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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SC WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1311681

Anthony Shelley, Claimant, Appellant,

RockTenn, Employer,
and New Hampshire Insurance Company, Carrier, Defendants/Respondents.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE FULL COMMISSION ERR AS A MATTER OF LAW IN FAILING TO FIND THAT THE CLAIMANT SUFFERED AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT?**
 - A. DID THE FULL COMMISSION ERR IN FINDING THAT “DISOBEYING A DIRECT ORDER AND INSTRUCTION OF HIS SUPERVISOR TOOK THE CLAIMANT OUTSIDE THE COURSE AND SCOPE OF HIS EMPLOYMENT?”**
 - B. DID THE FULL COMMISSION ERR IN FAILING TO FIND THAT CLAIMANT’S INJURIES, RESULTING FROM THE ALTERCATION BETWEEN THE CLAIMANT AND THE DRIVER WERE COMPENSABLE BECAUSE THE ALTERCATION WAS “SPONTANEOUS, IMPULSIVE, INSTINCTIVE, OR OTHERWISE LACKING A DELIBERATE OR FORMED INTENT TO DO HARM.” KINSEY V. CHAMPION AMERICAN SERVICE CENTER, 268 S.C. 177 (1977)?**
- II. DID THE FULL COMMISSION ERR IN FAILING TO FIND THAT THE CLAIMANT SUFFERED AN INJURY ON THE JOB?**
- III. DID THE FULL COMMISSION ERR IN ADMITTING HEARSAY STATEMENTS GIVEN BY TRUCK DRIVER, ALBERT MCNEIL?**

STATEMENT OF THE CASE

This is a denied case heard before the Commission on the Claimant's Form 50. The Claimant alleged that on August 10, 2013, he suffered an injury to his left jaw and brain when he was assaulted with a mallet by a delivery driver, after which he fell from a truck, striking the back of his head. (Am. Form 50).

Claimant testified that he has worked for nearly 22 years at RockTenn Paper Mill in Florence, South Carolina and that his job duties include spotting for trucks, i.e., directing tractor trailer drivers in backing their rigs up to the unloading facility at RockTenn. (Single Comm. Hrg. Tr. p. 31, line 13 - p. 32, line 1).

On August 10, 2013, Claimant was spotting for a tractor trailer rig owned and operated by D & L Trucking. (Single Comm. Hrg. Tr. p. 32, lines 2-4). A disagreement erupted between the Claimant and driver related to the backing of the truck, whereupon the Claimant called his supervisor, Jack Baxley, to the scene. (Single Comm. Hrg. Tr. p. 33, lines 14-21). Mr. Baxley arrived at the scene and took over the spotting. (Single Comm. Hrg. Tr. p. 33, line 23 - p. 34, line 6; p. 92, line 10 - p. 93, line 18). Mr. Baxley directed the Claimant to get in his own truck and to leave the scene. (Id.). Claimant testified that he went to his truck to leave when he realized the driver had not signed the Bill of Lading, documentation required by the company. (Single Comm. Hrg. Tr. p. 34, lines 7-21).

Claimant testified that at that point, he went back to the D&L truck, climbed up on the side of the truck, and signaled to the driver that he needed to sign the Bill of Lading. (Id.). Claimant further testified that the driver grabbed an orange mallet and struck the Claimant in the left jaw with the mallet causing Claimant to fall from the truck and strike the back of his head on the ground.

(Single Comm. Hrg. Tr. p. 36, lines 3-16). The Claimant was unconscious for several minutes. (Id.).

The Claimant was initially treated at the plant by Joan Rink, RN. Her note indicates that at 06:25 on August 10, 2013, she received a call from the yard indicating “man down - hit in head ‘come to site.’” (APA No. 5, p. 113). She arrived at the scene at 06:35. (Id.). Claimant was in a pickup. (Id.). She indicated he was alert but unaware of what had happened and co-workers stated he was not responding appropriately. (APA No. 5, p. 113). She took him to the First Aid office and noted abrasion on the back of his head, swelling and bruising on left jaw area in front of his ear. (APA No. 5, p. 113). She noted that:

Pt states he was hit c̄ mallet from driver of truck. Additional injury alleged to have happened when he fell from truck to concrete - hit back of head. Coworkers state loss of conscious for brief time. (Id.).

By 07:26, she noted the Claimant had vomited a moderate amount and that she had completed an alcohol test which results were negative. (Id.). Thereafter, he was transported to McLeod Regional Medical Center in a pickup truck driven by a security officer at 08:30. (APA No. 5, p. 114).

There the Claimant was evaluated by numerous physicians, including an oral surgeon who noted:

This is a contusion in the left masseter muscle noted on clinical exam and also CT. There are 2 circular linear bruised area approximately 4 cm on the left cheek at the left mandible angle. and generalized tenderness and swelling on the left masseter muscle. (APA No. 1, p. 20)(emphasis added). (APA No. 1, p. 20).

Photos at the hospital also revealed the circular bruise on Claimant’s left cheek. (APA No. 6, pp. 116, 118).

In their Form 51 Answer, Defendants did not dispute that the Claimant sustained injuries on

the date in question. They denied the claim, however, on the grounds that the Claimant was “an instigator of an altercation.” (Form 51).

During the course of the trial, the Commissioner allowed into evidence the out-of-court statement written by truck driver, Albert McNeil, although Mr. McNeil was not present at trial. (Def. Exh. No. 1). The Claimant objected to the statement on hearsay grounds. (Order, p. 4). The objection was overruled by the Commissioner citing Rule 803(1), SCRE. (Id.).

Mr. McNeil’s statement indicates that Claimant jumped up onto his truck, reached into the truck and, while the two were pushing each other, McNeil opened the door and Claimant fell from the truck, hit the ground, and was knocked out. (Order p. 18).

The Single Commissioner denied the case finding that:

Pursuant to §42-1-160 the claimant failed to prove he sustained a compensable injury by accident arising out of and in the course and scope of employment. Disobeying a direct order and instruction of his supervisor took the claimant outside the course and scope of his employment. Moreover, as noted in the above Findings of Fact, the undersigned would also find the claimant to be the aggressor of the incident in question. (Order p. 20).

The Appellate Panel of the Workers’ Compensation Commission affirmed and this appeal followed.

ARGUMENT

I. THE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO FIND THAT CLAIMANT SUFFERED AN INJURY BY ACCIDENT OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. The Full Commission erred in finding that “disobeying a direct order and instruction of his supervisor took the claimant outside the course and scope of his employment”.

At trial, the defense argued, and the Commissioner found, that “disobeying a direct order and

instruction of his supervisor, took the Claimant outside the course and scope of his employment.”
(Decision and Order, p. 20).

There is no dispute that Claimant’s supervisor directed the Claimant:

I’m going to take care of this, you go ahead and leave... (Single
Comm. Hrg. Tr., p. 93, lines 15-16).

Or that the Claimant subsequently returned to the truck driver’s truck. (Single Comm. Hrg.
Tr., p. 34, lines 3-21).

However, neither the Defendants, nor the Commission, cite any law in support of the
proposition that the Claimant’s act of going back to the truck took him out of the course and scope
of the employment.

Defense takes the position that as of the moment that his supervisor told him to “go ahead
and leave”, the Claimant had been advised to leave the premise and was, as of that moment, no
longer in the course and scope of employment. However, Claimant was injured on the Employer’s
premises and our Courts have long held that, even after one clocks out, employees remain in the
course and scope of employment for a reasonable length of time to allow them to separate from the
work place.

In Williams v. South Carolina State Hospital, 245 S.C. 377 (1965), the Supreme Court
affirmed an award of compensation where the claimant was injured when, while walking from the
building where she worked to her car, she slipped in mud in the lot. The Court held:

The fact that the accident occurred shortly after the claimant had left
her immediate place of work is not conclusive. A reasonable length
of time must be given an employee to separate himself or herself from
the place of work. The employment contemplated her entry and
departure from the place of work as much as it contemplated her
working there, and must include a reasonable interval of time for that
purpose.

Williams v. South Carolina State Hospital, 245 S.C. at 381, 140S.E.2d at 603 (quoting, Bountiful Brick Co. V. Giles, 276 U.S. 154, 158 (1928)).

Moreover, the Order fails to address the Supreme Court's decision in Kinsey v. Champion American Service Center, 268 S.C. 177, 181 (1977), which is on point. In Kinsey, the Claimant was told to go home by his employer after the outbreak of a disagreement between the Claimant and a fellow employee. Kinsey at 179. The Claimant failed to do so and the Claimant and the fellow employee commenced a fight that involved the Claimant swinging a tire iron and the fellow employee throwing a knife and a hammer. Faced with these facts, the Supreme Court reversed the Single Commissioner, the Full Commission, and the Circuit Court and found the case compensable.

Claimant was not taken out of the course and scope of employment when his supervisor told him: "I'm going to take care of this, you go ahead and leave." (Single Comm. Hrg. Tr. p. 93, lines 15-16).

B. The Full Commission erred in failing to find that the Claimant's injuries, resulting from the altercation between the Claimant and the driver, were compensable because the altercation was "spontaneous, impulsive, instinctive, or otherwise lacking a deliberate or formed intent to do harm." Kinsey v. Champion American Service Center, 268 S.C. 177 (1977).

The Defendants' Form 51 Answer indicated: "Defendants note there is no doubt Claimant sustained some injuries on the date in question, however, the evidence currently in existence reveals Claimant was the instigator of an altercation." (Form 51).

Presumably, by that statement in their Form 51, Defendants intended to raise S.C. Code §42-9-60's provision that injuries arising out of and in the course of employment are not compensable where they are the result of the "willful intention of the employee to injure or kill himself or

another.” This has, at times in our law, been known by the misnomer of the “aggressor defense.” This is indeed, however, a misnomer as there is no “aggressor defense.”

In Kinsey v. Champion American Service Center, 268 S.C. 177, 181 (1977), our Supreme Court held that the so-called “aggressor defense” had no statutory basis. There “the Court reversed a denial of compensation by the Commission which the Court found bottomed upon the inappropriately denominated ‘aggressor defense.’” Beard, Poteat, Lamar, Sumwalt, Hayes, The Law of Workers’ Compensation Insurance of South Carolina, Fifth Edition, 2008, Chapter 6 (III)(c), p. 250-253. (citing Kinsey v. Champion American Service Center, 268 S.C. 177, 180).

The facts of Kinsey involved a Claimant who had a history of personal disagreements regarding the authority of a fellow employee to supervise the Claimant and was told to go home by his employer one day after he was drinking. When it became obvious that the Claimant was not leaving, the employer instructed him to do some other work. The Claimant then cursed and drew back a tire iron whereupon the fellow employee retaliated by throwing a knife. Claimant then retreated only to have the fellow employee throw a hammer at him upon his return. After retrieving the hammer, the co-employee instructed the Claimant to wait in the front office. An altercation developed between the two men and resulted in serious injuries to the Claimant. The testimony conflicted over whether one or two fights occurred and whether the Claimant or the co-employee struck the first blow. See Beard, The Law of Workers’ Compensation Insurance of South Carolina, p. 251. (citing Kinsey).

The employer took the position that an aggressor, or person who struck the first blow, willfully intended to do injury and was barred from compensation. The Supreme Court disallowed the so-called “aggressor defense” and stated:

The statute does not afford a defense merely on who strikes the first blow. Its application is limited to ‘those cases where it is shown that

the acts of the employee are so serious or aggravated as to evince a willful intent to injure.’
Beard, at 251-252.

The Court went on to explain that because “the ultimate altercation was spontaneous and impulsive” §42-9-60 was inapplicable. See Kinsey at 182. The Court held: “If an altercation is spontaneous, impulsive, instinctive, or otherwise lacking a deliberate or formed intention to do injury, the statutory defense is inapplicable.” See Kinsey at 181.

Even if this Court were to assume that the Claimant was the aggressor in an altercation with the driver, there is no evidence that such an altercation was premeditated and the product of some deliberate and formed intent on the part of the Claimant as opposed to a spontaneous altercation. As Kinsey holds, so long as an altercation was spontaneous and impulsive, §42-9-60 is inapplicable. Thus, even under the employer’s view of the facts, the case is compensable.

Specifically, the Supreme Court found on the facts in Kinsey where the Claimant’s injuries were the product of a fight, where the Claimant was the aggressor, and where the Claimant had violated a direct order by a supervisor to leave, the Claimant’s injuries were compensable because they were not a product of a willful intention to injure someone but rather the result of a spontaneous and impulsive altercation. See Kinsey at 181-182.

In the case at bar, the Supervisor, Mr. Baxley, specifically testified:

Q. Let me ask you this, was there anything at any point in this thing that indicated to you that Mr. Shelley had a premeditated intention to go up there and injure this driver?

A. No....

(Single Comm. Hrg. Tr., p. 113, line 24 - p. 114, line 3).

Certainly, every employer in South Carolina has a company policy that prohibits fighting on the job. Every fight that occurs on the job occurs in violation of the employer’s prohibition. Nevertheless, our Supreme Court has held that injuries that result from impulsive or spontaneous

altercations, albeit in violation of employer directions, arise out of and in the course of employment are compensable.

As the Supreme Court has held with regard to horseplay:

It is common knowledge from universal experience that when men are gathered together at work they are given to pranks [or, here, altercations] which sometimes result in injuries, as here; and it is one of the anticipated risks of employment... The Claimant's presence in the factory in association with other workmen involved exposure to the risk of injury from the careless acts of those about him... Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service ...

Allsep v. Daniel Construction Company, 216 S.C. 268 (1950).

The Claimant worked in a factory around other men. His participation in a spontaneous altercation with one of those men over the performance of the job, albeit in violation of the employer's established prohibition against fighting, or in violation of the employer's direction instruction to cease the altercation and leave, is part of the risk associated with the job where "men are gathered together to work" and is compensable, as the Supreme Court has held in Kinsey.

II. THE COMMISSION ERRED IN FAILING TO FIND THAT THE CLAIMANT SUFFERED AN INJURY ON THE JOB.

The Commission erred in failing to find the Claimant suffered an injury on August 10, 2013.

The Defendants Form 51 Answer indicated: "Defendants note there is no doubt Claimant sustained some injuries on the date in question, however, the evidence currently in existence reveals Claimant was the instigator of an altercation." (Form 51).

There was a dispute between the parties as to whether the Claimant struck was struck by a mallet and fell to the ground by the side of the truck or whether he fell from the truck when the driver opened the door. There is no dispute, as the Defendants' admit in their Form 51 Answer, that Claimant sustained an injury as a result of the fall.

Of course, there is also disagreement as to whether the injury arose out of and in the course and scope of his employment within the meaning of the Workers' Compensation Act, and that disagreement is the focus of the hearing, the Order, and of the Appellant's brief hereinabove.

However, there is no dispute the Claimant suffered an injury on August 10, 2013, on the Employer's premises and the Commission erred in failing to find so.

III. THE HEARSAY STATEMENTS OF THE TRUCK DRIVER, ALBERT MCNEIL, SHOULD HAVE BEEN EXCLUDED.

In pre-trial, the Defendants offered the written statement of Albert McNeil in Mr. McNeil's absence. (Order, p. 4). Claimant objected on hearsay grounds. The defense cited as an exception, SCRE Rule 803(1), and the Commission overruled the objection.

Rule 803(1) provides that hearsay evidence is admissible even where the declarant is available as a witness if it is the product of a present sense impression that is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." (SCRE Rule 803 (1)) (emphasis added).

This statement prepared by the truck driver was made and signed by him at 8:50 a.m. (Def. Exh. No. 1). First aid was called, shortly after the incident, at 6:25 a.m. (APA No. 5, p. 112). Thus, the statement was made 2 hours and 25 minutes after first aid was called; and, therefore, at least 2 hours and 25 minutes after the incident.

In construing the term "immediately thereafter", our courts have held that:

There must be some evidence showing the timing of the event in relation to the statement. State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999), fn. 4. The statement was usually admissible if it were made while the declarant was actually perceiving the event. See, e.g., Marks v. I.M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938). The Court has also permitted a short time lapse. See, e.g., Lazar v. Great Atlantic & Pacific Tea Co., 197 S.C. 74, 14 S.E.2d 560 (1941) (statement about five minutes after the event admissible). However, declarations made

considerably after the event or condition have generally been excluded. See, e.g., Marshall v. Thomason, 241 S.C. 84, 127 S.E.2d 177 (1962) (statement about thirty minutes after the accident); State v. Burroughs, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (ten hours later). Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993); United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985); Hilyer v. Howart Concrete Co., 188 U.S. App. D.C. 180, 578 F.2d 422 (1978) (15 to 45 minutes later); Cardenas v. State, 787 S.W.2d 160 (Tex. App. 1st Dist. 1990); State v. Verrinder, 161 Vt. 250, 637 A.2d 1382 (1993). It was believed that if the statement was made too long after the event the declarant would have time to reflect and make a more self-serving statement, which would not have the same circumstantial guarantees of trustworthiness. Marshall v. Thomason, supra; Wilson v. Childs, supra. Danny R. Collins, South Carolina Evidence, 573 (2nd Edition 2000).

Thus, South Carolina Courts have, under Rule 803(1), excluded statements made 30 minutes after an incident or later, see, State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999),(on the theory that a statement made too long after the event allowed the declarant to reflect and make a self-serving statement).

Here, that's exactly what happened and the statement made at least two hours and twenty-five after the incident, should have been excluded as hearsay.

CONCLUSION

It was undisputed in the case at bar that the Claimant suffered an injury on August 10, 2013, when he fell from the side of the truck driver's vehicle on the Employer's premises during the course of an altercation with a truck driver, after having been directed to "go ahead and leave" by his supervisor.

The Commission found that "disobeying a direct order and instruction of his supervisor took the claimant outside the course and scope of his employment," and, therefore, found the case was not compensable. This finding is in error.

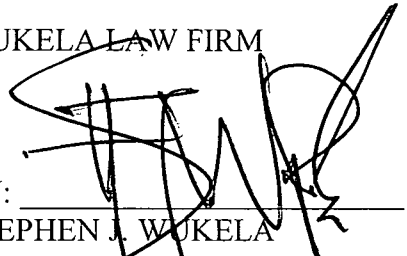
It is clear from the precedent set by Williams v. South Carolina State that if the Claimant had

fallen and been injured in the parking lot while leaving the workplace, such injuries would be compensable as in the course and scope of his employment. Similarly, pursuant to Kinsey v. Champion American Service Center, 268 S.C. 177, 180, if the Claimant had left the building and gotten in a fist fight in the Employer's parking lot, the case would be compensable so long as the altercation was spontaneous, impulsive, instinctive, or otherwise lacking deliberate, informed intent to do harm.

Here, the Claimant was on the Employer's premises and was involved in an altercation that, by the supervisor's admission, was not the product of any premeditated intent on behalf of the Claimant. Therefore, the Commission's Order was in error and should be reversed.

Respectfully submitted,

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January 15th, 2015

THE STATE OF SOUTH CAROLINA
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SC WORKERS' COMPENSATION COMMISSION

WCC File No. 1311681

Anthony Shelley, Claimant, Appellant,

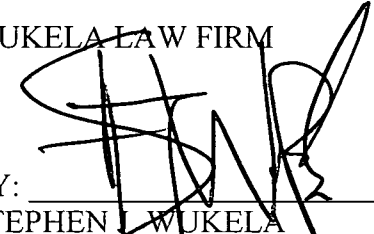
v.

RockTenn, Employer, and
New Hampshire Insurance Company, Carrier, Defendants/Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief on RockTenn and New Hampshire Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on January 13th, 2015, addressed to their attorney of record, Grady Beard, PO Box 11449, Columbia, SC 29211.

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