

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
1207113

Boisha Wofford, alleged surviving spouse,
and Kaelyn Wofford, surviving child, on behalf
of Brian Wofford, deceased employee,

CLAIMANTS/APPELLANTS,

v.

City of Spartanburg,

EMPLOYER AND SELF-INSURER,

through the

South Carolina Municipal Insurance Trust,

DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on February 18, 2014

Appellate Panel Decision and Order
Filed _____, 2014.

APPEARANCES:

Claimant/Appellant represented by Kenneth C. Anthony, Esquire of The Anthony Law Firm, PA.
Defendants/Respondents represented by Stephanie Lamb Pugh, Esquire, of McAngus Goudelock
& Courie, L.L.C. of Greenville, South Carolina.

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SC Court of Appeals

STATEMENT OF THE CASE

The underlying claim was heard by Commissioner T. Scott Beck on August 15, 2013. On November 7, 2013, Commissioner Beck issued the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Claimants allege that Decedent's accident, which took place on May 18, 2012, and resulted in Decedent's death, arose out of and in the course of Decedent's employment with the City of Spartanburg. Defendants deny these allegations.

2. Decedent worked as a Parks & Recreation Director for the City of Spartanburg and as such, he was a salaried employee. His typical workday was from 8am-5pm, but he had the ability to flex his schedule depending on his job responsibilities.

3. I find that Decedent was not working at the time of his death. He never reported to work on the day of his accident; instead, he delegated his job duties to his subordinates. He made/received four to five minutes worth of phone calls, sent/received nine very brief text messages/emails, and engaged in one very brief chat with his subordinate. Therefore, on the date of his death, he spent approximately ten minutes communicating remotely with his subordinates. I find that Decedent's use of his work phone to communicate with his subordinates on the morning of his accident was a convenience to Decedent. The fact that he made a few work related calls, texts, etc. is not dispositive. Because he communicated remotely with his subordinates, he did not have to come in to work to perform his job duties. I find that this remote, telephonic/electronic communication does not rise to the level that would bring Decedent's actions within the course and scope of his employment.

4. Instead of coming to work on the day of his accident, Decedent drove approximately nine miles from his apartment in the opposite direction to his mother's home in Moore, South Carolina to pick up his motorcycle and visit with his mother. He remained at his mother's home approximately three hours. This visit to his mother's house was of a purely personal nature. I find that even if it can be said that Decedent was working at some point on his date of accident, that the trip and visit to his mother's house in Moore, South Carolina, was a substantial deviation from his employment.

5. I find that Decedent's accident, which occurred at the corner of Reidville Road and Plateau Street in Moore, South Carolina, and was approximately two miles from his mother's house, took place at a location that Decedent's work duties did not require him to be. Nothing about Decedent's job, on the date of his accident, required that he travel to or visit any location in Moore, South Carolina or that he go and pick up his motorcycle in Moore, South Carolina. The only job duties Decedent had on the date of his accident were located in the City

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of Spartanburg, which was about ten and a half miles or twenty-five minutes away from Decedent's mother's home.

6. This claim is barred by the going and coming rule, and there are no applicable exceptions.

7. I find that Decedent was not charged with any work related duties at the time of his accident but instead was on a purely personal mission to get to work. There is no evidence establishing that Decedent was tasked with any work related responsibility at the time of his accident. He was merely on his way to work to engage in his typical job responsibilities.

8. I find that Decedent was not performing a special task, service, mission, or errand for the City of Spartanburg at the time of his accident. Whether Decedent was headed to his office, the City's employee appreciation lunch, or to one of the recreation centers that he supervises, all of these activities were a customary part of his employment with the City of Spartanburg. The evidence establishes that Decedent was on his way to work to perform his typical job duties, duties that fell within his job description and duties that were expected of him on a regular basis.

9. A \$250,000.00 settlement was given to Claimants as a result of the motorcycle accident that resulted in Decedent's death. A portion of the settlement proceeds have already been disbursed. The remainder of the settlement proceeds is being placed in an annuity for the minor child. No proceeds from the settlement were held in trust for Defendants' statutory lien. Therefore, if this claim had been deemed compensable, Defendants would have been entitled to take credit for their lien against the award for death benefits.

10. I find that Claimants never filed a Form S-2, but that because an action was not commenced in the civil court regarding the third party case, that this failure does not bar their claim.

CONCLUSIONS OF LAW

1. The Findings of Fact set forth above are construed to be conclusions of law, if applicable.

2. Pursuant to South Carolina Code Annotated § 42-1-160, Decedent did not suffer a compensable injury under the Act. Claimants failed to establish that Decedent's accident arose out of and in the course of his employment, as Decedent was not working at the time of his accident.

3. Even if Decedent's electronic or telephonic communication with his co-workers could be said to bring this claim within the purview of the Act, the Decedent's decision to drive nine miles to his mother's house in Moore, South Carolina, to stay at his mother's house for approximately three hours, and to pick up his motorcycle from his mother's house resulted in a substantial deviation from employment. See White v. S.C. State Highway Dep't, 226 S.C. 380, 85 S.E.2d 290 (1955); Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949).

4. Pursuant to Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) and Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011), Claimant's claim for benefits is barred by the going and coming rule.

5. There are no applicable exceptions to the going and coming rule. See Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011).

6. Pursuant to Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333 (2008), the duty or task exception to the going and coming rule is inapplicable, because Decedent's accident, near his mother's home, took place on his way to work. This trip was serving the personal objective of getting Decedent to work. Decedent had no work-related duties to perform on his way to work, nor was he under the control of the City of Spartanburg on his way to work. See also Gregg v. Dorchester County Schools System, 270 S.C. 189, 241 S.E.2d 554 (1978).

7. Pursuant to Bickley v. South Carolina Electric & Gas Company, 259 S.C. 463, 192 S.E.2d 866 (1972), the special errand exception to the going and coming rule is inapplicable, because Decedent was not charged with any task on his way to work. In fact, the testimony revealed that the only job duties Decedent had on the day of his accident were his typical job duties in the City of Spartanburg, which were all contemplated by his job description. At the time of his accident, Decedent was on a personal mission to get to work. Whether Decedent was headed to his office, the City's employee appreciation lunch, or to one of the recreation centers that he supervises, all of these activities were a customary part of his employment with the City of Spartanburg. Nothing was unique or special about any of the aforementioned activities. See also Sylvan v. Sylvan Bros, Inc., 225 S.C. 429, 82 S.E.2d 794 (1954).

8. Claimants' failure to file a Form S-2 is not a bar to benefits. South Carolina Code Annotated § 42-1-560(b) requires that an action be commenced for the Section to be applicable. Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced when a summons and complaint are filed with the clerk of court. No action was ever filed in Claimants' third party claim. Therefore, Claimants were not required to file a Form S-2.

9. Pursuant to South Carolina Code Annotated § 42-1-560 and by stipulation of the parties, if Claimants had prevailed on this claim, Defendants would have a statutory lien on the third party settlement proceeds.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED** that Claimant's claim to workers' compensation benefits under the South Carolina Workers' Compensation Act be denied, as Decedent's accident did not arise out of and in the course and scope of his employment.

IT IS SO ORDERED.

Within the statutory period, counsel for both parties filed an Application for Review in the case setting forth their reasons for appeal, copies of which were furnished to all interested parties, prior to oral arguments, which took place before the Appellate Panel on February 18, 2014.

By way of appeal, Claimants/Appellants assert the Hearing Commissioner erred in the following:

1. Did the Commissioner err in finding that the decedent was not working at the time of his death?
2. Did the Commissioner err in finding that the claim was barred by the going and coming rule, and that there was no applicable exceptions? Specifically, did the Commissioner err in failing to find that the decedent, on his way to or from his work, was still charged with some duty or task in connection with his employment? Medlin v. Upstate Plaster Services, 329 S.C. 92, 495 S.E.2d 447 (1997).

By way of appeal, Defendants/Appellants assert the Hearing Commissioner erred in the following:

1. Whether the Hearing Commissioner erred in Finding of Fact Number Ten wherein he states, "I find that Claimants never filed a Form S-2, but that because an action was not commenced in the civil court regarding the third party case, that this failure does not bar their claim," when such a factual finding is against the greater weight and preponderance of the evidence in the record.
2. Whether the Hearing Commissioner erred in Conclusion of Law Number Eight, wherein he concludes, "Claimants' failure to file a Form S-2 is not a bar to benefits. South Carolina Code Annotated § 42-1-560(b) requires that an action be commenced for the section to be applicable. Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced when a summons and complaint are filed with the clerk of court. No action was ever filed in Claimants' third party claim. Therefore, Claimants were not required to file a Form S-2," when such a conclusion of law is against the greater weight and preponderance of the evidence in the record and is based upon erroneous factual findings.
3. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that Claimants' failure to maintain the third party settlement

proceeds in trust and/or disbursement of these proceeds is/are a bar to recovery under the South Carolina Workers' Compensation Act.

4. Whether the Hearing Commissioner erred in failing to order that Claimants' claim for benefits under the Act is barred as a result of their election of remedies.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

Pursuant to South Carolina Code Annotated § 42-17-50, the Appellate Panel shall review the award, weigh the evidence that was presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, we hereby grant a **FULL AFFIRMATION** of the Hearing Commissioner's Decision and Order. Accordingly, the Findings of Fact, Conclusions of Law, and Order of the Hearing Commissioner and as set forth below shall become and hereby are the law of the case:

FINDINGS OF FACT

1. Claimants allege that Decedent's accident, which took place on May 18, 2012, and resulted in Decedent's death, arose out of and in the course of Decedent's employment with the City of Spartanburg. Defendants deny these allegations.

2. Decedent worked as a Parks & Recreation Director for the City of Spartanburg and as such, he was a salaried employee. His typical workday was from 8am-5pm, but he had the ability to flex his schedule depending on his job responsibilities.

3. We find that Decedent was not working at the time of his death. He never reported to work on the day of his accident; instead, he delegated his job duties to his subordinates. He made/received four to five minutes worth of phone calls, sent/received nine

very brief text messages/emails, and engaged in one very brief chat with his subordinate. Therefore, on the date of his death, he spent approximately ten minutes communicating remotely with his subordinates. We find that Decedent's use of his work phone to communicate with his subordinates on the morning of his accident was a convenience to Decedent. The fact that he made a few work related calls, texts, etc. is not dispositive. Because he communicated remotely with his subordinates, he did not have to come in to work to perform his job duties. We find that this remote, telephonic/electronic communication does not rise to the level that would bring Decedent's actions within the course and scope of his employment.

4. Instead of coming to work on the day of his accident, Decedent drove approximately nine miles from his apartment in the opposite direction to his mother's home in Moore, South Carolina to pick up his motorcycle and visit with his mother. He remained at his mother's home approximately three hours. This visit to his mother's house was of a purely personal nature. We find that even if it can be said that Decedent was working at some point on his date of accident, that the trip and visit to his mother's house in Moore, South Carolina, was a substantial deviation from his employment.

5. We find that Decedent's accident, which occurred at the corner of Reidville Road and Plateau Street in Moore, South Carolina, and was approximately two miles from his mother's house, took place at a location that Decedent's work duties did not require him to be. Nothing about Decedent's job, on the date of his accident, required that he travel to or visit any location in Moore, South Carolina or that he go and pick up his motorcycle in Moore, South Carolina. The only job duties Decedent had on the date of his accident were located in the City of Spartanburg, which was about ten and a half miles or twenty-five minutes away from Decedent's mother's home.

6. This claim is barred by the going and coming rule, and there are no applicable exceptions.

7. We find that Decedent was not charged with any work related duties at the time of his accident but instead was on a purely personal mission to get to work. There is no evidence establishing that Decedent was tasked with any work related responsibility at the time of his accident. He was merely on his way to work to engage in his typical job responsibilities.

8. We find that Decedent was not performing a special task, service, mission, or errand for the City of Spartanburg at the time of his accident. Whether Decedent was headed to his office, the City's employee appreciation lunch, or to one of the recreation centers that he supervises, all of these activities were a customary part of his employment with the City of Spartanburg. The evidence establishes that Decedent was on his way to work to perform his typical job duties, duties that fell within his job description and duties that were expected of him on a regular basis.

9. A \$250,000.00 settlement was given to Claimants as a result of the motorcycle accident that resulted in Decedent's death. A portion of the settlement proceeds have already been disbursed. The remainder of the settlement proceeds is being placed in an annuity for the minor child. No proceeds from the settlement were held in trust for Defendants' statutory lien. Therefore, if this claim had been deemed compensable, Defendants would have been entitled to take credit for their lien against the award for death benefits.

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CONCLUSIONS OF LAW

1. The Findings of Fact set forth above are construed to be conclusions of law, if applicable.
2. Pursuant to South Carolina Code Annotated § 42-1-160, Decedent did not suffer a compensable injury under the Act. Claimants failed to establish that Decedent's accident arose out of and in the course of his employment, as Decedent was not working at the time of his accident.
3. Even if Decedent's electronic or telephonic communication with his co-workers could be said to bring this claim within the purview of the Act, the Decedent's decision to drive nine miles to his mother's house in Moore, South Carolina, to stay at his mother's house for approximately three hours, and to pick up his motorcycle from his mother's house resulted in a substantial deviation from employment. See White v. S.C. State Highway Dep't, 226 S.C. 380, 85 S.E.2d 290 (1955); Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949).
4. Pursuant to Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) and Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011), Claimant's claim for benefits is barred by the going and coming rule.
5. There are no applicable exceptions to the going and coming rule. See Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011).
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to perform on his way to work, nor was he under the control of the City of Spartanburg on his way to work. See also Gregg v. Dorchester County Schools System, 270 S.C. 189, 241 S.E.2d 554 (1978).

7. Pursuant to Bickley v. South Carolina Electric & Gas Company, 259 S.C. 463, 192 S.E.2d 866 (1972), the special errand exception to the going and coming rule is inapplicable, because Decedent was not charged with any task on his way to work. In fact, the testimony revealed that the only job duties Decedent had on the day of his accident were his typical job duties in the City of Spartanburg, which were all contemplated by his job description. At the time of his accident, Decedent was on a personal mission to get to work. Whether Decedent was headed to his office, the City's employee appreciation lunch, or to one of the recreation centers that he supervises, all of these activities were a customary part of his employment with the City of Spartanburg. Nothing was unique or special about any of the aforementioned activities. See also Sylvan v. Sylvan Bros. Inc., 225 S.C. 429, 82 S.E.2d 794 (1954).

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9. Pursuant to South Carolina Code Annotated § 42-1-560 and by stipulation of the parties, if Claimants had prevailed on this claim, Defendants would have a statutory lien on the third party settlement proceeds.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED** that Claimants' claim to workers' compensation benefits under the South Carolina Workers' Compensation Act be denied, as Decedent's accident did not arise out of and in the course and scope of his employment.

IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION



Susan Barden, Commissioner

FULL AFFIRMATION

WE CONCUR:



Gene McCaskill, Commissioner



Aisha Taylor, Commissioner

Columbia, South Carolina

_____, 2014

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on May 12, 2014