

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SEP 10 2014

S.C. Supreme Court

Case No. 2012-212258

STEPHEN C. WHIGHAM.....PETITIONER,

v.

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

PETITION FOR REHEARING

Respondents, Jackson Dawson Communications and the Hartford, by their undersigned attorneys, respectfully Petition for Rehearing of the Court's Opinion No. 27440 filed on August 27, 2014, pursuant to Rule 221 (a), SCACR. This Petition for Rehearing is based on the grounds that the Court overlooked or misapprehended that the substantial evidence standard did not apply to whether Appellant's accident: (1) arose out of his employment; and (2) occurred during the course and scope of his employment.

Respondents argue to this Court that both of the requirements of compensability, *supra*, are factual questions. Specifically, the question of whether Appellant was impliedly required to *participate* in the kickball game he organized as well as whether there was a causal relationship between the condition under which his work was to be performed and his injury are factual questions to which the substantial evidence standard applies.

The factors established by Professor Larson and adopted in Leopard v. Blackman-Uhler, apply only to the issue of whether an injury occurred in the course and scope of a claimant's employment; thus, the Leopard factors only apply to one of the two required prongs for compensability (whether the injury occurred in the course and scope of employment). The Court's finding that Appellant's injury *arose out of* his employment as a matter of law appears to be premised on the *factual* conclusions that: (1) his employer expected his attendance at the kickball game; and (2) there was an implied expectation that he would attend the game.

There are three separate factual questions that are intertwined with respect to this issue of whether Appellant's employer had *implied* expectations that Appellant would execute such activities due to his job duties. These are: (1) was Appellant, as a part of his job and as a member of "upper management," expected to *organize* events such as the kickball event in question; (2) was Appellant, once he had completed the organization of the kickball event, expected to *attend* said event; and (3) once Appellant had organized and attended the kickball event, did his employer's expectations then reach as far as expecting him to *participate* in the game itself, thus leading to his injury.¹ Respondents submit that once the conclusion that Appellant was not expected to organize/plan the event, the only logical conclusion is that he also was not expected to attend/participate, as his participation would no longer be "set apart from that of all other employees," per this Court's opinion.

The Court's opinion relies on testimony from Appellant and his supervisor concerning whether Appellant attendance was required by his employer and was vital to his job of executing the event. Respondents respectfully argue that substantial evidence clearly exists in the record to support a finding that Appellant was not expected to organize the event but, once he had

¹ Appellant agreed that the cause of the injury was his participation in the event ("Q: You weren't injured organizing the event. You were injured playing in the event, correct? A. That's correct.")

volunteered to organize the event and had completed its execution, there was a common sense expectation that he would then attend the event as its organizer. In fact, a full reading of Appellant's testimony shows that any expectation for him to attend the event was due to his planning of the event, thereby increasing the peculiarity of his absence from it:

Q. This particular event you heard Mr. Renfrow say and talk about how it was voluntary. I believe you testified nobody was forced to go.

A. No.

Q. Did you feel like it was voluntary for you?

A. I think I would have been upset if a lot of people hadn't shown up. I mean, I planned the event. I think it would have been a poor reflection on management if I decided not to show up.

R. p. 124, lines 5-13, *emphasis added*.

Testimony from Kevin Johnson furthers this notion that any expectation of Appellant's attendance/participation was caused by his volunteering to organize the event:

Q. Would you have been upset if he hadn't been involved that day?

A. I would have been surprised and shocked, because he spent all the time planning the thing.

R. p. 102, lines 5-11.

The record contains overlooked evidence that there was no expectation for Appellant to organize, attend, or participate in the kickball event, other than a common sense expectation that it would have been abnormal or unusual for him to not attend, given the time he had spent volunteering to organize it. Kevin Johnson was specifically asked what his expectations of Appellant were given his position as Director of Creative Services and answered, "As director of creative services he's responsible for the overall creative department, creative messaging. So it could include graphic artists, writers, designer; the people that developed the creative product. In most cases that's print or web related." (R. p. 90, lines 9-15) Mr. Johnson further testified to whether there was any implied expectation for Appellant to plan/organize or attend such events:

Q. Was there anything about his job that required him to plan events for the company internally?

A. No requirement.

Q. Okay. Was there any expectation that Mr. Whigham would do this?

A. I mean, when you talk about doing those things you throw it open to anybody.

Q. Yeah, but if the guy in the warehouse said I'm a creative guy. I want to plan a kickball event. Could he have done it?

A. Yes.

Q. Okay. So there wasn't anything specific about his job that had him planning a kickball event or a summer cookout?

A. Other than he thought of it.

R. p. 91, lines 2-16.

Given the above-quoted testimony, Respondents submit to this Court that substantial evidence existed to support a factual finding that Appellant was not expected or impliedly required to organize, attend and/or participate in the kickball event. In fact, the organization of such events was suggested or "thrown out" to everybody there. Again, the question of whether there was an implied expectation is, by its nature, factual. Respondents further submit that a conclusion that the facts and evidence surrounding this question were undisputed and were unequivocal in their indication is impossible in light of the above testimony.

Appellant initially testified that there was no expectation for him to perform planning and organizing of such events in his deposition testimony, with which he agreed at the hearing before the Single Commissioner:

Q. My question to you was "but there was nothing about your role at the company that required you to come up with company events to build morale." What was your answer?

A. "No, not at all."

Q. Your answer was "no, no, not at all," right?

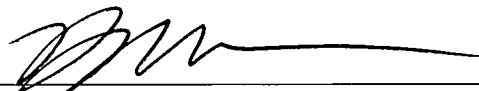
A. Okay.

R. p. 142, lines 15-21.

Given that a conclusion that the facts surrounding the issue of any implied expectation were anything but undisputed or unequivocal, Respondents would respectfully request a rehearing and that the facts of this claim be examined under the substantial evidence standard, as the holding in Grant, as relied on by this Court in its opinion, should not apply in this instance. In order to draw the conclusion that no factual dispute existed in this claim, one is ironically required to ignore much of the evidence.

For the foregoing reasons, Respondents would respectfully request an opportunity for this case to be reheard by this honorable Court.

Respectfully submitted,



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9th of September, 2014

