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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From the Appellate Panel
South Carolina Workers' Compensation Commission

On Certiorari to the South Carolina Court of Appeals
Unpublished Opinion No. 2012-UP-552
Submitted August 1, 2012 – Filed October 10, 2012
Withdrawn, Submitted and Refiled January 9, 2013

Virginia A. Miles, Employee, ... Petitioner,

v.

Waffle House, Inc., Employer, and Brentwood Services, Inc., Carrier, ... Respondents.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Petitioner, Virginia Miles, is employed as a waitress for the Waffle House. She was injured in the early morning hours of March 14, 2010 when she was assaulted by a Waffle House customer who tried to run her over in the parking lot.

Miles filed a Form 50 (Request for Hearing) on May 5, 2010. [R. p. 1].

On May 17, 2010, Waffle House and its insurance carrier, Brentwood Services, Inc., filed a Form 51 (Employer's Answer to Request for Hearing) denying the claim. [R. p. 5].

A hearing was held before the Honorable Scott A. Beck on July 29, 2010.

On October 5, 2010, Commissioner Beck issued a Decision and Order denying the claim. [R. pp. 11-47]. His primary holding was "Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant's actions leading to her injuries clearly were not within the course and scope of her employment, nor did they benefit Waffle House, the Defendant. [R. p. 43, Finding of Fact 10]. The Single Commissioner also assessed hearing costs against Petitioner holding the case was brought without "reasonable legal grounds." [R. p. 45, Finding of Fact 22].

Miles timely filed a Form 30 (Notice of Appeal) to the Appellate Panel of the Full Commission on October 11, 2010. [R. pp. 7-10].

Arguments before the Appellate Panel were heard on January 18, 2011. The Appellate Panel unanimously affirmed the denial of the underlying claim in a Decision and Order issued on March 23, 2011. By a 2-1 margin, the Appellate Panel reversed the assessment of hearing costs. [R. pp. 48-67].

Miles timely appealed to the South Carolina Court of Appeals on April 18, 2011. The Court of Appeals affirmed the decision below in an unpublished memorandum opinion. Miles v. Waffle House, Inc., Employer, and Brentwood Services, Inc., Carrier, Op. No. 2012-UP-552 (S.C.Ct.App. filed October 10, 2012). Miles filed a Petition for Rehearing on October 21, 2012. The Petition for Rehearing was granted in part and denied in part on January 9, 2013.

STATEMENT OF THE FACTS

Virginia Miles, known as Ginny, is employed as a waitress at the Waffle House at 1198 Broad River Road in Columbia, South Carolina. James Kearse was the store manager.

Miles was hired on October 14, 2008. [R. p. 76, lines 19-24]. She was supposed to go through three days of training at a different location than the store she actually worked in. However, Miles has a medical condition (anxiety, stress, and panic disorder) which creates a problem with being overwhelmed. [R. p. 90, lines 1-8]. She became overwhelmed by the training schedule. She testified, "After the second day I didn't show up the third day nor did I call in. . . [b]ecause I felt that I was being trained so fast and my head filled so fast with stuff that I did not think I could handle it." [R. p. 81, lines 5-15].

The training ostensibly included safety and security training. No manager went through detailed safety and security training with Miles. [R. p. 81, line 16-p. 83, line 25; p. 312]. The only specific training Miles received about security was, "If there was a yellow tag on the back door after dark, do not go out the back door. And if anyone come in to rob the place, give them all the money." [R. p. 84, lines 2-9]. She was not trained in dealing with the situation which ultimately arose in this case. [R. p. 88, lines 3-17]. The other waitress, Lori Green, acknowledged waitresses are not trained for such situations, remarking, "No. Who is trained for that as a server?" [R. p. 177, lines

11-24].

Miles was also told by James Kearse that if someone tried to leave without paying, she was to go outside "To try to get them to pay their ticket if they happen to be walking out the door without paying." [R. p. 87, lines 10-25].

This incident occurred on third shift in the early morning hours of Sunday, March 14, 2010. As this was the Sunday morning of Saint Patrick's Day weekend, the shift was "very busy and very hectic" with a larger than usual number of drunk, unruly patrons. Even before the trouble started, Miles found it "[a] little overwhelming." [R. p. 89, lines 6-25].

Per Waffle House policy, no managers were working on third shift. The cooks, Michael Strong and Mary Summers, were in charge of the store. Also working that night were three waitress: Miles, Brittany Massalou, and Lori Green. [R. p. 86, lines 14-25]. Miles was scheduled to leave at 3:00 or 4:00 a.m., but stayed over because they were busy. [R. p. 88, line 18-p. 89, line 5].

Around 5:00 a.m., an argument broke out among four patrons: two unidentified men and two women: Kelly Mae Howes and Tiffany Gibson. Miles went over to the customers and asked them to calm down as "arguments escalate into fights. I would appreciate it if you hurry up, go ahead and finish, pay your ticket, and leave." [R. p. 91, line 16-25].

Kelly Mae Howes told Miles, you "waited on [me] before and was very nice . . . tonight you are not being nice so you will not get a tip." [R. p. 92, lines 10-14]. Howes stated she would pay both tickets. Miles walked over to other tables to clean them off and told Howes she did not care.

The men paid their bill and went outside. "One antagonized Mike Strong to come outside and fight which Mike did not." [R. p. 92, line 25-p. 93, line 5]. The men then left.

Tiffany Gibson then went outside and got in her car. She was on a separate ticket, so Miles

went outside to tell her she needed to pay her ticket. Gibson told Miles she was looking for the money. Miles then went back inside and continued her side work. [R. p. 93, lines 10-15].

Howes got up out of the booth and had a confrontation with Brittany Massalou. Howes attempted to hit Massalou, but Massalou punched her first. [R. p. 133, lines 5-p. 134, line 11]. Howes then began "causing trouble and starting to vandalize the Waffle House." She started sweeping caddies off the tables with her arms and throwing sauce bottles. [R. p. 96, line 20-p. 97, line 3].

"As soon as [she] saw trouble starting," Miles called 911. [R. p. 94, lines 15-18]. The call began at 5:12:24 a.m. and lasted 15 seconds. She reported a female was throwing stuff everywhere and they needed the police to get there *now*. Miles was obviously frantic and panicked. Screaming can be heard in the background as she makes the call. [R. p. 315 (audio CD)].

Howes then ran outside and got in the car with Gibson.

Miles ran out after Howes and said to Mike Strong that she was "getting the license plate number." [R. p. 133, lines 15-17]. Miles stood behind the car – either to prevent them from leaving until the police arrived or to get the tag number. [R. p. 73, lines 17-21]. Gibson was originally in the driver's seat; but the girls switched places so that Howes was driving. [R. p. 228, lines 10-14].

Lori Green "went outside after [Miles] and attempted to get her to come back inside, but [Miles] refused to do so."[1] [R. P. 51, Finding of Fact 15]. Green then went back inside.

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[1]This is drawn from a finding of fact by the Commission – which itself was based on Lori Green's testimony. Green testified that she went outside, got the license plate number, grabbed Miles's arm and told her to come on. [R. P. 171, line 8-p. 172, line 22]. Green also testified that Massalou handed her the phone during the second 911 call, so if she was outside, it was for a very brief period of time. [R. P. 176, lines 9-11].

Miles was never asked about whether anyone else came outside or tried to have her come in. Given her mental state at the time, she may have been unaware anyone came out. The

"[Miles] got from behind the car, walked around the front, was walking back in, and the girl mashed the gas and went to hit her. So she jumped on the hood. The girl took out of the parking lot."[2] [R. p. 228, lines 10-14]. Miles jumped on the hood of the car to avoid being run over.

Howes, with Miles hanging onto the hood, exited the parking lot and accelerated down Broad River Road. After about a block and a half, she swerved into a Burger King parking lot, throwing Miles onto the pavement. [R. p. 98, line 18-p. 99, line 7]. Miles suffered multiple injuries and was transported to the hospital by ambulance.[3]

Mike Strong got inside his truck, and went down the road, finding Miles lying on the ground at the Burger King. [R. p. 139, lines 2-19].

All of this happened extremely quickly. Miles' call to the police ended at 5:12:39. The 911 operator called back thirteen seconds later at 5:12:52. The phone was answered by Brittany Massalou. At 5:14:09, Massalou – even more panicked and frantic than Miles – screamed and told the police "they have one of our waitresses on the hood of their car." From the time Miles hung up the phone and Massalou told the police Miles was on the hood of the car, only 90 seconds had elapsed. [R. pp. 292-293].

Commission found Miles' "actions were taken without thinking." [R. P. 51, Finding of Fact 12].

[2]This testimony is drawn from Michael Strong's deposition. At the hearing, Strong changed his testimony from his deposition (taken only three days earlier). At the hearing, Strong testified, "A couple waitresses came outside to get Ginny from behind the car, but she would not move." [R. p. 135, lines 2-4]. In the deposition, Strong testified, "She . . . *was walking back in*, and the girl mashed the gas and went to hit her." R. p. 228, lines 10-14]. Strong had earlier testified that immediately before the hearing he and a group of his coworkers had met "to agree what [their] testimony was going to be." [R. p. 125, line 19-page 126, line 2].

[3]The Commission made no findings of fact as to the extent of Miles' injuries and medical treatment. Assuming this Court reverses, the Commission must make those findings on remand.

Miles attempted to return to work on March 26, 2010. She was only able to work one partial shift, before her leg pain forced her to stop working. On the day she worked, James Kearse, the store manager, gave her a Performance Review he had dated March 18, 2010 (four days after the incident). Miles signed the Performance Review on March 26, 2010. [R. p. 314].

STANDARD OF REVIEW

On appeal from an appellate panel of the Workers' Compensation Commission, the Court can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). 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. James v. Anne's Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

ARGUMENT

1. Miles is entitled to workers' compensation benefits because injuries arising from an assault by the Employer's customer arise in the course and scope of the employment as a matter of law.

Ginny Miles was injured when she was assaulted by a Waffle House customer while she was working at Waffle House. Her job as a waitress required her to deal with "rowdy customers." As such, even if she handled the situation badly in the heat of the moment, she was acting entirely within the scope of her employment. See Baggott v. Southern Music, Inc., 496 S.E.2d 852, 330 S.C. 1 (1998)(assault on employee by customer in pool hall arose out of and in the course of employment because the "dispute had its origin in . . . claimant's employment"). Cf. Skipper v. Southern Bell Telephone & Telegraph Co., 271 S.C. 152, 246 S.E.2d 94 (1978) (injury to employee assaulted by another employee growing out of a quarrel about the employer's work arises out of the employment). The Appellate Panel erred by injecting fault into its ruling, finding her "actions were taken without thinking . . . and completely contrary to common sense." [R. P. 43, Findings of Fact 12-13].

Moreover, even if Miles stepped outside the scope of her employment, her actions were entirely for the benefit of Waffle House – in no way can it be said anything she did that night was for her own personal benefit. See, e.g., Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007)(injury incurred removing debris from road compensable even though it was not part of employee's job duties) As such, her injuries arise out of and in the course of her employment with Waffle House. See Shah v. Howard Johnson, 140 N.C.App. 58, 535 S.E.2d 577 (N.C.App. 2000)(employee shot during robbery was injured under "unquestionably compensable circumstances").

A. Miles' actions did not exceed the scope of her employment because as a waitress she was required to deal with rowdy customers.

The legal theory advanced by Respondents is that Miles violated a company policy which took her outside the scope of her employment – specifically a policy against going outside on third shift. As noted below, Miles did not knowingly and intentionally violate any specific and express company policy. Regardless of whether she did or not, any such policy violation did not take her outside the scope of her employment because dealing with rowdy customers is part of her job.

The rule applied by the Commission in this case is "when an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, are not compensable." Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell was acting outside scope of his employment). The Black Court explained:

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act . . . Certain rules concern the conduct of the workman within his sphere of employment, while others limit the sphere itself. A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied. Id., *quoting* Johnson v. Merchants Fertilizer Co., 183 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941).

The application of this rule is important. Even if Waffle House truly had a rule prohibiting going outside on third shift (and actually enforced it), a violation would not take Waffle House employees outside the scope of their employment. An employee who went outside for any purpose – to smoke, to get something out of their car, to take the trash out, even to get a license plate number or ask a patron to pay a ticket – would still be within the sphere of employment. These activities are all

within the normal job of a waitress (or, in the case of smoking, covered under the personal comfort doctrine).

As a threshold issue, there is no evidence Miles ever went outside her own assigned work at all. She was responsible for seeing that her customers paid their tickets. This is not a situation where she left the premises, or was engaged in a personal errand, or intervened in a robbery of a third person. She did not pursue anybody. Nor is this a situation where she placed herself in obvious danger. No reasonable person could expect that a young woman would attempt to run over a waitress just to avoid paying a restaurant bill.

It is equally important to note that no manager was present. The person in charge, Michael Strong, testified, "We went outside to control the situation and get the license plate number. That's what happened." [R. p. 83, lines 11-14]. This was plainly an emergency situation where events unfolded in seconds. No one had time to reflect; they all reacted and tried to handle the situation as best they could. See Hiers v. Brunson Construction Co., 221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952)("[I]f in the course of [a worker's] employment an emergency arises and, without deserting his employment, [the worker] does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his employer, and in so doing he suffers injury, the accident may properly be regarded as arising out of the employment.")

It would frustrate the purposes of the Act if an employer could make every risky or foolish act outside the scope of employment (and thus not compensable) merely by making a rule against it. As Professor Larsen observed:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and

> let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 1.03[1] (2014), *quoted in* Nicholson v. SCDSS, Op. No. 27478 (S.C.Sup.Ct. filed January 14, 2015)(Shearouse Adv.Sh. No. 2 at 18)(Injecting fault into workers' compensation "is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head.").

The Court's point can be illustrated with some examples. A machine operator who injures his hand cleaning a machine in violation of a safety rule; a truck driver who runs a red light and crashes his truck; and a CNA who injures her back using prohibited lifting techniques can all recover for their injuries despite the fact each violated a company policy. The reason is because each rule concerns the "conduct of the workman within his sphere of employment."

Perhaps the clearest illustration of this scenario in practice occurred in Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). The claimant in Black was the police chief of a small town. He died when he fell from the side of a fire truck on which he was riding out to a fire. The mayor had previously instructed Black not to ride on the truck because it was not his "duty to ride the truck or have anything to do with it." The Supreme Court held Black's fatal injuries were outside the scope of his employment, noting the evidence "not only fails to show that deceased's injuries were sustained while performing duties within the scope of his employment but positively shows that such injury was brought about through his own acts which were not only wholly without

the scope of his employment but had been expressly forbidden by his employers."

Black is instructive because the facts illustrate the bright line test between a violation of policy that takes one outside the scope of employment and one that does not. Police officers injured riding on the side of fire trucks were not covered under the Act because riding on a fire truck was both prohibited and outside the scope of their employment. Conversely, firemen injured while riding on the side of fire trucks are covered under the Act – even with the same prohibition in place. The difference: riding on fire trucks is a fireman's job; not a policeman's. Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell was acting outside scope of his employment).

In this case, Waffle House contends Miles violated two rules: (1) dealing with rowdy customers; and (2) going outside on third shift. A violation of either of these rules might be against Waffle House policy, but would still be within the scope of her employment. The rules regulate how she does her job as a waitress; not whether she takes herself outside the sphere of her employment.

The first rule is not really a rule at all; it is merely a guideline or tip for dealing with rowdy customers. The fact there is a rule at all proves that dealing with rowdy customers is an inherent risk of employment at Waffle House – particularly on third shift on St. Patrick's Day weekend.[4]

The rule is not posted inside the store nor was Miles ever trained in the rule.[5] It is part of the

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[4]Mike Strong testified, "Every third shift is rowdy at Waffle House." [r. p. 128, lines 6-7].

[5]As part of its new employee training, Waffle House management is supposed to review the safety and security policies with each new hire. There is a training checklist which is supposed to be initialed and signed by the employee and the training manager. Miles testified no manager went over these policies with her. Her testimony is confirmed by the fact the training checklist is signed by her, but not by a manager. [R. p. 312].

"Safety and Security Training Manual" which is kept on a shelf inside the manager's office. It is not part of the employee handbook. [R. p. 148]. The guideline itself states:

> ROWDY CUSTOMERS
> To help handle "out of control" customers, here are a few tips.
> - Waffle House can refuse to serve rowdy rude, or abusive individuals and ask them to leave the premises as long as denial of service is not based on race, age, religion, gender or country of origin.
> - Never argue or provoke a customer, especially if they are intoxicated or under the influence of drugs. Simply ask the customer to calm down. If they continue to argue, call the police.
> - Should a fight break out in the unit, call the police immediately. Do not intervene and try to break up the dispute.
> - Never follow a customer to the parking lot, whether to calm them down or to collect cash. Take down the automobile description and license number and call police.

No doubt these are good policies designed for the safety of the employees. Nonetheless, they are still "tips" on how to deal with the rowdy customers inherent in Waffle House's business. They tell employees "how to" because this is part of their job. You cannot work third shift at Waffle House and not encounter "out of control" customers as a central part of your job. See Baggott v. Southern Music, Inc., 496 S.E.2d 852, 330 S.C. 1 (1998)(assault on employee by customer in pool hall arose out of and in the course of employment because the "dispute had its origin in . . . claimant's employment").

For the most part, Miles did exactly what Waffle House would have wanted her to do. She did not argue with nor provoke her intoxicated customers. [R. p. 175, line 23-p. 176, line 6]. She was the one who tried to take charge of the situation and called the police – *not* the cooks who were supposedly in charge of the store. Mike Strong testified, "I was sitting down the whole time. [R. p. 157, line 2]. She admittedly did follow a customer into the parking lot (as did another employee) – which would be contrary to one of the tips. Nonetheless, this was still part of her job – no different

than the machinist putting his hand into the machine, the truck driver running a red light, and the CNA awkwardly lifting a patient.

Miles panicked and used bad judgment – but she was still doing her job dealing with Waffle House customers. As such, her actions – even if they violated policy; even if "abysmal in [their] clumsiness, rashness and ineptitude" – were still within the scope of her employment. "For an accidental injury to be compensable under the worker s' compensation scheme there must be a causal connection between the employment and the injury; that is the test and the claimant need prove nothing more." Nicholson v. SCDSS, Op. No. 27478 (S.C.Sup.Ct. filed January 14, 2015)(Shearouse Adv.Sh. No. 2 at 18, 25). Therefore, the Court should reverse and remand for an award of benefits.

B. Waffle House cannot prove Miles committed a direct and intentional violation of a specific and express policy when she was assaulted by a customer on the Employer's premises.

At 5:13 a.m. on March 14, 2010 – Saint Patrick's Day weekend – Virginia Miles was injured when a Waffle House customer attempted to run her over in the Waffle House parking lot. At the time of the incident, Miles was acting in the course and scope of her employment. Waffle House contends Miles intentionally injured herself by violating a company policy and taking herself out of the course of her employment. As there is no question she was on the clock doing her job on the employer's premises, the only way Waffle House can prevail is by showing Miles committed a direct and intentional violation of a specific and express policy when she was assaulted by a customer on the Employer's premises.

The leading case on this issue is Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). In Howell, a grocery store employee was sent across the street to retrieve a number of

shopping carts. He saw two boys grab the purse of a woman. He gave chase, running into a low fence and breaking his arm. The Supreme Court affirmed the award of workers' compensation benefits adopting the generally recognized rule stated by Professor Larson as "An act outside an employee's regular duties taken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of the employment." Id. at 301, 214 S.E.2nd at 822.

The Appellate Panel reached the opposite result, relying on Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). In Wright, the employee's principal duty was bagging groceries, but he died of a heart attack while pursuing a suspected shoplifter off the employer's premises on his moped. Unlike Waffle House, Bi-Lo had a specific policy prohibiting hourly wage earners, including Wright, from approaching or apprehending suspected shoplifters.

Wright is clearly distinguishable from the instant case. On the Tuesday before his death, Wright had gotten into a heated argument with a suspected shoplifter. The store manager took him outside and specifically explained the prohibition on hourly employees pursuing shoplifters. Wright manifested his understanding by asking whether he should "clock out." A similar incident occurred three days later on Friday, when a supervisor stopped Wright as he was going out the door after another suspected shoplifter. On the day of his death, the following Monday, Wright again went outside after a shoplifting suspect. The "supervisor told him to go back inside. Wright refused, stating that he was 'going after' the fleeing suspect. The supervisor told him 'no' and again told him to go back inside. Wright jumped on his moped and gave chase. As Wright headed out on his moped, the customer service manager came outside. He began waving his arms and screaming at Wright to go back inside the store. Wright ignored him and continued the chase. Four hours later,

Wright was found lying by his moped, dead of heart attack." Id. at 154, 442 S.E.2d at 188.

Wright was specifically warned on three different occasions by multiple managers not to pursue shoplifters. He was explicitly told to go back inside on each occasion – including the incident that lead to his death.

The rule applied in Wright was "when an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, are not compensable." Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell was acting outside scope of his employment).

The cases largely turn on whether the employer can prove the employee's acts were "in direct and intentional violation of a specific and express policy" prohibiting the act. In the three leading cases denying compensation, the employer had repeatedly warned the employee not to engage in the specific act, including specific instructions given immediately before the act and blatantly disobeyed by the employee. See, Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004)(employee explicitly instructed not to take company truck home on the day of the accident); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store immediately before chasing shoplifter on moped). Multiple other cases reached the opposite result – because the employer could not prove it had given clear and explicit instructions. See, e.g., Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007)(injury incurred removing debris from road compensable even though it was not part of employee's job

duties); Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975)(fall while chasing purse snatcher off the premises not specifically prohibited by employer even though outside regular job duties); Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645 (1971)(employer allowed employees to act outside scope of their duties); Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959)(employee died of anaphylactic shock administered by nurse who knew of prohibition against giving shots without doctor's orders); Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 17 S.E.2d 695 (1941)(compensation awarded where employee was found dead in an allegedly prohibited area because conflicting evidence on whether employer had given "clear and explicit" orders on not going into this area).

In the instant case, there is no evidence Miles directly and intentionally violated a specific and express policy. Miles was never trained on how to handle the situation the employees were faced with. She and the other employees attempted to control the situation as best they could. Miles did not deliberately get injured nor did she have time to reflect on another course of action. No manager was there to give them guidance. The person in charge at the time, Michael Strong, testified in his deposition that "We went outside to control the situation and get the license plate number. That's what happened." [R. p. 230, lines 18-19]. If the person Waffle House put in charge of the store agreed with what she did, Miles can hardly be faulted herself. It certainly cannot be said she intentionally violated company policy.

Moreover, Waffle House cannot show it had a specific and express policy which it communicated to Miles. James Kearse claims he told the employees never to go outside during third shift. However, this is not a written policy – at least not one that Waffle House could produce. Both Miles and Strong testified the "rule actually is on third shift don't go out [the back door] if there is

a yellow tag on the back door." [R. p. 84, lines 6-7; p. 162, lines 10-13].

Moreover, if there was a blanket policy on going outside, it was regularly breached by third shift employees with the tacit approval of management. The hourly employees uniformly testified they went outside on numerous occasions to smoke or to go to the convenience store next door. See Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645 (1971)(compensation awarded where employer allowed employees to act outside scope of their duties).

Kearse claims he wrote up every single employee who went outside that night. However, every one of those employees denied being written up. The supposed write-up of Miles obviously never happened. It was never given to her; it was not produced by Waffle House as part of her personnel file. The flimsy explanation give by Kearse was that "I'm pretty sure the [new manager] threw a bunch of stuff away." [R. p. 214, lines 3-21]. See Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E.2d 675 (Ct.App.2006)(under "spoliation of evidence" doctrine, trier of fact could draw a negative inference from the defendant's failure to produce important pieces of evidence).

Waffle House contends its "tips" for dealing with rowdy customers demonstrate a policy. The very characterization of these "policies" as "tips" shows that they were not specific and express rules; merely suggestions. Furthermore, there is no evidence Miles was ever informed of them. Her training record shows no manager went over safety and security policies with her. And the tips were kept in a binder in the manager's office, inaccessible to hourly employees.

In short, Waffle House does not meet its burden of showing Miles directly and intentionally violated a specific and express policy when she was the victim of an assault by a Waffle House customer. As such, this Court should reverse the Commission and find her injuries arose out of and

in the course of her employment as a matter of law.

C. Even if the alleged policy violation took Miles outside the scope of her employment, her actions were done for the benefit of Waffle House, not Miles personally.

Everything Miles did that night – including going outside the store in hopes of keeping the customers on the premises until the police arrived – was done for the benefit of her employer. The store manager, James Kearse testified, "I felt like she was trying to be the hero trying to stop them and save the day and get the money for the check . . ." [R. p. 199, lines 15-17]. There is no evidence anything Miles did was for her own personal benefit. The basic rule is "An act outside an employee's regular duties taken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of the employment." Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975).

The store manager, James Kearse, testified tofive specific benefits conferred on Waffle House by Miles's actions: (1) calming the customers; (2) getting the police there; (3) getting the tag numbers; (4) being able to collect money from people rather than having them walk out without paying; and (5) ensuring that people who vandalize the store are apprehended by law enforcement. [R. p. 207, line 6-p. 208, line 5]. See Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (1998)(reversing Commission's factual findings as unsupported by substantial evidence because employer bound by its own testimony.)

The manager's testimony was further corroborated by Mike Strong, the cook in charge of the shift that night. He testified:

> Because the food has to be paid for somehow. Or they just come in, and you're the one getting the writeup, because you know, they walk out, if they watch the tape and all the other blah, blah, blah. But it doesn't matter. Either way somebody has to pay

> for this food. So either you get the tag number or you're just stuck. But in that case we needed the tag number anyway. I mean, she tore up the whole restaurant. [R. p. 13, lines 14-21].

He further agreed he, "as the man in charge, wanted to make sure that lady got caught and arrested by the police . . ." [R. p. 148, lines 21-24].

There is no question everything Miles did that morning was for Waffle House. "Nothing in the evidentiary record suggests [she] engaged in any activities of a personal nature that might break the causal link between [her] employment and [her] injuries." Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct.App. 2007).

The actions of Waffle House immediately after the incident confirm that Waffle House approved of Miles's conduct – at least up until the point where she filed her workers' compensation claim. Miles was not written up. Kearse claims he wrote her up, but his claim is an obvious fabrication. What is not fabricated is the "Performance Review" written up by Kearse on Miles on March 18, 2010 – a *mere four days* after the incident.[6] [R. p. 314]. In that Review, she met all expectations. Kearse further testified "she's welcome back" when she is physically able to work. [R. p. 209, lines 12-15]. He characterized her as a "good" employee who "was a hard worker, dependable, and punctual." [R. p. 193, lines 17-22].

Miles acted in good faith solely for the benefit of Waffle House. It does not matter whether she acted foolishly or whether she broke a rule – only that her actions were *intended* to benefit Waffle House. As they undoubtedly were, this Court should reverse.

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[6]Kearse claims he wrote the Performance Review sometime before March 14, 2010, but dated it March 18, 2010 because that was when it was due to be turned in to corporate. As noted at pages 24-26, Kearse's statements on this issue are palpably false.

2. As this was an emergency situation with no time for reflection, Miles' injuries arose out of her employment under the Sudden Emergency Doctrine.

The Commission found "Claimant's actions were taken without thinking." [R. p. 63, Finding of Fact 12]. This finding shows even the Commission recognized that Miles was panicked and merely reacting to an emergency situation.

Under the sudden emergency doctrine, injuries sustained in dealing with a work-related emergency are inherently compensable. "[I]f in the course of [a worker's] employment an emergency arises and, without deserting his employment, [the worker] does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his employer, and in so doing he suffers injury, the accident may properly be regarded as arising out of the employment." Hiers v. Brunson Construction Co., 221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952) (quoting 58 Am.Jur. 764). Cf. Kinsey v. Champion Am. Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977)(fight between employees compensable where the altercation is "spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury"). This rule is based on the *subjective intent* of the employee. It is irrelevant whether the employee lacked common sense or exercised poor judgment under the pressure of the situation. Miles cannot be penalized for knowingly violating a policy when she does not even have a chance to think about company policy, particularly when the people who are supposed to be in charge are doing nothing to control the situation.

The rule applied by the Commission in this case requires the employee to knowingly violate an explicitly stated company policy. Inherent in every one of the cases denying compensation is a warning given to the employee in sufficient time for him to make a rational decision before pressing forward. See, Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (S.C. 2004)(employee

explicitly instructed not to take company truck home on the day of the accident); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store immediately before chasing shoplifter on moped). None of these cases involve an emergency situation like the one here where no one with any authority was in charge.

All of the employees present agreed this was a fast-developing, crazy situation. Lori Green described it "like movie fast." [R. p. 175, lines 1-16]. Strong testified it was "pretty hectic" and "everything happened real fast." [R. p. 147]. Green stated "The whole situation was out of control. It was a mess." [Tr. p. 182, lines 23-24]. The timeline from the Irmo Police Department shows that Miles ended up on the hood of the care within 90 seconds of hanging up the phone. [R. p. 292-293]. The audio of the 911 phone calls graphically demonstrates how panicked Miles, Massalou and Green were. [R. p. 315 (audio recording)]. One can hear the urgency in their voices, as well as the shouting in the background.

Although he was not present during the incident, similar testimony was elicited from the store manager James Kearse: "I've seen some wild situations working for Waffle House. And that was considered one of them, yes." [R. page 206, lines 1-7]. Kearse further admitted that as no managers were present, "people have to take control of the situation as best they can," and "if they grill operator doesn't give them instructions, they've kind of got to make it up on their own . . ." [R. page 206, line 12-page 207, line 5].

The undisputed evidence shows Miles was presented with an emergency situation. Not one witness contradicts this assessment. Even the Commission found Miles "actions were taken without

thinking." [R. p. 43, Finding of Fact 12]. The actions she took were to call 911 and run outside – either to get the license plate or to stop the customers from leaving. See Hiers v. Brunson Construction Co., 221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952)("An employee does not go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to * * * save his employer's property."). All of this took place on the employer's premises in the span of 90 seconds. This set of facts, without a doubt, comes under the Sudden Emergency Doctrine.

This Court should reverse the Commission and find Miles is entitled to workers' compensation benefits under the Sudden Emergency Doctrine.

3. The Commission erred in finding James Kearse "credible as it relates to all aspects of this claim."

Much of the Commission's decision was based on the testimony of James Kearse. The Commission specifically found "Based on the evidence submitted by the parties, as well as testimony presented at the hearing, the testimony of James Kearse, the unit manager at the time of the incident on March 14, 2010, is *credible as it relates to all aspects of this claim*, including but not limited to communication of Waffle House policies and procedures and Claimant's average weekly wage and compensation rate." [R. p. 63, Finding of Fact 16].

It was error to find Kearse a credible witness. There were numerous instances in his testimony where he was contradicted by *all* the other witnesses and by official Waffle House documents. In other instances, he offered blatantly implausible and self-serving testimony. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but

its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.").

Kearse claimed he "wrote all of them up, everybody who went outside, except for Ms. Mary. She didn't exit the building." [R. p. 189, lines 11-19]. No actual writeups were produced – Kearse testified "I'm pretty sure the [new manager] threw a bunch of stuff away." [R. p. 214, lines 8-9]. See Cole Vision Corp.. v. Hobbs, 394 S.C. 144, 714 S.E.2d 537 (S.C. 2011)(remedy for spoliation of evidence is to strike a party's pleadings or approve "the use of adverse jury instructions against a party found to have lost or destroyed relevant evidence in the case where the evidence was to be presented").

The employees testified otherwise. Lori Green testified she had never been written up or reprimanded for going outside on third shift ever in her career, "Not the whole year I've been there, no." [R. p. 183, lines 11-16]. When asked, "you weren't written up for going outside that night, were you," Mike Strong testified, "Not that I recall. I don't think so." [R. p. 162, lines 4-9]. Miles testified she was never written up or disciplined for anything she did that night. [R. p. 105, lines 1-3].

Kearse also gave incredible testimony about the Performance Review. The Performance Review was not provided to Petitioner by Waffle House in response to a subpoena for her personnel file. The copy introduced at the hearing was given to Miles twelve days after the incident when she signed it on March 26, 2010. Kearse dated the Performance Review on March 18, 2010 – four days after the March 14, 2010. He offered the explanation that he filled it out before March 14th, but dated it for March 18th because it was to be turned in on that date.

Kearse's other testimony about company policies is patently self-serving. Waffle House produced no corroborating evidence of the polices supposedly posted on the wall in the restaurant or

supposedly written in the employee handbook – even those these items were plainly in their control and they knew this was a central issue. In fact, the documentary evidence shows that Waffle House *never* trained Miles in safety and security procedures. [R. p. 312].

Kearse also gave inconsistent, biased and self-serving testimony regarding whether Waffle House benefitted from Miles' actions. On cross-examination by Petitioner's attorney, Kearse admitted to five specific benefits conferred on Waffle House by Miles' actions. [R. p. 207, line 6-p. 208, line 5]. However, when questioned by Waffle House's attorney on redirect, he completely contradicted himself.

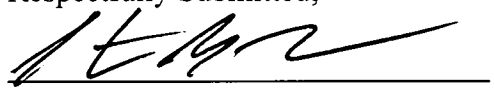
Although there is a general rule that the Commission is the sole arbiter of the credibility of a witness, there is a point at which a credibility finding becomes arbitrary and capricious. S.C.Code Ann. § 1-23-380(A)(6)(f) (2010)(setting out standard for reversing findings of administrative agency when arbitrary or capricious). That point was reached here when the Commission found Kearse "credible as it relates to all aspects of this claim . . ." [R. p. 63, Finding of Fact 16]. Any finding unsupported by the evidence – even a credibility finding – must be reversed. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence).

As such, the finding that Kearse was a credible witness in "all aspects of this claim" should be reversed, as should any findings adverse to Miles based on his testimony.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Workers' Compensation Commission should be reversed. The Commission should be directed to issue an Order directing Respondents to pay temporary total disability compensation and provide medical treatment from March 14, 2010 and continuing.

Respectfully Submitted,



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February 26, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Lower Court Case No. 1004913
Appellate Case No. 2013-00274

Virginia (Ginny) A. Miles, Employee, ... Petitioner,

v.

Waffle House, Inc., Employer, and
Brentwood Services, Inc., Carrier ..... Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, the undersigned paralegal to Stephen B. Samuels have caused a copy of the **BRIEF OF PETITIONER**, to be served, via first class mail and addressed to the attorneys for Respondents as indicated below:

Weston Adams, III, Esquire
Helen F. Hiser, Esquire
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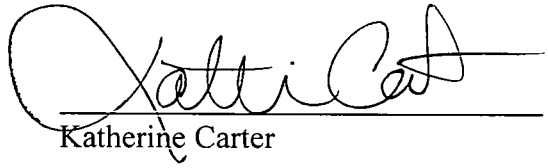
Post Office Box 12519
Columbia, South Carolina 29211-2519



Katherine Carter

February 27, 2015

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
ATTORNEY AT LAW

February 27, 2015

RECEIVED
FEB 27 2015
S.C. Supreme Court

VIA HAND DELIVERY
Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Virginia Miles v. Waffle House, Inc. and Brentwood Services, Inc/
Appellate Case No.: 2013-000274

Dear Mr. Shearouse:

Enclosed for filing please find the original and fifteen (15) copies of our **Brief of Petitioner** in the above-referenced appeal. We have also enclosed thirteen (13) additional copies of the **Appendix**. Please date stamp the extra copies of the Brief and Appendix for our file and return it to our courier.

By copy of this letter and enclosure to Weston Adams and Helen Hiser, we are serving a copy of our **Brief of Petitioner** upon counsel for the Respondents as indicated by the attached Proof of Service.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/krc
Enclosure(s) as stated

cc w/encl: Weston Adams, III, Esquire
Helen Faith Hiser, Esquire