

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From the Appellate Panel
South Carolina Workers' Compensation Commission

Unpublished Opinion No. 2012-UP-552
Submitted August 1, 2012 – Filed October 10, 2012
Withdrawn, Submitted and Refiled January 9, 2013

RECEIVED

FEB - 8 2013

S.C. Supreme Court

Virginia A. Miles, Employee, Petitioner,

v.

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

APPENDIX

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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**

Virginia A. Miles, Employee, Appellant,

v.

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

Appellate Case No. 2011-190726

Appeal From the Appellate Panel
South Carolina Workers' Compensation Commission

Unpublished Opinion No. 2012-UP-552
Submitted August 1, 2012 – Filed October 10, 2012
Withdrawn, Substituted and Refiled January 9, 2013

AFFIRMED

Stephen B. Samuels, of Samuels Law Firm, LLC, of
Columbia, for Appellant.

Weston Adams, III, and Helen F. Hiser, both of
McAngus Goudelock & Courie, LLC, of Columbia, and
Erroll Anne Y. Hodges, of McAngus Goudelock &
Courie, LLC, of Greenville, for Respondents.

PER CURIAM: Virginia A. Miles (Employee) appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) finding she failed to prove her alleged injuries arose out of and in the course and scope of her employment with Waffle House, Inc. On appeal, Employee argues (1) the Appellate Panel erred in finding her injuries arose outside the scope of her employment, (2) the finding of a witness's credibility was arbitrary and capricious, and (3) her injuries arose out of her employment under the sudden emergency doctrine. We affirm¹ pursuant to the following authorities:

1. As to whether the Appellate Panel erred in finding Employee's injuries did not arise out of and in the course and scope of her employment: *Houston v. Deloach & Deloach*, 378 S.C. 543, 549, 663 S.E.2d 85, 88 (Ct. App. 2008) (stating that pursuant to the Administrative Procedures Act, an appellate court's review of a decision of the Appellate Panel is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law); S.C. Code Ann. § 1-23-380(5) (Supp. 2011) ("The [appellate] court may not substitute its judgment for the judgment of the [Appellate Panel] as to the weight of the evidence on questions of fact."); *Houston*, 378 S.C. at 550, 663 S.E.2d at 89 ("Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached in order to justify its action."); *McCuen v. BMW Mfg. Corp.*, 383 S.C. 19, 24, 677 S.E.2d 28, 31 (Ct. App. 2009) ("For an injury to be compensable, it must arise out of and in the course of employment." (citing S.C. Code Ann. § 42-1-160(A) (Supp. 2011))); *id.* ("An injury arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances."); *id.* at 24-25, 677 S.E.2d at 31-32 ("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." (citation and quotation marks omitted)); *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007) ("In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances."); *Houston*, 378 S.C. at 554, 663 S.E.2d at 91 ("The phrase 'in the course of the employment' refers to the time, place, and

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

circumstances under which the accident occurred."); *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) ("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, not compensable.").

2. As to whether the Appellate Panel erred in finding a witness credible: *Houston*, 378 S.C. at 551, 663 S.E.2d at 89 ("The appellate court is prohibited from overturning findings of fact of the [A]ppellate [P]anel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based."); *Hall*, 376 S.C. at 348, 656 S.E.2d at 758 ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.").

3. As to whether Employee's injuries arose out of her employment under the sudden emergency doctrine, the Appellate Panel's factual findings, which are supported by substantial evidence, preclude the application of what Employee calls the "sudden emergency doctrine." See *Hiers v. Brunson Constr. Co.*, 221 S.C. 212, 234-35, 70 S.E.2d 211, 222 (1952).

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Unpublished Opinion No. 2012-UP-552

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OCT 24 2012

SC Court of Appeals

Virginia A. Miles, Employee, Appellant,

v.

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

PETITION FOR REHEARING

The Appellant, by and through her undersigned attorney, hereby files this Petition for Rehearing. On October 10, 2012, this Court issued an opinion affirming the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission. Miles v. Waffle House, Inc., Employer, and Brentwood Services, Inc., Carrier, Op. No. 2012-UP-552 (S.C.Ct.App. filed October 10, 2012).

As grounds for granting this Petition, Appellant would respectfully show that the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) the scope of employment; (2) the authority of the appellate courts to review credibility findings that are arbitrary and capricious; and (3) the preservation and merits of the sudden emergency doctrine.

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.

This Court reviewed this case under the substantial evidence standard as if it involved a factual dispute. Respectfully, the issue of whether a particular action is outside the scope of employment is a legal issue. "Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." Pierre v. Seaside Farms, Inc., 689 S.E.2d 615, 386 S.C. 534 (2010), *quoting*, Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945). Moreover, even under the substantial evidence standard, the evidence plainly shows Miles was assaulted by a Waffle House customer. As such, she was injured under "unquestionably compensable circumstances." Shah v. Howard Johnson, 140 N.C.App. 58, 535 S.E.2d 577 (N.C.App. 2000).

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." Even if she handled the situation badly in the heat of the moment, she was acting entirely within the scope of her employment. Moreover, even if she 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. As such, her injuries arise out of and in the course of her employment with Waffle House.

For these reasons and the reasons previously stated in Appellant's Brief, Miles respectfully

requests that this Court reconsider its decision; grant oral argument; and hold that Miles proved her injuries arose out of and in the course of her employment.

II. The Court has authority to reverse credibility findings made by the Appellate Panel when those findings are arbitrary and capricious.

The Court was asked to rule on the Commission's finding that store manager James Kearse "is credible as it relates to all aspects of this claim . . ." [R. p. 63, Finding of Fact 16]. The Court made this ruling:

As to whether the Appellate Panel erred in finding a witness credible: Houston, 378 S.C. at 551, 663 S.E.2d at 89 ("The appellate court is prohibited from overturning findings of fact of the [A]ppellate [P]anel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based."); Hall, 376 S.C. at 348, 656 S.E.2d at 758 ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.").

Respectfully, while it is *generally* true that the Commission is the final judge of a witness's credibility, a finding of credibility is fundamentally no different from any finding of fact. As the Court noted, when "there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based" then the Commission's credibility finding as to that witness is subject to review and correction by the appellate courts.

For example, in the recent case of Cranford v. Hutchinson Construction, this Court specifically rejected the suggestion that the fact an injured worker was referred to a particular doctor by his attorney would discredit the doctor's medical opinion or allow the Appellate Panel to afford less weight to his medical reports. The Court specifically held, "We find both parties presented *credible* conflicting medical evidence." Cranford v. Hutchinson Construction, Opinion No. 4939 (S.C.Ct.App. withdrawn, substituted and refiled June 13, 2012)(Shearouse Adv.Sh. No. 20 at 40).

This confirms that this Court does possess – and has exercised – the authority to correct arbitrary credibility findings made by the Commission. 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.”).

This case presents an opportunity for the Court to exercise that authority. 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, as detailed in Appellant’s Brief. Appellant respectfully requests this Court reconsider its decision and exercise its authority to correct the Commission’s arbitrary and capricious finding that store manager James Kearse “is credible as it relates to all aspects of this claim . . .” [R. p. 63, Finding of Fact 16]. S.C.Code Ann. § 1-23-380(A)(6)(f) (2010)(setting out standard for reversing findings of administrative agency when arbitrary or capricious).

III. The Court should have held that Miles’ injuries arose out of her employment under the Sudden Emergency Doctrine.

This Court declined to address the argument that Miles’ injuries arose out of her employment under the sudden emergency doctrine, instead *sua sponte* ruling that the issue was not preserved.

Miles specifically addressed this issue in her brief to the Appellate Panel. That brief was not made part of the original Record on Appeal because issue preservation was not raised in this case by Respondents. Respondents knew the issue had been raised below and, accordingly, limited their

argument to the merits. [Brief of Respondents, 16-20].

Had Appellant had *any* notice that preservation of this argument was an issue, she would have filed a Reply Brief addressing it as well as including proof in the Record on Appeal. This Court's dismissal of the issue without notice deprived Miles of due process. See S.C. Const., art. 1, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard."). See also, e.g., Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing Article I, Section 22 and stating "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct.App.2009) (citing Amendments V and XIV of the United States Constitution and Article I, Section 22 of the South Carolina Constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review").

Appellant now moves this Court for leave to supplement the Record on Appeal with the brief she filed with the Appellate Panel. In the brief, she explicitly makes the same argument made to this Court. A copy of that brief is attached to the Motion as an exhibit.

In workers' compensation hearings, there are no opening statements or argument. The issues are framed by the pleadings and in an off-the-record pretrial conference. The Commissioner then states the issues at the call of the case. In this case, the Commissioner specifically stated he did not need to hear legal arguments on the parties' respective positions – which had already been heard in the pre-trial conference. [R. page 74, lines 10-18]. Appellant cannot be faulted if the Commissioner

refuses to hear an on the record argument on an issue – particularly here where the Single Commissioner assessed hearing costs because “I note that the pre-hearing conference and hearing lasted in excess of three hours and thirty minutes.” [Finding of Fact 22, R. page 45].

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers’ compensation cases as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)(“The commission’s failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.”) If the Court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant’s arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”). This Court has held issues are preserved where “it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order.” Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, this Court has ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. Appl. 1994)(“On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21,

1990.”).

Even without considering the Appellant’s brief to the Appellate Panel, the record shows the sudden emergency doctrine was raised below. The Single Commissioner and Appellate Panel found as a fact that, “Claimant’s actions were taken without thinking.” [Finding of Fact 12, R. page 43; Finding of Fact 12, R. page 63]. This finding was expressly directed at the sudden emergency doctrine.

Furthermore, specific testimony was elicited to prove the sudden emergency doctrine. Lori Green was asked on cross-examination, “This was like an **emergency**, crazy, freak-out kind of situation, wasn’t it?” [R. page 175, lines 14-16 (emphasis added)]. Michael Strong was asked, “Because this whole thing was an **emergency situation**, right?” [R. page 139, lines 20-21 (emphasis added)].

Although he was not present during the incident, similar testimony was elicited from the store manager James Kearse: “Well, you would agree that from what you’ve seen on the video and from what you’ve heard about that situation, it was a pretty wild and wooly situation, wasn’t it?” [R. page 206, lines 1-4]. 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 testimony referenced above was specifically elicited to prove the sudden emergency doctrine. The issue was brief before the Appellate Panel and this Court. The testimony of the witnesses, along with the Appellate Panel’s finding that “Claimant’s actions were taken without thinking,” confirms that Miles proved that her injuries arose out of and in the course of her employment under the sudden emergency doctrine. 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.”) (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”).

Therefore, this Court should grant the Motion to supplement the Record on Appeal; reconsider its holding that the sudden emergency doctrine issue is preserved; and hold on the merits that Miles proved that her injuries arose out of and in the course of her employment under the sudden emergency doctrine.

CONCLUSION

For the foregoing reasons, the Court should withdraw its initial Opinion and issue a new opinion reversing the Appellate Panel and remanding this case to the Commission to award benefits under the Workers' Compensation Act. Alternatively, Appellant requests the Court to grant her Motion to Supplement the Record on Appeal, withdraw the opinion, and grant oral argument to the parties.

Respectfully Submitted,



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Attorney for Appellant

Columbia, South Carolina
October 25, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 24 2012

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Unpublished Opinion No. 2012-UP-552

Virginia A. Miles, Employee, Appellant,

v.

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

APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

The Appellant, by and through her undersigned attorney, hereby files this Motion to Supplement the Record on Appeal, pursuant to Rule 212(b), SCACR. On October 10, 2012, this Court issued an opinion affirming the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission. Miles v. Waffle House, Inc., Employer, and Brentwood Services, Inc., Carrier, Op. No. 2012-UP-552 (S.C.Ct.App. filed October 10, 2012).

In that opinion, the Court held:

As to whether Employee's injuries arose out of her employment under the sudden emergency doctrine: *Smith v. NCCI, Inc.*, 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) ("Only issues raised [to] and ruled upon by the [Appellate Panel] are cognizable on appeal."); *Pratt v. Morris Roofing, Inc.*, 353 S.C. 339, 352, 577 S.E.2d 475, 481 (Ct. App. 2003) (noting an issue cannot be raised for the first time on appeal).

Miles specifically addressed this issue in her brief to the Appellate Panel. That brief was not

made part of the original Record on Appeal because issue preservation was not raised in this case by Respondents. Respondents knew the issue had been raised below and, accordingly, limited their argument to the merits. [Brief of Respondents, 16-20].

Had Appellant had *any* notice that preservation of this argument was an issue, she would have filed a Reply Brief addressing it as well as including proof in the Record on Appeal. This Court's dismissal of the issue without notice deprived Miles of due process. See S.C. Const., art. 1, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard."). See also, e.g., Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing Article I, Section 22 and stating "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct.App.2009) (citing Amendments V and XIV of the United States Constitution and Article I, Section 22 of the South Carolina Constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review").

Appellant now moves this Court for leave to supplement the Record on Appeal with the brief she filed with the Appellate Panel. In the brief, she explicitly makes the same argument made to this Court. A copy of that brief is attached as an exhibit.

In workers' compensation hearings, there are no opening statements or argument. The issues are framed by the pleadings and in an off-the-record pretrial conference. The Commissioner then states the issues at the call of the case. In this case, the Commissioner specifically stated he did not

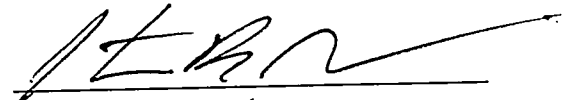
need to hear legal arguments on the parties' respective positions – which had already been heard in the pre-trial conference. [R. page 74, lines 10-18]. Appellant cannot be faulted if the Commissioner refuses to hear an on the record argument on an issue – particularly here where the Single Commissioner assessed hearing costs because “I note that the pre-hearing conference and hearing lasted in excess of three hours and thirty minutes.” [Finding of Fact 22, R. page 45].

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers' compensation cases as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)(“The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.”) If the Court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”). This Court has held issues are preserved where “it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order.” Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, this Court has ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215

(Ct. Appl. 1994)(“On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.”).

As the Appellant’s brief to the appellate panel conclusively shows she raised the sudden emergency doctrine to the Appellate Panel, this Court should grant the Motion to Supplement the Record on Appeal. Due process requires that Appellant have notice of the preservation issue raised *sua sponte* by the Court and a fair opportunity to address it by supplementing the Record on Appeal.

Respectfully Submitted,



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Columbia, South Carolina
October 25, 2012

EXHIBIT A

BRIEF OF APPELLANT TO
FULL COMMISSION DATED
12/16/2010

WITH COVER LETTER TO
VIRGINIA CROCKER,
JUDICIAL DIRECTOR



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December 16, 2010

The Honorable Virginia C. Crocker
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

RE: Virginia A. Miles v. Waffle House and Brentwood Services
W.C.C. File Number: 1004913

Dear Ginger:

Enclosed for filing please find the original and three (3) copies of our Appellant's Brief in the above referenced appeal. Also enclosed is the Certificate of Service showing service upon opposing counsel.

Thank you for your assistance in this matter. Please call me with any questions.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosures

cc w/encl.: Erroll Anne Hodges, Esquire
Ms. Virginia Ann Miles

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Virginia Ann Miles,)
)
Claimant/Appellant,)

WCC FILE NO. 1004913

-vs-

BRIEF OF APPELLANT

Waffle House, Inc.,)
)
Employer,)

and)

Brentwood Services, Inc.,)
)
Defendants/Respondents.)
_____)

Claimant, by and through her undersigned attorney, hereby submits her Brief of Appellant in support of her claim for workers' compensation benefits.

STATEMENT OF THE CASE

This is an appeal from a Form 50 hearing. The Claimant, 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.

Waffle House denied the claim, alleging Miles exceeded the scope of her employment. After a hearing, the Single Commissioner denied the claim, holding "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. [Order, Finding of Fact 10, page 33]. The Single Commissioner also assessed

hearing costs against Claimant holding the case was brought without “reasonable legal grounds.”
[Order, Finding of Fact 22, p. 35].

Claimant appeals this Order.

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. At the time of the incident, James Kearse was the store manager.

This incident occurred 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 unusually busy with a large number of drunk, unruly patrons.

No managers were working on the shift. The cook, Michael Strong and Mary Summers, were in charge of the store. Working that night were three waitress: Miles, Brittany Massalou, and Lori Green. [Tr. P. 19,].

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.” [Tr. p. 24].

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.” [Tr. p. 25, 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. [Tr. p. 25, line 25-page 26, line 5]. The men then left.

Tiffany Gibson then went outside and got in her car. Howes got up out of the booth and had a confrontation with Brittany Massalou. Howes attempted to hit Massalou, but Massalou punched her first. 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. [Tr. p. 29-30].

“As soon as [she] saw trouble starting,” Miles called 911. [Tr. p. 27, 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 come to the Waffle House now. Miles was obviously frantic and panicked.

Howes then ran outside and got in the car with Gibson. Gibson was originally in the driver’s seat; but the girls switched places so that Howes was driving.

Miles ran out after Howes and said to Mike Strong that she was “getting the license plate number.” [Tr. p. 72, lines 15-17]. Lori Green and Brittany Massalou ran out behind her. Miles stood behind the car either to prevent them from leaving until the police arrived or to get the tag number. The car backed up and Miles ended up in front of it. Howes then suddenly pulled the car forward. Miles jumped on the hood of the car to avoid being run over.

Howes, with Miles on the hood, exited the parking lot and drove down Broad River Road. After about 500 feet, she swerved into a Burger King parking lot, throwing Miles onto the pavement.

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.

When the car drove off with Miles on the hood, Mike Strong went outside. He got inside his truck, and went down the road, finding Miles lying on the ground at the Burger King.

Miles suffered multiple injuries.

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. Moreover, even if she 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. As such, her injuries arise out of and in the course of her employment with Waffle House.

Furthermore, the Single Commissioners findings on credibility – particularly as to the testimony of the store manager, Jason Kearse, have no support in the evidence. Kearse blatantly lied under oath on numerous issues on which he was impeached by official Waffle House documents and by the testimony of every witness in the case. As such, his testimony should be given no weight and the finding he is a credible witness should be reversed.

- 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 Defendants 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 contends she 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 in these cases 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 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, it is disputed whether 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 that, "We went outside to control the situation and get the license plate number. That's what happened." 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.

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. This is best 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 that each of them has violated a company policy. The reason for this is because each of these rules concerns the "conduct of the workman within his sphere of 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 for dealing with rowdy

customers. The fact that 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.

The rule is not posted inside the store nor was Miles ever trained in the rule.¹ It is part of the “Safety and Security Training Manual” which is kept on a shelf inside the manager’s office. They are not part of the employee handbook. [Tr. 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.

For the most part, Miles did exactly what Waffle House would have wanted her to do. She did not argue with or provoke her intoxicated customers. 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.

¹As 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 that the training checklist is signed by her, but not by a manager. [Claimant’s Exhibit 2].

Mike Strong testified, "I was sitting down the whole time. [Tr. p. 97, line 2]. She admittedly did follow a customer into the parking lot (as did several other employees) – 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 panicked² 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 – were still within the scope of her employment.

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 her 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

²Miles suffers from a pre-existing anxiety disorder.

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.

Defendants rely on the case of 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 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 rules on 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 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 (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). 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." 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] I fihre is a yellow tag on the back door." [Tr. p. 102, lines 10-13].

Moreöver, 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. 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. [Tr. p. 161].

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, largely 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, the Commission should find her injuries arose out of and in the course of her employment.

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. 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).

Even the store manager, James Kears, testified to how Waffle House would benefit from what Miles was trying to do. He specifically testified to five 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. [Tr. p. 154, line 6-page 155, line 5].

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. Kears claims he wrote her up, but his claim is an obvious fabrication. What is not fabricated is the "Performance Review" written up by Kears on Miles on March 18, 2010 – a mere four days after the incident.³ In that Review, she met all expectations. Kears further testified "she's welcome back" when she is physically able to work. [Tr. p. 156, lines 12-15]. He characterized her as a "good" employee who "was a hard worker, dependable, and punctual." [Tr. p. 139, lines 17-22].

³Kears 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 15-16, Kears's statements on this issue are palpably false.

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, the Single Commissioner should be reversed.

D. As this was an emergency situation with no time for reflection, Miles should not be penalized for panicking.

The rule applied by the Single Commissioner 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.” [Tr. p. 117, lines 1-16]. Strong testified it was “pretty hectic” and “everything happened real fast.” [Tr. p. 86]. She stated “The whole situation was out of control. It was a mess.” [Tr. p. 124, 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. The audio of the 911 phone calls graphically demonstrates how panicked Miles, Massalou and Green were.

The Single Commissioner found “Claimant’s actions were taken without thinking.” [Order, Finding of Fact 12, page 38]. This finding shows even he recognized that Miles was panicked and merely reacting to an emergency situation. 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”). She 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.

E. James Kearse is not a credible witness.

Much of the Single Commissioner’s decision was based on the testimony of James Kearse. The Single Commissioner 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.” [Order, Finding of Fact 16, page 39].

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.” [Tr. p. 8134, lines 11-19]. No actual writeups were produced – Kearse testified “I’m pretty sure the [new manager] threw a bunch of stuff away. [Tr. p. 161].

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.” [Tr. p. 125, 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.” [Tr. p. 102, lines 4-9]. Miles testified she was never written up or disciplined for anything she did that night. [Tr. p. 38, lines 1-3].

Kearse also gave incredible testimony about the Performance Review. The Performance Review was not provided to Claimant 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 policies 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. [Claimant’s Exhibit 2].

As such, the finding that Kearse was a credible witness should be reversed, as should any findings based on his testimony.

2. The Single Commissioner abused his discretion in assessing Claimant with hearing costs.

The Single Commissioner assessed Miles with hearing costs. He specifically found:

Based on the evidence submitted by the parties, as well as testimony presented at the hearing, I find this proceeding was brought without reasonable legal grounds and costs of \$634.20 are assessed against the Claimant. I note that the pre-hearing conference and hearing lasted in excess of three hours and thirty minutes. [Order, Finding of Fact 22, p. 35].

Respectfully, the assessment of hearing costs in this case is an abuse of discretion. This case came before the Commission with ample legal grounds. Claimant was injured when she was assaulted by a customer of the Employer while she was working on the Employer's premises. The fact this case was denied on an exceptionally narrow legal technicality shows that it was brought with a good faith belief in its merits.⁴

The Commissioner gave no specific grounds for this ruling other than noting the proceeding "lasted in excess of three hours and thirty minutes." [Order, Finding of Fact 22, p. 35]. The length of a trial is not a grounds to assess hearing costs against either party. Moreover, several days prior to the hearing, Claimant's attorney e-mailed the Commissioner's office specifically to inform him that the hearing would likely take 2-3 hours because of the number of witnesses and length of the testimony.

There are no recent South Carolina cases interpreting what constitutes bringing a case without reasonable legal grounds. Two older cases show that where there is no factual or legal for denying a case, a Defendant can be assessed with hearing costs. See Dameron v. Spartan Mills, 211

⁴Although not appealed, the parties also litigated the issue of the average weekly wage and compensation rate. As the evidence on this issue was in dispute due to disparities in the documents and testimony as to Claimant's actual earnings from tips, this issue was also brought with reasonable legal grounds.

S.C. 217, 44 S.E.2d 465 (1947)(sufficient evidence for the “Commission to have concluded that the defendants defended without reasonable grounds [when defendants] had knowledge of the injury at the time, paid doctors' bills, medical bills, provided her with a brace and had access to her work charts which they introduced into evidence; and do not now contend that claimant's injury did not arise out of and in the course of her employment.”); Cole v. State Highway Department, 190 S.C. 142, 2 S.E.2d 490 (1939)(“It seems to us that there is some evidence for the commission to have concluded that the defendant defended without reasonable ground” when the defendant had full knowledge of claimant’s undisputed physical condition and work status). Neither of these cases provide much analysis beyond the basic showing that a defendant cannot reasonably deny and defend a case when the facts and law are undisputed.

North Carolina has a significantly more developed body of law on this issue – in part because North Carolina’s statute also assesses attorney’s fees against defendants who unreasonably deny compensable claims.⁵ North Carolina’s provision on assessing hearing costs is virtually identical to South Carolina’s.

The leading case in North Carolina involved defense attorneys who argued a legal position which was the complete opposite of a recent North Carolina Supreme Court decision. In upholding the assessment of hearing costs, the court was unimpressed with the attorneys’ professed ignorance of the law, stating:

⁵North Carolina’s statute states: “If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.” N.C.G.S. § 97-88.1.(1997).

Defendants nevertheless contended at oral argument before this Court that since they were unaware of the holding in Heffner, they should be excused for having advanced their position at the hearing below. That is absurd. Defendant's ignorance of a 1986 North Carolina case directly on point provides no support for their contention that grounds for requesting a hearing in 1991 were reasonable. Such a construction would encourage incompetence and thwart the legislative purpose of N.C.G.S. § 97-88.1. We affirm the Commission's conclusion that defendant brought the subject hearing without a reasonable ground. Troutman v. White & Simpson, Inc., 121 N.C.App. 48, 50-55, 464 S.E.2d 481, 484-86 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

Troutman is instructive because it shows that incompetence and ignorance of the law by a party taking an unreasonable position is grounds for assessing hearing costs. That is not the case here.

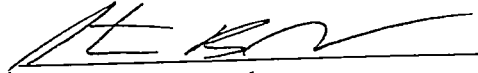
In another case, the North Carolina Supreme Court approved the assessment of attorney's fees against an employer for unreasonable defending a case when the undisputed facts clearly showed the claimant had suffered a compensable injury. See Beam v. Floyd's Creek Baptist Church, 99 N.C.App. 767, 768, 394 S.E.2d 191, 192 (1990)(unreasonable to deny claim where church secretary helped pastor carry 75-pound spotlight up flight of stairs and woke up with back pain the next morning). The Beam court stated the purpose of the statute is to prevent "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." Id.

There was no basis for the hearing Commissioner to assess hearing costs in this case. This case was brought with a good faith belief in its merits. It is amply supported both by the evidence and by the law. As such, not only should the underlying decision on the merits be reversed, but the assessment of hearing costs should also be reversed.

CONCLUSION

As Ginny Miles was injured when she was assaulted by a customer while acting within the scope of her employment for the benefit of Waffle House, she is entitled to receive workers' compensation benefits. The decision below should be reversed both on the merits and on the assessment of hearing costs.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Virginia Miles v. Waffle House, Inc.

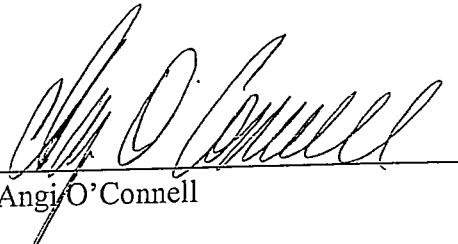
W.C.C. File Number: 1004913

This is to certify that I, Angi O'Connell, paralegal to attorney Stephen B. Samuels, have served a copy of the following described document by mailing a copy of same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

Document served: **APPELLANT'S BRIEF**

Person(s) served: Virginia Crocker, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

Erroll Anne Hodges, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 2980
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Angi O'Connell

December 16, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1004913

Virginia A. Miles, Employee, Appellant,

v.

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

**RESPONDENTS' RETURN IN OPPOSITION TO
APPELLANT'S PETITION FOR REHEARING**

Pursuant to Rules 221 & 240(e), SCACR, Respondents oppose Appellant's Petition for Rehearing ("Petition"). Appellant has raised no valid factual issues or arguments that have been overlooked or misapprehended by this Court.

I. This Court properly upheld the Commission's determination that Appellant's injuries did not arise in the course and scope of her employment with Waffle House.

Appellant's assertion that "the issue of whether a particular action is outside the scope of employment is a legal issue," as opposed to a factual matter governed by the substantial evidence standard, is entirely without support. "The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the full commission." Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Wright v. Bi-Lo, Inc., 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994) (same, and noting that appellate "review of factual issues is limited to whether substantial evidence supports the decision of the Full

Commission”). This factual determination includes whether an employee leaves or exceeds the scope of employment at the time of an alleged accident. Pratt, 357 S.C. at 622-23, 594 S.E.2d at 274; Wright, 314 S.C. at 155, 442 S.E.2d at 188.

The cases cited by Appellant, Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) and Pelfrey v. Oconee County, 207 S.C. 433, 36 S.E.2d 297 (1945) stand for precisely the same premise. The quote from Pelfrey, which is only partially contained in Pierre and in Appellant’s Petition, is revealing:

Where employer and employee are subject to the compensation act, ... an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (**arising from the proven facts**) of the propriety of such conclusion. **And the conclusion is mainly, at least, one of fact, as to which the finding by the Industrial Commission is final if there be any supporting evidence.**

207 S.C. at 440, 36 S.E.2d at 300 (emphasis added).¹ In fact, both Pierre and Pelfrey were decided on appeal based on whether sufficient evidence in the record supported the Commission’s decision regarding the scope of employment. Pierre, 386 S.C. at 548, 689 S.E.2d at 622 (overturning the Commission’s findings that the claimant was not required to live on the employer’s premises and that the sidewalk was not a peculiar hazard to which his employment exposed him because they were “not supported by substantial evidence in the record”); Pelfrey, 207 S.C. at 442, 36 S.E.2d at 300 (upholding the Commission’s determination that the claimant was acting within the scope of his employment when he was injured because the evidence was “more than necessary for affirmance; there need be only some supporting evidence for the findings and award”).

¹ The “any evidence” standard applied in Pelfrey has been replaced by the “substantial evidence” standard. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

Appellant's reliance on Shah v. Howard Johnson, 140 N.C. App. 58, 535 S.E.2d 577 (N. C. Ct. App. 2000) is misplaced for all the reasons previously set forth in Respondent's Brief. The claimant in Shah was actually performing his regularly scheduled duties when he was assaulted. In contrast, there is nothing about Appellant's scheduled duties that required, or even permitted, her to chase a patron into the parking lot and attempt to block their vehicle with her body. Even if Shah was arguably factually similar, which Respondents do not concede, there is no requirement that South Carolina courts treat North Carolina cases as binding precedent, particularly where the North Carolina case is "by an intermediate appellate court" as is the case with Shah. Pierre, 386 S.C. at 689 S.E.2d at 619.

Substantial evidence supports the Commission's finding of fact that Appellant was acting outside the scope of her employment when she was injured. Appellant raises no facts or arguments that this Court overlooked or misapprehended and, therefore her Petition should be denied.²

II. This Court properly upheld the Commission's credibility determinations.

Appellant attempts to reargue the Commission's credibility determination with respect to James Kearse. First, her arguments do not point to any fact or argument that this Court overlooked or misapprehended. The only argument in her Petition that was not previously set forth in her Brief is her reference to Cranford v. Hutchinson Constr., 2012 S.C. App. LEXIS 302 (Ct. App., June 13, 2012), in an attempt to alter the long-standing rule that the Commission is the final arbiter of witness credibility. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 529 (2001); Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct.

² Appellant requests that this Court "grant oral argument ..." However, this Court advised the parties on August 1, 2012 that this case would be submitted to the Court on the record and the briefs and that no oral argument would be heard. Appellant could have, but failed to ask for oral argument at that point. Her exceedingly late request, which contains no explanation of why this Court should order oral argument, should be denied.

App. 2007). In any event, the quote lifted from Cranford dealt with the credibility of conflicting medical evidence. There, where the claimant argued that the Commission had afforded less weight to one doctor than to another, this Court held that “ultimately the Appellate Panel had the discretion to weight the conflicting evidence in rendering its decision. Thus, we defer to its findings on this issue.” 2012 S.C. App. LEXIS 302 at **21-22. Cranford essentially maintains the same appellate standard for credibility determinations that was applied in this case. As noted in Respondents’ Brief, there are numerous points on which Mr. Kearsse’s testimony is in agreement with the other witnesses at the hearing,³ which provides substantial evidence to support the Commission on this point. Even if Mr. Kearsse’s testimony was somehow deemed unreliable, however, the Commission’s decision is fully supported by other testimony in the record, particularly that of Lori Green and Mike Strong, and should be upheld.

III. This Court properly held that the issue of whether Appellant’s injuries arose of her employment under the sudden emergency doctrine was not preserved for appellate review.

Appellant repeats the arguments from her Motion for Leave to Supplement Record (“Motion”) as to why this Court should reconsider its decision that she failed to preserve her argument regarding application of the so-called sudden emergency doctrine to this case. Both her Motion to Supplement the Record and her Petition should be denied on this point.

Appellant was free to designate any portions of the record below that she desired to have included in the Record on Appeal and/or file a Reply Brief with this Court, but she chose to do

³ For example, Mr. Kearsse’s testimony that he had raised the specific issue of going outside after dark in an employee meeting where Appellant was present is supported by the testimony of both Mr. Strong and Ms. Green. (R. p. 152, lines 21-25) (R. p. 164, lines 1-5) (R. pp. 170, lines 3-21). Likewise, Mr. Kearsse’s testimony regarding the rule that, if necessary, employees should obtain a license place number from inside the store if possible is supported by the testimony of Ms. Green. (R. p. 170 line 22 – p. 171, line 7 (confirming that, if a license tag number was needed, employees were to try to get the license number from the window)). Mr. Kearsse’s testimony that employees who were caught going outside the restaurant at night were either written up or reprimanded is supported by the testimony of both Mr. Strong and Ms. Green. (R. p. 151, lines 18-25) (R. p. 167, lines 5-16) (R. p. 168, lines 2-9) (R. p. 181, lines 11-22).

neither. It was not until this Court upheld the Full Commission's Decision that she decided to attempt to submit evidence to show she preserved her argument regarding the so-called emergency doctrine. Appellant's Motion should be denied for the reasons stated in Respondents' Return in Opposition to Appellant's Motion and contained herein.

First, it is axiomatic that an issue cannot be raised for the first time on appeal. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). In the workers' compensation context, "[o]nly issues raised and ruled upon by the commission are cognizable on appeal." *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006). For an issue to be preserved before the Full Commission, it must be raised in a party's Form 30 appeal from the single commissioner decision. *Jervey v. Martint Env'tl, Inc.*, 396 S.C. 442, 452, 721 S.E.2d 469, 474 (Ct. App. 2012) (an issue must be either raised to and ruled on by the single commissioner "**or in a request for commission review** of the single commissioner's order to be preserved for appellate review") (emphasis added); *Creech v. Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) (noting that the Commission does not have "authority to address an issue not raised in an application for review," and holding that "only issues within the application for review are preserved for the full commission"). Even the case cited by Appellant notes that "[t]he commission's failure to explicitly rule on **an issue raised to it in a Form 30** does not create an error preservation problem although a similar omission in a civil proceeding would be fatal." *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000) (emphasis added). In fact, in *Nettles*, the reason the Court held that the contested issue was preserved for review was precisely "because she raised the issue on her Form 30 ..." *Id.*

Here, Appellant's Form 30 raised 22 separate issues on appeal, (R. pp. 7-10), but none of them mention in any way a so-called emergency doctrine. Therefore, regardless of whether Appellant raised this issue in her Brief to the Commission, she did not properly raise or preserve it to the Full Commission because she failed to reference the emergency doctrine or even an emergency situation in her Form 30 detailed list of appealed issues.⁴ Thus, her proposed addition to the Record is irrelevant and should not be included.

Second, an appealed order "comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error." McCall v. IKON, 380 S.C. 649, 659-660, 670 S.E.2d 695, 701 (Ct. App. 2008). Part of that burden is presenting a record that demonstrates that an issue was raised and properly preserved in the lower tribunal. Solley v. Navy Fed. Cred. Union, Inc., 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012). Concomitantly, "the appellant has the burden of providing an adequate record on appeal." Id., 397 S.C. at 214, 723 S.E.2d at 608; *see also* Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000) (deciding against the appellant on a particular issue because county ordinances were not in the record, and holding the appellant has "the burden of presenting this Court with an adequate record"); McCall, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (ruling against the appellant despite his protestations that he had no opportunity to address an issue, because the appellant "did not provide this court with an adequate record to consider this argument"). Appellate courts routinely refuse to consider arguments because of the appellant's failure to provide a sufficient record for review. *See, e.g.*, Parker v. Fireman's Ins. Co., 297 S.C. 166, 375 S.E.2d 325 (Ct. App. 1998) (refusing to consider whether the insurance policy excluded South Carolina because the appellant did not include a copy of the policy in the appellate record);

⁴ Merely by responding to the issues raised in the Final Brief of Appellant, Respondents have not conceded and do not concede that she has properly preserved this issue on appeal. In fact, the Court of Appeals correctly determined that it was not preserved.

Porter Bros., Inc. v. Specialty Welding, Co., 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985) (refusing to address an argument that the lower court erred by refusing a request for a jury charge under the UCC because the record failed to include either the request for the charge or the charge the trial judge gave). If an appellant simply could move to supplement the appellate record each time it lost an argument because of a failure to provide a sufficient record on appeal, appellants unfairly would be allowed multiple attempts to prove their case on appeal.

Here, Appellant waited until this Court ruled against her and only then moved to supplement the Record on Appeal in order to adequately support her appeal. In Johnson v. South Carolina Dept. of Probation, Parole, and Pardon Servs., 372 S.C. 279, 641 S.E.2d 895 (2007), the Supreme Court upheld this Court's denial of appellant's motion to supplement the record as well as the affirmation of the lower tribunal's decision based on the record on appeal. "Ordinarily, no point will be considered which does not appear in the record on appeal. Rule 210(h), SCACR. Because court rules require the appealing party to prepare the record on appeal, *see* Rule 210(a), SCACR, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review." 372 S.C. at 283, 641 S.E.2d at 897. As the burden was on Appellant to prepare and properly support all of her arguments as to why the Commission's Decision should be overturned, but failed to do so, she has not been denied due process by this Court. Instead, allowing her to supplement the Record on Appeal at this late date would allow her an unwarranted second chance to argue her appeal before this Court.

The cases relied on by Appellant do not dictate a different result. In Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793 (Ct. App. 1989), the issue the appellant sought to raise was "reasonably clear from the employee's arguments and **was ruled on by the Single**

Commissioner.” 300 S.C. at 176, 386 S.E.2d at 795 (emphasis added). This court also noted that the issue “could readily be determined and was meritorious.” In fact, “both parties understood this to be the basic point of contention.” 300 S.C. at 176, 386 S.E.2d at 795. None of those factors is present here – the specific argument Appellant now seeks to preserve (application of the so-called sudden emergency doctrine) was not ruled on by the Single Commissioner, cannot readily be determined, is not meritorious and was never understood by the parties to be the basic point of contention. Appellant cites Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988) for the proposition that an issue is preserved for appeal so long as it was raised to the Single Commissioner. In Palm, this Court held that the issue was not preserved because the circuit court had not ruled on it and the claimant failed to file a Rule 59(e) motion to amend. What is unclear in Palm, and what distinguishes it from the instant case, is whether the issue was preserved to the Full Commission regardless of whether it was “inferable from the record that she raised this issue before the single commissioner.” 296 S.C. at 51, 370 S.E.2d at 468.⁵ Appellant cites Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003) and Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994) for the proposition that an issue can be raised for the first time on appeal to the Full Commission. What is unclear in both of those cases is whether the issues were included on the Form 30 appeals to the Commission; however, it can only be assumed that they were, since “only issues within the application for review are preserved for the full commission.” Creech, 320 S.C. at 564, 467 S.E.2d at 117; *see also* Jervey, 396 S.C. at 452, 721 S.E.2d at 474.

⁵ Thus, the fact that Appellant points to testimony before the Single Commissioner that purportedly shows that the word “emergency” was included by Appellant’s counsel in certain questions to witnesses, (Petition p. 7), does not demonstrate that this issue was properly preserved for appeal. The bottom line is that Appellant failed to notice this as an issue on appeal to the Full Commission in any way in her extremely detailed Form 30.

Appellant is not the victim of unfair surprise; she was required to raise all of her issues in her Form 30 to the Full Commission and, as the Appellant to this Court, under an obligation to make sure her claims were properly supported by a sufficient record on appeal. The failure to do so rests solely with her.

In any event, even if this Court improperly held that this issue was not preserved for appeal, it is harmless error as Appellant failed to show that doctrine would apply to her in this situation. As stated in Respondents' Brief, the quote from Hiers v. Brunson Constr. Co., 221 S.C. 212, 70 S.E.2d 211 (1952) does not indicate that there is a broad, generally applied doctrine that injuries incurred in emergency situations, regardless of the cause of the emergency, are inherently compensable. An injury still must arise out of and occur in the scope and course of employment in order for it to be compensable. Even the quote contained in Appellant's Petition acknowledges that the injury must be incurred in the course of employment and that the claimant must not "desert" his employment. Furthermore, the rest of the quote clarifies that, "[a]n 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." 221 S.C. at 235, 70 S.E.2d at 222. In the instant case, Appellant was doing nothing to preserve Waffle House property – the people causing the disturbance inside the restaurant had exited. The police had been called. Another employee had even obtained the license plate of the vehicle driven by Ms. Howes. In addition, Appellant did not merely "step beyond" her regularly designated duties – she took on a role that had nothing whatsoever to do with her job as a waitress when she attempted to prevent customers from leaving the parking lot. There is nothing about her job as a waitress that indicates or suggests in any way that she should perform such a law enforcement role.

Furthermore, Hiers is factually distinguishable from the instant case. In Hiers, the claimant was a construction supervisor. On a cold, rainy day in February, he was working on the construction of a health center where a leak had developed in the roof, causing damage to the plaster. The claimant and another worker worked outside in the cold rain to repair the leak in order to preserve his employer's property. One of the arguments made by the employer in that case was that the claimant "deviated from his duties as superintendent when he went upon the roof to make needed repairs." 221 S.C. at 234, 70 S.E.2d at 221-22. The Court rejected this argument, finding that "[a] leak was apparent and damage was being done to the employer's property and [claimant] in the emergency was acting in his master's interest." Id., 70 S.E.2d at 222. In the instant case, as noted above, any damage to Waffle House property had been done prior to the patrons leaving the restaurant. Appellant's actions when she went outside were in no way protecting her employer's property. Furthermore, in Hiers, the claimant stepped outside his normal duties as a supervisor to help perform the repair himself. The activity he was performing at the time of his injury was the business of his employer – construction. Here, Appellant stepped entirely outside her normal duties and, in fact, was doing something prohibited by her employer, when she placed her body in the path of Ms. Howes' car, not once, but twice. Thus, to the extent this Court recognizes a so-called sudden emergency doctrine, it would not apply in this case because the emergency was caused by Appellant herself, in direct contravention of her employer's instructions, and after the situation inside the restaurant had been properly handled. Her actions in the parking lot which gave rise to her injuries in no way protected the property of or advanced the interests of her employer.

Finally, Appellant's reliance on Kinsey v. Champion American Serv. Ctr., 268 S.C. 177, 232 S.E.2d 720 (1977), completely misses the mark. The language cited by Appellant, regarding

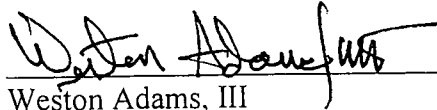
whether an altercation was “spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury,” goes to whether an employer can maintain a so-called “aggressor defense” under what is now codified at Section 42-9-60. That section provides, in pertinent part, that “[n]o compensation shall be payable if the injury or death was occasioned . . . by the willful intention of the employee to injure or kill himself or another.” S.C. Code Ann. § 42-9-60. Kinsey in no way suggests or supports the conclusion that all impulsive, unthinking actions of claimants are compensable. Appellant’s injuries are not compensable because she undertook a rash course of action which was entirely outside the course and scope of her employment.

This Court properly declined to hear Appellant’s argument on this point because they were not preserved for appeal; however, even if Appellant were to prove that she had properly preserved this issue for appeal, this Court should still affirm the Commission’s finding that Appellant’s injuries were not incurred in the course and scope of her employment under any so-called sudden emergency doctrine.

CONCLUSION

For all the reasons stated herein, this Court should deny Appellant's Petition for Rehearing.

Respectfully submitted,



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Attorneys for Respondents

November 5, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1004913

Virginia A. Miles, Employee, Appellant,

v.

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

**RESPONDENTS' RETURN IN OPPOSITION TO
APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT RECORD**

Pursuant to Rules 212 & 240(e), SCACR, Respondents oppose Appellant's Motion for Leave to Supplement the Record ("Motion"). Appellant was free to designate any portions of the record below that she desired to have included in the Record on Appeal and/or file a Reply Brief with this Court, but she chose to do neither. It was not until this Court upheld the Full Commission's Decision that she decided to attempt to support her argument regarding the so-called emergency doctrine. Appellant's Motion should be denied for the reasons stated herein.

First, it is axiomatic that an issue cannot be raised for the first time on appeal. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). In the workers' compensation context, "[o]nly issues raised and ruled upon by the commission are cognizable on appeal." *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006). For an issue to be preserved before the Full Commission, it must be raised in a party's Form 30 appeal from the single commissioner decision. *Jervey v.*

Martint Envt'l, Inc., 396 S.C. 442, 452, 721 S.E.2d 469, 474 (Ct. App. 2012) (an issue must be either raised to and ruled on by the single commissioner “**or in a request for commission review** of the single commissioner’s order to be preserved for appellate review”) (emphasis added); Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) (noting that the Commission does not have “authority to address an issue not raised in an application for review,” and holding that “only issues within the application for review are preserved for the full commission”). Even the case cited by Appellant notes that “[t]he commission’s failure to explicitly rule on **an issue raised to it in a Form 30** does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.” Nettles v. Spartanburg Sch. Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000) (emphasis added). In fact, in Nettles, the reason the Court held that the contested issue was preserved for review was precisely “because she raised the issue on her Form 30 ...” Id.

Here, Appellant’s Form 30 raised 22 separate issues on appeal, (R. pp. 7-10), but none of them mention in any way a so-called emergency doctrine. Therefore, regardless of whether Appellant raised this issue in her Brief to the Commission, she did not properly raise or preserve it to the Full Commission because she failed to reference the emergency doctrine or even an emergency situation in her Form 30 detailed list of appealed issues.¹ Thus, her proposed addition to the Record is irrelevant and should not be included.

Second, an appealed order “comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error.” McCall v. IKON, 380 S.C. 649, 659-660, 670 S.E.2d 695, 701 (Ct. App. 2008). Part of that burden is presenting a record that demonstrates that an issue was raised and properly preserved in the lower tribunal.

¹ Merely by responding to the issues raised in the Final Brief of Appellant, Respondents have not conceded and do not concede that she has properly preserved this issue on appeal. In fact, the Court of Appeals correctly determined that it was not preserved.

Solley v. Navy Fed. Cred. Union, Inc., 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012). Concomitantly, “the appellant has the burden of providing an adequate record on appeal.” Id., 397 S.C. at 214, 723 S.E.2d at 608; *see also* Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000) (deciding against the appellant on a particular issue because county ordinances were not in the record, and holding the appellant has “the burden of presenting this Court with an adequate record”); McCall, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (ruling against the appellant despite his protestations that he had no opportunity to address an issue, because the appellant “did not provide this court with an adequate record to consider this argument”). Appellate courts routinely refuse to consider arguments because of the appellant’s failure to provide a sufficient record for review. *See, e.g.*, Parker v. Fireman’s Ins. Co., 297 S.C. 166, 375 S.E.2d 325 (Ct. App. 1998) (refusing to consider whether the insurance policy excluded South Carolina because the appellant did not include a copy of the policy in the appellate record); Porter Bros., Inc. v. Specialty Welding, Co., 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985) (refusing to address an argument that the lower court erred by refusing a request for a jury charge under the UCC because the record failed to include either the request for the charge or the charge the trial judge gave). If an appellant simply could move to supplement the appellate record each time it lost an argument because of a failure to provide a sufficient record on appeal, appellants unfairly would be allowed multiple attempts to prove their case on appeal.

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point will be considered which does not appear in the record on appeal. Rule 210(h), SCACR. Because court rules require the appealing party to prepare the record on appeal, *see* Rule 210(a), SCACR, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review.” 372 S.C. at 283, 641 S.E.2d at 897. As the burden was on Appellant to prepare and properly support all of her arguments as to why the Commission’s Decision should be overturned, but failed to do so, she has not been denied due process by this Court. Instead, allowing her to supplement the Record on Appeal at this late date would allow her an unwarranted second chance to argue her appeal before this Court.

The cases relied on by Appellant do not dictate a different result. In Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793 (Ct. App. 1989), the issue the appellant sought to raise was “reasonably clear from the employee’s arguments and **was ruled on by the Single Commissioner.**” 300 S.C. at 176, 386 S.E.2d at 795 (emphasis added). This court also noted that the issue “could readily be determined and was meritorious.” In fact, “both parties understood this to be the basic point of contention.” 300 S.C. at 176, 386 S.E.2d at 795. None of those factors is present here – the specific argument Appellant now seeks to preserve (application of the so-called sudden emergency doctrine) was not ruled on by the Single Commissioner, cannot readily be determined, is not meritorious and was never understood by the parties to be the basic point of contention. Appellant cites Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988) for the proposition that an issue is preserved for appeal so long as it was raised to the Single Commissioner. In Palm, this Court held that the issue was not preserved because the circuit court had not ruled on it and the claimant failed to file a Rule 59(e) motion to amend. What is unclear in Palm, and what distinguishes it from the

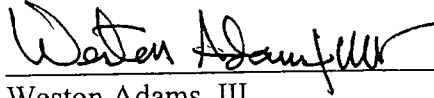
instant case, is whether the issue was preserved to the Full Commission regardless of whether it was “inferable from the record that she raised this issue before the single commissioner.” 296 S.C. at 51, 370 S.E.2d at 468. Appellant cites Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003) and Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994) for the proposition that an issue can be raised for the first time on appeal to the Full Commission. What is unclear in both of those cases is whether the issues were included on the Form 30 appeals to the Commission; however, it can only be assumed that they were, since “only issues within the application for review are preserved for the full commission.” Creech, 320 S.C. at 564, 467 S.E.2d at 117; *see also* Jervey, 396 S.C. at 452, 721 S.E.2d at 474.

Appellant is not the victim of unfair surprise; she was required to raise all of her issues in her Form 30 to the Full Commission and, as the Appellant to this Court, under an obligation to make sure her claims were properly supported by a sufficient record on appeal. The failure to do so rests solely with her.

CONCLUSION

For all the reasons stated herein, this Court should deny Appellant's Motion for Leave to Supplement the Record.

Respectfully submitted,



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November 5, 2012

The South Carolina Court of Appeals

Virginia A. Miles, Employee, Appellant,

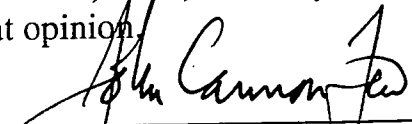
v.

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

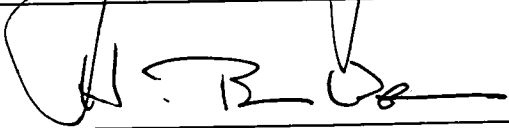
Appellate Case No. 2011-190726

ORDER

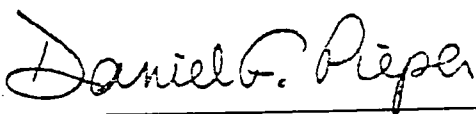
On October 10, 2012, this court affirmed the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) finding Appellant Virginia Miles failed to prove her alleged injuries arose out of and in the course and scope of her employment. On October 24, 2012, Miles filed a petition for rehearing and a motion to supplement the record. On November, 5, 2012, Respondents filed a return to the motion to supplement the record, objecting to the supplementation of the record after the issuance of the opinion. After a thorough review of the filings, we grant the motion to supplement the record. Furthermore, the petition for rehearing is granted. We dispense with further briefing and argument. The opinion filed on October 10, 2012, is hereby withdrawn and the attached opinion is substituted for that opinion.



C.J.



J.



J.

Columbia, South Carolina

cc:

Erroll Anne Yarbrough Hodges

Weston Adams, III

Helen Faith Hiser

Stephen Benjamin Samuels

Virginia L. Crocker

FILED

9 Jan 2013