The State of South Carolina
In the Supreme Court

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

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

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S.C. Supreme Court

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

Nathalie I. Davaut,

Petitioner

v.

University of South Carolina,
and State Accident Fund,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was timely made and finally ruled on by the Court of Appeals on May 8, 2015.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the denial of worker's compensation benefits for a work-related injury sustained by the Employee when she was struck by a vehicle while walking across a public street from her Employer's office building to her car in a University parking lot?

Or an otherwise restated:

I. Did the mere act of crossing a public street within the boundaries of the Employer's property remove the Employee from the course and scope of her employment when she had not yet had the opportunity to get to her car parked on her Employer's premises?

A. Did the Court of Appeals overlook or misapprehend the legal premise that a claimant is the course of her employment if she is in a reasonable margin or time and space necessary to be used in passing to and from the place where she has been conducting her work?

B. Did the Court of Appeals overlook or misapprehend the legal premise that an injury arises out or and in the course of her employment where she is be injured while passing from her work over the premises of another in such proximity and relation as to be in practical effect a part of the employer's premises?

II. Can the denial of benefits be sustained by the fact that the Employee made a discretionary choice as to which available University lot she parked her car in when she arrived at work on the day of the accident?

A. Did the Court of Appeals misapprehend and overlook the uncontroverted testimony that faculty members are allowed to park in the parking lot across the street?

B. Did the Court of Appeals misapprehend and overlook undisputed evidence that the Claimant chose to park across the street only because she could not find a parking space in the lot nearest her office building?

STATEMENT OF THE CASE

This workers' compensation case arises from a work-related accident that occurred when the Claimant, an employee of the University of South Carolina, was struck by a truck as she was walking to her car which was parked on the Employer's property after exiting the building where she had been working late on the evening of February 16, 2012. Claimant filed the Employee's Notice of Claim on April 18, 2012. [ROA 20.] Claimant filed her Request for Hearing on May 22, 2012. [ROA 22.] Employer timely filed an Employer's Answer denying the claim. [ROA 25.] The matter was heard by the Single Commissioner on September 25, 2012. [ROA 31.] The Single Commissioner found that Claimant had failed "to prove an injury by accident arising out of and in the course and scope of her employment" in an Order of November 6, 2012. [ROA 8.]

Claimant timely filed a Request for Commission Review on November 26, 2012. [ROA 26.] The Appellate Panel heard the Claimant's appeal on March 18, 2013. The Panel issued an Order on July 22, 2013 affirming the decision of the Single Commissioner. [ROA 1.] Claimant filed this appeal on August 20, 2013. [ROA 28.]

The Court of Appeals issued an opinion affirming the Commission's decision on January 21, 2015. [App. 1.] The Claimant timely filed a petition for rehearing on February 4, 2015. [App. 4.] The Court issued on order denying rehearing on May 8, 2015. [App. 24.]

STATEMENT OF THE FACTS

The Employer, The University of South Carolina-Lancaster, is a branch of the University of South Carolina located in Lancaster, South Carolina. The campus is dissected by a public highway, Hubbard Drive, which runs west to east. [ROA 159.] The

University owns property on the north and south side of Hubbard Drive, but most of the campus classrooms are located on the south-side of Hubbard Drive. [ROA 159.]

Claimant is a professor of foreign languages at the University, where she teaches Spanish and French. [ROA 96.] She has achieved multiple degrees, including a Bachelor's in English Studies, and Masters' in English Linguistics, French Literature, and Spanish, and she also has a Ph.D. in French Literature and Civilization. [ROA 89.] She has been a full-time professor with the Employer at the Lancaster campus since 2008. [ROA 95.]

Hubbard Drive dissects through the University Campus. Employee's office is located in the Medford Building which is located on the south-side of Hubbard Drive. [ROA 96, 159, 183.] The Medford Library is housed in the same building. [ROA 152, 209.] The Claimant does not have an assigned, reserved faculty parking spot designated for her personal, exclusive use. [ROA 110.] There is no separate faculty parking lot for the Medford Building; rather, there are only a limited number of spaces specifically designated for faculty in the parking lot on the south-side of Hubbard Drive nearest her office. [ROA 110.] On the morning of the accident, Tuesday, February 16, 2012, the Claimant looked for a parking space in the University faculty/student lot nearest to her office, but she was unable to find any available spaces in that lot. [ROA 108.] She then drove to the next closest University parking lot which is adjacent to the University's Carole Ray Dowling Center located on the north-side of Hubbard Drive, where she was able to find a space and parked. [ROA 108.] The parking lot, owned and maintained by the University, is provided for faculty/staff/students and the general public having business on the campus. [ROA 194.] There is a marked crosswalk on Hubbard Drive between the two

parking lots. [ROA 165.] The Employee was walking in the crosswalk when she was struck. [ROA 141, 144.]

According to John Catalano, Ph.D., Dean of the School, there is insufficient faculty parking on the south-side of Hubbard Drive during certain times of day and on certain days of the week, particularly on Tuesdays and Thursdays. He further testified that on those busy Tuesdays and Thursdays, faculty and staff members regularly use the parking lots on the north-side of Hubbard Drive, where Claimant parked her vehicle on that Tuesday, the day the accident: "Not unusual at all for faculty members or a staff member to park in this parking lot on the west side of Carol Ray Dowling. I have seen faculty members and staff members park there on Tuesdays and Thursdays especially." [ROA 193; see also ROA 163-64.]

After parking, the Claimant walked across Hubbard Drive to the Medford Building where her office was located and she went about her duties throughout the day. [ROA 108.] She normally worked from 9-5pm, but on that day, she did not leave her work at the usual time. Instead, she walked downstairs to the Library to work on a special project at the request of her supervisor. [1] [ROA 106-107, 114.] Immediately before 9:00 p.m., the Claimant returned materials to the Library staffer on duty and left the building to walk to her vehicle which was still parked in the University lot on the north-side of Hubbard. [ROA 109-10, 126, 140-141, 243.]

[1] The special project consisted of serving on a University faculty search committee and involved reviewing resumes of applicants for a foreign languages instructor's position. Those resumes were on reserve in the Library.[1] [ROA100, 214.] While this committee was not part of the Claimant's assigned teaching duties, her participation in the project had been requested specifically by her supervisor, Bruce Nims, Ph.D.[ROA 210, 100.]

The Claimant was using the designated crosswalk that connected the south-side of the Employer's premises to the north-side across Hubbard Drive. [ROA 141, 144, 245.] Before she reached the University parking lot, she was struck by a truck. [ROA 245, 127-128.] The Claimant testified that she walked the most-direct route from the Library to the place where the accident occurred. [ROA 140-141.]

Summary of Argument

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

> Davaut was injured while walking across Hubbard Drive towards the parking lot at the Carole Ray Dowling Center. She admitted that faculty members parked in the Dowling Center lot "sometimes, probably not very often," and assistant librarian David Helwer testified the Dowling Center lot "meant nothing to [him]" before Davaut's accident. Moreover, while the Dowling Center lot was located on the north side of Hubbard Drive, all faculty parking was located on the south side. [App. 2.]

The Employee petitions this Court pursuant to Rule 242, SCACR, for a writ of certiorari for review of the Court of Appeals' decision on the grounds that the Court of Appeals is in conflict with prior decisions of the Supreme Court on the "going and coming

rule," including Howell v. Pacific Mills, 291 S.C., 469, 354 S.E.2d 384 (1987), and Williams v. South Carolina State Hospital, 254 S.C. 377, 140 S.E.2d 601 (1965). This case presents a novel question to the extent that the Appellate Courts have not yet addressed the issue of whether an injury on premises not controlled by the employer (such as a public street) is "in the course of employment" if the employee parks in an employer-maintained parking lot and is injured going between the parking area and the employer's place of business. While this Court specifically declined to address the question of adopting a "divided premises rule" in Howell because the employee had never even entered the parking area that was maintained by the employer, the Employee in this case had parked in the Employer's lot. The Claimant submits that she had not left the Employer's premises yet, and she still was in the course of her employment while walking to her car in the University lot, because she had yet to access the ability to exit the employer's property. Camp v. Spartan Mills, 302 S.C. 348, 396 S.E.2d 121 (Ct.App.1990).

In addition, while the standard of review only allows review of factual findings under the substantial evidence standard, the Court of Appeals has overlooked the undisputed, relevant facts that she did not could not find a parking space in the faculty/student lot nearest her office building on the north side of Hubbard Drive, and she properly parked in a lot authorized for faculty parking across the street. Workers' compensation law is supposed to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act." This fundamental concept is ill served if the Employee is denied benefits because she made a discretionary choice to park "across the street" when she could not find a space in the lot closest to the building where she worked.

ARGUMENT

THE CLAIMANT IS ENTITLED TO BENEFITS FOR THE WORK-RELATED INJURY SHE SUSTAINED WHEN SHE WAS STRUCK BY A VEHICLE WHILE WALKING ACROSS A PUBLIC STREET FROM HER EMPLOYER'S OFFICE BUILDING TO HER CAR WHICH WAS PARKED IN A UNIVERSITY EMPLOYEE/STAFF PARKING LOT AT THE END OF HER WORK DAY.

The Applicable Law and Standard of Review

The fundamental precepts applicable to this case are well established -- "Workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment." S.C. Code Ann. § 42–1–310; Bentley v. Spartanburg Cnty., 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012). The Worker's Compensation Act establishes benefits for workers injured "by accident[s] arising out of and in the course of employment." S.C. Code Ann. § 42–1–160(A); Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601, (1965); Howell v. Pac. Columbia Mills, 291 S.C. 469, 471-72, 354 S.E.2d 384, 385 (1987). This case presents a question of whether the Claimant was injured "in the course of her employment."

"[T]he term 'in the course of' refers to the time, place, and circumstances under which the accident occurred." Howell, *id.* at 385. "An injury occurs in the course of employment 'when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto.' " Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998).

One component of the "in the course of employment" analysis includes the "going and coming rule" which is a general rule "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" Howell, *id.* at 385. However, the Appellate Courts have

recognized five exceptions to the general "going and coming rule": 1) if the employer provides the means of transportation or pays travel time; 2) if the employee performs duties during his commute; 3) if the way used is inherently dangerous; 4) if the place where the injury occurs is in such close proximity to the workplace that it is brought within the scope of employment; and 5) if the injury occurs while the employee is on a special errand for the employer. *Id.*

The Commission's findings of fact are subject to review under the substantial evidence standard. S.C. Code Ann. §1-23-380; Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); Howell v. Pac. Columbia Mills, supra. However, questions of law are viewed de novo. *See* Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005) ("[W]here the Commission's decision is controlled by an error of law, this court's review is plenary."). "The South Carolina Court of Appeals exercises freedom and independence in deciding an issue of law in a workers' compensation case." Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 154, 659 S.E.2d 171 at 179(Ct. App. 2008).

In this case, the Commission denied benefits on the reasoning that the Claimant was injured on a public street not controlled by the Employer and she made the choice to park in a lot that required her to cross Hubbard Drive. The Claimant did not challenge the factual findings for it is undisputed that she was injured in a public street, and she made a discretionary decision to park across in the University lot across the street from her office building. However, the Claimant respectfully submits that the Court of Appeals misapplied the going and coming rule and misconstrued the undisputed facts.

First, in sustaining the denial of benefits "all faculty parking was located on the south side," the Court of Appeals has overlooked the undisputed, relevant evidence regarding the parking situation on the USC Lancaster Campus. While all ***designated*** faculty parking was located on the south side, the Claimant did not have a designated space in that lot. Finding no place to park in the faculty/student lot nearest her office building on the north side of Hubbard Drive, and she properly parked in a lot authorized for faculty parking across the street. Regardless of the fact that the Claimant was in a public street, she was not yet "gone" from work because she had not left the Employer's premises yet; rather, she still was in the course of her employment while walking to her car in the University lot, because she had yet to access the ability to exit the employer's property.

I. The Claimant remained "in the course of employment" when she walked from her Employer's office building, across a public highway to her Employer's parking lot, so as to allow her access her car and exit the Employer's premises at the end of her work day.

A. THE "GOING AND COMING" RULE: A claimant is the course of her employment if she is in a reasonable margin or time and space necessary to be used in passing to and from the place where she has been conducting her work.

As noted above, the phrase "in the course of employment" refers to the time, place, and circumstances under which the accident occurred. An injury occurs "in the course of" employment within the meaning of the Workers' Compensation Act when it occurs within the period of employment and at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto. Notwithstanding that the Claimant was crossing a public street at the end of her work day, the Claimant still was in the "course and scope of her employment" as she had yet to access the University parking lot and she was injured before she ever had an opportunity to leave the Employer's premises.

The factual and legal difference between "going and coming" to and from work and traversing to and from an Employer parking lot was contemplated and considered in Williams v. South Carolina State Hospital, when the Supreme Court stated as follows:

> ...Employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the expressed or implied consent of the employer, to or from his work by way over the employer's premises, or over those of another in such proximity and relation as to be in practical affect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached.

140 S.E.2d at 603. The Court of Appeals summarily rejected the Claimant's reliance upon Williams as being without merit because the claimant there was injured on the employer's premises while walking to her car.[2] While the facts are different, the analysis is comparable and supports this Claimant's contentions.

In Williams, the Supreme Court clearly and expressly recognized that the period of employment includes a reasonable period of time necessary for the employee to travel to a point where the employee can access the place of work and travel to the point where the employee can egress the place of work. The Court of Appeals considered the Williams decision in Camp v. Spartan Mills, in discussion of a "passing to and from" scenario as compared to the "going and coming" rule:

> The course of employment includes not only the actual doing of the work but also in a reasonable margin of time and space to use in passing to and from the place where the work is done, [citing *Williams*]. The act of leaving the

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

employer's premises is "in course of" one's employment if the employee leaves the premises as contemplated at close of the work day.

396 S.E.2d at 122.[3]

It is crucial to note that in Williams, the Supreme Court recognized in plain language that the movement of the employee from the place where the work was to be performed to a place where the employee can egress and ingress the employer's premises including travel "over those [property] of another" where such premises were so close in proximity and so close in relation so as to be in practical affect a part of the employer's premises. While the claimant in Williams was walking on her employer's property to her car, that specific distinguishing fact does not negate the applicability of the Williams' decision in this case. The Claimant's case falls squarely within the Williams description in that she traveled over a public street in close proximity and so close in relation as to be in practical affect a part of the University's premises. As related above in the Statement of the Facts and seen on the campus map [ROA 152, Exhibit Number 1 to Claimant's Dep.] Hubbard Drive dissects the University campus between the Medford Building and the University parking lot (next to the Carole Ray Dowling Center) where the Claimant parked her car. The designated crosswalk where she was struck is located mid-block providing the closest access from the Medford Building area to that parking lot.

The Commission's denial of benefits rests on the fact that Hubbard Drive is a public street. However, it is of no consequence that Claimant was traversing across the public street in a direct path to reach the University parking lot. Under Williams and Camp, an employee

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[3] In Camp, the Court held that a four hour delay between clocking out and walking to the parking lot was outside the reasonable time scope. Here, it is undisputed, that there were mere minutes between the time the Claimant left the Library and was struck in the crosswalk.

has a reasonable period of time to travel between the employer's parking lot and the employee's worksite. The pivotal fact, which is undisputed, is that the Claimant was injured as she walked directly from the place where work was performed to a parking lot, controlled and maintained by her Employer, where she could access her vehicle to exit the Employer's premises. Egress and ingress from Claimant's workplace (her office and the Library within the Medford building) across the public street to the University owned, maintained and controlled parking lot were clearly in the course of her employment with the University. Likewise, clearly the Claimant was within the margin of time and space contemplated in Camp. While it is undisputed that she was on a public highway when she was struck by the vehicle, she had not had the opportunity to access her vehicle to exit the Employer's premises. She was attempting to access her car that was parked on property maintained, owned and controlled by the employer.

As referenced in the Court's opinion in Williams, the Supreme Court extended the definition of "place and time" to an area not owned by the employer in Evans v. Coats & Clark, 338 S.C. 467, 492 S.E.2d 806 (1997). The employee had sustained an injury when she slipped on the floor while leaving work through the lobby of a building in which the employer leased office space on the third floor. While the lobby was not an area owned, leased, controlled or maintained by the employer, it was one of several routes the employees regularly took going to and from the employer's office and the Court held that it was "for purposes of workers' compensation the premises of the employer." *Id.* at 808. This Claimant's case again falls squarely within the same parameters contemplated by the Evans decision. She used the most direct route from where her work was performed to access

her vehicle on the employer's premises across Hubbard Drive, and according to the Dean, it was a path regularly and routinely used on busy Tuesday's such as the day of this accident.

Williams draws no distinction between exiting the employer's premises by way of car and by way of foot. The act of exiting the employer's premises by way of her automobile was a reasonable incident to her leaving the place of her work and the injury therefore resulted from a risk reasonably incident to her employment and "arose out of" the employment.

In Holston v. Allied Corp., 300 S.C. 174, 177, 386 S.E.2d 793, 795 (Ct. App. 1989), the Court affirmed coverage to an employee who was injured even after she had reached her car because she had not yet left the employer parking lot. As described by the Court, after completing her normal work responsibilities, the employee "left the plant, walked through her employer's parking lot, got into her vehicle, backed out of the parking space, began her movements forward to exit the parking lot on her way home and was struck in the rear by a vehicle owned and operated by a fellow employee who, likewise, was leaving work. *Id.* at 794. The Court held that "the act of exiting the employer's premises by way of her automobile was a reasonable incident to her leaving the place of her work and the injury therefore resulted from risk reasonably incident to her employment and "arose out of" the employment. *Id.*

So, under established precedent reviewed above, the rules appear to be that:

- An employee is covered if injured while walking through a work office building lobby even when the lobby is not owned, controlled or maintained by the employer. Evans.
- An employer is covered if injured while traveling across the employer's premises to reach his/her car in the employer's parking lot. Williams.
- And, the employee still is covered if injured while driving out of the employer's parking lot, and the employee is also covered if injured while walking through the employer's landlord's lobby. Holston.

Claimant submits that under a proper application of these rules and the reasoning of those decisions, 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.

B. THE DIVIDED PREMISES RULE: An injury arises out or and in the course of her employment where she is be injured while passing from her work over the premises of another in such proximity and relation as to be in practical effect a part of the employer's premises.

The Commission found that the Court's decision in Howell v. Pacific Mills controlled the facts presented by claimant; however, the Howell case is not factually analogous to the case at bar. In Howell, the claimant was struck by a car in a crosswalk, on a public street in front of the place of her employment. The claimant had exited her husband's vehicle while the vehicle was parked in a public street at or near a crosswalk, and she was struck by a vehicle **before** she could reach the employer's property. The critical difference in the Howell case from the one at bar is the claimant in the Howell case **never** accessed the employer's premises so as to fall under the "reasonable margin of time and space to use in passing to and from the place where the work is done." Camp at 350, 122. The claimant in Howell was never on the premises of the employer before she stepped on the public street and she never accessed the employer's premises prior to the accident.

The Williams and Camp holdings are based upon the employee having first accessed the employer's premises, while the claimant in Howell never entered the "passing to and from" sphere. In the instant case, the Claimant had the express consent of her employer to park in the Carole Ray Dowling Center lot and thus the implied consent to cross the public street to get to/from her car. She had accessed the Employer's premises where she had accomplished most of her task and was then attempting to leave the Employer's premises. She was unable to exit the Employer's premises because she never

accessed her vehicle which was situated on an Employer controlled, maintained and owned property. Thus, under the analysis set forth in Williams, Hubbard Drive was the "premises of another" but in such proximity and relation as to be in the practical affect a part of USC's premises.

While the Commission denies coverage to the Claimant because she was injured in a public street, other jurisdictions follow the divided premises rule and recognize that when an employee is attempting to access one side of the employer's property from another that is separated by a public street, the employee is still within the course and scope for employment. For example, in our sister State of Georgia, in the case of Knight Rider Newspaper Sale, Inc. v. Desselle, 176 Ga. App. 174 at 175, 335 S.E.2d 458, (Ct. App. 1985), the court recognized that "[t]he period of employment generally includes a reasonable time for ingress to and egress from the place of work, while on the employer's premises," and stated: "[i]t is not significant that appellee in the instant case was injured on a public street. He could not have reached the parking lot without crossing the street. What is important is that he was taking a direct route from part of the employer's premises to another." See also West Point Pepperell v. McIntire, 150 Ga. App. 728, 258 S.E.2d 530 (1979) (an employee was held to have been in the course of her employment when struck by a car on a public street while going from her place of work to a company controlled parking lot); Department of Human Resources v. Jankowski, 147 Ga. App. 441, 249 S.E.2d 124 (1978).

In Quality Car Wash v. Cox, 438 A.2d 1243, 1246 (Del. Super. 1981), *rev'd* 449 A.2d 231 (Del. 1982).[4] The claimant was struck by a car while crossing a public highway walking to his car which was parked in the parking lot of a shopping center across the road from the employer's carwash. The Court held that while the general rule is that injuries occurring while employees are going to and from work are compensable if they occur on the employer's premises, they are not compensable if they occur off the premises. Id. at 1245. However, the Court further found that the general rule is subject to two exceptions:

> (1) Injuries sustained while the employee travels along or across a public road between two parts of his employer's premises are compensable, and (2) an injury sustained as a result of a special hazard encountered while traveling a normal route to and from work are compensable ....

Id. The Delaware Superior Court referred to Exception No. 1 as the "parking lot exception," and held:

> [s]ince, ..., a parking lot owned or maintained by the employer is treated by most courts as part of the premises, the majority rule is that an injury in a public street or other off premises place between the plant and the parking lot is in the course of employment, being on a necessary route between the two portions of the premises. But if the parking lot is a purely private one, the principle passages between two parts of the premises is not available. An employee crossing a public street to get to the parking lot is not protected.

Id. at 1245-1246, quoting *1 Larson Workers' Compensation Law* § 15.14, p. 4-36.

Likewise, in the case of Lewis v. Workers' Comp Appeals Bd., 15 Cal. 3d 559, 542 P.2d 225 (1975) (citing *1 Larson Workers' Compensation Law* § 15.14), the Court held that the dissection or fragmentation of the employer's premises by public highway does not

[4] The Delaware Supreme Court reversed on the sufficiency of the evidence with no challenge to the "employer's premises" rule and its two exceptions.

interrupt the employer/employee relationship that gives rise to an "in the course of employment" finding. The court stated as follows:

> The fragmentation of the physical premise of the employer into the parking lot on the one hand and the place of work on the other does not fracture the employer/employee relationship; it is the commencement of that relationship by the employee's entrance into the employer's parking premises that is determinative.

542 P.2d at 229.

In Howell, the Court of Appeals declined to adopt the divided premises rule. Finally, here and now, the Claimant would urge the Court to adopt the rule – whether denominated as the divided premises rule or the parking lot rule – that an employee is covered while traveling a direct path to and from an employer's lot within a reasonable time (without unnecessary, unreasonable, personal detours) without regard to whether the path includes premises of another. In urging the Court to adopt such rule, the Claimant would ask the Court to consider that the "going and coming rule" is not a statutory rule limiting coverage. Rather it is a "rule" of judicial creation evolving over the years from various opinions under the rubric of determining the application of the basic "in the course of employment" element. Thus, as a "rule" of coverage is it subject to the fundamental precept that "workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the 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).

An illustrative example of our Appellate Court's application of the concept of liberal construction is seen in Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 323-24, 108 S.E.2d 409, 410 (1959), which involved an employee struck while crossing a street on

his way to work. The employee, whose job was to load trucks, was late for work and being driven to work by his brother, and on the way they met the loaded truck that stopped for him. His brother stopped on the opposite side of the road, and as the employee was crossing the street, he was struck by another vehicle. While the employer argued that benefits should be denied under the going and coming rule, the Court followed the precept that "doubts are to be resolved in favor of compensability," *id.* at 412, and found that the rule did not apply:

> Respondent was simply going to work, and within the exclusionary rule, until his car was stopped opposite the truck of the employer, upon which respondent worked. When the truck, driven by his superior, was stopped for him to board it, it was an implied direction of the employer to him to cross the street and do so; he was no longer the master of his movements. The crossing of the street thereby became incidental to the employment and injury there incurred was in the course of his employment and arose out of it. The street became, for the time being, a part of respondent's work environment; he was not a mere member of the public, traveling upon it.

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

The divided premises/parking lot rule is a fair and reasonable construction of "in the course of employment" that serves the beneficent purpose of providing coverage to injured workers. In contrast, the Commission's rationale creates an absurdity where an employee virtually can play legal hopscotch – jumping in and out of coverage -- on the way to/from his/her vehicle in an Employer parking lot at the end or beginning of the work

day. To illustrate the absurdity, consider an example using the main campus of the University in Columbia, where a member of the faculty at the USC Law School has been asked by the Dean to attend an evening reception at the National Advocacy Center. Under the Commission's reasoning, the Professor might pass in and out of worker's compensation coverage at least four times when crossing public streets (South Main, Sumter, Greene, and Pickens Streets) to return to his/her car parked in Lot D-2 adjacent to the Law School at the end of the evening. Or, more generally, one could contemplate that with the size and configuration of the main Columbia campus, any University employee might cross one or more public streets to reach a staff parking lot. The employee should be covered if injured anywhere on a reasonably direct path from his worksite to the Employer's parking lot.

II. The Employee should not be denied benefits because she made a discretionary choice to park in the University lot across the street.

The Commission based its denial, in part, on the facts that there were other University parking lots on the south-side of Hubbard Drive and the Claimant made the choice to park in the north-side lot without first driving through all the south-side lots to try to find an available faculty designated space. In affirming the denial of benefits, the Court of Appeals relied on "substantial evidence" that all faculty parking was located on the south side, and the north side lot was infrequently used by faculty and staff. The denial of benefits is not well founded in fact or law.

A. The undisputed fact is that faculty members are allowed to park in the parking lot across the street.

First, the Court's statement that "all faculty parking is located on the south side of Hubbard Drive" is not supported by the undisputed evidence and, in fact, conflicts with the finding made by the Commission. The Commission found: "The Employer did not assign

parking to staff/faculty or dictate what parking lots could be used by staff or faculty and the selection of parking was left to the discretion of employees." [ROA 4.]

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

B. The undisputed evidence is that the Claimant chose to park across the street only because she could not find a parking space in the lot nearest her office building.

As to the reasonableness of the Claimant's "choice" in parking across the street, the undisputed testimony from the Dean was that there is not sufficient faculty parking in the south-side lots and that faculty and staff regularly, as a routine, use the parking lot on the north-side particularly on busy Tuesdays, such as the day of the Tuesday of this accident. While the north-side parking lot did not have any faculty designated spots, faculty was permitted to park in any available space in that lot. So the Claimant did not violate any Employer directive, and her right to choose was authorized under the Employer's parking policy and practices.

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

> Q: BASED ON YOUR -- ON WHAT YOU'VE SEEN, DO OTHER FACULTY MEMBERS USE THAT LOT WHERE YOU PARKED THAT DAY?
>
> A: SOMETIMES, PROBABLY NOT VERY OFTEN. [ROA 39:6-9]

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

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

While the assistant librarian testified that the lot across the street "never meant anything to him," his statement must be considered in context of his entire testimony, including the fact that he was not familiar with the parking situation during the time of day that the Claimant arrived on campus (10:45 am). Namely, he worked a 5-9 shift and did not

arrive at work until approximately 4:45 pm, and he most always finds an empty parking space in the lot closest to the Medford building. [ROA 261, 263.] He further testified that while he had never parked in the lot across the street, he knew that it was available to staff. [ROA 249:17-23; 256:19.] On this point, the assistant librarian's testimony as to his personal parking habits, as cited by the Court of Appeals, simply cannot support a conclusion that the Claimant did not suffer an injury arising out of and in the course of her employment. However, of note is the fact that this same library assistant testified that the lot closest to the Medford building is often full – testimony fully consistent with that of the Dean as discussed above. [ROA 248:19-22.]

Further, and foremost, the workers compensation jurisprudence does not support the denial of benefits because the employee has a choice of where to park. In a review of relevant case law that addresses the "parking lot" exception and the divided premises rule, it does not appear that the employee's discretion as to where to park has been identified as a disqualifying fact. See Knight-Ridder Newspaper Sales, Inc. v. Desselle, 335 S.E.2d at 459 ("the parking lot was provided by the employer for the convenience of the employer and of the employees, who were encouraged to use the lot. It is immaterial that the appellee was not required to park in the lot. He did so on this occasion.")

Making the Claimant's discretion in choosing between different available parking lots a consideration in determining compensability creates an impracticable absurdity. In this case, would the Claimant be required have to prove which parking lots she drove through or how many times she circled the parking lots looking for a space south of Hubbard Drive? Would she be denied coverage on the reasoning that the Claimant could have arrived earlier to find a parking spot in the lot adjacent to her office building? These

are not relevant or practical considerations. The undisputed facts are that the Claimant was injured while traversing a reasonable, permissible path from her worksite to her Employer's parking lot at the end of her work day, and she is entitled to workers' compensation benefits.

CONCLUSION

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

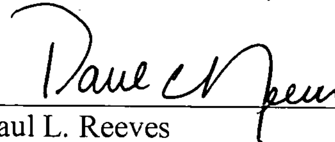
The denial of benefits on these facts contravenes the guiding principle that undergirds the entire workers' compensation system – namely, that "[w]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act." Nicholson v. S.C. Dep't of Soc. Servs., 411 S.C. 381, 769 S.E.2d 1, 3 (2015). The Commission's decision, as affirmed by this Court, to deny benefits because she was crossing a public street and she choose to park on the north-side of Hubbard Drive does not serve the beneficent purpose of the Act. The Commission's reasoning creates an impracticable and absurd hopscotch rule where an employee may walk in and out of coverage in the path of travel to/from his/her car in an employer lot. The Court should adopt the divided premises rule to provide coverage for

an injury on a public street that the employee travels across in route to/from their car in an employer lot.

WHEREFORE, based on the foregoing and all the arguments made in the Appellant's Brief, the Claimant submits that case presents a special, important, and novel issue in the law of workers compensation and respectfully requests that the Court grant the petition, reverse the Commission's decision, and remand this matter for the award of benefits to which she is entitled under the Workers' Compensation Act.

Respectfully Submitted,

REEVES LAW FIRM, LLC



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June 8, 2015

The State of South Carolina
In the Supreme Court

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

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

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

Nathalie I. Davaut, Petitioner

v.

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

Certificate of Service

I certify that I have served the Petition for a Writ of Certiorari and Appendix on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 8, 2015, to the Counsel of Record, as listed below:

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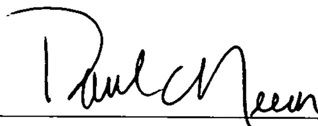

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