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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

Appellate Case No. 2012-212258

STEPHEN C. WHIGHAM..PETITIONER,

v.

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

THE UNDISPUTED FACTS AND REASONABLE INFERENCES FROM THOSE FACTS LEAD ONLY TO THE CONCLUSION THAT, WHILE PETITIONER WAS NOT SPECIFICALLY REQUIRED TO PLAN, ORGANIZE, PROMOTE, AND EXECUTE A TEAM BUILDING EVENT, HE KNEW THAT RESPONDENT WANTED AND EXPECTED HIM TO DO SO FOR ITS BENEFIT.

This case involves a question of law: namely, whether an employer must mandate an activity – couching an order in the imperative – for the activity to "arise out of" employment, or whether meeting an employer's desires and expectations is enough.

Respondent embraces an incorrect legal position originally taken by the Single Commissioner, namely that an injury cannot "arise out of" employment unless it occurs during an activity that has "been required" or is "part of [an employee's] job description/duties … ." (R. p. 24.) Throughout its brief, Respondent repeatedly asserts that Petitioner was not specifically "required" by his job description to put on the team-building event, nor was he given an "ultimatum" to execute or attend it, and that the event was his idea. (E.g., "No aspect of Petitioner's specific job as a member of upper management required him to create activities internally for employees …."; "He also admitted there was no ultimatum given …")

Respondent's assertions are true in a most literal sense. But Respondent is anchoring its position upon a rigid, impractical, unrealistic, and legally unsupportable formulation of "arising out of." Under Respondent's formulation, only those activities specifically required by an employer are compensable. It is not enough that an employer *wants* and *expects* an employee to perform an activity and the employee *knows* of that expectation. Thus, Respondent fails to address the testimony of its sole witness, Kevin

Johnson, that "there was consensus in upper management that these events ... were wanted ... by upper management" and that "as a member of upper management, of course, [Petitioner] would have known this." (R. pp. 61-62.); and, further, that he would have been "surprised and shocked" if Petitioner had failed to attend the event, that failure to attend would have been "just unexpected, unbelievable ..." (R. p. 102, ll. 5-22.)[1]

In essence, Respondent's position is that, unless an activity is outlined in a job description or an employee is told "You need to do ..." or "You'd better do ...", the activity cannot "arise out of" employment. Such a standard is not only rigid, impractical and unrealistic, but also it is inconsistent with positions previously taken by this Court. "[A]n 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 assigned work is thereby furthered, is within the course of employment." Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869, 871-72 (S.C. 2007), citing Howell v. Kash and Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). See also Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753, 762 (S.C. App. 2007) ("An employee need not be in the actual performance of the duties for which he was expressly employed in order for his injury to be in the course of employment.")

This case presents an opportunity to make clear that an activity need not be specifically required or mandated to "arise out of" employment. "Ultimatums" are not necessary. Given the similarities between the Workers' Compensation Acts in South Carolina and North Carolina, it is significant that North Carolina courts have held:

[1] It is incredulous for Respondent to contend that Petitioner's failure to attend the event would have been shocking and unexpected while at the same time arguing he wasn't even *impliedly* required to attend. Leopard v. Blackman-Uhler, 318 S.C. 369, 458 S.E.2d 41, 42 (S.C. 1995). While this isn't a "company team" case, it can also be decided in favor of Petitioner as a matter of law using the Larson's framework outlined in Leopard.

> "The order or request *need not be couched in the imperative.* It is sufficient for compensation purposes that the suggestion, request or even the employee's mere perception of what is expected of him serves to motivate undertaking an injury–producing activity."

(Emphasis added.) Stewart v. North Carolina Department of Corrections, 29 N.C.App. 735, 738, 225 S.E.2d 336 (N.C. App. 1976); Houser v. Advanced Plastiform, Inc., 133 N.C.App. 378, 384, 514 S.E.2d 545 (N.C. App. 1999).

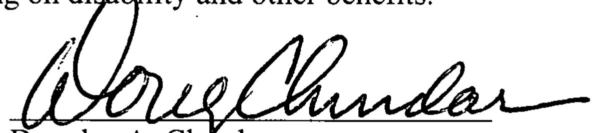
While it is undisputed that Petitioner was not specifically required to put on this team-building event nor given an ultimatum to attend, it is acknowledged by Respondent and, thus, equally undisputed that Respondent wanted and expected Petitioner to plan, organize, promote, and execute the team-building event and would have been surprised and shocked had he failed to do so. Knowing what his employer wanted and expected, Petitioner suggested a team-building event to Respondent (so, yes, it *was* his idea), received enthusiastic approval and elaborate support, and proceeded to follow through until his injury. This is enough to meet the "arising out of" standard outlined in Grant and Hall, especially considering the policy of broadly construing the language of the Workers' Compensation Act in favor of coverage. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615, 618-19 (S.C. 2010); Hall, 656 S.E.2d at 759.

It is also undisputed that Petitioner's injury occurred "in the course of" his employment. He was injured at the time and place scheduled for and while executing the team-building event that arose out of his employment.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court reverse the Court of Appeals' decision and rule as a matter of law that Petitioner's injury is compensable and remand the case to the Commission for a hearing on disability and other benefits.

Date: 2/21/14



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PROOF OF SERVICE

I hereby certify that I have this 21 day of February, 2014 served **REPLY BRIEF OF PETITIONER** on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, Benjamin Mason Renfrow, Esq., Willson Jones Carter & Baxley, PA, 872 S. Pleasantburg Drive, Greenville, SC 29607.

2/21/14
Date

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