THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1207113

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

v.

City of Spartanburg, Employer and Self-Insurer,
through the South Carolina Municipal Insurance Trust,..... Respondents.

FINAL BRIEF OF RESPONDENTS

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Stephanie Lamb Pugh
55 East Camperdown Way, Suite 300
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. Whether Appellants' claims are barred/defeated by the two issue rule?

II. Whether the Full Commission properly held that Decedent's fatal accident does not fall within any exception to the going and coming rule?

STATEMENT OF THE CASE

Decedent Brian Wofford was involved in a fatal motorcycle accident on May 18, 2012, in Moore, South Carolina. He is survived by his wife, Boisha Wofford, and minor daughter, Kaelyn, who filed the instant case seeking workers' compensation death benefits (collectively referred to herein as "Appellants"). At the time of his fatal accident, Decedent was separated from his wife and living in an apartment in Spartanburg.

Decedent was employed by the City of Spartanburg as the Parks and Recreation Superintendent. In that capacity, he was responsible for overseeing and managing the "the development and delivery of all programs related to Parks and Recreation," including personnel, facilities, grounds, and programs, and assisting and leading Special Events activities. (R. 162). Mitch Kennedy, the City's Director of Community Services, was Decedent's supervisor. (Transcript of hearing before Single Commissioner T. Scott Beck, August 15, 2013 ("Hr'g Tr."), R. 60, lines 16-18). Decedent was a salaried employee. Although his normal working hours were 8 a.m. to 5 p.m., Monday through Friday, he was allowed to flex his schedule if necessary for work activities. (Id., R. 30, line 16 – 32, line 2).

On May 18, 2012, Decedent did not go directly to work at 8 a.m.[1] but, instead, drove in the opposite direction from his apartment to his mother's house in Moore, South Carolina, where his motorcycle was being garaged. (Dep. of Janice Littlejohn, R. 155, lines 6-9)) (Dep. of Boisha Wofford, R. 154, lines 6-7)) (Hr'g. Tr., R. 46, lines 16-19) (Id., R. 48, line 1 – 49, line 2) (Id., R. 49, lines 10-13) (R. 151-153). Mr. Kennedy

[1] Decedent had attended an event the evening before and then gone to restaurant. (Hr'g Tr., R. 31, lines 3-13).

testified that Decedent had no work-related duties in Moore, South Carolina, nor did his work require him to pick up his motorcycle or visit his mother. (Hr'g Tr., R. 71, lines 2-23). Decedent stayed at his mother's house between two and three hours. (Id., R. 53, lines 2-11). While there, he visited with his mother and ate something. (Id., R. 54, lines 9-10). During that time, he had some brief work-related phone conversations and text messages. He also had personal calls and messages. (R. 157-160) (R. 161) (Hr'g. Tr., R. 76, lines 6-15).

The Parks and Recreation Department was involved in or assisting with two events on May 18, 2012: 1) an employee appreciation "Spring Fever" lunch, and 2) a bicycle event sponsored by an unrelated non-profit organization. Early on the morning of May 18, Decedent had a brief email conversation with Sonya Culbreth, Communications and Marketing Specialist with the City of Spartanburg, about providing a podium for the bike event. (Hr'g Tr., R. 8, line 9 – 12, line 4). Although Ms. Culbreth was emailing Decedent about the bike event, she was off work that day. (Id., R. 9, lines 22-24). She testified that communicating with Decedent about issues like this was not unusual. (Id., R. 12, lines 5-7).

Scott Page, the City's Parks Manager, testified that Decedent was his direct supervisor. (Hr'g Tr., R. 16, lines 9-11). Mr. Page testified that he "didn't always go into the office first thing in the morning and [Decedent] also worked out of the office at Recreation Center, CC Woodson .... I know that [Decedent] might go straight to CC Woodson sometimes if he was working out of that Rec Center office or if he had a meeting or something." (Id., R. 16, line 25 – 17, line 15). Mr. Page confirmed that both he and Decedent traveled to the various parks that fell under their department. (Id., R.

18, lines 16-20). He texted and had a short phone conversation with Decedent on the morning of May 18 about a podium for the bike event. (Id., R. 20, line 10 – 22, line 10) (Id., R. 24, line 21 – 25, line 2).

Tracy Ballew testified that, as the aquatics director for the City, she worked under Decedent. (Hr'g Tr., R. 37, lines 6-24) (Id., R. 42, lines 20-22). Ms. Ballew testified that it was common for Decedent to go to the Swim Center as well as the other Parks and Recreation facilities. (Id., R. 38, lines 14-19) (Id., R. 42, lines 16-25). On May 18, Ms. Ballew spoke with Decedent on the phone briefly about signing some forms for her and retrieving a key from the C.C. Woodson Center for the Swim Center. (Id., R. 40, line 19 – 41, line 19) (Id., R. 43, lines 10-12). According to Ms. Ballew, Decedent agreed and/or volunteered to come by the Swim Center with the key and sign the forms. (Id., R. 41, lines 8-18).

Mr. Kennedy testified that Decedent was "directly responsible for the day to day operations of Parks and Recreation ... which included our community centers, which was, at the time of Brian's death, that would have been four locations[:] CC Woodson Community Center, TK Gregg Community Center, Northwest Community center, and the Swim Center," as well as "over 20 parks." (Hr'g. Tr., R. 62, line 20 – 63, line 7) (Id., R. 69, lines 22-24). He confirmed that Decedent's normal job required travel among the different locations "based upon what was needed from a manager." (Id., R. 63, lines 8-11). He testified that it would have been normal for Decedent to go to the Swim Center or pick up keys for his employees, as his job was not strictly a desk job. (Id., R. 69, lines 5-24). However, he testified that Decedent did not have any work-related duties in Moore, South Carolina on that date, or any work-related reasons to travel to Moore to

visit his mother or pick up his motorcycle. (Hr'g Tr., R. 71, lines 6-23). Mr. Kennedy testified that, as a professional, he did not consider himself to be working when he texted, emailed or made phone calls when he was physically out of the office. (Id., R. 64, lines 4-20).

Deborah McClary, Administrative Assistant for the Parks, Recreation, and Special Events Department, (Hr'g. Tr., R. 55, lines 17-19), testified that, although her office was in the same location as Decedent's office, Decedent did not always work out of his physical office.

> Q: But was his work always done there physically in the office or did he get out of the office?
>
> A: Not necessarily, he had several different locations he would be at at times.
>
> Q: Okay. Did his job really require him to go from - -
>
> A: From place to place, because we had center - - recreation centers; CC Woodson, Northwest, we had the Swim Center, and we also have park locations.

(Id., R. 56, lines 9-16).

Decedent left his mother's house in Moore at about 11:15 a.m. on the morning of May 18. He told his mother he was going to work. (Hr'g Tr., R. 50, lines 6-13) (Dep. of Janice Littlejohn, R. 156, lines 8-12). Not long after, he was involved in an accident at the corner of Reidville Road and Plateau Street in Moore, which resulted in fatal injuries. (R. 129-130) (R. 131-135) (R. 136-149) (R. 150) (R. 151-153). The accident occurred approximately two miles from his mother's house in Moore. (Hr'g Tr., R. 51, lines 16-18) (R. 129-130) (R. 131-135).

Appellants filed for benefits under the South Carolina Worker's Compensation Act ("Act"). Respondents denied that their claim was compensable because Decedent was not acting within the course and scope of his employment at the time of his accident.

A hearing was conducted before the Single Commissioner on August 15, 2013. Subsequently, he issued a decision, denying workers' compensation benefits on the basis that Decedent's fatal accident did not arise out of and in the course of his employment. In addition, the Single Commissioner found that Decedent was not charged with any work-related duties at the time of his accident and was not performing a special task, service, mission or errand for his employer. Instead, Decedent was on a purely personal visit to his mother's house. The Single Commissioner specifically found that, even if Decedent had conducted some work-related activities that morning, his trip to Moore, South Carolina and his mother's house "was a substantial deviation from his employment." His accident occurred at "a location that Decedent's work duties did not require him to be." The Single Commissioner also held that the claim was barred by the going and coming rule and that none of the exceptions to that rule applied. (Order of the South Carolina Workers' Compensation Commission, T. Scott Beck, filed November 7, 2013, R. 80-92).

Appellants appealed to the Full Commission, raising two issues. First, Appellants argued that the Single Commissioner erred "in finding that the decedent was not working at the time of his death." Second, Appellants argued that the finding that the claim is barred by the going and coming rule was erroneous, asserting specifically that the Single Commissioner erred "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," and citing

Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998). (App. Form 30, dated Nov. 18, 2013, R. 1).

An Appellate Panel of the Full Commission ("Commission") heard oral argument on February 18, 2014. The Commission upheld the Single Commissioner's findings of fact and conclusions of law in their entirety. (Appellate Panel Decision & Order of the South Carolina Workers' Compensation Commission, filed May 12, 2014 ("Commission Decision"), R. 118-128). Specifically, the Commission found as a matter of fact that Decedent "was not working at the time of his death," and that, "[i]nstead of coming to work on the day of his accident, Decedent drove approximately nine miles from his apartment in the opposite direction to his mother's home in Moore, South Carolina to pick up his motorcycle and visit with his mother ... This visit to his mother's house was of a purely personal nature." The Commission found that, even if it could be said that "Decedent was working at some point on his date of accident, that the trip and visit to his mother's house in Moore, South Carolina was a substantial deviation from his employment." Importantly, there was no finding that, following the substantial deviation, Decedent returned to his work duties. The Commission also found that the fatal accident occurred "at a location that Decedent's work duties did not require him to be. Nothing about Decedent's job, on the date of his accident, required that he travel to or visit any location in Moore, South Carolina or that he go and pick up his motorcycle in Moore, South Carolina." Instead, all of Decedent's job responsibilities were located within the City of Spartanburg.

The Commission also found that the claim was barred by the going and coming rule, from which "there are no applicable exceptions." Decedent was not charged with

any work related duties but was "on a purely personal mission to get to work," at the time of his accident. The Commission also found that "Decedent was not performing a special task, service, mission, or errand for the City of Spartanburg at the time of his accident," but instead, all of the activities he planned to engage in once he got to work "were a customary part of his employment," which were job duties "that fell within his job description" and "expected of him on a regular basis." (Commission Decision, R. 123-125).

The Commission concluded as a matter of law that "Decedent was not working at the time of his accident." Even if Decedent had been performing some work-related tasks that morning, the trip to Moore to visit his mother and pick up his motorcycle constituted a substantial deviation which, under White v. S.C. State Highway Dep't, 226 S.C. 380, 85 S.E.2d 290 (1955) and Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949), bar his claim.

In addition, the Commission ruled that, because none of the exceptions to the going and coming rule applied, Appellants' claim was barred by that rule as the Decedent was on his own "personal mission" to get to work when the accident occurred. "Decedent had no work-related duties to perform on his way to work, nor was he under the control of the City of Spartanburg ..." The Commission held that the special errand exception is not applicable because "Decedent was not charged with any task on his way to work," but instead, the only job duties Decedent had on the day of his accident were his typical and customary job duties. (Commission Decision, R. 126-127).

Appellants timely appealed to this Court. Although Appellants listed two issues in their notice of appeal, they have abandoned their argument that, in light of Decedent'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* App. Br. p. 3 n.1). The only issue raised on appeal is whether Appellants' claim "falls within an exception to the 'going and coming' rule." (Id., p. 3).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Id., at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162,

163 (1992). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

It is well-established that, "the burden is upon the claimants to prove such facts as will render the injury and ensuing death compensable within the provision of the Workmen's Compensation Act, and such award must not be based upon surmise or conjecture or speculation." Sola v. Sunny Slope Farms, 244 S.C. 6, 10, 135 S.E.2d 321, 324 (1964). A key element of this burden is proving that the injury arose out of and in the course of the claimant's employment. *See, e.g.*, Falconer, 215 S.C. at 330, 54 S.E.2d at 909 (the "burden of supplying evidence from which the inference can be legitimately drawn that [the claimant's] death arose out of and in the course of his employment rests upon [the claimant]").

ARGUMENTS

I. Appellants' claims are barred/defeated by the two issue rule.

This Court can and should dispose of this appeal by applying the two issue rule. That rule provides that, "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." Lott v. Jones, 387 S.C. 339, 346, 692 S.E.2d 900, 803 (2010).

Here, the Commission denied the compensability of this claim on multiple grounds and legal theories. First, the Commission found as a matter of fact that Decedent "was not working at the time of his death." (Commission Decision, R. 123). The Commission further found that, even if Decedent had been working during the morning

of May 18, his trip to visit his mother and pick up his motorcycle constituted "a substantial deviation from his employment." (Id., R. 124). In its Conclusions of Law, the Commission held that Appellants "failed to establish [that] Decedent's accident arose out of and in the course of his employment, as Decedent was not working at the time of his accident." Even if he had been working, his accident occurred during "a substantial deviation from employment." (Id., R. 126). Critically, there is no finding that Decedent returned to his course of employment following the substantial deviation prior to his accident.

Appellants have appealed none of these findings of fact and conclusions of law, which are the law of the case. *See, e.g.*, Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) ("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 and its notice to the respondent of the issues the respondent would be required to meet," *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)); Colonna v. Marlboro Park Hosp., 404 S.C. 537, 548, 745 S.E.2d 128, 134 (Ct. App. 2013) (unappealed Commission rulings are the law of the case).

The bar from benefits because of a substantial deviation is a separate legal theory from the applicability of the going and coming rule. *Compare* Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011) (discussing going and coming rule), *with* White v. S.C. State Highway Dep't, 226 S.C. 380, 85 S.E.2d 290 (1955) (discussing substantial deviation during travel). Even if this Court were to reverse the Commission's decision on the applicability of the going and coming rule, there is still a

finding that Decedent substantially deviated from his employment at the time of this accident and no finding that he had returned to the course of his employment. Thus, the finding of a substantial deviation in and of itself results in the non-compensability of this claim. *See* White, 226 S.C. at 382, 85 S.E.2d at 291 ("we are constrained to hold ... that the accident occurred during a substantial deviation from duty which renders it noncompensable"); Falconer, 215 S.C. at 328, 54 S.E.2d at 908 (denying benefits because "the only reasonable inference warranted by the evidence is that the fatal accident occurred at a time when the deceased had deviated completely from his mater's business and had gone on a personal errand"). Therefore, this case falls squarely within the "two issue" rule and this Court should affirm the Commission's denial of benefits because Appellants failed to appeal the substantial deviation finding, which constitutes an alternate sustaining ground.

II. The Full Commission properly held that Decedent's fatal accident does not fall within any exception to the going and coming rule.

In the alternative, this Court should uphold the Commission's finding that Appellants' claim is barred by the going and coming rule. "As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment." Medlin v. Upstate Plaster Serv., 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998). There are five well-recognized exceptions to the going and coming rule: 1) where the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; 2) "[w]here the employee, on his way to or from his work, is still charged with some duty or task in connection with his

employment"; 3) where the way to work is inherently dangerous and is either the exclusive way or constructed and/or maintained by the employer; 4) where the injury is incurred in close proximity to the workplace and there is an "implied requirement" that the employee use that approach to go to and come from work; and 5) where an employee is injured "while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work." Id., at 95-96, 495 S.E.2d at 449.

Appellants essentially have presented a "moving target" in terms of which exception to the going and coming rule they believe applies in this case. Their statement of the issue on appeal merely refers to "an exception" to the going and coming rule, without identifying specifically which exception they claim applies. This lack of specificity flies in the face of Rule 208(b)(1)(B), which requires that the "statement shall be concise and direct as to each issue ... [b]road general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. On this point, Appellants' statement of issues and their Brief itself leave both this Court and Respondents "to 'grope in the dark' to ascertain the precise point at issue." Lott, 387 S.C. at 348, 692 S.E.2d at 904.

In their brief to the Commission, Appellants, cited Medlin and argued that their case falls within the second exception, asserting that Decedent was "charged with some duty or task in connection with his employment." (Brief of Claimant/Appellant, dated January 17, 2014). At oral argument before the Commission, however, Appellants cited Medlin for the proposition that their case falls within the "special errand" exception.

(Transcript of Full Commission Hearing, held February 18, 2014, R. 100, line 15 – 101, line 2).[2] On appeal to this Court, Appellants have dropped their argument that Decedent's accident falls within the special errand exception, as that exception is neither identified in their statement of issues on appeal nor addressed anywhere in their Brief. Appellants cannot raise the special errand exception now. "It is axiomatic an issue cannot be raised for the first time in a reply brief." McClurg v. Deaton, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011); *see also* Ahrens v. State of South Carolina, 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2011) (even where issue is properly raised on appeal, if it is not argued in the brief, it is "deemed abandoned and will not be considered by the appellate court").

Appellants cite Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972) for the general proposition that, to be compensable, an injury must both arise out of and in the course of employment. (App. Br. p. 4). Although Bickley involved the special errand exception to the going and coming rule, merely citing a case for an unrelated issue does not raise or preserve an issue for appeal. Moreover, the facts of Bickley are readily distinguishable from the case at hand. In Bickley, the decedent had been called out in the middle of the night to travel from Columbia to Charleston to repair storm-damaged electrical lines. In adopting the special errand exception, the Supreme Court held that, "[w]here an employee is obligated to make emergency calls or to perform service at times other than during his regular working hours and goes on a special errand or mission for the employer, he is entitled to the protection of the compensation law from the time he leaves home until his return thereto." 259 S.C. at

[2] Although Medlin recites the recognized exceptions to the going and coming rule, that case was decided on the basis of the first exception – that the employer provided the means of transportation to and from work. 329 S.C. at 96, 495 S.E.2d at 450.

470, 192 S.E.2d at 870. Here, Decedent was injured during regular working hours when he normally would have been at work and nothing about the trip to Moore, South Carolina was for the benefit of his employer. Furthermore, there is abundant evidence in this record that the tasks Decedent was going to perform once he arrived at work were part of his normal job duties and fell well within his job description. *See* (Hr'g Tr., R. 12, lines 5-7) (Ms. Culbreath testifying that communicating with Decedent about events like the bike event was not unusual) (Id., R. 18, lines 16-20) (Mr. Page testifying that it was not unusual for either him or Decedent to travel to the various parks that fell within their department) (Id., R. 38, lines 14-19) (Id., R. 42, lines 16-25) (Ms. Ballew testifying that it was normal for Decedent to go to the Swim Center as well as the other Parks and Recreation facilities) (Id., R. 69, lines 5-24) (Mr. Kennedy testifying that it would have been normal for Decedent to go to the Swim Center or pick up keys) (Id., R. 56, lines 9-16) (Ms. McClary testifying that Decedent did not always work out of his physical office but, instead, traveled among the various recreation centers and parks); *see also* (R. 162) (Decedent's job description). Thus, there was nothing special about what he was going to do once he arrived at work.

On appeal, Appellants argue that Decedent's injuries arose out of and in the course of his employment (which Respondents dispute) and, therefore, his accident "falls within an exception to the 'going and coming' rule." (App. Br. 3). At a minimum, Appellants have the analysis backwards – if an injury incurred on the way to work falls within an exception to the going and coming rule, it is deemed to arise out of and in the scope and course of employment, not the other way around. Critically, as noted above, Appellants did not appeal the Commission's determination that they failed to prove that

"Decedent's accident arose out of and in the course of his employment, as Decedent was not working at the time of his death," (Commission Decision, R. 123, 126), which is the law of the case. *See, e.g.*, Green, 311 S.C. 7at 80, 427 S.E.2d at 687; Colonna, 404 S.C. at 548, 745 S.E.2d at 134.

Before this Court, Appellants appear to revert to their argument that Decedent was "charged with a duty or task in connection with his employment," citing Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011) and Skinner v. Braum's Ice Cream Store, 890 P.2d 922 (Okla. 1995). Appellants' substantive reliance on Matute is curious. In Matute, benefits were denied because the claimant fell on the sidewalk outside of work and she was not fulfilling any duty or task at the time of her accident. 391 S.C. at 296, 705 S.E.2d at 475. The same result should obtain here, where Decedent was on his way to work and not tasked with any task in connection with his employment until he arrived at his place of work.

Not only is Skinner not a South Carolina case,[3] it is not even a workers' compensation case. The issue in Skinner was whether the injured plaintiff could hold the employer vicariously liable for an automobile accident caused by the employer's employee while she was en route to a store location other than the one where the she normally worked. 890 P.2d at 923. Skinner is not applicable, let alone controlling. In fact, the key issue of whether the employee's supervisor had instructed her to go pick up supplies, as opposed to the employee voluntarily doing so, was never decided by the

[3] Although South Carolina courts may look to foreign jurisdictions where there are no cases on point in South Carolina, *see* Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005), Appellants have neither asserted nor demonstrated that that is the case here. In fact, Appellants rely heavily on Gray v. The Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000), which addresses, among other issues, the "duty or task" exception to the going and coming rule.

court. Instead, the case was remanded. 890 P.2d at 925. Here, the testimony is uncontroverted that Decedent agreed and/or volunteered to pick up a key from one of his normal work locations and deliver it to another normal work location. (Hr'g Tr., R. 41, lines 8-18).

Appellants erroneously assert that their case is similar to Gray. (App. Br. pp. 5-6). First, the language quoted by Appellants is drawn from this Court's analysis of the two separate requirements that compensable injuries "arise out of" and are incurred "in the course of" employment. Here, Appellants did not appeal the Commission's rulings that they failed to establish that "Decedent's accident arose out of and in the course of his employment, as Decedent was not working at the time of his death." (Commission Decision, R. 123, 126) (App. Form 30, R. 1). As is the case with much of their argument, they attempt to graft language and analysis from various workers' compensation concepts onto their case in order to create an exception or standard that they can meet. This Court should reject such efforts. For example, the language cited by Appellants, that "Brian 'was on his way to [C.C. Woodson Center] to fulfill his employment duties,'" (App. Br. p. 7), is lifted from this Court's discussion of whether the claimant in Gray was injured in the course of his employment. The "in the course" prong looks at "the time, place, and circumstances under which the injury occurred," Gray, 339 S.C. at 187, 528 S.E.2d at 443, but does not necessarily address the concepts and/or exceptions embodied in the going and coming rule.

Second, the part of Gray that addresses the going and coming rule was decided on the basis of the first exception: "We find that the circumstances in this case fit into the first exception to the 'going and coming rule.' Gray was paid for both his travel time and

for mileage. His time and mileage began when he left his home on Friday mornings." 339 S.C. at 189, 528 S.E.2d at 444. Although the theory of their case has been unclear and evolving, Appellants have never asserted that Decedent's accident falls within the first exception to the going and coming rule.

Nevertheless, the instant case is distinguishable from Gray because Decedent was not required to pick anything up from his mother's house or even from Moore, South Carolina. There is absolutely no evidence that, at the time of his accident, Decedent was carrying documents for his employer or performing any business-related tasks. He simply was going to work. The fact that he was on his way back to Spartanburg in order to go to work does not convert his trip into an assigned job or task by his employer.

Appellants specifically attack the Commission's Conclusion of Law in ¶ 6 of its Decision, which determined that "the duty or task exception to the going and coming rule is inapplicable ..." (App. Br. p. 3). Appellants appear to question whether the Commission's findings of fact that "Decedent was not charged with any work related duties at the time of his accident but instead was on a purely personal mission to get to work," and that 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," (Commission Decision, R. 125), are actually conclusions of law. (App. Br. p. 3 n.2). Contrary to Appellants' suggestion otherwise, there is more than sufficient evidence in the record to support the Commission's factual findings on these points, (Hr'g Tr., R. 12, lines 5-7) (Id., R. 18, lines 16-20) (Id., R. 38, lines 14-19) (Id., R. 42, lines 16-25) (Id., R. 50, lines 6-13) (Id., R. 56, lines 9-16) (Id., R. 69, lines 5-24) (Id., R.

71, lines 2-23) (Dep. of Janice Littlejohn, R. 156, lines 8-12)) (R. 162), which should be upheld on appeal.

The weakness in Appellants' case is belied by their attempt to characterize the well-established going and coming rule as a mere "'shortcut' for assessing liability," based on the premise that "a person on his way to work 'is not engaged in performing any service growing out of his employment.'" (App. Br. p. 4). Appellants argue that Decedent's accident is compensable because it does not fall within the premise or assumptions on which they argue the going and coming rule is based. Apparently, because they cannot establish that Decedent's accident falls within any of the recognized exceptions to the going and coming rule, they instead attempt to create an additional catch-all exception that is loosely comprised of "assumptions" or "the factors of control, lack of personal discretion, and lack of personal purpose." (App. Br. pp. 5, 7, 8). Such an exception has never been adopted by South Carolina courts and should not be given any credence here.

Furthermore, even if this Court were to analyze the elements put forth by Appellants – *i.e.*, consideration of "control, discretion, and personal purpose in determining whether a trip arises out of and is in the course and scope of employment," (App. Br. p. 4), their claim still fails. Although Appellants allege that Decedent was on an errand for and under the control of the City, that the errand was of value to the City, and that he had no personal discretion, (App. Br. p. 8), there is no evidence in the record to support any of these assertions. Instead, it 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. (Hr'g Tr., R. 71, lines 2-23). 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). (Id., R. 41, lines 8-18). Finally, there is no evidence whatsoever that Decedent was constrained from visiting someone else or performing other personal errands on his way to work, and Appellants' suggestion otherwise is no more than rank speculation.

Despite Appellants' focus on the element of control, (App. Br. pp. 3 n.2, 4-5, 7, 8), here Decedent was in no way under his employer's control at the time of his accident. Although Ms. Ballew requested that Decedent pick up a key from the C.C. Woodson Center and bring it to the Swim Center, Ms. Ballew was not Decedent's supervisor. In fact, the opposite is true – Decedent was Ms. Ballew's supervisor. (Hr'g Tr., R. 37, lines 20-24) (Id., R. 42, lines 20-22). Decedent was not instructed to pick the key up and deliver it; instead, he agreed and/or volunteered to do so. (Id., R. 41, lines 8-18). As a result, Appellants' assertion that Decedent "was in the process of executing a specific task given him by Tracy Ballew," (App. Br. p. 7), is nonsensical. It is, instead, further evidence of the lengths to which Appellants attempt to stretch the facts and the law to fit their case, which this Court should reject.

Furthermore, there is no evidence in this record that the tasks of picking up and delivering the key and signing papers were time sensitive. (Hr'g Tr., R. 40, line 19 – 41, line 19) (Id., R. 43, lines 1-12). Thus, Decedent could have stopped to perform any number of personal tasks on his way back to Spartanburg to start work.

Like the employee in Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942), Decedent was merely on his way to work and could have changed his mind about

going to work at that precise time, visited with friends as he had visited with his mother, or transacted other business. To say that he would have impinged on his employer if he had not picked up and delivered the key as he had agreed/volunteered to do is tantamount to saying that a worker who was scheduled to work at the mill "at the appointed time" would not have impinged on his employer by not showing up for his shift. 201 S.C. at 265, 22 S.E.2d at 718-719. As was the case with the claimant in Gallman, no duty was required of Decedent until he arrived at work, which was in Spartanburg. Decedent was not tasked with picking up anything in Moore, or anywhere else, until he arrived at his regular place of work, which included both the C.C. Woodson Center and the Swim Center. *See* (Hr'g Tr., R. 38, lines 14-19) (Id., R. 42, lines 16-25) (Id., R. 69, lines 5-24 (Id., R. 56, lines 9-16) (Id., R. 71, lines 2-23); *see also* (R. 162).

Similarly, the instant case is comparable to Gregg v. Dorchester County Sch. Syst., 270 S.C. 189, 241 S.E.2d 554 (1978). There, the claimant, an assistant Summerville High School principal, was required to stay late on nights when football games were scheduled. The Claimant lived in Orangeburg and traveled to Summerville on Monday mornings and back home to Orangeburg on Friday evenings. On the evening in question, he stayed late for a football game and was injured while returning home to Orangeburg. The Court upheld the Commission's denial of benefits because "[t]he trip was made solely because of appellant's election to return to Orangeburg each weekend, and not in the performance of any service for which he was employed." 270 S.C. at 193, 241 S.E.2d at 556. Here, Decedent's decision to visit his mother during normal working hours was for purely personal reasons, and he was returning to his job in Spartanburg to perform his regular job duties when he was injured. Although he had made a few short

phone calls and communicated briefly via email and text during the morning, that did not convert his commute to work into a work-related trip. As the Supreme Court stated in Sylvan v. Sylvan Bros., "[i]t 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." 225 S.C. 429, 436, 82 S.E.2d 794, 797 (1954). In fact, such a finding would swallow the going and coming rule for just about all white collar workers.

Like the claimant in Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333 (2008), Decedent was not tasked with any work to perform until he actually arrived at work. "The primary purpose of [claimant's] trip served a personal objective, namely for [claimant] to travel to the place where his work was to be performed. [Claimant] 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 ... as evidenced by his personal deviation."[4] Id. at 641, 661 S.E.2d at 336. Unlike the claimant in Sola, 244 S.C. at 15-16, 135 S.E.2d at 321, 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. Decedent's accident, while indisputably tragic, simply is not compensable under the Act.

The Minnesota case relied on by Appellants, Locke v. Steele County, 27 N.W.2d 285 (Minn. 1947), is readily distinguishable from the case at hand. In Locke, the employee was instructed by her supervisor that, at the end of her normal lunch hour from 12 noon to 1 p.m., she was to travel to the post office and pick up the office mail. On the

[4] At least the claimant in Whitworth was transporting a tool that was needed for his job that day, 377 S.C. at 639, 661 S.E.2d at 335, although even that fact did not bring his claim with in the duty or task exception to the going and coming rule. Here, there is no evidence that Decedent was transporting any work-related items at the time of his accident.

day she was injured, she had lunched at home and was traveling in the direction of her job in order to go to the post office. The Minnesota Court held that the claimant's injuries were compensable because, due to her employer's specific instructions, "at 1 p.m., her services for her employer were resumed," which required her to be on the public streets and consequently subjected her to ordinary street risks while she was performing those services. Id. at 288. In contrast, here Decedent was under no direction from his supervisor, who did not even know he was not in the office on the morning of May 18, (Hr'g Tr., R. 70, lines 17-22), to go anywhere.

Appellants appear to confuse the going and coming rule with the rule applied to traveling employees. (App. Br. pp. 5-6). Although there may be similarities, the application of the two rules is distinct and they apply in different factual situations. Although an employee may be considered traveling, in a technical sense, on his or her way to work, the rules applicable to employees traveling out of town on business do not apply to employees going to and coming from work. The rules applicable to traveling employees simply do not apply here, where there has not been even a suggestion that Decedent traveled out of town on business.

Thus, Appellants' reliance on Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 200 S.E.2d 83 (1973), one of two cases Appellants insist is "most similar" to their own, is misplaced precisely because Beam deals with an out of town trip by two teachers to attend a meeting of the South Carolina Education Association. The issue in Beam was whether the activity the claimants were engaged in at the time of their accident – traveling to the out of town meeting – pertained to or was incidental to their regular job duties. Beam did not discuss in any manner the going and coming rule but, instead, held

that attendance at the meetings, which their supervisor admitted was expected of them, "was consistent with their contracts of hire and was logically related to their employment." 261 S.C. at 333, 200 S.E.2d at 86. The key factual distinction between Beam and the instant case is that, in Beam, the claimants were not only encouraged but urged and expected to attend the out of town meeting and were injured on the way to that event. Here, nothing about Decedent's job required to him to go to Moore or to visit his mother or to pick up his motorcycle. At the time he was injured, Decedent was merely on his normal way to work.

Finally, Appellants make much of the fact that Decedent agreed/volunteered/was planning to pick up a key at the C.C. Woodson Center and deliver it to the Swim Center. This was a normal part of his job responsibilities and would be performed entirely at places he normally worked. In short, Appellants' argument appears to be that, because Decedent had work to do once he got to work, he comes within the "duty or task" exception to the going and coming rule. Their position would eliminate the "going" part from the going and coming rule because every employee is anticipated to engage in work-related activities once they arrive at work. This Court should reject any such argument.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission's denial of benefits to Appellants.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

October 3, 2014

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

Stephanie Lamb Pugh
S.C. Bar No.: 78483
55 East Camperdown Way, Suite 300
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM 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,, ... Appellants,

v.

City of Spartanburg, through the
South Carolina Municipal Insurance Trust,. ..... Respondents.

PROOF OF SERVICE

I certify that on the 3rd day of October 2014, I served the **Final Brief of Respondents** on Boisha Wofford, alleged surviving spouse, and Kaelyn Wofford, surviving child, on behalf of Brian Wofford by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record:

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

Jann L. Richards
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM 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,, ... Appellants,

v.

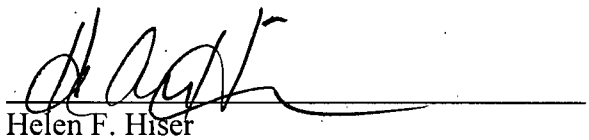
City of Spartanburg, through the
South Carolina Municipal Insurance Trust,..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief of Respondents complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

October 3, 2014

McANGUS GOUDELOCK & COURIE, L.L.C.



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