

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2012-212258

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S.C. Supreme Court

STEPHEN C. WHIGHAM.....PETITIONER,

v.

JACKSON DAWSON COMMUNICATIONS
AND THE HARTFORD..... RESPONDENTS.

BRIEF OF RESPONDENTS

Benjamin M. Renfrow
Wesley J. Shull
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3296
Attorneys for Respondents

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE RECORD CONTAINED SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S DECISION THAT PETITIONER DID NOT SUSTAIN AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ON OCTOBER 5, 2007?

STATEMENT OF THE CASE

On June 29, 2009, Petitioner filed a Form 50 requesting a hearing and alleging that he sustained a compensable injury to his right lower extremity on October 5, 2007, while playing in a kickball game. Respondents timely filed a Form 51 denying that Petitioner sustained an injury by accident arising out of and in the course of his employment. Pursuant to these pleadings, a hearing was held on October 30, 2009.

At the hearing, Petitioner alleged that he sustained a compensable injury while playing in a company-wide kickball game that he planned¹ and that benefited Respondent by boosting morale and team building. Petitioner further asserted that the game was sanctioned and provided by Respondent. Thus, Petitioner contended that he was entitled to benefits under the South Carolina Workers' Compensation Act.

Respondents maintained that Petitioner did not sustain an injury by accident arising out of and in the course of his employment. In support of their denial, Respondents cited Professors Arthur and Alex Larson in The Law of Workmen's Compensation § 22.00 (1994) (hereinafter "the Larson's analysis") regarding injuries sustained during recreational and social activities that has been adopted by this Court. Respondents contended that intent to improve employee morale was not enough for the kickball game in question to fall within the course and scope of Petitioner's employment. Respondents further argued that Petitioner's injury did not arise out of his employment.

Following a lengthy hearing and both parties' submission of Memoranda of Law, via a January 4, 2010, Decision & Order, the Single Commissioner found that, *inter alia*, Petitioner failed to establish any of the factors required to bring recreational and social activities within the

¹ It is undisputed that the Claimant was not injured while planning this kickball game, but was actually injured while playing in the game (R. p. 144, lines 13-16). Specifically, he was injured on the last play of the game when he jumped in the air to miss being hit by a kickball thrown at him by one of his friends and playmates.

course and scope of employment, and that his injury did not arise out of his employment. As a result, the Single Commissioner found that Petitioner had failed to meet his burden of proof in establishing that he sustained a compensable accident.

Petitioner appealed to the Appellate Panel of the South Carolina Workers' Compensation Commission, which heard the case on May 18, 2010. On July 21, 2010, the Appellate Panel of the South Carolina Workers' Compensation Commission issued a Decision & Order fully affirming the Hearing Commissioner's Decision & Order. Petitioner filed his Notice of Intent to Appeal the Full Commission's Decision & Order to the South Carolina Court of Appeals on August 18, 2010.

On March 20, 2012, the South Carolina Court of Appeals heard arguments from the parties on Petitioner's appeal. The Court of Appeals issued an April 11, 2012, opinion affirming the Commission. Subsequently, Petitioner filed a Motion for a Rehearing on April 25, 2012, which was denied.

On July 12, 2012, Petitioner filed for Writ of Certiorari with this Court. This Petition was granted by a September 19, 2013, Order. This appeal follows.

STATEMENT OF THE FACTS

Petitioner works for Respondent as its Director of Creative Services. It is undisputed that no aspect of his job required Petitioner to organize company events in order to build morale. (R. p. 141, line 23-p. 142, line 23) A kickball game was voluntarily planned by Petitioner and a few co-employees. (R. pp. 150-171) In fact, Petitioner approached his supervisor and requested permission to organize said game. (R. p. 67, line 17; R. p. 69, lines 7-9) Respondent paid the rental fee for the field and provided T-shirts to the players. (R. p. 96, lines 10-15) Those T-shirts did not bear the company name or logo on them. (R. p. 97, lines 12-25) The kickball game occurred on October 5, 2007, at the Y.M.C.A. in Simpsonville, South Carolina, five to ten miles from Respondent's premises. (R. p. 143, lines 15-21) The participants in the game were responsible for transportation to the field. Respondent provided no transportation and did not reimburse employees for mileage going to and from the game. (R. p. 143, line 22-p. 144, line 1) No company automobiles were utilized for transporting employees to and from the game. (Id.)

Petitioner was injured while running around the bases on the last play of the game. (R. p. 120, lines 2-14) Petitioner jumped to avoid a ball thrown at him, landed awkwardly, and injured his right tibia and fibula. (Id.) Employees were not required to attend the kickball game, and attendance was absolutely voluntary. (R. p.140, line 15-p. 141, line 6) No clients or customers of Respondent were present or invited to participate, and no advertising was performed during the game. (R. p. 139, lines 17-20) Spouses and children of employees attended the game to watch and cheer. (R. p. 139, lines 21-23) Petitioner testified that absolutely no pressure was placed on employees to attend. (R. p. 141, lines 5-8) In fact, if an employee had a project that required work, he or she was expected to not attend the games in order to complete the project. (R. p. 140, lines 22-25) Some employees of Respondent chose to play in the game, others chose to stay at

Respondent's premises to continue work, and yet others opted to return to their homes for the day as was customary due to Respondent's "company summer hours policy."² (R. p. 140, lines 12-21)

² Company policy allowed all employees to "clock out" or leave on Friday afternoons at 3:30 pm if company business was completed. It is also undisputed that they could leave even earlier than 3:30 if they needed to and could work through their lunch breaks.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the finder of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987).

"Substantial evidence" necessary to support a decision of the Commission is:

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307.

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for further proceedings. The Court may reverse or modify the decision if substantial rights of the Petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007).

Thus, “review is limited to deciding whether the Commission’s decision is unsupported by substantial evidence or is controlled by some error of law.” Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)). “The determination of legislative intent is a matter of law.” Charleston County Parks & Rec. Comm’n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841 (1995).

It is also well settled that:

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. [Citation omitted] Notwithstanding, this Court will afford the most respectful consideration to the interpretation of the statute by the agency charged with its administration. [Citation omitted]

Hardee v. McDowell, et. al., 372 S.C. 413, 417, 642 S.E.2d 632, 634 (Ct. App. 2007) (citing Bursey v. South Carolina Dep’t of Health & Environmental Control, 369 S.C. 176, 186, 631 S.E.2d 899, 905 (2006)).

ARGUMENT

I.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S DECISION THAT PETITIONER'S ACCIDENT NEITHER AROSE OUT OF NOR OCCURRED IN THE COURSE & SCOPE OF HIS EMPLOYMENT.

In order to be entitled to compensation for an injury under the South Carolina Workers' Compensation Act, a claimant must show that he or she suffered an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 2006). The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact. Gibson v. Spartanburg County Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000). One of the main facts on which the parties disagree, and which is determinative of whether Petitioner's injury arose out of his employment, is the factual question of whether or not Respondent *impliedly required* Petitioner's attendance at the kickball game. For this reason, the substantial evidence standard does apply to this case, especially with respect to the issue of Claimant's alleged mandatory attendance at the game and Respondent's alleged implied requirement of attendance.

"[T]he two parts of the phrase 'arising out of and in the course of employment' are not synonymous." Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). Rather, "[b]oth parts must exist simultaneously before any court will allow recovery." Id.

A. Petitioner's Injury Did Not Arise Out of His Employment.

The substantial evidence in the record establishes that Petitioner's alleged accident did not arise out of his employment with Respondent. The term "arising out of" refers to the origin of the cause of the accident. Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965);

Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965); Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972). The injury arises “out of” the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is to be performed and the resulting injury. Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965); Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973).

The overwhelming weight of evidence reveals that Petitioner simply failed to meet this requirement. Kevin Johnson, Petitioner’s direct supervisor at the time of the accident and Executive Vice President for Respondent, testified at the hearing.³ According to Mr. Johnson, no aspect of Petitioner’s specific job as a member of upper management required him to create activities internally for employees, such as the kickball game giving rise to this litigation. (R. p. 90, line 23-p. 91, line 1) He indicated that no aspect of Petitioner’s position existed that required him to plan events for the company and there was no expectation for him to do this. (R. p. 91, lines 2-8) He also testified that, hypothetically, if an employee in a department different than Petitioner’s wished to plan a kickball game, he or she would also be allowed to perform such a task. (R. p. 91, lines 9-12) Mr. Johnson further testified that Petitioner was not paid extra to plan events for his co-employees. (R. p. 94, lines 9-12) He admitted that the kickball game was Petitioner’s idea, and that Petitioner approached him to request permission to plan it. (R. p. 67, line 17; R. p. 69, lines 7-9)

Mr. Johnson also testified that two of Respondent’s website technicians had planned similar activities prior to Petitioner’s kickball game. (R. p. 92, lines 8-10) In addition, a

³ The Single Commissioner and Full Commission specifically found Mr. Johnson’s testimony to be “very credible” based on observations of him and the delivery of his testimony (R. p. 17). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the full commission . . .” Rogers v. Kunja Knitting Mills, 312 S.C. 377, 440 S.E.2d 410 (Ct. App. 1994).

warehouse manager had occasionally organized a softball team. (R. p. 93, lines 17-24) Per Mr. Johnson, members of upper management were notified of the game as all employees were, but they were not encouraged any more so to attend.⁴ (R. p. 71, lines 13-24) It is clear from the evidence in this case that Petitioner's alleged accident did not "arise out of" his position with Respondent, as there was clearly no causal connection between the conditions under which Petitioner's work is required to be performed and the resulting injury.

Petitioner even admitted at his deposition, and later attempted to clarify at the hearing, that there was nothing about his role with Respondent that required him to scheme company events, such as a kickball game, in order to build company morale. (R. p. 142, lines 13-25) At the hearing, Petitioner also testified that, in his opinion, team building was not a responsibility required by his position in upper management. (R. p. 108, lines 18-21) He testified that planning the kickball game was his idea and that he volunteered to see it through. (R. p. 110, lines 12-17)

Petitioner admitted that, were he not playing kickball that afternoon, but rather had chosen to return to his home (as many other of his co-employees had), he would have earned the same pay for his services that day. (R. p. 144, lines 4-7) He further testified that he would have received the same pay had he stayed in the office in order to work as opposed to playing kickball. (Id.) He received no extra payment for organizing this game. (R. p. 144, lines 11-12) He reiterated that he was not injured organizing the games, but was injured playing in the game. (R. p. 144, lines 13-16) The substantial evidence in the record, including Petitioner's own testimony, revealed that his October 5, 2007, injury on the Y.M.C.A. softball field did not arise out of his position with Respondent.

⁴ Petitioner admitted that he did not usually attend or participate in other employee only events such as games for the company softball team, which is a strong indicator that it was not part of his job description to attend or participate in such events.

Petitioner, in his brief, attempts to use Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007), as an analogous case to support his position that the injury he sustained while playing kickball arose out of his employment. In Hall, the claimant was employed as a regional sales manager which “necessitated an average of four days of business travel every week.” Id. at 345, 756. Hall was given an expense account by Desert Aire because it was the “custom and practice” of its employees to “conduct business in the context of entertaining.” Id. at 354, 760. On the date of his injury, Hall had travelled to Little Rock, Arkansas, in order to “meet with key engineers, and to plan a strategy for securing the Walmart account.” Id. From there, he planned to travel to Omaha, Nebraska, and Des Moines, Iowa. While in Arkansas, Hall attended a dinner at a business associate’s home, which included the consumption of alcohol. After the dinner, Hall and the business associate continued to discuss business strategy, and decided to ride in the business associate’s Jeep, resulting in a motor vehicle crash.

In finding that Hall’s accident arose out of his employment, this Court analyzed prior case law and stated, “Like the claimants in *Gray* and *Grant*, Hall’s purpose in traveling was wholly and exclusively in pursuit of his duties as national sales manager for Desert Aire. Nothing in the evidentiary record suggests he engaged in any activities of a personal nature that might break the causal link between his employment and his injuries.” Id. at 354, 761. In its opinion, this Court further stated, “Hall was engaged in ongoing discussions with business associates involving the marketing and sale of Desert Aire equipment at the time of the accident. *But for* these employment activities, Hall would not have traveled to Little Rock, attended the business dinner at the Brunner home, or continued his business conversation with Brunner on into the evening.” Id. at 355, 356, 762.

Unlike Hall, Petitioner was not travelling at the time of his injury “in the pursuit of his duties” as Director of Creative Services for Respondent. The Commission was clearly correct in taking into account Petitioner’s normal job duties in making its decision. There is no evidence in the record that supports the notion that Petitioner and the other employees involved in the kickball game were conducting or discussing business matters. Hall is clearly distinguishable from the case at hand.

B. Petitioner’s Injury Does Not Meet the Requirements of the Larson’s Analysis.

The substantial evidence in the record supports the Commission’s finding that Petitioner’s injury did not arise out of his employment because his attendance was not required (expressly or impliedly) and gave no direct substantial benefit to Respondent. In determining if injuries sustained while participating in recreational or social activities arise out of employment, three factors are to be considered. Specifically, this Court has determined that injuries sustained while participating in recreational or social activities arise out of employment when:

- (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or
- (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
- (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Leopard v. Blackman-Uhler, 318 S.C. 369 (1995); A. Arthur Larson and Lex Larson, The Law of Workmen’s Compensation § 22.00 (1994).

In Leopard, this Court held that the employee’s injury did not arise out of his employment when he was injured while playing on the company softball team. The facts of

Leopard are largely similar to the facts of the instant case: (1) Leopard's injury did not take place on the employer's premises and did not occur during normal working hours; (2) the activity in question (playing in a softball game) was organized by the employees; (3) the employer furnished equipment, including uniforms, and paid the League dues; (4) none of the employees participating on the company softball team were paid for their time spent playing or coaching; (5) the team uniforms bore the company name and logo and the results of the games were published in the local newspaper.

In finding that Leopard's injury was not compensable, this Court stated, "[f]urnishing equipment, uniforms, and league dues coupled with the remote advertising benefit to the company of a successful company softball team fall short of brining Leopard's injury within the scope of his employment at Blackman-Uhler." Id. at 372, 42.

Two other applicable cases from other jurisdictions are Pizza Hut of America, Inc. v. Hood, 198 Ga.App. 112, 400 S.E.2d 657 (1991), and Shade v. Ayars & Ayars, 513 N.W.2d 881 (Neb.App. 1994). In Hood, the employee drowned at an employer-sponsored picnic. Attendance at the picnic was encouraged but not required, and the employer used the games as a promotional tool to sell its latest product. Despite these factors, the Georgia Court of Appeals found that the employee's death did not arise out of or occur during the course and scope of his employment and, therefore, was not a compensable claim.

In Shade, an employee was injured at an employer-sponsored picnic. The event was sponsored by the employer, attendance was encouraged, all expenses were paid by the employer, and the event was advertised by the employer within the place of employment. However, the Nebraska Court of Appeals analyzed these same factors and found that the employee's injury was not a compensable event.

The facts of case at hand are even less supportive of a finding of compensability than those of Leopard. In the case at hand, the kickball game did not occur during normal working hours. Respondent instituted flexible summer hours in which employees were off on Fridays during the Summer months starting at 3:30 p.m. (R. p. 77, lines 14-24 & p. 79, lines 20-22) In this case, employees were allowed to work through the standard 30 minute lunch so they could leave work, clock out and arrive at the game at 3:00 (R. p. 99, lines 10-13) While most employees at this company are salaried, hourly employees were required to “clock out” to participate in the kickball game. (R. p. 145, lines 5-18) No employee believed the kickball game to be mandatory. (R. p. 141, lines 5-17)

In addition, the T-shirts worn by the employees during the kickball game did not bear Respondent’s company name or logo, so Respondent did not enjoy the “remote advertising benefit” as the employer in Leopard did. The kickball game in question was not only organized by employees, but actually voluntarily organized by Petitioner himself.

C. Petitioner’s Attendance at the Kickball Game Was Not Required.

Petitioner’s own testimony presents substantial evidence in support of the Commission’s ruling. Petitioner admitted that many of the employees did not come to the kickball games. (R. p. 140, lines 12-19) He explained his belief that the reason that many of the employees did not attend the game was because they had to perform work and that service to Respondent’s clients was always the highest priority. (R. p. 116, lines 17-24) Petitioner testified that nobody was forced into going to this kickball game. (R. p. 124, lines 5-8) Petitioner testified that kickball was not something he regularly performs as an employee of Respondent. (R. p. 139, lines 5-7) Petitioner admitted that no clients or prospective clients were invited to play. (R. p. 139, lines 17-20) Petitioner admitted that there was no pressure from anyone, including him, for employees

to play in this kickball game. (R. p. 141, lines 5-7) He also admitted there was no ultimatum given from upper management for the associates to attend this kickball game. (R. p. 141, lines 9-15) *He specifically admitted his attendance at this game completely voluntary.* (R. p. 141, lines 16-17) He indicated that none of Respondent's employees had ever approached him to state that they felt pressured to play in said kickball game. (R. p. 141, lines 18-22)

Petitioner also admitted that Respondent did not provide any transportation to the game or reimbursement for mileage to and from the game. (R. p. 143, lines 22-24) He admitted that Respondent did not hire a bus or van to transport employees to the game. (R. p. 143, line 25-p. 144, line 1) He further admitted that no employees were punished and no pay decreased for those who opted not to attend the game. (R. p. 145, lines 12-15) He indicated that the results of the game were not published in any local newspaper and no pressure was put on any employee to participate. (R. p. 145, line 22-p. 146, line 2) Mr. Johnson testified the game was not a required activity and attendance was completely optional. (R. p. 72, lines 5-9) The "very credible" testimony of Mr. Johnson, as found by the Single Commissioner, supports the decision of the Commission.

It is undisputed that some employees played kickball, other chose to return to their homes for the day as they normally would, and yet others simply chose to stay in order to complete work. (R. p. 76, lines 12-16) Mr. Johnson indicated that approximately half of the employees participated or attended the kickball game and that he did not know the reason why the other half did not. (R. p. 76, lines 7-11) He emphasized that no employee was required to participate in this game, no employee was punished for not participating, and no employees' pay was decreased if they decided not to play in the kickball game. (R. p. 98, lines 18-24)

Mr. Johnson's opinion of an employee was not lowered if he or she opted against playing in Petitioner's kickball game, and many employees, in fact, chose not to play. (R. p. 99, lines 4-6) He clarified that some employees worked through their lunch, went home at 3:00 p.m. that day, and did not play kickball. (R. p. 99, lines 10-13) *This particular testimony regarding whether or not the employees would have been required to be at Respondent's office working were they not participating in the kickball game, or whether they were given the option to go home, was directly at odds with Petitioner's testimony that the nonparticipating employees were expected to be working. This contradiction in testimony was noted by the Single Commissioner, who chose to believe Mr. Johnson over Petitioner, in making this factual determination. (See Finding of Fact #18 of January 4, 2010, Decision & Order; R. p. 17)* He emphasized that attendance or participation in the kickball game was completely voluntary and approximately 40 or 50 percent of the company did not participate in this game. (R. p. 236, lines 12-14)

Mr. Johnson explained that there was no roll call at the game or an attendance sheet to sign. (R. p. 237, lines 10-14) According to Mr. Johnson, hypothetically, if an employee were in transit to the kickball game and decided *en route* against playing due to back pain, he or she could have simply turned around and gone home with no consequence. (R. p. 237, lines 15-19) He admitted that no client of Respondent's was billed for this game. (R. p. 238, lines 8-10) He testified that there was no requirement for a salaried employee to clock in or record their time for playing in the kickball game. (R. p. 238, lines 15-22)

Mr. Johnson testified that no reimbursement for travel was provided or any carpooling organized to transport employees to and from the game. (R. p. 239, lines 9-11) He testified further that, if Petitioner had not submitted his time while at the game as administrative time, he

still would have received his normal salary that day for his services that day. (R. p. 239, lines 4-7)

Mr. Johnson clarified that this game did not take place on Respondent's premises and that Respondent does not have a recreation period. (R. p. 243, lines 3-4) He explained that kickball game was not a regular incident of employment with Respondent. (Id.) Mr. Johnson very strongly testified that, if Petitioner had not attended or organized the game, he would not have been terminated. (R. p. 103, lines 7-10)

Petitioner admitted that he volunteered to plan the game, and he made the decision to use the company Intranet, email, and flyers to promote the game. In fact, Petitioner admitted that he put on his self-evaluation form that the kickball game was a morale booster and used to build a team atmosphere. Petitioner testified that no clients were invited to the kickball game and that the game was planned by employees for employees. Petitioner admitted that he would have received the same amount of money in his paycheck if he would have gone home instead of going to the kickball game. There was no ultimatum made by Respondent to play kickball, attendance at the game was voluntary, and attendance at the kickball game did not affect any employee's pay. Petitioner was not injured while organizing the game, but rather while playing in the game. Petitioner's injury occurred on a field at the Y.M.C.A., approximately five miles from Respondent's premises. The game was not scheduled during working hours. The time and place factors required by the Larson's analysis were not met. Respondent did not require employees to attend and only loosely encouraged attendance; therefore, the Larson's degree of employer initiative factor cannot be met.

Clearly, the facts of this claim, including both Petitioner's testimony and the testimony of Mr. Johnson, show that Respondent did not make Petitioner's attendance at the kickball game a

requirement of Petitioner's services or impliedly brought it "within the orbit of his employment," as required by the second prong of the Larson analysis adopted by this Court in Leopard.

D. Respondent Derived No Substantial Direct Benefit From the Kickball Game Beyond the Intangible Value of Improvement in Employee Health and Morale That Is Common to All Recreation.

The third prong of the Larson's analysis requires that the employer derived a substantial and direct benefit from the social or recreational event in question. The preponderance of the evidence supports the Commission's finding that Respondent derived no substantial direct benefit from the kickball game beyond the intangible value of improvement in employee health and morale that is common to all recreation. Respondent paid the field rental fee and provided T-shirts, but had no intent to advertise or market there. Respondent received no profit by having a kickball game other than improving employee health and boosting company morale. Boosting company morale, by itself, does not subject an employer-sponsored recreational or social activity to the Workers' Compensation Act. Petitioner relies solely on boosting morale – "We thought it was a clever, fun, creative way of (team building)." (R. p. 54) Kickball is a clever and fun way of team building and an avenue to "blow off steam," but provides Employer no substantial direct benefit from the activity beyond improvement in employee health and morale.

In fact, Petitioner's own "2007 Manager Self Evaluation," which he submitted as an exhibit into the record of this case, indicated that "[one of my major accomplishments over the past year was] [t]he internal *esprit d'corps* activities of a cookout in early Summer and the kickball game. Both had very positive lifts to the working culture at J-D." (R. p. 188)

According to Merriam-Webster Online Dictionary, the definition of "morale" is "the mental and emotional condition (as of enthusiasm, confidence, or loyalty) of an individual or group with regard to the function or tasks at hand; a sense of common purpose with respect to a

group; ESPRIT DE CORPS.”⁵ Petitioner’s own choice of words from his self evaluation clearly shows that the benefit of this kickball game to the company, if any, were nothing more than the intangible value of improvement in employee health and morale.

Mr. Johnson testified that, in his opinion, all of the positive things that come from an event like this kickball game were ultimately promotion of company morale and general health. (R. 96:1-5) Mr. Johnson also testified that the T-shirt design was Petitioner’s idea. (R. 97:3-11) He indicated there was nothing on the T-shirts that would or could be used in marketing for Respondent. (R. 97:12-15) As a consequence, the Commission’s decision denying benefits in this claim should be affirmed in its entirety.

E. Petitioner’s Injury Did Not Occur During the Course and Scope of His Employment.

The words “in the course of employment” have reference to the time, place and circumstances under which the accident occurs. Ergle v. South Carolina Electric & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944); Willard v. Commissioners of Public Works, 219 S.C. 477, 5 S.E.2d 874 (1951); Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173; Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965); Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972).

An injury occurs “in the course of” employment for workers’ compensation purposes when it happens within the period of employment, at a place where the employee reasonably may be in the performance of the employee’s duties, and while fulfilling those duties or engaging in something incidental to those duties. Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d (Ct. App. 2008); Houston v. Deloach & Deloach, 378 S.C. 543, 669 S.E.2d 628 (Ct. App. 2008).

⁵ Petitioner used this very phrase “esprit de corps” in his own personal self evaluation following the kickball event. The term ‘*Esprit de corps*’ is synonymous with the term ‘morale’.

Petitioner attempts to use Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975), to argue that his accident somehow occurred during the course and scope of his employment. In Howell, the claimant broke his arm while chasing two young boys who snatched the purse of a prospective customer of the employer a few feet from the entrance to the employer's store. Although protecting customers was not a part of the employee's regular duties, the court felt he nevertheless was advancing the employer's interests by trying to save the very money the customer was intending to spend in the employer's store and by creating customer goodwill. This Court stated, "[I]n view of the current prevalence of purse snatching by juvenile delinquents, there is *obvious and substantial benefit* flowing from a merchant from knowledge on the part of customers that the merchant and his employees will make every reasonable effort to protect the customers and their purses from such juvenile delinquents." Id. at 301, 821, *emphasis added*.

Thus, according to Howell, in order for acts outside of an employee's regular duties to be considered during the course and scope of his employment, the acts must give the employer an "obvious and substantial benefit." As argued above, Respondent received no such obvious and substantial benefit from said kickball game. Further distinguishing this claim from Howell is the fact that Petitioner's accident did not occur during working hours or at Respondent's premises, as Howell's injury did.

Petitioner also attempts to use Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007), to argue that his injury at the kickball game occurred during the course and scope of his employment. Grant is easily distinguished from the case at bar. In Grant, the claimant was the vice president of the employer, a family-owned business. On the day of Grant's accident, after making a deliver to a customer, he traveled in a company-owned vehicle to meet his father, the CEO of the employer. Id. at 198, 870. He and his father planned to meet customers who were

interested in purchasing textile bobbins. Claimant intended to drop off bobbin samples, return to his office, and then go back to his home. Id. He was meeting his father at a hunting preserve used by the employer to meet and entertain customers. Upon arrival at the hunting preserve, the claimant noticed that there was debris in the roadway. While trying to remove the debris from the road, the claimant was struck and injured by a passing vehicle.

With respect to an analysis of the issue of whether Petitioner's injury occurred during the course and scope of his employment, the following comparisons can be made to the facts of Grant: (1) Time: Grant's accident occurred at approximately 5:30 pm, a time that Grant likely worked past due to his title of vice-president of the employer. Grant intended to return to his office to continue working before returning home for the day. Petitioner, while a member of Respondent's upper management, had the option of returning to his home on the day of the injury, rather than playing kickball; (2) Place: Grant's accident took place on the premises of a hunting preserve he personally owned, but rented to the employer and was used by the employer for the purpose of meeting and entertaining clients. Petitioner's injury, on the other hand, occurred on a softball field owned by the Y.M.C.A.; (3) Purpose of the Event: Grant was meeting customer's of the employer and intended to drop off samples of the employer's goods for the potential customers to view; thereby providing an obvious and substantial benefit to the employer in the form of potential sales. Petitioner's motivation was to increase the goodwill and morale of himself and his fellow employees; and (4) Transportation: Grant was travelling in an employer-owned vehicle at the time he decided to remove the debris from the roadside. Petitioner admitted that Respondent did not provide him, or any employee, transportation or reimbursement for travel to and from the kickball game.

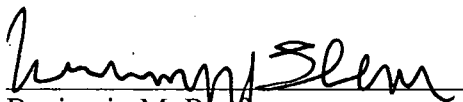
In finding the accident compensable in Grant, this Court specifically stated, “The full commission erred by finding that the accident did not have a causal connection with Claimant’s employment. The accident would not have happened but for Claimant’s business trip to the Clinton House to meet his employer’s customers.” Id. at 201, 872. In Petitioner’s case, the accident had no connection to his employment and no customers were present at the softball game. For this reason, the factual scenario analyzed in this claim falls more correctly under the analysis used by this Court in Leopold, analyzed and discussed in detail, *supra*.

Petitioner, in his brief, attempts to use Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007), as an analogous case to support his position that the injury he sustained while playing kickball occurred during the course and scope of his employment; however, as described above, Hall was a travelling sales manager for his employer. This Court’s analysis regarding whether Hall’s accident occurred during the course and scope of his employment centered largely on whether or not he had substantially deviated from his employment by partaking in the Jeep ride with Bruner, the business associate.

In the instant case, Petitioner failed to even prove that he was acting in the course and scope of his employment by playing in the kickball game at all, much less that he had not substantially deviated. Claimant was not travelling for business purposes, so the settled rule of law that “traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return ...” is completely inapplicable to Petitioner’s case. Id. at 357, 762, (citing Arthur Larson, Larson’s Workers’ Compensation Law, § 14.01 (Lexis-Nexis 2004)). Again, Petitioner’s attempt to use Hall fails because the facts of this case are clearly more analogous to Leopard, which involved an injury while playing at an employer-sanctioned softball game not during normal working hours or on the employer’s premises.

CONCLUSION

Petitioner's injury should not be deemed compensable because Petitioner's alleged accident did not "arise out of" his position at Employer and because it fails to fall within the course and scope of employment when analyzed by the Larson factors. The kickball game did not occur on Respondent's premises, it was not a required event, and Respondent did not derive substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. As a consequence this case should be denied as a matter of law, and the Commission's Decision & Order should be affirmed in its entirety.



Benjamin M. Remfrow

Wesley J. Shull

Willson Jones Carter & Baxley, P.A.

872 S. Pleasantburg Drive

Greenville, SC 29607

Attorneys for Respondents

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS
AND THE WORKERS' COMPENSATION COMMISSION

Case No. 2012-212258

Stephen C. Whigham.....PETITIONER,

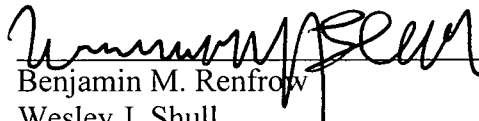
v.

Jackson Dawson Communications
And The Hartford..... Respondents.

PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Stephen C. Whigham by depositing copies of it in the United State Mail, postage prepaid, on January 13, 2014, addressed to his attorney of record, Douglas A. Churdar, Esquire, DOUGLAS A. CHURDAR, P.C., 712 East Washington Street, Greenville, South Carolina 29601.

January 13, 2014


Benjamin M. Renfrow
Wesley J. Shull
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3296
Attorneys for Respondents