

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James Avery B. Wilkerson, Jr., Commissioners

WCC File No. 1110704

Claudia Bryant-Perreira, Employee, Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier..... Respondents.

**RESPONDENTS' RETURN IN OPPOSITION
TO APPELLANT'S
PETITION FOR REHEARING OR FOR A FULL OPINION**

RECEIVED

APR 15 2014

SC Court of Appeals

Pursuant to Rules 221 and 240, SCACR, Respondents IMSCO/TFE Logistics Group and Zurich American Insurance Company hereby oppose Appellant/Claimant Claudia Bryant-Perreira's Petition for Rehearing or for a Full Opinion ("Petition"). Claimant has raised no points that were overlooked or misapprehended by this Court that warrant rehearing. In addition, this Court's Per Curium Opinion No. 2014-UP0126 does not need to be expanded.

Respondents respond to each of the seven arguments raised by Claimant as follows:

1. Claimant's argument that this Court "overlooked" Claimant's lack of intent and/or the speed/spontaneity with which events occurred does not warrant rehearing. First, Claimant has cited no authority for the proposition that "intent" and/or speed/spontaneity have any relevance to an analysis of whether an employee violated a workplace rule. As such, her argument is cursory and unsupported and should be deemed abandoned. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); *see also* Jones v. SC Dept. of Health & Envtl. Control, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (an issue is abandoned where "argument is conclusory and unsupported by authority").

In reality, neither intent nor speed/spontaneity is discussed in any of the cases substantively relied on by Claimant in other sections of her Petition. *See* Wright v. Bi-Lo, Inc., 314 S.C. 152, 422 S.E.2d 186 (Ct. App. 1994); Johnson v. Merchant's Fert. Co., 198 S.C. 373, 17 S.E.2d 695 (1941); Portee v. S.C. State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959), none of which discusses intent or speed/spontaneity as relevant factors. Not even Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (N.C. 1982), the North Carolina case relied on most heavily by Claimant, discusses intent or speed/spontaneity as relevant factors.¹ As is discussed further herein, Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975) does not even address violation of a workplace rule.

Instead, it is "the employee's knowledge of work rules [that] continues to be a critical factor in these types of cases." Wright, 314 S.C. at 157 n.7, 442 S.E.2d at 189 n.7. Here, Claimant admitted at the hearing that she knew she was not authorized, and

¹ In fact, in Hoyle, the claimant was specifically instructed by another employee to perform the prohibited action, thereby negating any hint of spontaneity.

therefore not permitted, to operate the walkie-rider. (R. 177, line 14 – 179, line 6) (R. 183, lines 5-9).

2. Claimant's assertion that this Court did not consider any factors that would determine whether the workplace rule she violated "concerned the conduct of the worker within the scope of her employment, or did the policy limit the scope of her employment," is simply incorrect. In fact, the very quote from Wright that Claimant includes in this argument, 314 S.C. at 155, 442 S.E.2d at 188, *quoting Johnson*, 198 S.C. at 378-79, 17 S.E.2d at 697-98, is set forth verbatim in this Court's Opinion as controlling authority. The fact that this Court did not address specifically her various arguments regarding: 1) Claimant's prior use of the walkie-rider during supervised training; 2) the fact that other employees who had passed the certification course were authorized to use the walkie-rider; 3) that the 2008 Safety Policy and 2009 Memorandum contain different categories of rules; and 4) that the Safety Policy contains language stating it is a "guide" and may be "subject to change," does not mean that this Court did not consider the appropriate factors to determine whether the rule limited Claimant's sphere of employment. This Court considered the appropriate factors and reached the correct result. With respect to these arguments that Claimant was acting within the scope of her employment, "[t]he Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR.

3. Because she cannot credibly contest her knowledge of the rule against operating walkie-riders without proper certification and authorization, Claimant erroneously argues this Court should have applied the test set forth in Howell, which analyzed whether "[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 own assigned work is thereby furthered, is within the course of employment." 264 S.C. at 301, 214 S.E.2d at 822. Claimant's arguments are unavailing precisely because there was no suggestion in Howell that the employee had violated a workplace rule. Thus, the test applied in Howell is inapplicable in this case.

In addition, Claimant has not and cannot show how having uncertified and unauthorized employees operate walkie-riders benefits TFE. In fact, given the danger of such actions to both Claimant and her coworkers, the only evidence in this case is that there is **no** benefit to TFE in having uncertified and unauthorized employees operate walkie-riders. To the extent she is arguing that moving the walkie-rider out of her way benefitted TFE by allowing her to continue on with her assigned job, that task could and should have been performed by someone who was certified to do it, a fact Claimant herself recognized when she first asked Matt Cox to move the walkie-rider for her. Mr. Cox was nearby, close enough to see her attempt to operate the walkie-rider, as he was the person who yelled for her to let go of the handle. (R. 175, lines 2-3). Another certified coworker, Leslie Roberson, was a table's width away from Claimant. (R. 194, lines 2-7). There was no benefit whatsoever to TFE in having an uncertified employee operate the walkie-rider.

Furthermore, Claimant cannot demonstrate that she operated the walkie-rider in good faith precisely because she was violating a known prohibition against using power equipment, such as the walkie-rider, without proper certification and authorization. In fact, the very argument Claimant makes here was raised and rejected in Wright: "Wright's act was not in 'good faith' because it was an act in direct violation of specific

orders from the employer.” Wright, 314 S.C. at 158, 442 S.E.2d at 190. In short, the benefit-to-the-employer test embodied in Howell and relied on by Claimant is not relevant when the employee is in violation of a specific order or prohibition from the employer.

Claimant continues to misstate the facts and holding in Portee. There, the person who violated the workplace rule was not the claimant, but a coworker who gave the claimant the penicillin injection. The court pointed out that the claimant was unaware of any rule prohibiting his coworker from giving him injections, and that “[t]he disobedience by fellow workmen of orders is as much one of the risks of a man’s employment as a defect in the mechanical appliances.” 234 S.C. at 58, 106 S.E.2d at 674. Thus, the analysis in Portee is inapplicable to the case at hand, where the claimant was injured when she knowingly violated a workplace rule.

Next, Claimant argues erroneously that the proper test is whether her conduct was reasonably related to the accomplishment of the task for which she was hired, citing this Court’s opinion in Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003). Pratt, in which this Court upheld the ruling that the claimant was outside the scope of his employment at the time of his injury because he had violated his employer’s instruction to not take the company truck home, does not support her argument. 353 S.C. at 350, 577 S.E.2d at 481. In Pratt, this Court noted that the claimant cited Hoyle in support of his case, and pointed out that that case was “inapposite” to the case before it. 306 N.C. at 349, 293 S.E.2d 480. The same is true here. In Hoyle, “the employee was faced with the choice of abandoning the furtherance of his employer’s business or acting in contravention of a previous order.” Id. Here, as was the case in Pratt, there was no

such dilemma or choice facing Claimant. At least two coworkers who were certified on the walkie-rider were nearby and could have moved it for Claimant had she asked.

Furthermore, Hoyle was decided under a specific section of the North Carolina General Statutes that merely reduces by 10% the benefit to a claimant who is injured while acting in “willful breach” of a recognized workplace rule. N.C.G.S. § 97-12(3); see Hoyle, 306 N.C. at 257, 293 S.E.2d at 201. Because there is no corresponding language in the South Carolina Workers’ Compensation Act, Hoyle carries no precedential or even persuasive weight in this state. See Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434-435, 4214 S.E.2d 489, 490 (1992) (noting differences in North Carolina’s counterpart to Section 42-9-60 and, consequently, declining to defer to North Carolina precedent). In fact, the rule enunciated in Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975),² simply does not apply where the statute of another state is substantively different, as is the case with the statute under consideration in Hoyle.

Claimant has not and cannot cite to **any** South Carolina authority for the proposition that, where a claimant’s actions are in knowing violation of a specific workplace rule that she is nonetheless entitled to compensation if her conduct was somehow reasonably related to the accomplishment of a task for which she was hired. In fact, when asked directly at oral argument, her counsel could not identify one South Carolina case that awarded benefits when the claimant was found to have knowingly violated a workplace rule. The only case he could identify was Hoyle which, as is noted

² Hines stands for the proposition that, “[w]here the language incorporated into a statute is identical or substantially identical with that appearing in similar statutes of other states, ... it will be presumed that the subsequently enacted statute was intended to be understood and applied in accordance with the construction given it by the courts of the states which had first adopted it.” 263 S.C. at 405, 211 S.E.2d at 223.

above, is entirely inapplicable here.

4. This case does not present any jurisdictional issues. As Claimant notes, the parties stipulated to the Commission's jurisdiction. Thus, there was no need for this Court to cite White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720 (1964), or discuss the standard for resolving jurisdictional issues. See Rule 220(b)(2) (“[t]he Court of Appeals need not address a point which is manifestly without merit”).

5. This Court applied the correct standard of review. Although Claimant suggests that there are no material facts in dispute in this case, there are clear disputes over: 1) whether Claimant was prohibited from operating the walkie-rider; 2) whether she was aware that she was prohibited from operating the walkie-rider; 3) whether she operated the walkie-rider on July 15, 2011; 4) whether she asked her co-worker to not report the incident to the safety department and/or her supervisor, and 5) whether TFE had allowed her to operate the walkie-rider in the past under circumstances that would lead Claimant to believe she was authorized to operate it on July 15, 2011. Thus this Court correctly applied the substantial evidence standard of review in this case.

In addition, Claimant's suggestion that the determination of whether she was acting in the course and scope of her employee is a jurisdictional question lacks any support whatsoever and should be summarily dismissed. This Court both stated and applied the correct standard of review. See, e.g., Wright, 314 S.C. at 155, 442 S.E.2d at 188; Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 758 (Ct. App. 2007) (the determination of whether a claimant's injuries arose out of and in the course of employment is largely a factual question, subject to the substantial evidence standard of review).

6. Because the Commission did not hold that “any violation of a company policy/instruction removed the Claimant from the course of her employment,” this Court did not need to discuss any such standard which, in any event, is fabricated completely out of whole cloth. Claimant misconstrues the Commission’s Findings of Fact and Conclusions of Law in an attempt to create an issue where there is none. In Finding of Fact No. 8, partially quoted by Claimant, the Commission found specifically that, “[w]hen the claimant turned the handle of the walkie-rider, which then lurched forward, this was in direct contravention of company policy and specific instructions to not operate the walkie-rider.” (Commission Decision, R. 6). After explaining in detail that Claimant was aware of the rule against operating the walkie-rider without proper certification and authorization, Finding of Fact No. 11, also only partially quoted in Claimant’s Petition, states: “The claimant operated the walkie-rider in direct violation of the employer’s directions/instructions. This took her injury out of the sphere of her employment.” (Commission Decision, R. 7). Claimant also references Conclusion of Law No. 9, which cites Wright, and then states, “Claimant is not entitled to benefits based on the fact that she operated the walkie-rider in direct contradiction of company training, and instruction by her safety manager.” (Commission Decision R. 8). Far from ruling that **any** violation of **any** company policy/instruction would remove Claimant from the course of her employment, the Commission Decision leaves no room for doubt as to which policy Claimant violated: operating a walkie-rider without proper certification and authorization. Therefore, this Court did not need to specifically address Claimant’s arguments on this point. *See* Rule 220(b)(2) (“[t]he Court of Appeals need not address a point which is manifestly without merit”).

7. Claimant's request that this Court issue a full opinion outlining its reasoning should be denied. First, this Court's Opinion, which addresses every point that is necessary to the decision of the appeal, is fully compliant with Rule 220(b), SCACR. The fact that this Court did not specifically address some of Claimant's arguments does not mean it overlooked or misapprehended them. Pursuant to Rule 220(b)(2), "[t]he Court of Appeals need not address a point which is manifestly without merit."

Second, Claimant's argument on this point is no more than one sentence and contains no authority whatsoever. A cursory and unsupported argument is deemed abandoned. McCracken, 346 S.C. at 92, 551 S.E.2d at 238; Jones, 384 S.C. at 317, 682 S.E.2d at 294.

Finally, Rule 221, SCACR, does not include requests for a full opinion in the grounds that justify rehearing; instead, a rehearing petition should state the points that a petitioner believes were overlooked or misapprehended by the Court. This Court should deny Claimant's request for a "full opinion."

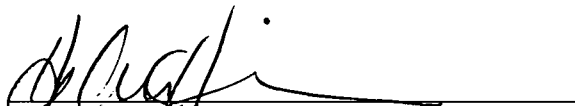
CONCLUSION

For all the reasons stated herein, this Court should deny Claimant's Petition for Rehearing or for a Full Opinion in its entirety.

April 11, 2014

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



Weston Adams, III
S.C. Bar No.: 64291
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE
Logistics Group and Zurich American
Insurance Company*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James Avery B. Wilkerson, Jr., Commissioners

WCC File No. 1110704

Claudia Bryant-Perreira, Employee, Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier Respondents.

PROOF OF SERVICE

I certify that I have served the **Respondents' Return in Opposition to Appellant's Petition for Rehearing or for a Full Opinion** on Claudia Bryant-Perreira, by depositing a copy of it in the United States Mail, postage prepaid, on April 11, 2014 addressed to her attorney of record:

Samuel D. Harms, Esquire
Harms Law Firm, P.A.
33 Market Point Drive
Greenville, South Carolina 29607

RECEIVED

APR 15 2014

SC Court of Appeals



Sharon Strubel
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents IMSCO/TFE Logistics
Group and Zurich American Insurance Company*

mqc

**INSURANCE
DEFENSE**

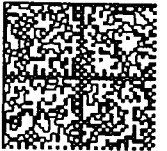
POST OFFICE BOX 550007
MOUNT PLEASANT, SC 29465

2062.13034/HFH/em
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
SC Court of Appeals

APR 15 2014

Priority Mail
ComBasPrice



UNITED STATES POSTAGE
02 1R
0006555030
MAILED FROM ZIP CODE 29464
\$ 05.320
APR 11 2014
PRIMEY BOWLES