

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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Unpublished Opinion No. 2024-UP-258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.

APPENDIX VOLUME 5

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1 **BY COMMISSIONER JAMES:**

2 All right. Next witness.

3 **BY MR. MOGIL:**

4 Raven, do you need to leave? I wanted to see
5 if she can be excused.

6 **BY COMMISSIONER JAMES:**

7 Does anyone need this witness to stay, or can
8 she be excused?

9 **BY MR. COGGIN:**

10 What did you ask?

11 **BY COMMISSIONER JAMES:**

12 Can the witness be excused?

13 **BY MR. COGGIN:**

14 The Claimant excuses the witness. Thank you.

15 **BY COMMISSIONER JAMES:**

16 All right. Thank you, ma'am.

17 **BY THE WITNESS:**

18 Thank you.

19 **BY COMMISSIONER JAMES:**

20 Let's take a break.

21 **OFF THE RECORD**

22 **BY COMMISSIONER JAMES:**

23 Are we ready?

24 **BY MR. MOGIL:**

25 Thank you, Your Honor. We'd like to call Mr.

1 Amir Bitton.

2 **BY COMMISSIONER JAMES:**

3 And if you can have a seat, sir. If you would
4 raise your right hand.

5 * * * * * * * * * * * * * *

6 The witness was duly sworn to tell the truth, the
7 whole truth, and nothing but the truth concerning the
8 matter herein:

9 **AMIR BITTON,**

10 Being first duly sworn, testified on his oath as follows:

11 **BY COMMISSIONER JAMES:**

12 Your witness, sir.

13 **BY MR. MOGIL:**

14 Thank you, Your Honor. I just made a few notes
15 on my iPad rather than writing them.

16 **DIRECT EXAMINATION BY MR. MOGIL:**

17 Q. Good morning, Mr. Bitton. What is your role with
18 the employer, Harbour Town Surf Shop, LLC?

19 A. I'm one of the owners.

20 Q. Okay. And who is the other owner?

21 A. Alon Mentz.

22 Q. Are there any third owners?

23 A. No, sir.

24 Q. What is the physical space, if you could describe it
25 for the Commissioner, that is the Harbour Town Surf

1 Shop, what is it composed of?

2 A. It actually consist of a thirty-nine hundred square-
3 feet -- it's two-thousand square-feet is the general
4 store, and there's a hallway, a big hallway, which
5 is a ten-feet hallway wall that connects between the
6 surf shop and a general store. So one side, which
7 is a seventeen/eighteen-hundred square-feet. It's
8 thirty-six hundred. Sorry, sixteen-hundred square-
9 feet is a retail surf shop; two-thousand square-feet
10 is a general store.

11 Q. Okay. And just so that -- this hasn't come up yet
12 this week. What does the surf shop sell that's
13 different than the general store?

14 A. It's more clothing -- it's more clothing, and it's
15 surf brand names from Salt Life, Guy Harvey. We've
16 got fishing, you know, clothing. Mainly clothing.
17 And the general store's more like food, drinks,
18 snacks, little souvenirs and so forth, boogie
19 boards, beach supplies.

20 Q. And when did you start doing business as the Harbour
21 Town Surf Shop down in Harbour Town?

22 A. In Harbour Town, I started in 2010, and then
23 gradually over the years, after 2016, I took spots,
24 you know, that's next to me and expanded, and in
25 2016, in the end of 2016, well, in July of 2016 we

1 purchased the general store facility. And in 2017,
2 actually, we operated as one big entity, one joint
3 entity.

4 Q. Now, the claim that Ms. Bridges -- was she working
5 at the general store when you acquired it in 2016?

6 A. Yes, she was.

7 Q. She was kept on as an employee?

8 A. Yes, she was.

9 Q. And at that time, what was her job?

10 A. Just a regular employee.

11 Q. Over the time from -- were you opened continuously
12 from the time you purchased the general store?

13 A. No. We were closed in 2000 -- we were opened for
14 the summer because we purchased it at the end of
15 July. So we worked as -- as it is for August,
16 September, and then usually in the wintertime, we
17 start renovating, but we actually closed the store
18 for January and February of 2017 for renovation.

19 Q. So, you were closed January and February of 2017?

20 A. Yes.

21 Q. When you reopened, was Ms. Bridges working?

22 A. She -- yeah. All the employees, we let 'em go, and
23 they can take time off or whatever. We usually
24 close every winter for January and February
25 depending on how busy, depend on the business,

1 depend on the weather, depending on many items.

2 Q. So, nobody down there works 52 weeks a year?

3 A. Pretty much, no. It's -- it's shut down. It's
4 closed.

5 Q. Sometimes a little bit more -- how long is it
6 usually closed?

7 A. Usually, it's closed between 30 to 60 days,
8 depending. For example, in 2018 we had the snow
9 storm, and we were closed for more than that, you
10 know what I'm saying, so.

11 Q. And how many ---

12 **BY MR. MOGIL:**

13 Strike that.

14 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

15 Q. In 2017 when you were opened, was Ms. Bridges
16 impaired in any way?

17 A. I'm sorry?

18 Q. When you reopened, was Ms. Bridges hurt in any way,
19 2017?

20 A. No. Hold on, 2017 -- 2017 when she opened up, but
21 at the end of the year, she was sick with her eye.

22 Q. What happened?

23 A. Like in August she started -- she started going to
24 the doctors, and apparently she had some problem
25 with the eye, which after -- after that, you know, I

1 found that she had the herpes of the eye, and then
2 she was gone, you know, she couldn't work. She had
3 to go to doctors. She couldn't see. She -- it was
4 -- she was in a lot of problems with, you know, her
5 sight, dizziness, so forth, you know, can't work,
6 cannot work. So she had to take some time off, and
7 she pretty much work -- didn't work from like
8 September until maybe just a little before
9 Christmas, she came back for a few hours because she
10 had a condition. I remember my business partner,
11 Alon, telling me she cannot work more than four
12 hours, you know, most likely, something like that.
13 So and then we closed in January.

14 Q. Did she ever quit?

15 A. Yes, she did quit. In January, she quit. She sent
16 my partner a text message that she had a health
17 problem, and her doctors instructed her not to work
18 anymore, and that's it, she left.

19 Q. Now, to your personal knowledge, what happened
20 between the time she quit and when she returned?

21 A. Well, it's not what happened, it's what I found out.
22 Because she said -- she text my partner that she's
23 quitting because of health reasons and so forth, and
24 then, you know, we're the store owners. We know
25 what's going on in own businesses; it's a small

1 island, and come to find out, she's working for one
2 of our competitors. She went to work over there,
3 and that's about it, which we didn't care. I mean,
4 it was fine with us.

5 Q. Okay. Then she came back to work at some point?

6 A. Yes, in March -- March 17, around that time, she
7 texted my business partner, Alon, and asked to get
8 back, about her condition, that she's still, you
9 know, suffering from the eye, and she had to work
10 with her condition and so forth, and he said,
11 "That's fine. We'll -- we'll accommodate anything
12 you need."

13 Q. Starting in March, when does that store typically
14 open in the morning?

15 A. We usually -- in March, depending on the weather.
16 Again, depending on the weather. Because some --
17 some springs are really cool, so we open at nine,
18 and if it's warm, we open at eight. Now, our season
19 consist of six weeks. So we have only like a week
20 that we're busy in the springtime, which is Easter
21 week, and that's about it. So usually, our busy --
22 busiest times start from June 15 to like beginning
23 of August, and that's we're open eight to ten
24 strictly.

25 Q. The rest of the year, you are not?

1 A. No, we're not.

2 Q. And do you increase staffing during the busy season?

3 A. No, we increase -- decrease staffing.

4 Q. During the busy season?

5 A. The busy season we increase, the non-busy season, we
6 decrease.

7 Q. So, in the off season, you have fewer employees?

8 A. We should probably have one employee. Just one
9 employee that -- you know, that opening the store,
10 but, you know, we rotate 'em.

11 Q. Okay. So, going back to 2018, in the off season,
12 how many people do you have there before June
13 working every day?

14 A. I can't recall, but it'll usually two. And until
15 the busy season kicks in, it's -- I'm talking just
16 the general store, but in the surf shop we have one,
17 and then in the busy season, we have another one,
18 which is two. That's it.

19 Q. And how long is your busy season?

20 A. Six weeks. From the kids get out of school until
21 they go back to school, and it's the Northern
22 schools, not the Southern.

23 Q. Ms. Bridges testified that she was working from
24 seven-thirty in the morning to some nights after ten
25 at night. Did you ever observe her working that

1 much?

2 A. No. She sick mainly. As far as I remember her, she
3 was sick. See, 2016 wasn't an indication because we
4 just took over, and we weren't really in the
5 business. 2017, in August she started getting sick,
6 and since then, that's all I remember that she
7 cannot work; a few hours here, a few hours there.
8 And that's about it.

9 Q. Okay. Did she work -- what was your role in the
10 general store; what do you do there?

11 A. I do almost everything as far as fixing,
12 merchandising, stocking up, hanging, doing
13 everything that -- I'm basically the janitor of the
14 company.

15 Q. Are you there all day every day?

16 A. I'm there in the morning for a few hours. Then I
17 leave to visit the other businesses. I usually come
18 back with stuff that they need in the afternoon.
19 Stay there for a few hours, and go to a different
20 location.

21 Q. And was there a manager at the general store back in
22 June of 2018; was there somebody with that title?

23 A. Well, we -- we assign somebody kind of in charge.
24 It was Leticia. And -- and -- yeah, 'cause Lynn
25 just got back after she left and worked for our

1 competitor. I was kind of upset. My partner didn't
2 care, but she came back, and she was just a regular
3 employee. Leticia was kind of in charge, because
4 she was there kind of since the beginning of the
5 year and knew exactly what was going on, and I was
6 training her what I need done and so forth.

7 Q. Okay. Did you have any role in paying the
8 employees?

9 A. No.

10 Q. Who paid the employees?

11 A. Alon. I mean, the off season, they're off, so.

12 Q. You've been in the Courtroom. There's been a lot of
13 testimony about cash payments. Have you ever paid
14 the employees other than Zack cash?

15 A. No.

16 Q. Did you pay Zack cash?

17 A. I usually -- he comes to my house every weekend
18 almost with his -- with his dad, and so I always
19 give him like -- you know, he goes out, I give him
20 fifty, a hundred bucks, go to the movies, whatever.
21 Just like -- you know, like family, but I took care
22 of him this way.

23 Q. Going back to June of 2018, were you in the store at
24 all during the week when Ms. Bridges came back from
25 North Carolina?

1 A. Yes, sir, I'm in the store every day.

2 Q. Were you there on the Monday she came back?

3 A. Yes, I was.

4 Q. And what did you observe?

5 A. I walked in to the counter. I saw her, and I saw
6 that her foot was with a band-aid, a wrapped,
7 elastic band-aid, and her toes -- she was wearing
8 long pants, so I didn't see underneath, but her toes
9 was swollen just from the band-aid, and I asked her,
10 "What -- what happened?" And she's like, "I hurt
11 myself, aAnd I knew she was at the graduation of her
12 grandson. I didn't go into details. She didn't
13 tell me anything about the incident, but I was
14 watching her walking, and she was limping. So I was
15 making sure she was okay. I asked her if she's
16 taking care of it, and she said, yes, she's taking
17 care it.

18 Q. Say it again, you mumbled. What did you say to her?

19 A. If she's taken care of it. Like if she's going to
20 the doctor for it or, you know, she's taking care of
21 that 'cause she didn't give me details of what
22 exactly happened. So I didn't know how severe it
23 is. So I trusted her word that she was taking care
24 of it.

25 Q. What did she tell you?

1 A. That she -- she got hurt.

2 Q. But did she tell you she was going to the doctor?

3 A. I asked her if she was going to take care of it with
4 the doctor, and she said, yes, she will.

5 Q. And you observed her throughout that week?

6 A. Whenever she worked.

7 Q. Was she there all the time when you were there?

8 A. I -- I don't recall, but I saw her a few times that
9 week.

10 Q. Okay. Going now, moving forward, later that week,
11 there's testimony that there was an incident with a
12 ladder on Saturday the 16th; ---

13 A. Yes.

14 Q. --- do you have recollection of that day?

15 A. Yes.

16 Q. And what time did you get to the business that day?

17 A. I went to give them some stuff, and I gave them some
18 products for the general store. I got in there
19 about, I would say, like eleven, eleven-thirty.

20 Q. What did you observe?

21 A. Lynn was on the main counter where she usually is.
22 Saw Leticia and Lily on the ice cream counter. I
23 went to check on Zack and Raven, make sure
24 everything's okay. Came, gave them my stuff,
25 whatever I needed to do. I was there for like an

1 hour or so, a couple of hours. I don't -- don't
2 recall exactly the time lines, but then I saw Lynn
3 walking next to me, and she was really like -- you
4 know, from the last time I saw her, she was a lot
5 worse. Kind of like she -- when you're walking and
6 you're kind of making a noise from hurting. So --
7 and -- and then I stopped immediately, and I was
8 like, "Okay, please, no climbing, no ladder, no
9 physical work. All I want you..." Because I
10 checked the schedule that minute. I was like -- I
11 saw that she was working 'til three. She was
12 getting off at three and she had like maybe a few
13 hours left, and so I was like, "No any physical
14 work. All I want you to do is cash people out. Be
15 a cashier today. Don't do nothing. You've got Zack
16 if you need to climb on a ladder. Go ask Zack,
17 he'll do anything, and there's the rest of the girls
18 for any other chores that you needed to do."

19 Q. And who was present within earshot, within listening
20 distance?

21 A. I was standing exactly in the connection between the
22 surf shop, the general store. So when I'm standing
23 there, the ice cream counter is maybe two-feet away
24 from me. Leticia and Lily stood over there. I was
25 watching even with my eyes, kind of to the side,

1 that Raven and Zack were looking at me, talking to
2 me, 'cause I was giving her strict instructions.

3 Q. Did you give her instructions more than one moment,
4 or is that the only time you gave her instructions?

5 A. I -- I was talking to her for a good few minutes and
6 telling her exactly "Do not go on the ladder. Do
7 not."

8 Q. Had you ever, prior to that day, instructed her not
9 to go on the ladder?

10 A. Not really. I usually -- I'm there most of the
11 time, so I'm the one that gave them all their big
12 stuff on the -- on the -- on the cooler. That's
13 where we store the majority of our stuff. Or, you
14 know, if we need to bring a box maybe once every two
15 weeks and get it down so they can have inventory,
16 but I tried to do that most of the time. The only
17 thing the girls needed is when there was an urgency
18 and I wasn't around or there wasn't a guy around,
19 you know, I mean, to climb for them.

20 Q. After you talked to Lynn, as is your testimony about
21 your instructions, did you give that instruction to
22 anybody else in the store?

23 A. Yes, I personally went to Leticia, because she was
24 standing next to me, and I was like, "Did you hear
25 what I talked to her about?" And she's like,

1 "Clearly." I said, "Please do me a favor. Do not -
2 - she's hurt. Do not let her -- she's, you know, an
3 older woman. Do not let her go on the ladder, and
4 she's hurt especially. Please." And then I went
5 specifically to Zack, because I know Zack and her
6 had some issues earlier that week, and there --
7 there was some confrontation between them, and so I
8 asked him, "Please, no -- no games. Don't play
9 games with her. If she needs something,
10 immediately, 'cause she's hurt, go do it, okay."
11 And then I asked Raven if she heard me, and she's
12 like, "Yeah, I heard clearly." "I thank you," and
13 then I left.

14 Q. Okay. And after you left, what was the next thing
15 you recall about the day that happened?

16 A. The next thing I recall, I was doing some work in
17 one of the other shops, and then I get a phone call.
18 I don't recall if it was Raven or Leticia called me
19 to be honest, but I got a phone call from one of the
20 girls, and they told me "We need to call 9-1-1," and
21 then I asked 'em why. "Lynn fell off the ladder."
22 And then I kind of lost it to be honest with you,
23 and I -- I yelled at them. I said, "What exactly,
24 thirty minutes. Thirty minutes I was there, and
25 what did I instruct each one of you personally?" So

1 she said, "You know, we were busy. We didn't pay
2 attention. She just went ahead and did it."

3 Q. Did you go back to the store?

4 A. Yes, after that.

5 Q. Was Lynn there when you went back to the store?

6 A. (Inaudible).

7 Q. Have you had any conversations with Lynn since the
8 date of the ladder incident?

9 A. I texted her one after that, later on that day, to
10 see how she was doing, and she never did text me
11 back, and that's it.

12 Q. Now, you brought the ladder with you today; did you
13 not?

14 A. Yes, sir.

15 **BY MR. MOGIL:**

16 Madam Commissioner, would it be helpful for
17 your -- I know it's not going to be in evidence, if
18 you could actually see this ladder, so you could see
19 the size and the space rather than from the
20 pictures?

21 **BY COMMISSIONER JAMES:**

22 We borrow the locations, so I do not want to
23 bring the ladder in the building.

24 **BY MR. MOGIL:**

25 Maybe at the end then we can take a look at it?

1 **BY COMMISSIONER JAMES:**

2 Let's talk about that at the end ---

3 **BY MR. MOGIL:**

4 Okay.

5 **BY COMMISSIONER JAMES:**

6 --- with the rest of the materials.

7 **BY MR. COGGIN:**

8 Your Honor, I don't know, I might object to
9 this. We don't know what ladder it is, and he could
10 have gotten any ladder. It could be a ---

11 **BY MR. MOGIL:**

12 We'll represent it's the same ladder that you
13 took pictures of.

14 **BY MR. COGGIN:**

15 --- fireman's ladder, who knows. I just don't
16 -- this is kind of beyond the (inaudible.) There's
17 been no -- I have a picture of the ladder. You can
18 use that. To bring the ladder in itself, I don't
19 think that's anything ---

20 **BY COMMISSIONER JAMES:**

21 We'll talk about it at the end. If the
22 ladder's identified, then we'll talk about it at the
23 end. Right now, let's proceed forward with the
24 actual testimony.

25 **BY MR. COGGIN:**

1 Okay.

2 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

3 Q. Okay. Mr. Bitton, you went to the store last week
4 and had a series of pictures taken of the location
5 and the ladder with you in them; is that correct?

6 A. Yes, sir.

7 Q. Okay. And were these pictures printed by you?

8 A. Yes, sir.

9 Q. Okay. Were they taken with your phone?

10 A. Yes, sir.

11 Q. Okay.

12 **BY MR. MOGIL:**

13 And I've shown these to you before, Mr. Coggin.

14 These are just ---

15 **BY MR. COGGIN:**

16 Well, I'd like to see them again.

17 **BY MR. MOGIL:**

18 --- to show the Commissioner the scene.

19 They're not anything with Ms. Bridges in it.

20 **BY MR. COGGIN:**

21 Again, this is a bit questionable. We've got a
22 ladder with him standing on top of the ladder. I
23 was happy if it was the ladder itself being shown.
24 I don't know why you need a model here.

25 **BY MR. MOGIL:**

1 You just said you didn't want the ladder being
2 shown -- you just said you didn't want the ladder
3 being shown.

4 **BY COMMISSIONER JAMES:**

5 So, you would rather show me the ladder?

6 **BY MR. COGGIN:**

7 You're going to see it anyway. Why don't you
8 go take a look at the ladder. I've taken pictures
9 of the ladder. I don't understand. This is
10 overkill having somebody standing on the ladder.
11 What's that got to do with this case?

12 **BY MR. MOGIL:**

13 Well, I think the reason, Your Honor, just so
14 the picture of that -- is it shows the room. It
15 shows where Ms. Bridges claims that she climbed up.
16 It's exactly the scene so that Your Honor sees,
17 because she's claiming a pretty significant injury
18 here. I wanted Your Honor to see the room, the
19 ladder, the location as part of your evaluation.

20 **BY MR. COGGIN:**

21 The problem is is we've got a man that's --
22 he's a big man, what, five-ten, five-eleven. This
23 is a little woman. It's not exactly the same. And,
24 you know, pictures of somebody on them -- this one
25 here, it's like a circus act (indicating).

1 **BY COMMISSIONER JAMES:**

2 All right. Mr. Killen, did you have something
3 you wanted to say, sir?

4 **BY MR. KILLEN:**

5 I just wanted to say we went over this
6 photograph issue at length two days ago, and Mr.
7 Coggin, at that time, to the best of my
8 recollection, agreed to allow these photographs in.

9 **BY MR. COGGIN:**

10 Your Honor, he agreed the photographs coming
11 in, and then protested when they came in. So it's a
12 little bit different.

13 **BY MR. KILLEN:**

14 No.

15 **BY COMMISSIONER JAMES:**

16 All right. Let's go off the record for a
17 moment.

18 **OFF THE RECORD**

19 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

20 Q. Mr. Bitton, what does this picture depict?

21 A. (Witness views photograph). This is exactly where
22 Leticia and Raven were standing when I spoke to
23 Lynn, which is -- if you can see that ice cream
24 edge, the gelato machine, I was standing there
25 talking to Lynn, and at the end of the -- the room,

1 you see, that's where the incident happened.

2 Q. What is at the end of the room?

3 A. That's where the shelf -- you cannot see it, but the
4 shelves are just above that wall. It's just a
5 little bathroom.

6 Q. In that closet?

7 A. Yeah, that closet.

8 Q. Okay. So, it ---

9 **BY MR. MOGIL:**

10 Your Honor, this is just being shown so, Your
11 Honor, since you're not at the store, has some
12 context of where everybody is here, what the witness
13 is testifying is this is where they had the
14 discussion, and in the back there is where the
15 incident happened in the corner. I'm agreeing not
16 to put that into evidence.

17 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

18 Q. And Mr. Bitton, this next picture, what does this
19 picture show?

20 A. (Witness views photograph). This is basically the
21 ladder, how they stand it up, and if they need to
22 reach to get -- there's two shelves as you see. And
23 these are the stored candies on the right-hand side
24 of the first shelf, and this is if you stand on the
25 second step from the bottom you can see that you can

1 reach the -- the first shelf, and you don't need to
2 climb anymore (indicating).

3 Q. So, when you say you usually store candies on the
4 first shelf, is that the first shelf where there are
5 cardboard boxes right now?

6 A. That's where the candy is. They're stored in the
7 cardboard boxes. They come like that.

8 Q. Do you ever store it on the upper shelf?

9 A. No.

10 **BY MR. MOGIL:**

11 Your Honor, this one was admitted (indicating).

12 **BY COMMISSIONER JAMES:**

13 All right. This will be admitted as
14 Defendant's Number 4.

15 (COURT REPORTER MARKS PHOTOGRAPH DEFENDANT'S
16 EXHIBIT NUMBER 4, RETAINED IN COMMISSION FILE)

17 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

18 Q. Okay. And in that picture that you just showed, you
19 are the person in the picture, right?

20 A. Yes, sir.

21 Q. And which step are you standing on?

22 A. The second step.

23 Q. And then what's this picture depicting?

24 A. This is basically, if you're standing on the second
25 step from the top, it's just for showing your body

1 in relation to the shelf. Basically, you have
2 nothing to climb all the way up there for because
3 you are basically hitting the ceiling, and you're
4 way above the second shelf or the first shelf.

5 Q. Could you even reach down to the second shelf from
6 there?

7 A. No, it's -- it's too low.

8 Q. Too low.

9 A. You have to get down.

10 **BY MR. MOGIL:**

11 Your Honor,...

12 **BY COMMISSIONER JAMES:**

13 All right. Defendant's Exhibit Number 5.

14 (COURT REPORTER MARKS PHOTOGRAPH DEFENDANT'S
15 EXHIBIT NUMBER 5, RETAINED IN COMMISSION FILE)

16 **DIRECT EXAMINATION RESUMED BY MR. MOGIL:**

17 Q. Mr. Bitton, do all the employees work the hours on
18 those work schedules?

19 A. No.

20 Q. Where are the work -- do you ever see the work
21 schedules?

22 A. Yes.

23 Q. Where do you see them?

24 A. At the store posted.

25 Q. Are they usually marked up?

1 A. Yes.

2 Q. What's on them?

3 A. Basically, one of them does, is just send them a
4 confirmation of availability for the employees for
5 the days whenever they can work, if it's like
6 morning or night. So he writes, let's say, "eight
7 to ten." So he knows they can be available either
8 morning or night, and then he scratch it with his
9 pen in the office, or the secretary does it. She
10 confirm with everybody that's -- those are the days
11 they're available, and then he scratch it and fix
12 the shifts for them.

13 Q. Do you keep the work schedules after the weeks are
14 completed in your business records?

15 A. The employees usually trash it, and they post a new
16 one.

17 Q. Do you keep them?

18 A. I don't.

19 Q. Does the business keep them?

20 A. No, we don't.

21 Q. Do you use the same template over and over?

22 A. Yeah, it's just an Excel form. It's blank, and then
23 you fill it in, and they send a picture, and then
24 one of the employees come -- they come to the store
25 and then they check their schedule.

1 Q. Has there been ever a prior -- since 2010, has there
2 ever been an injury claim against the business, ---

3 A. No.

4 Q. --- Harbour Town Surf Shop?

5 A. I never had any injury claims against me.

6 Q. On that business?

7 A. On any of my businesses.

8 Q. Okay.

9 **BY MR. MOGIL:**

10 No, further questions, Your Honor.

11 **BY COMMISSIONER JAMES:**

12 Cross.

13 **BY MR. COGGIN:**

14 I'm wondering if -- how are we doing this? Do

15 I get to cross on each gentleman comes up, Mr.

16 Killen comes up and direct -- do I ---

17 **BY COMMISSIONER JAMES:**

18 We go back through until we're finished.

19 **BY MR. COGGIN:**

20 Okay, that's fine.

21 **BY COMMISSIONER JAMES:**

22 So, yes.

23 **CROSS-EXAMINATION BY MR. COGGIN:**

24 Q. Mr. Bitton, good morning to you. Thank you for
25 being here. I have a couple of questions about your

1 schedules. You make up schedules for what reason?

2 A. I don't make them up.

3 Q. Okay. We're going to play that game. What I'm
4 asking is, do you or ---

5 **BY MR. MOGIL:**

6 Objection, Your Honor.

7 **BY MR. KILLEN:**

8 He's badgering the witness.

9 **BY COMMISSIONER JAMES:**

10 Mr. Coggin -- Mr. Coggin -- Mr. Coggin,

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. --- someone else -- I'm asking about your company.
13 Does the company make up schedules?

14 **BY COMMISSIONER JAMES:**

15 Mr. Coggin, please. As we discussed a couple
16 of days ago, let's not have individual commentary.

17 **BY MR. COGGIN:**

18 Oh, okay. Yes.

19 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

20 Q. Who makes up the schedule?

21 A. From what I understand, it's my secretary and my
22 business partner.

23 Q. And how are those schedules determined?

24 A. I don't understand the question.

25 Q. How do you determine who works when?

1 A. They ask for the employees -- they call each person
2 or text them, and they ask for their availability
3 for this week, and they send them the days that
4 they're available. They say "I can be working the
5 whole day. I can work --" They say -- they say "I
6 can work all day." That means that he can fit them
7 morning or night, whatever he needs to.

8 Q. Okay.

9 A. And then he fix -- fix it up, and then he post it.

10 Q. And so your testimony is, is if somebody is
11 scheduled from eight until ten at night, they can
12 come in and work anytime they want to?

13 A. No, it means my partner can schedule them either
14 morning shift or night shift. They're available the
15 whole day for any shift that day.

16 Q. Once they're on the schedule though, they're
17 supposed to work those hours?

18 A. No.

19 Q. They're not supposed to work those hours. You
20 schedule them, and what happens?

21 A. If it was up to me, I wish they can work, but half
22 of them don't show up. They call in, and there's
23 always something happen. But the -- the schedule
24 actually is marked, and it says -- it -- it cross --
25 they -- they print it out, and then it says "three

1 to nine," or "eight to three" whatever. Usually,
2 they work after three, and then from three to night
3 shift.

4 Q. But for your intents and purposes, when they're
5 scheduled say from nine to five, they're expected to
6 be there at nine; is that correct?

7 A. I don't know. That's -- that's what my partner
8 decides with them after that.

9 Q. Have you ever discussed that with your partner?

10 A. Nobody -- it's each employee specifically.

11 Q. So, essentially what you're saying is they can show
12 up anytime they want to then?

13 A. No. He discusses with them and gets exactly what
14 time and what shift they're going to be.

15 Q. Isn't that what Zack told us the other day?

16 A. I don't know what Zack told you.

17 Q. Well, you were sitting there.

18 A. I don't remember.

19 Q. Okay. He said he kind of worked anytime he wanted
20 to; take off, go here, go there.

21 A. Zack, specifically, yes. He could have worked
22 anytime because he -- I was training him.

23 Q. Okay. So, you got Raven scheduled on June the 18th
24 from nine to ten. That's 13 hours. Now, when did
25 Raven come in, and when did she leave?

1 A. I don't remember.

2 Q. Okay. So, what you're saying is, is that this
3 schedule is a schedule for people to work.
4 Sometimes they don't work, sometimes they do. You
5 switch them around, and this really doesn't mean
6 very much?

7 A. No, it just shows their availability. That's it.

8 Q. Okay. Let's talk about Lynn. When she was
9 scheduled from eight until ten, did she come and
10 work?

11 A. Lynn was just available from eight to ten. She
12 couldn't work. She was sick all the time.

13 Q. When did she work?

14 A. She worked half a day.

15 Q. She worked half a day?

16 A. Either eight to three or three to closing, to ten.

17 Q. So, this was fiction then if you scheduled her from
18 eight until ten; is that right?

19 A. I don't understand the question.

20 Q. Well, that was made up then if you scheduled her
21 from eight until ten, and she was only going to work
22 a half a day?

23 A. Are you done?

24 Q. Yes, I am. Go ahead.

25 A. That's just her availability.

1 Q. I'm sorry, speak up.

2 A. This is just her availability for that day that she
3 can work either morning or night, that she's
4 available the whole day, but he can schedule her
5 morning shift or night shift, whatever he decided.

6 Q. I'm just trying to get to the bottom of this. If
7 somebody was scheduled eight o'clock, that opens the
8 store; is that right?

9 A. No. Alon usually be there all the time in the
10 morning before anybody.

11 Q. Alon. Okay, Alon opens the store?

12 A. The majority of time, he's there when the store is
13 opened.

14 Q. Okay. And then she's scheduled until ten o'clock at
15 night. Does she close the store then?

16 A. If you're scheduled to close, yes. But if not,
17 you're not.

18 Q. Okay. But what you have her down here for is from
19 eight in the morning until ten o'clock at night?

20 A. She's available from eight 'til nine.

21 Q. Does that mean -- here's what I'm trying to get at.
22 Does that mean she can come in anytime she wants to?

23 A. No. It's discussed later after her availability,
24 then he mark the schedule. He post it, and then
25 they can see when -- because the schedule comes

1 earlier before the end of the week so they can see
2 exactly what they work.

3 Q. Okay. Your testimony earlier though was that these
4 schedules are sent out Thursday and Friday; is that
5 right?

6 A. I didn't say that.

7 **BY MR. MOGIL:**

8 Objection. Witness didn't make any of that
9 testimony. That was another party.

10 **BY COMMISSIONER JAMES:**

11 You can answer the question, sir.

12 **BY THE WITNESS:**

13 I said, "I didn't say that." I didn't testify
14 to that. This is my first time testifying in front
15 of you, sir.

16 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. Okay. I have, for example, Aleiandro working from
18 nine to nine on June the 18th. Tell me what
19 happened with Aleiandro. Would he come and work
20 from nine until nine? That's what I'm trying to get
21 at; you don't know?

22 A. I wouldn't know. This happened in 2018 in June, so
23 I -- you're asking me about specific people I -- I
24 couldn't recall.

25 Q. I got Monda scheduled from nine to nine.

1 A. I have no idea who that is. I have no idea who that
2 is.

3 Q. Okay. Abigail from nine to nine.

4 A. Again, they're available those hours. That's it.
5 It doesn't mean that they're going to work the whole
6 shift, the whole time, nine to nine. They're
7 available to work morning or day or night. That's
8 the whole idea.

9 Q. Okay. But when they're available, and they're
10 scheduled for nine, shouldn't they show up at nine?

11 A. This is not a schedule. This is just their
12 availability. That's all it is. And then the
13 schedule is printed out, fixed and posted in the
14 store by the weekend so they can see for the next
15 week what they work.

16 Q. Okay. So, we talked earlier this morning to Raven,
17 right, and Raven said she never worked for 30 -- 30
18 hours -- more than 30 hours a week; is that correct?

19 A. I don't know what she works really.

20 Q. She testified this morning that she never works more
21 than 30 hours a week.

22 A. I guess she knows when she works.

23 Q. I showed her a sheet that said she worked mostly 13
24 hours a day.

25 A. Again, it showed her -- it showed her availability

1 for that week, not that she worked that week.

2 Q. Here's my question. If in fact she has a habit of
3 only working 30 hours a week, why do you have her
4 available from nine to nine -- nine to nine, nine to
5 eleven?

6 A. So he -- he can know that she's available the whole
7 day, and if he need her either for the morning shift
8 or the -- or night shift, so he can play with the
9 other employees that cannot show up for different
10 shifts.

11 Q. I gotcha. So, he'll give them a call, say at eight
12 in the morning saying "Don't come in at nine"?

13 A. I don't know what he does.

14 Q. And this is Alon?

15 A. Yes.

16 Q. Does your company have a handbook?

17 A. I'm not sure what you're asking.

18 Q. A company handbook where you list the rules and so
19 forth that the company employees have to adhere to?

20 A. We have different businesses, so each business is --
21 is different.

22 Q. I thought all your businesses were under one
23 umbrella.

24 A. Umbrella of what?

25 Q. You have Island Republic, Harbour Town, Harbour Town

1 Two, Treasure Island, Neptune Beach, a tattoo shop;
2 are they all owned by you and Alon?

3 A. Yes, sir.

4 Q. Okay. So, it's under the umbrella of Amir and Alon;
5 is that correct?

6 A. Yes, sir.

7 **BY MR. KILLEN:**

8 Objection, Your Honor. We're here for Harbour
9 Town Surf Shop, LLC, not two individuals, and I
10 don't know which LLCs or whether individuals own
11 these other entities.

12 **BY COMMISSIONER JAMES:**

13 I'll allow the questions. Y'all have available
14 cross and re-direct with regards to -- I understand
15 the entity that we're here for today.

16 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. Could you describe your function with the company
18 again, Amir? You testified to that on direct. Can
19 you tell me what you do?

20 A. I do basically all the -- the merchandising,
21 stocking, fixing. I'm more in the field.

22 Q. You're the operations manager?

23 A. Correct.

24 Q. Okay. And Amir is the legal and administrative,
25 would you say?

1 A. No, Amir is the operative ---

2 Q. Oh, excuse me, Alon. I apologize.

3 A. Alon is in the office. He does all the invoices,
4 payments, payroll.

5 Q. I have a "yes" or "no" question for you. Do you
6 believe that Ms. Bridges' injuries that she
7 sustained took place on the Saturday at three
8 o'clock when she fell from the ladder, or did they
9 take place the week before when she was in North
10 Carolina?

11 A. I'm not sure where they took, but I don't think it
12 happened at my place.

13 Q. Let me ask you that one more time, and we're going
14 to make sure we both understand the same thing.
15 Amir, Lynn is here with injuries, all right, and
16 I'll make it as simple as possible for myself, not
17 for you. Did those injuries take place in North
18 Carolina, or did they take place in the storage room
19 on Hilton Head Island?

20 **BY MR. KILLEN:**

21 Objection, Commissioner. I don't even know
22 that he was there at the time. All the other
23 witnesses say he wasn't even there. He's asking
24 about a medical opinion about something that he
25 didn't witness.

1 **BY MR. COGGIN:**

2 Your Honor, in response to that, ---

3 **BY COMMISSIONER JAMES:**

4 If you can repeat the question, the witness can
5 answer.

6 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

7 Q. Did the injuries that she has today as she sits
8 here, did they take place in North Carolina, or did
9 they take place in the Harbour Town Surf Shop in
10 Hilton Head?

11 A. I don't know. I don't know where they took place.
12 I'm not the one to decide that.

13 Q. Are you telling me that they did not take place when
14 we claim they did?

15 A. I don't understand what you're trying to tell me, or
16 you're asking me.

17 Q. They did not take place at Hilton Head Surf Shop?

18 A. I don't know. That's my answer, I don't know where
19 they took place.

20 Q. Mr. Bitton, the reason we're here today is because
21 there was no workers' compensation insurance
22 available; is that correct?

23 **BY MR. MOGIL:**

24 Objection. That's not the reason we're here
25 today, Your Honor. We're here today because she's

1 made a claim.

2 **BY MR. COGGIN:**

3 Your Honor, if you'd give me a couple ---

4 **BY MR. MOGIL:**

5 If there was workers' compensation coverage or
6 not coverage, it's an irrelevant question. If there
7 was coverage, we'd be here today. If there wasn't
8 coverage, we'd be here today.

9 **BY MR. KILLEN:**

10 And the Fund is not the only entity that denies
11 claims. Plenty of carriers deny claims as you well
12 know.

13 **BY COMMISSIONER JAMES:**

14 All right. Mr. Coggin, you can ask the
15 question, sir.

16 **BY MR. COGGIN:**

17 Thank you.

18 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

19 Q. Do you agree the reason we're here today is because
20 you do not carry workers' compensation insurance?

21 **BY MR. MOGIL:**

22 Objection.

23 **THE WITNESS ANSWERS:**

24 A. I'm not a lawyer, so I don't know why we're here
25 today.

CROSS-EXAMINATION RESUMED BY MR. COGGIN:

Q. Do you know what workers' compensation insurance is?

A. Vaguely.

Q. Tell me what your understanding of it is.

A. Barely nothing.

Q. Pardon me?

A. Barely nothing I understand about it. Because ---

Q. In your busy season, and I've counted the list here, you employ anywhere from 15 to 23 employees; is that correct?

A. You have the list. I don't know.

Q. Okay. And you purchased the Harbour Town Surf Shop in 2016; is that correct?

A. I purchased the -- the general store in 2016.

Q. Excuse me, general store. I apologize. I said that statement about a hundred times before. I apologize. You purchased that when, what time, you purchased the business?

A. July -- July in -- the end of July of 2016.

Q. And you purchased it from a gentleman by the name of John Trunck?

A. Correct.

Q. Are you saying -- I think you're a terrific businessman, and I always thought that. Did you look at John Trunck's financials before you

1 purchased this?

2 A. Yes, I did.

3 Q. You and Alon?

4 A. Correct.

5 Q. Did John Trunck's financials say anywhere that he
6 was paying workers' compensation?

7 A. I -- I don't recall.

8 Q. Didn't he in fact advise you to take out a policy
9 and continue that policy for workers' compensation?

10 A. No.

11 Q. No?

12 A. No.

13 Q. Now, you and I talked about workers' compensation
14 sometime ago, we talked about it at length; do you
15 recall that?

16 **BY MR. MOGIL:**

17 Objection.

18 **BY COMMISSIONER JAMES:**

19 Basis for objection?

20 **BY MR. COGGIN:**

21 What's the objection?

22 **BY MR. MOGIL:**

23 There's no evidence in the record that Mr.
24 Coggin and Mr. Bitton had any prior relationship.
25 If he wants to be more specific; did they talk at a

1 bar, did he talk at Mr. Coggin's house. I don't
2 know what this is about.

3 **BY MR. COGGIN:**

4 We talked at a deposition.

5 **BY MR. KILLEN:**

6 It's also irrelevant.

7 **CROSS EXAMINATION RESUMED BY MR. COGGIN:**

8 Q. Remember, we talked in deposition?

9 **BY COMMISSIONER JAMES:**

10 Was this witness's deposition taken?

11 **BY MR. COGGIN:**

12 Yes.

13 **BY COMMISSIONER JAMES:**

14 Is that what you're referring to then?

15 **BY MR. COGGIN:**

16 Yes.

17 **BY COMMISSIONER JAMES:**

18 Okay. Then if you'll refer to that.

19 **BY MR. MOGIL:**

20 Thank you, Your Honor.

21 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

22 Q. Do you remember when we talked at your deposition?

23 A. Yes, sir.

24 Q. And I asked you if you had workers' compensation,
25 and you said, "no"?

1 **BY MR. MOBIL:**

2 Objection. That's inaccurate, Your Honor.
3 He's mischaracterizing the testimony of the witness
4 at the deposition. Your Honor, this is getting out
5 of control. If he wants to read from the deposition
6 and say "Here was my question and answer," but he
7 can't just mischaracterize it to bait him into
8 trying to answer. The testimony -- there's a signed
9 document with the Workers' Compensation Commission
10 that this company purchased workers' compensation
11 after this incident, after being advised what the
12 law was, because they thought if they had two or
13 less employees most of the year, they didn't have
14 it. But if he wants to open the door -- so in the
15 compliance action, they went and bought -- they
16 contacted him, they went and purchased it. So when
17 he asked him at deposition, they had workers'
18 compensation insurance.

19 **BY COMMISSIONER JAMES:**

20 All right.

21 **BY MR. COGGIN:**

22 Your Honor, this is critical to this. I don't
23 understand the basis of any of this.

24 **BY COMMISSIONER JAMES:**

25 Well, if you want to provide -- if you want to

1 ask -- again, we can discuss the use of depositions
2 and how they're used for impeachment, but if you
3 want to ask him a question today, and if it's
4 something different -- if you want to show him the
5 deposition, then ---

6 **BY MR. COGGIN:**

7 That's -- I have his -- that's what I was
8 doing.

9 **BY COMMISSIONER JAMES:**

10 Okay.

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. Do you remember when we talked about this, I asked
13 you why you didn't carry workers' compensation; do
14 you remember that?

15 A. No.

16 Q. Okay. Do you remember the name "Erica"?

17 A. Yes.

18 Q. Okay. Who is Erica?

19 A. My insurance agent.

20 Q. Okay. Do you remember you told me that Erica
21 advised you not to have it?

22 A. No.

23 Q. You know, when I asked you about Erica, I asked you
24 for her last name. You didn't know that, did you?

25 A. Correct.

1 Q. And I asked you where her insurance agency was, you
2 didn't know where that was either?

3 A. I know where it is, I just don't remember the name
4 of the company.

5 Q. Yes. And I asked you the name of it, and you didn't
6 know the name of that; is that right?

7 A. I didn't remember that.

8 Q. Huh?

9 A. It's not that I didn't know. I didn't remember.

10 Q. Don't you remember you told me that Erica said you
11 didn't need it?

12 A. No, not -- I didn't say that. I said, "She is doing
13 an umbrella insurance for all my businesses," and I
14 never, you know, was advised to -- she never told
15 me. That means she just didn't -- she didn't
16 counsel specifically, say "Hey, you don't need work
17 comp." She just never mentioned it. So I didn't
18 know if I needed it or not, and I -- I trusted her,
19 like I trust my CPA and my accountant and everybody
20 else.

21 Q. And when we continued to talk about that, you told
22 me you asked her about it?

23 A. No, I didn't.

24 Q. You didn't ask her about it?

25 A. No, I didn't say that. After the fact, I asked her

1 about it.

2 Q. Okay. Well, tell me what she said.

3 A. She said she messed up. She said that.

4 Q. And you haven't brought a negligence action against
5 her for that?

6 A. No.

7 Q. Have you talked to any attorneys about bringing an
8 action against the insurance company?

9 **BY MR. KILLEN:**

10 Objection, Commissioner. Whether or not he's
11 talked to a lawyer about a negligence action against
12 a third party that's not even here is not relevant.

13 **BY COMMISSIONER JAMES:**

14 Mr. Coggin, ---

15 **BY MR. COGGIN:**

16 What I'm trying to get in here is that ---

17 **BY COMMISSIONER JAMES:**

18 --- I think we've established there's no
19 insurance.

20 **BY MR. COGGIN:**

21 Yes. What I'm trying to get in is, is that
22 there was no due diligence in this in even
23 attempting to get the insurance, okay?

24 **BY COMMISSIONER JAMES:**

25 What the Commission has to determine today is

1 whether it's subject to the act, which the parties
2 have agreed to. The parties have agreed that
3 there's no insurance, and so I'm not -- we don't
4 make a determination with regards to negligence in
5 not acquiring it. It's that it's just not acquired.
6 So, I mean, is it relevant for another reason?

7 **BY MR. COGGIN:**

8 I think it's relevant in establishing an
9 apparent pattern of negligence that goes through the
10 operation of this company, yes.

11 **BY COMMISSIONER JAMES:**

12 Okay. Workers' comp is not a negligence
13 system.

14 **BY MR. COGGIN:**

15 I know that, but I was asking if they brought a
16 negligence action. That's all I said. She couldn't
17 sue them under workers' comp, but he could have
18 brought a negligence action. These are brought all
19 the time. People come to me all the time for these
20 cases.

21 **BY COMMISSIONER JAMES:**

22 All right. I'm not going to allow that.
23 That's another arena. I'm not really sure why we
24 would be getting into ---

25 **BY MR. COGGIN:**

1 Well, I think it goes to ---

2 **BY COMMISSIONER JAMES:**

3 There's no insurance.

4 **BY MR. COGGIN:**

5 I think it goes to credibility.

6 **BY COMMISSIONER JAMES:**

7 All right. Go ahead and answer the question,
8 sir.

9 **BY THE WITNESS:**

10 I'm sorry, what was the question, Your Honor?

11 **BY COMMISSIONER JAMES:**

12 I believe he ---

13 **BY MR. COGGIN:**

14 We'll just waive that question, that's fine. I
15 really don't care.

16 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. Isn't the fact of the matter is that you never
18 purchased worker' compensation insurance; you just
19 wanted to save the money?

20 A. No, that wasn't an issue. That wasn't an issue
21 even.

22 Q. And didn't you think that you'd get away with this,
23 ---

24 **BY MR. MOGIL:**

25 Objection, Your Honor.

1 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

2 Q. --- that something like this would never happen?

3 **BY MR. MOGIL:**

4 Objection.

5 **BY MR. COGGIN:**

6 I can ask his opinion.

7 **BY COMMISSIONER JAMES:**

8 I'm going to allow it. Go ahead.

9 **THE WITNESS ANSWERS:**

10 A. No.

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. This is an important question. Did you ever tell
13 any of your employees that you did not have workers'
14 compensation?

15 A. I didn't know I don't have it, so how can I tell
16 them if I don't know if I have something or not?

17 Q. Your testimony is you thought you had workers'
18 compensation insurance?

19 A. No. I said, "I didn't know I had it." I didn't
20 know I don't have it, so how can I tell them if I
21 know if I have something or not? I didn't know if I
22 had workers' comp or not.

23 Q. You had a responsibility to your company to provide
24 for their welfare in addition to this. Didn't you
25 ever tell -- the question's "yes" or "no." Did you

1 tell any of your employees you did not carry
2 workers' compensation insurance?

3 A. Repeat the question.

4 Q. Did you ever tell any of your employees that you did
5 not carry workers' compensation insurance?

6 A. It never came up. Never spoke about that to any of
7 my employees.

8 Q. It goes back to the handbook. That would be in the
9 handbook. Did you ever tell them -- don't you think
10 you have an affirmative duty to tell them that?

11 A. No.

12 Q. And would it in fact if you told your employees, a
13 long-time employee like Lynn, that you did not carry
14 workers' compensation, they probably would have gone
15 and gotten a job somewhere else?

16 A. Two months is a long time employee?

17 Q. Pardon me?

18 A. Two months for you is a long time employee? She
19 worked for me for two months. That's a longtime
20 employee? I'm just asking. I don't know what's a
21 long time employee in your definition, sir, so.

22 Q. Thank you for that. My question is though, did you
23 ever tell Lynn that you didn't have workers'
24 compensation insurance?

25 A. It never came up.

1 Q. Do you think it might have been an affirmative duty
2 on your part as a boss to tell your employees if
3 they were covered or not?

4 A. I don't know to be honest with you.

5 Q. And if perhaps if they weren't covered, they would
6 go out and purchase their own; didn't you give them
7 that option?

8 **BY MR. MOGIL:**

9 Objection. He's speculating to what employees
10 -- I think he can ask him if he believes he had a
11 duty, but not what the employees may or may not have
12 done. He's just speculating as to things that no
13 employer could think of.

14 **BY MR. COGGIN:**

15 Your Honor, anybody I've ever worked for ---

16 **BY COMMISSIONER JAMES:**

17 Mr. Coggin, you can ask the question; however,
18 with regards to speculation as to what another
19 individual would do, that's a different question.

20 **BY MR. COGGIN:**

21 I'm sorry.

22 **BY COMMISSIONER JAMES:**

23 Speculation as to what somebody else would do
24 is a different question. You can ask this witness
25 what this witness would do or didn't do.

CROSS-EXAMINATION RESUMED BY MR. COGGIN:

Q. So, let's make it a matter of record, you did not have workers' compensation insurance; is that right?

A. I'm sorry, sir. Say again.

Q. You did not have workers' compensation insurance at the time of her accident?

A. Correct.

Q. You do have it now?

A. Correct.

Q. Mr. Bitton, since I've taken this case over, and I've been on this case since probably the end of June 2018, I've seen a number of erroneous defenses floated.

BY MR. KILLEN:

Objection, Commissioner.

CROSS-EXAMINATION RESUMED BY MR. COGGIN:

Q. One of the first ---

BY COMMISSIONER JAMES:

Mr. Coggin, I would ask that ---

BY MR. COGGIN:

I'll strike the erroneous.

BY COMMISSIONER JAMES:

Okay. And again, we've had some characterizations.

BY MR. COGGIN:

1 I know, I apologize.

2 **BY COMMISSIONER JAMES:**

3 Okay.

4 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

5 Q. Initially, I was aware, Mr. Bitton, that arguments
6 of the fact that Harbour Town Surf Shop did not come
7 under the jurisdiction of Title 42 of the workers'
8 compensation; is that right?

9 A. I have no idea what you're talking about.

10 Q. Did you ever argue -- or let me ask you this. I'm
11 sure you've talked to Mr. Mogil. The attorney that
12 he is, I know he would have told you about this.
13 Under Title 42, which is a workers' compensation --
14 go ahead.

15 **BY MR. KILLEN:**

16 Finish your question.

17 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

18 Q. Under Title 42, did he ever discuss with you your
19 options?

20 **BY MR. KILLEN:**

21 Objection to attorney/client privilege. He's
22 specifically soliciting something that Mr. Mogil
23 talked about.

24 **BY COMMISSIONER JAMES:**

25 Sustained.

1 **BY MR. COGGIN:**

2 I would agree.

3 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

4 Q. Did you ever talk about workers' compensation and
5 the fact that you might not be under the
6 jurisdiction?

7 A. I -- I don't know what you're talking about, sir.
8 Those terms, I ---

9 Q. That workers' compensation didn't apply to you?

10 A. If I talk about -- the majority of my business don't
11 need workers' comp actually.

12 Q. Okay. Explain that.

13 A. 'Cause I have less than three employees in the
14 business.

15 Q. You have less than three employees?

16 A. Yes.

17 Q. Now?

18 A. Always had. And I found out just later when I find
19 -- you know, when I got the lawsuit, and then I
20 started, you know, acquiring my workers' comp and
21 what's the law and what we needed. I always thought
22 just construction company needs it. You know,
23 people that are working in dangerous stuff like
24 that. I never knew that a t-shirt/souvenir shop
25 needed it.

1 Q. Okay. Do you agree that on, I believe it was,
2 August the 8th a consent agreement was signed, not
3 by you, but by Alon, admitting that you were outside
4 the jurisdiction of Title 42, and that you were
5 liable for her injury?

6 A. Did I know that?

7 **BY MR. KILLEN:**

8 Objection, Commissioner. That's not what the
9 client's agreement says, and it's part of the
10 Commission's file.

11 **BY MR. COGGIN:**

12 Read number one and number four.

13 **BY MR. KILLEN:**

14 It does not say he's liable for her injuries.

15 **BY MR. MOGIL:**

16 Right. And Your Honor, this is an agreement
17 somebody else and I -- I believe I signed it with
18 somebody else, but it's not something that Mr.
19 Bitton necessarily reviewed or signed. He hasn't
20 established that. He's asking him to interpret the
21 law, which is the legal argument that he can make to
22 Your Honor, but Mr. Bitton's not a lawyer. He's not
23 ---

24 **BY MR. COGGIN:**

25 Your Honor, I have just passed that up, and I,

1 you know, want to make the point that they agreed
2 that they were under Title 42.

3 **BY MR. KILLEN:**

4 So stipulated.

5 **BY MR. COGGIN:**

6 And they said they should have been under Title
7 40. That's it.

8 **BY COMMISSIONER JAMES:**

9 I think from the beginning of the trial and
10 even when we started, everybody agreed that they did
11 not have insurance and were subject to the act. Was
12 that not an initial stipulation?

13 **BY MR. COGGIN:**

14 I don't know.

15 **BY MR. KILLEN:**

16 Yes, ma'am, it was.

17 **BY COMMISSIONER JAMES:**

18 Yes.

19 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

20 Q. Now, we have speculation now that Ms. Bridges hurt
21 her leg when she was in North Carolina; do you
22 agree?

23 A. Correct.

24 Q. Okay. And when she came back from the graduation of
25 her grandson from high school, she was limping, ---

1 A. Correct.

2 Q. --- and in a great deal of pain?

3 A. On Saturday, she was.

4 Q. Okay. Unable to walk?

5 A. She was walking.

6 Q. She was walking?

7 A. Barely, but she was walking.

8 Q. And she has variously been described as suffering
9 from pain to her ankle and her foot.

10 A. Say your question.

11 **BY MR. MOGIL:**

12 Objection.

13 **BY THE WITNESS:**

14 Are you making a statement or asking me a
15 question?

16 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. I'm asking you a question.

18 A. What was the question? I didn't understand.

19 Q. Okay. I said are you of the opinion that it was an
20 injury to her ankle and her foot?

21 A. I -- I -- I was sure there was an injury. She told
22 everybody she got hurt, so it was obvious.

23 Q. Okay. And she was wrapped?

24 A. Yes.

25 Q. She had the wrap? You call it a bandage. It was

1 actually a -- or a band-aid. It was actually a
2 bandage, an Ace bandage; is that right?

3 A. Those elastic wrap thing that you pull when you
4 twist your ankle or whatever, but, you know, she had
5 long pants, so I -- I couldn't see all the way to
6 the middle of her foot. You know, I mean, that's
7 about it.

8 Q. My question is, that even though she was apparently
9 badly injured, she worked Monday for 14 hours?

10 A. I don't know.

11 Q. Tuesday for 14 hours?

12 A. That's what you're saying.

13 Q. Wednesday for 14 hours?

14 A. That's what you're saying.

15 Q. Thursday for 14 hours? No?

16 A. Is that a question or a statement? Again, I don't
17 understand. If you ask me the question, ask me the
18 question. I'll answer.

19 Q. I'm asking you if she worked ---

20 A. I don't know.

21 Q. --- Monday, Tuesday, Wednesday, Thursday ---

22 A. Again, I told you, on the schedule it reflects
23 availability of employees, not the original schedule
24 that is marked and changed and stuff. I can show
25 you text messages of her that she cannot show up

1 every week for two days. So how about that?

2 Q. Tell me what days she worked then, the day that
3 you're focused on.

4 A. I don't remember. I don't do the schedule, so I
5 don't remember who ---

6 Q. Was she off Monday?

7 A. I don't know -- no, Monday she was working, because
8 I saw her in the morning. That's for sure.

9 Q. How about Tuesday?

10 A. I don't know.

11 Q. Weren't you in the shop on Tuesday?

12 A. I'm -- I'm there every day.

13 Q. Wednesday?

14 A. She worked one more day, maybe one or twice that
15 week, but I -- I don't recall when. I saw her a few
16 times that week, but that's about it.

17 Q. Thursday?

18 A. I don't remember.

19 Q. She's off Friday?

20 A. I don't even know that. I don't remember that
21 either.

22 Q. Saturday you saw her? Saturday ---

23 A. Definitely, I saw her.

24 Q. Tell me what you saw.

25 A. I came to the store, walked in about eleven, eleven-

1 thirty again, did whatever I needed, greeted her. I
2 saw her in the main counter. Said, "hi" to her.
3 Went down, saw Leticia and Lily in the ice cream
4 counter. Said, "hi" to them. Did a few things over
5 there, and then I went to Raven's and Zack's store.
6 Go over there and talk to them, "What's going on."
7 Then I came back. And then Lynn came out of the
8 counter, and she's walking -- was walking toward
9 where I'm at, and I saw her walking kind of like a
10 lot slower. Because she usually would walk, she
11 moves. And then I saw her kind of slowly walking,
12 and the pain kind of, "ugh". So I -- that drawn my
13 attention, and I immediately, I was like, "Hey,
14 you've been hurt since Monday already. I -- I don't
15 even know what you're doing here basically, but do
16 not, no physical, no climbing, no climbing on the
17 ladder or no doing any physical. Just cash out
18 people on the register," 'Cause I knew she was
19 getting off at three that day. She was the morning
20 shift, so.

21 Q. On the schedule it says that she was working until
22 ten o'clock at night.

23 **BY MR. KILLEN:**

24 Objection, Commissioner.

25 **BY THE WITNESS:**

1 Her availability.

2 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

3 Q. Pardon me?

4 A. Her availability.

5 **BY MR. KILLEN:**

6 We've been over this ad nauseam.

7 **BY COMMISSIONER JAMES:**

8 You can finish your answer, sir.

9 **BY THE WITNESS:**

10 I'm done.

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. The schedule said that she worked from eight to ten.
13 She was not scheduled to three. Again, let's go
14 back to the foot. What did the foot look like?

15 A. It was wrapped with those elastic band-aids.
16 They're whatever you call it, Ace band, whatever you
17 want to call it.

18 Q. On the ankle, too?

19 A. I don't know. She had long pants, so I couldn't
20 see. I could -- could have seen just a part of the
21 foot that was exposed, and it was up to like the
22 middle of the foot (indicating). That's about it.

23 Q. And that is the injury that she had when she came
24 back from North Carolina with; is that right?

25 A. Correct.

1 Q. That raises a couple of questions with it. Why
2 didn't you send her to the hospital?

3 A. It's not my duty.

4 Q. Why didn't you take her to the doctor?

5 A. It's not my job.

6 Q. Why didn't you tell her to go home?

7 A. I did.

8 Q. You told her to go home?

9 A. I asked her if she needs to go home, she said, "no,"
10 she can -- she -- she'll be all right. I asked her
11 if she went to the doctor for it, and she said she's
12 taking care of it.

13 Q. Okay. Was this injury you think to her foot, her
14 ankle, whatever it was, was that severe enough that
15 she should have gone to the doctor?

16 A. I'm not a doctor. I don't know how ---

17 Q. I'm asking your opinion as a layman.

18 A. I'm sorry?

19 Q. Under the law, you can give your opinion as a
20 layman.

21 A. I cannot give you an opinion on something that I
22 don't know how they feel or how that look like or
23 whatever.

24 Q. Do you think she should have been sent to the
25 doctors?

1 **BY MR. MOGIL:**

2 Objection.

3 **THE WITNESS ANSWERS:**

4 A. She should have went to the doctor herself if she
5 felt that bad. She's old enough to be responsible
6 for -- for herself. I'm not dealing with a child
7 here.

8 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

9 Q. Was the injury that bad that say she have gone to
10 the hospital and gotten an X-ray?

11 **BY MR. MOGIL:**

12 Objection.

13 **THE WITNESS ANSWERS:**

14 A. It's not my duty.

15 **BY COMMISSIONER JAMES:**

16 Sir?

17 **THE WITNESS ANSWERS:**

18 A. It's not my duty. She came injured to work after a
19 vacation. So I don't know what happened, where it
20 happened, and how it happened. I was just making
21 sure she can work and perform her duties that day.
22 That's it.

23 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

24 Q. I'm just trying to determine the severity of this
25 injury. That's all.

1 A. I don't know. I'm not a professional.

2 Q. But didn't you say she on this Saturday was in
3 terrible condition; is that what you said?

4 A. You said that. I said she was hurting.

5 Q. I'm asking you. I'm referring to your deposition.

6 **BY MR. COGGIN:**

7 Page fifty-eight, gentlemen, line ten.

8 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

9 Q. "Before I left, Lynn was walking by me, and I saw
10 her in agonizing pain limping." Now, what does that
11 say?

12 A. I said exactly "She was hurt bad, and she was
13 walking and making a -- a -- a noise like she's
14 hurting, like 'ugh -- ugh.'"

15 Q. My question to you is, if that injury had been
16 yours, would you have gone to the doctor, gotten an
17 X-ray, had someone see if it was broken; what would
18 you have done?

19 A. I don't know, it depends.

20 Q. And you did not suggest that she go home or anything
21 else; is that right?

22 A. I asked if she can work, and she said she can. And
23 I asked her if she wanted to check with a doctor on
24 that, and she said she's checking, and that's the
25 best I can do.

1 Q. Mr. Bitton, you know that she was in the hospital
2 that afternoon, don't you?

3 A. Yes.

4 Q. And when she was in the hospital, she was checked
5 over probably by -- and I have the list as a matter
6 of fact, and the list is here in the APAs. And she
7 was checked over the first -- I think it's the four
8 days or something like ---

9 A. By someone ---

10 **BY MR. MOGIL:**

11 Excuse me, Your Honor. I'm sorry, I don't mean
12 to prolong this, but I'm going to object to any
13 questions -- he testified that he didn't have any
14 contact with her or see her after the incident. So
15 anything that anybody else observed of her after the
16 incident is not within this witnesses -- that comes
17 in through doctor testimony or medical nurse
18 testimony or Ms. Bridges' testimony, but she already
19 rested, but it doesn't come in through my client.

20 **BY MR. COGGIN:**

21 Your honor, I'm just ---

22 **BY MS. MELLARD:**

23 He has nothing to do with the hospital.

24 **BY MR. COGGIN:**

25 I'm just trying to make a point and get through

1 this with him. I asked him if ---

2 **BY COMMISSIONER JAMES:**

3 Mr. Coggin, I'm trying to understand. If the
4 witness said that they've had no further contact
5 with her -- so what is the basis of the question?

6 Before you go through the list of doctors, what ---

7 **BY MR. COGGIN:**

8 Could I ask him two more questions, and I'll
9 get this done.

10 **BY COMMISSIONER JAMES:**

11 Okay. And I just want to know, before you go
12 through the list of doctors, if we can have the
13 basis of the question without the doctors, then I
14 can rule on it.

15 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

16 Q. My question is this. If her ankle was so severe --
17 you said, "Before I left, Lynn was limping, walking
18 by me, and I saw her in agonizing" that's your word,
19 "pain limping." Okay, do you remember that? Do you
20 want to look at it?

21 A. Yes.

22 Q. Okay. Three hours later, ---

23 A. Not three hours. Thirty minutes later I got a call
24 that she fell. Not three hours. I can remember
25 that clear as the sun.

1 Q. Then you remember everything that happened here then
2 too?

3 A. No, that particular thing I remember clearly,
4 because I was furious.

5 Q. The point I'm trying to make is, I have 2200 pages
6 of medical testimony. I have something like 65
7 medical testimony pages that I've handed up to the
8 Commissioner. Mr. Mogil and Mr. -- have testimony.
9 Not one time is the ---

10 **BY MR. KILLEN:**

11 Commissioner, there's no medical testimony. If
12 he's referring to medical records, that's a whole
13 different ball game. But...

14 **BY MR. COGGIN:**

15 Your Honor, medical testimony. What I'm saying
16 is omission. Not one time in all of this -- I defy
17 you to look here and see if there's any mention of
18 her ankle anywhere at all. In fact, when I ---

19 **BY THE WITNESS:**

20 I didn't say her ankle. Nobody said her ankle.
21 We just saw the bandage on her foot here
22 (indicating), but we didn't know how far it goes.
23 You know, I mean, nobody -- that's all we saw.
24 Because she was covering it with long pants. That's
25 about it. That's all I'm saying.

CROSS-EXAMINATION RESUMED BY MR. COGGIN:

Q. What I'm saying is that everybody testified so far it was a twisted ankle. One girl said that her toes ---

A. That's what it looked like to them.

Q. One girl said her toes were black. She was wrapped. And what I'm saying is there's not one mention of the ankle or the foot in a year's worth of medical work. I thought ---

A. Are you asking me questions, or are you making statements?

BY THE WITNESS:

I need to understand why I'm sitting here for, ma'am.

CROSS-EXAMINATION RESUMED BY MR. COGGIN:

Q. This is the statement I'm making.

BY MR. KILLEN:

Objection to that, Commissioner. He's not a witness.

BY COMMISSIONER JAMES:

All right. Mr. Coggin, I understand you're on cross, but at the end of statements, there's usually a question. So if ---

BY MR. COGGIN:

Well, I thought I had. The question was in the

1 tone of my voice. A lot of times in your tone of
2 voice is the question. That's all. I can ---

3 **BY MR. KILLEN:**

4 The Court of Appeals can't read your tone of
5 voice.

6 **BY COMMISSIONER JAMES:**

7 And the court reporter can't get the tone of
8 the voice either. So make sure that if you're going
9 to have a statement, there's a question at the end.

10 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

11 Q. Do you find it strange, Mr. Bitton, that after you
12 characterized her of being in agonizing pain, then
13 she goes to the hospital and there's not one mention
14 of her ankle, and there's not one mention of black
15 and blue toes, there's not one mention of a twisted
16 ankle anywhere in any of the medical records?

17 A. What was the question?

18 Q. That was the question. Are you surprised?

19 A. Am I surprised, no.

20 Q. No?

21 A. Why would I?

22 Q. I don't know.

23 A. You're asking the question, you should know.

24 Q. Pardon me?

25 A. You're asking me the question, you should have the

1 background for it, you know. If you're asking me
2 the question. I don't know, I'm not a doctor. I'm
3 not a professional. All I can tell you is what we
4 saw, and what I saw. That's it.

5 Q. Fair enough. Thank you.

6 **OFF THE RECORD DISCUSSION**

7 **BY MR. COGGIN:**

8 No, I'm not done, not by a longshot. I'm not
9 done.

10 **BY COMMISSIONER JAMES:**

11 Can we take a break?

12 **OFF THE RECORD**

13 **BY COMMISSIONER JAMES:**

14 We're back on record.

15 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

16 Q. During the deposition that you had with me, and this
17 was in March of 2019, the 29th of March, I was
18 there, and Mr. Mogil was there, Mr. Killen was
19 there; you remember that, ---

20 A. Yes, sir.

21 Q. --- and we talked about this?

22 A. About what?

23 Q. This whole issue that we're talking about here.

24 A. Yes, sir.

25 **BY MR. COGGIN:**

1 Okay. And I'm going to refer to page 58. Go
2 back to line nine, Tim.

3 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

4 Q. And here's what you said. Let's skip to the bottom
5 line. It's almost like we're talking here. Let's
6 start there, that's what you said, "Before I left,
7 Lynn was walking by me. I saw her in agonizing pain
8 limping." Do you agree?

9 A. Agreed.

10 Q. "And then I turned around, and I was like 'you do
11 not do any physical work today.'" I assume you were
12 talking to Lynn; is that correct?

13 A. Correct.

14 Q. Okay. "Then I went personally to each one of my
15 employees." Do you remember who was working there
16 that day?

17 A. Yes.

18 **BY MR. KILLEN:**

19 You skipped over some lines there, Gary.

20 **BY MR. COGGIN:**

21 No, I don't think I did.

22 **BY MR. KILLEN:**

23 Yes, you did.

24 **BY MR. COGGIN:**

25 Oh, okay, I'm sorry. Back up.

1 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

2 Q. "And I turned around, and I was like 'you do not do
3 any physical work today. You just greet
4 customers,'" right?

5 **BY MR. COGGIN:**

6 Thank you, Tim.

7 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

8 Q. "Don't climb on any ladder. Don't pick anything.
9 Then I went personally to each one of the employees.
10 'Do not let her go on the ladder. Do not let her do
11 any physical work.' Zack was working in the surf
12 shop. I went specifically to him. I was like,
13 'Zack, you're the guy here. You're my family. Make
14 sure no girls go on the ladder. Especially Lynn.'"
15 Do you agree?

16 A. Agreed.

17 Q. "She's hurting. She's sick. Let her be with
18 customers today." You agree that's what you said?

19 A. Agreed.

20 Q. That's not exactly what happened, is it?

21 **BY MR. MOGIL:**

22 Objection.

23 **THE WITNESS ANSWERS:**

24 Q. I don't understand the question. I don't know ---

25 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

1 Q. I just said, "That's not exactly what happened, is
2 it?"

3 A. That's exactly how it happened.

4 Q. Wasn't Lynn working at the front of the store when
5 you came in about eleven, eleven-thirty?

6 A. She was ---

7 Q. And you asked her what she was doing?

8 A. No.

9 Q. And didn't she tell you that that day she was going
10 on top of the cooler, ---

11 A. No.

12 Q. --- and she was going to take inventory ---

13 A. No.

14 Q. --- just like she had done the previous several
15 years she had worked there?

16 A. We don't do inventory on Saturday. We do it on
17 Monday.

18 Q. And didn't you tell her when she said, "I'm going up
19 onto the cooler to take inventory," you said, "I
20 don't want you to do that. Zack, that's what Zack
21 is here for"?

22 A. No.

23 Q. And then you said to her, "I want you to tell Zack
24 that he has to go up onto the ladder and get the
25 inventory"?

1 A. I did that.

2 Q. You did tell her ---

3 A. Not inventory. I told her if she needs to go on the
4 ladder, go and get Zack. He will go on the ladder
5 for you and ---

6 Q. Let me repeat what I said. Didn't you tell her,
7 "You need to go onto the -- get Zack and tell him to
8 go onto the cooler and take the inventory"?

9 A. No, that's not correct.

10 Q. And didn't she tell you -- didn't you say "I'm going
11 to talk to him, too"?

12 A. Say it again.

13 Q. She said, "I'm going to talk to him also"?

14 A. No, she didn't say nothing. She was quiet and put
15 her head down like she agreed to what I said, and
16 that's it, and she went back to the counter.

17 Q. And then didn't Lynn confront -- or you didn't
18 confront him. You went and saw Zack. Zack was in
19 the bathroom putting lotion on his face.

20 A. I wasn't there, so I don't know.

21 Q. I'm just describing it for you.

22 A. I wasn't there. I'm answering.

23 Q. Putting lotion on his face. And didn't she tell
24 Zack at that time "You have to go up." And he said,
25 "Yeah, I'll do it. Amir already talked to me"?

1 A. I wasn't there. I don't know.

2 Q. You never talked to Zack?

3 A. I talked to Zack, but he never mentioned anything
4 like that to me. So I have never heard that until
5 when I heard it from you.

6 Q. And wasn't it in fact your proscription, or your
7 prohibition was, "Don't go on the cooler today, up
8 on the cooler today. Have Zack do it"?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Do you want to think about that for a minute?

13 **BY MR. MOGIL:**

14 Objection. He's just baiting the witness,
15 arguing with the witness, Your Honor. That's not a
16 fact probative question.

17 **BY MR. COGGIN:**

18 Let me ---

19 **BY COMMISSIONER JAMES:**

20 Mr. Coggin, if you want to proceed with the
21 questions.

22 **BY MR. COGGIN:**

23 I'm sorry. Let me finish this.

24 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

25 Q. Here's what you said again. "I went specifically to

1 him. I was like 'Zack, you're the guy here. You're
2 my family'"; is that right?

3 A. Correct.

4 Q. And Zack is your family. "Make sure no girls go on
5 the ladder," is that right, ---

6 A. Correct.

7 Q. --- "Especially Lynn. She's hurting, she's sick.
8 Let her be with customers today"; is that right?

9 A. Correct.

10 Q. Do you know when Lynn went to the hospital what she
11 was treated for?

12 A. Do I know what she was treated for that day?

13 Q. Yes.

14 A. All I heard is she broke her -- her leg, her foot,
15 and that's about it.

16 Q. Would it surprise you it wasn't her leg or her foot,
17 it was her knee?

18 A. Would it surprise me?

19 Q. Yes.

20 A. I don't understand the question.

21 Q. Here's my question. Is that you had three young
22 women testify that Lynn was in a black boot. Lynn's
23 -- one of them said, "Lynn's toes were black and
24 blue." Someone else said, "her ankle was twisted."
25 And my question to you is, does it surprise you that

1 her knee was broken into 22 different pieces?

2 A. Why I'm supposed to be surprised finding that? I
3 don't understand the question really. I'm not -- I
4 don't know where -- where you're trying to go with --
5 - with that.

6 Q. Let me ask you the same question I asked you before.
7 Maybe we can clear it up this way. And I asked you
8 for a "yes" or "no" answer. When Lynn came back
9 from North Carolina, the injury you claim that she
10 came back with, is that what she is in here today
11 about?

12 A. I'm not a doctor. I don't know. And I haven't seen
13 the injuries. I just saw the band-aid on it.
14 That's it. So I don't know what kind of injuries
15 she had from the get go.

16 **BY MR. COGGIN:**

17 I don't know, Your Honor, which is the
18 photograph. I have this photograph, and then the
19 photograph of her with her grandson. Can I use
20 those two?

21 **BY COMMISSIONER JAMES:**

22 They're all up here.

23 **BY MR. COGGIN:**

24 Yes, okay. I just didn't want to shuffle
25 through your stuff.

1 **BY COMMISSIONER JAMES:**

2 No, they're meant for y'all.

3 **BY MR. COGGIN:**

4 Okay.

5 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

6 Q. I'm going to show you, Amir, Plaintiff's Exhibit
7 number 3 for identification. Do you recognize the
8 people in that photograph?

9 A. (Witness views photograph). Yes.

10 Q. Who are they? You recognize one of them, don't you?

11 A. Both.

12 Q. Both?

13 A. I know her grandson too, yeah.

14 Q. Okay, good. Now, the testimony was that this was
15 taken the day of his graduation, okay?

16 A. Okay.

17 Q. And that would have been the 12th, I believe, of
18 June.

19 A. Okay.

20 Q. How do her legs look there?

21 A. Fine.

22 Q. This was Saturday morning?

23 A. So you say.

24 Q. Okay. Let me show you what's been marked as
25 Plaintiff's Exhibit Number 5 for identification. Do

1 you recognize that?

2 **BY COMMISSIONER JAMES:**

3 Exhibit.

4 **BY MR. COGGIN:**

5 Exhibit, I'm sorry.

6 **THE WITNESS ANSWERS:**

7 A. (Witness views photograph). Do I recognize that?

8 No, I don't see anybody I recognize.

9 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

10 Q. Do you recognize the woman in the hat?

11 A. No. Looks like a blurry-blond woman with glasses.

12 I don't know who she is though.

13 Q. That blurry-blond woman, would you tell me what her
14 legs look like, her ankles?

15 A. I cannot see. There is a pole of the umbrella
16 covering it.

17 Q. The left leg is the one that you said was injured,
18 and it's right there.

19 A. It's blurry.

20 **BY MR. MOBIL:**

21 Your Honor, I think that Your Honor is capable
22 of looking at the picture, which we admitted into
23 evidence without knowing when it was taken. We just
24 stipulated that he could use it for demonstrative
25 purpose. We don't know if that was taken here, but

1 I think Your Honor can look at it. His opinion of
2 what the picture shows is irrelevant. It really has
3 no relevance to whether the person was hurt, or
4 whether she is hurt or his role. It's for the fact
5 finder to look at that picture.

6 **BY MR. COGGIN:**

7 I'm a little confused. Is Mr. Mogil saying
8 that I can't show impeachment evidence?

9 **BY COMMISSIONER JAMES:**

10 Mr. Coggin, if you can go ahead and move on
11 with the questions please, sir.

12 **BY MR. COGGIN:**

13 Okay, yes.

14 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

15 Q. Do you see any wraps on this woman's leg, the left
16 leg?

17 A. No.

18 Q. Do you see any black boot on that leg?

19 A. No.

20 Q. Looks like the leg's perfectly normal, isn't it?

21 A. It is. Please don't hover over me.

22 Q. Oh, I'm sorry.

23 A. Thank you.

24 Q. No problem.

25 **BY MR. COGGIN:**

1 Thank you, Your Honor.

2 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

3 Q. So, you would agree that in that photograph her leg
4 looks was perfectly normal; is that correct?

5 A. I would agree, but I wouldn't agree that it's Lynn.
6 I don't know if it's Lynn or not. So it could be
7 any woman that is healthy and perfectly fine.
8 'Cause I don't recognize that woman, you know. To
9 be honest, it's just blurry and not clear, so.

10 Q. Now, when Lynn was injured, she went onto the
11 stepladder to get hard-rock candy; is that correct?

12 A. That's what they -- I've been told.

13 Q. And the reason that I mentioned the other day that
14 it was red hots, and whatever the other one was, was
15 because they were kept on the top shelf; isn't that
16 correct?

17 A. No, I don't keep anything that we need on a daily or
18 weekly basis up -- up. I try -- try to keep it
19 close. Only the big stuff that I need once every
20 two weeks or whatever we keep up. So I -- I get it
21 down for them.

22 Q. Now, in your testimony in deposition you said that
23 nobody saw her falling, and people were six -- five
24 -- six to eight-feet away. Nobody heard her
25 falling, screaming, breaking a leg; is that right?

1 A. Correct.

2 Q. Okay. There was no argument -- and you've stated
3 that she fell and broke her knee, and there was no
4 noise, no screaming, nothing?

5 **BY MR. KILLEN:**

6 Objection.

7 **BY THE WITNESS:**

8 That's what I've been told.

9 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

10 Q. Okay. What is your suggestion when you say that?

11 A. I don't understand that question.

12 **BY MR. MOGIL:**

13 He testified he wasn't there.

14 **BY COMMISSIONER JAMES:**

15 Mr. Coggin, was this witness there?

16 **BY MR. COGGIN:**

17 This is his testimony, Your Honor.

18 **BY COMMISSIONER JAMES:**

19 Okay. But he wasn't -- this is testimony
20 today. I understand that's a discovery deposition.

21 **BY MR. COGGIN:**

22 Yes.

23 **BY COMMISSIONER JAMES:**

24 But today this witness has indicated that he
25 wasn't there.

1 **BY MR. COGGIN:**

2 What I'm only saying is what he said under
3 deposition.

4 **BY COMMISSIONER JAMES:**

5 But today is -- so, there are things in
6 depositions that are discovery that aren't
7 necessarily admissible. So that's why we start with
8 the testimony of the witness first before we revert
9 to the deposition. So if my understanding is the
10 witness says he wasn't there, ---

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. Well, my next question is, if you weren't there, how
13 did you know that there was no scream, there was no
14 noise?

15 A. 'Cause I asked the people that were next -- standing
16 next to her. It was Lily and Leticia.

17 Q. Okay. And what does that mean?

18 A. I don't understand the question.

19 Q. If she didn't yell, you didn't hear a bone breaking,
20 nobody heard anything, and they were six to eight-
21 feet away, why are you even saying that?

22 A. Because most likely when somebody -- accidents,
23 people breaking legs. I was in the special forces
24 in the military. I've seen people getting hurt, and
25 leg -- breaking bones. When you break your bone,

1 you scream, it hurts. So I ---

2 Q. That's why I'm ---

3 A. --- I -- for me, it's like an automatic human being
4 reaction. If you get hurt, especially women,
5 they're usually like more louder than guys when they
6 scream or do any kind of action or they cry or
7 whatever. And when I questioned the employees that
8 were standing over there, they haven't heard
9 anything, they haven't seen anything, and I was just
10 kind of -- kind of like -- it doesn't make sense to
11 me. You know when a woman breaks her -- a bone, and
12 especially after I found out the severity of the
13 break, and that -- she didn't make any -- not even a
14 sound. That kind of was ---

15 Q. But you were trying to make a point when you say
16 that, and I asked you that. I asked you ---

17 A. That's my point.

18 Q. What's the point?

19 A. That it -- it didn't make sense to me that somebody
20 breaks a bone and doesn't make any sound or crying.

21 Q. Are you saying that she or somebody ---

22 A. I'm not saying anything. I was just saying it
23 didn't sound right. That's it.

24 Q. Do you think she broke that bone somewhere else?

25 A. I have no idea.

1 Q. Do you think she broke that bone in North Carolina?

2 A. I don't know.

3 Q. The fact of the matter is that she didn't break any
4 bones in North Carolina.

5 **BY MR. KILLEN:**

6 Objection.

7 **BY COMMISSIONER JAMES:**

8 Sustained.

9 **BY MR. COGGIN:**

10 I apologize for this, but somebody is going to
11 have to tell me the basis of why I'm allowed to say
12 that.

13 **BY COMMISSIONER JAMES:**

14 You are stating what the ultimate facts are in
15 this case. I think you can ask questions otherwise,
16 but you're making a statement, and none of the
17 attorneys can ultimately say what the facts are in
18 this case unless they're undisputed.

19 **BY MR. COGGIN:**

20 Okay.

21 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

22 Q. You still maintain that she had an injury in North
23 Carolina; is that correct?

24 A. She was injured in North Carolina, that's for sure.
25 Because she came back to work limping and with her -

1 - with her foot band-aid and wrapped with an elastic
2 band-aid. So it was a fact that she told everybody
3 -- she didn't tell me specifically the details of
4 the injury. She told me she got injured, but she
5 told everybody else the detail too. So, I mean,
6 what's the question. You know, it's not that I'm
7 making up stuff. It's just she told everybody
8 clearly.

9 Q. Okay.

10 A. And the severity of the injury, we don't know
11 because we're not professionals. So -- and she
12 didn't show me personally what she was covering as I
13 said. So I -- I couldn't determine what was the
14 injury, and even if I could see, I wouldn't be able
15 to determine, because I'm not a doctor.

16 Q. You and I had a curious exchange towards the end of
17 the deposition. "Curious" is my characterization.

18 BY MR. COGGIN:

19 Beginning on page 70, line eight, gentlemen,
20 which I'm going to read in. Tell me when you're
21 ready.

22 BY MR. MOGIL:

23 Again, Your Honor, I don't want to prolong
24 this, but objection on the basis that deposition
25 testimony is admissible to impeach contrary

1 testimony at trial. We're not litigating the
2 deposition today. So he needs to ask a question,
3 and if the answer is different, he can use the
4 deposition transcript to do that, but we're not
5 litigating why the witness said something at
6 deposition today.

7 **BY MR. KILLEN:**

8 I wholeheartedly agree with that.

9 **BY MR. COGGIN:**

10 I am trying to point out, Your Honor, ---

11 **BY COMMISSIONER JAMES:**

12 Mr. Coggin, and we can go look at the civil
13 rule, and we're under the civil rules when it comes
14 to depositions.

15 **BY MR. COGGIN:**

16 Yes, I know that.

17 **BY COMMISSIONER JAMES:**

18 So, the depositions are one part of the civil
19 rules indicate that they're used for an impeachment
20 purpose. So if you ask a question and there's a
21 contrary answer, then you go to the deposition.

22 **BY MR. COGGIN:**

23 I understand.

24 **BY COMMISSIONER JAMES:**

25 So, if you would first ask ---

1 **BY MR. COGGIN:**

2 I agree.

3 **BY COMMISSIONER JAMES:**

4 --- whatever questions there are, and then if
5 you have a contrary answer, then go to the
6 deposition.

7 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

8 Q. Mr. Bitton, didn't you during the deposition infer
9 that I was involved in this whole matter before any
10 of these accidents took place?

11 **BY MR. KILLEN:**

12 Again, it's the same objection that we just
13 made.

14 **BY MR. COGGIN:**

15 I've asked him, then I'm going to read the
16 answer. I want to see what his answer is.

17 **BY COMMISSIONER JAMES:**

18 Before going to the deposition, ask him a
19 question, and if he says to the contrary -- so
20 you're saying some contact at the deposition? All
21 right, go ahead and ask the question. But ---

22 **BY MR. COGGIN:**

23 I'll do it again.

24 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

25 Q. Did you infer at anytime that I was involved in this

1 case with Lynn before the accident?

2 A. I don't remember.

3 Q. We were talking about the retention of lawyers, and
4 I had asked you why you didn't contact her ---

5 **BY MR. KILLEN:**

6 Mr. Coggin, can you point out where you're
7 referring to in the deposition?

8 **BY MR. COGGIN:**

9 I thought I told you. I'm sorry. It's 70,
10 line eleven. I thought I told you that.

11 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

12 Q. My question was, "Did you ever go to the hospital?"
13 Your answer was "no." "Why not?" You said,
14 "Because my -- I don't know why. Because I think
15 she took a lawyer, or she hired you, and when
16 somebody retains a lawyer against me -- I mean, I
17 hired a lawyer that tells me what to do, so I was
18 waiting for instructions. Because she retained you
19 the next day on a Sunday, the day after the
20 accident"; is that correct?

21 A. Maybe so.

22 Q. "Or maybe you knew about that before."

23 A. Okay.

24 Q. What did you mean by that?

25 A. I don't remember what was the topic of conversation

1 when you questioned me last.

2 Q. Would it be okay if I read it to you again; would
3 you understand?

4 A. No, because it's going to be out of context if
5 you're reading just a few lines of it.

6 Q. No, it's in context. I was just wondering ---

7 A. You want me to read the whole deposition again?

8 Q. Pardon me?

9 A. Do you want me to read it again, and then I can
10 remember it maybe?

11 Q. Yes -- yes, you want me to read the whole thing?

12 A. No.

13 **BY MR. MOGIL:**

14 Your Honor, he's arguing with the witness.

15 This has nothing to do with the accident. I don't
16 really -- even if Mr. Bitton said anything about Mr.
17 Coggin at the deposition, which he didn't, but
18 there's nothing wrong in going -- it's not relevant
19 to the injury.

20 **BY COMMISSIONER JAMES:**

21 The question's been asked and answered.

22 **BY MR. COGGIN:**

23 Yes, it was a half-answered.

24 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

25 Q. You just don't know what the basis of that was?

1 A. I just don't remember what we spoke about. So I
2 don't want to answer something that is going to be
3 out of context, because you just gave me one
4 sentence of what I said, so.

5 Q. No, I followed up with you a number of times, and
6 you just said you didn't know. I thought maybe you
7 could clear it up. Okay. Mr. Bitton, you are aware
8 that through your attorney -- and this was -- Mike
9 has been in and out of this case, your attorney,
10 okay. Your attorney at one time was Mary Sharp.

11 A. You're making a statement that's not correct first
12 of all, because Mike has always been on the case.
13 He's never been in and out.

14 Q. Do you remember Mary Sharp was your attorney?

15 A. Yes.

16 Q. And she represented you for, oh, I don't know, quite
17 some time, don't you think?

18 A. Since December.

19 Q. Pardon me?

20 A. Since December. December/January would be -- it
21 would be around that time.

22 Q. And do you remember through your attorney on March
23 the 4th I subpoenaed your text messages and cell
24 phone bills for that period?

25 A. Do I remember that?

1 Q. Uh-huh.

2 A. I think so.

3 Q. Pardon me?

4 A. Maybe.

5 **BY MR. COGGIN:**

6 I'm going to mark this into evidence.

7 **BY COMMISSIONER JAMES:**

8 Show it to the other side first.

9 **BY MR. COGGIN:**

10 Yes, okay.

11 **BY MR. KILLEN:**

12 Is this the subpoena we discussed at length at
13 the outset of this litigation?

14 **BY MR. COGGIN:**

15 No, I don't think so.

16 **BY COMMISSIONER JAMES:**

17 Are there any objections?

18 **BY THE WITNESS:**

19 Any objections?

20 **BY COMMISSIONER JAMES:**

21 Are there any objections?

22 **BY MR. MOGIL:**

23 No.

24 **BY MR. KILLEN:**

25 No.

1 **BY COMMISSIONER JAMES:**

2 All right. This is Claimant's 6.

3 (COURT REPORTER MARKS DOCUMENT DEFENDANT'S
4 EXHIBIT NUMBER 6, RETAINED IN COMMISSION FILE)

5 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

6 Q. Take a look at what's just been marked as
7 Plaintiff's Exhibit Number 6 for identification; do
8 you recognize that?

9 **BY COMMISSIONER JAMES:**

10 No, it's in evidence.

11 **BY MR. COGGIN:**

12 In evidence. I'm sorry. I keep saying
13 "identification."

14 **BY THE WITNESS:**

15 (Witness views document). Okay.

16 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. Do you see what I asked for?

18 A. Yes.

19 **BY THE WITNESS:**

20 Can you stand over there, please (indicating)?

21 **BY MR. COGGIN:**

22 Sure.

23 **BY THE WITNESS:**

24 Thank you. I just don't like people behind me.
25 I'm sorry, it's a military thing. I apologize.

1 **BY MR. MOBIL:**

2 Your Honor, this is also kind of also bizarre
3 that he's standing over the witness. I mean, in no
4 court does the attorney stand over the witness and
5 try to intimidate him into, you know, ---

6 **BY MR. COGGIN:**

7 I wasn't trying to intimidate him.

8 **BY THE WITNESS:**

9 I am not intimidated by all means. So don't
10 worry about that. That's not the issue.

11 **BY MR. COGGIN:**

12 Thank you.

13 **BY MR. KILLEN:**

14 He's pretty tall though, isn't he?

15 **BY THE WITNESS:**

16 It's just he's breathing and all that, and it
17 just like ---

18 **BY MR. COGGIN:**

19 Bad breath.

20 **BY THE WITNESS:**

21 --- I feel like -- yeah, I just ---

22 **BY COMMISSIONER JAMES:**

23 All right. Mr. Coggin, do you have a question?

24 **BY MR. COGGIN:**

25 Yes, I thought I asked him if he recognized

1 that.

2 **BY COMMISSIONER JAMES:**

3 Okay.

4 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

5 Q. One of the things that I asked you for, if you
6 recall, and I was very interested in looking at your
7 cell phone; do you remember that?

8 A. Yes, sir.

9 Q. And do you remember Mary and I had some problems
10 over that, and you never produced that; is that
11 correct?

12 A. I produced to my lawyers whatever I needed to
13 produce to them.

14 Q. Do you remember ---

15 A. The cell phone records, because I lost it. I lost
16 the cell phone.

17 Q. What happened?

18 A. I was in Cuba for the weekend with my cousins, and I
19 left it in a cab on the last day of my trip.

20 Q. Where, Havana, Cuba?

21 A. In Havana, Cuba, yes, sir.

22 Q. And we talked about -- didn't we talk about the
23 messages be allowed and so forth?

24 A. I -- I didn't have any storage cloud. I just got
25 storage cloud after I lost it, because I had some

1 important things that I needed too.

2 Q. And you lost that in a cab in Cuba; is that correct?

3 A. Yes, sir.

4 **BY MR. COGGIN:**

5 Your Honor, I may be very close to being done.

6 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

7 Q. A couple other things. Do you remember a young lady
8 by the name of Jamie that worked for you?

9 A. Jamie?

10 Q. Yes.

11 A. Jamie who. I have many Jamies.

12 Q. Jamie Willard?

13 A. Yes.

14 Q. Okay. And she had testified in deposition that you
15 had threatened to take papers out on her.

16 A. If she was saying it. Whatever she said, okay.

17 Q. Did you threaten that?

18 A. Threaten to take papers on her?

19 Q. Yes.

20 A. No, never said anything like that. Did I take
21 papers on her? So you say "papers." I'm -- I'm not
22 sure what you're referring to, "take papers on her."

23 Q. So, you're saying you didn't do that?

24 A. No, I didn't do anything, obviously.

25 Q. But didn't you say that if in fact she didn't back

1 out of testifying -- she was the young lady that was
2 in ---

3 A. I know exactly who you're talking about.

4 Q. That you were going to take papers out on her?

5 A. No, I never said that.

6 Q. Wasn't that the testimony that you gave in
7 deposition that Zack told her?

8 **BY MR. KILLEN:**

9 Objection, Commissioner. Now he's asking for
10 hearsay and referring to a deposition that's who
11 knows where.

12 **BY MR. COGGIN:**

13 I'm going to have to ask for a ruling of law
14 here, Your Honor, because I couldn't find the
15 answer. If we could go off, I want to ask about
16 that.

17 **BY COMMISSIONER JAMES:**

18 Well, she had testimony the other day.

19 **BY MR. COGGIN:**

20 Yes.

21 **BY COMMISSIONER JAMES:**

22 So, if you're going to refer to whatever the
23 testimony is and ask, then that's fine.

24 **BY MR. COGGIN:**

25 But I read excerpts of the deposition into the

1 record.

2 **BY COMMISSIONER JAMES:**

3 Well, then that's what she testified to
4 yesterday while you were reading the excerpts, if
5 that's one of the things that you're referring to.

6 **BY MR. COGGIN:**

7 "No" or "yes"? I'm sorry, I didn't hear you.

8 **BY COMMISSIONER JAMES:**

9 I'm not sure what you're asking me.

10 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

11 I'm asking you if -- we're on the topic now of
12 vale -- what would I say? I want to be careful what
13 I say here. Things that Amir said through Zack.
14 And I asked Zack about these things, and I read them
15 into record.

16 **BY COMMISSIONER JAMES:**

17 Okay. Then what ---

18 **BY MR. COGGIN:**

19 And I want to ask Amir about that.

20 **BY COMMISSIONER JAMES:**

21 Well, then go ahead and ask him about that.

22 **BY MR. COGGIN:**

23 That's what I want to know.

24 **BY COMMISSIONER JAMES:**

25 But they need to be -- they're from the

1 testimony that we had two days ago, correct?

2 **BY MR. COGGIN:**

3 Yes.

4 **BY COMMISSIONER JAMES:**

5 Okay. Then go from the testimony that we had
6 two days ago if that's what you're asking.

7 **BY MR. COGGIN:**

8 Okay. I'm not going to remember what went into
9 the testimony. I'll go as closely as I can.

10 **BY COMMISSIONER JAMES:**

11 Okay.

12 **BY MR. MOGIL:**

13 And Your Honor, just for the record, we'll
14 object to him not referring to the live testimony
15 and rather reading what happened at a deposition
16 three or four months ago. Because all the witnesses
17 have testified here at this proceeding.

18 **BY MR. COGGIN:**

19 No, this was all testimony yesterday, or the
20 day before.

21 **BY COMMISSIONER JAMES:**

22 Okay. If there's testimony from two days ago.
23 Otherwise, then all of these hearsay witnesses that
24 have been available so that the hearsay could come
25 in, are now no longer here. So ---

1 **BY MR. COGGIN:**

2 That's Rule 42. That's what I -- that's
3 exactly right. I just want to get it clear ---

4 **BY COMMISSIONER JAMES:**

5 But they're no longer here. So, yes, whatever
6 was referred to yesterday. If something else comes
7 up and -- well, go ahead. Just go ahead.

8 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

9 Q. And do you remember when I talked to Zack, and I
10 asked him if he was going to -- if you had told Zack
11 you were going to take papers out on Jamie if she
12 stayed in the case?

13 A. What was the question?

14 Q. Do you remember when I was doing -- when I was
15 interviewing Zack, doing the cross-examination --
16 direct examination of Zack, I asked him if he had
17 ever said anything about you taking papers out on
18 Jamie?

19 A. I don't remember.

20 Q. You don't remember?

21 **BY MR. COGGIN:**

22 On line 17, page 30 of Zack's deposition.

23 **BY THE WITNESS:**

24 We're talking about my testimony, or
25 deposition?

1 **BY MR. MOGIL:**

2 Yes, you're going back to the deposition.

3 **BY MR. COGGIN:**

4 Yes, that's what we read from at the ---

5 **BY THE WITNESS:**

6 Yeah, you asked me about the testimony. You
7 don't ask me about the deposition. So decide what
8 you want to ask me, because the deposition, I don't
9 know what he said. I don't remember.

10 **BY COMMISSIONER JAMES:**

11 Mr. Coggin, the witness is -- let me see how to
12 explain this. I understand that you may have been
13 reading from that yesterday ---

14 **BY MR. COGGIN:**

15 Yes.

16 **BY COMMISSIONER JAMES:**

17 --- when you asked Zack questions, but you need
18 to refer to the testimony from two days ago. We
19 need to be very clear as to what you're referring to
20 with regards ---

21 **BY MR. COGGIN:**

22 And I understand. That's the reason I asked
23 you.

24 **BY COMMISSIONER JAMES:**

25 --- with regards to any of the evidence.

1 **BY MR. COGGIN:**

2 The rules aren't that clear on this. I've read
3 it a number of times.

4 **BY COMMISSIONER JAMES:**

5 All right. Well, if you will go ahead and ask
6 the question, but if you ask the question from what
7 -- I mean, the testimony that was presented was two
8 days ago.

9 **BY MR. COGGIN:**

10 My question to Zack was, "Did Amir ever
11 threaten to take papers out on Jamie?" And he of
12 course said, "No," and I read for him Jamie's
13 testimony.

14 **BY MR. MOGIL:**

15 But, Your Honor, we are not impeaching Zack's
16 testimony right now. Zack is not on the stand. So
17 ---

18 **BY MR. COGGIN:**

19 We're impeaching his testimony (indicating).
20 You can use the testimony.

21 **BY MR. MOGIL:**

22 I'm sorry if I'm out of turn, but he can use
23 Mr. Bitton's testimony to impeach Mr. Bitton. He
24 can't use Zack's deposition testimony to impeach
25 Zack when Zack is no longer here, and he's been

1 cross-examined ---

2 **BY MR. COGGIN:**

3 You can use the deposition testimony of anybody
4 if it's been used in trial for the same trial.

5 **BY COMMISSIONER JAMES:**

6 That's been used -- okay, what page are you on?

7 **BY MR. COGGIN:**

8 I am on page 30 of the deposition testimony of
9 Jamie Willard.

10 **BY MR. MOGIL:**

11 Mr. Coggin, you were just reading from Zack's
12 deposition, so that's what we were just focusing on,
13 not Ms. Willard's testimony. Ms. Willard testified
14 in Court as well.

15 **BY MR. COGGIN:**

16 If you have time, I'll talk to you later about
17 it.

18 **BY COMMISSIONER JAMES:**

19 Let's go off record for a moment.

20 **OFF THE RECORD**

21 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

22 Q. Did you ever tell Zack you were going to take papers
23 out on Jamie?

24 A. No, I didn't.

25 Q. And didn't Zack say, ---

1 **BY MR. COGGIN:**

2 And this is on page 30, 31. I want to give you
3 a chance, because I don't know if you want me to do
4 this or not.

5 **BY COMMISSIONER JAMES:**

6 Just ask the question of the witness. You
7 don't ---

8 **BY MR. COGGIN:**

9 I already did. I asked him, "Did you ever --"

10 **BY COMMISSIONER JAMES:**

11 Right, but you don't need to refer to the
12 deposition page. Just go ahead and ask.

13 **BY MR. COGGIN:**

14 Well, I already asked him. I said, "Did you
15 ever threaten to take papers out on Jamie?"

16 **BY COMMISSIONER JAMES:**

17 Okay.

18 **BY THE WITNESS:**

19 I said, "no."

20 **BY MR. COGGIN:**

21 On page 30, line 23 of ---

22 **BY COMMISSIONER JAMES:**

23 But that's not his deposition. Do you have a
24 question of him?

25 **BY MR. COGGIN:**

1 If I have a question of another -- I'm
2 impeaching him from another deposition is what I'm
3 doing.

4 **BY COMMISSIONER JAMES:**

5 No. You can ask him about other testimony in
6 the deposition to impeach -- that's from the
7 testimony. His deposition is used to impeach him.

8 **BY MR. COGGIN:**

9 All right. I may be wrong. I'll go back and
10 read the rule. I think I'm correct. That rule is -
11 --

12 **BY COMMISSIONER JAMES:**

13 You can ask him questions about the other
14 witness. You don't have to read from the deposition
15 to do it. You don't have to give us the page and
16 line number.

17 **BY MR. COGGIN:**

18 Okay.

19 **BY COMMISSIONER JAMES:**

20 If you have a question from him -- for
21 instance, you've already asked him did he not
22 threaten to take out papers on Jamie, and he
23 answered it. Then you can go on with that question.
24 But ---

25 **BY MR. COGGIN:**

1 Okay.

2 **BY COMMISSIONER JAMES:**

3 --- if he's said other things to other people
4 or whatnot -- but I don't -- as far as the
5 deposition page numbers from -- we've had the
6 testimony from two days ago.

7 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

8 Q. Let's try it again. Did you ever tell Zack that you
9 were going to take papers out on Jamie?

10 A. No.

11 Q. Would Jamie have done anything that would take
12 papers out on her for?

13 A. I could have if I needed to, if I wanted to.

14 Q. What was it?

15 A. She stole money from me for a long time every day.

16 Q. Did she pay that back?

17 A. No. Hell, no.

18 Q. Didn't you keep \$300 off of her?

19 A. Which is just what I could have got out of her,
20 because that's the money she was working for, and
21 that's ---

22 Q. Was is you or Alon?

23 A. Alon.

24 Q. She told me she paid Alon.

25 A. She paid Alon.

1 Q. Okay. It wasn't you?

2 A. No, it wasn't me.

3 Q. She had an agreement with Alon, didn't she, ---

4 A. No.

5 Q. --- the case was closed?

6 A. No.

7 Q. Didn't Jamie give -- I don't need to go into that
8 now.

9 A. I don't do agreements with thieves.

10 Q. Pardon?

11 A. I don't do agreements with thieves.

12 Q. But you never threatened to take papers out on her?

13 A. If I wanted to, I would have a long time ago. Why
14 would I threaten her now?

15 Q. And did you ever tell Zack how he's supposed to
16 testify?

17 A. Never.

18 Q. And if Zack had said, "I'm going to say whatever
19 Amir told me to say," that didn't mean he'd talk to
20 you?

21 A. Is that a question?

22 Q. Yes.

23 A. What was the question?

24 Q. The question is, did Zack ever say "I'm going to do
25 whatever Amir tells me to do"?

1 A. I don't know what Zack said.

2 Q. And my next question is, did you ever tell Amir what
3 to say, ---

4 A. I'm Amir.

5 Q. --- or Zack what to say?

6 A. No, I never told anybody what to say, especially
7 Zack.

8 Q. Okay. We're almost done. A couple of things, Amir.
9 Your testimony is that Lynn came back from North
10 Carolina injured; is that correct?

11 A. Correct.

12 Q. And that you saw her the whole week that she was
13 injured; is that right?

14 A. No.

15 Q. You saw her how many times that week?

16 A. A few times that week, as far as I recall.

17 Q. And every time you saw her, she was injured?

18 A. Yes, sir.

19 Q. And she was worse on Saturday; is that right?

20 A. Yes.

21 Q. Okay. And each time you talked about it, you talked
22 about the ankle and the foot; is that right?

23 A. No.

24 Q. What did you say?

25 A. I said that all I can see is the band-aid all the

1 way -- wrapped all the way down to her foot. But I
2 couldn't determine what was injured because she was
3 covered.

4 Q. Would you agree that every witness you have came in
5 here said it was her ankle ---

6 A. No.

7 Q. --- and her foot?

8 A. They said that they can see the band-aid on her
9 foot, and they saw a boot. Which I never saw a boot
10 either. So I saw just the Ace bandage, and that's
11 about it.

12 Q. Amir, do you agree that she actually fell off the
13 ladder at your store?

14 A. I don't know.

15 Q. Is that your answer?

16 A. Yes, sir.

17 Q. And the fact that she broke eight -- twenty bones in
18 her foot did not take place while she was in the
19 course of employment?

20 A. I don't think so. Because the -- the -- the height
21 of she -- she claimed in the beginning she fell and
22 where you can climb up, I don't think you can break
23 20 places in your whatever part of your leg from
24 that height.

25 Q. My question to you is, did she or did she not break

1 her leg ---

2 A. You asked for my opinion. I gave you my opinion.

3 Q. Pardon?

4 A. You asked for my opinion. I gave you my opinion.

5 Q. And what is your opinion?

6 A. That from wherever she claims she fell off, I don't
7 think anybody can break any bones, not even a
8 fracture.

9 Q. What I'm trying to get at, I've been trying to get
10 at this whole afternoon, is it one injury or two
11 injuries?

12 A. I don't understand the question.

13 Q. Did she have one injury or two injuries that she
14 went to the hospital for?

15 A. I -- I have no idea. I don't understand your
16 question, and I don't know what she went to the
17 hospital for, you know. I wasn't there. I was told
18 that they called 9-1-1. Supposedly, she fell off
19 the ladder, that nobody saw her or heard her, and
20 that she had multiple fractures, the facts after.
21 You know, that's all I know.

22 Q. Well, it seems to me from looking at this that what
23 you're saying is that she had an injury in North
24 Carolina, and that's the injury she faked, and then
25 she went to the hospital with that; is that right?

1 A. I don't understand the question.

2 Q. Did she fake the fall from the ladder?

3 A. I don't know.

4 Q. Do you think she did?

5 A. Does my opinion really matter?

6 Q. Oh, I think it does.

7 A. That's what we're here for.

8 **BY MR. MOGIL:**

9 Objection.

10 **THE WITNESS RESUMES ANSWER:**

11 A. So, the judge will decide, not me.

12 **BY MR. MOGIL:**

13 Objection, Your Honor. The basis of the
14 objection is it is asking for a lay opinion, and I'm
15 not familiar with the Commission's practice, but I
16 don't want my client to be prejudiced in any way if
17 he states what his opinion is, because I don't know
18 that it's relevant. I don't want him to be
19 prejudiced if he says, you know -- and he's a fact
20 witness to this. He's not the judge. The employer
21 has taken the position that's set forth in the Rule
22 51 response that was filed back in November, and
23 then also in the APA submissions, and in the Rule
24 58. And then I believe the Fund may have agreed as
25 to what the employer's defenses are. Those defenses

1 were crafted by the attorneys. I don't want to get
2 anybody out of bounds here by stating an opinion
3 when it's already been stated what the decision --
4 you know, what the defense is.

5 **BY COMMISSIONER JAMES:**

6 Okay. You're not asking for a legal opinion.
7 Just go ahead and ask the question. I think the
8 greater part of it has already been asked and
9 answered.

10 **CROSS-EXAMINATION RESUMED BY MR. COGGIN:**

11 Q. Earlier in this deposition, or this hearing today, I
12 asked you to give me a "yes" or "no" answer; "Did
13 the injury she went to the hospital with take place
14 in North Carolina?" You said you don't know.

15 A. I don't know.

16 Q. And then I asked you "Was she injured in the storage
17 room of Harbour Town Surf Shop?" and your answer is
18 "I don't know."

19 A. Correct.

20 Q. Was she injured?

21 A. She was injured when she came back from North
22 Carolina, that's for sure. That's the only thing I
23 can tell you.

24 Q. That's the only thing you know?

25 A. Yeah.

1 **BY MR. COGGIN:**

2 Okay. I have no further questions. I greatly
3 appreciate spending time with you.

4 **BY THE WITNESS:**

5 Thank you.

6 **BY MR. COGGIN:**

7 Thank you.

8 **BY COMMISSIONER JAMES:**

9 Cross on behalf of the Fund.

10 **BY MR. KILLEN:**

11 Thank you, Commissioner.

12 **CROSS-EXAMINATION BY MR. KILLEN:**

13 Q. Mr. Bitton, I'm Tim Killen for the Uninsured
14 Employers' Fund. Do you know whether or not Ms.
15 Bridges was at work the day before she said she
16 fell?

17 A. I don't remember.

18 Q. If the schedule, which we've gone over, shows that
19 Lynn was off on Friday, June 15th, would she have
20 been at work?

21 A. If she's off, unless she got called on emergency or
22 anything like that, and she's willing to work, that
23 means she's off. That's why we ask for availability
24 to know when to schedule her.

25 Q. Okay. So, you don't know whether or not she injured

1 herself even worse on that Friday, do you?

2 A. I have no clue.

3 Q. Okay. But you do know is on that Saturday you told
4 her not to get on the ladder; is that correct?

5 A. Correct.

6 Q. Okay. And you told her not to get on a ladder
7 because of the condition of her leg, correct?

8 A. Correct.

9 Q. And so, when she got on that ladder, she was acting
10 contrary to explicit and clear instructions you had
11 given her; is that correct?

12 A. Correct.

13 Q. So, getting on the ladder that day wasn't part of
14 her job, was it?

15 A. No.

16 Q. And you close for two months for 30 to 60 days every
17 winter?

18 A. Every winter, right.

19 Q. So, nobody's getting paid during those two months?

20 A. No. It's like a ghost town. There's not even
21 customers. It's torturing the employees basically.

22 Q. And you have a number of businesses that you run,
23 correct?

24 A. Yes, sir.

25 Q. Okay. And do you have an LLC for each particular

1 entity?

2 A. Correct.

3 Q. And the entity that Ms. Bridges was working for is
4 Harbour Town Surf Shop, LLC, correct?

5 A. Correct.

6 Q. Okay. And you and Mr. Mentz are the members of that
7 LLC, correct?

8 A. Correct.

9 Q. And for most of the year ---

10 **BY MR. KILLEN:**

11 Well, thank you, that's all I have. I
12 appreciate it.

13 **BY COMMISSIONER JAMES:**

14 Any re-direct?

15 **BY MR. MOGIL:**

16 No, Your Honor.

17 **BY MR. COGGIN:**

18 Re-cross, or cross?

19 **BY COMMISSIONER JAMES:**

20 Okay.

21 **RE-CROSS EXAMINATION BY MR. COGGIN:**

22 Q. I showed you a photograph marked Plaintiff's Exhibit
23 Number 3. Did I give that back to you?

24 **BY COMMISSIONER JAMES:**

25 They're all up here.

1 **BY MR. COGGIN:**

2 It's the beach photograph.

3 **RE-CROSS EXAMINATION RESUMED BY MR. COGGIN:**

4 Q. I'm handing you what's been marked as Plaintiff's
5 Exhibit Number 3; what's the date on that?

6 A. (Witness views document). June 15, 2018.

7 Q. That's a Friday; is that right?

8 A. I don't know.

9 Q. Okay. That was a Friday, the accident took place on
10 Saturday; is that right? The last day before that
11 she was at work. I want you to look at that again.
12 The woman with the hat on, her daughter came in on
13 Wednesday and testified.

14 A. It wasn't her daughter.

15 Q. It was Chuck's daughter. Very good.

16 A. Her boyfriend's daughter.

17 Q. Yes, thank you, daughter-in-law. Oh, no, it's not
18 even that. It's Chuck's daughter.

19 A. Her boyfriend's daughter.

20 Q. Go ahead.

21 A. What's the question?

22 Q. You testified -- didn't she testify that that was
23 Lynn?

24 A. I don't remember what she testified. But, okay.

25 Q. If that was -- let's do it this way. If that was

1 Lynn, did she have any marks on her body at all?

2 A. If that was her, no. But ---

3 Q. But is it her?

4 A. --- is it her?

5 Q. I'm sorry, go ahead.

6 A. Is it her?

7 Q. If that was Lynn, ---

8 A. Is it her? My question, is it her, because I don't
9 recognize that woman. I know Lynn very good, and
10 I've seen her in pictures. It's blurry, and I don't
11 recognize that woman. So I cannot define what --
12 what determines who's that woman.

13 Q. If it was her, does she have any marks on her body?

14 A. But it's not her. So, if -- I cannot answer if it
15 was her. If it -- if -- if it's a different woman,
16 I can -- I -- from the picture, I can see blurry
17 legs, that they look normal. But that's ---

18 Q. Didn't Beth Anne McAlpine give testimony, and she
19 was cross-examined that she took that photograph?

20 **BY MR. MOGIL:**

21 Objection, Your Honor. This witness wasn't at
22 this scene. It doesn't matter what Beth said.
23 That's for Your Honor's determination. This
24 witness's observation of this picture is irrelevant
25 to this case.

1 **BY MR. KILLEN:**

2 Outside of the scope of my cross.

3 **BY COMMISSIONER JAMES:**

4 How is this within the scope of the cross?

5 **BY MR. COGGIN:**

6 I think it is within the scope of the cross
7 because they were talking about her injury. What
8 I'm trying to determine is this woman didn't have no
9 injuries whatsoever.

10 **BY MR. KILLEN:**

11 I didn't talk about her injuries.

12 **BY COMMISSIONER JAMES:**

13 There was -- I'm looking back -- hold on.
14 There was no questions with regards to her condition
15 prior to June 16th. So it's outside the scope of
16 the cross.

17 **BY MR. COGGIN:**

18 Thank you.

19 **BY MR. KILLEN:**

20 Thank you.

21 **RE-CROSS EXAMINATION RESUMED BY MR. COGGIN:**

22 Q. And I believe you said that she was under explicit
23 directions not to use the ladder; is that right?

24 A. Correct.

25 Q. And every other girl in the place was under explicit

1 instructions for that same day; is that correct?

2 A. No.

3 **BY MR. COGGIN:**

4 Give me a minute, Your Honor. I have to look
5 this up. I'm reading from page 58.

6 **BY MR. KILLEN:**

7 Same one you read it from before.

8 **BY MR. COGGIN:**

9 I'll start at line 19.

10 **RE-CROSS EXAMINATION RESUMED BY MR. COGGIN:**

11 Q. "I was like 'Zack, you're the guy here, you're my
12 family. Make sure no girls go on the ladder.
13 Especially, Lynn." You want to read that into the
14 testimony ---

15 A. I heard you.

16 Q. Do you agree you said that?

17 A. I agree I said that.

18 Q. So, you explicitly said all the girls; is that
19 right?

20 A. But I said specifically about Lynn I spoke about.
21 In general, we have respect to women. So we tend
22 not to let women do the heavy lifting and stuff like
23 that out of respect.

24 Q. Especially Lynn?

25 A. That's how I run my businesses. So that's -- that's

1 what I meant. Just be respectful for the ladies.
2 If there is anything that is heavy, or they need to
3 climb, don't let them. Be courteous. That's it.
4 But Lynn specifically, do not let her.

5 Q. Then you say "Make sure no girls go on the ladder"?

6 A. Correct.

7 Q. You did say that?

8 A. I did say that.

9 Q. Only -- today only; is that right, only today?

10 A. You're referring to what, only today?

11 Q. Girls going on the ladder?

12 A. Only today?

13 Q. Yes.

14 A. No, I didn't say that. I said that...

15 Q. "She's hurting, she's sick. Let her be with
16 customers only today."

17 A. I'm referring to Lynn, not to the girls. That's
18 what I asked, if you're referring to the girls.

19 Q. I'm referring to the ladder, only today?

20 A. You asked me a question about the girls, so be more
21 specific please ---

22 **BY THE WITNESS:**

23 'Cause I don't understand his question.

24 **RE-CROSS EXAMINATION RESUMED BY MR. COGGIN:**

25 Q. Lynn worked around the shop for quite some time,

1 didn't she?

2 A. No.

3 Q. And she used the ladder for quite a lot, didn't she?

4 A. No.

5 Q. She used the ladder probably two, three times a
6 week, right?

7 A. No.

8 Q. She never used the ladder at all?

9 A. She did, but not that is seen, or that I let her.

10 Q. Wasn't it her job to take the inventory on top of
11 the cooler?

12 A. No.

13 Q. Didn't she do that almost every week?

14 A. No, I did it. I did it, and I still do it until
15 today.

16 Q. No one except for you took that on top of the
17 cooler?

18 A. They're making a list of what they need that they
19 know, and then I finish the inventory of what I know
20 I need and check things off and so forth.

21 Q. What I'm asking you is how many times do you
22 remember Lynn being on the ladder?

23 A. I don't recall her ever on the ladder.

24 Q. And you made that proscription -- when did you make
25 that proscription? When did you say that she

1 couldn't go on the ladder specifically?

2 A. On that Saturday, June 16th. Specifically, I
3 instructed her not to go on the ladder.

4 Q. And that's what you said half an hour before this
5 accident took place?

6 A. Correct. No, I -- I said that maybe 30 minutes
7 after I left I got a call that she fell. Let's be
8 correct. The instruction, I'm not sure if it was --
9 because I was there for a few hours. I don't
10 remember if it was like -- you know, exactly what
11 the time, but I -- I give her instruction -- I did
12 some work, and then I give her instruction, then I
13 left. And I remember, 30 minutes after I got a call
14 that she got hurt, and that was -- that I remember
15 really good.

16 Q. And wasn't the conversation -- I'll do this one more
17 time, and then we're done. Wasn't the conversation
18 with Lynn is when she told you she was going to take
19 the inventory, you said, "Let Josh do it," or "Let
20 Zack do it"? Excuse me. I keep calling him Josh.

21 A. She didn't. We do inventory on Mondays.

22 Q. You said, "that's what ---"

23 A. So, there's no reason to do inventory on Sunday.

24 Q. Didn't you say "That's what Zack's here for"?

25 A. No -- no, I asked -- I told her anything she needs

1 specifically -- if she needs anything, to get Zack.
2 He can get her anything that she needs. Not to
3 climb on a ladder, not to go anywhere. Just be
4 behind the counter to greet customers and check
5 customers.

6 Q. And that's because she had injured her leg; is that
7 right?

8 A. Because I saw her in pain.

9 Q. And you deny that this is her picture where her leg
10 is perfectly ---

11 A. I just don't agree. I don't recognize the people in
12 that picture. That's all I said.

13 Q. Let me put it this way. If in fact this was Lynn,
14 would you say that perhaps in all this testimony,
15 yours is wrong?

16 **BY MR. KILLEN:**

17 Objection.

18 **BY MR. MOGIL:**

19 Objection.

20 **BY COMMISSIONER JAMES:**

21 Mr. Coggin, I'll look at the photograph.

22 **BY MR. COGGIN:**

23 What?

24 **BY COMMISSIONER JAMES:**

25 I'll look at the photograph.

1 **BY MR. COGGIN:**

2 Okay. I'm done anyway. That's all the
3 questions I have. Thank you very much.

4 You know what, Your Honor, I got the wrong one.

5 **BY COMMISSIONER JAMES:**

6 Well, we're going to count these before we
7 leave anyway. Anything further from this witness?

8 **BY MR. MOGIL:**

9 Well, just to re-direct on one specific point
10 that Mr. Coggin made, Your Honor. Not to belabor
11 this.

12 **RE-DIRECT EXAMINATION BY MR. MOGIL:**

13 Q. Mr. Bitton, did you give any other female employee
14 an express instruction not to get on the ladder?

15 A. On that day?

16 Q. On that day.

17 A. No.

18 Q. You mentioned it to Zack but to nobody else?

19 A. No, I gave all the girls instruction not to let Lynn
20 go on the ladder but not specifically to them. I
21 just told them that, you know, if they need anything
22 in general, there's a guy here. And out of respect,
23 you know, usually, that's the way I was raised. Out
24 of respect, if there's a guy, the guy does all the
25 heavy lifting, climbing or whatever.

1 Q. But you specifically instructed Lynn?

2 A. Lynn, and everybody else, not to let Lynn go on the
3 ladder or do any physical work.

4 **BY MR. MOGIL:**

5 That's it, Your Honor.

6 **BY MR. COGGIN:**

7 Your Honor, I have to impeach that statement.

8 **BY COMMISSIONER JAMES:**

9 Hold on a second. Do you have anything further
10 from this witness?

11 **BY MR. KILLEN:**

12 No, Your Honor.

13 **BY COMMISSIONER JAMES:**

14 All right.

15 **BY MR. COGGIN:**

16 Page 58.

17 **BY MR. KILLEN:**

18 Same.

19 **BY COMMISSIONER JAMES:**

20 We've read page 58.

21 **BY MR. COGGIN:**

22 Line 20.

23 **BY COMMISSIONER JAMES:**

24 Is this the same thing we've read three times?

25 **BY MR. COGGIN:**

1 He, Zack -- or excuse me, Mr. Bitton, just said
2 he told no other girl, and he's made that
3 proscription against no other girl. I just want to
4 emphasize that fact.

5 **BY MR. MOGIL:**

6 No, that's not what he -- Mr. Coggin, you
7 opened the door. He didn't go to any other girl and
8 say "Don't get on a ladder." He told Zack "Don't
9 let the girls get on the ladder."

10 **BY MR. KILLEN:**

11 Right.

12 **BY MR. MOGIL:**

13 That's what his deposition says. He didn't go
14 to anybody else other than Lynn and say "Don't get
15 on the ladder." That's what it says, Mr. Coggin.
16 And you're mischaracterizing it if you say anything
17 else. That doesn't mention what he said to anybody
18 else. It's his conversation with Zack.

19 **BY MR. COGGIN:**

20 "Zack, you're the guy here, you're my family.
21 Make sure no girls go on the ladder, especially
22 Lynn." I rest my case.

23 **BY COMMISSIONER JAMES:**

24 Okay.

25 **BY MR. COGGIN:**

1 If you can rest a case.

2 **BY COMMISSIONER JAMES:**

3 Any further witnesses on behalf of the
4 Employer/Defendant?

5 **BY MR. MOGIL:**

6 No, Your Honor.

7 **BY COMMISSIONER JAMES:**

8 Any witnesses on behalf of the Fund?

9 **BY MR. KILLEN:**

10 No, Your Honor.

11 **BY COMMISSIONER JAMES:**

12 Any rebuttal witnesses?

13 **BY MR. COGGIN:**

14 I have one rebuttal witness.

15 **BY COMMISSIONER JAMES:**

16 Okay. All right, is that the gentleman that's
17 outside?

18 **BY MR. COGGIN:**

19 Yes.

20 **BY THE WITNESS:**

21 Am I excused?

22 **BY COMMISSIONER JAMES:**

23 Yes.

24 **BY MR. COGGIN:**

25 Amir, thank you.

1 **BY THE WITNESS:**

2 Is there anyway I can take a break?

3 **BY COMMISSIONER JAMES:**

4 Certainly.

5 **OFF THE RECORD**

6 **BY COMMISSIONER JAMES:**

7 What is your last name, sir?

8 **BY THE WITNESS:**

9 Earley, E-a-r-l-e-y.

10 **BY COMMISSIONER JAMES:**

11 All right. If you would raise your right hand
12 for me please, sir?

13 * * * * * * * * * * * * * *

14 The witness was duly sworn to tell the truth, the
15 whole truth, and nothing but the truth concerning the
16 matter herein:

17 **CHARLES EARLEY,**

18 Being first duly sworn, testified on his oath as follows:

19 **BY COMMISSIONER JAMES:**

20 Your witness, sir.

21 **DIRECT EXAMINATION BY MR. COGGIN:**

22 Q. Mr. Early, I'm Gary Coggin, and I'm the attorney for
23 Lynn. You've already told the Court your full name.

24 Where are you from, Charles?

25 A. Originally, Pittsburgh, Pennsylvania.

1 Q. Where did you go to high school?

2 A. North Hills High School.

3 Q. What did you after -- what was your professional
4 life after high school -- what did you do after high
5 school?

6 A. Went in the -- well, let's see. I went to college
7 at Youngstown State University.

8 Q. When did you go into the Navy?

9 A. Three years later I went into the Navy for
10 approximately seven years. Air Navy, NAS, Norfolk,
11 Virginia.

12 Q. And your daughter testified yesterday; is that
13 correct?

14 A. Yeah.

15 Q. And she testified, we had a photograph, of your
16 longtime girlfriend, Lynn, in evidence; is that
17 correct?

18 **BY MR. MOGIL:**

19 Objection. He wasn't in the room when she
20 testified.

21 **BY MR. COGGIN:**

22 I'm sorry?

23 **BY MR. MOGIL:**

24 He should have no knowledge -- unless he's been
25 coached by the attorney or talked to by other

1 witnesses, he should have no knowledge of her
2 testimony.

3 **BY MR. COGGIN:**

4 He lives with his daughter.

5 **BY COMMISSIONER JAMES:**

6 All right. Well, Mr. Coggin, he wasn't in the
7 courtroom. You're referencing to what happened in
8 the courtroom.

9 **BY MR. COGGIN:**

10 No, that's not true. She came for the reason
11 as to ---

12 **BY MR. MOGIL:**

13 Objection.

14 **BY MR. COGGIN:**

15 --- turn certain evidence into ---

16 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. --- is that right?

18 **BY MR. MOGIL:**

19 Your Honor, I don't think he can tell this
20 witness what the other witness testified. That's
21 why we do sequestration.

22 **BY COMMISSIONER JAMES:**

23 Yes.

24 **BY MR. COGGIN:**

25 Let me ask it this way. That's fine.

DIRECT EXAMINATION RESUMED BY MR. COGGIN:

Q. Do you recognize this photograph? Let me show you what's been marked as Plaintiff's Exhibit Number 3 for identification.

BY COMMISSIONER JAMES:

No, it's Number 5 in evidence.

BY MR. COGGIN:

Five in evidence. I am so sorry.

DIRECT EXAMINATION RESUMED BY MR. COGGIN:

Q. Do you recognize that photograph?

A. (Witness views photograph). Yes.

Q. Do you recognize yourself in there?

A. No, I guess I don't.

Q. Okay. Is that the gentleman that's getting up in the background?

A. It is kind of -- oh, okay, I see myself now.

Q. Okay. Let me ask it this way. Do you see Lynn in that photograph at all?

A. Yes.

Q. Where is she?

A. She has a foot pad on, and she's on a lounge chair.

Q. She had a foot pad on; is that what you said?

A. Yeah, it's like a pill. Yeah.

Q. Look at her. Do you see any deficiencies in her body at all?

1 A. No -- no.

2 Q. Look at both her right and left leg; do you see any
3 deficiencies there?

4 A. (Witness complies). No.

5 Q. Okay. Now, what is your arrangement with Lynn, how
6 long have you known her?

7 A. It's been seven-and-a-half, eight years now.

8 Q. Okay. So, you're a companion for Lynn; is that
9 right?

10 A. Yes, significant other.

11 Q. Yes. And you live together?

12 A. Yes, we do.

13 Q. Okay. Did you go to North Carolina with her?

14 A. No, sir.

15 Q. And I'm talking for her grandson's graduation?

16 A. No, sir.

17 Q. Do you remember when she came back?

18 A. Several days later.

19 Q. Okay. What did she look like when she came back?

20 A. She looked good.

21 Q. Did she have any injuries?

22 A. No.

23 Q. Did she have anything wrong with her foot?

24 A. No.

25 Q. Did she have any wrapping on her foot?

1 A. No.

2 Q. Did she have a boot on her foot?

3 A. No.

4 Q. Was there any of her toes black and blue?

5 A. No.

6 Q. Did you see her walking around? I know she walks
7 for exercise. Did you see her walking?

8 A. On the beach. We walked maybe a thousand yards back
9 and forth. We did it all the time.

10 Q. Any noticeable limp at all?

11 A. No.

12 Q. Okay. Did she tell you anything about, let me see
13 if I got this right, a white fold-up table falling
14 off a, I think it was a truck onto her leg, or at a
15 party onto her leg?

16 A. No.

17 Q. Nothing like that at all?

18 A. No, sir.

19 Q. The entire time that she was at home following going
20 up to her grandson's graduation, did you at any time
21 see her -- did she appear sick at any time?

22 A. No.

23 Q. Did she appear injured at any time?

24 A. No.

25 Q. Was she limping or hobbling?

1 A. No.

2 Q. Did she by any chance go to the doctor or to the
3 hospital early that week when she came back?

4 A. No.

5 Q. Was there any evidence that she went to the hospital
6 in North Carolina?

7 A. None that I'm aware of.

8 Q. Okay. Do you recognize this photograph -- do you
9 recognize ---

10 A. (Witness views photograph). I do, yes.

11 Q. Do you know when it was taken? Look down at the
12 corner.

13 A. Yeah, it's June -- well, my daughter and family and
14 grandchildren were all there.

15 Q. That's your family?

16 A. Well, yes, by and large. They're kind of scattered
17 everywhere (indicating).

18 **BY MR. MOGIL:**

19 Your Honor, I'd ask the attorney not to coach
20 him and tell him what the date is. That's
21 completely inappropriate.

22 **BY COMMISSIONER JAMES:**

23 All right.

24 **BY MR. MOGIL:**

25 He can recognize when the picture was taken

1 from his personal knowledge ---

2 **BY COMMISSIONER JAMES:**

3 Sustained.

4 **BY MR. MOGIL:**

5 --- if he can recognize it.

6 **BY COMMISSIONER JAMES:**

7 Mr. Coggin, if you ---

8 **BY MR. MOGIL:**

9 The fact that there's a stamp on the picture
10 doesn't mean it's taken -- I can go into any
11 computer and put a stamp on anything. That's what
12 we call Photoshop. And I'm not saying that
13 happened, Your Honor, but he's not supposed to tell
14 the witness when a picture was taken. He's supposed
15 to ask the question.

16 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

17 Q. Let's go back to Lynn and the photograph. Does she
18 have any infirmities -- deformities, I'm sorry. Not
19 infirmities.

20 A. No.

21 Q. Is there any bandages on her legs?

22 A. No.

23 Q. Okay. It's been over a year since Lynn was injured.
24 You know that, don't you?

25 A. I'm sorry?

1 Q. It's been over a year since Lynn has been injured;
2 you know that?

3 A. Yes, I understand. Yes, I know that.

4 Q. And you live with her. What has her life been like?

5 A. Pretty dismal. She's been depressed. Imagine
6 yourself stuck in the house for over 13 months.
7 It's been hard on our friendship/relationship, et
8 cetera.

9 Q. What's her mental state been like?

10 A. Up and down -- up and down.

11 Q. How does she get around?

12 **BY MR. MOGIL:**

13 Objection, Your Honor. He's a rebuttal
14 witness. I don't know what he's rebutting. Ms.
15 Bridges was on the stand for two hours. She wasn't
16 asked about her mental state or anything. What's he
17 rebutting, what's he here for? His case in chief is
18 closed, Your Honor. This is entirely inappropriate.

19 **BY COMMISSIONER JAMES:**

20 Mr. Coggin, he is a rebuttal witness.

21 **BY MR. COGGIN:**

22 Okay. Did he ask her how she gets around -- I
23 asked how she got around before we started.

24 **BY MR. MOGIL:**

25 Your Honor, I'm going to object to anything

1 that's rebutting. It's statement he's rebutting.

2 What is going on here?

3 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

4 Q. My last question. How have you guys been getting by
5 -- how have you been getting by? Lynn's not
6 employed anymore. How are you guys getting by?

7 **BY MR. MOGIL:**

8 Objection, Your Honor. It's not that I don't
9 want to hear the answer, but what's it rebutting?
10 His case in chief closed. He brought him in as a
11 rebuttal witness. That's what he testified, stated
12 to the Court, and that's the only reason -- what's
13 he rebutting?

14 **BY COMMISSIONER JAMES:**

15 Mr. Coggin?

16 **BY MR. COGGIN:**

17 Well, actually, what we're rebutting, and I'm
18 trying to get into this, is ---

19 **BY COMMISSIONER JAMES:**

20 Because there wasn't -- I don't ---

21 **BY MR. COGGIN:**

22 --- how much she made. Everybody's making the
23 statement they worked 30-hours a week. I'm going --
24 -

25 **BY COMMISSIONER JAMES:**

1 Okay. If it's rebuttal for that purpose, but
2 after the fact, can you move back into the relevant
3 portion?

4 **BY MR. COGGIN:**

5 Well, I'm almost done, so it doesn't matter.

6 **BY COMMISSIONER JAMES:**

7 Okay. Just -- okay.

8 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

9 Q. You remember what Lynn -- how much she worked a
10 week?

11 A. Close to 80 hours most weeks.

12 Q. Uh-huh. And that was how many days a week?

13 A. Five to six.

14 Q. Uh-huh.

15 **BY MR. MOGIL:**

16 Your Honor, ---

17 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

18 Q. She ever call in sick?

19 **BY MR. MOGIL:**

20 Objection, Your Honor. Mr. Coggin is saying
21 "uh-huh." This is not a party. This is supposedly
22 a third-party witness that's being brought to rebut
23 something. It's clearly inappropriate for counsel
24 to agree with, nod, "uh-huh." And I usually
25 wouldn't object, but this is getting out of hand.

1 **BY MR. COGGIN:**

2 I apologize for saying that. I didn't know I
3 was doing that. Thank you for pointing that out,
4 Mike. I appreciate that.

5 **DIRECT EXAMINATION RESUMED BY MR. COGGIN:**

6 Q. How many hours a week did she work?

7 A. Seventy or eighty hours a week.

8 Q. Ever take any time off?

9 A. Rarely, if ever.

10 Q. Uh-huh.

11 **BY MR. COGGIN:**

12 I have no further questions. Thank you so much
13 for coming in.

14 **BY COMMISSIONER JAMES:**

15 Cross.

16 **BY MR. COGGIN:**

17 You might have something from Tim or Mike.

18 **BY MR. MOGIL:**

19 Your Honor, just a couple. Well, Your Honor,
20 before I ask it, I do think that the entire
21 testimony that wasn't related to rebutting is not --
22 shouldn't be admissible.

23 **CROSS-EXAMINATION BY MR. MOGIL:**

24 Q. But Mr., your last name is "Earley," right?

25 A. (Witness nods head up and down).

1 Q. You and I have met before, correct?

2 A. Oh, yeah.

3 Q. Right. And I think many years ago we may have even
4 talked about legal matters and stuff; is that
5 correct?

6 A. Yes.

7 Q. Probably five, ten years ago?

8 A. Longer.

9 Q. Yes, longer than that. Okay. So I just want to
10 make it clear. So you and I know each other. We've
11 seen each other out?

12 A. Oh, yeah.

13 Q. All right. Are you working now?

14 A. No.

15 Q. Are you retired?

16 A. You can say I was, I am.

17 Q. Are you collecting a pension?

18 A. Of sorts, yes.

19 Q. Like Social Security you mean?

20 A. Yes.

21 Q. Do you get a private pension as well?

22 A. It would be my, yes, investments over the years.

23 Q. Okay. So, do you contribute to the household income
24 of Ms. Bridges?

25 A. Absolutely.

1 Q. Okay. And I'm not going to go back in history. In
2 the last year, does anybody else live in the
3 household with you and Ms. Bridges?

4 A. Full time, no.

5 Q. Who else ---

6 A. Guests in and out, yes.

7 Q. But nobody else calls it their residence?

8 A. No.

9 Q. So, is there anybody else contributing to the
10 household income of Ms. Bridges other than you and
11 whatever she has?

12 A. Just me, yeah.

13 Q. Any other source of income coming in besides you and
14 whatever she has?

15 A. No.

16 **BY MR. MOGIL:**

17 Okay. No further questions, Your Honor.

18 **BY COMMISSIONER JAMES:**

19 All right.

20 **BY MR. COGGIN:**

21 I have one further question of what he brought
22 up.

23 **BY COMMISSIONER JAMES:**

24 Wait. Cross?

25 **BY MR. COGGIN:**

1 Tim has something. I'm sorry.

2 **BY MR. KILLEN:**

3 Thank you, Mr. Coggin. Thank you, Your Honor.

4 **BY MR. COGGIN:**

5 Thank you, Tim.

6 **CROSS-EXAMINATION BY MR. KILLEN:**

7 Q. Mr. Earley, my name is Tim Killen; I represent the
8 South Carolina Workers' Compensation Uninsured
9 Employers' Fund.

10 A. Hi, Tim, how are you?

11 Q. It's nice to meet you.

12 A. Same here.

13 Q. It took yourself a while to pick yourself out of
14 that picture, didn't it?

15 A. Yeah, it did. But now that I'm focused on me, I
16 don't believe I look that old number one, but that's
17 me.

18 Q. Okay. And how long have you lived with Ms. Bridges?

19 A. Seven years, approximately, plus maybe a couple of
20 months here or there.

21 Q. Okay. And you've been significant others that
22 entire time?

23 A. Say it again.

24 Q. She has been your significant other the entire time
25 you've lived with her?

- 1 A. Yes, sir.
- 2 Q. And you continue to live with her now?
- 3 A. Excuse me?
- 4 Q. You continue to live with her now?
- 5 A. Yes.
- 6 Q. Okay. So, y'all spent the night in the same house
7 last night; is that correct?
- 8 A. Yes, sir.
- 9 Q. You said she rarely if ever missed work, and you
10 also said she'd never been sick. That's not
11 entirely true, is it?
- 12 A. No, I didn't say that. Not the sick.
- 13 Q. Okay. Well, he asked you if she had ever been sick
14 or injured, and you said, "never."
- 15 A. Okay.
- 16 Q. Okay. But she has missed -- she did miss a lot of
17 time work due to her eye illness; is that correct?
- 18 A. I have no knowledge.
- 19 Q. But you live together?
- 20 A. I don't know the answer.
- 21 Q. So, you don't know when she was working, when she
22 wasn't working?
- 23 A. I didn't keep her schedule, and I didn't -- you
24 know, we were both working, so.
- 25 Q. Okay. So, "no," you don't know when she was working

1 and when she wasn't working?

2 A. From time to time, I probably did know.

3 Q. But she's not really stuck in the house now, is she?

4 A. Right now?

5 Q. Yes.

6 A. Are you kidding me?

7 Q. I'm asking you the question.

8 A. Yes, she is.

9 Q. She doesn't go to the pool and lay out?

10 A. Very rarely. But, yes, she has.

11 Q. Okay. Was she working in January and February of
12 2018?

13 A. January and February of 2018, yes, she was. Yes.

14 Q. Who was she working for in January and February of
15 2018?

16 A. Steve somebody maybe.

17 Q. When does the Harbour Town Surf Shop, the General
18 Store, does it ever close?

19 A. Oh, yeah.

20 Q. When does it close?

21 A. Close, period, you mean?

22 Q. Close for an extended period of time, not at the end
23 of the day.

24 A. I believe the month of January 2000 maybe '19.

25 **BY COMMISSIONER JAMES:**

1 Thank you. That's all I have.

2 **BY MR. COGGIN:**

3 I have one question I want to clear up.

4 **RE-DIRECT EXAMINATION BY MR. COGGIN:**

5 Q. You haven't worked over the past year? I'm talking
6 to you, Chuck.

7 A. Me?

8 Q. Yes.

9 A. No, I've worked.

10 Q. What have you done?

11 A. Everything from delivering pizzas to working at a
12 hardware store.

13 **BY MR. COGGIN:**

14 Okay. No further questions.

15 **BY MR. KILLEN:**

16 Nothing further.

17 **BY MR. COGGIN:**

18 Thank you very much.

19 **BY COMMISSIONER JAMES:**

20 All right. Any further witnesses?

21 **BY MR. COGGIN:**

22 None.

23 **BY MR. MOGIL:**

24 No witnesses from our side, Your Honor.

25 **BY MR. KILLEN:**

1 None from the Fund.

2 **BY COMMISSIONER JAMES:**

3 All right. Let's take a moment off record to
4 look at the evidence.

5 **OFF THE RECORD**

6 **BY COMMISSIONER JAMES:**

7 All right. We're back on record just for
8 purposes of going through the evidence as to what
9 was placed in the record because there are some --
10 based on the beginning of the trial, because some
11 things were not numbered. There are some things I
12 need to correct. So the Claimant handed up and was
13 submitted in as far as the APAs are not twenty-two-
14 hundred pages. It is page one through fourteen-
15 ninety. The Claimant will be uploading those
16 electronically. The Claimant handed up -- it's not
17 evidence, but handed up a summary sheet of the
18 medical evidence that he wanted to provide the
19 Commissioner for review. Those pages were numbered
20 to a sixty-two page subset. The subset is not going
21 to be made evidence. Instead, the Claimant will re-
22 number this summary sheet to match the fourteen-
23 ninety so that everybody can follow that.

24 The Defendant/Fund has placed into record pages
25 one through ten that was stated in the beginning.

1 That's correct. The Defendant/Employer has placed
2 in the record pages one through fifty-four. When I
3 counted them, they were not numbered. When I
4 counted I believe that there were fifty-five. But
5 after numbering them, there is fifty-four, and those
6 will be uploaded by the Defendant/Employer.

7 **BY MR. COGGIN:**

8 That's the Employer's APAs?

9 **BY COMMISSIONER JAMES:**

10 That's the APAs. We've not gotten to evidence
11 yet. These are just -- the Claimant wanted to
12 submit two pages, which were pictures of X-rays that
13 were submitted on a light screen. Those should be
14 within the APA. If they are -- as I indicated
15 before, I am not a physician, so these by themselves
16 -- but there was another objection to the fact that
17 they're not identified. And if there's any
18 identification on this, it's not present. So of
19 course the X-ray reports and everything should be
20 within these fourteen-hundred and ninety pages.
21 This seems to be extremely inclusive. If you wish
22 to proffer these and place them in a proffer,
23 there's a category electronically that you can take
24 these and place them in a proffer in the Commission
25 file.

1 **BY MR. COGGIN:**

2 Is it just those two that will be in the
3 proffer?

4 **BY COMMISSIONER JAMES:**

5 Based on what you said before, I'm assuming
6 that the X-ray report and all of these -- because
7 you have them in your summary package, are already
8 going to be in these twenty-two hundred pages.

9 **BY MR. COGGIN:**

10 Yes, they're in -- I was going to say, they're
11 in this.

12 **BY COMMISSIONER JAMES:**

13 Okay. If they're already in there, then that's
14 fine. Then I don't need them as a duplicate exhibit
15 anyway.

16 **BY MR. COGGIN:**

17 I need you to check first and see.

18 **BY COMMISSIONER JAMES:**

19 All right. The Defendants, particularly the
20 Defendant/Employer, has placed into evidence five
21 exhibits, and the Claimant has placed into evidence
22 six exhibits. The Commission will upload those.
23 There have been handed up two notations. Those are
24 not evidence. They're just two summary sheets where
25 the parties have presented various math off of a

1 exhibits that they've looked at, and so they
2 provided those as aid. They're not exhibits, and
3 they're not evidence. But just for the record, as
4 indicated previously, it's Claimant's summary of
5 Zack's schedule and a Defendant/Fund summary with
6 regards to wages and what the Defendant/Fund
7 believes the calculation of the average weekly wage
8 and the comp rate is.

9 Okay. I think that takes care of everything.
10 Does anybody have anything else with regards to what
11 went in?

12 **BY MR. COGGIN:**

13 Your Honor, I have a procedural question that's
14 in regarding the Form 52 that I handed up today.
15 Pursuant to regulation 52 ---

16 **BY COMMISSIONER JAMES:**

17 You mean 51?

18 **BY MR. COGGIN:**

19 Yes, Form 51, excuse me.

20 **BY COMMISSIONER JAMES:**

21 That's in the Commission file already.

22 **BY MR. COGGIN:**

23 Yes. I've made the argument that there should
24 have been no affirmative defenses in this case.

25 **BY COMMISSIONER JAMES:**

1 And that argument's already been perfected in
2 the beginning of the trial.

3 **BY MR. COGGIN:**

4 Pardon me?

5 **BY COMMISSIONER JAMES:**

6 It's already been perfected and placed on
7 record in the beginning.

8 **BY MR. COGGIN:**

9 That's what I wanted to know. Thank you.

10 **BY COMMISSIONER JAMES:**

11 Okay. All right.

12 **BY MR. MOGIL:**

13 And Your Honor, I believe that we really didn't
14 get into detail. I did object to the -- even though
15 I don't know if it's relevant based on Your Honor's
16 rulings that the employer's 51 was late in the
17 context of that it was filed nine months ago, and
18 you said it didn't matter. You said, "That that's
19 not a defense." But I just did make that argument.

20 **BY COMMISSIONER JAMES:**

21 We had a pretrial earlier. That part was not
22 on the record with regards to what was affirmative
23 defense or not. That was during the pretrial. I
24 only stated when we went on record what the
25 positions were, and the position of Mr. Coggin, ---

1 **BY MR. COGGIN:**

2 Yes, that's fine. Yes.

3 **BY COMMISSIONER JAMES:**

4 --- and the position of the Fund and also the
5 position that you just stated.

6 **BY MR. MOGIL:**

7 Okay.

8 **BY COMMISSIONER JAMES:**

9 Okay. All right.

10 **BY MR. COGGIN:**

11 Your Honor, the only other thing I have is that
12 I have also in my Form 58, I think I had six
13 questions or something like that. The last question
14 had to do with the hundred and fifty-day rule. I
15 cannot tell you what the number is on that one. The
16 idea being that the employer has a hundred and fifty
17 days to contest whether or not they should receive
18 anymore compensation. And by the same token, in a
19 case-called Jury, it's come up that if they don't
20 contest within a hundred and fifty days, also they
21 give away their right to deny compensation, and I
22 have that in there. And I just wanted to make sure
23 that was there also.

24 **BY COMMISSIONER JAMES:**

25 All right.

1 **BY MR. KILLEN:**

2 Commissioner, I would just like to state that
3 he's talking about the regulations.

4 **BY MR. COGGIN:**

5 Speak up, Tim, I can't hear you.

6 **BY MR. KILLEN:**

7 He's referring to accepted cases and ignoring
8 the general denial of the regulation.

9 **BY MR. COGGIN:**

10 I didn't hear any of that.

11 **BY MR. KILLEN:**

12 What you're referring to refers to accepted
13 cases. They have a hundred and fifty days to deny
14 the case without a hearing, the stop payment of
15 TTDs. It's not accepted cases. It's denied cases.
16 And even if you're correct on the Form 51, or Forms
17 51, the general denial reg kicks in.

18 **BY MR. COGGIN:**

19 I do not agree with you. We'll have to talk
20 about that.

21 **BY COMMISSIONER JAMES:**

22 All right. I believe that's everybody's
23 position on the record.

24 **BY MR. COGGIN:**

25 That is a position.

1 **BY COMMISSIONER JAMES:**

2 So that concludes this hearing.

3 **(THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS**
4 **CONCLUDED AT THE HOUR OF 3:47 P.M.)**

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CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1808344

EMPLOYEE/CLAIMANT: NAOMI LYNN BRIDGES

EMPLOYER: HARBOUR TOWN SURF SHOP, LLC

INSURER: (UNINSURED)

I, SHEILA SMALL, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING **202** PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF **NAOMI LYNN BRIDGES** TAKEN ON THE 26TH DAY OF JULY, 2019.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND THIS 7TH DAY OF NOVEMBER, 2019.

SHEILA SMALL
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3-11-2029

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1808344

Naomi L. Bridges,)
)
 Claimant,)
)
 v.)
)
 Harbour Town Surf Shop, LLC,)
)
 Employer,)
)
 and)
)
 South Carolina Uninsured)
 Employer's Fund,)
)
)
 Carrier/Defendants.)
 -----)

FULL COMMISSION HEARING

Monday, January 24, 2022
2:47 p.m. - 3:13 p.m.

The Full Commission Hearing was heard virtually before Commissioner Michael Campbell, II, Gene McCaskill, and T. Scott Beck at the Workers' Compensation Commission, 133 Main Street, Panel A, Columbia, South Carolina on the 24th day of January, 2022, before Amber Scarborough, Court Reporter and Notary Public in and for the State of South Carolina.



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Bridges, N. 2141

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Also present:
Naomi Bridges, via ZOOM

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EXHIBITS

(No Exhibits were marked at this hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



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CALL TO ORDER:

MADAME COURT REPORTER: Today is January 24th, 2022.

This is South Carolina Workers' Compensation Case Number 1808344. This is the case of Naomi L. Bridges versus Harbour Town Surf Shop, LLC and SCUEF. The Appellant is the Claimant, represented by Warren Johnson and Josh Fester. The Respondent is represented by Michael Mogil for the Employer and Timothy Killen for the SCUEF. Each side is allowed ten minutes for oral argument and the Appellate three minutes in reply. You are requested to argue the grounds of exception and stay within the record. And I think we had said seven minutes for Killen and three minutes Mr. Mogil.

COMMISSIONER BECK: That's correct.

Mr. Fester, glad to hear from you, sir.

APPELLANT'S POSITION:

MR. FESTER: Yes, sir. Again, my name is Josh Fester and I represent the Claimant, Ms. Naomi Bridges, in this case. Before I get too far in the weeds of our legal argument today I just wanted to briefly cover basic facts here. Ms. Bridges was employed by Harbour Town Surf Shop on June 16th, 2018, the date of her injury, and



1 at the hearing the Employer stipulated they
2 were subject to the Act and that is at all
3 times relevant to this case, and that the
4 owner, the Employer, admitted that they were
5 not insured in compliance with the Act at the
6 time of the accident. On that date Ms. Bridges
7 climbed the ladder to retrieve some items, I
8 believe it was some candy in this case, to
9 restock. And the evidence of record is that
10 she was a shop clerk and part of her regular
11 duties was restocking shelves, getting out
12 inventory for her customers. Ms. Bridges fell
13 from the ladder and shattered, fractured her
14 tibial plateau on the left knee. At the
15 hearing -- well, the Single Commissioner denied
16 this case primarily due to the injury fell
17 outside of the scope of employment due to clear
18 and explicit instructions not to climb the
19 ladder on the date of her injury. That was a
20 Single Commissioner's findings. And this was
21 based on testimony from the Employer (technical
22 break in audio) self-conflicting and self-
23 contradicting and also from the Claimant. My
24 client testified that she understood that Mr.
25 Benton, the owner of the -- Employer, told her



1 not to use a ladder to get on top of a cooler
2 to reach things, and so that was her
3 understanding. But based on these findings
4 Commissioner James found that this was outside
5 of the scope of her employment, this injury,
6 and also found an average weekly wage and
7 compensation rate based solely upon pay records
8 while there was other evidence and testimony
9 that she worked far in excess of what was on
10 her pay stubs and ---

11 **COMMISSIONER BECK:** Mr. Fester, wasn't she given the
12 opportunity to provide that evidence and failed
13 to do so?

14 **MR. FESTER:** She was. She did not. She was not
15 able to for some reason or another produce the
16 tax records within the two week period. And I
17 can't speak to that and quite frankly I wasn't
18 the -- I didn't represent her at that time, but
19 there is significant testimony of record from
20 her other employees and they were frequently
21 paid under the counter. Even a witness that
22 was supposed to be friendly to the Employer
23 stated that he was paid in cash frequently and
24 in kind and so this was common. And then there
25 were other schedules that showed her working



1 well in excess of 40 hours a week frequently
2 especially during, you know, the busy season
3 for Hilton Head which is spring and summer. So
4 but the -- I guess the first issue is that the
5 Commissioner applied the wrong standard, wrong
6 legal standard here holding that ---

7 **COMMISSIONER MCCASKILL:** Can I ask you to hold on
8 just one second?

9 **MR. FESTER:** Sure.

10 **COMMISSIONER MCCASKILL:** Mr. Chairman, Lynn's Ipad,
11 that's the title of the device, is in the
12 waiting room and Jeanie wants to know should
13 she let that person in.

14 **MR. FESTER:** That is Ms. Bridges.

15 **COMMISSIONER BECK:** Would you like Ms. Bridges to
16 attend?

17 **MR. FESTER:** Yes, Your Honor.

18 **COMMISSIONER BECK:** Let her go -- let her in Jean.

19 **MR. FESTER:** Sorry, I got ahead of myself. I
20 thought she was already in the mix here.

21 **COMMISSIONER BECK:** All right, Mr. Fester, we're
22 going to go ahead and resume your time.

23 **MR. FESTER:** All right. So the first issue is that
24 the Single Commissioner applied the wrong
25 standard. The burden of showing an exception



1 or exclusions to the Act, as in this case that
2 the injury fell outside of the course and scope
3 of her employment, is always on the Employer.
4 That is an exception or exclusion and those are
5 to be strictly construed. It's an affirmative
6 defense. And so the Commissioner applied the
7 wrong the standard here, but let's assume that,
8 you know, she had held the Defendant and the
9 Employer to their burden here, the Employer
10 just did not prove that exclusion and the
11 Commissioner erred in the finding including
12 that the Claimant was removed from the scope of
13 her employment. So we look at three things in
14 looking at an exception or exclusion in South
15 Carolina. And that's violation of an express
16 order, one. Second, that that order is clear
17 or that permission was clear and explicit. And
18 three, that the award goes to the sphere of
19 employment itself and not the conduct or
20 method. Professor Larson phrases it as method
21 versus the ultimate thing being done. I might
22 phrase it the how versus the what.

23 **COMMISSIONER BECK:** Hang on a second, Ms. Fester.
24 Mr. Killen, could you mute yourself. We're
25 getting some -- a lot of background noise



1 coming in and it's sort of conflicting with our
2 ability to hear Mr. Fester.

3 **MR. KILLEN:** Apologies. I will surely do so.

4 **COMMISSIONER BECK:** Thank you, sir. All right, Mr.
5 Fester.

6 **MR. FESTER:** Yes, Your Honor. And so here we look
7 first to whether there was an expressed order
8 and whether that was clear and explicit. And
9 it's our position that it's certainly not.
10 Greater weight of the evidence does not support
11 a clear and explicit pro-admission here. We
12 have conflicting testimony from the Employer
13 himself who says -- and it depends on where
14 we're at in the hearing or in his deposition or
15 what time of day it is or how he feels, but at
16 one point he says cleanings, no climbing, no
17 ladder, no physical work to Ms. Bridges. At
18 another point he says you got Zack, who's a co-
19 employee, if you need to climb on the ladder go
20 ask Zack. He'll do anything and there's the
21 rest of the girls for any other chores. And at
22 another point he says no girls on the ladder.
23 So at one point in the hearing he feels a
24 little bit more chivalrist for some reason but
25 there's conflicting testimony about that. And



1 based on these inconsistencies greater weight
2 of the evidence can't support a finding that
3 there was a clear and explicit prohibition.
4 But, let's assume for the sake of argument that
5 we find here that there was a clear and
6 explicit prohibition, no climbing on the
7 ladder. That in of itself is not enough to get
8 us outside of the scope of employment because
9 that -- as I said earlier, that is conduct with
10 the sphere of employment or the how you do
11 something versus what you're doing and so that
12 doesn't get us there. That doesn't get the
13 Defense there and that was respectively just a
14 nuance of things that was missed at the Single
15 Commission. And so again, don't climb on the
16 ladder, it's just not enough to get us there.
17 It's her regular job duties. I mean,
18 undisputed facts here are her regular job
19 duties were stocking shelves, putting inventory
20 out, and that is a manner of doing something.
21 Another distinction between this and the cases
22 that are cited in I think both of our briefs
23 and in this case and in the ones where they
24 define that an Employee's injury is outside of
25 the scope of her employment is -- is in both



1 the *Black v. Town of Springfield* and the *Bi-Lo*
2 case that the courts made the point of showing
3 a pattern of telling you the injured Employee
4 not to do it several times over the course of
5 a lot of time. It conveniently -- Ms. Bridges
6 was allegedly told not to get on the ladder the
7 day she was injured, so it's a pretty big
8 distinction. I think it goes to more whether
9 there was a clear and explicit prohibition
10 rather than, you know, the method versus scope,
11 but it is a distinction. And also the
12 Commissioner erred in finding that the very
13 weight of the evidence supported that Ms.
14 Bridges suffered a pre-existing left leg injury
15 prior to the date of the workplace accident.
16 The only evidence of record is lay testimony
17 from her Employees that she might have had a
18 wrap around her leg. No medical evidenced at
19 all, I mean, any pre-existing left leg injury.
20 You know, in *Burnett v. City of Greenville* the
21 Court said that a Commissioner attempting to
22 interpret an MRI regarding a change in
23 condition is speculative, it's conjecture
24 surmised. This is even more so. We have lay
25 testimony that she might have had a wrap around



1 the leg that day. And while it wasn't clear
2 from the order or the Employer's testimony, I
3 am glad that at least in briefing they take the
4 position that the pre-existing left leg injury
5 wasn't the same as the date, and I think it's
6 painfully obvious that a fracture of the tibial
7 plateau that requires an ambulance ride, it
8 couldn't have pre-existed if she showed up to
9 work that day. But there's just absolutely no
10 support at all for a pre-existing injury that
11 day. And lastly, you went into a bit, but I
12 just find the fact that the Single Commissioner
13 took the word of this Employer who has -- for
14 Hilton Head's a comparatively large employer.
15 It has 15 plus employees, no workers' comp
16 coverage, claim did not know he needed workers'
17 comp coverage in the hearing and that somehow
18 we're supposed to place more weight on his word
19 versus my client's word. And that just, it
20 seemed upside down to me when this guy has
21 every reason to try and get out of, you know,
22 paying, you know, fines and comp --
23 substantial compensation in this case. So as
24 to the wage issue, I think that, you know,
25 greater weight of the evidence shouldn't lie in



1 Mr. Benton's testimony. But I think I'm about
2 out of time -

3 **COMMISSIONER BECK:** You are exactly out of time.
4 Thank you very much, Mr. Fester. Mr. Killen,
5 seven minutes, sir.

6 **RESPONDENT'S POSITION (SCUEF):**

7 **MR. KILLEN:** Thank you, Mr. Chairman. May it please
8 the Commission. Tim Killen here for the South
9 Carolina Workers' Compensation Uninsured
10 Employer's Fund. The way Claimant's counsel
11 phrased his arguments it was as if you have
12 only two witnesses in this case. You have the
13 Claimant and you have the Employer but that's
14 not in fact the case. I think we had eight or
15 nine different witnesses in this case and I
16 should have counted them, but it's all in
17 there. And, I would argue against any
18 statement that Mr. Benton's testimony was
19 contradictory. He was very clear throughout
20 the entire time that his -- he did in fact tell
21 her not to get on the ladder. It's very clear.
22 And this testimony is supported by the other
23 witnesses, and these include LaTisha Rodriguez
24 who was a former Employee. She wasn't working
25 for the Employer at the time of the injury.



1 She told her -- she testified that Benton told
2 the Claimant not to use the ladder due to her
3 already injured foot. Ms. Rodriguez testified
4 that the Claimant came to work that day with an
5 injured foot that she injured it in North
6 Carolina when the table fell on it. That was
7 the story that she told many different
8 witnesses and they all testified to it. And
9 Ms. Rodriguez importantly testified that it
10 wasn't limited to certain tasks. I mean, the
11 instruction was specific, it was not to get on
12 a ladder. And then you have Zack Hendry [sic],
13 he was family friend of the Employer, that's
14 admitted. But he testified that the Claimant
15 was told not to get on the ladder because of
16 her already injured foot, which she came to
17 work with an injured foot. There's Raven
18 Baden, this is -- she's no longer -- she was no
19 longer an Employee of the Employer at the time
20 of the accident either. She testified that the
21 Claimant was told not to get on the ladder
22 because of her already injured foot. This
23 makes sense. Of course he didn't tell her not
24 to do it previously because she hadn't come to
25 work with an injured foot previously. Raven



1 Baden testified. She contradicted the
2 Claimant's testimony on how far she actually
3 fell. And Raven's testimony is supported by
4 the actual EMS records and the initial hospital
5 records. Claimant testified she fell much
6 further than she did in the records than she
7 did when she -- when Raven Baden, who was there
8 present at the scene. And Ms. Baden was
9 instructed or asked by the Claimant to call the
10 Claimant's long time companion Mr. Chuck Early
11 and tell him that she got hurt. As she
12 testified that when she talked to Chuck Early
13 on the phone Mr. Early got mad at the Claimant
14 because he had previously told the Claimant not
15 to call the ambulance and she called an
16 ambulance. I don't know whether Mr. Early was
17 psychic or ... Anyway, and you have Amir
18 Benton, who is the Employer, he testified it
19 was clear and explicit instructions not to get
20 on a ladder. And Christine Sweeny also no
21 longer an Employee of the Employer at the time
22 of the hearing. She testified about Claimant's
23 prior injuries on the date of accident. Though
24 she wasn't present to hear the instructions but
25 she did know that the Claimant came to work



1 with injuries to her left leg. And I just want
2 to say before I forget that the Commissioner's
3 finding of fact number eight is about the prior
4 condition. It's not -- she doesn't say -- this
5 is what she said, that the Claimant suffered an
6 injury to the left leg prior to June 16th, 2018
7 and she is suffering from this injury prior to
8 her alleged fall. And then the second sentence
9 of the finding of fact is, this finding is
10 supported by the witnesses' testimony and
11 comports with the admitted instructions given
12 for her not to climb the ladder. It's not --
13 the Commissioner never found it was a pre-
14 existing condition that the Claimant was
15 suffering from. I don't know what it was. We
16 don't -- it's kind of -- it's immaterial. It
17 just -- the reason that she found it was
18 justified was the clear and explicit
19 instructions for the Claimant not to climb the
20 ladder. Your other witnesses were ---

21 **COMMISSIONER MCCASKILL:** Mr. Killen?

22 **MR. KILLEN:** Yes, sir.

23 **COMMISSIONER MCCASKILL:** This injury to her foot now
24 all these folks testifying but there are no
25 medical records in evidence about that are



1 there?

2 **MR. KILLEN:** That's correct, Your Honor, because the
3 injury happened in North Carolina. We were
4 unable to get any medical records from North
5 Carolina to say that there was. Even if she
6 didn't go to the doctor the fact is that she
7 came to work with a -- and these people
8 testified and multiple witnesses testified that
9 she came to work with her foot wrapped.

10 **COMMISSIONER MCCASKILL:** I understand that but my
11 question was, which you answered, there's been
12 no medical records as to that foot injury?

13 **MR. KILLEN:** That's correct.

14 **COMMISSIONER MCCASKILL:** All right. I'm sorry. Go
15 ahead.

16 **MR. KILLEN:** And would say that the Single
17 Commissioner didn't make any findings about her
18 medical condition, just simply that she had a
19 an injury at the time on the day of the
20 accident preceding the alleged fall. Other
21 witnesses were called by the Claimant. We have
22 Chuck Early, the Claimant's boyfriend who lived
23 with the Claimant for seven years. He wasn't
24 present when the Claimant was instructed not to
25 get on the ladder. He testified he didn't keep



1 the Claimant's schedule so he didn't know how
2 often she worked. She testified she worked 80-
3 90 hours a week. Everybody else testified they
4 worked 30 hours a week or less except for Jamie
5 Willard Hudson, who the claimant also testified
6 she said she worked 40 hours a week. This is
7 still contradictory of the Claimant's testimony
8 that she worked double that. When Jamie
9 Willard Hudson was fired by the Employer prior
10 to this testimony she was fired for theft. She
11 admitted it. She didn't deny that it happened.
12 She was represented by the Claimant's attorney
13 in a separate incident. Claimant's attorney
14 didn't charge her for it and she testified.
15 But she still testifies she's still
16 contradicting the Claimant's testimony on the
17 number of hours and she wasn't working on the
18 date of accident so she didn't hear any
19 instructions. And then you have the Claimant's
20 -- well Mr. Early's daughter who was visiting
21 from Ohio that weekend. She wasn't present on
22 the date of accident. She didn't have any
23 information on that instruction. So all we
24 have are the Claimant and these many other
25 multiple former Employees, one current



1 employee, and the Employer and the -- all the
2 Employees' testimony about this are very
3 similar. And you'll see that if you read the
4 two day trial transcript, I mean, it's all in
5 there and it should be laid out very well in
6 our briefs.

7 **COMMISSIONER BECK:** Mr. Killen, your time's expired,
8 sir.

9 **MR. KILLEN:** Thank you, Commissioner.

10 **COMMISSIONER BECK:** Mr. Mogil. You gotta unmute
11 yourself, sir.

12 **RESPONDENT'S POSITION (EMPLOYER):**

13 **MR. MOGIL:** Okay. Thank you, Your Honor. I'm
14 Michael Mogil. I -- may it please the Court,
15 Michael Mogil. I also tried the case along
16 with Tim. I don't -- I join in his brief and
17 his argument. I would just point out, Your
18 Honor, that there's not actual evidence other
19 than her testimony that she fell from a ladder.
20 I believe she told one of the Employees that
21 she fell from the second rung of a ladder. No
22 Employee saw her fall. Mr. Killen noted that
23 she communicated with her boyfriend who was
24 upset that she had called the ambulance before
25 she called him. But nobody saw her fall and



1 she's alleging a pretty devastating injury to
2 fall from the second rung of the ladder
3 besides so it's not taken as fact that she
4 actually fell. All the witnesses -- she
5 acknowledged, I believe that there was a
6 meeting before work, but all the witnesses
7 testified similar that there was a meeting
8 before work and due to her obvious injury she
9 was instructed not to climb or do anything, not
10 to climb on anything including the ladder.
11 Finally, Your Honor, I point out that this
12 Employee had just come back from vacation,
13 that's the week before that week. This was the
14 week she came back and she hadn't even been
15 working for this Employer for a large gap of
16 time after she quit to work for a competitor.
17 So there was a four to five to six month gap
18 before she came back and then took this
19 vacation and then came back. So when she's
20 testifying about all the hours she worked it
21 was long before this incident occurred.

22 **COMMISSIONER BECK:** All right. Thank you, sir. Mr.
23 Fester you have three minutes in reply, sir.

24 **APPELLANT'S REPLY:**

25 **MR. FESTER:** Yes, sir. I guess to the -- I'm a bit



1 surprised by the argument of Employer's counsel
2 to the extent that they're arguing or implying
3 this injury is somehow fake. I just needed to
4 address this. There is no, again, no medical
5 evidence of a pre-existing injury. To have a
6 pre-existing condition there needs to be
7 evidence of a condition. Secondly, that ---

8 **COMMISSIONER BECK:** Well, there's not evidence --
9 there's not medical evidence, but there is
10 evidence.

11 **MR. FESTER:** There is. And to that point there's
12 evidence and there's lay testimony that she had
13 a wrap around her foot. We're talking about
14 a knee injury. This is tibial plateau. It was
15 so devastating. I mean, I'm sure you've seen
16 ample of these in your tenure. This is a
17 devastating injury to the knee. A complex,
18 traumatic fracture of that knee that she
19 couldn't have hobbled in there. Common sense
20 would dictate that she couldn't have hobbled in
21 there that day and tried to work prior to this.
22 And so I would just address to the extent that
23 counsel for the Employer is arguing that this
24 is -- this was somehow staged I think is absurd
25 just all on the face that -- on the face and



1 the evidence we have here. And that would
2 essentially conclude what I have other than,
3 again, I would just point out and I don't
4 believe that counsel for the UEF even addressed
5 it, but there's a difference between method
6 versus or conduct within the sphere of
7 Employment and the Employment itself. So even
8 if this whole Commission finds that there was
9 a expressed prohibition, a clear and explicit
10 prohibition not to get on the ladder, that
11 legally doesn't get us there to get us out of
12 the scope of Employment. And that's supported
13 by *Johnson versus Merchants*, 80 year old case
14 and all of it's progeny, literally every case
15 after Johnson. It's a 80 year precedent in
16 this state. While nuanced and a bit
17 complicated that is the law in South Carolina.
18 You know, we would just ask that this
19 Commission reverse on those grounds that at the
20 very least.

21 **COMMISSIONER BECK:** All right. Thank you very much.
22 Gentlemen, it's good to see you. That will
23 conclude this proceeding. You have a great
24 afternoon.

25 **(There being nothing further, the hearing concluded**



1 at 3:13 p.m.)
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Jan 26 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

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

Naomi Lynn Bridges.....Claimant, Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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January 26, 2022

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE COMMISSION ERRED IN FAILING TO FIND AND CONCLUDE THAT IT WAS DEFENDANTS' BURDEN OF SHOWING THAT THE CLAIMANT WAS REMOVED FROM THE SCOPE OF HER EMPLOYMENT AT THE TIME OF HER WORKPLACE ACCIDENT.
2. WHETHER THE COMMISSION ERRED IN FINDING AND CONCLUDING THAT THE GREATER WEIGHT OF THE EVIDENCE ESTABLISHED THAT THE CLAIMANT LEFT THE SPHERE OF HER EMPLOYMENT BY VIOLATING SPECIFIC ORDERS NOT TO CLIMB THE LADDER.
3. WHETHER THE COMMISSION ERRED IN FINDING THAT THE GREATER WEIGHT OF THE EVIDENCE SUPPORTED THAT THE CLAIMANT SUFFERED FROM A PRE-EXISTING INJURY OR CONDITION AND THAT SHE FAILED TO MEET HER BURDEN OF PROVING SHE HAD SUFFERED AN INJURY IN THE COURSE AND SCOPE OF HER EMPLOYMENT.
4. WHETHER THE COMMISSION ERRED IN DETERMINING THE CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

STATEMENT OF THE CASE

This case arose out of a workplace incident 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, the Claimant sought a determination of compensability for the injury to her left leg, which occurred as a result of her workplace accident. Claimant 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 the Claimant 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 the Claimant 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 the Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) were \$354.62 and \$236.43, respectively. 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 in Claimant's Exhibit 1, 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 Claimant 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 the Claimant's claim for benefits under the Workers' Compensation Act based on the alleged injury by accident was denied and the Commissioner assessed no hearing costs. The Claimant 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. Claimant timely filed a notice of appeal.

STATEMENT OF THE FACTS

This claim arose out of Claimant's workplace accident with Employer on June 16, 2018. The Claimant, Ms. Naomi Lynn 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, Claimant’s 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 candies that she was reaching for were 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 over time. 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 your [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 of 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 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 Claimant's 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.

ARGUMENTS

I. THE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO FIND AND CONCLUDE THAT IT WAS DEFENDANTS' BURDEN OF SHOWING THAT THE CLAIMANT WAS REMOVED FROM THE SCOPE OF HER EMPLOYMENT DURING HER WORKPLACE ACCIDENT

The Single Commissioner and the Appellate Panel of the Full Commission erred in finding and concluding Ms. Bridges had failed to meet her burden of proving that her workplace injury occurred in the scope of her employment instead of determining whether Defendants had met their

burden of proving that she removed herself from the scope of employment at the time of her workplace injury, applying the wrong legal standard throughout their Orders. In South Carolina, jurisdictional doubts, such as whether an injury occurred within the scope of a Claimant's employment, are resolved in favor of inclusion rather than exclusion. *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720, 723 (1964). In addition, as stated in *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010):

[The] general rule [is] that *workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage in are to be strictly construed.* See *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)). (emphasis added).

In the present case, Defendants argued an exception to coverage, that Ms. Bridges was outside the scope of her employment at the time of her workplace injury, which is to be narrowly construed by the Commission and our courts. The Defendants were, therefore, arguing an affirmative defense and the burden was on the Defendants in this case to establish that Claimant violated an express prohibition that removed her from the scope of her employment at the time of her workplace accident. See *Johnson v. Merchant's Fertilizer Co.*, 198 S.C. 373, 377, 17 S.E.2d 695 (1941) (“[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.”). In failing to hold Defendants to the burden of establishing this defense and proving the facts of the defense, the Commission has essentially required Ms. Bridges to prove a negative, that she was not removed from the scope of her employment at the time of her workplace injury. The Commission, therefore, erred as a matter of law in finding and concluding that the burden of proving that the Claimant was removed from the scope of her employment due to an alleged express prohibition was on the

Claimant, without adequately determining whether Defendant had met their burden of showing an exclusion to coverage under the Act.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT LEFT THE SPHERE OF HER EMPLOYMENT BY VIOLATING SPECIFIC ORDERS FROM HER EMPLOYER AND THE COMMISSION ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE CLAIMANT LEFT THE SPHERE OF EMPLOYMENT.

Assuming *arguendo* the Commission had applied the proper legal standards in this case and held Defendants to their burden of proving that Claimant's injury was excluded under the Act, the Commission erred in finding and concluding that the Claimant left the scope of her employment at the time of her workplace accident pursuant to *Wright v. Bi-Lo, Inc.*, 314, S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). 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. *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950). However, in determining whether an employee steps out of the scope of his employment by violating an employer's order, our courts have held:

[N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act . . . "Certain rules concern the conduct of the workmen within the sphere of his employment, while others limit the sphere itself. A transgression leaves the scope of his employment unchanged, and will not prevent recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied."

Id at 155 (quoting *Johnson v. Merchants Fertilizer Co.*, 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941) (citations omitted)).¹

¹ This principle is succinctly stated by Professor Larson:

"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.

Stated in a different fashion, by Larson's Workers' Compensation Law, there exists a distinction 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 or 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).

Larson's further provides a brief catalog of the kinds of forbidden misconduct which "since they related only to method have not blocked compensation . . . [and] serve to show better than anything else the extent to which modern compensation law has eliminated the employee-fault compensation from the test of compensability." 3 Larson's Workers' Compensation §33.02(2). Those instances of forbidden misconduct include: sitting upon a fender to operate a dangerous machine instead of standing as ordered, climbing onto a basketball goal to paint the roof of a gymnasium, . . . operating a meat-grinding machine with the guard removed, oiling machinery in motion . . . jumping a railing instead of climbing a stairway . . . etc. *Id.*

In *Johnson v. Merchants Fertilizer*, and each and every time the issue of exceeding the scope of employment due to an express prohibition has arisen, our courts have expressed that it is the burden of Defendants to establish the fact that: (1) at the time of the employee's injury he/she

had violated an express order, and (2), that the order or prohibition was clear and explicit. The courts emphasized this “clear and explicit” requirement in *Wright v. Bi-Lo* (Claimant, a grocery store courtesy clerk, had been told not to attempt to apprehend shoplifters on multiple occasions and on the day of the accident his manager told him to “get back in the store”), and in *Black v. Town of Springfield* (police chief was told on numerous occasions to not ride on the back of fire trucks). These examples of “clear and explicit” prohibitions are opposed to the one in *Johnson v. Merchant’s Fertilizer Co.*, wherein the Court held compensable the death of an employee, who was 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. 373, 377, 17 S.E.2d 695 (1941).

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.”).

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 “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. Despite saying there’s “the rest of the girls for any other chores” he testified that he said “no girls on the ladder,” and for that date only. R. at 2102. While others testify that they heard Mr. Bitton tell Ms. Bridges not to climb the ladder, this testimony should have been given much less weight and afforded much less probative value as it is hearsay and does nothing to help any fact finder understand what Ms. Bridges understood her instructions to be. Thus, because of the conflicting testimony, especially the self-contradictory testimony from the person supposedly giving Ms. Bridges the prohibition, substantial evidence does not support that there was a “clear and explicit” prohibition to climb the ladder at all on that day only. From Ms. Bridge’s perspective she understood her instruction to be “not to climb the ladder to get on top of a cooler,” or climbing the ladder for that specific reason. Substantial evidence does not support that she

understood the order to be not to climb the ladder at all because it was a regular and necessary part of her job. Moreover, the burden of proving that there was a “clear and explicit” prohibition that was violated by the employee and led to the Claimant’s injury, was not met by the employer given the owner’s conflicting testimony.

While Claimant certainly does not concede this point, assuming that the substantial evidence supports one of Mr. Bitton’s versions of his testimony, that he told Ms. Bridges not to get on the ladder at all, and to let a male coworker do any climbing for that day only, this instruction does not pull Ms. Bridges out of the scope of her employment at the time of her workplace injury. Climbing the ladder to grab inventory to place on shelves was a normal part of her job, and not simply an incidental benefit to her employer. In the words of our Courts in *Johnson v. Merchants Fertilizer* and *Wright v. Bi-Lo, Inc.*, this was a rule (which was allegedly for one day only), that concerned “the conduct of the work[er] within the sphere of [her] employment” and not a limitation of the sphere itself. In the words of Professor Larson on Workers’ Compensation, this alleged prohibition concerned the “method” of the work being done, and not the “thing” required to be done. The only evidence of record is that Ms. Bridges was still required to perform her daily tasks on the date of the injury, which included putting inventory on shelves when necessary. Moreover, and while this may lend itself more to the issue of whether the prohibition was “clear and explicit,” the present case is not analogous to *Black v. Town of Springfield* or *Wright v. Bi-Lo, Inc.*, because in both of those cases, although there was arguably a benefit to the employer, the claimants were told on multiple occasions not to engage in the prohibited behavior, which led to their injuries. Thus, even assuming *arguendo* that substantial evidence supported the Commission’s factual finding of an express prohibition, the Commission made a clear error of law in concluding that Ms. Bridges’ actions removed her from the scope of employment.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUFFERED FROM A PRE-EXISTING INJURY OR CONDITION AND THE COMMISSION ERRED IN FINDING THAT THE CLAIMANT FAILED TO MEET HER BURDEN OF PROVING THAT SHE SUFFERED AN INJURY IN THE COURSE AND SCOPE OF HER EMPLOYMENT

The Commission erred in finding that Ms. Bridges suffered a pre-existing left leg injury, as there is absolutely no evidence of record, let alone substantial evidence, about a prior injury beyond mere conjecture by the Commission, based on testimony from employer and employer's representatives. While a "finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Burnette v. City of Greenville*, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (2013). In *Burnette v. City of Greenville*, substantial evidence did not support the Commission's findings of a preexisting injury that was neither injured nor aggravated or that such pre-existing injury "returned to baseline," when the only evidence of record supporting the finding was an MRI that showed "a minimal protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004," with "no evidence indicat[ing] this opinion originated from a medical provider, yet appear[ed] in the single commissioner's order . . . forc[ing] [the court] to conclude that it is the medical opinion of the single commissioner." *Id.*

There is no daylight between the erroneous findings of the Single Commissioner and Appellate Panel in the present case, and the Commissioner's findings in *Burnette*. Finding that there was an injury of the magnitude suffered by Ms. Bridges prior to her workplace injury is, in a sense, more egregious than the findings by the Commission in *Burnette*, because there is not a single document of a diagnostic or medical nature or anything from a medical provider stating or in any way indicating that Ms. Bridges had an injury to her left leg or knee prior to her June 16,

2018, workplace injury. The Orders of the Single Commissioner and Appellate Panel state that the Commission's "finding is supported by the witness testimony and comports with the admitted instructions given to her not to climb the ladder." R. at 29. No other medical evidence is provided in support of this finding. The employer submitted no medical evidence of an injury to Ms. Bridges' left leg prior to her workplace injury on June 16, 2018, and the record is completely devoid of *any* medical evidence of a pre-existing left knee or left lower extremity injury. The only evidence presented by the employer is, at best, conflicting testimony that Ms. Bridges was wearing a boot or a wrap around her left foot and or ankle on the day of the injury. Even throughout all of the testimony provided by employer's representatives and witnesses, there is no testimony Ms. Bridges had a left knee injury, only that she may or may not have been limping on the day of her workplace injury and she may have had a wrap or boot around her *foot* or *ankle*. At one point in the trial testimony, Mr. Bitton, perhaps unwittingly, agreed that the assertion that she had a foot injury the week prior to her workplace injury was speculation. R. at 2038, ln. 20 – 25. The accounts from the witnesses called by Defendants vary and are disputed by Ms. Bridges, her significant other, Mr. Earley, and by Elizabeth McAldine, the daughter of Mr. Earley, who were both with Ms. Bridges that week prior to the accident and also testify that her foot or leg was not injured prior to June 16, 2018. Importantly, and while Claimant's Exhibit 3 and 5 were glossed over by the Commissioner as not being "dispositive of anything" and not lending "credibility to Claimant's arguments." R. at 30, ¶ 9. Ms. McAldine testified that she took the picture date stamped June 15, 2018, testified that she took it on that date, and identified Ms. Bridges on the beach in the picture without any leg brace or wrap. She further testified that she walked on the beach and was not limping on the day prior to the accident. Accordingly, the finding that Ms. Bridges suffered an

unspecified injury to her left leg prior to her workplace injury is not supported by substantial evidence as it is based upon conjecture, speculation, and conflicting testimony from lay witnesses.

While it is unclear from the Orders of the Single Commissioner and Appellate Panel whether their Finding No. 11 (finding that Claimant failed to meet her burden of proving that she suffered an injury in the scope of employment by the greater weight of the evidence) was made because of the other findings by the Commission that she exceeded the scope of her employment at the time of the injury or that she injured her left leg outside of work prior to June 16, 2018, Finding No. 11 is also erroneous. The Commission erred in finding that Ms. Bridges had not met her burden of showing that she suffered an injury arising out of and in the course and scope of her employment on June 16, 2018, as the only medical evidence submitted indicates that she suffered a very severe knee injury requiring an extended hospital stay, a surgery, and months of in-patient rehabilitation and home health care, and all of the medical evidence of record states that it was due to a fall from a ladder at her workplace.

The findings of the Commission are based so much on speculation that the Claimant can only begin to guess or speculate herself as to how the Single Commissioner and Appellate Panel came to those findings and conclusions that Ms. Bridges' left knee and leg injury did not occur as a result of her workplace accident. While the Order does note a discrepancy in the testimony and medical records about which rung of the ladder Ms. Bridges fell from, the discrepancy appears to be the basis of speculation and conjecture regarding whether this sort of injury could have come from a fall from one of the lower rungs. The notes from the EMS state that she was on a step ladder and while coming down missed the last step and fell to the ground. R. at 75. Notes from the emergency department note a major knee injury and state that she "developed sudden onset of dull constant non-radiating 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. As summarized above, she underwent a complex open reduction, internal fixation of the left tibial plateau (near the knee), which was performed by Dr. Tobin, who later undertook care.

While, as discussed above, there was speculation about a previous left foot or ankle injury based on conflicting testimony among the trial witnesses, there is no medical evidence of a prior foot or ankle injury, let alone a previous leg or knee injury in the nearly 1500 pages of medical records submitted by the Claimant in her APAs. In an attempt to point to *any* medical evidence of a prior foot or ankle injury, the Commission’s Orders make a point in summarizing the medical evidence to discuss a September 6, 2018, office note from Dr. Tobin, who states that there was some swelling in the left foot and he was concerned whether there had been some fractures in her left foot or ankle. However, what the Commission fails to note is that x-rays taken of the left foot and ankle were negative for any fractures. R. at 1279.

Pursuant to S.C. Code Ann. § 42-9-35, a pre-existing injury must be established by a preponderance of the evidence “including medical evidence,” which is defined as “expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records or other material that is offered by a licensed health care provider.” Establishing the existence of a preexisting injury also presupposes the existence of a diagnosis from a licensed healthcare provider. Moreover, while it is Defendants’ burden of proving a pre-existing condition or injury, and not the Claimant’s, there is simply no evidence of a foot, ankle, or lower left extremity injury prior to June 16, 2018, and it would stand to reason that if she had suffered an ankle or foot injury that this would have been addressed at some point in her more than 10 day in-patient stay at the hospital, and by the doctors that performed a major surgery upon that same left leg. Thus, for the foregoing reasons, and because the only medical evidence of record is that Ms. Bridges suffered a

workplace injury to her left knee when she fell from a ladder at work, the finding that Ms. Bridges failed to meet her burden of showing by the greater weight of the evidence that she suffered an injury arising out of and in the scope of her employment is erroneous, and the finding that she suffered a pre-existing injury is not supported by substantial evidence, or any real evidence for that matter.

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.

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.² 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 10:00 p.m., and that she would frequently work as much as 80

² 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.

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 – 10 every day on that week but 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, Claimant's Exhibit 2, 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, 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 (CI's Exhibit 1), 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 and 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 Employer's burden to show all payments including any cash payments to his employees.³ 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 the Claimant 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

³ 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 the Claimant's Average Weekly Wage and Compensation rate.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment, findings of fact and conclusions of law of the Appellate Panel of the Full Commission.

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January 25, 2023

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Jan 26 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Naomi Lynn Bridges.....Claimant, Appellant,

v.

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

CERTIFICATE OF COUNSEL

Counsel for Claimant/Appellant certifies that the Final Brief of Appellant complies
with Rule 210(g), SCACR.

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Jan 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM
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SCWCC FILE NO. 1808344

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Naomi Lynn Bridges, Appellant

v.

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

**FINAL BRIEF OF RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION
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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT HAS THE BURDEN TO PROVE THAT AN INJURY AROSE FROM AND WAS SUFFERED IN THE COURSE OF HER EMPLOYMENT.**
- II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT FAILED TO MEET HER BURDEN OF PROOF.**
- III. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT THE CLAIMANT CAME TO WORK INJURED ON THE DATE OF ACCIDENT.**
- IV. WHETHER THE COMMISSION CORRECTLY DETERMINED THE CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.**

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. The matter arises from the filing of the parties' Forms 50 and 51. Claimant alleged she suffered compensable injuries to her left leg in a fall from a ladder on June 16, 2018. ROA 1670; Tr. Vol. 1, pp. 4, 11 and ROA 54; Form 50. Claimant sought payment of all past medical treatment, additional medical treatment for her injuries, temporary total disability benefits from the date of accident and continuing. ROA 63 – 66; Claimant's 1/23/2019 Form 58.

The Employer agreed it was subject to the terms and provisions of the South Carolina Workers' Compensation Act, and it stipulated that Claimant was its employee. ROA 1677; Tr. Vol. 1, p. 11. However, Employer asserted that Claimant was acting outside the scope of her employment at the time she alleged to have suffered an injury. *Id.*

The South Carolina Workers' Compensation Uninsured Employers' Fund's (UEF's) position mirrored that of the Employer's. *Id.* The UEF further asserted that the case of *Wright v.*

Bi-Lo, 314 S.C. 152, 442 S.E.2d 186 (Ct.App. 1994), is controlling, and that Claimant was acting outside the course of her employment at the time she alleged to have suffered her injuries. *Id.*

Claimant took the position that Defendants' position (that Claimant was acting outside the scope of employment) amounted to an affirmative defense. ROA 1676; Tr. Vol. 1, p. 10. Claimant did so in order to allege that neither the Employer nor the UEF (despite timely filing a Form 51 with affirmative defenses) could argue that Claimant was outside the course of employment when she was injured. Oddly, Claimant apparently asserted the Employer could not even contest compensability due to "the 150-day rule."¹ ROA 2133; Tr. Vol. 2, p. 200, ll. 13 – 23.

The Employer and UEF contended that the Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) are \$354.62 and \$236.43, respectively. ROA 1678; Tr. Vol. 1, p. 12. The Claimant asserted only that the AWW and CR should be approximately double that asserted by Defendants. *Id.*

The hearing in this case lasted over the course of two (2) days. *See* ROA 1667 – 2136; Tr. Vol. 1 and Vol. 2. There were nine (9) live witnesses, one (1) of whom testified twice. Claimant submitted almost One Thousand, Five Hundred (1,500) pages of medical evidence, even though there was no dispute over the nature of the injuries. Claimant attempted to submit an actual x-ray film as evidence. ROA 1734 – 1735; Tr. Vol. 1, p. 68, l. 7 – p. p. 69, l. 25.

The Single Commissioner issued her Decision and Order on January 27, 2021. ROA 3. The claim was denied because Claimant failed to prove her injuries were suffered in the course of

¹ At the hearing, Claimant's attorney argued:

The last question [in Claimant's Form 58] had to do with the hundred and fifty-day rule. I cannot tell you what the number is on that one. The idea being that the employer has a hundred and fifty days to contest whether or not they should receive any more compensation. And by the same token, in a case-called Jury, it's come up that if they don't contest within a hundred and fifty days, also they give away their right to compensation, and I have that in there. And I just wanted to make sure that was there also.

ROA 2133; Tr. Vol. 2, p. 200, ll. 13 – 23.

employment. Claimant's appeal to the Appellate Panel of the Full Workers' Compensation Commission timely followed. The Appellate Panel heard the matter on January 24, 2022, and issued an order fully affirming the Single Commissioner on April 19, 2022. ROA 35.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp.*, 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed 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 the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004).

The appellate panel is the ultimate fact finder in Workers' Compensation cases, and it is not bound by the single commissioner's findings of fact. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The ultimate determination of a witness' credibility and the weight of such evidence is reserved to the appellate panel. *Shealy v. Aiken County*, 341 S.C. 488, 535 S.E.2d 438 (2000). The existence of inconsistent conclusions that may be drawn from the evidence does not preclude the administrative agency's findings from being based on substantial evidence. *DuRant v. South Carolina Dep't of Health & Envtl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). When such conflicts in the evidence concerning a factual issue exist, the findings of the appellate panel are conclusive. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct.

App. 2002). However, if the factual issue before the Commission involves a jurisdictional question, this court's review is governed by the preponderance of evidence standard. *Nelson v. Yellow Cab Co.*, 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000) *aff'd* 349 S.C. 589, 564 S.E.2d 110 (2002). While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. *See Dawkins v. Jordan*, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000) (*citing Ford v. Allied Chem. Corp.*, 252 S.C. 561, 167 S.E.2d 564 (1969)).

STATEMENT OF FACTS

Despite the voluminous record in the case, the facts are simple. Claimant alleged she hurt her left leg when she fell off of a ladder at work. Employer and UEF assert that Claimant was acting outside the scope of her employment when she climbed the ladder, as she had clearly and expressly been forbidden to do the same due to a pre-existing injury to her left leg.

ARGUMENTS

I. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT HAS THE BURDEN TO PROVE THAT AN INJURY AROSE FROM AND WAS SUFFERED IN THE COURSE OF HER EMPLOYMENT.

It is axiomatic that 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). Claimant argues that the Commission “appl[ied] the wrong legal standard throughout their Orders.” Brief of Appellant, p. 16. Claimant argues that a defendant bears the “burden of proving that [Claimant] removed herself from the scope of her employment” *Id.* This Court must reject this argument, as it is always Claimant’s

burden to prove that her injuries are compensable.

If successful, Claimant's argument would reverse her burden of compensability and to shift that to the backs of Defendants. She is arguing that whether an injury was suffered in the course of employment is a rebuttable presumption to be weighed in her favor. Though Workers' Compensation laws are to be construed liberally in favor of inclusion, of course, the purpose of the Act would be turned on its head if Claimant's interpretation were given effect.

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. SAILA 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).

As the Supreme Court has written,

"It is well established, at least in this jurisdiction, that these phrases are used conjunctively and that an accident, in order to be compensable, must both 'arise out of' and 'in the course of' the employment.' In *Eargle v. South Carolina Electric & Gas Co.*, 205 S.C. 423, 32 S.E. (2d) 240, this court said:

"*The two elements must co-exist.* They must be concurrent and simultaneous. One without the other will not sustain an award; yet the two are so entwined that they are usually considered together in the reported cases; and a discussion of one of them involves the other.

"As is generally held, the words 'arising out of' refer to the origin of the cause of the accident, while the words 'in the course of employment,' have reference to the time, place and circumstances under which the accident occurs."

Douglas v. Spartan Mills, 245 S.C. 265, 268-69, 140 S.E.2d 173, 174-75 (1965) (emphasis added).

The Supreme Court wrote that the two elements must co-exist. Without the presence of either of those elements, there cannot be a compensable claim. The Claimant cannot ease or shift that burden by labeling Defendants' defense an "affirmative defense" or an "exception to coverage." Brief of Appellant, p. 17. In her brief, Claimant argues that "the Commission has essentially required [Claimant] to prove a negative, that she was not removed from her employment at the time of her . . . injury." *Id.* This argument fails on its face, as the Commission required only that Claimant prove her injuries arose out of her employment, an essential element of compensability.

Because Claimant failed to prove that she no longer has the burden of proof in a contested case arising under the Act, the Commission's ruling should be affirmed. Further, the Order of the Commission should be affirmed.

Therefore, for the reasons set forth herein and those that may be presented at oral arguments of this matter, the UEF respectfully requests that the Order of the Workers' Compensation Commission be affirmed.

II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT FAILED TO MEET HER BURDEN OF PROOF.

The Claimant argues that, even if she still bears the burden of proof, her injuries nevertheless were suffered in the course of employment. In making these arguments, Claimant cites a 1941 case², one that was decided before the enactment of S.C. Code Ann. § 42-1-160. Regardless, the Claimant appears to agree, though, that disregarding "clear and explicit" instructions from an employer may remove and employment from her employment. *See* Brief of Appellant, pp. 17 – 19.

The seminal case on this issue in the modern era is *Wright v. Bi-Lo*, 314 S.C. 152, 442

² *Johnson v. Merchants Fertilizer Co.*, 198 S.C. 373 (1941). This case is easily distinguishable, as the "order" or instruction therein was not as definitive as the specific instructions given to Claimant in this matter.

S.E.2d 186 (Ct. App. 1994).³ In that case, the Court of Appeals wrote, “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.” *Wright v. Bi-Lo*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) (internal citations omitted). In *Wright*, benefits were denied when an employee of a grocery store violated an express prohibition against chasing shoplifters. Obviously, that prohibition, like the prohibition of an employee with an injured foot from climbing a ladder, was for the employee’s safety and to prevent further injury. Also instructive is the case of *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950). In that case, a police chief was denied benefits after falling from a fire truck, although he had work duties related to fire fighting. His employer expressly prohibited him from riding on fire trucks, but he ignored those instructions. When he was injured, it was determined that his injuries were not compensable. As the Court of Appeals wrote in 1994,

If a police chief's injuries from riding on a fire truck are not compensable as violative of an express prohibition, even though he has legitimate employment duties at the fire truck's ultimate destination, a courtesy clerk's specifically forbidden act of pursuing a fleeing shoplifter cannot be within the scope of his employment.

Wright v. Bi-Lo, 314 S.C. 152, 157, 442 S.E.2d 186, 189-90 (Ct. App. 1994). The same could be said in this case.

Claimant asserts that the case of *Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E.2d 821 (1975) bolsters her position. In that case, a Claimant was awarded benefits for engaging in “good Samaritan” conduct that was not part of his regular duties but was done for the benefit of his

³ It should be noted that the Court in *Wright v. Bi-Lo* distinguished the cases on which Claimant herein relies: “*Johnson* and *Portee* are easily distinguished. . . . More importantly, the present case establishes the existence of ‘clear and explicit’ orders repeatedly communicated to Wright and clearly violated by him in the events leading to his death.” *Wright v. Bi-Lo*, 314 S.C. 152, 156-57, 442 S.E.2d 186, 189 (Ct. App. 1994) (emphasis added). Further, the Court noted that, “The superficial similarity [in *Howell v. Kash & Karry*] to the present case is not controlling.” *Wright v. Bi-Lo*, 314 S.C. 152, 158, 442 S.E.2d 186, 190 (Ct. App. 1994)

Employer ("An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." *Howell v. Kash & Karry*, 264 S.C. 298, 301, 214 S.E.2d 821, 822 (1975)). That case can be distinguished because the Employer therein had not specifically prohibited such actions, and there was no such "good Samaritan" behavior in this case.

Claimant also cites *Portee v. S.C. State Hosp.*, 234 S.C. 50, 106 S.E.2d 670 (1959). This is another pre-1976 case that is distinguishable. The holding in that case relies not on any criteria relevant to the instant analysis, but only upon what is, essentially, what we know as the Personal Comfort Doctrine. The Claimant is *Portee* left his post due to illness, and his injuries were experienced during the time away from his post ("We now turn to the cases involving the right to recover compensation where death or injury results from an effort of an employee while at work to obtain relief from illness or discomfort. *Portee v. S.C. State Hosp.*, 234 S.C. 50, 55, 106 S.E.2d 670, 672 (1959)) ("It would seem clear that the slight deviation by the deceased to obtain medication for his sore throat did not break the chain of employment." *Portee v. S.C. State Hosp.*, 234 S.C. 50, 58, 106 S.E.2d 670, 674 (1959)).

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:

A. TESTIMONY OF LETICIA RODRIQUEZ

Leticia Rodriguez, a co-worker, testified. She testified she was present when Mr. Bitton addressed Claimant's limitations on the day she alleges she was injured: "He was talking to [Claimant]. I was a couple of feet away, so I heard everything. He actually told her not to use the ladder that day." ROA 1781; Tr. Vol. 1, p. 115, ll. 10 – 12. Ms. Rodriguez testified Bitton told

her not to use the ladder “because [Claimant] had the injured foot” ROA 1781; Tr. Vol. 1, p. 115, l. 15. Ms. Rodriguez testified Bitton told Claimant: “Do not use the ladder. If you need to get something, tell someone to get it for you’ . . . because she had the injured foot already.” ROA 1781; Tr. Vol. 1, p. 115, ll. 16 – 19. Ms. Rodriguez testified that, before the alleged fall, Claimant told her that she was already on medication for her foot injury. ROA 1805; Tr. Vol. 1, p. 139, ll. 1 – 6.

Ms. Rodriguez further testified that Bitton did *not* limit his instructions to climbing on the cooler, and that Claimant wasn’t to use the ladder for any reason. ROA 1781; Tr. Vol. 1, p. 115, ll. 20 – 23. She testified that Bitton “told me, ‘If [Claimant] needs to get anything, you get it for her.’ After that, he walked into the other store, and he told the other employees in there as well, ‘Do not let [Claimant] use the ladder.’” ROA 1782; Tr. Vol. 1, p. 116, ll. 2 – 5. Ms. Rodriguez testified that Bitton gave clear and explicit instructions to Claimant not to get on the ladder. ROA 1785; Tr. Vol. 1, p. 119, ll. 5 – 7.

After being asked multiple times by Claimant’s attorney to recount Bitton’s instructions, Ms. Rodriguez further testified:

Okay. That day Amir [Bitton] told [Claimant] to not use the ladder. He specifically said, ‘Do not use the ladder’ for the same reason of her foot being injured. ‘If you need one of – any – anyone else to get something for you, tell them. After that, he told me ‘Did you hear that? I do not want her to use the ladder at all. If she needs to get something to be pulled that involves using the ladder, get it – get it for her. Or if not, call Zach.

ROA 1811; Tr. Vol. 1, p. 145, l. 22 – p. 146, l. 6.

Clearly, Ms. Rodriguez’s testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

B. TESTIMONY OF ZACHARY EDRI

Claimant called Zachary Edri, a co-worker, to testify. Mr. Edri testified he was working

on Claimant's alleged date of accident. ROA 1828; Tr. Vol. 1, p. 162, ll. 22 – 25. Mr. Edri testified that Mr. Bitton 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. Mr. Edri further testified that Bitton said, "'I've already talked to [Claimant]. I told her not to go on the ladder because of her foot.' So at any point at all today, if she ever needs to go on the ladder or needs to get something up high, for her to come [to] me." ROA 1852; Tr. Vol. 1, p. 186, ll. 21 – 25. Mr. Edri later testified that Mr. Bitton instructed him that, should Claimant need to get something from a height, he was to get it for her so that she does not further injure herself. ROA 1856; Tr. Vol. 1, p. 190, ll. 19 – 23.

Mr. Edri testified that Claimant did not ask him for any assistance with climbing on the day she alleges to have been injured. ROA 1857; Tr. Vol. 1, p. 191, l. 22 – p. 192, l. 1.

Clearly, Mr. Edri's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

C. TESTIMONY OF RAVEN BADEN

Employer called Raven Baden, a co-worker, to testify. Ms. Baden testified she saw Claimant limping during the morning before her alleged accident. ROA 1942; Tr. Vol. 2, p. 9, ll. 18 – 21. Ms. Baden testified that Mr. Bitton "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. She 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 [Claimant] was not supposed to go on the ladders at all." ROA 1980; Tr. Vol. 2, p. 47, ll. 12 – 16. She further testified that those instructions were given to her because Claimant

was already injured. ROA 1980; Tr. Vol. 2, p. 47, ll. 17 – 19.

Clearly, Ms. Baden’s testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

D. TESTIMONY OF AMIR BITTON

Employer called Amir Bitton, principal of Employer, to testify. Mr. Bitton testified he was present in the store after Claimant returned from her trip to North Carolina. ROA 1995; Tr. Vol. 2, p. 62, ll. 2 – 3. He testified her foot was wrapped and she told him, “I hurt myself . . . at the graduation of [my] grandson.” ROA 1995; Tr. Vol. 2, p. 62, ll. 5 – 12. He testified her observed her limping. ROA 1995; Tr. Vol. 2, p. 62, ll. 13 – 14; ROA 2038 – 2039; Tr. Vol. 2, p. 105, l. 24 – p. 106, l. 1. He testified she told him she was going to take care of the injury by seeing a doctor. ROA 1996; Tr. Vol. 2, p. 63, ll. 2 – 4.

Mr. Bitton testified that, after hearing Claimant moaning in pain while walking, 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.

Mr. Bitton testified he told Letitia, Zack, and Raven not to allow Claimant get on the ladder. ROA 1998; Tr. Vol. 2, p. 65, l. 23 – p. 66, l. 13.

On cross-examination by the attorney for Fund, Mr. Bitton testified he gave Claimant clear and explicit instructions not to get on the ladder due to the condition of her leg. ROA 2096; Tr.

Vol. 2, p. 163, ll. 3 – 12. Mr. Bitton testified that getting on the ladder that day was not part of her job. ROA 2096; Tr. Vol. 2, p. 163, ll. 13 – 15.

Clearly, Mr. Bitton's testimony supports the Finding that the prohibition to climb the ladder was clear and explicit.

E. TESTIMONY OF CLAIMANT

Claimant testified. 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). In the light most favorable to the Claimant, she did not understand the instructions. However, that does not make her alleged interpretation reasonable, nor does it make the instructions any less clear and explicit.

Claimant testified that, on the day of her accident, she began her normal work routine. ROA 1714; Tr. Vol. 1, p. 48. She testified Bitton 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).

Claimant later testified that she was told “[n]ot to be on the ladder to get on top of the

cooler.” ROA 1746; Tr. Vol. 1, p. 80, l. 2. Further:

Q. Okay. So, you could have used the ladder to do anything else but [] get on the cooler; is that right?

A. That’s what he told me.

ROA 1746; Tr. Vol. 1, p. 80, ll. 3 – 6.

Claimant testified that she saw some candy bins were low on candy so she (who is “the type of person, if I see something that needs to be done, I’ll do it and forget eating lunch or water. Finish that up.”) decided to refill them. ROA 1717; Tr. p 51, ll. 10 – 16. Though she had been told to have Zach assist her with the ladder, she “[went] ahead and [got] the ladder like I always have done.” ROA 1717; Tr. Vol. 1, p. 51, ll. 18 – 19. Even her own testimony supports a finding that Claimant was prohibited from using the ladder, and that she was well aware of the prohibition.

Claimant argues that the testimony of these witnesses “should be given much less weight and afforded much less probative value as it is hearsay and does nothing to help the Commission understand *what [Claimant] understood her instructions to be.*” Brief of Appellant, p. 21. First, any objections to hearsay must be made at the trial level, and no such objections were made. In fact, Claimant’s attorney was actually the one who solicited much of the testimony recited above and in the Single Commissioner’s Order. Second, the testimony most certainly does establish whether or not the instructions to Claimant were clear and explicit. Assuming, *arguendo*, that Claimant’s understanding of the instructions were actually as she testified, her inability to grasp simple instructions should not transform this a compensable accident. Any reasonable employee would have understood that “do not go on the ladder” means “do not go on the ladder.”⁴ Claimant’s purported confusion makes these instructions no less clear.

Claimant argues that the Employer’s instructions were “conflicting.” Brief of Appellant,

⁴ ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7.

p. 21. However, there is not actually any conflicting testimony referenced by Claimant. The witnesses seem to agree that she was told not to get on the ladder.

Claimant's last argument is that, presuming Claimant was instructed not to get on that ladder for any reason, this prohibition only limited the "conduct of the work[er] within the sphere of [her] employment." Brief of Appellant, p. 22. As set out explicitly above, Claimant was not to engage in activity involving the ladder. Thus, the sphere of employment was most certainly limited by Employer: (A) Bitton: "Okay, please, no climbing, no ladder, no physical work." ROA 1997; Tr. Vol. 2, p. 64, ll. 5 – 9. Bitton further testified, "You've got Zack 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; (B) Rodriguez: "Do not use the ladder. If you need to get something, tell someone to get it for you' . . . because she had the injured foot already." ROA 1781; Tr. Vol. 1, p. 115, ll. 16 – 19; and (C) Baden: "[Bitton] 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. Further, Mr. Bitton testified that, on the day of the alleged accident, he told Claimant, "No[t] any physical work. All I want you to do is cash people out. Be a cashier today. Don't do nothing. You've got Zack if you need to climb a ladder." ROA 1994; Tr. Vol. 2, p. 61, ll. 13 – 16.

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

Accordingly, Respondent UEF respectfully requests that the Commission's judgments be given great weight, and that the Order of the Commission be affirmed.

III. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT THE CLAIMANT CAME TO WORK INJURED ON THE DATE OF ACCIDENT.

Claimant argues that the Commission's Finding of Fact Eight (8)⁵ is "mere conjecture" for which "there is absolutely no evidence of record". Brief of Appellant, p. 22. This argument must be rejected, as there is a plethora of evidence of record that Claimant was suffering from an injury when she came to work on the alleged date of accident. Important to this analysis is the fact that Commission did not find that the Claimant's current condition is the same injury Claimant suffered she suffered prior to the date of accident. The Commission did not find that her current condition pre-existed the date of accident; this was not the basis of the denial. The Commission made this finding simply to explain why Claimant was prohibited from getting on the ladder. Claimant's arguments citing *Burnette v. City of Greeneville*, 401 S.C. 417, 737 S.E.2d 200 (2013) are irrelevant, as the Commission did not make a finding that Claimant's current condition is a preexisting condition. The Commission's finding only reflects the fact, as it found it, that Claimant came to work on the subject date with an injured foot, in union with the reliable testimony of witnesses.

The more than substantial evidence supporting this finding is based on the testimony, to wit:

A. TESTIMONY OF LETICIA RODRIGUEZ

Ms. Rodriguez testified that, "[Claimant] has actually gone on vacation before [the day she alleged her fall] to visit family, and when she came back, she came back with like an injured, you know, foot. She told us that she had dropped a table on it, and that's the injury she did have."

⁵ "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."

ROA 1780; Tr. Vol. 1, p. 114, ll. 10 – 14. She further testified that Claimant’s foot was wrapped upon returning to work. ROA 1780; Tr. Vol. 1, p. 114, ll. 16 – 17.

B. TESTIMONY OF ZACHARY EDRI

Claimant’s attorney asked Mr. Edri about his prior deposition testimony that Claimant told him she injured her foot in North Carolina. He asked Mr. Edri what Claimant told him about that, and he replied, “She told me she dropped a table on her foot.” ROA 1821 – 1822; Tr. Vol. 1, p. 155, l. 24 – p. 156, l. 4. Mr. Edri testified he was working on Claimant’s alleged date of accident. ROA 1828; Tr. Vol. 1, p. 162, ll. 22 – 25. Mr. Edri testified that Mr. Bitton said, “He said that, you know, 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.” ROA 1829; Tr. Vol. 1, p. 163, ll. 16 – 19.

C. TESTIMONY OF CHRISTINE SWEETING

Employer called Christine Sweeting, a former co-worker of Claimant’s, to testify. Ms. Sweeting was no longer employed by Employer. She was asked whether she had a recollection of whether or not Claimant was injured upon returning from North Carolina. ROA 1912; Tr. Vol. 1, p. 246, ll. 17 – 18. Ms. Sweeting flatly testified:

She was injured. She had a black boot on her foot. I asked her what happened, and she also had an ACE bandage wrap. The black boot was there for maybe a couple of days, but then she just wore her flip-flops for the ACE bandage, and I asked her what happened. She said that while she was in North Carolina, they were moving a table, a foldable table I guess, and it must have slipped or something, and it fell on her foot, so . . .

ROA 1912 – 1913; Tr. Vol. 1, p. 246, l. 19 – p. 247, l. 2.

Ms. Sweeting further testified that Claimant did not get better, and that “[s]he was hobbling around . . . and she was always limping around and stuff, and we never really wanted her to do much.” ROA 1913; Tr. Vol. 1, p. 247, ll. 8 – 12.

The only apparently contrary testimony on this issue came from Elizabeth Anne McAldine and Charles “Chuck” Earley. Mr. Earley is Claimant’s live-in “long-time companion” and Ms. McAldine is his daughter. ROA 1901; Tr. Vol. 1, p. 235, l. 17 – 21.

Ms. McAldine’s testimony was objected to by Employer, as she was not timely listed on Claimant’s Pre-Hearing Brief. ROA 1900; Tr. Vol. 1, p. 234, ll. 14 – 24; ROA 1906 – 1907; Tr. Vol. 1, p. 240, l. 4 – p. 241, l. 12. She was allowed to testify, and she testified she took the picture that became Exhibit 5. ROA 1903; Tr. Vol 1, p. 237, ll. 12 – 21. She testified, “That’s [Claimant] laying on her beach chair.” ROA 1904; Tr. Vol. 1, p. 238, l. 4. She testified that her father (Mr. Earley) lives with Claimant. ROA 1909; Tr. Vol. 1, p. 243, ll. 2 – 6. She testified that she is from Ohio, and she takes the opportunity to visit Hilton Head at least once a year (sometimes more) and that she visits with Claimant and her father. ROA 1909; Tr. Vol. 1, p. 243, ll. 4 – 12.

Mr. Earley was also asked about Exhibit 5 by Claimant’s attorney. Initially, he testified he did not even recognize himself in the picture. ROA 2113; Tr. Vol. 2, p. 180, ll. 10 – 13. He later testified that the picture showed Claimant with “a foot pad on”. ROA 2113; Tr. Vol. 2, p. 180, l. 21. He testified that a “foot pad” is “like a pill.” ROA 2113; Tr. Vol. 2, p. 180, l. 23.

He testified that his income and Claimant’s comprise the entirety of their household income. ROA 2123; Tr. Vol. 2, p. 190, ll. 9 – 15.

IV. THE SINGLE COMMISSIONER CORRECTLY DETERMINED THE CLAIMANT’S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

The Commission determined Claimant's Average Weekly Wage (AWW) and Compensation Rate (CR) to be \$368.80 and \$245.88, respectively. ROA 45; Order, Finding of Fact Seven (7), p. 11. Claimant has appealed this finding, alleging she was paid unreported cash, and citing the so-called "schedules" which did not reflect actual time worked (a point attempted to be made *ad nauseum* at the hearing) and downplaying the actual records included in Exhibit M (Pay Records).

At the hearing, Claimant failed to articulate or propose any numbers to be used for her AWW and CR. Claimant was given the opportunity after the hearing to produce her income tax records. She failed to do so despite a lawful subpoena issued to her for the same.⁶ However, Claimant testified she failed to pay income taxes on any of the alleged cash payments received from Employer. ROA 1704; Tr. Vol. 1, p. 38, ll. 13 – 15; ROA 1746; Tr. Vol. 1, p. 80, ll. 14 – 17.

Further, 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 placed a significant emphasis on the schedule (Claimant's Ex. No. 1). However, the greater weight of the evidence establishes that the schedule (Claimant's Ex. No. 1) did not actually or accurately reflect the number of hours worked by any employee. Further, the greater weight of the evidence is that Employer did not pay Claimant or any other party with payments under the table.

The only corroborating evidence Claimant can cite comes from the testimony of Jamie Willard Hudson, who testified that Employer fired her stealing cash from Employer. ROA 1891;

⁶ ROA 44; Order, Finding of Fact Four (4), p. 10: "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."

Tr. Vol. 1, p. 225, l. 17. Further, *Ms. Hudson is or was a client of Claimant's attorney (Mr. Coggin) in another matter and for which Claimant's attorney did not charge her a fee.* ROA 1875; Tr. Vol. 1, p. 209, ll. 14 – 16; and ROA 1898 – 1899; Tr. Vol. 1, p. 232, l. 23 – p. 233, l. 3. While the undersigned is not accusing Mr. Coggin of anything untoward, the circumstances giving rise to Ms. Willard's testimony are elucidating. Nevertheless, Ms. Hudson testified that she only worked forty (40) hours per week, half of which was paid in cash. ROA 1871; Tr. Vol. 1, p. 205, l. 17 – p. 206, l. 4. This does not comport with Claimant's apparent theory that payments beyond forty (40) hours per week were made in cash to avoid overtime payments.

Mr. Bitton testified that Employer did not ever pay its employees in cash. ROA 1727; Tr. Vol. 2, p. 61, ll. 7 – 9. Mr. Edri, who wasn't paid by the hour, testified he received some money directly from Mr. Bitton (not from Employer) ("Like, you know, he's family to me. He gave me a little 50 bucks here and there." ROA 1819; Tr. Vol. 1, p. 153, l. 25 – p. 154, l. 1.). When asked if he paid Mr. Edri cash, Mr. Bitton testified, "I usually – [Mr. Edri] comes to my house every weekend almost with his – with his dad, and so I always give him like – you know, he goes out, I give him fifty, a hundred bucks, go to the movies, whatever. Just like – you know, like family, but I took care of him this way." ROA 1994; Tr. Vol 2., p. 61, ll. 17 – 22. Ms. Baden testified she was paid by check every two (2) weeks for thirty (30) hours of work per week. ROA 1963; Tr. Vol. 2, p. 30, ll. 2 – 8 ("I got a paper check").

Claimant relies heavily on Claimant's Exhibit 1, which she called a schedule. While Claimant testified the "schedule" showed the actual hour each employee worked, not one of the other witness testified that was the case. It was Claimant's testimony that she worked up to ninety-eight (98) hours per week. ROA 1689; Tr. Vol. 1, p. 23, ll. 9 – 11. Claimant testified she

“probably” worked eighty (80) hours per week during the tourist season. ROA 1705; Tr. Vol. 1, p. 39, l. 24 – p. 40, l. 1.

Claimant further testified she worked “maybe” a hundred and sixty-eight (168) hours over the two (2) weeks preceding April 18, 2018. ROA 1703; Tr. Vol. 1, p. 37, ll. 10 – 14.

Claimant also testified that the work was seasonal: “Now, the winter, we would cut back on our hours” and she agreed that she worked fewer hours in the winter than during the high season. ROA 1744; Tr. Vol. 1, p. 78, l. 24 – p. 79, l. 16.

Other witnesses testified about Exhibit 1. Mr. Edri was questioned by Claimant’s attorney about the hours shown on the schedule.⁷ See entire testimony of Mr. Edri. To wit,

Q. Okay. Do you agree, Josh, after we’ve gone through this that in fact – Zack, I’m sorry. After we’ve gone through this that you worked a lot more than the thirty hours a week that you claimed to have worked earlier?

A. No, ‘cause *this is a schedule*.

Q. And you agree, Zack – and *I don’t believe your story* that you were paid [in merchandise] ---

ROA 1848; Tr. Vol. 1, p. 182, ll. 4 – 11 (emphasis added). Mr. Edri further testified that the hours shown on the schedule do not accurately reflect the hours worked by employees of Employer. ROA 1854; Tr. Vol. 1, p. 188, ll. 13 – 16. He testified he actually worked fewer hours than shown on the schedule. ROA 1854; Tr. Vol. 1, p. 188, ll. 17 – 19.

Ms. Baden was also asked about Claimant’s Exhibit No. 1. Ms. Baden testified that she did not actually work the number of hours shown on the schedule. ROA 1956 – 1958; Tr. Vol. 2, p. 23, l. 1 – p. 25, l. 23; ROA 1961 – 1962; Tr. Vol. 2, p. 28, l. 4 – p. 29, l. 23; ROA 1963 – 1968; Tr. Vol. 2, p. 30, l. 25 – p. 35, l. 3. “The schedule’s a guideline,” she testified. “If we’re not busy,

⁷ “And according to your schedule, you would work 580 hours; is that right?” ROA 1859; Tr. Vol. 1, p. 193, ll., 19 – 20.

then some of us get to go home earlier. This is just kind of a guideline.” ROA 1958; Tr. Vol. 2, p. 25, ll., 21 – 23. Nevertheless, Claimant’s attorney continued the line of questioning:

Q. Okay. But this is you’re scheduled to work; is that correct?

A. That is what I’m given, but it doesn’t mean I work it.

ROA 1959; Tr. Vol. 2, p. 26, ll. 5 – 8.

Ultimately, Ms. Baden testified as follows:

Q. This schedule you were asked about, it’s fair to say that it does not accurately and truly reflect the hours you actually worked, correct?

A. Yes.

ROA 1979; Tr. Vol. 2, p. 46, ll. 6 – 9.

Regarding the schedules and the number of hours worked, Mr. Bitton testified consistent with the others that employees do not work all of the hours shown on the schedules. ROA 2007; Tr. Vol. 2, p. 74, ll. 17 – 19. He testified the schedules are only times that the employees should be available to work. ROA 2008; Tr. Vol. 2, p. 75, ll. 3 – 6. He testified that the schedules are generally disposed of when a new schedule is posted. ROA 2008; Tr. Vol. 2, p. 75, ll. 13 – 18. On cross-examination by Claimant’s attorney, Mr. Bitton testified that the schedule does not represent the hours the employees were actually supposed to work, it only represents their availability. ROA 2011; Tr. Vol. 2, p. 78, ll. 10, ll. 10 – 18; ROA 2013 – 2017; Tr. Vol. 2, p. 80, l. 2 – p. 84, l. 10; ROA 2040; Tr. Vol. 2, p. 107, ll. 8 – 108, l. 1; ROA 2042 – 2043; Tr. Vol. 2, p. 109, l. 21 – p. 110, l. 10.

Claimant finally argues that there “is no indication that [Employer] kept any record of cash payments”, and Claimant argues that Employer’s “failure to produce such records” . . . should lead “to an adverse inference against Employer.” Brief of Appellant, p. 29. However, Employer maintains that it did not pay its employees in cash; therefore, there would be no records to produce.

Because Claimant's AWW and CR were calculated in a manner that's fair and equitable to all parties and is supported by the evidence, the Single Commissioner's ruling should be affirmed. Further, the Order of the Single Commissioner should be affirmed.

Nevertheless, this Court need not address this issue because the Claimant failed to prove compensable injuries. *By Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985).

CONCLUSION

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

RESPECTFULLY SUBMITTED,



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Jan 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

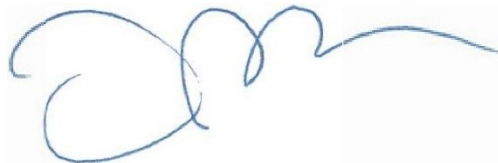
v.

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

CERTIFICATE OF COUNSEL

I hereby certify that the Respondent South Carolina Workers' Compensation Uninsured Employers' Fund's Final Brief complies with Rule 211(b) of the SCACR.

January 19, 2023



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Nov 07 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

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

Naomi Lynn Bridges.....Claimant, Appellant,

v.

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

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ARGUMENT

The Appellant, Naomi Lynn Bridges (hereinafter, Claimant or “Ms. Bridges”), by and through her undersigned attorney, hereby replies to the Initial Brief of Respondent South Carolina Workers’ Compensation Uninsured Employers’ Fund as follows:

Just as in their brief to the Appellate Panel of the Workers’ Compensation Commission, the South Carolina Uninsured Employers’ Fund (hereinafter “UEF”) dedicates much of their Brief to this Court to mischaracterizing and misstating Appellant’s position and argument, especially concerning the burden of proof and proper application thereof. In their brief, the UEF attempts to paint Claimant’s argument as a ploy to “reverse her burden of compensability and to shift that to the backs of the Defendants.” Brief of Respondent p. 5. The UEF also erroneously states that the Appellant is arguing that “whether an injury was suffered in the course of employment is a rebuttable presumption to be weighed in her favor.” *Id.* However, nothing could be further from the truth. The Claimant has clearly argued that she met her burden of proof of showing an injury arising out of, and in the course of her employment, and that the Single Commissioner erred in applying the law and legal standard regarding Respondents’ burden of proving an exception to coverage, which is an affirmative defense to be asserted by Employers/Defendants. It is so routine as to be axiomatic that the burden of proof as to any affirmative defense is on the party asserting. This was not addressed by the Commission, which failed to hold Defendants to their burden of showing an exception to coverage, or that Appellant’s actions temporarily removed her from the scope of employment at the time of her injury, which otherwise arose out of her employment.

Again, as below in their brief to the Appellate Panel of the Full Commission, the UEF attempts to discount more than 80 years of unbroken precedent in referring to the Court’s holding in *Johnson v. Merchant’s Fertilizer Co.*, 198 S.C. 373 (1941) simply as a “1941 case, one that was

decided before the enactment of S.C. Code Ann. § 42-1-160.” Regardless of how Counsel for the UEF may feel about the *Johnson* case as it applies to the present case, it is still the law of the State of South Carolina and is consistently cited throughout relevant case law concerning Employer challenges to allegedly prohibited conduct and whether they take employees’/claimants’ injuries out of the scope of their employment. The Court in *Johnson*, and our courts throughout relevant case law cited in Claimant’s brief, including *Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), make clear that the burden of proving an exception to coverage due to a prohibition lies upon the employer. Specifically, the Court in *Johnson* stated 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. et al*, 198 S.C. 373, 376, 17 S.E.2d 695 (1941). This is because our courts have recognized that this is an affirmative defense that must be proven by the Defendants, when the Claimant has asserted and met their burden of showing that the injury was otherwise within the course and scope of their employment.

Notably, in the nearly 22 pages of their brief, the UEF dedicates little more than a page addressing Respondents’ burden of showing an exclusion to coverage due to an employee leaving the sphere of employment during a workplace injury, and the circumstances under which such an exclusion arises. The UEF and the Commission have completely missed the nuances involved in determining when a Defendant can prove a claimant’s workplace injuries are exempted, as being outside the scope of their employment. The UEF in their brief, and the Commission in their orders, rely simply on our courts’ holdings that that “[w]hen 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.” *Wright v. Bi-Lo*, 314, S.C. 152, 155, 442 S.E.2nd 186, 188 (Ct. App. 1994). While simply finding a prohibition by the employer appears to be the

end of the UEF's and the Commission's inquiry, our courts have expressed that not every prohibition or "violation of an order given to an [employee] will necessarily remove him from the protection of the [Workers'] Compensation Act." *Johnson v. Merchants*, 198 S.C. at 379. Rather, "[c]ertain rules concern the conduct of the worker within the sphere of his employment, while others limit the sphere itself." *Id.* 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 of the sphere of his employment and compensation will be denied." *Id.* The prohibition must also be "clear and explicit." Thus, only a violation of a "clear and explicit" order which relates to the thing or task being done and not simply the "conduct" or method of performing a task may remove a workplace injury from the scope of employment. The Commission failed to engage in the analysis required by our courts to establish that an employee left the sphere of employment due to a prohibition and the UEF in their brief to this Court continue to ignore nuance between prohibitions related to the conduct or method of performing work tasks, and prohibitions regarding the tasks or things to be performed.

As discussed at length in the Appellant's Brief, substantial evidence does not support that there was a "clear and explicit" prohibition to Ms. Bridges. The UEF's own brief helps to further illustrate this, because it identifies at least 5 different versions of what Amir Bitton, the owner of employer LLC, claimed he instructed the Claimant to do or not do on the date of the accident: 1) "Okay please no climbing, no ladder, no physical work," Tr. Vol. 2, p. 64, ll. 5 – 9; 2) "You've got Zach if you need to climb on the ladder," Tr. Vol. 2, p. 64, ll. 15 – 18; 3) that he gave "strict instructions," Tr. Vol. 2, p. 65, l. 2.; 4) "Do not go on the ladder. Do not," Tr. Vol. 2., p. 65, ll. 6 – 7; (5) "No[t] any physical work. All I want you to do is cash people out. Be a cashier today. Don't do nothing. You've got Zack if you need to climb a ladder." Tr. Vol. 2, p. 61, ll. 13 – 16.

As noted in Appellant's brief, despite saying "there's the rest of the girls for any chores that you needed to do," (Tr. Vol. 2, p, 64, ln. 15 – 18), Mr. Bitton also claims that he told the employees that there should be "no girls on the ladder," and for that date only. Tr. Vol. 2, p. 169. The assertion that he gave all of these versions of instructions to Ms. Bridges in the "thirty minutes" he was physically present at the store on the day of the accident, strains credulity and should have been given no weight as Mr. Bitton's testimony is self-contradictory and self-serving. Tr. Vol. 2, p. 66, ll. 16 – 25. Therefore, substantial evidence does not support the finding that the Employer gave a "clear and explicit" prohibition to Mrs. Bridges. Additionally, as discussed in Appellant's Brief, the burden of proving that there was a "clear and explicit" prohibition that was violated by the employee that led to the Claimant's injury was not met by the employer given the owner's own conflicting testimony, let alone considering Mrs. Bridges testimony that she was apparently confused about the nature of the employer's order(s). This case is also factually distinguishable from *Wright v. BiLo* and *Black v. Town of Springfield*, because the Courts in those cases made a point of noting that the claimants in those cases were given a prohibition repeatedly on different occasions, establishing that the prohibition was "clear and explicit." In the present case, the Appellant testified that her understanding of the prohibition was different than what her employer claimed the prohibition was, and the expression of the prohibition by the employer allegedly occurred during a thirty-minute span, merely hours before the workplace accident.

Furthermore, while Claimant disputes that there was a "clear and explicit" prohibition, a violation of this alleged prohibition to not climb on the ladder does not, in itself, take her out of the scope of her employment. As discussed in the Brief of Appellant, pursuant to *Johnson* and its progeny, this order would not limit the sphere of employment such that a violation thereof would take the employee and her workplace injury outside of the scope of employment. This is because

such an order simply limits the “conduct” of employment within the sphere of employment, without limiting the sphere itself. This distinction, which has been entirely ignored by the Commission and the UEF in their brief, was described by Larson’s Workers’ Compensation Law as the ultimate “thing to be done” (sphere of job duties and employment) versus the method (or conduct) of accomplishing these duties. 3 Larson’s Workers’ Compensation Law, Ch. 33 Syn. In the present case, stocking shelves and bringing out inventory was a part of Ms. Bridges’ normal work duties, or the ultimate “things to be done” that were within the sphere of employment. Using a ladder to do so was a common and necessary *method* of accomplishing these duties. Thus, assuming *arguendo* substantial evidence supported that there was a “clear and explicit” order not to use a ladder, Ms. Bridges utilizing this *method* or engaging in this *conduct* to perform tasks otherwise within the scope of her employment, does not create an exception to coverage for her injury under the laws of this State, as there would only be a violation of an order relating to the method or conduct, and not of the sphere of her employment.

CONCLUSION

For the reasons stated above, and those found within the Brief of Appellant, this Court should reverse the judgment, findings of fact and conclusions of law of the Appellate Panel of the Full Commission.

[Signature Block Follows]

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November 7, 2022

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Nov 07 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

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

Naomi Lynn Bridges.....Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served Reply Brief of Appellant on the South Carolina Workers' Compensation Commission and on the attorney of record for the Respondents, Harbour Town Surf Shop, LLC and South Carolina Workers' Compensation Commission Uninsured Employers' Fund, by depositing a copy of it in the United States Mail, postage prepaid, on the 7th day of November, 2022, addressed as follows:

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Judicial Director, South Carolina Workers'
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Naomi Lynn Bridges, Appellant,

v.

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

Appellate Case No. 2022-000600

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2024-UP-258
Heard April 3, 2024 – Filed July 17, 2024

AFFIRMED

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P.A., of Hilton Head Island, for Respondent Harbour
Town Surf Shop, LLC.

Timothy Blair Killen, of Holder, Padgett, Littlejohn &
Prickett, LLC, of Mount Pleasant, for Respondent South

PER CURIAM: In this workers' compensation action, Naomi Lynn Bridges appeals the Appellate Panel of the South Carolina Workers' Compensation Commission's (Appellate Panel's) order finding her claim was not compensable. Bridges argues the Appellate Panel erred in (1) determining she had the burden to prove she was acting within the course and scope of her employment when she fell from a ladder while at work; (2) finding the evidence established she left the sphere of her employment by violating specific orders not to climb the ladder; (3) finding the greater weight of the evidence supported that she suffered from a preexisting injury or condition and she failed to meet her burden of proving she had suffered an injury in the course and scope of her employment; and (4) calculating her average weekly wage and compensation rate. We affirm.

1. Bridges, as the claimant, had the burden to prove she was acting within the course and scope of her employment.¹ See *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) ("Pursuant to section 42-1-160(A) of the South Carolina Code, for an injury to be compensable under the [Workers' Compensation] Act, it must be 'an injury by accident' and 'aris[e] out of and in the course of employment.'" (second alteration in original) (quoting S.C. Code Ann. § 42-1-160(A) (Supp. 2011))); *Gibson v. Spartanburg Sch. Dist. # 3*, 338 S.C. 510,

¹ Bridges provides no support for her arguments that the question of whether an employee was acting in the course and scope of her employment was a jurisdictional question. Additionally, she provides no specific support for the argument that asserting an employee is acting outside her scope is an affirmative defense, which would place the burden on the employer. Accordingly, these arguments are abandoned. See *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 620, 602 S.E.2d 747, 750 (2004) (deeming issues abandoned when the arguments on those issues were conclusory); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the failure to provide arguments or supporting authority for an issue renders it abandoned); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *aff'd as modified on other grounds*, 337 S.C. 622, 525 S.E.2d 246 (2000).

518, 526 S.E.2d 725, 729 (Ct. App. 2000) ("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."); *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842 ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law" (quoting *Clade v. Champion Lab'ys*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998))); *Houston v. Deloach & Deloach*, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct. App. 2008) ("The question of whether an injury arises out of and is in the course and scope of employment is largely a question of fact for the . . . [A]ppellate [P]anel."); *Pilgrim v. Eaton*, 391 S.C. 38, 48, 703 S.E.2d 241, 246 (Ct. App. 2010) ("Our courts have frequently stated that the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. These cases generally place the burden on a claimant to prove the injury is compensable." (citations omitted)); *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) ("Our review of factual issues is limited to whether substantial evidence supports the decision of the [Appellate Panel]."); *Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004) (providing that in workers' compensation cases, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact but may reverse when an error of law affects the decision); *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004) (stating the substantial evidence rule governs the standard of review in a workers' compensation decision); *Shuler v. Gregory Elec.*, 366 S.C. 435, 439-40, 622 S.E.2d 569, 571 (Ct. App. 2005) (providing this court must affirm the Appellate Panel's decision as to whether an injury arose out of and was in the scope of employment if substantial evidence in the record supported it because that determination was a question of fact).

2. 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. See *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 623, 594 S.E.2d 272, 274 (2004) ("When an employer limits the scope of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable."); *Wright*, 314 S.C. at 155, 442 S.E.2d at 188 ("[N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act. . . . "Certain 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 of the sphere of his employment and compensation will be denied." (alteration and omission in original) (quoting *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) ("[D]etermining whether an injury occurs in the course of employment remains an inherently fact-specific inquiry."); *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842 ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law" (quoting *Clade*, 330 S.C. at 11, 496 S.E.2d at 857)); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (providing that the Appellate Panel is the ultimate finder of fact).

3. The Appellate Panel did not find Bridges suffered from a preexisting injury or condition. The Appellate Panel's finding regarding Bridges's prior injury was made to explain why she was instructed to not use the ladder. The testimony from other employees that Bridges was injured when she returned from vacation and on the day she fell from the ladder provides substantial evidence to support this finding. *See Palmetto All., Inc.*, 282 S.C. at 432, 319 S.E.2d at 696 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 (stating the Appellate Panel is the ultimate finder of fact); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004) (providing that when the evidence conflicts for a factual issue, the Appellate Panel's findings are conclusive); *Bass v. Kenco Grp.*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [A]ppellate [P]anel."). The Appellate Panel did not find Bridges's injury was uncompensable because she was already injured; it found that because she disregarded Employer's instructions, which led to her injury, she was outside the sphere of employment when her injury occurred and thus, the injury was not compensable. Thus, Bridges failed to meet her burden of proving she had suffered an injury in the course and scope of her employment. *See Pratt*, 357 S.C. at 623, 594 S.E.2d at 274 ("When an employer limits the scope of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the

scope of employment and, therefore, not compensable."); *Davaut*, 418 S.C. at 640, 795 S.E.2d at 685 ("[D]etermining whether an injury occurs in the course of employment remains an inherently fact-specific inquiry."); *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 (providing that the Appellate Panel is the ultimate finder of fact).

4. Substantial evidence supports the Appellate Panel's determination Bridges did not sustain a compensable injury because she left the sphere of her employment. Therefore, we need not address whether the Appellate Panel incorrectly calculated Bridges's average weekly wage and compensation rate. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address the remaining issues when its determination of a prior issue is dispositive of those remaining issues).

AFFIRMED.

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

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

Naomi Lynn Bridges.....Appellant,

v.

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

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

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July 30, 2024

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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July 30, 2024

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September 6, 2024

VIA EMAIL – ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Naomi L. Bridges, Appellant, v. Harbour Town Surf Shop, LLC, and SC Workers'
Compensation Uninsured Employers' Fund, Respondents.
Appellate Case No. 2022-000600

Dear Ms. Kitchings:

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

Sincerely,



Timothy B. Killen

TBK/maa
Enclosure

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

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

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

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

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

Appellant has petitioned this Court to rehear the matter, alleging that the Court has "inject[ed] fault or negligence in a workers' compensation scheme" Petition for Rehearing, p. 1.¹ Further, Appellant alleges that substantial evidence does not support that clear and explicit instructions for the Appellant not to use a ladder on the date of alleged accident, where said use directly led to Appellant's alleged injuries. Appellant also asserts that this Court has erred by requiring a Claimant to prove her injuries arose from and were suffered in the course of her employment. Appellant additionally asserts that Respondents' defense that Claimant's injuries did not arise from and were not suffered in the course of employment is an affirmative defense, an issue the Court deemed abandoned on appeal by this Court.

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

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

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

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

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

This Court affirmed the Commission's findings, determining that

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

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

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

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

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

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

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

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

³ "The Opinion states that because Ms. Bridges violated specific orders not to climb a ladder at work, her workplace injury fell outside of the scope of employment. This is the same erroneous conclusion reached by the Commission." Petition for Rehearing, p. 3.

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

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

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

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

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

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

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

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

(3) Amir Bitton, owner of Employer, testified he instructed her, "Okay, please, no climbing, no ladder, no physical work." ROA 1997; Tr. Vol. 2, p. 64, ll. 5 – 9. He further testified he told her, "You've got Zach if you need to climb on the ladder. Go ask Zack, he'll do anything, and there's the rest of the girls for any other chores that you needed to do." ROA 1997; Tr. Vol. 2, p. 64, ll. 15 – 18. He testified the instructions given to Claimant were "strict instructions". ROA 1998; Tr. Vol. 2, p. 65, l. 2. Mr. Bitton further testified he instructed her, "'Do not go on the ladder. Do not.'" ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7; and

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

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

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

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

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

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

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

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

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

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

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

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

Appellant further mischaracterized what the Commission actually determined. Appellant writes: “Moreover, the Commission’s decision specifically found that this violation of a workplace order was not analogous to that of Wright because the order by Saluda’s for Marrs to stay off the stairs was not a limitation of the sphere of employment.” Petition for Rehearing, p. 9. However, after discussing the specifics of the injury (ACL tear), the actual Finding of Fact from the Commission reads as follows:

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

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

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

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

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

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

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

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

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

CONCLUSION

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

RESPECTFULLY SUBMITTED,

A handwritten signature in blue ink, appearing to read 'TKillen', is written over a light blue rectangular background.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-000600

Naomi Lynn Bridges, Appellant

v.

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

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

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

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The South Carolina Court of Appeals

Naomi Lynn Bridges, Appellant,

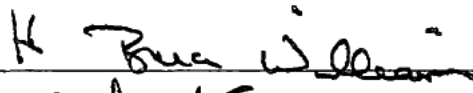
v.

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

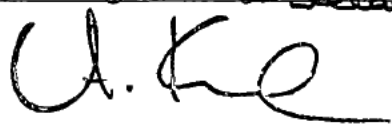
Appellate Case No. 2022-000600

ORDER

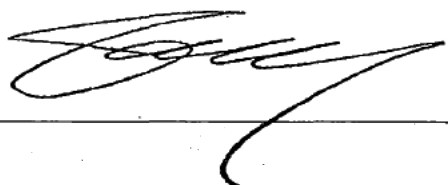
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

FILED
Sep 20 2024

cc:

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