STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 19 2015
SC Court of Appeals

Appeal from South Carolina
Workers Compensation Commission

Case No. 2013-001778

Nathalie I. Davaut, Employee, Claimant, ... Appellant,

v.

University of South Carolina
and State Accident Fund, Defendants, ... Respondents.

RESPONDENTS' RETURN TO PETITION FOR REHEARING

Paul L. Hendrix, Esquire
S.C. Bar No.: 64217
Jones & Hendrix, P.A.
50 Applewood Lane
Spartanburg, South Carolina 29307-2225
(864) 583-5577
Paul@sccompdefense.com

STATEMENT OF THE CASE

This matter comes before the Court upon a Petition For Rehearing filed by the Appellant, Nathalie I. Davaut. This case arose as a result of a motor vehicle versus pedestrian accident that took place on the late evening of February 16, 2012 when the Appellant was struck while crossing a public street by a third party that was charged as being at fault in the accident. At the time of the accident, the Claimant was in a public crosswalk that was not owned, constructed, or maintained by the University of South Carolina, the Respondent named herein.

Following a Hearing on the merits of the claim, the Single Commissioner found that the Appellant had failed to prove an injury by accident arising out of and in the course and scope of her employment and denied the claim in an Order dated November 6, 2012. The Appellate Panel unanimously found that the Claimant had not sustained an injury by accident within the meaning of the Workers Compensation Act and denied the claim by Order dated July 22, 2013.

Following oral arguments in the case, this Court affirmed the Decision and Order of the South Carolina Workers' Compensation Commission by Order dated January 21, 2015. The Respondents maintain that the Order of this Court properly applied the law to the facts of this claim and correctly affirmed the Order of the South Carolina Workers' Compensation Commission which found that the Claimant did not suffer an injury arising out of and in the course of her employment.

ARGUMENTS

I. THE COURT DID NOT MISAPPREHEND THE FACTS REGARDING THE CLAIMANT'S ACTIONS IN PARKING IN THE CAROLE RAY DOWLING CENTER LOT ON THE NORTH SIDE OF HUBBARD DRIVE.

In support of her Petition, the Appellant asserts that this Court misapprehended the undisputed, relevant facts regarding the Claimant's actions in parking in the Carole Ray Dowling Center lot on the north side of Hubbard Drive. The Appellant then asserts that the Court's statement that "all faculty parking is located on the south side of Hubbard Drive" is not supported by the undisputed evidence. This assertion is completely without merit. It is undisputed that the only faculty designated parking was located on the south side of Hubbard Drive which would not have required the Claimant to cross Hubbard Drive at all. As found by the South Carolina Workers' Compensation Commission, the Claimant's accident resulted because of the Claimant's discretionary choice to park in the parking lot located on the north side of Hubbard Drive that did not contain any faculty designated parking spaces. (R. p. 4, Appellate Panel Order - Finding of Fact No. 14). . To quote the Claimant, "I decided to just park the car, **even though it wasn't faculty parking**, to park the car there instead of trying to go all the way across campus to see if there were any other faculty spots available." (R. p. 108, lines 7-17).

The Claimant also argues in her Petition that the Employer somehow dictated that she use the parking lot that she elected to use on the date of her accident because Tuesday was a busier day of the week than normal implying that there was nowhere else to park. This assertion by the Claimant is speculative at best. By the Claimant's own admission, she never checked any of the other parking lots on the south side of Hubbard Drive which also contain faculty designated

parking. When asked at the Hearing if other faculty ever parked in the parking lot she elected to utilize on the day of her accident on the north side of Hubbard Drive the Claimant testified "sometimes, probably not very often". (R. p. 39, line 9).

The Claimant also asserts that the Court misapprehended the testimony of the assistant librarian. Mr. Helwer, the Assistant Librarian, testified that prior to this accident the parking lot used by the Claimant meant nothing to him because there were always available spots in the other parking lots located on the south side of Hubbard Drive. (R. p. 261, lines 1-4). Mr. Helwer also testified that he always parked in the lots on the south side of Hubbard Drive designated for faculty because it was his understanding that that was what he was supposed to use since he was staff at the University. (R. p. 259, lines 10-12).

The Claimant also asserts that the Court 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 on the south side of Hubbard Drive. This assertion ignores the Claimant's very testimony on this issue. When questioned about this very issue the Claimant admitted, "I decided to just park the car, even though it wasn't faculty parking, to park the car there **instead of trying to go all the way across campus to see if there were any other faculty spots available**." (R. p. 108, lines 7-17).

The Claimant's Petition further alleges that the Claimant was using a "designated crosswalk" at the time of her accident. The undisputed facts in this case reflect that there are three crosswalks on Hubbard Drive which were owned, constructed and maintained by the City of Lancaster. The University of South Carolina does not exercise any control over the crosswalks or Hubbard Drive. (R. p. 166). All traffic control, ticketing, and accident investigations relating to Hubbard Drive is conducted by the City of Lancaster exclusively. (R. p. 179).

In short, the Court properly ascertained the testimony offered and the admissions made in this case in reaching its decision that the findings of the South Carolina Workers' Compensation Commission were supported by substantial evidence. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence. Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E. 2d 407 (1991). Where there is conflicting evidence, the findings of the Commission are conclusive, Miller v. State Roofing Company, 441 S.E. 2d 323 (1994), and when factual findings are supported by substantial evidence, analogous to a jury's findings of fact on disputed issues, the Commission's conclusions must be affirmed. Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E. 2d 613 (1986). Final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Ford v. Allied Chemical Corp., 252 S.C. 561, 167 S.E. 2d 564 (1969).

II. THE CHOICE MADE BY THE CLAIMANT ON THE MORNING OF HER ACCIDENT IS RELEVANT.

The Claimant argues in her Petition that the fact that she made a discretionary choice as to where she decided to park on the morning of her accident has no bearing on whether her accident is compensable. This assertion is squarely refuted by the Court's decision in Howell v. Pacific Mills, 291 S.C., 469, 354 S.E.2d 384 (1987). In Howell, the Claimant was dropped off by her husband in a crosswalk which connected the parking lot to one of the entrances to the plant where she worked. The Claimant was struck while in the crosswalk and injured. The Court found that the Claimant did not sustain an injury arising out of and in the scope and course of her employment. In rejecting the Claimant's argument that crossing the street in the crosswalk where she was injured was an implied requirement in her employment the court noted the following:

> Appellant contends that the circuit court erred in affirming the full commission's determination that her case does not fall within the exception stated above. We disagree. The Commission found that the appellant failed to establish an implied requirement in her contract of employment that she cross the street in the crosswalk where the accident occurred. The employer exercised no control over which route appellant chose to use in coming and going to work. On the night that the accident took place, her husband just as readily could have let appellant out on the mill side of Heyward Street. Appellant contends that, since "no parking" signs were located on the mill side of Heyward Street, the only place for a person being driven to work to legally exit a car would be on the parking area side of the street. Evidence in the record shows that employees were regularly picked up and dropped off on the mill side of the crosswalk. In fact, it is lawful for passengers to be picked up or discharged at a crosswalk or in front of "no parking" signs. S.C. Code Ann. Section 56-5-2530. Appellant was plainly free to cross Heyward at many points or not to cross it at all.

Howell, 291 S.C. at 472, 354 S.E.2d at 385.

The Courts discussion in Howell, makes it clear that an employee's discretion or choice is not only a relevant factor, but a critical one, in applying the going and coming rule and the exceptions to same. In the case currently before the Court, the Claimant was free to cross Hubbard Drive at any of three crosswalks constructed and maintained by the City of Lancaster or not to cross it at all. To quote the Claimant "I decided to just park the car, **even though it wasn't faculty parking**, to park the car there instead of trying to go all the way across campus to see if there were any other faculty spots available." (R. p. 108, lines 7-17). As found by the South Carolina Workers' Compensation Commission, the Claimant's accident resulted because of the Claimant's discretionary choice to park in the parking lot located on the north side of Hubbard Drive that did not contain any faculty designated parking spaces. (R. p. 4, Appellate Panel Order - Finding of Fact No. 14). The Claimant could have decided to take the time to locate a faculty designated parking spot, all of which are located on the south side of Hubbard Drive, and her accident would have

never occurred.

III. THE CLAIMANT'S CONTINUED RELIANCE ON THE CASE OF WILLIAMS V. SOUTH CAROLINA STATE HOSPITAL IS MISPLACED.

The Claimant continues to argue that the case of Williams v. South Carolina State Hospital, 254 S.C. 377, 140 S.E.2d 601 (1965) is controlling under the facts of this case. In Howell, the Court specifically rejected the argument advanced by the claimant that the case was on all fours with Williams v. South Carolina State Hospital, stating "This contention is without merit. In Williams, the claimant was injured on the employer's premises. In the present case, appellant was injured on a public street." Howell, 291 S.C., at 474, 354 S.E.2d at 386. This is the very argument advanced by the Appellant herein.

In Williams, the Employer owned the street where the Claimant's injury occurred, the Employer owned the sidewalk used by the Claimant when walking to and from her car and specifically designated the parking area used by the Claimant as parking for nurses. In the case currently before the Court it is undisputed that the City of Lancaster owns and maintains Hubbard Drive where the Claimant's accident occurred and the City of Lancaster constructed and maintained the cross walk where the Claimant's accident occurred. It is also undisputed that **all** faculty designated parking is located on the south side of Hubbard Drive and does not require crossing Hubbard Drive at all. The parking lot used by the Claimant on the day of her accident was open to the general public and did not contain any faculty parking.

The Claimant also argues that the Supreme Court's decision in Howell v. Pacific Columbia Mills does not support a denial of this case. In Howell, the Supreme Court rejected a Claimant's attempt to argue one of the five exceptions to the going and coming rule after being injured in a

crosswalk located on a public street between an Employer owned parking lot and the plant. In that case, the only Employer owned parking lot was on the other side of a public street that ran in front of the plant. In rejecting the Claimant's arguments that her claim was compensable, the Court noted that the Claimant was plainly free to cross Heyward Street at any point or not to cross it at all. The same is true in the case at hand. The Claimant was free to cross Hubbard Drive in any of the three

The Claimant argues that the Court's decision in Howell v. Pacific Mills, 291 S.C., 469, 354 S.E.2d 384 (1987) does not apply to the facts of the case currently before this court because the Claimant in Howell was never on the premises of the Employer before she entered the crosswalk on the public street where she was injured. A review of the Howell decision reflects that it is analogous to the case currently before this Court. While the Court in Howell noted that the Claimant had not entered the parking lot across from the plant it did so in a discussion wherein the Court was summarily dismissing the "divided premises rule" argument advanced by the Claimant in that case.

In rejecting the claimant's argument that crossing the street in a crosswalk where her injury occurred was an implied requirement in her contract of employment, the Court in Howell stated as follows:

> The Employer exercised no control over which route the Appellant chose to use in coming and going from work...Appellant was plainly free to cross Heyward at many points or not to cross it at all. The logic behind Appellant's argument appears to be that since she had to cross Heyward Street to get to the mill and since there was a crosswalk in front of one entrance, it was an implied requirement of her employment that she cross the street on the crosswalk. Any injury occuring in that crosswalk, therefore, is compensable. There would be nothing to prevent this line of reasoning from being extended to mean that all Employees must leave home in order to come to work, coming to work is an implied requirement of their employment. All accidents occuring on the way to work are compensable. This kind of reasoning would

permit the exceptions to swallow the rule.

Howell, 291 S.C. at 472, 354 S.E.2d at 385.

In her Petition, the Claimant continues to assert that she was "in the course of her employment" because her path from her Employer's office building to her Employer's parking lot necessarily included traversing a public street. This assertion by the Claimant is simply not supported by the evidence of record and was rejected by the South Carolina Workers' Compensation Commission in this claim. As with the claimant in the Howell case, the Claimant herein was free to cross Hubbard Drive at any of three crosswalks constructed and maintained by the City of Lancaster or not to cross it at all. To quote the Claimant "I decided to just park the car, **even though it wasn't faculty parking**, to park the car there instead of trying to go all the way across campus to see if there were any other faculty spots available." (R. p. 108, lines 7-17). It is undisputed that the only faculty designated parking was located on the south side of Hubbard Drive and does not require a faculty member to cross Hubbard Drive at all. As found by the South Carolina Workers' Compensation Commission, the Claimant's accident resulted because of the Claimant's discretionary choice to park in the parking lot located on the north side of Hubbard Drive that did not contain any faculty designated parking spaces. (R. p. 4, Appellate Panel Order - Finding of Fact No. 14).

CONCLUSION

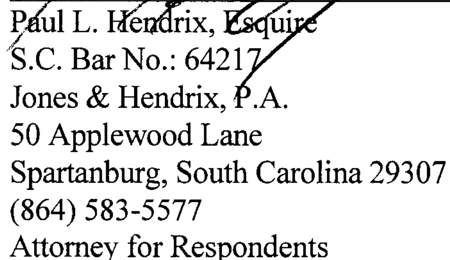
In South Carolina, to be entitled to an award under the South Carolina Workers' Compensation Act, an Employee bears the burden of proving facts that establish an injury by accident that both "arose out of" and "in the course of" the employment. S.C. Code Ann. §42-1-160. After reviewing all of the evidence submitted in this case, the South Carolina Workers'

Compensation Commission concluded that the Claimant had failed to carry her burden of proving an injury by accident arising out of and in the course and scope of her employment.

It is submitted that the Supreme Court's Decision in Howell v. Pacific Mills, 291 S.C., 469, 354 S.E.2d 384 (1987) is directly on point with the facts of this case and dictates the very result reached by the Commission and affirmed by this Court. In Howell, the Court reiterated the general rule in South Carolina which states that an injury sustained by an employee away from the employer's premises while on his way to or from work does not arise out of and in the course of employment. The Decision and Order of the Commission properly applied this rule. The Decision of the South Carolina Workers' Compensation Commission is supported by the substantial evidence of record and was properly affirmed by this Court.

WHEREFORE, Respondents respectfully request that the Appellant's Petition for Rehearing be denied.

Respectfully Submitted,



Paul L. Hendrix, Esquire
S.C. Bar No.: 64217
Jones & Hendrix, P.A.
50 Applewood Lane
Spartanburg, South Carolina 29307
(864) 583-5577
Attorney for Respondents

February 17, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 1 9 2015
SC Court of Appeals

Appeal from South Carolina
Workers Compensation Commission

Case No. 2013-001778

Nathalie I. Davaut, ... Appellant,

v.

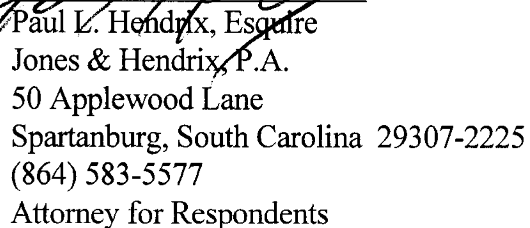
University of South Carolina
and State Accident Fund, ... Respondents.

CERTIFICATE OF SERVICE

I, Paul L. Hendrix, do hereby certify that I have this day served a copy of the Respondents' Return to Petition for Rehearing upon the following person by placing a copy of same in the United States Mail, First Class Mail, properly addressed and with the correct amount of postage affixed thereto:

Paul L. Reeves, Esq.
Blackwell, Trimnal, Reeves, & Myers, LLC
P.O. Box 11126
Columbia, S.C. 29211

Dated this the 17th day of February, 2015.



Paul L. Hendrix, Esquire
Jones & Hendrix, P.A.
50 Applewood Lane
Spartanburg, South Carolina 29307-2225
(864) 583-5577
Attorney for Respondents

JONES & HENDRIX, P.A.
- ATTORNEYS AND COUNSELORS AT LAW -

50 APPLEWOOD LANE
SPARTANBURG, SC 29307-2225

Reply To:
Paul L. Hendrix
Telephone (864) 583-5577 Ext. 122
Facsimile (864) 583-2166
paul@scscompdefense.com

February 17, 2015

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1205 Pendleton Street
Columbia, S.C. 29201

Re: Nathalie I. Davaut v. University of South Carolina, and State Accident Fund.
C.A. No. 2013-001778

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Respondents' Return to Petition for Rehearing on behalf of the Respondents in the above-captioned matter. Also enclosed is the original and one copy of the Certificate of Service, which reflects that Counsel for the Appellant has been served with a copy of the Respondents' Return to Petition for Rehearing. Please let me know if any additional information is needed from our office at this time.

With highest regards, I remain,

Very truly yours,

JONES & HENDRIX, P.A.

Paul L. Hendrix

RECEIVED
FEB 19 2015
SC Court of Appeals

PLH/pcm
Enclosure:
cc: Paul L. Reeves, Esq. (w/encl.)
State Accident Fund (w/encl.)

JONES & HENDRIX, P.A.
- ATTORNEYS AND COUNSELORS AT LAW -
50 APPLEWOOD LANE
SPARTANBURG, SC 29307-2225

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1205 Pendleton Street
Columbia, S.C. 29201