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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 2409881

Neval Brunson, Claimant,. . . . . Appellant,

v.

Cutter Buyer, LLC, Employer, and
Property & Casualty Insurance Company of Hartford, Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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1. As a safety rule governs the employee's conduct within the sphere of employment rather than limiting the sphere of employment, was it legal error for the Appellate Panel to hold that Appellant's claim was barred because he "left the course and scope of his employment when he rode on the back of the woodchipper" not for any personal benefit but as a means of transportation between jobsites?

2. Even if a safety rule limits the sphere of employment, was it legal error fo the Appellate Panel to find Appellante left the course and scope of his employment when no supervisor explicitly ordered Appellant and his coworkers not to ride on the truck or the chipper immediately before the accident and the safety rule had not been enforced until after the accident?

3. Whether the Appellate Panel erred as a matter of law in injecting fault into the Workers' Compensation system when it barred Appellant's claim by holding he rode "the machinery in the manner that directly resulted in his injuries" and when the accident occurred because no other means of transportation was made available and the direct and proximate cause of the acciddent was the chipper becoming unhitched from the bucket truck?

STATEMENT OF THE CASE

This matter involves an appeal from the Appellate Panel of the Workers' Compensation Commission.

Appellant Neval Brunson was employed on the ground crew of a company that trimmed trees along power line right of ways. On July 23, 2024, Brunson and a coworker were injured when the chipper on which they were riding became detached from the bucket truck which was towing it.

The Employer Cutter Buyer, LLC, and Carrier, Property & Casualty Insurance Company of Hartford, accepted Brunson's claim. They began providing temporary total disability benefits and medical treatment for his back, pelvis and coccyx.

On September 16, 2024, Brunson filed a Form 50 (Request for Hearing) alleging injuries to his "Pelvis, Hip, Back, Neck, Bilateral Legs, Head, Teeth." [Form 50 9/16/24).

On October 16, 2024, Respondents timely filed a Form 51 (Employer's Answer to Request for Hearing) stating "Defendants admit that claimant sustained an injury to his back, pelvis and coccyx. Defendants deny, pending investigation, all other injuries alleged as a result of the admitted injury." The 51 further stated: "Defendants admit, pending additional investigation, that the claimant was performing services arising out of and in the course of his employment." [Form 51 10/16/24].

On November 19, 2024, Respondents filed an Amended Form 51 "deny[ing] this claim pending further investigation. The Form stated: "Defendants assert the injury was the result of horseplay and/or the result of the known noncompliance with company policy." [Form 51 11/19/24]. Respondents also filed a Form 15 (Section II) terminating TTD on the grounds that the "accident did not occur in the course of claimant's employment." [Form 15 11/19/24].

The case was tried before Commissioner Cynthia C. Dooley on December 10, 2024. . Respondents argued Brunson violated company policy by riding on the chipper. They argued "when

you through acts of your own and with intent violate expressly forbidden, or expressed prohibitions by your employer, and are injured as a result thereof, your claim should be denied because you were outside of the course and scope of your employment when you did that." [Tr. page 9].

Appellant argued the alleged "violation of the rules were . . . rules concerning the conduct of Mr. Brunson within the scope of his employment and, therefore, leave the scope of his employment unchanged and don't prevent the recovery of compensation." [Tr. page 8].

Commissioner Dooley issued a Decision and Order on March 25, 2025. The Order denied Brunson's claim holding:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Claimant is not entitled to benefits under the Act because he clearly violated express and specific orders from his employer not to ride the machinery in the manner that directly resulted in his injuries. The Claimant left the course and scope of his employment when he rode on the back of the woodchipper. Therefore, his claim is not compensable.

[Order 3/25/23].

Appellant Brunson timely filed his Form 30 (Request for Commission Review) on April 4, 2025. [Form 30 4/4/25]. The Appellate Panel heard oral argument on on July 14, 2025.

On September 5, 2025, the Appellate Panel affirmed Commissioner Dooley's Decision and Order in it's entirety. [FC Order 9/5/25].

This Appeal followed.

STATEMENT OF THE FACTS

The Respondent Employer, Cutter Buyer, LLC, operates a tree cutting service known as Zylem Tree Experts. Neval Brunson was hired by Zylem in June 2024.

Zylem operated with two types of crews: a tree crew and a ground crew. The tree crew worked overhead out of bucket trucks trimming branches on trees along the right of way for power lines. [Tr. page 40, lines 10-14]. The ground crew picked up the branches and ran them through a wood chipper. Brunson worked on the ground crew.

Normally, the crew rode in a "chip truck with a buddy cab" with enough seating to accommodate the entire four-man crew within the truck. However, on July 23, 2024, the regular buddy truck had been in the shop for a week. Instead, Zylem used a lift truck with a single bench seat to pull the chipper – which meant "you couldn't sit everybody in there . . ." [Tr. page 44, line 23-page 45, line

On July 23, 2024, the company was clearing tree branches from power lines along Trufield Drive in Sumter Country near Dalzell. Brunson worked on the 4-man ground crew. Their job was to follow the tree crews, pick up cut off branches and run them through a chipper. No supervisors were on the scene when the accident happened. At the time of the accident, Brandon Conner was driving the bucket truck (not wearing a seatbelt). [Tr. page 89, lines 1-7]. Conner was merely another groundsman – "not the boss man" – with no authority to give orders. [Tr. page 92, line 8]. One worker stood on the running board of the truck hanging on with his arm through the window. The other two workers – including Brunson – rode behind on the chipper.

Brunson himself has no memory of the day in question due to post-traumatic amnesia. Neither of the supervisors who testified were on site when the accident occurred. Bryan Norton, the general foreman, could not see the accident and was "not present at all to see what was going on."

"Tr. Page 43, line 18-page 44, line 2]. Anthony Preast, the supervisor, was not on the job at all. [Tr. page 71, lines 5-7]. Brandon Conner did not testify as to specifically how the accident occurred.

No one disputes that Brunson and another employee, Roberto, were riding on the chipper. The accident report states:

> employees sat on chipper attached to truck while going down rode, both fell off chipper causing neval Brunson to fall off an cut in his head an broken pelvis, Roberto also fell but denied service until today an waiting on doctor report today. last update he was claiming to be sore.

[Defendants' APA page 1 (grammar and spelling errors in original)].

The in-truck video and on scene photographs show the accident occurred when the chipper came loose from the bucket truck causing the front end to drop to the ground and launching the employees into the air. The video is viewed from the dashboard showing the driver (Conner) and another employee hanging outside on the running board. When the video starts, the bucket truck is already moving and picking up speed. At 19 seconds, the video shows the bucket truck suddenly shift and shake. At 23 seconds, the driver stops the truck while the man on the running board looks back. At 30-33 seconds, both men leave the truck and run towards the back. The driver is in such a hurry that he leaves the driver's door open. [Defendants' Exhibit D].

Assuming the truck is traveling at an average of 20 mph, it would travel 675 feet in 23 seconds – further considering the truck is already moving when the video starts. The video shows the truck passing houses on both sides of the street.

A photograph from the accident report shows the scene looking forward down Trufield Road. A large divot or groove is shown in the pavement. [Defendants' APA page 13]. One can also see a power pole on the left with a clear view down the road showing no trees to clear along the line.

A screen shot from Google Streets from February 2025 (seven months after the accident) shows that the divot has been repaired with road tar. It also shows a wider view of the same scene confirming there are no trees to clear along the wire. This explains why the crew were riding instead of walking and why the driver was going as fast as he was.

Other photographic evidence shows that Brunson did not merely fall off the back of the chipper. Photograph 6 shows the rear of the bucket truck. There are holes and other damage to the back of the truck. [Defendants APA page 6].

Other closeup photographs were taken of the hitch both hitched and unhitched. [Defendants' APA pages 7-9]. The accident report lists the 2023 MORBARK 1215 CHIPPER and 2019 FORD F750 as assets involved. The report further states: "Anticipated Cost for Repair: $10000 or Above." [Defendants' APA page 14].

If Neval Brunson had simply fallen off the chipper, there would be no divot in the road, no jarring of the bucket truck severe enough to make the driver immediately come to a stop and run behind it, and no reason for the accident to cause over $10,000.00 in property damage. Brunson himself testified – without objection – "I was told I was thrown off the wood chipper . . . one of the employees said he saw me go up in the air and come down." [Tr. page 36, line22-page 37, line 3]. The only reasonable inference to be drawn from the accident report is that the chipper became unhitched causing damage to the equipment and launching Brunson into the air causing his injuries.

Brunson was rendered unconscious by the impact. He was airlifted from the scene to the

trauma center at Prisma Health in Columbia. [Claimant's APA pages 1-7]. The hospital report states:

> Patient was reportedly at work where he works as an arborist. Patient was reportedly on top of a wood chipper and fell approximately 5 to 6 feet. . . . Patient is unable to recall the events leading up to the fall and endorses loss of consciousness. . . .

[Claimant's APA page 8].

Brunson suffered a traumatic brain injury with loss of consciousness, transverse sacral fracture, and back injury with parasthesia of his right lower extremity. The claim was initially accepted and he was provided limited treatment until the claim was denied..

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of the full commission's decision. Lark v. Bi–Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Under this standard, the appellate court can reverse or modify the decision only if the claimant's substantial rights 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 on the whole record. S.C.Code Ann. § 1–23–380(A)(5) (Supp. 2025).

Two principles form the lens through which the court reviews decisions of the workers' compensation commission. First is the guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

When the facts are undisputed, whether an accident is compensable is a question of law. Shuler v. Gregory Elec., 366 S.C. 435, 622 S.E.2d 569 (Ct.App.2005). In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances. Lanford v. Clinton Cotton Mills, 204 S.C. 423, 425, 30 S.E.2d 36, 41 (1944). The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant. Davis v. S.C. Dep't of Corr., 289 S.C. 123, 125, 345 S.E.2d 245, 246 (1986).

ARGUMENT

1. As a safety rule concerns the conduct of the workman within his sphere of employment, a willful disregard of a safety rule does not take him out of the sphere of employment thus does not bar him from receiving workers' compensation.

A workplace injury is covered under the Workers' Compensation Act if it results from an "injury by accident arising out of and in the course of employment . . ." . It is undisputed that Brunson suffered an injury by accident arising out of his employment when he was thrown off the chipper on which he was riding. The dispute concerns whether the *accident occurred in the course of employment.*

An injury occurs "in the course of employment when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007)(injuries sustained "in drunken joyride" were within the course of employment because the " accident occurred within the period of employment, at a place where [employee] was reasonably in the performance of his duties and was fulfilling those duties or engaged in activities incidental to that employment [and] was not exercising a personal privilege wholly apart from [employer's] interests."). "It is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment." Skipper v. Southern Bell Tel. & Tel. Co., 271 S.C. 152, 156, 246 S.E.2d 94, 96 (1978). "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." Grant v. Grant Textiles, 372 S.C. 196, 202, 641 S.E.2d 869, 871-72 (2007), *citing* Howell v. Kash & Karry, 264 S.C. 298, 301, 214 S.E.2d 821, 822 (1975).

The legal theory advanced by Respondents is that Neval Brunson violated a safety policy which took him outside the scope of his employment – specifically a provision in the employee handbook against riding on machinery. Any such policy violation did not take Brunson outside the scope of his employment because (1) rules governing safety on the job inherently "concern the conduct of the workman within his sphere of employment"; (2) the policy was not enforced as shown by the fact that all four members of the crew were in violation of company policy by riding on the chipper, standing on the running board of the truck, or driving without a seatbelt; (3) and no supervisor gave explicit instructions not to ride on the chipper on the day of the accident.

A. Violation of a safety rule cannot take an employee out of the course of his employment as a matter of law because safety rules concern the conduct of the employee within the sphere of his employment.

The legal rule applied by the Appellate Panel in this case is "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, are not compensable." Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell was acting outside scope of his employment). The Black Court explained the distinction between rules governing the work – such as safety rules – and rules limiting conduct outside the employee's job description:

> [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 his sphere of 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. Id., *quoting* Johnson v. Merchants Fertilizer Co., 183 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941).

The legal application of this rule is at the heart of this case. Black requires that the employee's injury must be "brought about through his own act which were not only *wholly without*

the scope of his employment but had been expressly forbidden by his employers." Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(emphasis added). It is not enough for an employer to have a policy against riding machinery for safety reasons. Nor does it matter if the act is expressly forbidden. What matters is whether the act is "wholly outside the scope of his employment." Black.

Fundamentally, workers' compensation is a no-fault system. It would frustrate the purposes of the Act if an employer could make every risky or foolish act outside the course of employment (and thus not compensable) merely by inserting a rule against it in their employee handbook.

As Professor Larsen observed:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.
>
> Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 1.03[1] (2014), *quoted in* Nicholson v. SCDSS, 411 S.C. 381, 769 S.E.2d 1 (2015)(injecting fault into workers' compensation "is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head.").

The point can be illustrated with some examples. A machine operator who injures his hand cleaning a machine in violation of a safety rule; a truck driver who runs a red light and crashes his

truck;[1] and a CNA who injures her back using prohibited lifting techniques can all recover for their injuries despite the fact each violated a company policy. The reason is because each rule concerns the "conduct of the workman within his sphere of employment."

The key to each case is not merely that the instructions were given immediately by a then present supervisor, but that the instructions concerned conduct outside the sphere of the particular employment.[2] Black was a police officer, not a firefighter. Wright was a grocery stocker, not a security guard. Had Black been a firefighter or Wright a security guard both would have been entitled to compensation.

In the instant case, the four members of Brunson's crew were caught between a rock and a hard place. The Employer normally provided a chip truck with a buddy cab which had enough seats with seat belts to accommodate the entire crew. On June 10, 2024, the buddy truck had been out of service for a week. The Employer elected to tow the chipper with a single seat bucket truck making it *impossible* for all members of the crew to sit inside and wear seatbelts. They were not engaging in horseplay; they were simply moving from one jobsite to another jobsite via the only means available to them.

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[1]See Gray v. Club Group, Ltd., 339 S.C. 173, 190, 528 S.E.2d 435 (Ct.. App. 2000)(. . . exceeding the speed limit [by 120 miles per hour] in performance of his duties as a courier is not a substantial deviation, sufficient to remove the accident from the course and scope of employment.").

[2]Pratt deals with a different factual situation in that he was driving a company truck from home to a jobsite when he had been explicitly ordered not to take the truck home the night before. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Conceptually, Pratt is closer to a *coming and going rule* case. Ordinarily travel to and from home and work is outside the course of employment. One exception is when the means of travel is provided by the employer. In Pratt, the employer had withdrawn its provision of travel the night before, thus when Pratt drove the truck to work after being explicitly told he was no longer allowed to do so, the trip was outside the course of his employment. To be sure, the court used the analysis from Black in that the prohibition against taking the truck home took him out of the sphere of his employment. This illustrates that Pratt is a fact specific case.

Bryan Norton, the foreman, tried to get around the need to be driven. He testified "you couldn't sit everybody in [the bucket truck], but we were in a neighborhood, so, from spot to spot, where we had to chip the brush, you could walk. You know, it was chip here, walk 20-30 foot, you chip again, you know." [Tr. page 45, lines 1-9].

While Norton may have been correct about how things went during active chipping, he was not present at the accident and his testimony has no relevance to this case. The investigation confirms the crew was not actively chipping. The video shows the truck accelerating as it goes past the neighborhood – up until the point when the chipper came loose. Assuming the truck is traveling at an average of 20 mph, it would travel 675 feet in the 23 seconds shown on the video. The truck was already moving when the video starts so the distance already traveled was likely much greater. [Defendants' Exhibit D]. The photographs looking down Trufield Road show the truck was heading into a clear area where there was no brush to clear. The crew was not chipping; they were driving to another location. Walking was impractical if not impossible. Indeed, Brunson was put in the absurd position of either riding the chipper with the rest of the crew as they left the neighborhood or running along behind the truck.

Moreover, the Employer never enforced the "rules all employees are expected to follow" set out in the Employee Handbook. This included the rules that employees always wear seat belts and "No one shall be permitted to ride on the running boards, fenders, or any part of a vehicle except the seats." [Defendants' APA page 56].

The video evidence clearly shows the driver not wearing a seatbelt and one employee riding on the running board. [Defendants' Exhibit D]. The remaining two employees, including Brunson, were riding on the chipper.

It beggars the imagination to assume this was the first time this had happened. Brunson

testified:

> [G]enerally we ride on - when we are in the area we ride on we all be riding on the back of the wood chipper. . . . That's an every day occurrence. . . . On the top of the truck and ride on the side of the truck. If they – you can climb on top of the truck. One guy I know, he rides in the back of – inside where the chips go inside the truck. I seen this guy and I was, like, wow. Yeah, I've see them ride all over the truck. . . . Daily. It's a daily occurrence.

[Tr. page 26, line 8-page 27, line 12].

Brandon Connor agreed, testifying "people keep riding on the equipment . . . pretty frequently." [Tr. page 90, lines 7-18].

Foreman Norton confirmed this testifying: "I've caught people [riding on the chipper] and they've gotten disciplinary actions, you know."[3] [Tr. page 50, lines 16-20]. When asked if this happened on a fairly regular basis, Norton responded: "No. Not anymore, they don't. . . . Well, since the accident, no." [Tr. page 64, lines 4-9]. In other words, Norton's testimony confirms the Employer never bothered enforcing the safety rules until *after* Brunson's accident.

Another key point about non-enforcement of the rules is the "All-Stop" rule. The Employee Handbook states: "If you notice an unsafe condition that you cannot safely correct yourself, you must report it immediately to your supervisor and call an 'all stop.'" [Defendants' APA page 58]. Anthony Preast, the supervisor over the entire job, testified no "all stop" was called before the accident (Preast was also not present at the scene of the accident). He testified "everybody that would have seen [employees riding on the chipper] would have been in violation of company policy." [Tr. page 81, lines 8-15]. If the policy was truly enforced, how did these four employees even get into the situation where they were compelled to ride on the chipper?

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[3]Norton admitted he never wrote anyone up for safety violations when the company was called Rightway because "they didn't have the policies that Zylem did." [Tr. page 51, lines 22-25]. Zylem took over in January 2024 – six months before the accident. Even after Zylem took over, the driver of the truck, Brandon Connor, testified he had never seen someone get fired for riding on the chipper. [Tr. page 90, lines 6-20].

The leading case adopting the rule is Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). Superficially, Black would seem similar to the instant case as both employees were injured falling from equipment. A moment's analysis shows the similarity is merely in the means of injury; not the issues at hand here.

The claimant in Black was the *police chief* of a small town. He died when he fell from the side of a *fire truck* on which he was riding out to a fire. The mayor had previously instructed Black not to ride on the truck because it was not his "duty to ride the truck or have anything to do with it." The South Carolina Supreme Court held Black's fatal injuries were outside the scope of his employment, noting the evidence "not only fails to show that deceased's injuries were sustained while performing duties within the scope of his employment but positively shows that such injury was brought about through his own acts which were not only wholly without the scope of his employment but had been expressly forbidden by his employers."

Black is instructive because the facts illustrate the bright line test between violation of a policy or order that takes one outside the scope of employment and one that governs one's employment. A police chief injured riding on the side of a fire truck was not covered under the Act because riding on a fire truck was both prohibited to him and outside the scope of his employment. Conversely, firemen injured while riding on the side of fire trucks are covered under the Act – even with the same prohibition in place. The difference: fighting fires is a fireman's job; not a policeman's. Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell was acting outside scope of his employment).

In the instant case, Brunson was part of the ground crew. He was required to use the chipper. If he "misused" it by riding on it as the crew moved on to another jobsite, it was still machinery that

was part of his job. Falling off the chipper is no different than cutting your hand off by putting your hand inside the machine to free a log.[4] And by the same token, had Brunson fallen because he climbed a tree or went up in a bucket against a supervisor's orders and for his personal amusement, any resulting injuries would not be covered.

The claimant in Black was the police chief. His job had *nothing* to do with fire trucks. His choice to ride on the fire truck was done for the thrill of it.[5] Brunson's riding on the chipper was part of his job because the crew was moving to another jobsite (much more than 20-30 feet away) and the Employer did not provide a safer option.

This is not to say that safety is not important. Those of us who work within the workers' compensation system are acutely aware of the impact of workplace injuries on people's lives. The fact of the matter is that no matter how careful or careless people may be, accidents with injuries are still going to happen. The Legislature intended the workers' compensation system to provide for injured workers regardless of fault. Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945). ("Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed.") No matter how well intended, a safety rule cannot eliminate an employer's liability for a workplace accident even when scrupulously enforced – and certainly not when enforcement is so lax and sporadic that employees simply ignore it with the tacit consent of management.

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[4]The Handbook states: "Employees shall not place any body part into the infeed hopper during chipping operations." [Defendants APA page 58].

[5]In Wright, the Court observed Professor Larson "describes the police chief as a 'victim of his unconquerable passion for riding on fire trucks.' Here, it appears Wright was a victim of his 'unconquerable passion' for police work." Wright v. Bi-Lo, Inc., 314 S.C. 152 n.8, 442 S.E.2d 186 n.8 (Ct. App. 1994)(denying compensation for grocery store stocker because "the substantial evidence establishes Wright left the sphere of his employment by violating the specific orders not to confront, pursue, or apprehend suspected shoplifters.:).

The Legislature previously recognized that barring claims for safety violations would be contrary to public policy. The Act formerly provided:

> When an injury or death is caused by the willful failure of an employee to use a safety appliance or perform a statutory duty or by the *willful breach of any rule or regulation adopted by the employer*, approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten percent.

S.C. Code Ann. § 42-9-50 (repealed by 1988 S.C. Acts 677 § 5).

The Legislature repealed this section in 1988. This confirms the Legislative intent not to penalize violations of safety rules governing conduct within the sphere of employment, while still leaving in place the rule from Black wherein a claim can be barred by violations of explicitly communicated instructions that limit the sphere of employment.

The Court should reverse as a matter of law because a safety rule fundamentally concerns the conduct of the workman within his sphere of employment. Additionally, even if violation of a safety rule could take an employee out of the sphere of his employment, the employer failed to prove that Brunson was immediately and specifically instructed by a supervisor not to ride on the chipper, and that it actually enforced the policy prior to Brunson's accident. Therefore, the Court should reverse and remand to the Appellate Panel with instructions to schedule a hearing on hte specific benefits due to Brunson.

B. The Commission erred in finding riding on the chipper took Brunson out of the scope of his employment because no supervisor explicitly ordered Brunson and his coworkers not to ride on the truck or the chipper immediately before the accident.

For an employer to successfully assert the defense that a violation of a safety rule removed an employee from the course of employment, it is not enough to show the mere existence of a written policy – even more so when, as here, the policy was not enforced until after Brunson's accident. The employee must be given clear and explicit instructions *immediately* before engaging in the prohibited

act (and the prohibition must concern the sphere of employment). The employee must be shown to have knowingly and wilfully have violated a rule limiting the sphere of his employment.

In the three leading cases denying compensation, the employer had repeatedly warned the employee not to engage in the specific act, *including specific instructions given immediately before the act and blatantly disobeyed by the employee*. See, Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004)(employee explicitly instructed not to take company truck home *on the night before the accident*); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck *immediately* before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store *immediately* before chasing shoplifter on moped). Our sister state of North Carolina follows the same rule. See Spratt v. Duke Power Co., 310 S.E.2d 38 (N.C. App. 1983)("We are unable to conclude that plaintiff's disobedience of the prohibition against running in the Steam Station was sufficient to break the causal connection between the injury and the employment, especially in view of the fact that plaintiff was not violating an immediate and direct order of a then present superior.").

Multiple other cases reached the opposite result even when employees acted outside the scope of their duties – finding the cases compensable because the employer could not prove it had given clear and explicit instructions, because the act benefitted the employer, or because the employer did not enforce the prohibition about acting outside the scope of employment. See, e.g., Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007)(injury incurred removing debris from road compensable even though it was not part of employee's job duties because the act benefitted the employer); Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975)(fall while chasing purse snatcher off the premises not specifically prohibited by employer even though outside regular

job duties); Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645 (1971)(claim not barred because employer allowed employees to act outside scope of their duties); Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959)(employee died of anaphylactic shock administered by nurse who knew of prohibition against giving shots without doctor's orders); Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 17 S.E.2d 695 (1941)(compensation awarded where janitor was found dead in area of plant he was not supposed to sweep because employer had not given "clear and explicit" orders on not going into this area).

A key holding in Black is that the employer proved the police chief was specifically told by the mayor that riding the fire truck was outside his employment *mere minutes* before he knowingly and intentionally violated the rule. The mayor testified:

> I was standing on the street by the police house and Mr. Black approached me very erect and looked like a million dollars and asked if he could go and turn the siren on and take the truck out and I told him 'No, sir.' I was already mad about the whole thing anyway and I told him that he did not have any duties with the fire department and told him he could not do anything about carrying the truck out and *I wanted it specifically understood that none of the police had anything to do with the truck, and in less than five minutes he had done exactly what we told him not to do.*

Id. 420-421, 60 S.E.2d 854, 857-858 (emphasis added).

If a supervisor had explicitly told Brunson not to ride the chipper on the day of the accident, then this case might be closer to Black. That didn't happen. While there is substantial evidence that the safety rules violated by the entire crew were stated in the handbook and may have been mentioned in a general sense at prior safety meetings, there is no evidence any supervisor was even gave specific instructions safety rules immediately prior to the accident. Both supervisors admit they were not there.

And consider, even if an employee was told not to put his hand into a chipper and still proceeded to do so to clear it, he would still have a compensable claim because safety rules fundamentally "concern the conduct of the workman within his sphere of employment, while others

limit the sphere itself." Black.

Brunson testified that foreman Norton never told him not to ride on the chipper nor to get off the chipper when he rode on it. [Tr. pages 26-32]. Norton never directly contradicted Brunson's testimony. At no point did he testify he told Brunson *directly* not to ride on the chipper or to stop riding on the chipper, and certainly not on the day of the accident.

Norton gave vague testimony about safety meetings, catching people riding chippers and other equipment, and writing people up after being caught riding equipment (although no one had been fired for doing so). One would think if he had really given direct and explicit instructions *on the jobsite on the day of the accident* to all four members of the ground crew none of them would be riding without seatbelts, on the running board, or on the chipper. Either these four men had never attended the safety meetings or they knew the employer never truly enforced the rules.

The Court should reverse as a matter of law because even if violation of a safety rule could take an employee out of the sphere of his employment, the employer failed to prove that Brunson was immediately and specifically instructed by a supervisor not to ride on the chipper, and that it actually enforced the policy prior to Brunson's accident. Therefore, the Court should reverse as a matter of law and remand to the Appellate Panel with instructions to schedule a hearing on the specific benefits due to Brunson.

2. If fault is to be an issue in this case, then the Employer's failure to provide safe transportation and its further failure to properly hitch the chipper to the bucket truck is the proximate cause of the accident.

The Single Commissioner erroneously found Brunson to be *at fault* for the accident because she found Brunson's injuries were caused by his choice "to ride the machinery in the manner that directly caused his injuries." This phrasing indicates she found him at fault, *i.e.*, negligent, and that his negligence was the direct cause of his injuries. The Appellate Panel repeated this error. This is

reversible legal error as injecting fault into workers' compensation "is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head." Nicholson v. SCDSS, 411 S.C. 381, 769 S.E.2d 1 (2015).

If fault is now to be a consideration in workers' compensation, then the fault should be found to lie with the Employer. The direct cause of Brunson's injuries is the fact he was "launched" into the air when the chipper became detached from the bucket truck. Had he merely been riding on the chipper at low speed, he likely would not have fallen off and certainly would not have suffered such severe injuries as a TBI and fractured pelvis.

The record shows the Employer (1) failed to provide safe transportation at the site; (2) failed to safely attach the chipper to the bucket truck; and (3) failed to provide adequate supervision to ensure *all* employees followed the Employee Handbook. As such, the proximate cause of the accident was the negligence of the Employer.

To be clear, Appellant does not believe fault has any place in the workers' compensation system. This issue is only being raised because the Single Commissioner and Appellate Panel appear to have based their holding on fault.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate should be reversed. the Court should remand the case to the Appellate Panel with instructions to schedule a hearing on the specific benefits due to Brunson.

Respectfully Submitted,

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