The State of South Carolina
In the Court of Appeals

Appeal from S.C. Worker's Compensation Commission
Appellate Panel

Susan S. Barden, Commissioner
Avery B. Wilkerson, Commissioner
Gene McCaskill, Commissioner

W.C.C. File No. 1203664
Appellate No. 2013-001778
S.C. Ct. App. Op. No. 2015-UP-041, filed January 21, 2015

Nathalie I. Davaut,

Employee, Claimant, Appellant,

v.

University of South Carolina,
and State Accident Fund,

Respondents.

PETITION FOR REHEARING

This workers' compensation case arises from a work-related accident that occurred when the Claimant, an employee of the University of South Carolina at the USC- Lancaster campus, was struck by a truck as she was walking from her employer's building across a public street to her car which was parked on the Employer's property. The Workers' Compensation Appellate Panel denied benefits based on a finding that the Claimant did not suffer an injury arising out of and in the course of her employment because she was injured on a public street not controlled by the Employer and she made the choice to park in a lot that required her to cross the street. In affirming the denial of benefits, this Court has overlooked

and misapprehended the undisputed facts and relevant case law precedent in the following particulars:

1. The Court misapprehends the undisputed, relevant facts regarding the Claimant's actions in parking in the Carole Ray Dowling Center lot on the north side of Hubbard Street.

a. The Court misapprehended or overlooked the testimony of the Dean of USC-Lancaster that faculty members are allowed to park in the parking lot across the street and that they regularly do so on busy days, such as Tuesdays, and in any event, how often faculty park in that lot is wholly irrelevant to the issue presented.

b. The fact that the assistant librarian testified that the parking lot at the Carole Ray Dowling Center "meant nothing to [him] before the accident" is wholly irrelevant to the issue presented.

c. The Court's statement that "all faculty parking was located on the south side" is not supported by the undisputed evidence in this Record, and such fact, if true, would be wholly irrelevant to the issue presented.

2. The Court misapprehends or overlooks the rulings in the Supreme Court's opinion Williams v. South Carolina State Hospital, which apart from any factual distinctions, fully support the proposition that at the time of the accident, she had not left the Employer's premises yet, and she still was in the course of her employment while walking to her car in the University lot, because she had yet to access the ability to exit the employer's property.

a. The Court overlooked the ruling in Williams that a claimant is the course of her employment if she is in a reasonable margin or time ***and space*** necessary to be used in passing to and from the place where she has been conducting her work;

b. The Court overlooked the ruling in Williams that an injury arises out or and in the course of her employment where she is be injured while passing from her work ***over the premises of another*** in such proximity and relation as to be in practical effect a part of the employer's premises.

3. The Court misapprehends or overlooks the underlying facts and legal premise of the decision in Howell v. Pac. Columbia Mills, 291 S.C. 469, 474, 354 S.E.2d 384, 386 (1987), wherein the Court specifically declined to consider the issue presented in this case.

A. ***The Undisputed Fact is that the Claimant was properly parked in a lot authorized for faculty parking.***

First, the Court's statement that "all faculty parking is located on the south side of Hubbard Drive" is not supported by the undisputed evidence and, in fact, conflicts with the finding of the Commission. The Commission found: "The Employer did not assign parking to staff/faculty or dictate what parking lots could be used by staff or faculty and the selection of parking was left to the discretion of employees." [ROA 4.]

The Claimant does not have an assigned, reserved faculty parking spot designated for her personal, exclusive use. [ROA 110.] While there are designated faculty parking spaces in the University faculty/student lot on the south-side of Hubbard Drive nearest to the Claimant's office in the Medford Building, there are only a limited number of spaces specifically designated for faculty. [ROA 110.] Further, the Court overlooked the testimony of the Dean of USC Lancaster that the parking lot on the north side at the Carole Ray Dowling Center, owned and maintained by the University, does not have any designated faculty spaces, but it is provided for ***faculty***, as well as staff, students and the general public having business on the campus. [ROA 194, 202.] Thus, no inference should be drawn that the Claimant did not park in a lot where she was not authorized to park.

Second, the Court's reliance on the Claimant's testimony about the frequency of parking in the Carole Ray Downing Center lot on the north side of Hubbard Drive is taken out of context. The Claimant testified:

Q: BASED ON YOUR -- ON WHAT YOU'VE SEEN, DO OTHER FACULTY MEMBERS USE THAT LOT WHERE YOU PARKED THAT DAY?

A: SOMETIMES, PROBABLY NOT VERY OFTEN. [ROA 39:6-9]

The Court overlooked the testimony of the Dean of the school that they do not have enough faculty parking on the south-side of Hubbard Drive, during certain times of day and days of the week, particularly on Tuesdays and Thursdays. He testified that on those busy days, faculty and staff members regularly use the parking lots on the north-side of Hubbard Drive, where Claimant parked her vehicle on that Tuesday, the day the accident: "Not unusual at all for faculty members or a staff member to park in this parking lot on the west side of Carol Ray Dowling. I have seen faculty members and staff members park there on Tuesdays and Thursdays especially." [ROA 193:4-10.]

While the assistant librarian testified that the lot across the street "never meant anything to him," his statement must be considered in context of his entire testimony, including the fact that he was not familiar with the parking situation during the time of day that the Claimant arrived on campus (10:45 am). Namely, he worked a 5-9 shift and did not arrive at work until approximately 4:45 pm, and he most always finds an empty parking space in the lot closest to the Medford building. [ROA 261, 263.] He further testified that while he had never parked in the lot across the street, he knew that it was available to staff. [ROA 249:17-23; 256:19.] On this point, the assistant librarian's testimony as to his personal parking habits, as cited by the Court, simply cannot support the Commission's conclusion that the Claimant did not suffer an injury arising out of and in the course of her employment. However, of note is the fact that this same library assistant testified that the lot closest to the

Medford building is often full – testimony fully consistent with that of the Dean as discussed above. [ROA 248:19-22.]

Third, Court has overlooked the undisputed facts that on the morning of the accident, a Tuesday, the Claimant looked for but was unable to find any available spaces in that on the south side closer to her building. Only then did she drive to the next closest University parking lot across the street where she was able to find a space and parked. [ROA 108.]

Thus, to clarify any inference that the Claimant's made an inappropriate or unauthorized choice in parking in that lot, the undisputed testimony from the Dean was that there is not sufficient faculty parking in the south-side lots and that faculty and staff are allowed to use the parking lot on the north-side – which they regularly do particularly on busy Tuesdays, such as the Tuesday of this accident. While the north-side parking lot did not have any faculty designated spots, faculty was permitted to park in any available space in that lot. So the Claimant did not violate any Employer directive, and her right to choose was authorized under the Employer's parking policy and practices.

B. The fact that the Claimant made a discretionary choice as to which available University lot she parked her car in when she arrived at work on the day of the accident does not sustain the denial of benefits.

The Commission based its denial, in part on the facts that there were other University parking lots on the south-side of Hubbard Drive and the Claimant made the choice to park in the north-side lot without first driving through all the south-side lots to try to find an available faculty designated space. However, an employee's exercise of discretion as to where to park from multiple authorized options is not a disqualifying fact. The U.S. Supreme Court – as relied upon by the S.C. Supreme Court in Williams – has stated that the relative safety of a worker's choice of route arriving at work (and logically, also leaving work) is not relevant. Bountiful Brick Co. v. Giles, 276 U.S. 154, 157-58 (1928); *see also* Knight Rider Newspaper

Sale, Inc. v. Desselle, 176 Ga. App. 174, 175, 335 S.E.2d 459 (Ct. App. 1985)("the parking lot was provided by the employer for the convenience of the employer and of the employees, who were encouraged to use the lot. It is immaterial that the appellee was not required to park in the lot. He did so on this occasion.").

Allowing such a "choice" factor to disqualify a worker from benefits would be impracticable and unreasonable. In this case, would the Commission require the Claimant have to prove which parking lots she drove through or how many times she circled the parking lots looking for a space south of Hubbard Drive? Would the Commission be allowed to deny coverage on the reasoning that the Claimant could have arrived earlier to find a parking spot in the lot adjacent to her office building? These are not relevant or practical considerations. The undisputed facts are that the Claimant was injured while walking in the crosswalk from her worksite to her Employer's parking lot – where she was authorized to park -- at the end of her work day, and she is entitled to workers' compensation benefits.

C. The Claimant was still in the course of her employment while walking across the public street from her Employer's building to where her car was parked in her Employer's lot because she had yet to access the ability to exit her Employer's property.

The Claimant maintains that she had not left the Employer's premises yet, and she still was in the course of her employment while walking to her car in the University lot, because she had yet to access the ability to exit the employer's property. In support of her argument, the Claimant relies upon the analysis that can be found in Williams v. South Carolina State Hospital, 254 S.C. 377, 140 S.E.2d 601 (1965). This Court has summarily rejected the Claimant's reliance upon Williams as being without merit because the claimant there was

injured on the employer's premises while walking to her car.[1] While the facts are different, the analysis is comparable and supports this Claimant's contentions.

In Williams, the employee was injured when she slipped and fell while walking from the building where she worked to an automobile parking area located on the hospital premises, and the employer contended that the going and coming rule applied. The Court was addressing a question of whether the claimant worker had already "left work" and was "going" on her way to her car, and found the injury compensable, stating: "The act of claimant in walking from the building where she worked to the parking area was just as much a reasonable incident to her leaving the place of her work as walking from the ward where she worked along a hallway to the door of the building." 140 S.E.2d at 603.

While the claimant was walking on her employer's property to her car, that specific distinguishing fact does not negate the applicability of the Williams' decision in this case. In addressing the specific question presented to in that appeal, the Court articulated several propositions that are relevant and applicable to the facts of this case:

- '[E]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done.'

- 'If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance.'

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[1] This Court relies upon Medlin v. Upstate Plaster Serv., 329 S.C. 92, 96, 495 S.E.2d 447, 450 (1998). However, that case is inapposite because the Court was addressing the first "transportation" exception to going and coming rule where the facts were that the employer had provided transportation to the employee that was directly related to the work of employer.

140 S.E.2d at 603 (quoting from Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928)). This Claimant was within a reasonable margin of both time and space necessary to be used in leaving her work that night. While Hubbard Drive was not her employer's premises, the evidence establishes – as discussed above – that she had the express consent of her employer to park in the Carole Ray Dowling Center lot and thus the implied consent to cross the public street to get to/from her car. Thus, under the analysis set forth in Williams, Hubbard Drive was the "premises of another" but in such proximity and relation as to be in the practical affect a part of USC's premises.

The Commission and this Court rely upon the Court's decision in Howell v. Pac. Columbia Mills, 291 S.C. 469, 474, 354 S.E.2d 384, 386 (1987), wherein the Court sustained the denial of benefits to an employee injured in a public road when her husband dropped her off for work across the street from the employer's premises. However, the Court's decision in that case does not dictate the denial of benefits in this case. Notably, although the claimant asked the Court to adopt a "divided premises rule" as it relates to an employee going between an employer-maintained parking area and the employer's place of business, the Court distinguished the facts and declined to consider the issue: "We need not consider this under the facts of the present case because appellant had never even entered the parking area that was maintained by the employer. Appellant was hit after she got out of her husband's car on a public street while on her way to work."

Whether it would be considered adopting a new rule or simply application of the general principles enunciated in Williams, the Claimant urges the Court to reconsider and find the injury compensable because she still was in the course of her employment while walking to her car in the University lot, because the public road was, as a practical matter, still a part of her Employer's premises as she had yet to access her car in order to exit the

Employer's property. Claimant would urge this Court to reconsider such examples of the long line of cases which reflect the guiding principle that undergirds the entire workers' compensation system – namely, that workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act."

As discussed in the Claimant's Brief, in Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 323-24, 108 S.E.2d 409, 410 (1959), the employer argued that benefits should be denied to an employee struck while crossing a street on his way to work under the going and coming rule. In finding compensability, the Court followed the precept that "doubts are to be resolved in favor of compensability," *id.* at 412, and found that the rule did not apply, stating:

> The crossing of the street thereby became incidental to the employment and injury there incurred was in the course of his employment and arose out of it. The street became, for the time being, a part of respondent's work environment; he was not a mere member of the public, traveling upon it.

Id. at 410-11. This Claimant was not a mere member of the public crossing Hubbard Drive, rather, in crossing the street to a parking lot provided by her Employer, she was in the course of her employment. To further follow the reasoning of the Court, when the University placed parking lots on the north-side of Hubbard Drive which requires the Claimant to across a public road to reach his/her car from their worksite, it was the implied direction of the employer to him to cross the street.

CONCLUSION

As recently as last month, the Supreme Court restated the fundamental premise that underlies all of workers' compensation law: "Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed.

Nicholson v. S.C. Dep't of Soc. Servs., No. 2014-000329, 2015 WL 161719, at *1 (S.C. Jan. 14, 2015). The Commission's decision, as affirmed by this Court, to deny benefits because she was crossing a public street and she choose to park on the north-side of Hubbard Drive does not serve the beneficent purpose of the Act.

The undisputed facts are that there was no assigned parking, the Claimant only "chose" to park in that lot because the lot next to her building was full, she was authorized to park in that lot, and she used the designated crosswalk to across the public road to get back to her car immediately at the end of her workday. Under the principles in Williams, she was in a reasonable margin or time and space necessary to leave work, and she was passing from her work over the premises of another in such proximity and relation as to be in practical effect a part of her Employer's premises.

WHEREFORE, based on the foregoing and all the arguments made in the Appellant's Brief, the Claimant respectfully requests that the Court reconsider its decision, and reverse the Commission's decision and remand this matter for the award of benefits to which she is entitled under the Workers' Compensation Act.

Respectfully Submitted,

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February 4, 2015

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Certificate of Service

I certify that I have served the Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2015, to the Counsel of Record, as listed below:

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February 4, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Nathalie I. Davaut v. University of South Carolina and State Accident Fund
WCC File No. 1203664
Appellate No.: 2013-001778

Dear Ms. Kitchings:

Pursuant to Rule 240, SCACR, enclosed for filing is my original and six copies of Petition for Rehearing along with my filing fee of $25.00. Also enclosed is the original and one copy of the Certificate of Service evidencing that I am serving the Petition for Rehearing upon Counsel for the Respondent by copy of this letter. Please file the original and return the clocked copy to me.

Sincerely,

Paul L. Reeves
Attorney at Law

PLR:jer
Enclosures

cc: Paul L. Hendrix, Counsel for Respondents

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