THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

Case No. 2014-001269

Brian Wofford, deceased
Employee, by and through Boisha
Wofford, surviving spouse,

Appellant,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

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This matter, currently on appeal with this Court, stems from the death of Brian Wofford, an employee with the City of Spartanburg, as the result of a motor vehicle accident on May 18, 2012. A workers' compensation action was timely filed by his surviving spouse, Boisha Wofford, alleging that, at the time of his death, Mr. Wofford was acting within the course and scope of his employment. Appellant's claim was denied by the single commissioner and the ruling was fully affirmed by the Appellate Panel by an Order sent electronically on May 12, 2014. On June 9, 2014, Appellant filed a Notice of Appeal (attached as Exhibit A), appealing the ruling of the Full Commission to this Court. Following Appellant's submission of its Initial Brief to this Court, Respondents filed a motion to dismiss Appellant's appeal. For the reasons set forth below, Appellant respectfully requests that the Court deny Respondents' motion.

Respondents contend that Appellant's appeal must be dismissed on two grounds: (1) that Appellant's Notice of Appeal "does not properly delineate the grounds for appeal" under S.C. Code Ann. § 42-17-60 and (2) that Appellant's appeal fails pursuant to the "two issue rule"[1] as Appellant does not challenge all grounds supporting the decision of the Appellate Panel. Both claims are without merit.

A. Notice of Appeal

S.C. Code Ann. § 42-17-60 provides that "[n]otice of appeal [to the Court of Appeals] must state the grounds of the appeal or the alleged errors of law." Chief Justice Toal wrote that the Notice need only set forth "a general statement of the grounds for appeal . . . ." See JEAN HOEFER TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 42 (2d ed. 2002). The Notice was addressed in the context of a Petition for Judicial Review in Judge Randall T. Bell's treatise on South Carolina Appellate Practice Handbook. The author noted that the purpose of the

[1] Respondents do not cite the two issue rule by name, but this seems to be the essence of their argument.

petition was essentially "to invoke judicial review within the time requirements." See RANDALL T. BELL, ET AL., SOUTH CAROLINA APPELLATE PRACTICE HANDBOOK VIII-12 (1985). Judge Bell listed the following examples of stated grounds for appeal: "the agency acted in excess of its statutory authority; or, the authority relied upon by the agency was unconstitutional." Id.

In its Notice of Appeal, Appellant cited the following grounds:

I. The Full Commission erred in finding that the death of Brian Wofford did not arise out of and in the course of his employment as Appellant's claim falls within an exception to the "going and coming" rule.

II. The Full Commission erred in finding that, given Brian Wofford's cell phone and other electronic communications on the morning of his death, he was acting in the course and scope of his employment at the time of his death.

See Exhibit A. Respondents complain that these points of appeal "are so vague in nature that Respondents are unable to determine exactly what it is they are appealing." See Motion to Dismiss, p.1.

Appellant's statement of issues in its Notice of Appeal more than suffices to meet the requirements of the statute and case law. Respondents cite to Smith v. South Carolina Dep't of Soc. Services for the proposition that a petition must "direct the court's attention to the abuse or abuses allegedly committed below through a distinct and specific statement of the rulings complained of." See Motion to Dismiss, p.3, citing Smith. Appellant's grounds for appeal, as set forth in the Notice, plainly satisfy this standard, citing two specific errors of law that Appellant contends were committed by the Commission. Respondents offer little to support their assertion that Appellant's stated grounds are overly "vague" other than to say that they are unable to discern from the Notice which exception to the "going and coming" rule Appellants are asserting. This will be further addressed below.

The views of Chief Justice Toal and Judge Bell, along with case law make clear that Respondents' reading of Smith as establishing a heightened standard for the grounds for appeal is erroneous. Each court that has addressed the holding of Smith has noted the extreme facts of the case. As noted by this Court in Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005), "In Smith, the petition for review was 'broad and unspecific' and contained 'no allegation which would explain why [the appellant] believe[d] the agency decision was wrong. The Smith court stated, 'In essence, the petition merely represents a statement by her that she is dissatisfied with the decision that she received from the agency below.'" See Bass, 366 S.C. at 459, 622 S.E.2d at 582, citing Smith, 284 S.C. at 470-71, 327 S.E.2d at 349 (internal citations omitted). The Bass court distinguished Smith from the facts of the case before it and refused to dismiss the appeal, noting, "[u]nlike the court in Smith, [appellant's] assignments of error are not so opaque or laconic as to hinder our review." See id. at 459, 622 S.E.2d at 582.

The issue was also raised to this Court in White v. Med. Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003). Appellant stated the following exception in his petition for review: "The Full Commission erred in finding as a fact and concluding as a matter of law that the Claimant was not entitled to benefits under the South Carolina Workers' Compensation Act." The unanimous panel rejected the Respondent's argument that this was not a sufficient statement of the grounds for appeal:

> In Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct. App. 1992), an injured worker's exception that "the facts found by the commission were not supported by credible evidence" was specific enough to satisfy the notice requirements of section 42-17-60. [Appellant's] exception, attacking the commission's findings of fact and conclusions of law, is substantially similar to the one upheld in Solomon.

White, 355 S.C. at 520, 586 S.E.2d at 160. When Appellant's stated grounds for appeal in the instant case are compared with those at issue in White and Solomon, is it clear that the statutory standard has been met.

It should also be noted that the White court pointed out that, to the extent that the specific grounds were unclear, the history of the case cannot be ignored in considering the Notice. The Court noted that the issue below concerned the statute of limitations, therefore notice of appeal "was sufficient to direct the circuit court to the error complained of" and "[b]oth the court and [Respondent] were on notice" as to Appellant's claim. See White, 355 S.C. at 520, 586 S.E.2d at 160.

As noted, Respondents feel that Appellant's stated grounds for appeal and are "so vague in nature that Respondents are unable to determine exactly what it is they are appealing." See Motion to Dismiss, p.1. In particular, Respondents are at a loss to determine which of the exceptions to the "going and coming" rule Appellant asserts and claim that this leaves them in a position of having to defend all "five different exceptions . . . ." See Motion to Dismiss, p.2. Of course, Respondents were present for the entirety of this claim, from the single commissioner through the Full Commission. If they wish to know which exception Appellant's assert, they might consult their own brief to the Appellate Panel in which they note:

> Injuries occurring while employees are going to and coming from work are generally not compensable under the South Carolina Workers' Compensation Act, because they do not occur within the course of employment and are deemed personal in nature. *However, there are five exceptions to this rule, and Claimants assert the following exception is applicable: "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment."*

See Respondents' Brief to the Appellate Panel, attached as Exhibit B. (internal citations omitted) (emphasis added). Respondents were aware of Appellant's position as it was stated explicitly in

Appellant's Form 30 (attached as Exhibit C) and in Appellant's Brief to the Appellate Panel (attached as Exhibit D), was argued before the Appellate Panel, and was the only exception addressed by the Appellate Panel's order. See Appellate Panel Decision and Order, p.3, ¶8. Given this, it is difficult to understand Respondents' assertion in their motion that they are unable to determine which of the exceptions Appellant advances. See Motion to Dismiss, p. 2 (asserting that Respondents are left "in a position to defend the applicability of all exceptions").

It should be noted that, given Respondents' actions throughout the history of this case, it is difficult to determine what sort of statement Respondents would feel does *not* warrant dismissal. In their brief to the Appellate Panel (Exhibit B), Respondents also asked the Appellate Panel to dismiss Appellant's appeal based on Respondents' contention that the Form 30 did not adequately state the reasons for appeal. Appellant's Form 30 set forth the following issues for appeal to the Appellate Panel:

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 . . . failing to find that the claim was barred by the going and coming rule, and that there were 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 Service, 329 S.C. 92, 495 S.E.2d 447 (1997).

See Exhibit C. Respondents wrote as follows in requesting that the Commission dismiss the appeal:

> [Claimants] certainly failed to comply with Regulation 67-701(3)(a), which requires them to present their grounds for appeal concisely[2] and also requires that the grounds for appeal concern only one finding of fact or conclusion of law. Regulation 67-701(3). Instead of complying with the regulation, Claimants broadly asserted general errors that they allege the Hearing Commissioner made, which left Defendants/Respondents unsure of what exactly they were appealing, given that

[2] While Respondents ask this Court to dismiss Appellant's appeal for failing to sufficiently describe the grounds for appeal, it seems that Respondents asked the Commission to dismiss Appellant's appeal, in part, for not being sufficiently concise.

> there were alternate findings of non-compensability by the Hearing Commissioner. 'Due process requires that litigants receive notice of the issues to be met on . . . appeal.' Smith v. S.C. Dep't of Mental Health, 329 S.C. 485 n.9, 494 S.E.2d 630, 639 n.9 (Ct. App. 1997). Claimants deprived Defendants of this right. . . . In the case at hand, *Claimants' failure to properly appeal this matter, as prescribed by the Commission, has resulted in a great deal of confusion. Defendants are unsure of exactly what it is that Claimants are appealing.* . . . Defendants submit that Claimants failed to properly appeal from the Hearing Commissioner's decision, which resulted in a fatal procedural error and due process violation. . . . Given this failure, Defendants respectfully request that the Commission dismiss Claimants' appeal.

See Exhibit B, p. 4-5 (emphasis added). The Appellate Panel rejected this argument by Respondents, and Appellant respectfully requests that, as Respondents have again raised the same objection, this Court do the same.

Case law and commentators make clear that only a "general statement" of the grounds for appeal is required to be included in the Notice and that Respondents' extreme, heightened reading is not the standard. Appellant's stated issues on appeal, standing alone, are sufficient to meet the requirements of South Carolina's statutes and case law. Moreover, based on their involvement with the case, Respondents are acutely aware of the legal issues in dispute. Appellant respectfully submits that Respondents' position on this issue is without merit.

B. Two-Issue Rule

Respondents' second ground for requesting dismissal of Appellant's appeal is essentially an argument that the appeal fails pursuant to the two-issue rule. Under the two-issue rule, where a decision is based on more than one ground the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Respondents argue that the order of the Appellate Panel denying compensation was based on three grounds and Appellant appealed only two, and the appeal therefore fails. As demonstrated below, this argument is without merit.

To address this issue, it is necessary to consider the facts of the case. For this reason, this issue is best reserved for argument in the briefs and at oral argument. Yet, for Appellant to respond to Respondents' motion, a brief recitation of the facts is required:

At the time of his death, Brian Wofford was employed as superintendent of the City of Spartanburg Parks and Recreation Department. (Transcript p.63, ll. 19-22). Brian had a physical office at 100 North Liberty Street in downtown Spartanburg. (Trans. p.17, ll. 12-18). The job of superintendent required irregular hours and Brian had worked late at an event the night before. (Trans. p.27, ll. 22-25; p. 28, ll. 1-5). Consequently, he did not report to his office at his normal time on the morning following the event, but instead went to his mother's home in Moore, South Carolina. (Trans. p.50, ll. 3-9).

Throughout the morning, Brian was engaged in work-related electronic communication on his cell phone regarding two events in which Parks and Recreation was participating. (Trans. p.40, ll. 3-20; p.23, ll. 4-10; p.67, ll. 14-20). Additionally, the City's Aquatics Director, Tracy Ballew, testified that she and Brian spoke by phone as she needed Brian to sign paperwork regarding a new hire and also needed him to retrieve a key from the C.C. Woodson Recreational Center. (Trans. p.41-42, ll. 17-25, 1-4). Ultimately, Brian agreed to go to the C.C. Woodson Center to pick up the key and to then bring the key to Ms. Ballew at the Swim Center, where he would also sign the forms. (Trans. p.42, ll. 5-19). Importantly, Ms. Ballew testified that Brian told her that he was going "directly to CC to get the key, and then coming to the Swim Center to sign the paperwork, and then going to the Spring Fever event . . . ." (Trans. p.46, ll. 1-7). This conversation between Ms. Ballew began at 10:48 AM according to cell phone records, and Brian left his mother's house only minutes later and was killed in a motor vehicle accident at 11:15 AM. (Trans. p.52, ll. 10-17).

Respondents take the position that there were three grounds for the ruling of the Appellate Panel: (1) the accident did not occur in the course and scope of employment as Brian was not working at the time of the accident; (2) even if Brian was working on the morning of the accident, his trip to his mother's house constituted a substantial deviation from his employment, such that the claim is not compensable, and (3) the claim for benefits is barred by the "going and coming" rule. See Motion to Dismiss, p.2. Respondents argue that Appellant appealed only issues 1 and 3, and therefore issue 2 stands and causes this appeal to fail.

This position misunderstands the two-issue rule. The purpose of the rule is to avoid the need for unnecessary appeals where, even if the Court were to decide in favor of the appellant, the result would not be changed. A relevant example is cited in Anderson v. S.C. Dep't of Highways and Pub. Transp., 322 S.C. 417, 472 S.E.2d 253 (1996): "[I]f a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the 'two issue' rule if the plaintiff failed to appeal both grounds . . . ." 322 S.C. at 420, 472 S.E.2d at 255. In this situation, if the appellate court were to rule in favor of the appellant on the one issue appealed (for example, inapplicability of the statute of limitations), the ruling of the appellate court would not conflict with the unappealed ground (contributory negligence) and therefore the result would not be changed.

The instant case is not comparable and is not suited to the two-issue rule. For example, if the Court were to side with Appellant's position that, at the time of his death, Brian was engaged in a special task for his employer and therefore met an exception to the "going and coming" rule, then the Commission's ruling on issues 1 and 2 would be in conflict with the ruling of this Court, and therefore invalidated. Therefore, in this situation, the unappealed ruling would not support the Appellate Panel decision. Similarly, if the Court were to side with Appellant's position that,

on the morning of his death, Brian was so engaged in electronic communication – even while at his mother's house – that he was acting in the course and scope of employment at the time of his death, then the Commission's ruling on issue 2 would be in conflict. Of course, this latter example is no longer relevant as Appellant abandoned its second issue on appeal.

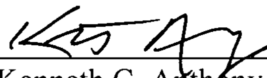
It is worth noting that, like their first ground for dismissal, Respondents unsuccessfully raised this same issue to the Appellate Panel. See Exhibit B. The Commission found no merit to this argument. Appellant respectfully requests that this Court decline Respondents' invitation to engage in "an over-zealous application of appellate preservation rules" or to "play a 'gotcha' game with attorneys . . . ." See Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012), Toal dissenting.

C. **Conclusion**

Appellant's appeal is properly before this Court and Respondents are fully aware of the issues. Appellant respectfully requests that this Court deny Respondents' motion and allow the appeal to proceed.

Respectfully Submitted,

THE ANTHONY LAW FIRM, P.A.



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July 17, 2014
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

Case No. 2014-001269

Brian Wofford, deceased
Employee, by and through Boisha
Wofford, surviving spouse,

Appellant,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Response to Respondents' Motion to Dismiss Appeal by depositing a copy of it in the United States Mail, on July 17, 2014, addressed to Respondents' attorneys of record, at the following address:

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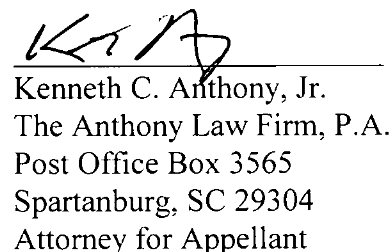

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EXHIBIT A

THE ANTHONY
LAW FIRM, P.A.

June 9, 2014

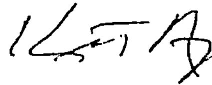
The Honorable Kenneth A. Richstad
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: ***Brian O. Wofford, deceased employee, by and through Boisha Wofford, surviving spouse vs. City of Spartanburg and South Carolina Muicipal Insurance Trust Carrier***
WCC File Number: 1207113

Dear Mr. Richstad:

Enclosed for filing is a Notice of Appeal along with a Proof of Service as to opposing counsel in the above matter. I am also enclosing your filing fee of $100.00.

Very truly yours,



Kenneth C. Anthony, Jr.

KCAjr:akl
Enclosures

cc: Stephanie Lamb Pugh, Esq.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

W.C.C. File No.: 1207113

Brian O. Wofford, deceased
employee, by and through Boisha
Wofford, surviving spouse,

Appellant,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

NOTICE OF APPEAL

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ATTORNEYS FOR RESPONDENT

Brian O. Wofford, by and through Boisha Wofford, his surviving spouse, hereby appeals the decision of the Workers' Compensation Commission, dated May 12, 2014. Appellant received written notice of entry of this decision on May 12, 2014. Appellant appeals on the following grounds:

I. The Full Commission erred in finding that the death of Brian Wofford did not arise out of and in the course of his employment as Appellant's claim falls within an exception to the "going and coming" rule.

II. The Full Commission erred in finding that, given Brian Wofford's cell phone and other electronic communications on the morning of his death, he was acting in the course and scope of his employment at the time of his death.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

Dated: June 9, 2014
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

W.C.C. File No.: 1207113

Brian O. Wofford, deceased employee, by and through Boisha Wofford, surviving spouse,

Appellant,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

CERTIFICATE OF SERVICE

I, Kenneth C. Anthony, Jr., counsel for Appellant, certify that I have served the Notice of Appeal of Appellant on the following persons and entities by depositing copies of the same in the United States mail, postage prepaid, at the following addresses:

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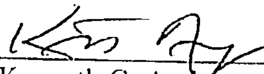

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Dated: June 9, 2014
Spartanburg, South Carolina

EXHIBIT B

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 1207113

Brian O. Wofford, Employee, Claimant, vs. City of Spartanburg, Employer, AND South Carolina Municipal Insurance Trust, Carrier, Defendants.	RESPONDENTS' CITY OF SPARTANBURG AND SOUTH CAROLINA MUNICIPAL INSURANCE TRUST'S BRIEF TO THE APPELLATE PANEL

The City of Spartanburg and the South Carolina Municipal Insurance Trust (collectively Respondents or Defendants), by and through their undersigned attorney, hereby submit their Respondents' Brief to the Appellate Panel. Because this is a cross-appeal, Respondents have submitted an Appellants' Brief under separate cover.

STATEMENT OF THE CASE

This appeal arises from the Hearing Commissioner's Order finding that Claimants' claim is not barred by their failure to file a Form S-2 prior to settlement of their third party claim. There are cross-appeals in this matter and for that reason, this brief will only address the issues Appellants have on appeal, as a second brief will be submitted responding to Claimants' Appellants' Brief.

Brian Wofford (Decedent) was involved in a fatal motorcycle accident on May 18, 2012, in Moore, South Carolina, before reporting to work. He left behind a wife, Boisha Wofford, and a daughter, Kaelyn Wofford (collectively Claimants/Respondents). Claimants have alleged that Decedent's death occurred in the course and scope of his employment with the City of Spartanburg. Defendants have denied the compensability of this claim on multiple grounds. Defendants also asserted that Claimants' failure to file a Form S-2 bars their claim.

Claimants filed a Form 52 requesting a hearing on the compensability of this claim on April 3, 2013. Defendants again denied the compensability of the claim via their Form 53. Due to the fact that this claim was a contested death case, the Commission did not set a hearing initially but instead required that the parties mediate pursuant to Regulation 67-1802. Mediation failed, and the case was ultimately heard before Commissioner Beck on August 15, 2013.

Commissioner Beck found that Decedent's death was not a compensable work injury on multiple grounds. He first found that Claimants failed to carry their burden in proving that Decedent's accident arose out of and in the course of his employment. He also found that even if Decedent's cell phone activity brought him within the course and scope of his employment that Decedent deviated from his employment by going to Moore, South Carolina, visiting with his mother for approximately three hours, and picking up his motorcycle. Lastly, the Hearing Commissioner held that Claimants' claim for benefits was barred by the going and coming rule as Decedent was on his way to work at the time of his accident, and that no exceptions to the going and coming rule were applicable. From a procedural standpoint, the Hearing Commissioner ruled that Claimants' claim was not procedurally barred by their failure to file a Form S-2, because they never filed an "action" in the civil court as required for application of South Carolina Code Annotated § 42-1-560. The parties cross-appealed the Commissioner's order by filing forms 30.

STATEMENT OF THE FACTS

Brian Wofford, Decedent, died in a motorcycle accident in Moore, South Carolina, prior to coming to work on May 18, 2012. He was the father of one minor daughter, and the husband to Boisha Wofford. The Woffords were separated at the time of Decedent's death. He was an employee for the City of Spartanburg, and he held the position of Parks & Recreation Director. He supervised all of the City's recreational centers and parks. He was a salaried employee. Decedent's typical workday was from 8am-5pm, but he was allowed to flex his schedule if needed for work activities. He reported directly to Mitch Kennedy, but Mitch had no contact with Decedent on the day of Decedent's accident.

On May 18, 2012, Decedent did not come to work at 8am, likely because he was scheduled to work into the evening doing interviews for summer internships. On the date in question, there were two events going on in the City of Spartanburg: (1) a bicycle event with politicians sponsored by an outside organization; and (2) an employee appreciation lunch. The City provided some sound system materials for the first event and actually ran the second event. Decedent's department had minor responsibilities for both events. His cell phone records from his work phone reveal that he made/received telephone calls and text messages from his colleagues regarding the aforementioned events on this day. His personal cell phone records reveal that he also made multiple personal telephone calls on the day in question, including one to his wife.

Decedent had separated from his wife and moved to a separate apartment in Spartanburg the month before his death, so little is known about his actions on the day of May 18, 2012. However, his mother testified that Brian came to her home, located in Moore, South Carolina on the morning in question, ***so that he could pick up his motorcycle***, which he stored in her garage. He arrived at her house, conversed with her, ate something, and left on his motorcycle. Hearing testimony revealed that Decedent remained at his mother's home for approximately three hours. Decedent's mother testified that he said he had a long day ahead of him and that he was headed to work. (Janice Littlejohn Dep., p. 14, lines 11–16, March 19, 2013.) Fifteen to twenty minutes later, she left her house and drove up on her son's motorcycle accident. He had been fatally injured and died shortly after the accident. Decedent's time of death is 11:35am. The location of

his accident in Moore would be consistent with the route he would have taken to get to work or to go back to his apartment.

Tracy Ballew (Ballew), the swim center's manager, testified that she spoke with Decedent on the morning of his accident for about one minute, and he indicated that he would be coming to the employee appreciation lunch, but that he would bring her a key for from the CC Woodson Center he supervised and that he would also sign some personnel acquisition forms once he made it to the Swim Center, where Ballew worked. (Hr'g Tr. pp. 41–44.) Testimony of Ballew and Decedent's supervisor, Mitchell Kennedy, revealed that these are all typical responsibilities that Decedent would have had and that there was nothing special in nature about them. Decedent just had to actually come to work to do them. Decedent also spoke to his wife the morning of his accident, but he mentioned nothing about what he was planning for the morning, but he did state that it was going to be a long day. (Hr'g Tr. pp. 79–80.)

The evidence shows that Decedent, on the day of his death, used his work phone to have 6.4 minutes worth of telephone conversations, that he had one very brief chat conversation, and that he read and sent a total of eight very brief text messages. Therefore, Decedent spent a total of about ten minutes out of his four hour morning doing anything work affiliated before picking his motorcycle up from an out-of-town location and having his accident. It is virtually impossible to drive a street bike on the highway, while talking on the phone, or while sending a text message, so there is no allegation that Decedent was actually engaged in any kind of work-affiliated duties at the time of his accident.

After Decedent's accident, Claimants recovered $250,000 from the at-fault driver's insurance company. Claimant's attorney filed a Petition for Approval of Settlement on October 23, 2012, along with a civil *action* coversheet, delineating that the nature of the *action* was a death settlement. (APA 287.) An order approving the settlement was also drafted, bearing the civil *action* number of 2012-CP-424451. (APA 294.) On the Order Approving the Settlement, the judge specifically states, "... this *action* is dismissed, without prejudice." (APA 297) (emphasis added). At the time of the hearing on this claim, all of the settlement proceeds had been disbursed to the Claimants, except for the money that was to be placed in an annuity for Decedent's daughter, and they were still awaiting that information.

ISSUES ON APPEAL

I. DID CLAIMANTS PRESERVE THEIR RIGHT TO APPEAL THE HEARING COMMISSIONER'S DECISION?

II. DID CLAIMANTS PRESERVE THEIR RIGHT TO APPEAL THE HEARING COMMISSIONER'S FINDING THAT DECEDENT SUBSTANTIALLY DEVIATED FROM HIS EMPLOYMENT ON THE DAY OF HIS ACCIDENT?

III. DID THE HEARING COMMISSIONER CORRECTLY DETERMINE THAT CLAIMANT WAS NOT WORKING AT THE TIME OF HIS ACCIDENT?

IV. DID THE HEARING COMMISSIONER CORRECTLY DECIDE THAT CLAIMANTS' CLAIM WAS BARRED BY THE GOING AND COMING RULE AND THAT NO EXCEPTIONS TO THE RULE WERE APPLICABLE?

V. DID THE HEARING COMMISSIONER CORRECTLY DECIDE THAT EVEN IF IT COULD BE SAID THAT DECEDENT WAS WORKING ON THE DAY OF HIS ACCIDENT THAT HE SUBSTANTIALLY DEVIATED FROM HIS WORK THEREBY RENDERING CLAIMANTS' CLAIM NON-COMPENSABLE?

ARGUMENT

Pursuant to South Carolina Code Annotated § 42-17-50, the South Carolina Workers' Compensation Appellate Panel shall review an award of the Single Commissioner, reconsider the evidence as 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. S.C. Code Ann. § 42-17-50 (Supp. 2012). In his Decision and Order, Commissioner Beck correctly held that Claimants' claim was barred because Decedent was never working on the day of his accident and even if he was working, he substantially deviated from his employment, and that Claimants' claim was barred by the going and coming rule. Because the Hearing Commissioner incorrectly decided these issues, Defendants respectfully request that that Appellate Panel affirm the Commissioner's decision regarding the non-compensability of Claimants' claim.

I. CLAIMANTS FAILED TO PRESERVE THEIR RIGHT TO APPEAL THE HEARING COMMISSIONER'S DECISION.

Claimants failed to follow the proper procedure for filing an appeal with the South Carolina Workers' Compensation and therefore failed to preserve their right to appeal. Therefore, Defendants respectfully request that Claimant's appeal be dismissed, which results in the Hearing Commissioner's decision being the law of the case.

The South Carolina Workers' Compensation Act governs the filing of appeals at the Commission level, and Claimants failed to comply with the requirements of the Act. Regulation 67-701 explains the requirements for filing an appeal. It specifically states that "the grounds for appeal must be set out in detail on the Form 30 in the form of questions presented." Regulation 67-701(3). It goes on to state that "each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error." Regulation 67-701(3)(a).

In the case at hand, Claimants failed to comply with Regulation 67-701(3), which results in the dismissal of their appeal. Claimants' Form 30 only states 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 in failing to find that the claim was barred by the going and coming rule, and there were 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 Service, 329 S.C. 92, 495 S.E.2d 447 (1997).

Claimants failed to make any references to the Hearing Commissioner's Findings of Facts or Conclusions of Law. They certainly failed to comply with Regulation 67-701(3)(a), which requires them to present their grounds for appeal concisely and also requires that the grounds for appeal concern only one finding of fact or conclusion of law. Regulation 67-701(3). Instead of complying with the regulation, Claimants broadly asserted general errors that they allege the Hearing Commissioner made, which left Defendants/Respondents unsure of what exactly they were appealing, given that there were alternate findings of non-compensability by the Hearing Commissioner. "Due process requires that litigants receive notice of the issues to be met on . . . appeal." Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 502 n.9, 494 S.E.2d 630, 639 n.9 (Ct. App. 1997). Claimants deprived Defendants of this right. The failure to properly appeal their claim resulted in Claimants depriving the Commission of their appellate jurisdiction. *See* Allison v. W. L. Gore & Assocs., 394 S.C. 185, 188, 714 S.E.2d 547 549 (2011) ("[T]he question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction.").

In the case at hand, Claimants' failure to properly appeal this matter, as prescribed by the Commission, has resulted in a great deal of confusion. Defendants are unsure of exactly what it is that Claimants are appealing. Defendants submit that Claimants failed to properly appeal from the Hearing Commissioner's decision, which resulted in a fatal procedural error and due process violation. Additionally, the failure to properly appeal their claim resulted in the deprivation of the Commission's appellate jurisdiction. Given this failure, Defendants respectfully request that the Commission dismiss Claimants' appeal.

II. EVEN IF THE COMMISSION FINDS THAT CLAIMANTS PRESERVED SOME ISSUES FOR APPEAL, CLAIMANTS FAILED TO PRESERVE THEIR RIGHT TO APPEAL THE HEARING COMMISSIONER'S FINDING THAT DECEDENT SUBSTANTIALLY DEVIATED FROM HIS EMPLOYMENT ON THE DAY OF HIS ACCIDENT.

Even if the Appellate Panel finds that Claimants properly filed an appeal, Defendants submit that case law unequivocally establishes that Claimants have not preserved their appeal regarding whether Decedent substantially deviated from his employment on the date of his accident, as this ground for appeal is not noted on Claimants' Form 30, nor is it briefed in their Appellants' Brief. Thus, Defendants respectfully request that the Commission find that Claimants have made fatal errors in failing to preserve the deviation issue.

South Carolina case law makes clear that unless a ground of appeal is noted on the Form 30, it is deemed abandoned. "Due process requires that litigants receive notice of the issues to be met on trial, hearing or appeal. Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission." Green v. Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 686 (Ct. App. 1993) (internal citations omitted); *See also* Brunson v. Am. Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 871 (Ct. App. 2005) ("The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission . . . . Only issues within the

application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission."; Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) ("only issues within the application for review are preserved for the full commission").

Not only have Claimants failed to preserve the deviation issue on their Form 30, they have failed to brief the issue, which also results in the issue being abandoned. Case law from South Carolina's appellate courts indisputably holds that issues are not preserved for appeal when a party fails to argue them in its brief. *See, e.g.*, Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987) ("The failure to argue an exception in a brief ordinarily amounts to an abandonment of it."); Duncan v. CRS Sirrine Eng'rs, Inc., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999) (finding that certain issues were not preserved for appeal, because the appellant failed to argue them in his brief). Given that Claimants mention nothing about the legal principle of substantial deviation in their Appellants' Brief, Defendants request that the Commission find the failure to argue the issue in their Brief results in abandonment of the issue.

Although Claimants' failure to correctly appeal this claim has caused confusion, there is absolutely no confusion about the fact that Claimants failed to mention anything about the substantial deviation issue on their Form 30 or in their Brief. In light of these fatal flaws, Defendants respectfully request that the Commission find that Claimants have failed to preserve the issue on appeal, which ultimately results in an affirmation of the Hearing Commissioner's Decision.

III. THE HEARING COMMISSIONER CORRECTLY DECIDED THAT DECEDENT WAS NOT WORKING AT THE TIME OF HIS ACCIDENT.

Even if the Commission finds that Claimants have preserved their grounds for appeal, Defendants submit that the Hearing Commissioner corrected found that Decedent was not working at the time of his accident. Therefore, Defendants respectfully request that the Appellate Panel affirm the Hearing Commissioner's denial of benefits to Claimants.

Decedent was not working at the time of his accident, therefore, his accident did not arise out of and in the course of his employment. South Carolina Code Annotated § 42-1-160 states that an injury must be caused by an accident that "arise[s] out of" a worker's employment and that the injury must occur "in the course of employment" for it to be compensable under the South Carolina Workers' Compensation Act. S.C. Code Ann. § 42-1-160(A) (Supp. 2012). Thus, for an injury to be compensable, (1) it must be caused by an accident, (2) it must arise out of employment, and (3) it must occur in the course of employment. The words "arise out of" refer to the origin or cause of the accident, while the words "in the course of employment" refer to the time, place, and circumstances under which the accident takes place. Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 143, 37 S.E.2d 286, 287 (1976). Defendants submit that Claimants' have not met their burden to show that Decedent's injury arose out of and in the course of his employment, and therefore request that the Hearing Commissioner's Order be affirmed in this regard.

Decedent's accident was not caused by anything work related, nor did it take place while he was working or at a place where his work would require him to be. The testimony unequivocally shows that Decedent drove to his mother's house in Moore, South Carolina, which

was in the opposite direction he would have driven to get to his job, he socialized with his mother, he pulled his personal motorcycle out of her garage, got on his motorcycle, left his mother's home, and had an accident just two miles up the road from her home in Moore, South Carolina. He arrived at his mother's house around 8am and did not leave until approximately three hours later. (Hr'g Tr. p 54.) While he was there, he ate, he talked with his mother, and he also had multiple telephone conversations. Before he left his mother's home, he told her he was going to work, got on his motorcycle, and left. His fatal accident occurred while he was driving his sport bike, two miles up the road from his mother's home.

To determine if an accident arises out of the course of employment, the Commission must look to the facts to determine if it is "apparent to the rational mind up on consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965). There has never been any allegation that Decedent was doing anything work affiliated at the time of his accident. He was simply driving his sport bike. However, Claimants' argument has been that because Decedent made and received ten minutes worth of phone calls, texts, and emails, prior to his accident that he was in the course and scope of his employment at the time of his accident. This logic fails. First of all, Defendants agree with the Hearing Commissioner that ten minutes worth[1] of remote communication out of an allegedly four hour day does not amount to work. Decedent chose to communicate remotely, so that he did not have to come in to work. Secondly, what an employee does before an accident has nothing to do with what they are doing at the time of the accident. Going out of town to pick up a motorcycle, visiting with his mother for several hours, and then driving away on his motorcycle has absolutely nothing to do with the work Decedent did for the City of Spartanburg. Decedent' supervisor testified that nothing about Decedent's work required him to go to Moore, South Carolina, required him to pick up his motorcycle, or required him to drive his motorcycle. (Hr'g Tr. p. 72, Aug. 15, 2013.) There is simply no causal connection between Decedent's work conditions and his motorcycle accident.

The Commission looks to the facts concerning the time, place, and circumstances of an injured employee's accident to determine if the accident occurred in the course of employment. The evidence clearly establishes that Decedent's accident occurred at around 11:15am in Moore, South Carolina, at a location where his work responsibilities did not require him to be. As noted *supra*, Mitchell Kennedy, Decedent's supervisor, testified that none of Decedent's job duties required that he go to Moore, South Carolina on the date of his death, because Decedent's job duties were all within Spartanburg City Limits. (Hr'g Tr. p. 72–73.) Claimants' own witnesses testified that Decedent had travelled in the opposite direction of where he would have been working to get to his mother's house. (Hr'g Tr. pp. 50, 74–75.) Therefore, there is no plausible argument that Decedent's accident was in the course of his employment.

The preponderance of the evidence in this case establishes unequivocally that Decedent's motorcycle accident did not arise out of and in the course of his employment. Therefore,

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[1] Claimants assert in their Appellants' Brief that Decedent was communicating with his City of Spartanburg colleagues "all morning long." (Claimants' Brief, p. 4.) This is in stark contrast to the evidence, which reveals Decedent actually spent about ten minutes of his 240 minute morning remotely communicating with his coworkers.

Respondents respectfully request that the Appellate Panel affirm the Hearing Commissioner's decision that Decedent's accident did not arise out of and in the course of his employment.

IV. THE HEARING COMMISSIONER CORRECTLY DECIDED THAT CLAIMANTS' CLAIM WAS BARRED BY THE GOING AND COMING RULE AND THAT NO EXCEPTIONS TO THE RULE WERE APPLICABLE.

Defendants submit that the Hearing Commissioner correctly found that this claim is barred by the going and coming rule. Therefore, Defendants respectfully request that the Appellate Panel affirm his decision.

A. Decedent was not acting in furtherance of his employer's business at the time of his accident; therefore, there are no applicable exceptions to the going and coming rule.

As noted supra in Section I, to establish a compensable claim, an injured employee or his dependents must prove that an injury arose out of and in the course of employment. Injuries occurring while employees are going to and coming from work are generally not compensable under the South Carolina Workers' Compensation Act, because they do not occur within the course of employment and are deemed personal in nature. Sola v. Sunny Slope Farms, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964). However, there are five exceptions to this rule, and Claimants assert the following exception is applicable[2]: "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment." Matute v. Palmetto Health Baptist, 391 S.C. 291, 296, 705 S.E.2d 472, 475 (Ct. App. 2011). Defendants submit that despite Claimants' attempt to invoke this exception, the facts of this claim clearly illustrate that this exception is not applicable and that the claim is therefore barred.

Case law, which discusses the applicability of the duty or task exception reveals that this exception does not apply to the case at hand. In 2008, the South Carolina Supreme Court addressed the duty or task exception in relation to the going and coming rule. In the recent case of Whitworth v. Window World, Inc., 377 S.C. 637, 641, 661 S.E.2d 333, 336 (2008), the court described the exception as follows: "an employee will not be precluded from receiving benefits where the employee, *on his way to or from his work*, is charged with some duty or task in connection with his employment." Id. at 641, 661 S.E.2d at 336. In Whitworth, the claimant was involved in a motor vehicle accident on his way to work. At the time of the accident, he was pulling a trailer, which carried a piece of personal equipment that he needed to complete his job duties. The court held that the claimant's claim was not compensable, because *"[t]he primary purpose of Respondent's trip served a personal objective, namely for Respondent to travel to the place where his work was to be performed. Respondent had no work-related duties to perform on the way to work, was not under the control of Window World, and was free to conduct personal business on the way to the jobsite even with the breaker in tow, as evidenced by his personal deviation."* Id., 661 S.E.2d at 336 (emphasis added).

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[2] It is important to note that Claimants' Form 30 and Brief make clear this is the only exception to the going and coming rule Claimants' are invoking on appeal. They have not appealed the applicability of any other exceptions to the going and coming rule. (See Claimants' Form 30 and Claimants' Brief, pp. 4–5.)

In the earlier case of Gregg v. Dorchester County Schools System, 270 S.C. 189, 241 S.E.2d 554 (1978), the South Carolina Supreme Court also addressed the duty or task exception to the going and coming rule. In that case, a school employee was injured on his way home after working at a school football game. The court held that his injury was not compensable, because working at the game was an expected and customary part of his employment as a school employee, and the trip home did not further his employment. The claimant was merely going home after a typical work day.

In another very informative case, Sylvan v. Sylvan Bros., Inc., 225 S.C. 429, 82 S.E.2d 794 (1954), the court held that the duty or task exception was inapplicable where a business executive was injured on his way to work, with business papers in his hand, after having worked at his home. The South Carolina Supreme Court found that the claimant's injuries were not compensable, because he was a white-collar worker and carrying paperwork home was something that he did on a regular basis for his own convenience. The court reasoned that "he was simply on his way to work and not on an errand for his employer, either to transport the papers or otherwise: it is an inescapable inference from the record that he would have attempted to go to the store that morning as he always did, papers or no papers." Id. at 434, 82 S.E.2d at 796. The court goes on to favorably quote Professor Larson's treatise:

> It would be rash to announce a sweeping rule that whenever the employee performs any service at home, the intervening journey is in the course of employment. The teacher who does a little preparation at home, the lawyer who takes home a brief to read at his convenience, the newspaperman who polishes up a bit of writing at home, all might insist on compensation coverage of all their movements to and around the house by virtue of some morsel of work carried about in their pockets.

Id. at 436, 82 S.E.2d at 797. Therefore, the court reasoned that doing a little bit of work at home for one's convenience does not bring an injury an employee sustains on the way to or from work within the purview of the Workers' Compensation Act.

The Sylvan case was later discussed and distinguished in the case of Moore v. Family Services of Charleston County, 269 S.C. 275, 237 S.E.2d 84 (1977). In that case, a counselor's boss required that she take notebooks and a file home with her to study for a meeting the next morning. The evidence revealed that this was an unusual event, as the claimant's supervisor testified that counselors were not in the habit of taking home files and notebooks, but that this was a special case. The court distinguished Moore from Sylvan, because in Sylvan, the claimant was doing the work at home out of habit and convenience, while in the Moore case, the claimant's supervisor required that she take the books home to work on them and admitted that it was an unusual occurrence for the claimant to have to work at home. Id. at 279–80, 237 S.E.2d at 86–87.

Similar to the claimants in Whitworth, Gregg, and Sylvan, Decedent, in the case at hand, was simply headed to work from his mother's house in Moore, South Carolina, on his personal motorcycle. Therefore, the primary purpose of his trip was serving his personal objective of getting him 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. Decedent was not charged with any employment related duty as he drove his motorcycle back towards the City; he merely had to report to work to perform his typical work duties.

Furthermore, Decedent's supervisor did not force him to come in late for work, and he certainly did not force him to call, email, or text any of his subordinates or colleagues, while away from work, on the day of his death. Decedent did these things for his own convenience, so that he did not have to come to work. He was not charged with a duty or task on his way to work. Additionally, Decedent's accident allegedly took place while he was driving his personal motorcycle to work. Nothing about this motorcycle drive was in furtherance of the City of Spartanburg's business. In fact, Claimant had been discouraged from riding his motorcycle to work because of professionalism concerns, and his supervisor specifically testified that Decedent had no work related responsibilities in Moore, South Carolina or that required the use of a motorcyle. Tracy Ballew, one of Decedent's subordinates, testified that she spoke to Decedent prior to his accident and that he was coming to the City's Swim Center that he supervised to pick up a key and to sign some paperwork for her. Both Ballew and Decedent's supervisor, Mitchell Kennedy, testified that these were Decedent's typical every day job duties. However, in order to perform these job duties Decedent actually had to get back to where his job required him to be.

Defendants respectfully submit that the duty or task exception to the going and coming rule is inapplicable to the case at hand. Therefore, Defendants submit that the case is barred by the going and coming rule and request that the Appellate Panel affirm the Hearing Commissioner's Order.

V. DID THE HEARING COMMISSIONER CORRECTLY DECIDE THAT EVEN IF DECEDENT WAS WORKING ON THE DAY OF HIS ACCIDENT THAT HE SUBSTANTIALLY DEVIATED FROM HIS WORK THEREBY RENDERING CLAIMANTS' CLAIM NON-COMPENSABLE?

Defendants submit that the Hearing Commissioner correctly found that even if Decedent had been working on the day of his accident, that he substantially deviated from his employment, rendering this a non-compensable claim. Therefore, Defendants respectfully submit that Claimants' claim for benefits must fail.

If an employee engages in a substantial deviation from his employment and is injured while doing so, his injury has not occurred in the course and scope of employment. The issue turns on whether Decedent's deviation is considered substantial or slight. As noted above, Defendants deny Decedent was in the course and scope of his employment at any time on the date of his death, but even if the Commission finds that Decedent was working on the morning of his accident or that the going and coming rule is applicable, Defendants submit that Decedent deviated from his employment by driving out of the city limits to his mother's house in Moore, South Carolina, visiting with his mother for an extended period of time, eating at his mother's house, picking up his motorcycle, and driving his motorcycle in Moore, South Carolina.

Case law is clear that the actions of Decedent, meaning leaving his apartment, going to his mother's house, which was ten and half miles from the Decedent's job location, staying at his mother's house for approximately three hours, and picking up his motorcycle, prior to his fatal accident resulted in a substantial deviation from his employment. In the case of White v. South Carolina State Highway Dep't, 226 S.C. 380, 85 S.E.2d 290 (1955), the South Carolina Supreme Court held that the claimant's deviation was substantial and barred his workers' compensation claim. In that case, the employee was required to take a business trip from Conway to Sumter. He was given permission to take a route home through Darlington to see his family. However, the claimant actually dropped his family off in Darlington on the way to his Sumter destination. The court noted that the claimant's deviation was purely personal in nature and cited Larson's treatise for the proposition that "An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial." Id. at 383, 85 S.E.2d at 291 (citing 1 Larson's Workmen's Compensation Law, page 265 *et seq.*, sec. 19). In White, the claimant's deviation amounted to 12 miles, or 1/3 of the distance from his starting point to his work destination.

Furthermore, in Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949), the South Carolina Supreme Court also denied benefits to the claimant, because the claimant substantially deviated from his employment by making a personal errand and taking a longer route than he otherwise normally would. The claimant, a truck driver, left his drop location and drove in the opposite direction from where he needed to drive for work. Testimony revealed that he was headed to York, because he had a date waiting for him. The court held that the case was not compensable, because the claimant was not at a place where his work duties would have required him to be. Id. at 330, 54 S.E.2d at 909.

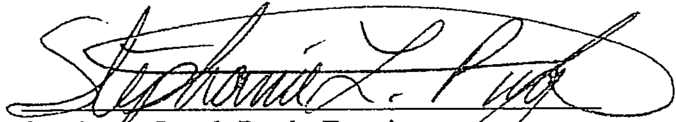
Similar to the White and Falconer cases, even if the Commission finds that Decedent was, at some point, in the course and scope of his employment on the date of his accident, at the time of his death, he was not at a place where his duties would have required him to be. None of Decedent's work responsibilities would have required him to leave the City of Spartanburg on the date of his accident. He chose to leave his home, go in the opposite direction of his job, go to his mother's house, visit with his mother, and pick up his motorcycle. His motorcycle accident occurred in Moore, South Carolina, just minutes from where his mother lived. Furthermore, had Decedent left his apartment and gone straight to work or to the CC Woodson Center, where Claimants allege he was heading, his trip would have been only five miles. However, Decedent's deviation to his mother's house was almost nine miles in the opposite direction from his job and was outside of the city limits.

In light of the above, Defendants submit that Claimants' claim for death benefits is barred. Decedent substantially deviated from his employment at this time of his accident, which took him out of the course and scope of his employment. Thus, although Defendants deny Decedent was ever in the course and scope of his employment on the day of his fatal accident, Defendants submit that Claimants' claim is nevertheless barred, because Decedent substantially deviated from his employment.

CONCLUSION

Based on the foregoing, Respondents respectfully submit that the Order of the Single Commissioner finding that Claimants' claim for benefits is barred on multiple grounds, including Decedent was never working on the day of his accident, that even if he was working he substantially deviated from his employment, and that Claimants' claim is barred by the going and coming rule should be affirmed. Defendants also request a finding the Claimants have failed to properly preserve their appeal, and in the alternative, that the substantial deviation issue was not properly preserved, thereby resulting in the affirmation of the Hearing Commissioner's decision.

Respectfully submitted,



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Attorneys for the Employer/Carrier

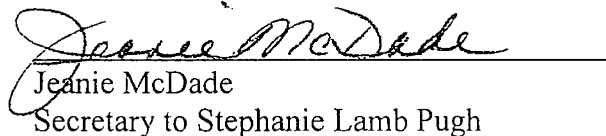
January 27, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at TURNER, PADGET, GRAHAM & LANEY, P.A., and that the attached Respondents' City of Spartanburg and South Carolina Municipal Insurance Trust's Brief to the Appellate Panel was served upon Kenneth C. Anthony, Jr., Esquire, the attorney for the claimant, this 27th day of January 2014, in accordance with Regulations 67-210, 67-211, 67-213, 67-214, and 67-215 and such other law as may be applicable, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

The Honorable Virginia L. Crocker
Judicial Director
SC Worker's Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Kenneth C. Anthony, Jr., Esquire
The Anthony Law Firm PA
P.O. Box 3565
Spartanburg, SC 29304



Jeanie McDade
Secretary to Stephanie Lamb Pugh

EXHIBIT C

South Carolina Workers' Compensation Commission
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P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov

WCC File #:	1207113
Carrier File #:	
Carrier Code #:	00925
Employer FEIN #:	

Claimant's Name: Boisha W. Wofford SSN: 251-67-6732 Employer's Name: City of Spartanburg

Address: 234 Holly Tree Circle Address: P.O. Box 1749

City: Duncan, State: SC Zip: 29334 City: Spartanburg State: SC Zip: 29304

Home Phone: (864) 574 - 9003 Work Phone: ( ) - Insurance Carrier: South Carolina Municipal Insurance Trust

Preparer's Name: Kenneth C. Anthony, Jr. Law Firm: The Anthony Law Firm, PA Preparer's Phone #: (864) 582 - 2355

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☑ Claimant ☐ Employer (check one) Date of Injury or Illness: (m/d/yyyy) 6-18-2012

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

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 Service, 329 S.C. 92, 495 S.E.2d 447 (1997).

(Check one) Oral argument ☐ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ **Mediation**

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Stephanie Lamb Pugh of Turner, Padget, Graham Laney Address PO Box 1509, Greenville, SC 29602 on the 18th day of November, 2013 by ✓ first class postage ____ certified mail ____ personal service.

	Attorney for Claimant	kanthony@anthonylaw.com	November 18, 2013
Preparer's Signature	Title	Email	Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

EXHIBIT D

BEFORE THE FULL COMMISSION

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1207113

Boisha Wofford, alleged surviving spouse, and
Kaelyn Wofford, surviving child, on behalf of
Brian Wofford, Deceased employee,..Claimant/Appellant

vs.

City of Spartanburg,........................ ....Employer and Self-Insurer,

through the

South Carolina Municipal Insurance Trust, ...Insurance Carrier,
Respondent. Respondent

BRIEF OF CLAIMANT/APPELLANT

APPEAL FROM THE ORDER
OF
COMMISSIONER T. SCOTT BECK
FILED NOVEMBER 7, 2013

Kenneth C. Anthony, Jr.
The Anthony Law Firm, P.A.
Post Office Box 3565
Spartanburg, SC 29304
Telephone: (864) 582-2355

Attorney for Appellant

STATEMENT OF THE CASE

Brian Wofford, the Director of the Parks & Recreation Department of the City of Spartanburg, died on May 18, 2012 when a car pulled out in front of his motorcycle. At 7:20 a.m. that morning, Brian had received an email from Sonya Culbreth, a co-worker at the City of Spartanburg concerning an event which was occurring that morning and for which Brian had responsibilities. There was an exchange of emails with her followed by an exchange of text messages with another worker in order to accomplish some of the necessary tasks. Throughout the morning, he continued to communicate, using his City-issued cell phone in various ways, with a number of City employees, culminating in a telephone conversation six minutes before his death with Tracy Ballew, wherein he promised to retrieve a key from one of the recreation centers and bring it to her at the Swim Center, where he would also sign some forms that she needed. He was undertaking this task when the wreck occurred.

Brian's widow filed this action, contending he was on the job when the wreck occurred, or, if the "coming and going" rule applied, the exception for a special duty or task was applicable. The City contended that he was not on the job, but rather on his way to work and that the "coming and going" rule applied.

The Single Commissioner agreed with the City, and this appeal follows.

QUESTIONS PRESENTED

1. Did the Commissioner err in finding that the decedent was not working at the time of his death?

2. Did the Commission err in finding that the claim was barred by the going and coming rule, and that there were 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 Service, 329 S.C. 92, 495 S.E.2d 447 (1997).

ARGUMENT

1. Did the Commissioner err in finding that the decedent was not working at the time of his death?

Boisha Wofford, the widow of Brian Wofford, hereby appeals from the Order denying compensation for his death, dated November 7, 2013. Appellant respectfully submits that the Single Commissioner found facts which support compensation but reached the wrong legal conclusion based thereon.

The Single Commissioner found that Brian Wofford died in a motorcycle accident on May 18, 2012, "presumably on his way to work," around 11:15 a.m. The Claimant and his employer agreed to jointly have all of the communications of that morning, consisting of emails, chats, text messages and cell phone communications, downloaded from his employer-issued cell phone. This revealed that he had been in communication, by these various methods, with a number of City employees about City business, from 7:20 a.m. that morning until 11:09 a.m., just minutes before his accident. Testimony was taken from all of these witnesses at the hearing. Their testimony consistently established the following:

a) It was not unusual for Parks & Recreation employees, particularly Brian, to work unusual hours. He and another employee, for instance, had been at a function that evening before.

b) Brian's office was in the Sparta building in downtown Spartanburg, but much of Brian's work was done outside of his office. A large part of his job involved traveling to different City recreation centers, parks and facilities or attending and managing different events. He was on the job while so traveling.

c) He communicated with other City employees constantly, by cell phone, text messaging, email and chat, whether he was in his office or not. The other employees did not always know where he was during these communications. He had a City-issued cell phone which he used for Parks & Recreation business. All communication that morning was on this phone.

d) There were two special events going on that Friday, with which he was involved. The first of these was a bicycle ride. The second was an event at a park for City employees. Brian had certain duties as to both.

The employer and the Commissioner make much of the fact that Brian went by his mother's house that morning to pick up the motorcycle which he was riding at the time of his death. It is uncontradicted, however, that all morning long, from 7:20 a.m. on, he was performing his City duties through communication by various methods with other City employees about City business, as shown by the records and the summary which was presented by Appellant. Appellant respectfully submits that this consistent and ongoing communication establishes that Brian was on the job all morning the day of his death.

2. Did the Commission err in finding that the claim was barred by the going and coming rule, and that there were 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 Service, 329 S.C. 92, 495 S.E.2d 447 (1997).

The employer and Single Commissioner took the position, however, that Brian was not yet on the job, but was on his way to work and therefore compensation was barred because of the "coming and going" rule. The Commissioner specifically found:

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

Even if one accepts that Brian was on his to work, Appellant respectfully submits that this case falls squarely within one of the well-recognized exceptions to the "coming and going" rule.

This exception, which appears repeatedly in our case law and has been upheld on many occasions, holds that "where the employee, on his way to or from work, is still charged with some duty or task in connection with his employment," the "going and coming" rule does not apply. The employee is considered on the job and the claim is compensable. *Medlin v. Upstate Plaster Service*, 329 S.C. 92, 495 S.E.2d 447 (1997); *Sola v. Sunny Slope Farms*, 244, S.C. 6, 135 S.E.2d 321 (1964).

The very last City employee to communicate with Brian just prior to his death was Tracy Ballew, the Aquatics Director of the Swim Center. It is her uncontradicted testimony that she spoke with Brian at 11:09 a.m. on his City-issued cell phone, which would have been approximately six minutes before his death. In that conversation, she asked him to go by the CC Woodson Recreation Center and pick up a key for her and bring it to the Swim Center, and to sign some forms that she had there at the Swim Center. She testified that she did not know where he was when they were talking but assumed he was in his office. Her testimony as to this 11:09 a.m. cell phone conversation, was:

> When I verbally spoke to him on the phone, at that point, he said he was going directly to CC to get the key, and then coming to the Swim Center to sign PACs and then going to the Spring Fever event, so.

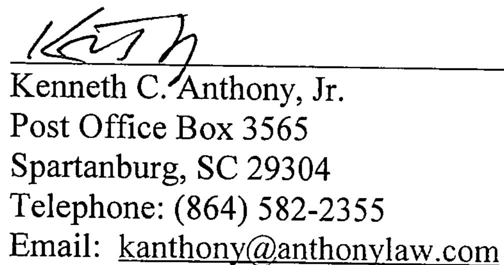
Her testimony was at all times consistent on this point and was not contradicted by anything in the record. Consequently, it is conclusively established that Brian, if on his way to work, was charged with the duty or task, in connection with his employment, of retrieving a key for her, taking it to the Swim Center where her office was located, and signing the forms when his unfortunate accident occurred.

CONCLUSION

Appellant respectfully submits that the Single Commissioner erred in failing to find that Brian Wofford was either on the job or was on a special task for his employer at the time of his death. In either case, the claim is compensable.

Respectfully submitted,

THE ANTHONY LAW FIRM, P.A.



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Attorney for Appellant

January 17, 2014
Spartanburg, SC

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July 17, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Brian O. Wofford, deceased employee, by and through Boisha Wofford, surviving spouse vs. City of Spartanburg and South Carolina Muicipal Insurance Trust Carrier
WCC File Number: 1207113

Dear Ms. Kitchings:

Enclosed for filing is an original and six copies of Appellant's Return to Respondents' Motion to Dismiss Appeal, along with a Proof of Service as to opposing counsel in the above matter.

Very truly yours,

Kenneth C. Anthony, Jr.

KCAjr:akl
Enclosures

cc: Stephanie Lamb Pugh, Esq.
Helen F. Hiser, Esq.

RECEIVED
JUL 21 2014
SC Court of Appeals