnings in cash and half by check. R. at 1871 - 1872. She testified that her employer did not pay her overtime. While she testified that she worked for Employer when Claimant was injured, she stated that she was on the beach when she was informed of the incident via telephone R. at 1872, ln. 20. She also testified that she never spoke with Claimant about how the accident took place. R. at 1887, ln. 21 – 23. She further testified that others at the Claimant's workplace such as Raven Baden and another employee named "Patricia" were telling rumors that Ms. Bridges was injured on purpose to get money, but that she didn't believe these stories had any basis in fact because of the severity of Ms. Bridges injury. R. at 1873. She further attested to Ms. Bridges' honesty among other workers of Employers, especially considering that the other employees would steal from Employer and she would not. R. at 1874. Ms. Hudson also testified that Zack told her he was going to lie in his testimony. R. at 1881, ln. 15. She also testified that Zack told her that if she knew what was good for her, she would not "get up there [in court] and say those things," and that "Amir said he was going to make [her] life a living hell." R. at 1882, ln. 19 – 24.

Elizabeth Anne McAldine

Ms. McAldine testified that she was the daughter of Ms. Bridges' longtime companion Chuck early. R. at 1901, ln. 17 – 21; R. at 1908, ln. 21 – 23. Ms. McAldine testified that she spent the week prior to the alleged accident, from June 8, 2018, to June 16, 2018, with Ms. Bridges, and that she was in good physical condition at that time and did not have any kind of impediment when walking. R. at 1902, ln. 7 – 22. Ms. McAldine testified that she took the photograph of Claimant dated June 15, 2018, submitted as Claimant's Exhibit 5, which she stated shows Claimant "laying on her beach chair." R. at 1903, ln. 21; ln. 4.

Christine Sweeting

In Employer's case in chief, Employer called Christine Sweeting to testify, who stated that she was a co-worker with Claimant for Employer, but that she no longer worked for Employer. R. at 1911. She testified that Ms. Bridges took a vacation to North Carolina for almost a week and that when she returned from vacation she was injured and "had a black boot on her foot . . . and an Ace bandage." R. at 1912, ln. 19 – 21. Ms. Sweeting testified that Claimant told her "that while she was in North Carolina, they were moving a table . . . and it fell on her foot" R. at 1912 – 1913. She testified that she was not at the store the day the accident happened. R. at 1913, ln. 15.

Zach Edri (Rebuttal)

The Employer recalled Zach Edri to testify. Mr. Edri testified that he never threatened Ms. Hudson or attempted to influence her testimony.

Raven Baden

At the beginning of the second day of hearing in this matter, the Employer called Raven Baden who testified that she worked for employer from March of 2017 to February of 2019, and that she was working at the time of Ms. Bridges workplace accident. R. at 1939. Ms. Baden testified that during the week that she was injured, Ms. Bridges "came back on that Monday from North Carolina, and she was limping. She had a black boot on. She took it off every once in a while and she had like an Ace bandage around her foot." R. at 1950 - 1953, ln. 17 – 20. She further stated that Ms. Bridges was limping during the morning before her alleged accident. R. at 1942, Ln. 18 – 21. While she testified that she did not see Ms. Bridges fall, she stated that after the fall, she asked Ms. Bridges how far she fell, and she testified that Ms. Bridges pointed to the bottom step. R. at 1947.

On cross examination by Claimant's counsel, Ms. Baden testified she was paid by check every two weeks for thirty (30) hours of work per week. R. at 1954, ln. 22 – 23; R. at 1963, ln 2 – 8. She testified that she never worked "40, 50, 60 hours," for Employer. R. at 1955, ln. 6 – 7. Upon cross-examination by counsel for the UEF, Ms. Baden testified that Mr. Bitton told Ms. Bridges not to go on the ladder, "she just needed to be behind the counter. If she needed any help, to ask us to help her." R. at 1980, ln 7 – 10. She also testified that Mr. Bitton "came over and told me that if Lynn needed any help to do it, no questions asked. Or if I needed to go on a ladder, then that's what I had to do, but she was not supposed to go on the ladders at all." *Id.*, ln. 12 – 16. She further testified that those instructions were given to her because Claimant was already injured. *Id.*

Amir Bitton

Amir Bitton, along with Alon Mentz, is an owner of the Employer. Mr. Bitton testified that he and Alon Mentz had several businesses under one umbrella – Island Republic, Harbour town, Harbour Town Two, Treasure Island, Neptune Beach, and a tattoo shop. R. at 2017 - 2018. He testified that the Harbour Town Surf Shop usually closes for two months during the winter. Tr. R. at 1988, ln. 23. He testified that in July 2016, he and his business partner purchased the "general store facility . . . and in 2017, actually, we operated as one big entity." R. at 1987. Mr. Bitton testified that Claimant quit in January of 2018 for personal health reasons but that she came back to work for Employer, two months later. He further testified that Ms. Bridges did not work as much as she claimed in 2017, and that the Employer did not ever pay its employees in cash. R. at 1993.

Mr. Bitton testified that he was present in the store after Claimant returned from her trip to North Carolina, that her foot was wrapped, and she told him "I hurt myself." R. at 1995. He testified that he "saw her a few times that week" prior to the accident. R. at 1996, ln. 8 – 9. He

testified that on the date of the accident he heard her "making noise from hurting" and told her "Okay, Please, no climbing, no ladder, no physical work." R. at 1997, ln. 5 – 9. He further testified 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. Mr. Bitton testified that he told Letitia, Zach, and Raven not to allow Claimant to get on the ladder, telling Zach that if Ms. Bridges needed anything that he should do it." R. at 1998 - 1999. After Ms. Bridges workplace accident Mr. Bitton testified that Raven or Letitia called him and said that one of them told him "we were busy. We didn't pay attention. She just went ahead and did it." R. at 2000, ln. 1 -2.

When asked regarding the schedules and number of hours worked, Mr. Bitton testified that the employees do not work all the hours shown on the schedules, testifying that the schedules are only times that the employees should be available to work. R. at 2007 - 2008. When asked by Claimant's counsel whether Mr. Bitton believed that Ms. Bridges' injuries that she sustained took place on the Saturday when she fell from the ladder or if they took place the week before when she was in North Carolina, Mr. Bitton stated "I'm not sure where they took, but I don't think it happened at my place." R. at 2019, ln. 5 – 12. Mr. Bitton agreed that there was "speculation . . . that Ms. Bridges hurt her leg when she was in North Carolina." R. at 2038, ln. 20 – 23.

In cross-examination by counsel for Claimant, Mr. Bitton admitted that he did not have workers' compensation insurance at the time of Ms. Bridges accident and claimed that "the majority of his businesses" weren't subject to the act. R. at 2036. In further cross examination, by Claimant's counsel, Mr. Bitton was asked if Mr. Bitton had said or testified in his deposition "Zack, you're the guy here. You're my family. Make sure no girls go on the ladder. Especially, Lynn," to which Mr. Bitton agreed. R. at 2101. He also later agreed that he stated on the date of Ms.

Bridges workplace accident that he told his employees "no girls go on the ladder" and only for that date. R. at 2102. Despite his testimony that he specifically told Ms. Bridges not to get on the ladder, Mr. Bitton told Claimant's counsel during the hearing that he never previously saw her on the ladder. Tr. R. at 2103, ln. 9.

Charles "Chuck" Earley

Claimant called Chuck Earley as a rebuttal witness, who testified that he was Claimant's "significant other." Mr. Earley testified that Claimant worked close to 80 hours per week. Vol. 2120, ln. 7. He also testified that Claimant "[r]arely if ever" took time off from work. R. at 2121, ln. 9. He further testified that he had no knowledge of Ms. Bridges missing work due to her eye illness, as he did not keep her schedule and they were both working. R. at 2125, ln. 16 – 24.

Medical Evidence

Claimant submitted nearly 1500 pages of medical records as part of her APA Submissions. EMS arrived at the scene on June 16, 2018, at 15:27:55. R. at 67. EMS noted "Pt. states she was on a step ladder and while coming down she missed the last step and fell to the ground." R. at 75. Ms. Bridges was thereafter taken to Hilton Head Hospital, where she would be under in-patient care until June 26, 2018. Notes from the Emergency Department state that Ms. Bridges presented with a "***Knee Injury – Major***" and state that she "developed sudden onset of dull constant nonradiating severe pain to her ***left knee*** after she fell coming off of a ladder at work just prior to arrival." (emphasis added) R. at 436. Notes from her Hilton Head Hospital June 17, 2018, state that her chief complaint was "***Left knee***, lower leg pain" (emphasis added). R. at 363. They further note:

> Patient is a 58-year-old woman who was at work on a ladder bringing something down, thought she was on the last rung of the ladder, but was not, fell injuring her left lower extremity. She was brought through EMS to the Emergency Room

> and she was found to have a tibial plateau fracture. She is complaining of significant pain of the left lower extremity. Denies any other injuries. R. at 363.

X-rays revealed a displaced comminuted proximal tibia plateau fracture with involvement of both the lateral and medial condyle with displacement. R. at 364. An x-ray of the knee also revealed a fracture of the fibular neck. R. at 535. J. Robert Gavin, MD, provided a diagnosis of bicondylar comminuted depressed left tibial plateau fracture. R. at 364. Dr. Gavin later noted that Ms. Bridges suffered from a Schatzker type 5 tibial plateau fracture. On June 20, 2018, Ms. Bridges underwent a complex open reduction and internal fixation of Schatzker type 5 extremely comminuted bicondylar left tibial fracture, which was performed by Joseph Tobin, MD. R. at 454.

Upon discharge from Hilton Head Hospital on June 26, 2018, she was transferred to a skilled nursing facility, Encompass Health, where she remained for physical rehab until July 4, 2018. Ms. Bridges established care with Dr. Tobin on July 5, 2018, after her discharge from Encompass. She was also provided home health care by Kindred at Home from July 7, 2018, through August 31, 2018.

Notes from Dr. Tobin's Office dated September 6, 2018, state she was complaining of swelling in her left foot and was concerned whether there had been some fractures in her foot or ankle. However, x-rays taken of the left foot and ankle were negative for any fractures. R. at 1279. September 11, 2018, notes from Dr. Tobin's office state that she had an open wound from her operation site, that may require a wound vac. He also recommended that once the tibia healed, that she should plan for a total knee replacement. R. at 1214.

Pay Records

Employer submitted Ms. Bridges' 2018 W-2, which shows that she earned $6,450.00 from Employer, and submitted paystubs into evidence. The paystubs only note what was paid by check to Ms. Bridges and not the cash that she testified she was paid.

STANDARD OF REVIEW

The standard for judicial review of decisions rendered by the South Carolina Workers' Compensation Commission is provided by the Administrative Procedures Act ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, an appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable probative and substantial evidence within the entire record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010)(citing S.C. Code Ann. § 1-23-380(5)(d),(e)). The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact but may reverse if the decision is affected by an error of law. Moreover, the general policy is to construe the Workers' Compensation Act in favor of coverage rather than exclusion. *Fox v. Newberry County Memorial Hospital*, 316 S.C. 537, 451 S.E.2d 28 (Ct. App. 1994) (citing *Davis v. South Carolina Dept. of Corrections*, 289 S.C. 123, 345 S.E.2d 245 (1986)).

"'Substantial evidence' is not a mere scintilla of evidence nor the evidence reviewed 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 or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.* 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) (Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached."). Applying the scope of review correctly, this Court should reverse the decision of the Appellate Panel of the Full Commission.

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 Opinion of 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 of the Court of Appeals 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 a 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)). [1]

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.
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> 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).

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[1] "When misconduct involves a prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the method of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment." 3 Larson's Workers' Compensation Law, Ch. 33 Syn.

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,* as opposed to *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 which removed 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.

Furthermore, in the analysis of whether an employee's conduct takes them out of the scope of their employment, the Court looks to whether the conduct could be for the benefit of their employer. See *Howell v. Kash & Karry*, 264 S.C. 298, 214, S.E.2d 821 (1975) (The Court recognized that where the checking clerk and stock boy of employer retailer injured himself while attempting to retrieve a purse from two boys that snatched a purse from a potential customer of employer, that the Claimant's actions were within the scope of his employment as benefiting the employer, through "increasing goodwill" in the community); *Portee v. South Carolina State Hospital*, 234 S.C. 50, 106 S.E.2d 670 (1959) (the Court found compensable the death of an employee when a co-worker, in violation of hospital policy, gave the employee an injection causing him acute anaphylactic shock, noting the benefit of the employer of "ward[ing] off any possibility of passing the infection on to the patients.").

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, this Court should rectify this clear error of law, which is 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 that 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 from 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 its unpublished opinion, 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. Based upon the prior unpublished 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 should be reversed. Moreover, the Court of Appeals' decision in *Marrs* is, and the reversal of the Opinion in this case would be, consistent with precedent which considers whether the activities of the employee inure to the benefit of the employer, when examining the scope of employment. At the time of their injuries, both Ms. Bridges and Mr. Marrs, the latter to a lesser degree, were engaged in conduct which benefited the employer. Thus, much like the claimants in

Howell and *Portee*, their injuries were within the scope of employment, and, therefore compensable under the Act.

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 remove her workplace injury from 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.[2] 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 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.

[2] 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*.

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. See *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000); *Hoffman v. County of Greenville*, 242 S.C.34, 129 S.E.2d 757 (1963). 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 a 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.

IV. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT MS. BRIDGES' AVERAGE WEEKLY WAGE AND COMPENSATION RATE WERE $368.80 AND $245.88, RESPECTIVELY, AND IT ALSO DISREGARDED SUBSTANTIAL EVIDENCE OF RECORD OF THE CLAIMANT'S PAY OUTSIDE OF HER PAYCHECKS AND 2018 W-2.

While not addressed by the Court of Appeals, the Commission erred in its findings concerning the calculation of Ms. Bridges' Average Weekly Wage (AWW) and resulting Compensation Rate (CR) and in finding that the Claimant did not articulate a clear way to calculate her AWW and CR. While it is not completely clear from the Order the AWW and CR found by the Single Commissioner, as Finding Number 7, provides an Average Weekly Wage and Compensation Rate of $368.80 and $245.88, respectively, and Conclusion of Law Number 10 provides an average weekly wage of $737.60 with a corresponding compensation rate of $491.76, Claimant presumes for her argument that the latter AWW and CR were typographical or clerical errors.[3] The AWW and CR provided in Finding Number 7 appears to be based upon the pay stubs submitted by Employer in their APA's. In basing Ms. Bridges' AWW and CR solely upon pay stubs, the Commissioner disregarded substantial evidence that the amounts on her pay stubs did not accurately reflect the amount she earned from employer and hours worked for her employer. Ms. Bridges testified that a typical workday started at 7:30 a.m. and frequently did not end until

[3] Claimant's position is that the second AWW and CR are closer to representing her actual AWW and CR than the AWW and CR in Finding Number 7.

10:00 p.m., and that she would frequently work as much as 80 hours per week or more during her employer's busy season. R. at 1683 - 1689. She further testified that she was paid under the table in cash for hours worked outside of what was reported on her pay stub. *Id.* Her testimony of working more than the hours worked on her pay stub was supported by Claimant's Exhibit 1, a schedule, which she testified showed her work hours. The work schedule for the week she was injured showed her hours from 8 a.m. to 10 p.m. every day on that week except Friday, the day she was off and at the beach with her loved ones, which was corroborated by testimony of Mr. Earley and Ms. McAldine. Her testimony that she was paid cash for additional hours worked, outside of the 80 per two-week period shown on her paystub (R. 1566 – 1569) was further supported by testimony from Jamie Willard Hudson, a coworker who testified that she was also paid half of her earnings in cash, and who, admitting that she engaged in theft with the employer on the record, testified to Ms. Bridges honesty and credibility. Additionally, Ms. Bridges' co-worker Zach also testified that he was paid in cash by Mr. Bitton, under the table, lending credibility to Ms. Bridges testimony, such that the greater weight of the evidence supports that Ms. Bridges worked more time and earned more money than was shown on her paystubs.

However, in rejecting substantial evidence submitted by the Claimant, the Commission erred in finding that the greater weight of the evidence established that the schedules in Claimant's Exhibit 1 (R. 1562 – 1565), which were created by the employer "did not actually reflect the number of hours worked by any employee" and erred in finding that the greater weight to the evidence was that the employer did not pay Claimant or any other party with payments "under the table." R. at 29, ¶ 5. These findings touch on the credibility of the witnesses, and in the present case, the Commissioner found the Employer to have greater credibility, and accordingly, placed greater weight with the testimony of Mr. Bitton than Ms. Bridges. This implicit finding that Mr.

Bitton's testimony is somehow more credible is misplaced and unfounded, considering that he is the owner of the employer, which he testified runs several local retail shops, has anywhere between 16 and 21 employees at any one time, according to his roster of employees shown on the schedule, and claims not to have workers' compensation insurance and not to need it. R. at 2036. Mr. Bitton is more incentivized than the Claimant toward mistruth or misrepresentation to save himself and his business from paying the Claimant's workers' compensation benefits along with fines and penalties for willfully violating the Act, and to keep himself and his business out of potential legal trouble stemming from the issue of illegal payment of wages (paying the Claimant under the table without reporting such payments, violating the South Carolina Payment of Wages Act, and illegally avoiding federal overtime requirements). Moreover, the South Carolina Payment of Wages Act requires the employer to keep records of all wages and deductions taken for a period of three years. S.C. Code Ann. § 41-10-30. It was the Employer's burden to show all payments including any cash payments to his employees.[4] There is no indication that he kept any record of cash payments with Ms. Bridges or with her co-worker Zachary Edri, who was regularly paid in cash by Mr. Bitton, per Mr. Bitton's and per Mr. Edri's admissions.

Thus, for the foregoing reasons, the Commission erred in finding that the greater weight of the evidence established that the schedule did not actually reflect the number of hours worked by Ms. Bridges and that she was not paid under the table, or in cash. The Commission also erred in finding that the claimant failed to articulate a way to calculate her AWW and CR, considering that Ms. Bridges provided substantial evidence in the way of testimony regarding her normal work hours and rate of pay, *inter alia.* Therefore, substantial evidence does not support the

[4] It is also noteworthy that Employer failed to produce any timecards reflecting the basis of the paycheck which further supports the conclusion that the schedule was a work schedule instead of a "on call" schedule. Additionally, the failure to produce such records which are required to be kept by SC Law, should to an adverse inference against the Employer. See *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 200 S.E.2d 681 (S.C. 1973).

Commission's findings and conclusions concerning Ms. Bridges' Average Weekly Wage and Compensation rate.

CONCLUSION

For the reasons stated above, Ms. Bridges would respectfully submit that this Court should reverse the opinion of the Court of Appeals, which affirmed the findings of fact and conclusions of law of the Commission.

Respectfully submitted,

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