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.

REPLY BRIEF

RECEIVED
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SC Court of Appeals

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BACKGROUND

In their Initial Brief to this Court in support of the ruling of the Appellate Panel, Respondents argue: (1) that the Appellate Panel must be affirmed because of application of the two-issue rule, (2) that the standard for findings of fact apply to the question before the Court, and (3) that the actions of Brian Wofford on the morning of his death do not meet the requirements of the "going and coming" rule. We address each argument in turn.

ARGUMENT

I. Applicability of the "Going and Coming" Rule

This case boils down to this simple question: When Brian Wofford, rather than traveling to his physical office, instead traveled to the C.C. Woodson Center for the purpose of picking up keys at the request of Tracy Ballew and then delivering them to Ms. Ballew at the Swim Center, was he merely going to work or was he executing a work-related task? If the former, then Brian's resulting death is not compensable. If the latter, then the claim is certainly compensable.

In arguing that Brian was simply going to work, Respondents point out (1) that he agreed to take on the task and (2) that the person who requested the task was a subordinate. See Initial Brief of Respondents, p.18-19. Yet these facts are unrelated to the ultimate question and Respondents cite no precedent to suggest that these are factors to be considered in analysis of the "going and coming rule." In fact, it is difficult to imagine a situation where an employee executes a task he did not agree to. To exclude all such scenarios would be to eviscerate all exceptions to the "going and coming" rule. With regard to the rank of the person requesting the task, Courts have not found any importance in such qualifications and instead have inquired whether the task was of value to the employer. See Beam v. State Workmen's Compensation

Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (employees "were about the performance of an act, incidental to and recognized as of value by their [employer]").

Respondents fault Appellant for asserting the factors of control, lack of personal discretion, and lack of personal purpose in analyzing whether the "going and coming" rule applies, yet each of these factors is derived from South Carolina caselaw on the "going and coming" rule and was cited by South Carolina courts in analysis, as set forth in Appellant's initial brief. See, e.g., Gallman v. Springs Mills, 201 S.C. 257, 265, 22 S.E.2d 715, 718-19 (1942) (upholding denial of claim because at the time of the injury, employee "was in no sense under the control of his employer" and had personal discretion); Beam, 261 S.C.at 332, 200 S.E.2d at 86 (analyzing whether employees were "exercising a personal privilege"). These were logical factors for a court to consider as they shed light on the ultimate question – was the employee simply going to work, or executing a task?

In attempting to characterize the action in question as simply Brian going to work, Respondents note that Brian "also worked out of the office at CC Woodson" and "might go straight to CC Woodson sometimes if he was working out of that Rec Center office or if he had a meeting . . . ." See Brief of Resp., p. 2. **But importantly, there is no evidence in the Record to suggest that Brian was planning to work out of an office at C.C. Woodson that morning or that he had a meeting at the Center.** Instead, all of the evidence shows that Brian's only reason for traveling to the C.C. Woodson Center on the morning of his death was to take care of the task given him by Tracy Ballew. Had he not been given this task, Brian would not have traveled to the C.C. Woodson Center and would presumably have traveled to his physical office at 100 North Liberty Street in downtown Spartanburg. That Brian did not go directly to his

office demonstrates that his travel that morning was an exception to his morning commute and that he was instead executing a specific task.

For this reason, precedent cited by Respondents, Gregg v. Dorchester County Sch. Syst., 270 S.C. 189, 241 S.E.2d 554 (1978), is not on point. Gregg involved an injury sustained by an employee while driving home from work, in this case a football game. As the Court pointed out, while merely traveling home, the employee was not engaged "in the performance of any service for which he was employed." See Gregg, 270 S.C. at 193, 241 S.E.2d at 556. Respondents' own brief admits that, in traveling to pick up the keys and deliver them to Ms. Ballew, Brian was certainly accomplishing a task related to his employment, and one could hardly assert otherwise.[1] See Brief of Resp., p. 3. The Court's analysis in Gregg therefore lends credence to Appellant's argument that Brian's accident falls outside of the general "going and coming" rule.[2]

On leaving his mother's home on the morning of his death, Brian Wofford was engaged in a work-related task beyond a simple commute. Had the keys been located at Ms. Ballew's house, for example, there would be little doubt that Brian's travel constituted a task or errand. That the keys happened to be located at a building where Brian occasionally works does not change the character of the travel.

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[1] It should be noted that, on multiple occasions in their Initial Brief, Respondents seem to analyze the instant case based on Brian's travel from his apartment to his mother's house. See, e.g., Brief of Resp., p. 18 ("[i]t is undisputed that retrieving his motorcycle and visiting with his mother were entirely personal and not work-related errands, which provided no value whatsoever to the City.); Brief of Resp. p. 21 ("Decedent was not injured while traveling between the places he was required to work nor did anything related to his trip to his mother's house have any connection to or provide any benefit to his employer."). Appellant agrees that Brian's trip from his apartment to his mother's house was not work-related and, had the accident occurred during that portion of his travel, no claim could be made under workers' compensation. The portion of travel which is of importance to the case is the travel after Brian left his mother's home and was traveling "directly" to the C.C. Woodson Center to retrieve the keys.

[2] Respondents also notes Appellant's "curious" "substantive reliance" on the case of Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011) and assert that Matute militates against Appellant's position. Appellant did not cite Matute as comparable caselaw and instead cited it for only general propositions of law. However, like Gregg, Matute is supportive of Appellant's argument when the facts are contrasted with the instant case. There, the Court affirmed the denial of benefits to a hospital employee injured by falling on a sidewalk ten minutes after clocking out. In its analysis, the Court pointed out that the employee "was not fulfilling any duty or task in connection with her employment . . . when she fell." See Matute, 391 S.C. at 296, 705 S.E.2d at 475.

II. Standard of Review

In their brief, Respondents characterize the key question of the case – whether Brian was charged with any work-related duties at the time of his death – as a mere finding of fact. As such, Respondents assert that applicable standard of review is whether there is "sufficient evidence in the record to support the Commission's factual findings . . . ." See Brief of Resp., p. 17. This is error, as the question for the Court is one of law rather than one of fact.

Although the Commission is the fact-finding body, where the evidence gives rise to but one reasonable inference the question becomes one of law for the courts to decide. See Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). "[W]here the evidence is not in dispute, the question of whether or not the employee sustained an injury arising out of and in the course of his employment becomes a question of law for the court." Smith v. Union Bleachery/Cone Mills, 276 S.C. 454, 456, 280 S.E.2d 52, 53 (1981).

Respondents cite the following statements as key "findings of fact":

(1) Decedent was not charged with any work related duties at the time of this accident but instead was on a purely personal mission to get to work.

(2) Decedent was not 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.

See Brief of Resp., p. 17. These statements must be read as conclusions of law, which is presumably why key phrases from caselaw – "duties" and "tasked" – were utilized.

As noted in Appellant's Initial Brief, the parties are in agreement as to the facts of the matter. Respondents called no witnesses at the hearing and no witness testimony conflicted as to the underlying issues. For this reason, it is undisputed that, at the time of his death, Brian was traveling to the C.C. Woodson Center to retrieve keys and then to convey them to Tracy Ballew at the Swim Center. See Brief of Resp., p. 18 ("It is also undisputed that he agreed/volunteered

to pick up a key from one of his normal work locations (the C.C. Woodson Center), and deliver it to a subordinate at another location (the Swim Center)."). There was no testimony at the hearing suggesting any other purpose for Brian's travel. Whether the action of traveling to C.C. Woodson to pick up and then deliver the keys was sufficient to meet an exception to the "going and coming" rule is the key issue on appeal and the question on which the validity of the entire claim depends. Applying the facts to the law is, of course, the very essence of a conclusion of law and, therefore, this Court's standard of review is a review for error of law. As the evidence is not in dispute, the question before the Court is, like that of Smith, simply one of law. See Smith, 276 S.C. at 456, 280 S.E.2d at 53 (holding that as evidence was not in dispute, question was one of law for the Court).

Assuming *arguendo* that the statements cited above are not conclusions of law and instead constitute findings of fact, the Appellate Panel decision must be overturned as the factual finding is not supported by competent evidence. Again, it is undisputed that, at the time of his death, Brian was traveling to the C.C. Woodson Center to retrieve keys and then to convey them to Tracy Ballew at the Swim Center and **no testimony or evidence suggests otherwise**. 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 began at 10:48 AM. See Cell Phone Records, bates-stamp number 097. At 11:15 AM, Brian was killed in a motor vehicle accident.[3] (Trans. p. 52, ll. 10-17); see also Accident Report, bates-stamp number 148-49.

Consequently, any determination that, at the time of the accident, Brian was not engaged in any work-related duty or task is simply unsupported by any evidence whatsoever and cannot

[3] It should be noted that the time entries on the cell phone records are set forth in Greenwich Mean Time (GMT). Times stated in the briefs are converted to local time.

stand. Whether these facts meet an exception to the "going and coming" rule is a question of law.

III. Two-Issue Rule

Respondents have filed a motion to dismiss Appellant's appeal on the basis of the two-issue rule as well as alleged deficiencies in the Notice of Appeal. Respondents again assert the two-issue rule in their brief. As Respondents elected to include this in their motion to dismiss, they should not be afforded a second bite at the apple in the event their motion is denied. Moreover, as set forth below, Respondents' position regarding the two-issue rule is groundless.

Under the two-issue rule, where a decision is based on two independent grounds 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). In this situation, the two-issue rule resolves the appeal because "it would be pointless to consider the exceptions which do not reach [the] dispositive finding." See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160, 177 S.E.2d 544 (1970). 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.

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 and "pointless" appeals where, even if the Court were to decide in favor of the appellant, the result would not be changed. For this reason, courts applying the two-issue rule often decline to decide the issue in question, as it would not change the result. 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.

The "substantial deviation" cited by Respondents is in Brian traveling **to** his mother's house. The trip which is the key to this appeal is Brian's travel **after** leaving his mother's house. Appellant could therefore even safely **concede** the issue of substantial deviation without harming her case.

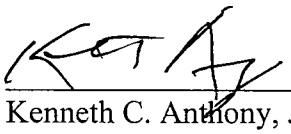
Respondents unsuccessfully raised this same issue to the Appellate Panel. The Commission found no merit to this argument. Appellant respectfully requests that this Court also decline Respondents' invitation to engage in "an over-zealous application of appellate preservation rules" or to "play a 'gotcha' 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.

IV. Conclusion

For the reasons set forth above, Appellant respectfully submits that, at the time of his death, Brian Wofford was engaged in executing a work-related duty or task such that his conduct falls outside of the "going and coming" rule. For this reason, the decision of the Appellate Panel should be reversed.

Respectfully Submitted,

THE ANTHONY LAW FIRM, P.A.



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August 27, 2014
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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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 written Reply Brief of Appellant on counsel for Respondent, by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

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This 27th day of August, 2014.

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August 27, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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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 a copy of the initial Reply Brief of Appellant and a Certificate of Service as to opposing counsel in the above matter.

Very truly yours,

Kenneth C. Anthony, Jr.

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SC Court of Appeals

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Enclosures

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