THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No.: 2014-001197

Brenda Oswald,
Employee.....Appellant.

v.

Oswald Law Firm, Employer,
and Norguard Insurance Company, Carrier.....Respondents.

INITIAL BRIEF OF THE RESPONDENTS

Peter P. Leventis
McKay, Cauthen, Settana & Stubley, P.A.
1301 Blanding Street
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES ON APPEAL

I. **DID THE CLAIMANT/APPELLANT SUFFER A COMPENSABLE WORKERS' COMPENSATION INJURY BY ACCIDENT UNDER S.C. CODE ANN. §42-1-160?**

STATEMENT OF THE CASE

The Claimant/Appellant Brenda Oswald was involved in a motor vehicle accident on September 27, 2010 on a stretch of highway 378, when her car was hit from behind by another vehicle. At the time of the automobile accident, the Appellant alleges she was in the course and scope of her employment for her husband's business, the Oswald Law Firm. According to the Appellant, who was the office manager for the Oswald Law Firm, she was driving in between two banks, and had just walked into one of the banks to pick up checks, gotten back in her car, and was on her way, in her car, to another bank to deliver the checks for deposit for the Oswald Law Firm.

The trial Commissioner found, among other things, that the Claimant/Appellant was not a credible witness, and did not believe the Claimant's allegations of where she alleged she was travelling to and form at the time of the motor vehicle accident. The trial Commissioner ultimately ruled that the Claimant/Appellant was not in the course and scope of her employment at the time of the accident, because the Commissioner did not believe her travel was related to work, nor related to the alleged duties the Claimant testified to at the hearing. The single Commissioner alternatively held that even if the circumstances of the Claimant's travel were "partially accurate" as alleged, the claim would still be barred under the "going and coming" exclusion to the Workers' Compensation Act because the according to the evidence the Claimant would have been traveling from a personal location (her home) to an employment location (her work) and no exception

This ruling by the single Commissioner was affirmed in full by the Appellate Panel of the full Commission in its Order dated May 6, 2014.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006).

The judicial review of the Workers' Compensation Commission's appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006).

However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. §1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)). See also *Grant v. Grant Textiles*, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that a reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law)

(reversed on other grounds (*Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)).

ARGUMENT

The Claimant/Appellant essentially makes two points as to why this case should be deemed a compensable workers' compensation injury, and that the Claimant was in the course and scope of her employment at the time of the motor vehicle accident. This first point is the Claimant was in the course and scope of her employment, and therefore the car accident was a work related event, because she was on the cell phone talking business with an insurance agent of the law firm at the moment the accident occurred. The second argument, is that the Claimant was indeed traveling between two banks at the time of her accident – one from which she had just stopped at, walked into, and picked up checks for the law firm – and the second to which she was driving to deliver and deposit those checks at the time her accident took place.

The Claimant's first argument, that she was on the cell phone essentially "talking business" at the time of the accident, and therefore, she is entitled to a finding that the car accident took place during the course and scope of her employment, is indeed a novel one. Nevertheless, this argument is abandon on appeal as this point was not raised and briefed to the full Commission panel of the S.C. Workers' Compensation Commission. (See Gen. the Appellate Brief of Brenda Oswald to the SCWCC Appellate Panel – which does not raise, reference or argue the point that the Claimant was in the course and scope of her employment due to the fact that she was on the telephone with an insurance agent at the time of her car accident).

> South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. *See Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is

> deemed abandoned and will not be considered by the appellate court."). In *Brown v. Theos,* 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct.App.1999), *aff'd,* 345 S.C. 626, 550 S.E.2d 304 (2001), we held that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal: "Brown states in a one sentence paragraph that he had raised an action for 'intentionally negligent and malicious conduct' .... We note Brown's argument is so conclusory that it may be deemed abandoned." (citation omitted).
> *Glasscock Inc. v. U.S. Fidelity and Guaranty Co.* 348 S.C. 76, 81, 557 S.E.2d 689, __ (Ct. App. 2001).

Therefore, the Defendants/Respondents contend this particular issue has been abandoned on appeal. The Claimant/Appellant Oswald not only failed to cite any authority to back up this proposition, but also did not even raise nor argue this particular issue in her appellate brief to the full Commission Panel for consideration. Moreover, the fact that the Claimant was on the cell phone at a place outside of her work, *even if* on a work-related call, would not, in and of itself, make any particular danger of a person's current circumstance (while on the phone), somehow peculiar to her employment relationship with her employer under S.C. Code Ann. §42-1-160.

Even if not abandoned on appeal, Defendants/Respondents would simply contend that by virtue of picking up a cell phone and making a work-related call, an employee cannot turn an otherwise potentially dangerous, non-work related situation – e.g. driving a car, flying in a plane, taking medications with harmful side effects, swimming, skiing, skydiving, hunting, roof cleaning, taking illegal drugs, et cetera – into a work situation for the purposes of receiving workers' compensation benefits. Lastly, it should be noted that the Claimant was found not to be credible in her testimony before the hearing Commissioner. (See Roche Order at p. 9, Finding of Fact No. 9). Lacking an abuse of discretion, the single Commissioner's findings on credibility, which were affirmed by the Appellate Panel, should be affirmed on further appeal. Moreover, the Claimant never challenged or appealed the finding of the single Commissioner, and later the full Commission Panel's affirmation, that she was indeed not credible in her testimony at trial.

The Claimant's second point is that she was indeed traveling between two points of work at the time of her accident. The hearing Commissioner weighed the evidence on this point, and found that the greater weight of the evidence showed that the Claimant was not actually traveling for work when she was allegedly injured in the accident. More to the point, there is clearly substantial evidence in the record to support these findings. Under the applicable standard of review, this alone would mandate an affirmation of the Workers' Compensation Commission's findings of fact as to the Claimant's course of travel at the time she was injured. The going and coming rule exclusion, which is a legal determination, was a secondary alternative finding made by the single Commissioner, assuming *arguedo* that the Claimant's story about her travel was accurate. As noted above, the hearing Commissioner, as affirmed by the Appellate, found the Claimant not to be credible, and this finding has never been challenged on appeal.

The Claimant alleges that at the time of her accident on Sept. 27, 2010 she left from her home in her personal vehicle, then to Burkett, Burkett & Burkett, (Burkett), accountant's for the Oswald Law Firm. Notably, she alleges, she *actually stopped and got out of the vehicle to go inside*. Mrs. Oswald testified that she then left Burkett, and was on her way to another bank, BB&T. (Hearing Trans. p. 29). According to the Claimant, it was during her travel between Burkett and BB&T she was involved in an auto accident when she was rear-ended by another vehicle. This vehicle which rear-ended Mr. Oswald on September 27, 2010 was driven by Mr. Franklin Riggins.

Mr. Riggins, who lives at 2225 Raven Trail Court in West Columbia, SC. Mr. Riggins lives *less than a quarter of a mile* Brenda Oswald, who lives at 2124 Raven Trail, West Columbia, SC. (See Riggins Depo. Trans. at p. 5, line 13; The SCWCC file generally, and Trial Exb. 19 of the Defendants). According to the sworn deposition testimony of Mr. Riggins , Mr.

Oswald was actually travelling directly from her own neighborhood, to whatever final destination she had planned, at the time of her accident. Mr. Riggins testified as follows:

Q: (By Attorney Barton) Immediately after the accident, did Mrs. Oswald tell you where she was coming from?

A: No, sir. I mean, I knew where she was coming from because I had followed her out of the neighborhood. I mean, I was – She had – When she went by the house, I backed out, and I pulled out right behind her, and so, --

(Riggins Depo. at p. 18, lines 19-25)

Q: (By Attorney Leventis) You had followed her out of your neighborhood that morning?

A: Yes, sir.

Q: And when I say that morning, I mean just prior to the wreck, just –

A: Just prior to the accident, yes.

Q: So you actually followed her onto 378?

A: Yes, sir.

Q: And when you say she passed you right before you backed out of your driveway, was that on Raven Trail her car –

A: Yes, sir.

Q: -- passed you?

A: Yes, sir.

(Riggins Depo. at p. 19 line 23 – p. 20, line 11).

This is in direct contravention to Mrs. Oswald's testimony that she was traveling from Burkett to BB&T. Moreover, in further contradiction of the Claimant's testimony (that she was traveling from Burkett to BB&T as opposed to leaving her home). As Mr. Riggins followed Mrs. Oswald onto 378 out of their neighborhood, and ultimately crashed into the back of her, it would have been impossible for the Claimant/Appellant to have left her house, physically stopped at Burkett and gotten out of her car to pick up checks, and still have been run into by Mr. Riggins on 378. The hearing Commissioner weighed this testimony, along with other considerations and found the Claimant's version of events not be credible.

Of note, the Claimant also previously testified that she had not had significant or ongoing problems with her neck from a prior 2008 car accident – or even injured her neck in that accident. (See Hearing Trans. at p. 42). However, the Claimant clearly had significant ongoing issues with her neck according to a letter she wrote to treatment providers in May of 2009 about how very significantly the ongoing neck pain from the 2008 accident had affected her and impaired her ability to work, exercise and other aspects of her daily life, back at that time. (See Defendants' APA's at p. 119).

The Claimant, on page 23 of her deposition stated that she has not worked for the Oswald Law Firm since her September 27, 2010 accident. Nevertheless, she has continually been paid her salary by the firm from Sept. of 2010 up to the March 2013 hearing. According to her husband Billy Oswald's testimony at the hearing, Owner of the Oswald Law Firm, these last 30 months of payments are based upon "accrued sick leave" that the Claimant had built up. (Hearing Trans. at p. 27, lines 11-14). However, the Claimant was also apparently laid off from

the Oswald Law Firm, and received unemployment for 6 months between December of 2009 and up to June of 2010, just a couple of months prior to this accident. (See Hearing Trans. at p. 23, line 22 – p. 24, line3) came back to the firm at double her previous annual salary.

Also, in regards to the Claimant's testimony at her deposition that she had not worked at the law firm since her September 27, 2010, a March 2011 report – six months after the date of accident - references the fact that the Claimant is "back at work as office manager for her husband's law practice but under stress over her husband's illness." (See Defendants APA's at p. 96). (Also see Defendants APA No. 108, dated April 23, 2012, two years after the accident, stating under "Occupation" that the Claimant is a "Real estate manager" and "Office manager for her husband's law firm," listing status as "active," for the answers).

The hearing Commissioner's finding that the Claimant was not credible in her testimony was supported by the greater weight of the evidence in the record, and certainly by substantial evidence. In the first instance, the Commissioner found the Claimant was not credible, and not traveling for work at the time she was injured, and that the Claimant did not carry her burden of proof in showing that her accident fell within the Workers' Compensation Act as a compensable injury.

These findings were not argued in the Claimant's appellate brief to the full Commission, therefore the challenging of such findings is abandon on appeal. *See Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Therefore, on this ground alone, the full Commission's Order should be affirmed, as the Claimant's appellate briefs to the full Commission panel, only argued the issues related to the "coming and going" rule exclusion – not whether the travel was simply not related to work at all,

as found by the trial Commissioner, and affirmed by the Appellate Panel. In the first instance, the single Commissioner did not find the travel compensable because she believed the direct testimony of the other driver, over that of the Claimant, and therefore was un-persuaded by the Claimant's own version of events that she was even traveling between banks in her capacity as office manager.

On these points it is worth citing the Commission's Order(s) at some length:

> 9. That Claimant's sworn testimony at the hearing was not credible due in part to the reasons stated above, and outlined conflicting evidence from her testimony; as well as evidence in the record; the undersigned's own observations of the witness, and specifically in light of the fact that her testimony as to the facts of the accident (such as where she was coming from at the time of the accident) were in direct conflict with a disinterested non-party to the workers' compensation claim, Mr. Franklin Riggins. (See Generally, the Deposition Testimony of Franklin Riggins *vis a vis* the sworn deposition and trial testimony of Mrs. Brenda Oswald) (Hearing Trans. at p. 29; Riggins Trans. at p. 18 lines 19-25; and p. 19, line 23 – p. 20, line 11).
>
> Namely, that Mrs. Oswald testified both in her deposition, and at trial that she was in the midst of going from an accountant's office to a bank at the time of the accident, yet Mr. Riggins, who lives approximately 0.2 miles from the Claimant, stated that he followed Mrs. Oswald out of the neighborhood that morning, and immediately preceding the motor vehicle accident in which he was the other involved driver.
>
> 10. I do not believe the Claimant's version events as to where she was traveling to and from, and her alleged purpose for such travels at the time of the accident which gave rise to her injuries. (See Also, Defendants' APA's at p 102, a July 26, 2011 report for treatment of the Sept. 27, 2010 date of accident checking "no" as to whether or not this "the patient's pain or condition arise as the result of a work related injury or accident.").
>
> 11. The Claimant has the burden of providing by the greater weight of the evidence that the claim is compensable and falls within the Act. No exhibits from the Claimant were provided in the record as to the alleged transaction(s) which took place on September 27, 2010 at Burkett or SCB&T which would corroborate her version of the events or her alleged actions on that date related to

her employment activities at either location. The Claimant has not met her burden of proof under the Act in proving by the greater weight of the evidence that her travel was work related and arose out of or in the course of her employment with the Oswald Law Firm.

Roche Order, Findings of Fact No's 9-11.

Note, that the single Commissioner (as fully affirmed by the Appellate Panel of the Commission) specifically found under Conclusion of Law No. "10" that:"[u]nder § 42-1-160, [Mrs. Oswald] has not met her burden of proof in showing that she sustained a compensable injury arising out of or in the course and scope of her employment with the Oswald Law Firm."

Again, the single Commissioner did not simply find that this accident was barred under the "going and coming" rule, but as a threshold matter that the Claimant failed to prove by the greater weight of the evidence that the accident took place under the circumstances she alleged they did. Underpinning that finding was, that, "[i]n the first instance, [the Commissioner] found the Claimant not to be credible [], and consequently finds the entire trip to be outside the course and scope of employment, as I do not believe her testimony in relation to where she was traveling to and from and why, or that it was work related travel." (See Roche Order Conclusion of Law No. "12" at p. 13). Again, the Claimant does not argue on appeal that the credibility finding was in error.

This credibility finding by the trial Commissioner, as fully affirmed by all three members of the appellate pane, was prefaced, in part, upon the contradictory evidence of an eye witness (and party to the accident), Mr. Frank Riggins, who followed the Claimant out of her own neighborhood that morning before he ultimately wrecked into the back of her on Highway 378 after travelling very briefly out of the neighborhood.

CONCLUSION

These Respondents contend that the Appellate Panel of the Workers' Compensation Commissions and conclusion are supported by substantial evidence in the record, and binding legal precedent or statutes. Moreover, certain legal and factual findings of the single Commissioner and Appellate Panel, which would necessarily need to be overturned in order to make a finding of compensability in this case, namely credibility, and proving that the circumstances of the accident itself fell within the Act have been abandoned on appeal as they were not raised and argued by the Claimant's/Appellant's Appellate Brief to the full Commission and/or the Court of Appeals.

These findings, in addition to the finding that such travel would have further been excluded from the Act under the "going and coming" rule, would all have to have been overturned for this claim to be found compensable. Lastly, the Defendants other legal arguments, as to: *laches*, aggravation of a pre-existing injury; ongoing wage payments; and continued work by the Claimant since the date of accident, are all viable affirmative or mitigating defenses still available to the Employer/Carrier in this claim. For the forgoing reasons, the factual findings, and legal conclusion of the full Commission Order should be affirmed in full by the Court.

Respectfully Submitted,

Peter P. Leventis, IV
McKay, Cauthen, Settana & Stubley
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645
Attorneys for the Defendants/Respondents

Columbia, South Carolina
February 17, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No.: 2014-001197

Brenda Oswald,
Employee.....Appellant.

v.

Oswald Law Firm, Employer,
and Norguard Insurance Company, Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents upon the Claimant/Appellant, by depositing a copy of it in the United States Mail, postage on February 17, 2015, addressed to the attorneys of records respectively Frank A. Barton Esquire, P.O. Box 3972 West Columbia, SC 29170, and H. Wayne Floyd, Esquire, Wayne Floyd Law Firm, P.O. Box 3972, West Columbia, SC 29170.

Peter P. Leventis IV

Peter P. Leventis, IV
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7212
Columbia, South Carolina 29202
(803) 256-4645
Attorneys for Respondents Oswald Law Firm, and NorGuard Insurance

February 17, 2015

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stubley
Janet Brooks Holmes
Peter P. Leventis, IV
Kelli L. Sullivan*

George D. Gallagher*
Temus C. Miles, Jr.
David M. Bornemann
Brandon P. Jones
James E. L. Fickling+
Richard E. Marsh, III
Courtney R. Pawley
Charles A. Kinney Jr.

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

P.O. Box 7217
Columbia, South Carolina 29202-7217

1303 Blanding Street
Columbia, South Carolina 29201

Douglas McKay, Jr.
(1917-2008)

Telephone
(803) 256-4645
Fax
(803) 765-1839
E-Mail
mms@mckayfirm.com
Web
www.mckayfirm.com

*S.C. Certified Mediator
+ Also licensed in N.C.

February 17, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street, Suite 200
Post Office Box 11629
Columbia, SC 29201

Re: ***Branda Oswald v. Oswald Law Firm***
Case No: 2014-001197
Our File No.: 1700-0294

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of Respondents, along with the Proof of Service, in the above-referenced matter. Please return the additional clocked-in copy with the self-addressed stamped envelope included for your convenience.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Initial Brief of Respondents to all parties.

Sincerely,

Peter P. Leventis, IV

PPL/ecs
Enclosures
cc: Frank A. Barton , Esquire (w/encl)
Wayne Floyd, Esquire (w/encl)
Amy Klatt (w/encl)

Law Offices

McKay, Cauthen,
Settana & Stubley, P.A.

Post Office Box 7217
Columbia, South Carolina 29202-7217

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street, Suite 200
Post Office Box 11629
Columbia, SC 29201

1700-0294