

**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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SC Court of Appeals

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.

APPENDIX
For Petition for a Writ of Certiorari

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On Petition for Writ of Certiorari

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Nathalie I. Davaut, Employee, Claimant, Appellant,

v.

University of South Carolina and State Accident Fund,
Respondents.

Appellate Case No. 2013-001778

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2015-UP-041
Heard November 5, 2014 – Filed January 21, 2015

AFFIRMED

Paul L. Reeves, Reeves Law Firm, LLC, of Columbia,
for Appellant.

Paul Linwood Hendrix, Jones & Hendrix, PA, of
Spartanburg, for Respondents.

PER CURIAM: Nathalie I. Davaut appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission denying her benefits. On appeal, Davaut argues the Appellate Panel erred in finding she did not suffer an injury arising out of and in the course of her employment.

Davaut urges this court to consider *Williams v. South Carolina State Hospital*, 245 S.C. 377, 140 S.E.2d 601 (1965), and contends that case "answers the question" of the compensability of her injury. However, the claimant in *Williams* was injured while walking over the employer's premises, 245 S.C. at 379, 140 S.E.2d at 602; in contrast, Davaut was injured on a public street that was not owned or maintained by her employer. Therefore, we reject her assertion that the facts of this case align with *Williams*. See *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 474, 354 S.E.2d 384, 386 (1987) ("[A]ppellant contends that this case is on all fours with [*Williams*]. This contention is without merit. In *Williams*, the claimant was injured on the employer's premises. In the present case, appellant was injured on a public street." (citation omitted)).

"The claimant has the burden of proving facts that will bring the injury within the workers' compensation law." *Houston v. Deloach & Deloach*, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct. App. 2008). "The general rule in South Carolina is 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*, 291 S.C. at 471, 354 S.E.2d at 385. Davaut maintains she was injured on a public street in close proximity and so close in relation as to be in practical effect a part of her employer's premises, and her injury was subsequently compensable. See *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 96, 495 S.E.2d 447, 449 (1998) ("[I]njury incurred by a workman in the course of his travel to his place of work and not on the premises of his employer but in close proximity thereto is not compensable *unless* the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and coming from his work." (emphasis added)); *Williams*, 245 S.C. at 381, 140 S.E.2d at 603 ("If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, *or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises*, the injury is one arising out of and in the course of the employment" (emphasis added) (citation omitted)).

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. Hence, there is substantial evidence supporting the Appellate Panel's decision that

Davaut's injury on Hubbard Drive did not arise out of and in the course of her employment. *See Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) ("Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law."). Accordingly, we affirm the Appellate Panel.

AFFIRMED.

FEW, C.J., LOCKEMY, J., and CURETON, A.J., concur.

The State of South Carolina
In the Court of Appeals

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Appellate Panel

Susan S. Barden, Commissioner
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Nathalie I. Davaut,

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Respondents.

PETITION FOR REHEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- '[E]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done.'
- 'If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance.'

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

Respectfully Submitted,

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February 4, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from South Carolina
Workers Compensation Commission

Case No. 2013-001778

Nathalie I. Davaut, Employee, Claimant, Appellant,

v.

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

RESPONDENTS' RETURN TO
PETITION FOR REHEARING

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STATEMENT OF THE CASE

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

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

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

ARGUMENTS

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

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

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

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

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

The Claimant also asserts that the Court overlooked the undisputed facts that on the morning of the accident, a Tuesday, the Claimant looked for but was unable to find any available spaces on the south side of Hubbard Drive. This assertion ignores the Claimant’s very testimony on this issue. When questioned about this very issue the Claimant admitted, “I decided to just park the car, even though it wasn’t faculty parking, to park the car there **instead of trying to go all the way across campus to see if there were any other faculty spots available.**” (R. p. 108, lines 7-17).

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

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

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

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

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

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

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

never occurred.

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

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

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

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

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

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

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

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

permit the exceptions to swallow the rule.

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

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

CONCLUSION

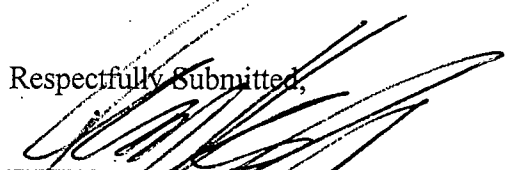
In South Carolina, to be entitled to an award under the South Carolina Workers’ Compensation Act, an Employee bears the burden of proving facts that establish an injury by accident that both “arose out of” and “in the course of” the employment. S.C. Code Ann. §42-1-160. After reviewing all of the evidence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

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

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

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

Respectfully Submitted,



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50 Applewood Lane
Spartanburg, South Carolina 29307
(864) 583-5577
Attorney for Respondents

February 17, 2015

The South Carolina Court of Appeals

Nathalie I. Davaut, Employee, Claimant, Appellant

v.

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

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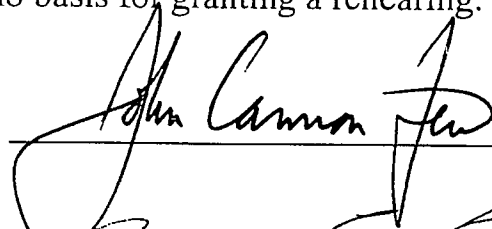
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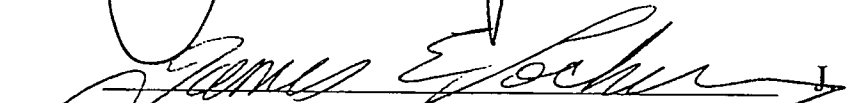
SC Court of Appeals

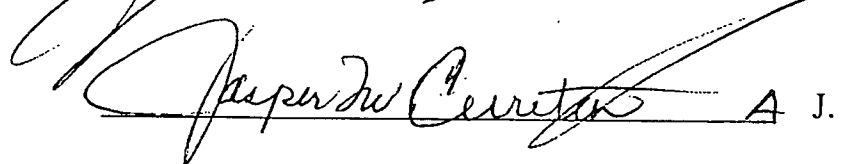
Appellate Case No. 2013-001778

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ C.J.


_____ J.


_____ A. J.

Columbia, South Carolina

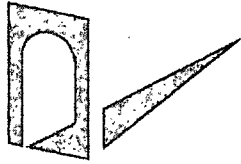
cc:

Paul L. Reeves, Esquire

Paul Linwood Hendrix, Esquire

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May 8, 2015



June 8, 2015

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SC Court of Appeals

HAND DELIVERED

The Honorable Daniel Shearouse
Clerk, S.C. Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: *Davaut v. University of South Carolina, et al*; Ct. App. Appellate No. 2013-001778
S.C. Ct. App. Op. No. 2015-UP-041, filed January 21, 2015

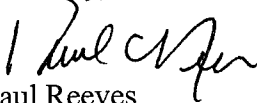
Dear Clerk:

Enclosed for filing please find the original and six (6) copies of a Petition for a Writ of Certiorari on behalf of the Nathalie I. Davaut together with two copies of an Appendix and two sets of the Record on Appeal and briefs from the Court of Appeals.

I am enclosing the \$100 filing fee and by copy of this letter I am serving Counsel for Respondent with the Petition and Appendix. I am also sending a copy of the Petition to the Court of Appeals.

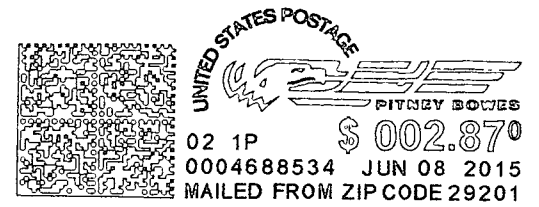
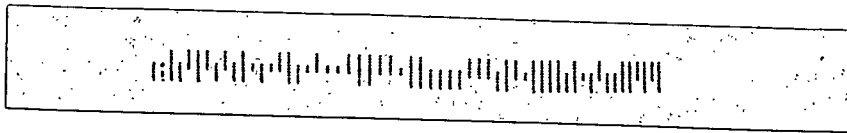
Thank you for your consideration and cooperation in this regard.

Sincerely,

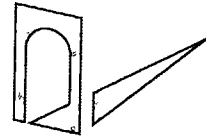

Paul Reeves
Attorney at Law

cc: Clerk of the Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Paul L. Hendrix
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50 Applewood Lane
Spartanburg, SC 29307-2225



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