THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Appellate Case No. 2025-001958

WCC File No. 2409881

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

v.

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

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# REPLY BRIEF OF APPELLANT

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### 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.

In their brief, Respondents completely fail to address the *legal* issue raised here. Instead, Respondents attempt to reframe the issue as "establishing the crux of the argument on which Respondents base their denial [as] Appellant was informed not to use the woodchipper as a means of transportation but disregarded these instructions." [Brief of Respondents, pages 6-7]. Respondents admit that the instructions in question concern "what the *safety rules* are for pulling the woodchipper." [Brief of Respondents, page 4 (emphasis added)].

The first question for the Court is whether a rule concerning safe use of equipment concerns conduct of the workman within his sphere of employment. As use – or even misuse – of equipment is quintessentially within the sphere of employment, the inquiry should end there and the Court should reverse the Decision and Order of the Appellate Panel as a matter of law.

Should further inquiry be necessary, the Court must then address the situation in its entirety. Factually, there is no dispute that the handbook contained several "Motor Vehicle Safety Rules and Safe Operating Procedures" including "Negligence in the care and use of company property may be considered cause for discipline, up to and including termination of employment," and"No one shall be permitted to ride on the running boards, fenders, or any part of a vehicle except the seats." [APA pages 55-56]. However, these is also strong evidence that the rules were not enforced (until after Brunson's accident) and no evidence that Brunson and his coworkers were explicitly ordered not to ride without seatbelts, on the running board or on the chipper by a supervisor on the day of the accident. The Court should hold that the lack of enforcement by management prevents the Employer from using the handbook as an *ex post facto* shield against a valid workers' compensation claim.

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.

Even if it were proven *arguendo* that Brunson wilfully and intentionally disobeyed clear and explicit instructions from a supervisor, the fact the rule in question is a safety rule means *ipso facto* it "concern[s] the conduct of the workman within his sphere of employment." Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950), *quoting* Johnson v. Merchants Fertilizer Co., 183 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941). Respondents discuss the facts of Black at length, yet never address whether riding the chipper "from one job site to a secondary job site down the road" (as Respondents describe it)[1] is "conduct within the sphere of employment [or conduct outside] the sphere itself." Id.

Without question, public policy favors a safe work environment. Safety benefits all parties. An employer absolutely has the right – indeed the obligation – to promote a safe environment by providing safety equipment (including adequate transportation within jobsites) and promulgating policies and procedures about work duties and use of equipment. If an employee violates safety policies an employer has a remedy– even after a work accident. It can terminate the employee. Safety policies exist to promote a safer work environment and lessen the frequency of accidents; not as shields against those accidents that do occur regardless of who is to blame. In our no-fault system, an employer cannot legislate its way out of liability for a workplace accident by creating written rules and regulations governing how someone does their job or uses equipment.

The Appellate Panel erred in slavishly applying the case law by only looking at whether Defendants had a policy against riding on equipment, whether Claimant had read the policy or had some knowledge of it, and whether he rode on the chipper in violation of the policy. This simplistic

[1]Brief of Respondents, page 3.

approach is legal error because it failed to address whether the policy was a safety rule governing "conduct within the sphere of employment" or a policy "limit[ing] 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).

As the Appellate Panel failed to take the initial step, the Court must step in and follow the Black requirement 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). As Respondents now concede that Brunson was injured "traveling from one job site to a secondary job site down the road"[2] on the equipment he used to do his job as a ground worker, the Court is able to conclude as a matter of law that he was not "wholly without the scope of his employment" without intruding on the Commission's fact finding role.

The admitted fact that the crew was traveling between job sites – not merely 20-30 feet between trees – confirms that the crew was forced to ride on or in the equipment. They were not engaging in horseplay; they were simply moving from one jobsite to another jobsite via the only means available to them. Under Respondents' theory of the case, Brunson should have eschewed riding with the rest of the crew (one with no seatbelt; one on the running board; one on the chipper)

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[2]Brief of Respondents, page 3. This is an important and correct concession, as it obviates the testimony of the foreman, Bryan Norton, who sought to contradict the video showing the truck driving out of a neighborhood onto an open road by testifying: "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 95, lines 1-9].

and run after the bucket truck on foot until he caught up with it at the next jobsite. The absurd prospect of Brunson running behind the truck plainly demonstrates that riding on the truck or chipper was within the scope of the employment, given the actual facts on the ground that day.

Black sets forth the distinction between those "rules [which] concern the conduct of the workman within his sphere of employment, while others limit the sphere itself." Id. The entire line of cases relied on by the Commission and discussed by the parties are not about this distinction. The cases all involve rules, instructions or conduct outside the sphere of employment. The issues in those cases are whether the conduct benefitted the employer, whether the instructions were given clearly and contemporaneously, or whether there was some other reason the claim should not be barred.

In Black, the issue was simple. Black was a police chief who for his own entertainment liked to ride on firetrucks to fires. There was no question fighting fires was outside the sphere of his job as police chief. The issue was whether he was given explicit contemporaneous instructions not to ride the on the firetruck – including within five minutes of his accident. The court held the evidence "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." Id.

In Wright, the employee was a stocker. Management had an explicit policy providing that only management had authority to identify, confront or apprehend shoplifters. Apparently for his own excitement, Wright was obsessed with catching shoplifters. The evidence overwhelmingly showed he had repeatedly been instructed not to pursue shoplifters because it was not his job. On the day of his death, he left the store to pursue a shoplifter even as his supervisor was shouting at him to come back into the store. Apprehending shoplifters was wholly without the scope of his

employment. 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).

Pratt is slightly different in that Pratt never brought himself within the sphere of his employment. Usually Pratt was provided a company truck to drive between home and work. As such, had he had an accident his injuries would be compensable because the employer's provision of transportation would be an exception to the "coming and going rule." Pratt's employer had prohibited him from taking the truck home the day before his accident. Pratt disobeyed, took the truck home, and was injured driving into work the next morning. The court held: "the substantial evidence establishes petitioner left the scope of his employment by violating the specific order not to drive the company vehicle home." Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004).

The other cases all follow the basic assumption that the employee was acting outside the scope of his employment. As such, they demonstrate that there are exceptions where even if an employee violates a rule limiting the scope or sphere of his employment, his accident may nonetheless be comepensable. 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).

In every one of these cases, the employee was on the clock but was engaged in some activity not part of his job or prohibited by the employer. Theses case demonstrate that even when employees act outside the scope of their duties, their injures are compensable when the employer can not prove it had given clear and explicit instructions, when the act benefitted the employer, or when the employer did not enforce the prohibition about acting outside the scope of employment.

None of these cases involve the situation here where the employee ostensibly violated a safety rule governing conduct within the scope of his employment as a groundsman. Brunson wasn't climbing a tree or using a chainsaw for the fun of it; he was simply riding with the rest of his crew "from one job site to a secondary job site down the road."[3] [Brief of Respondents, page 3].

Therefore, the Court should reverse the Appellate Panel and remand for a hearing to determine the benefits to which Brunson is entitled for his compensable work accident.

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[3] Nearly half a century ago, our sister state of North Carolina adopted a more liberal view consonant with Black. The North Carolina Supreme Court reasoned: "While the older cases often viewed acts outside the employee's job description as being outside the scope of the employment, the more recent cases have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired." Hoyle v. Isenhour Brick & Tile Co., 293 S.E.2d 196, 200 (N.C. 1982). The task here was traveliing from one job site to another. Considered under North Carolina's approach, Brunson's claim would be compensable.

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 [In Reply to Brief of Respondents at pages 8-13].

Respondents argue the Appellate Panel should be affirmed because "Appellant was informed not to use the woodchipper as a means of transportation but disregarded these instructions." [Brief of Respondents, page 6]. 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 or that an employee was "informed not to use the woodchipper as a means of transportation" – 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 – not a rule governing conduct within the sphere of his employment as in the instant case.

There is substantial evidence that the employee handbook stated "Negligence in the care and use of company property may be considered cause for discipline, up to and including termination of employment," and"No one shall be permitted to ride on the running boards, fenders, or any part of a vehicle except the seats." [APA pages 55-56]. Brunson admitted he read these provisions in the electronic handbook (although stated he did not think that part of the handbook included the chipper). [R.p. 79,lines 19-25]. There was evidence from Foreman Norton that he had "quite a few" meetings addressing riding on the woodchipper with the crew." [R.p. 99, lines 4-8].

Although this testimony is vague, superficial and contradicted in part by Brunson, it is substantial evidence to support a finding from the Appellate Panel that Brunson and his crew were

"informed" at some point not to ride without seatbelts, on running boards and on the woodchipper. The question for the Court is whether this nonspecific testimony is sufficient to prove that Brunson knowingly and willfully violated a company policy for his own benefit causing his injury.

In Brown, Pratt and Wright, 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, also 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."). None of that exists here.

The handbook includes general instructions but never mentions the woodchipper. There are no minutes or memoranda from the "quite a few meetings" – only a nonspecific response to a fairly generic leading question from Respondents' counsel. There is no evidence anyone was disciplined or fired for riding the chipper prior to Brunson's accident. This evidence is nothing like the extensive testimony about repeated specific warnings given up to and including five minutes before the accident in Black. There *could not* have been a clear and explicit instruction on the day of the accident because none of the supervisors were on the jobsite.

This leads into the next point wherein the policy or rule must have been enforced to become a bar to compensation. As the Court is aware, 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 dutyor *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 by ten percent. S.C. Code Ann. § 42-9-50 (repealed by 1988 S.C. Acts 677 § 5)(emphasis added).

This code section was repealed in 1988, evincing the Legislative decision to remove fault entirely

from the Act. See. also 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.").

Even those states which retained some measure of fault in their workers' compensation systems refuse to deny claims or impose penalties when the employer, as here, fails to enforce the rule. The Colorado Court of Appeals wrote: "The most frequent ground for rejecting imposition of a penalty, whether it be for violation of a safety rule or willful misconduct, is the lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation." Lori's Family Dining, Inc. v. Industrial Claim Appeals Office of State of Colo., 907 P.2d 715, 719 (Colo. App. 1995). Colorado adopted this rule in 1943 in case somewhat factually similar to the instant case. See Pacific Employers Insurance Co. v. Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (1943) (rule against jumping on moving vehicles that was not diligently enforced could not be invoked to reduce compensation). South Carolina essentially follows the same rule. See 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)(compensable claim even though employee died of anaphylactic shock administered by nurse who knew of prohibition against giving shots without doctor's orders because prohibition was not enforced).

North Carolina addressed the rule concerning violation of employer safety rules even more strongly:

> It is neither the role of the Industrial Commission nor of this Court to enforce the employer's rules or orders by the denial of Worker's Compensation. Enforcement of rules and orders is the responsibility of the employer, who may choose to terminate employment or otherwise discipline disobedient employees. This Court will not do indirectly what the employer failed to do directly." Hoyle v. Isenhour Brick & Tile Co., 293 S.E.2d 196, 203 (N.C. 1982).

There is overwhelming evidence that the handbook rule against riding on equipment was not enforced until after Brunson's accident. See Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)("evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision of the Industrial Commission.").

All four employees on Brunson's crew were violating the handbook rule. Anthony Preast, the supervisor over the entire job, testified "everybody that would have seen [employees riding on the chipper] would have been in violation of company policy." [R.p. 131, lines 8-15]. Brunson testified "That's an everyday occurrence." [R.p. 76, line 8-page 77, line 12]. Brandon Connor agreed, testifying "people keep riding on the equipment . . . pretty frequently." [R.p. 140, lines 7-18].

Foreman Norton testified: "I've caught people [riding on the chipper] and they've gotten disciplinary actions, you know." [R.p. 100, 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." [R.p. 114, lines 4-9]. Norton's testimony leaves only one inference (consistent with every other witness): Employer did not enforce the rule against riding on equipment until *after* Brunson's accident.

It is fair to say the Appellate Panel was right in finding that there was a rule against riding on the chipper and that Brunson was injured when the chipper became unhitched from the bucket truck.. However, this is not enough to bar compensation. Employer failed to prove (1) that Brunson violated an immediate and direct order of a then present superior; and (2) the handbook rule against riding on equipment rule was diligently enforced prior to Brunson's acciddent.

Therefore, the Court should reverse the Appellate Panel and remand for a hearing to determine the benefits to which Brunson is entitled for his compensable work accident.

C. The Commission erred in finding Brunson took himself out of the scope of his employment because he used the chipper as a means of transporation. [In Reply to Brief of Respondents at pages 8-15].

"Respondents do not disagree that there was not enough room in the truck for the entire crew." They contend this is of no import as the crew "could have walked from one job site to the other." [Brief of Respondents, page 14].

This would have been reasonable had the crew been actively shipping. The crew operating the chipper would obviously walk behind the truck if it were inching forward between piles of branches spaced 20-30 feet apart.

Things were different when Brunson was injured. The crew had finished on one jobsite and were driving through a neighborhood towards a clear area with no trees to cut on their way to another jobsite. This is why the entire crew was riding in or on the truck and the chipper. It *does* make a critical difference that the 4-man buddy truck was out of service. And even the tenuous argument that "there was actually an additional seat available" in the bucket truck fails because the employee who could have been riding in it was standing on the running board.

The Court should reverse the Appellate Panel and remand for a hearing to determine the benefits to which Brunson is entitled for his compensable work accident.

**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 [In Reply to Brief of Respondents at pages 15-18].**

The Single Commissioner and Appellate Panel erroneously found Brunson to be *at fault* for the accident because they found Brunson's injuries were caused by his choice "to ride the machinery in the manner that directly caused his injuries." 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).

Respondents agree workers' compensation is intended to be a no-fault system. However, they contend Appellants' argument could apply to all cases cited in the briefs. Respectfully, that is an overstatement, although it does not mean that the Court should not be wary of preventing fault to creep into the system.

There are two points here. First, it was the failure of the hitch that caused the accident. While the accident would not have happened had Brunson run behind the truck or had the buddy truck been present, the *proximate cause* of the accident was the chipper coming lose and throwing Brunson into the air. While there may be no testimony regarding this (Brunson has no memory of the accident due to his TBI), it is confirmed by the accident report prepared by Respondents. Secondly, Brunson had no meaningful choice. He and his other injured coworker both rode the chipper to the next jobsite because that was the only transportation provided. Assumption of the risk is no more a defense to a workers' compensation claim than negligence.

As to preservation, this issue was briefed and argued to the Appellate Panel. [R.p. 32-33, 49-50, 61, 164]. The parties at trial have no way of knowing what a Commissioner will base a ruling on – and certainly have no expectation that the analysis will be fault-based. Orders come months after a hearing. It is completely unlike a jury trial where a party has an immediate opportunity to make post-trial motions.

Moreover, unlike civil practice, while motions for reconsideration are allowed within five days of an order, they are neither mandatory nor necessary for issue preservation.

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers' compensation cases as there is no mechanism to rescue an issue

raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)("The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.") If the Court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)("it is inferable from the record that [claimant] raised this issue before the single commissioner"). This Court has held issues are preserved where "it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order." Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, this Court has ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. Appl. 1994)("On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.").

The Court should reverse the Appellate Panel and remand for a hearing to determine the benefits to which Brunson is entitled for his compensable work accident.

## 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.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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