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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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Supreme Court Case No. 2024-001768

Unpublished Opinion No. 2024-UP-258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

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Naomi Lynn Bridges, Appellant,

v.

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

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# BRIEF OF RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

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## 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. Respondent 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. Respondent 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 Respondent was its employee. ROA 1677; Tr. Vol. 1, p. 11. However, Employer asserted that Respondent 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 Respondent was acting outside the course of her employment at the time she alleged to have suffered her injuries. *Id.*

Respondent took the position that Defendants' position (that Respondent was acting outside the scope of employment) amounted to an affirmative defense. ROA 1676; Tr. Vol. 1, p. 10. Respondent 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 Respondent was outside the course of employment when she was injured. Interestingly, Respondent 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 Respondent's Average Weekly Wage (AWW) and Compensation Rate (CR) are $354.62 and $236.43, respectively. ROA 1678; Tr. Vol. 1, p. 12. The Respondent 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. Respondent submitted almost One Thousand, Five Hundred (1,500) pages of medical evidence, even though

[1] At the hearing, Respondent'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.

there was no dispute over the nature of the injuries. Respondent sought 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 Respondent failed to prove her injuries were suffered in the course of employment. Respondent'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. Respondent then appeal to the South Carolina Court of Appeals. The Court of Appeals heard oral arguments on April 3, 2024, and issued its Order affirming the Commission on July 17, 2024. *Bridges v. Harbour Town Surf Shop, LLC*, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257.

## 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. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The ultimate determination of a witness'

credibly 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. Respondent alleged she hurt her left leg when she fell off of a ladder at work. Employer and UEF assert that Respondent 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. THE COURT OF APPEALS CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE EMPLOYER LIMITED APPELLANT'S SPHERE OF EMPLOYMENT.

The Court of Appeals affirmed the Commission's findings, determining that

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

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

That's the standard of review on factual findings. The substantial evidence supports the Commission's determinations.

Appellant argues that the Court of Appeals' decision was an error of law because "our courts must discern whether the violation pertained to an order by the employer limiting the sphere or employment rather than an order concerning the conduct or methods of performing work within the sphere of employment." Brief of Appellant, p. 16. However, the Court of Appeals did, in fact, affirm the Commission's findings that the sphere of employment was limited by the Employer's instructions: "Substantial evidence supports the Appellate Panel's determination *Bridges left the sphere of her employment by violating specific orders not to climb the ladder*. The Appellate Panel found Bridges's employer limited the scope of her employment with his instructions." *Bridges v. Harbour Town Surf Shop, LLC*, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *3 (Ct. App. July 17, 2024) (emphasis added). The Court of Appeals then cited several cases on this issue, including *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 623, 594 S.E.2d 272, 274 (2004); *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) *Johnson v. Merchs. Fertilizer Co.*, 198 S.C. 373, 378-79, 17 S.E.2d 695, 697-98 (1941))); *Davaut v. Univ. of S.C.*, 418 S.C. 627, 640, 795 S.E.2d 678, 685 (2016), *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); and *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). *Bridges v.*

*Harbour Town Surf Shop, LLC*, No. 2024-UP-258, 2024 S.C. App. Unpub. LEXIS 257, at *2 - 4 (Ct. App. July 17, 2024).

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

Appellant further asserts that the Court of Appeals' decision "is in stark contrast to the Commission's and the Court's decision in a nearly factually identical case involving the issue of whether a violation of a workplace order removed an injury from the scope of employment," then cites an unpublished opinion from the Court of Appeals. Brief of Appellant, pp. 19 – 21. However, the only fact outlined in the unpublished, *per curium* opinion are contained in this line: "Saluda's appeals, arguing the Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding Marrs' knee injury was compensable when it occurred on stairs Saluda's prohibited Marrs from using." *Marrs v. 1751, LLC*, No. 2013-UP-230, 2013 S.C. App. Unpub. LEXIS 313, at *1 (Ct. App. May 29, 2013). Appellant's reliance on an unpublished opinion, which is expressly prohibited by SCRACR 268(d)(2), is misplaced. Moreover, the case is factually distinct and lacks sufficient detail to support Appellant's arguments.

Outside of the fact that the Commission found Marrs' knee injury to be compensable, there are no facts detailed in that unpublished opinion. It is unclear from the cited opinion how and why Appellant knows that Marrs was a cook, that the chair was rusty, and that Marrs was a smoker.

Those facts appear in the Commission's Order, which is also improperly cited.

Nevertheless, Respondent is forced to address the issue out of an abundance of caution. In referencing that case, Appellant ignores that the Commission determined that the Claimant had suffered compensable injuries. The Commission, of course, is the ultimate finder of fact. The Court of Appeals' standard of review limited it to determining whether the substantial evidence supported the Commission's decision. The Court of Appeals cannot overturn based on a factual finding.

Appellant further mischaracterized what the Commission actually determined in its Order. Appellant writes: "The Court of Appeals affirmed the Commission's conclusion, specifically holding that this violation of a workplace order was not analogous to that of *Wright* because the order by Saluda's for Marrs to stay off the stairs was not a limitation of the sphere of employment." Brief of Appellant, p. 21. However, after discussing the specifics of the injury (ACL tear), the actual Finding of Fact in the Commission's Order reads as follows:

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

*Marrs v. 1751, LLC*, 2011 SC Wrk. Comp. LEXIS 148, *7-8 (internal citations omitted). If the issue on appeal herein were one related to the personal comfort doctrine, this case *may* have some relevance (albeit unpublished). In Conclusion of Law Five (5), however, the Commission mentions the "sphere of employment." However, there is no discussion or substantive explanation provided by the Commission, only a conclusory summation that this particular action did not remove Claimant from the sphere of employment:

> The Claimant's action of walking down the back stairs did not take him outside the

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

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

As shown in the case law, every case must be determined on its own facts. There is no hard and fast rule when it comes to this issue.

The crux of Appellant's argument is whether the prohibition not to get on the ladder merely limited the method she was to perform her work and not the actual work itself (the thing). Essentially, Appellant argues that the instruction was "don't get on top of the cooler *via* the ladder." However, there is a wealth of testimony, outlined *infra*, that the instruction was not so limited. If getting candy from the top of the cooler required her to get on the ladder, then the instruction not to get on the ladder limited the sphere of her employment to working on the floor. An interpretation of the prohibition in this manner is not reasonable, as the prohibition was given to her because (as the Commission determined below) Respondent came to work with a left leg injury that day (the same leg alleged to have been injured herein). ROA 45; Finding of Fact 8, Appellate Panel Order, p. 45. Even if Respondent genuinely interpreted the instruction that way, her confusion does not make the instruction any less clear. As you will see later in this brief, her co-workers understood the instruction, and the instructions were specific.

Appellant argues that "80 years of precedent" has been turned on its head by the unpublished opinion below. Brief of Appellant, p. 19. Appellant cites cases on this issue (*Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994); *Johnson v. Merchs. Fertilizer Co.*, 198 S.C. 373, 17 S.E.2d 695 (1941); and *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950)) which have gone both ways, but then 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*. Appellant cites Professor Larson at length in her brief. A reading of the section cited by Respondent shows that the central question in each case is whether the instructions are clear. Larson cites denials in that section, as well, and he cites cases in which ladders were used: (1) a painter was denied benefits after taking a ladder into a place of high wind, contrary to the instructions of his employer (*Bigos v. Waddill & Skelly*, N.J. Super. 3, 66 A.2d 200 (1949)); and (2) a painter who was electrocuted after moving his ladder into a forbidden area (*Gacesa v. Consumers Power Co.*, 220 Mich. 338, 190 N.W. 279 (1922)). Those painters were still painting (the thing), but they violated specific prohibitions by using the ladders.

Two very important cases are summed up in Appellant's brief in a few short sentences. These are *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950) and *Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). In *Black*, a police chief was denied benefits after falling from a fire truck, although he had work duties related to fire fighting. His employer expressly prohibited him from riding on fire trucks, but he ignored those instructions. Like the Respondent here, the police chief's injuries were not compensable under the Workers' Compensation Act. The Claimant in *Wright v. Bi-Lo* was also denied benefits for engaging in behavior that was prohibited by the Employer's instructions. 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). This Court denied

certiorari on that case.

Respondent 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 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. Respondent also cites *Portee v. S.C. State Hosp.*, 234 S.C. 50, 106 S.E.2d 670 (1959). This is another distinguishable case. 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)).

As noted by Larson, the question in each case is whether the instructions were clearly given to the employee. As the Court of Appeals found, "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.'"

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 Court of Appeals be affirmed.

## II. THE COURT OF APPEALS CORRECTLY FOUND THAT SUBSTANTIAL EVIDENCE SUPPORTS THAT THE ORDER NOT TO USE THE LADDER WAS CLEAR AND EXPLICIT.

The Respondent argues that, even if she still bears the burden of proof, her injuries nevertheless were suffered in the course of employment because the instructions not to get on the ladder were not clear and explicit. Respondent cites *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 Respondent in this matter:

> Nor does it appear that he was ever clearly and specifically told not to enter the area between the brick wall and rock bin No. 2, which led to the end of the line shaft on that side of the room. In fact Mr. Bunch stated that he did not 'say anything to him one way or the other about sweeping in there.

*Johnson v. Merchant's Fertilizer Co. et al*, 198 S.C. 373, 377 (S.C. 1941).

Regardless, the Respondent appears to agree, though, that disregarding "clear and explicit" instructions from an employer may remove an employee from her employment. *See* Brief of Appellant, pp. 22 – 24.

The Commission found, as a fact, that the instructions given to Appellant were "clear and explicit." ROA 46; Finding of Fact 13, Appellate Panel Decision and Order, p. 12. The Finding is supported by the substantial evidence. In fact, there is a mountain of evidence that the Commission relied upon in this case to find that the Respondent 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 Respondent's limitations on the day she alleges she was injured: "He was talking to [Respondent]. 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 [Respondent] had the injured foot . . . ." ROA 1781; Tr. Vol. 1, p. 115, l. 15. Ms. Rodriguez testified Bitton told Respondent: "'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. Rodriquez testified that, before the alleged fall, Respondent 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 Respondent 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 [Respondent] 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 [Respondent] use the ladder.'" ROA 1782; Tr. Vol. 1, p. 116, ll. 2 – 5. Ms. Rodriguez testified that Bitton gave clear and explicit instructions to Respondent not to get on the ladder. ROA 1785; Tr. Vol. 1, p. 119, ll. 5 – 7.

After being asked multiple times by Respondent's attorney to recount Bitton's instructions, Ms. Rodriguez further testified:

> Okay. That day Amir [Bitton] told [Respondent] 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**

Respondent called Zachary Edri, a co-worker, to testify. Mr. Edri testified he was working on Respondent'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,[Respondent'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 [Respondent]. 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 Respondent 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 Respondent 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 Respondent 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 [Respondent] 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 [Respondent] 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 Leticia, Zack, and Raven not to allow Respondent 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 Respondent 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 RESPONDENT**

Respondent 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 Respondent, 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.

Respondent 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, Respondent 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).

Respondent 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.

Respondent 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 Respondent was prohibited from using the ladder, and that she was well aware of the prohibition.

Respondent 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 [Respondent] 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, Respondent'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 Respondent were clear and explicit. Assuming, *arguendo*, that

Respondent'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."[2] Respondent's purported confusion makes these instructions no less clear.

Respondent argues that the Employer's instructions were "conflicting." Brief of Appellant, p. 21. However, there is not actually any conflicting testimony referenced by Respondent. The witnesses seem to agree that she was told not to get on the ladder.

Respondent's last argument is that, presuming Respondent 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, Respondent 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 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; (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 [Respondent] 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 Respondent, "'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

[2] ROA 1998; Tr. Vol. 2, p. 65, ll. 6 – 7.

if you need to climb a ladder.'" ROA 1994; Tr. Vol. 2, p. 61, ll. 13 – 16.

Because Respondent's alleged injuries were suffered when she was engaged in activities that were clearly and expressly prohibited, the Court of Appeals' Order should be affirmed.

Accordingly, Respondent UEF respectfully requests that the Commission's judgments be given great weight, and that the Order of the Court of Appeals be affirmed.

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

Appellant argues that the Court of Appeals erred on the burden of proof. Appellant argues that Respondents were asserting an affirmative defense, and that Respondents bear the burden of proving that affirmative defense. However, Respondents did not assert any affirmative defenses below. Further, the Court of Appeals deemed this argument abandoned by 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 a claimant bears the burden of proving compensability: "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law . . ." *Crisp v. SouthCo. Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013).

A denial of liability does not equate to an affirmative defense ("An employer who has failed to respond to a claimant's workers' compensation action is therefore precluded only from raising affirmative defenses and may still deny liability." *Hargrove v. Carolina Orthopaedic Surgery Assocs., PA*, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010)). Respondents herein only denied liability.

However, even if they had asserted an affirmative defense, the Commission made specific findings that Respondents successfully proved that Respondent was outside the course and scope of employment:

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

ROA 46; Finding of Fact Thirteen (13), Appellate Panel Order, p. 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 employment by violating the specific orders not to climb the ladder."

ROA p. 46; Finding of Fact Fourteen (14), Appellate Panel Order, p.12;

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

ROA p. 46; Finding of Fact Fifteen (15), Appellate Panel Order, p.12; and

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

ROA p. 49; Conclusion of Law Thirteen (13), Appellate Panel Order, p. 15.

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

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

## IV. THE COMMISSION CORRECTLY DETERMINED THE RESPONDENT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

Although not addressed by the Court of Appeals because the case was denied, the Commission determined Respondent's Average Weekly Wage (AWW) and Compensation Rate (CR) to be $368.80 and $245.88, respectively. ROA 45; Appellate Panel Order, Finding of Fact Seven (7), p. 11. Of course, this was a finding of fact, and the Commission remains the ultimate fact finder in Workers' Compensation cases. Respondent 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 the Respondent's attorney attempted to make repeatedly at the hearing), and downplaying the actual records included in Exhibit M (Pay Records).

At the hearing, Respondent failed to articulate or propose any numbers to be used for her AWW and CR. Respondent 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.[3] However, Respondent 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, Respondent missed work due to her unrelated eye illness and for other reasons; Respondent 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 Respondent 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 Respondent or any other party with payments under the table.

The only corroborating evidence Respondent can cite comes from the testimony of Jamie Willard Hudson, who testified that Employer fired her stealing cash from Employer. ROA 1891; Tr. Vol. 1, p. 225, l. 17. Further, *Ms. Hudson is or was a client of Respondent's attorney (Mr. Coggin) in another matter and for which Respondent'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 Respondent's apparent theory that payments beyond forty (40) hours per week were made in cash to avoid overtime payments.

[3] ROA 44; Appellate Panel 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."

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").

Respondent relies heavily on Claimant's Exhibit 1, which she called a schedule. While Respondent testified the "schedule" showed the actual hour each employee worked, not one of the other witness testified that was the case. It was Respondent's testimony that she worked up to ninety-eight (98) hours per week. ROA 1689; Tr. Vol. 1, p. 23, ll. 9 – 11. Respondent 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.

Respondent 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.

Respondent 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 Respondent's attorney about the hours shown on the schedule.[4] 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, 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, Respondent'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?

[4] "And according to your schedule, you would work 580 hours; is that right?" ROA 1859; Tr. Vol. 1, p. 193, ll., 19 – 20.

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 Respondent'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.

Respondent finally argues that there "is no indication that [Employer] kept any record of cash payments", and Respondent argues that Employer's "failure to produce such records" . . . should lead "to an adverse inference against Employer." Brief of Appellant, p. 27. However, Employer maintains that it did not pay its employees in cash; therefore, there are no records to produce.

Because Respondent'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 Respondent 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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