THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. Supreme Court

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.

FINAL BRIEF OF APPELLANT

Stephen B. Samuels
Samuels Law Firm, LLC
1527 Blanding St.
P.O. Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 7

ARGUMENT 8

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. 8

   A. Miles' actions did not exceed the scope of her employment because as a waitress she was required to deal with rowdy customers. 8

   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. 13

   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. 17

2. As this was an emergency situation with no time for reflection, Miles' injuries arose out of her employment under the Sudden Emergency Doctrine. 19

3. The Commission erred in finding James Kearse "credible as it relates to all aspects of this claim." 21

CONCLUSION 23

CERTIFICATE OF COUNSEL 24

TABLE OF AUTHORITIES

CASES

Black v. Town of Springfield,
217 S.C. 413, 60 S.E.2d 854 (1950) 9, 11-12, 14-15, 20

Broughton v. South of the Border,
336 S.C. 488, 520 S.E.2d 634 Ct. App. 1999) 7

Compton v. Town of Iva,
256 S.C. 35, 180 S.E.2d 645 (1971) 15-16

Grant v. Grant Textiles,
372 S.C. 196, 641 S.E.2d 869 (2007) 15

Hall v. Desert Aire, Inc.,
376 S.C. 338, 656 S.E.2d 753 (Ct.App. 2007) 19

Hendricks v. Pickens County,
335 S.C. 405, 517 S.E.2d 698 (Ct. App.1999) 7

Hiers v. Brunson Construction Co.,
221 S.C. 212, 70 S.E.2d 211 (1952) 9, 20

Howell v. Kash & Karry,
264 S.C. 298, 214 S.E.2d 821 (1975) 13, 15, 18

Johnson v. Merchants Fertilizer Co.,
183 S.C. 373, 17 S.E.2d 695 (1941) 9, 15

Jolly v. Atlantic Greyhound Corp.
207 S.C. 1, 35 S.E.2d 42 (1945) 7

Kinsey v. Champion American Service Center,
268 S.C. 177, 232 S.E.2d 720 (1977) 7, 20

Lark v. Bi-Lo, Inc.,
276 S.C. 130, 276, S.E.2d 304 (1981) 7

Medlin v. Upstate Plaster Service,
329 S.C. 92, 495 S.E.2d 447 (S.C. 1998) 18

Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959) 15

Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004) 15, 20

Shah v. Howard Johnson, 140 N.C.App. 58, 535 S.E.2d 577 (N.C.App. 2000) 8

Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940) 21

Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E.2d 675 (Ct.App.2006) 17

Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) 13-15, 20

STATUTES

S.C.Code Ann. § 1-23-380 (2010) 23

STATEMENT OF ISSUES ON APPEAL

1. If an Employee is assaulted by a customer of her Employer over events related to the employment, do the employee's injuries arise out of the employment?

2. Did the Workers' Compensation Commission err in holding an employee who was assaulted by a customer of her employer Claimant violated a company policy which took her outside the scope of her employment when the alleged rule violation dealt with how she did her job rather than limiting the scope of her employment, in that dealing with rowdy customers is part of her job?

3. Did the Workers' Compensation Commission err in holding an employee who was assaulted by a customer of her employer was acting outside the scope of her employment even though her actions were undertaken entirely for the benefit of her Employer?

4. Did the Workers' Compensation Commission err in holding an employee was acting outside the scope of her employment when she was assaulted by a customer on the Employer's premises when there was no evidence the employee committed a direct and intentional violation of a specific and express policy?

5. Did the Workers' Compensation Commission err in failing to award benefits under the sudden emergency doctrine to an employee who was assaulted by a customer of her employer while the employee was doing what she thought necessary in an emergency situation for the purpose of advancing the work in which she was engaged in the interest of her employer?

6. Was it arbitrary and capricious for the Workers' Compensation Commission to find James Kearse "credible as it relates to all aspects of this claim" when his testimony was contradicted by every other witness in the case and by the documentary evidence?

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. 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.

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

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

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

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

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

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

This appeal followed.

<u>STATEMENT OF THE FACTS</u>

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

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

The training ostensibly included safety and security training. No manager went through detailed safety and security training with Miles. [R. p. 81, line 16-p. 83, line 25; p. 312]. The only specific training Miles received about security was, "If there was a yellow tag on the back door after dark, do not go out the back door. And if anyone come in to rob the place, give them all the money." [R. p. 84, lines 2-9]. She was not trained in dealing with the situation which ultimately arose in this case. [R. p. 88, lines 3-17]. The other waitress, Lori Green, acknowledged waitresses are not trained for such situations, remarking, "No. Who is trained for that as a server?" [R. p. 177, lines 11-24].

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

This incident occurred on third shift in the early morning hours of Sunday, March 14, 2010.

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

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

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

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

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

Tiffany Gibson then went outside and got in her car. She was on a separate ticket, so Miles went outside to tell her she needed to pay her ticket. Gibson told Miles she was looking for the money. Miles then went back inside and continued her side work. [R. p. 93, lines 10-15].

Howes got up out of the booth and had a confrontation with Brittany Massalou. Howes attempted to hit Massalou, but Massalou punched her first. [R. p. 133, lines 5-p. 134, line 11]. Howes then began "causing trouble and starting to vandalize the Waffle House." She started

sweeping caddies off the tables with her arms and throwing sauce bottles. [R. p. 96, line 20-p. 97, line 3].

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

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

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

"[Miles] got from behind the car, walked around the front, was walking back in, and the girl mashed the gas and went to hit her. So she jumped on the hood. The girl took out of the parking lot."[1] [R. p. 228, lines 10-14]. Miles jumped on the hood of the car to avoid being run over.

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

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

transported to the hospital by ambulance.[2]

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

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

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

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

STANDARD OF REVIEW

A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). Upon a proper appeal under the Worker's Compensation Act when only a question of law is involved, the facts having been concluded by the finding of the Commission, the appellate court as to review and correction of errors has plenary powers. Jolly v. Atlantic Greyhound Corp. 207 S.C. 1, 35 S.E.2d 42 (1945).

The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and provide a basis from which they reasonably may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures. Broughton v. South Carolina Game and Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). The substantial evidence rule, prescribed in the statute, means the appellate court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276, S.E.2d 304 (1981). However, when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). The Commission must consider all the evidence in the record when developing its findings of fact. Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App.1999).

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. See Shah v. Howard Johnson, 140 N.C.App. 58, 535 S.E.2d 577 (N.C.App. 2000)(employee shot during robbery was injured under "unquestionably compensable circumstances").

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

The legal theory advanced by Respondents is that Miles violated a company policy which took her outside the scope of her employment – specifically a policy against going outside on third shift. As noted below, Miles 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, there is no evidence Miles ever went outside her own assigned work at all. She was responsible for seeing that her customers paid their tickets. This is not a situation where she left the premises, or was engaged in a personal errand, or intervened in a robbery of a third person. She did not pursue anybody. Nor is this a situation where she placed herself in obvious danger. No reasonable person could expect that a young woman would attempt to run over a waitress just to avoid paying a restaurant bill.

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

It would frustrate the purposes of the Act if an employer could make every risky or foolish act outside the scope of employment (and thus not compensable) merely by making a rule against it. 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 each of them has violated a company policy. The reason is because each rule concerns the "conduct of the workman within his sphere of employment."

Perhaps the clearest illustration of this scenario in practice occurred in Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). The claimant in Black was the police chief of a small town. He died when he fell from the side of a fire truck on which he was riding out to a fire. The mayor had previously instructed Black not to ride on the truck because it was not his "duty to ride the truck or have anything to do with it." The Supreme Court held Black's fatal injuries were outside the scope of his employment, noting the evidence "not only fails to show that deceased's

injuries were sustained while performing duties within the scope of his employment but positively shows that such injury was brought about through his own acts which were not only wholly without the scope of his employment but had been expressly forbidden by his employers."

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

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

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

The rule is not posted inside the store nor was Miles ever trained in the rule.[3] It is part of the

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[3]As part of its new employee training, Waffle House management is supposed to review the safety and security policies with each new hire. There is a training checklist which is supposed to be initialed and signed by the employee and the training manager. Miles testified no

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

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

No doubt these are good policies designed for the safety of the employees. Nonetheless, they are still "tips" on how to deal with the rowdy customers inherent in Waffle House's business. They tell employees "how to" because this is part of their job. You cannot work third shift at Waffle House and not encounter "out of control" customers as a central part of your job.

For the most part, Miles did exactly what Waffle House would have wanted her to do. She did not argue with nor provoke her intoxicated customers. [R. p. 175, line 23-p. 176, line 6]. She was the one who tried to take charge of the situation and called the police – *not* the cooks who were supposedly in charge of the store. Mike Strong testified, "I was sitting down the whole time. [R. p. 157, line 2]. She admittedly did follow a customer into the parking lot (as did 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

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manager went over these policies with her. Her testimony is confirmed by the fact the training checklist is signed by her, but not by a manager. [R. p. 312].

light, and the CNA awkwardly lifting a patient. Miles panicked and used bad judgment – but she was still doing her job dealing with Waffle House customers. As such, her actions – even if they violated policy – 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 herself out of the course of her employment. As there is no question she was on the clock doing her job on the employer's premises, the only way Waffle House can prevail is by showing Miles committed a direct and intentional violation of a specific and express policy when she was assaulted by a customer on the Employer's premises

The leading case on this issue is Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). In Howell, a grocery store employee was sent across the street to retrieve a number of shopping carts. He saw two boys grab the purse of a woman. He gave chase, running into a low fence and breaking his arm. The Supreme Court affirmed the award of workers' compensation benefits adopting the generally recognized rule stated by Professor Larson as "An act outside an employee's regular duties taken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of the employment." Id. at 301, 214 S.E.2nd at 822.

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 off the employer's premises on his moped. Unlike Waffle House, Bi-Lo had a specific policy prohibiting hourly wage earners, including Wright, from approaching or apprehending suspected shoplifters.

Wright is clearly distinguishable from the instant case. On the Tuesday before his death, Wright had gotten into a heated argument with a suspected shoplifter. The store manager took him outside and specifically explained the 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's acts were "in direct and intentional violation of a specific and express policy" prohibiting the act. In the three leading cases denying compensation, the employer had repeatedly warned the employee not to engage in the specific act, including specific instructions given immediately before the act and blatantly disobeyed by the employee. See, Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004)(employee explicitly instructed not to take company truck home on the day of the accident); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store immediately before chasing shoplifter on moped). Multiple other cases reached the opposite result – because the employer could not prove it had given clear and explicit instructions. See, e.g., Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007)(injury incurred removing debris from road compensable even though it was not part of employee's job duties); Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975)(fall while chasing purse snatcher off the premises not specifically prohibited by employer even though outside regular job duties); Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645 (1971)(employer allowed employees to act outside scope of their duties); Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959)(employee died of anaphylactic shock administered by nurse who knew of prohibition against giving shots without doctor's orders); Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 17 S.E.2d 695 (1941)(compensation awarded where employee was found dead in an allegedly

prohibited area because conflicting evidence on whether employer had given "clear and explicit" orders on not going into this area).

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

Moreover, Waffle House cannot show it had a specific and express policy which it communicated to Miles. James Kearse claims he told the employees never to go outside during third shift. However, this is not a written policy – at least not one that Waffle House could produce. Both Miles and Strong testified the "rule actually is on third shift don't go out [the back door] if there is a yellow tag on the back door." [R. p. 84, lines 6-7; p. 162, lines 10-13].

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

Kearse claims he wrote up every single employee who went outside that night. However,

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

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

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

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

Everything Miles did that night – including going outside the store in hopes of keeping the customers on the premises until the police arrived – was done for the benefit of her employer. The store manager, James Kearse testified, "I felt like she was trying to be the hero trying to stop them and save the day and get the money for the check . . ." [R. p. 199, lines 15-17]. There is no evidence

anything Miles did was for her own personal benefit. The basic rule is "An act outside an employee's regular duties taken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of the employment." Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975).

Kearse testified to how Waffle House would benefit from what Miles was trying to do. He 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. [R. p. 207, line 6-p. 208, line 5]. See Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (S.C. 1998)(reversing Commission's factual findings as unsupported by substantial evidence because employer bound by its own testimony.)

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

> Because the food has to be paid for somehow. Or they just come in, and you're the one getting the writeup, because you know, they walk out, if they watch the tape and all the other blah, blah, blah. But it doesn't matter. Either way somebody has to pay for this food. So either you get the tag number or you're just stuck. But in that case we needed the tag number anyway. I mean, she tore up the whole restaurant. [R. p. 13, lines 14-21].

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

There is no question everything Miles did that morning was for Waffle House. "Nothing in the evidentiary record suggests [she] engaged in any activities of a personal nature that might break

the causal link between [her] employment and [her] injuries." Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct.App. 2007).

The actions of Waffle House immediately after the incident confirm that Waffle House approved of Miles's conduct – at least up until the point where she filed her workers' compensation claim. Miles was not written up. Kearse claims he wrote her up, but his claim is an obvious fabrication. What is not fabricated is the "Performance Review" written up by Kearse on Miles on March 18, 2010 – a *mere four days* after the incident.[4] [R. p. 314]. In that Review, she met all expectations. Kearse further testified "she's welcome back" when she is physically able to work. [R. p. 209, lines 12-15]. He characterized her as a "good" employee who "was a hard worker, dependable, and punctual." [R. p. 193, lines 17-22].

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

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

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

Under the sudden emergency doctrine, injuries sustained in dealing with a work-related emergency are inherently compensable. "[I]f in the course of [a worker's] employment an emergency

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[4]Kearse claims he wrote the Performance Review sometime before March 14, 2010, but dated it March 18, 2010 because that was when it was due to be turned in to corporate. As noted at pages 15-16, Kearse's statements on this issue are palpably false.

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

The rule applied by the Commission in this case requires the employee to knowingly violate an explicitly stated company policy. Inherent in every one of the cases denying compensation is a warning given to the employee in sufficient time for him to make a rational decision before pressing forward. See, Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (S.C. 2004)(employee explicitly instructed not to take company truck home on the day of the accident); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store immediately before chasing shoplifter on moped). None of these cases involve an emergency situation like the one here where no one with any authority was in charge.

All of the employees present agreed this was a fast-developing, crazy situation. Lori Green

described it "like movie fast." [R. p. 175, lines 1-16]. Strong testified it was "pretty hectic" and "everything happened real fast." [R. p. 147]. Green stated "The whole situation was out of control. It was a mess." [Tr. p. 182, lines 23-24]. The timeline from the Irmo Police Department shows that Miles ended up on the hood of the care within 90 seconds of hanging up the phone. The audio of the 911 phone calls graphically demonstrates how panicked Miles, Massalou and Green were. [R. p. 315 (audio recording)].

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

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

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

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

the power of review and correction by this Court.").

Kearse claimed he "wrote all of them up, everybody who went outside, except for Ms. Mary. She didn't exit the building." [R. p. 189, lines 11-19]. No actual writeups were produced – Kearse testified "I'm pretty sure the [new manager] threw a bunch of stuff away." [R. p. 214, lines 8-9].

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

Kearse also gave incredible testimony about the Performance Review. The Performance Review was not provided to 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 polices supposedly posted on the wall in the restaurant or supposedly written in the employee handbook – even those these items were plainly in their control and they knew this was a central issue. In fact, the documentary evidence shows that Waffle House *never* trained Miles in safety and security procedures. [R. p. 312].

Kearse also gave inconsistent, biased and self-serving testimony regarding whether Waffle House benefitted from Miles' actions. On cross-examination by Claimant's attorney, Kearse admitted

to five specific benefits conferred on Waffle House by Miles' actions. [R. p. 207, line 6-p. 208, line 5]. However, when questioned by Waffle House's attorney on redirect, he completely contradicted himself.

Although there is a general rule that the Commission is the sole arbiter of the credibility of a witness, there is a point at which a credibility finding becomes arbitrary and capricious. S.C.Code Ann. § 1-23-380(A)(6)(f) (2010)(setting out standard for reversing findings of administrative agency when arbitrary or capricious). That point was reached here when the Commission found Kearse "credible as it relates to all aspects of this claim . . ." [R. p. 63, Finding of Fact 16]. Any finding unsupported by the evidence – even a credibility finding – must be reversed.

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

CONCLUSION

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

Respectfully Submitted,

Stephen B. Samuels
Samuels Law Firm, LLC
1527 Blanding St.
P.O. Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

October 31, 2011

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Stephen B. Samuels
Samuels Law Firm, LLC
1527 Blanding Street
P.O. Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
October 31, 2011

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S.C. Supreme Court

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FINAL BRIEF OF RESPONDENTS

Weston Adams, III
Helen F. Hiser
McANGUS GOUDELOCK & COURIE, L.L.C.
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Attorneys for Respondents Waffle House, Inc. and Brentwood Services, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

Statement of Facts 1

Standard of Review 5

ARGUMENTS

I. The Commission correctly determined that Claimant's actions leading to her injuries were not within the course and scope of her employment 7

A. Claimant's actions exceeded the scope of her employment because dealing with rowdy customers does not include following them into the parking lot and blocking their vehicle 8

B. Claimant's actions exceeded the scope of her employment because she committed a direct and intentional violation of a specific and express policy when she followed customers into the parking lot and attempted to block their vehicle 11

C. The so-called "Sudden Emergency Doctrine" does not apply in this case 16

II. The Commission correctly determined that Claimant's actions leading to her injuries did not benefit Waffle House 20

III. The Commission properly found that the testimony of James Kearse was credible as it relates to all aspects of this claim 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Anderson v. Baptist Med. Ctr.,
343 S.C. 47, 541 S.E.2d 526 (2001) 6, 7, 24

Black v. Town of Springfield,
217 S.C. 413, 60 S.E.2d 854 (1950) 10, 12

Broughton v. South of the Border,
336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999)....................6, 18, 21

Compton v. Town of Iva,
256 S.C. 35, 180 S.E.2d 645 (1971) 14, 15

Etheredge v. Monsanto Co.,
349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)....................6

Grant v. Grant Textiles,
361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004)....................17

Grant v. Grant Textiles,
372 S.C. 196, 641 S.E.2d 869 (2007) 14, 18, 21

Hall v. Desert Aire, Inc.,
376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007)....................7, 10, 21, 24

Hiers v. Brunson Constr. Co.,
221 S.C. 212, 70 S.E.2d 211 (1952) 17, 18, 19

Howell v. Kash & Karry,
264 S.C. 298, 214 S.E.2d 821 (1975) .... Ibid.

Johnson v. Merchant's Fert. Co.,
198 S.C. 373, 17 S.E.2d 695 (1941) 14

Kinsey v. Champion American Serv. Ctr.,
268 S.C. 177, 232 S.E.2d 720 (1977) 19

Lark v. Bi-Lo,
276 S.C. 130, 276 S.E.2d 304 (1981) 5, 6

McGuffin v. Schlumberger-Sangamo,
307 S.C. 184, 414 S.E.2d 162 (1992) 6

Portee v. South Carolina State Hosp.,
234 S.C. 50, 106 S.E.2d 670 (1959) 14

Pratt v. Morris Roofing, Inc.,
353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003).. 12-13

Rogers v. Kunja Knitting Mills, Inc.,
312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994)..6

Ross v. American Red Cross,
298 S.C. 490, 381 S.E.2d 728 (1989) 6

Shah v. Howard Johnson,
140 N.C. App. 58, 535 S.E.2d 577 (N.C. Ct. App. 2000)................................7, 8

Sharpe v. Case Prod., Inc.,
336 S.C. 154, 519 S.E.2d 102 (1999) 25

Shealy v. Aiken County,
341 S.C. 448, 535 S.E.2d 438 (2000) 7, 24

Stallcup v. Carolina Wood Turning Co.,
217 N.C. 302, 7 S.E.2d 550 (1940)..24, 25

Watt v. Piedmont Automotive,
384 S.C. 203, 681 S.E.2d 615 (Ct. App. 2009)..25

Wright v. Bi-Lo, Inc.,
314 S.C. 152, 422 S.E.2d 186 (Ct. App. 1994)..12, 13

STATUTES

S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007)..5, 6

S.C. Code Ann. § 42-9-60...20

STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission correctly determined that Claimant's actions leading to her injuries were not within the course and scope of her employment?

II. Whether the Commission correctly determined that Claimant's actions leading to her injuries did not benefit Waffle House?

III. Whether the Commission properly found that the testimony of James Kearse was credible as it relates to all aspects of this claim?

STATEMENT OF THE CASE

Appellant Virginia Miles ("Claimant") filed a workers' compensation claim, alleging she sustained injuries as a result of a work-related incident that occurred on March 14, 2010. On that date, she was employed as a waitress by Waffle House, Inc., a self-insured employer whose workers' compensation coverage was administered through Brentwood Services, Inc. (jointly "Respondents"). Respondents denied that any injuries incurred by Claimant arose out of and in the course of her employment and argued that her injuries, therefore, were not compensable.

The parties were heard by Single Commissioner T. Scott Beck on July 20, 2010. The Single Commissioner issued an Order on October 5, 2010, finding that, "Claimant's actions leading to her injuries clearly were not within the course and scope of her employment, nor did they benefit Waffle House," among other findings, and assessed costs of the hearing against Claimant. (Decision and Order of the Single Commissioner, R. pp. 42-45). Claimant timely appealed this decision to the Full Commission. (Claimant's Form 30, R. p. 7-10). An Appellate Panel of the Full Commission heard the parties on January 18, 2011 and issued an order dated March 23, 2011 affirming the Single Commissioner in all respects except for the assessment of costs against Claimant. (Decision and Order of the Full Commission, R. pp. 60-66).

Claimant timely appealed to this Court.

STATEMENT OF THE FACTS

Claimant was employed as a waitress at the Waffle House at 1198 Broad River Road in Columbia, South Carolina. (R. p. 76, lines 19-21) (R. p. 79, line 24 – p. 80, line 1). James Kearse was Claimant's supervisor and unit manager of the Waffle House on

the date of the incident. (R. p. 108, lines 20-23).

Claimant was working the third shift on the night of March 14, 2010. (R. p. 88, line 18 – p. 89, line 1). In the early morning hours of March 14, 2010, four patrons (two couples) began arguing. Claimant testified that she went over to the customers and asked them to calm down, pay their ticket, and leave. (R. p. 91, line 16 – p. 92, line 3). The men paid the bill and then left. One of the women, Kelly Howes, told Claimant that she had not been nice so she was not going to leave her a tip. (R. p. 92, lines 10-14). Ms. Howes then had a confrontation with another waitress, Brittany Massalou, and swept her arm across a counter, knocking items off of it. (R. p. 93, lines 17-22) (R. p. 96, line 20 – p. 97, line 2) (R. p. 133, lines 12-17) (R. p. 140, lines 4-8).

Claimant testified that she called 911 and requested that the police come to the Waffle House. (R. p. 94, lines 13-18). Ms. Howes left the restaurant and got in the car with her companion, Ms. Gibson. Claimant testified that she ran outside and stood behind the car in order to keep Ms. Howes there until the police arrived, stating that she "wasn't thinking. I just thought that she would not move." (R. p. 97, lines 5-18).[1] Claimant admitted she had not gone out after Ms. Howes because of an unpaid check. (R. p. 114, lines 12-15).

A coworker, Lori Green, testified that she went outside, got the license plate number, and tried to make Claimant come back in the restaurant, but Claimant refused.

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[1] Although Appellant's Statement of Facts states that, "Lori Green and Brittany Massalou ran out with [Claimant]," citing page 72 of the Hearing Transcript, that page contains testimony of a coworker, Mike Strong, who merely stated, "and then all of a sudden Ginny goes outside and says she's getting the license plate number. For what?" (R. p. 133, lines 15-17). Mr. Strong later testified that, "No one went into the parking lot until Ginny went into the parking lot." (R. p. 145, lines 20-21). Claimant's testimony is consistent with this statement. (R. p. 97, lines 7-10). The statement in Claimant's Brief that she "was walking back in, and the girl mashed the gas and went to hit her," (App. Brief p. 5) is likewise contradicted by Claimant's own testimony that she deliberately stood behind the car and then moved to the front in an attempt to keep the car from leaving the parking lot. (R. p. 97, line 7 – p. 98, line 8) (R. p. 116, lines 7-13).

Ms. Green testified that she asked Claimant to come back in and even physically pulled on her to try to get her to come back inside the Waffle House, but Claimant again refused. (R. p. 171, line 8 – p. 172, line 17) (*see also* R. p. 134, line 12 – p. 135, line 5 (testimony of Mr. Strong that "[a] couple waitresses came outside and tried to get Ginny from behind the car, but she wouldn't move")) (R. p. 154, lines 16-19). In the meantime, Claimant testified that she observed a conversation between Ms. Howes and Ms. Gibson in the car. Ms. Gibson was originally in the driver's seat, but the women then switched places so that Ms. Howes was driving. (R. p. 114, line 20 – p. 116, line 6).

Ms. Howes started backing the car up, which "bumped" Claimant out of the way. At that point, Claimant was standing on the side of the car. She admitted that she deliberately walked around to the front of the car and attempted to stare Ms. Howes in the eye. (R. p. 97, line 21 – p. 98, line 7). Without looking back at Claimant, Ms. Howes accelerated the car, which hit Claimant in the calves. Claimant jumped onto the hood of the car. Ms. Howes pulled out of the Waffle House parking lot and drove about two blocks to a Burger King parking lot, where she slammed on the brakes, throwing Claimant from the hood. (R. p. 98, line 8 – p. 99, line 7).

Claimant testified that, prior to the incident on March 14, 2010, she had been trained by Waffle House that in an emergency situation like a robbery, she was to give the robbers the money or whatever they wanted and stay out of their way. She had been instructed specifically not to follow them outside the store. (R. p. 108, line 24 – p. 110, line 8). She also admitted that she had been told that, if a patron attempted to leave without paying their check, she was not supposed to try to prevent them from leaving the parking lot once they had gotten into their car. (R. p. 111, line 22 – p. 114, line 11).

Although Claimant characterized the situation that night as an emergency, (R. p. 175, lines 5-16), her co-workers explained that, to the extent there was an emergency situation, it was caused by Claimant when she followed the patrons outside of the Waffle House. (R. p. 153, line 17 – p. 155, line 13) (*See also* R. p. 143, lines 21-25 (Mr. Strong testifying that "everybody didn't go outside until Ginny went outside")) (R. p. 145, lines 20-21) (R. p. 163, lines 16-25) (R. p. 180, lines 7-19 (Ms. Green testifying that what caused the situation to get out of control was when Claimant went outside: "Yeah. She went outside and she just wouldn't come back inside. And she was demanding that they do whatever they needed to do, but she just wouldn't leave the back of the car").

Mr. Strong and Ms. Green also testified that it was Waffle House policy that employees were not supposed to go outside on third shift. (R. p. 151, lines 18-25) (R. p. 169, line 9 – p. 170, line 21) (R. p. 181, lines 16-22). Both Mr. Strong and Ms. Green recalled that Claimant was present when manager James Kearse instructed the employees about this policy. (R. p. 152, lines 21-25) (R. p. 164, lines 1-5) (R. p. 170, lines 3-21). Mr. Kearse confirmed that the rule against going outside on third shift was communicated to employees verbally and posted in the back room. (R. p. 185, line 18 – p. 186, line 13). Mr. Kearse stated that he specifically had a conversation with Claimant where he told her not to go outside on third shift. (R. p. 215, lines 13-17). Mr. Strong and Ms. Green both confirmed that if employees were caught going outside on third shift, they were either written up or reprimanded. (R. p. 168, lines 2-9) (R. p. 181, lines 11-22).

Mr. Strong testified that, during third shift, the cooks were basically in charge, although they were not managers. (R. p. 126, line 13 – p. 127, line 20). Mr. Strong indicated that, when patrons are rowdy or destructive, "All I'm required to do is get them

outside. I got them outside. She [Claimant] chose to follow them . . ." (R. p. 159, lines 10-13). He also testified that, even if a car was parked facing the store, (R. p. 165, line 24 – p. 166, line 12), they could obtain the license number when the car pulled out of the parking lot. (R. p. 168, lines 10-22). Ms. Green confirmed that, if a license tag number was needed, employees were to stay inside the store and try to get the license number from the window. (R. p. 170, line 22 – p. 171, line 7).

Per the testimony of Mr. Kearse, Mr. Strong, and Ms. Green, Waffle House policy is that employees on third shift are not to leave the building for safety reasons. (R. p. 151, line 18 – p. 152, line 25) (R. p. 185, line 18 – p. 186, line 1). Although there was testimony that employees do sometimes leave the building, for example, for smoke breaks or to purchase items at a nearby convenience store, Mr. Strong and Ms. Green testified that if they are caught by a manager leaving the building, they are reprimanded or written up. Further, it is Waffle House's policy that employees are not to try to "be a hero," apprehend "walk outs" on bills, or try to overpower criminal suspects. (R. p. 199, lines 1-21).

Mr. Kearse testified that he personally had gone over these policies with Ms. Miles and other employees in the past in the context of another situation prior to this incident. (R. p. 187, line 5 – p. 188, line 2) (R. p. 190, line 14 – p. 191, line 6).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view

of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

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 same conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679,681-82 (Ct. App. 2002). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93,

541 S.E.2d 526, 528 (2001); Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). Finally, the Commission is the final judge of witness credibility. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 529; *see also* Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (holding that the "final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission).

ARGUMENT

I. The Commission correctly determined that Claimant's actions leading to her injuries were not within the course and scope of her employment.

The Commission correctly held that Claimant's injuries were not compensable because the actions that lead to her injuries were outside the course and scope of her employment with Waffle House.. Claimant was hired as a waitress, not a law enforcement officer. She was not required or encouraged to chase after patrons and attempt to block their vehicles from leaving the parking lot as part of her job as a waitress. In fact, such actions were expressly prohibited and she had been trained not to "be a hero," and had even had been warned specifically about going outside during third shift.

Claimant cites a North Carolina case, Shah v. Howard Johnson, 140 N.C. App. 58, 535 S.E.2d 577 (N.C. Ct. App. 2000), in a general attempt to argue that her actions were within the scope of her employment. Shah is clearly distinguishable from the instant case. There, the evidence in the record demonstrated "unquestionably compensable circumstances," where the claimant was injured while performing his assigned duties. While the claimant "was performing his regular job duties as a desk clerk and night auditor," an individual robbed him at gunpoint and shot both the claimant

and a co-worker. The claimant suffered multiple gunshot wounds to his back, right arm and left thigh. 140 N.C. App. at 62, 535 S.E.2d at 580. The employer in Shah raised the suggestion that the assault on the claimant might have been for personal reasons and, therefore, not compensable as a work-related injury. The Commission rejected this defense as speculative, because the employer had produced no evidence of any personal basis for the assault. 140 N.C. App. at 64, 535 S.E.2d at 581. Unlike the claimant in Shah, in the present case Claimant was not performing her job – waiting tables – when she was assaulted by Ms. Howes. Claimant followed Ms. Howes to the parking lot and purposefully placed her body behind, and then in front of Ms. Howes' vehicle in an attempt to prevent her from driving out of the lot. She admittedly was not even attempting to obtain payment of a check. (R. p. 114, lines 12-15). This case would be more analogous to Shah, and a different outcome might be warranted, had Ms. Howes injured Claimant when she was throwing condiment bottles inside the restaurant; however, that is not the case before this Court.

A. Claimant's actions exceeded the scope of her employment because dealing with rowdy customers does not include following them into the parking lot and blocking their vehicle.

Claimant argues that, even if she violated a company policy against going outside on third shift, she was still within the scope of her employment "because dealing with rowdy customers is part of her job." (App. Br. pp. 8, 12). Although Respondents do not contest that the staff on third shift must sometimes deal with "rowdy customers," following them into the parking lot to block their car is in no way an acceptable manner of dealing with customers, rowdy or not. Testimony in the record established that, once the two couples had left the Waffle House, the situation was under control – in essence,

the situation involving rowdy customers had been handled, or dealt with. (R. p. 159, lines 8-13). It was Claimant's inexplicable decision to follow Ms. Howes into the parking lot and her attempt to block Ms. Howes' car with her body that caused the situation to escalate out of control. (R. p. 154, line 1 – p. 155, line 10) (R. p. 180, lines 7-19) (R. p. 182, lines 18-21) (R. p. 184, lines 14-16). Thus, if any "emergency situation" existed, (App. Br. p. 10), it was created by Claimant's decision to follow Ms. Howes into the parking lot and attempt to block her car. There was no emergency situation inside the Waffle House.

Appellant's argument that Waffle House's rules on how to deal with rowdy customers extend to her actions beyond the point when Ms. Howes and the others exited the restaurant ultimately fails. The prohibition on going outside on third shift, or following patrons into the parking lot, defines the sphere of her job responsibilities – not merely the conduct of employees within the sphere of employment. The examples cited by Appellant on pages 10 and 12-13 of her Brief go to "risky or foolish" acts *within* the scope of employment – in each case, the machine operator, the truck driver and the CNA are actually performing their assigned duties, albeit in a risky or foolish manner. In contrast, there is absolutely nothing about Claimant's job as a waitress that suggests she is responsible for following patrons into the parking lot to block their vehicles or to perform any other law enforcement type activities. Such actions go far beyond her duties as a waitress or dealing with rowdy customers, and in fact, are clearly prohibited by Waffle House policy.

Appellant suggests that she did not go outside her assigned work duties because she was responsible for making sure that customers paid their checks. (App. Br. p. 9).

Claimant herself testified that she did not follow Ms. Howes into the parking lot because of an unpaid check. (R. p. 114, lines 12-15). In fact, contrary to her assertions on appeal, Claimant not only pursued Ms. Howes by following her to her car but also placed herself in obvious danger when she placed her body in the path of Ms. Howes' car under the circumstances. It was evident that the two couples had been drinking and Ms. Howes already had created a disturbance in the restaurant – one logically could not expect someone under these conditions to behave as a reasonable person would behave. Unquestionably, after Ms. Howes bumped Claimant out of the way by backing up into her, any further attempt to block Ms. Howes' vehicle was a rash and dangerous act.

In the end, as was the case in Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950), Claimant's injuries are not compensable because they were incurred when she was "acting completely without the course of [her] employment and against the explicit instructions," of her employer. 217 S.C. at 422, 60 S.E.2d at 858. Appellant asserts that Black creates a "bright line test between a violation of policy that takes one outside the scope of employment and one that does not," and then suggests that the "bright line test" requires that an employer give specific instructions against performing an act immediately before the injury is incurred. No such bright line test exists for when an employee steps outside his or her scope of employment. Instead, each case is decided on its own facts. *See* Hall, 376 S.C. at 349, 656 S.E.2d at 759. In this case, the Commission weighed the evidence and found as a factual matter that Claimant was acting outside the scope of her employment when she followed Ms. Howes outside and attempted to block her vehicle from leaving the parking lot. Because it is supported by substantial evidence, this Court should uphold the Commission's determination that

Claimant was acting outside the course and scope of her employment.

B. <u>Claimant's actions exceeded the scope of her employment because she committed a direct and intentional violation of a specific and express policy when she followed customers into the parking lot and attempted to block their vehicle.</u>

The Commission properly concluded that "Claimant's actions were in violation of [Respondent's] policies (APA p. 65) and completely contrary to common sense." Although Claimant makes several objections to this finding, the Commission's determination is supported by substantial evidence and should be upheld.

First, Claimant admits that she violated the rule against following customers into the parking lot, (App. Br. p. 12), but alleges this was part of her job. The record clearly demonstrates however, that not only was this not part of her job, employees were prohibited from chasing customers into the parking lot and/or going outside on third shift. (R. p. 152, lines 21-25) (R. p. 164, lines 1-5) (R. p. 170, lines 3-21).

Second, Appellant wrongly asserts several times that Waffle House cannot or did not prove that it had a specific and express policy, that was conveyed to Claimant, that she should not chase customers into the parking. (App. Br. pp. 14, 16, 17). The Commission found that that Claimant specifically had been "instructed not to follow customers into the parking lot for failure to pay a food ticket," and "not to go outside after dark while working third shift." (Commission Decision, R. pp. 62, 64). The fact that there is evidence in the record from which the Commission could and did conclude that she had been made aware of these policies, (R. p. 152, lines 21-25) (R. p. 164, lines 1-5) (R. p. 170, lines 3-21), rebuts Claimant's arguments that she was not properly trained or made aware of the rules. (App. Br. pp. 11-12, n.3).

Next, Appellant incorrectly states that the leading case on "this issue" is <u>Howell</u>

v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). (App. Br. p. 13). Although Howell stands for the proposition that, "[a]n act outside an employee's regular duties which is undertaken 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 employment," 264 S.C. at 301, 214 S.E.2d at 822, there is no indication in Howell that the activity giving rise to the injury was in any way prohibited by the employer. In fact, Appellant cites Howell as a case where "the employer could not prove it had given clear and explicit instructions," prohibiting an activity. (App. Br. p. 15). However, the issue of whether chasing suspected purse snatchers was against the employer's policy simply was not an issue in Howell.

The case presently before the Court is much more similar to Wright v. Bi-Lo, Inc., 314 S.C. 152, 422 S.E.2d 186 (Ct. App. 1994), where the store had a specific policy regarding how shoplifting suspects were to be handled. Although Appellant attempts to distinguish this case from Wright by emphasizing that the claimant in Wright had been warned on three different occasions to not pursue shoplifters, there is no requirement regarding the number of times a claimant must be told that a particular activity is prohibited and not part of his or her job in order for a violation of that policy to take him or her outside the scope of employment. It is completely unrealistic to expect employers to repeatedly warn employees regarding prohibited activities and/or always be able to warn an employee immediately before he or she is about to do something that would violate the employer's policy, (App. Br. pp. 14-15), as just happened to be the case in Black and Wright. Contrary to Appellant's suggestion, this is not the test laid out in either of those cases or anywhere else. In fact, in Pratt v. Morris Roofing, Inc., 353 S.C.

339, 577 S.E.2d 475 (Ct. App. 2003), also relied on by Appellant for this point, there had been only one warning against taking the company vehicle home, even though previously the claimant occasionally had driven the truck home with his employer's approval.

Furthermore, the fact that the store manager explicitly told the claimant in Wright to go back inside the store on the occasion when he was injured highlights the similarities between that case and the present case, where a co-worker pleaded with Claimant to leave the parking lot and go back inside the store, going so far as to tug on her arm in an attempt to get Claimant to safety. (R. p. 171, line 8 – p. 172, line 17). Instead, both the claimant in Wright and Claimant in this case proceeded to violate specific prohibitions that limited the sphere of employment and were injured in the process. Because they were injured while acting outside of the scope of their employment, their injuries are not compensable.

Although Appellant argues that Waffle House did not prove it had a policy against following customers into the Waffle House parking lot, it must be noted that, in Wright, there is no indication of what the proof of the specific policy against chasing shoplifters consisted of, other than the fact that the store manager had told the claimant not to pursue shoplifters. *See* 314 S.C. at 153-54, 422 S.E.2d at 187. In the instant case, Appellant is simply wrong that her actions that led to her injuries did not violate a specific Waffle House policy. Instead, there is ample evidence in the record, including Claimant's own testimony, that she had been warned she should not chase customers into the parking lot and try to prevent them from leaving. (R. p. 112, line 19 – p. 113, line 15 (Claimant testifying that she knew she was not supposed to chase customers down or keep them form leaving once they were in their car)) (. p. 152, lines 21-25) (R. p. 164,

lines 1-5) (R. p. 170, lines 3-21).

Appellant recites a long list of cases that she alleges found injuries compensable "because the employer could not prove it had given clear and explicit instructions." (App. Br. p. 15). However, as noted above, in Howell there is no indication that the employer even argued that the claimant had been instructed to not chase purse thieves. The same is true for Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) (issue was whether the claimant's actions fell outside the scope of his job duties but no issue raised as to any prohibition against removing debris from the road); Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645 (1971) (the employer (the town of Iva) both benefitted from and acquiesced in a long history of town police officers performing law enforcement duties beyond the town limits, but no allegations that the town attempted to prove any prohibition against such practice); and Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959) (although specific instructions had been given to a co-employee about administering shots, the issue regarding the claimant was whether his attempt to treat his sore throat was of benefit to his employer; there was no issue raised as to whether the employer had ever instructed the claimant to not seek medical care).

Claimant relies on Johnson v. Merchant's Fert. Co., 198 S.C. 373, 17 S.E.2d 695 (1941), but that case is distinguishable on its facts. In Johnson, the issue was whether the employee, who had not previously worked on the floor of the mill where he was injured, had been given clear instructions about where he should and should not go. The Supreme Court upheld the Commission's determination that the claimant was where his assigned duties were to be performed, and "the warning given by the foreman to the deceased amounted to no more than a general admonition to exercise due care when he reached the

vicinity of the shaft." 198 S.C. at 377, 17 S.E.2d at 697. In contrast, in the instant case, Claimant was injured in the parking lot, where none of her duties were normally performed, and the clear conveyance of the prohibition against chasing customers outside is supported by substantial evidence in the record. (R. p. 111, line 22 – p. 114, line 11) (R. p. 187, line 5 – p. 188, line 2) (R. p. 190, line 14 – p. 191, line 6).

Appellant argues that, even if there was an explicit policy against going outside on third shift, it was breached by third shift employees with the "tacit approval of management," and that, under the holding in Compton, her injuries are therefore compensable. (App. Br. p. 16). First, there is substantial evidence in the record supporting the Commission's finding that Claimant had been instructed by Mr. Kearse not to go outside on third shift, and that "third shift employees are not to go outside after dark and that if they do so, they are reprimanded or written up for that action if caught." (Commission Decision, R. pp. 62, 64) (R. p. 152, lines 21-25) (R. p. 164, lines 1-5) (R. p. 170, lines 3-21). Second, Compton does not help Appellant here. In Compton, there was no argument raised that the practice of town police officers helping county, state or law enforcement departments of nearby towns had been prohibited by the Town of Iva. In addition, that practice benefitted the Town of Iva. Here, Claimant cannot show in any way that chasing customers into the parking lot and attempting to block their vehicles is a practice that was approved, tacitly or otherwise, by Waffle House. Instead, there is substantial evidence supporting the exact opposite conclusion. Second, even if there was any tacit approval of going outside on third shift to smoke cigarettes or go to the convenience store next door, which Respondents do not concede, that does not mean going outside to chase after and attempt to physically block a patron from leaving, an

entirely different action with vastly different potential consequences, was also tacitly approved. Third, as discussed in more detail below, Claimant's actions in chasing after Ms. Howes' car did not benefit Waffle House in any way.

Appellant next argues that Mr. Kearse's statement that he wrote up each of the employees who went outside the night of March 14, 2010 is contradicted by "every one of those employees" and that his testimony on this subject is otherwise false. (See App. Brief pp. 16-17). Claimant even goes so far as to accuse Mr. Kearse and/or Waffle House of "spoliation of evidence." Such accusations are entirely baseless and unwarranted and, as such, should be disregarded. First, there is absolutely no evidence in this case that any evidence was intentionally destroyed. Appellant's assertions to this effect are groundless speculation and entirely unsupported. Second, to the extent the trier of fact could draw negative inferences from a party's failure to produce certain pieces of evidence, in this instance the Commission, the trier of fact, concluded otherwise, finding Mr. Kearse's testimony credible regarding Waffle House's policies. (Commission Decision, R. p. 64).

C. The so-called "Sudden Emergency Doctrine" does not apply in this case.

In an apparent attempt to circumvent the Commission's factual finding that "Claimant's actions were taken without thinking," Claimant proposes a so-called "Sudden Emergency Doctrine." Claimant suggests that this doctrine holds that "injuries sustained in dealing with a work-related emergency are *inherently* compensable," and that the rule "is based on the subjective intent of the employee." (App. Br. p. 19) (emphasis added). Respondents contend that no such doctrine exists and, even if a Sudden Emergency Doctrine does exist, it would not apply in this case.

The quote from Hiers v. Brunson Constr. Co., 221 S.C. 212, 70 S.E.2d 211 (1952) at pages 19-20 of Claimant's Brief 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 Claimant's Brief 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, Claimant 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, Claimant 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.

The only other South Carolina cases that touch upon a so-called sudden emergency rule also require that the claimant be in the performance of his or her assigned duties or that the actions be of benefit to the employer, which, as explained above, is not the case here. Although Judge Hearn's dissent in this Court's opinion in Grant v. Grant Textiles, 361 S.C. 188, 194, 603 S.E.2d 858, 861 (Ct. App. 2004), cites the same

language from Hiers that Claimant relies on, the Supreme Court's opinion in that case held the claimant's injuries were compensable because his actions, "while outside his regular duties, [were] undertaken in good faith to advance his employer's interest and, therefore, was within the course of his employment." Grant, 372 S.C. at 202, 641 S.E.2d at 872. In addition, the Supreme Court clarified the circumstances where an injury arising out of an act outside the scope of an employee's regular duties may be found to be compensable. They include: "(1) acts benefiting co-employees: (2) acts benefiting customers or strangers; (3) acts benefiting the claimant; and (4) acts benefiting the employer privately." 372 S.C. at 201, 641 S.E.2d at 871-72. In the instant case, Claimant's actions in the parking lot did not benefit her co-employees, the customers, herself (admittedly (*see* App. Br. pp. 17-18)), or Waffle House.

The other South Carolina case discussing a so-called sudden emergency doctrine is Broughton. Although not describing it as a "doctrine," this Court recognized that "[a]n injury sustained during a rescue or sudden emergency has been recognized as bringing an accident within the course of employment." 336 S.C. at 501-02, 520 S.E.2d at 641. To illustrate what it meant, this Court cited and relied on the Supreme Court's decision in Howell, and concluded that the emergency in Howell was different from the emergency in Broughton, and that Howell "focused on the substantial benefit flowing to the employer." 336 S.C. at 503-04, 520 S.E.2d at 642.

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. Claimant'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, Claimant 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 Claimant 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, Claimant'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 Claimant, 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. This case in no way suggests or supports the conclusion that all impulsive, unthinking actions of claimants are compensable.

Claimant'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 should uphold the Commission's findings on these points.

II. The Commission correctly determined that Claimant's actions leading to her injuries did not benefit Waffle House.

The Commission correctly held that Claimant's actions that gave rise to her injuries did not benefit Waffle House. (Commission Decision, R. pp. 62, 64). Claimant argues that there is no evidence that Claimant's actions were taken for her own benefit. That, however, is not the test of whether her injuries are compensable. The test is whether her actions, even if outside the scope of her normal duties, were taken in good faith and benefitted her employer. Howell, 264 S.C. at 301, 214 S.E.2d at 822. In Howell, the Court held that the claimant's injuries arose out of and in the course of his employment because "it clearly would have been to the financial interest of the employer . . . if the claimant had successfully recovered the purse of the customer." Id., 214 S.E.2d at 822. The Court also noted that "the employer ultimately profited as a result of the good will thus created . . ." Id. at 301-302, 214 S.E.2d at 822. No such conclusion can be drawn here. Claimant's actions did not benefit Waffle House financially, and certainly did not foster any good will with the patrons. In fact, Mr. Kearse testified that

Claimant's actions were a detriment to Waffle House because it caused other employees to go outside. (R. p. 216, lines 12-15) (*see also* R. p. 191, lines 10-13 (Mr. Kearse testifying that it does not benefit Waffle House's for its employees "to have arguments or altercations with customers such as this situation")).

Next, Appellant argues that the only thing that matters is "that her actions were *intended* to benefit Waffle House." (App. Br. p. 19). This is not the test either. Cases applying this doctrine have found that there was some objective benefit to the employer beyond the claimant's subjective *intention* to somehow benefit his or her employer. *See* Grant, 372 S.C. at 202, 641 S.E.2d at 872 (finding claimant's actions were taken in good faith and actually benefitted his employer by removing a hazard that might have injured customers or co-workers); Howell, 264 S.C. at 301-02, 214 S.E.2d at 822 (finding that the claimant's actions would benefit the employer by retrieving money the customer intended to spend in the store and fostering good will); *but see* Broughton, 336 S.C. at 503, 520 S.E.2d at 642 (denying compensation where actual benefit to the employer was not proven). This rule makes sense; otherwise, employees could undertake any action outside the scope of their normal activities and claim their resulting injuries were compensable – so long as they *believed* they were furthering the interests of their employer no matter how far-fetched or unsound their theory or thought process.

In addition, Claimant's reliance on Hall is misplaced as the two cases are factually distinct. As this Court pointed out, "[i]n 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." 376 S.C. at 349, 656 S.E.2d at 759. In Hall, there were no allegations that the claimant was injured while performing an activity that his employer had

prohibited; in fact, the employer's "custom and practice of conducting business in an entertaining environment fostered good working relationships, facilitated planning, and *furthered Desert Aire's interests*." 376 S.C. at 354, 656 S.E.2d at 761 (emphasis added).

Furthermore, Claimant cannot show that her actions were taken in good faith because, as noted above, she had been specifically instructed not to go outside after dark. She also had been instructed not to follow patrons into the parking lot either to obtain payment for a check (which she admittedly was not doing in this instance) or to record a license plate number.

Claimant points to testimony by Mr. Kearse, asserting that he agreed her actions on the morning of March 14, 2010 benefitted Waffle House. (App. Br. p. 18). In general terms, Mr. Kearse testified that it was in Waffle House's interest to calm customers, call the police,[2] obtain tag numbers, collect money from customers and ensure that people who vandalize the store are apprehended by the police. (R. p. 207, line 6 – p. 208, line 5). However, he later clarified that having an employee follow a patron outside and stand in front of their car – or any of the actions taken by Claimant once she stepped outside of the restaurant – were of no benefit whatsoever to Waffle House. (R. p. 216, lines 8-15) (R. p. 217, line 10 – p. 218, line 7). To be clear, the fact that Mr. Kearse agreed that ensuring that people who vandalize the restaurant are apprehended by law enforcement does not equate to an agreement that Waffle House benefitted from having its wait-staff act as self-appointed law enforcement deputies. In fact, Claimant's actions, after the situation inside the restaurant was under control and she followed Ms. Howes into the

[2] Claimant makes much of the fact that she, and not the cooks, called 911. However, Respondents are not contesting that her actions inside the Waffle House on that occasion may have benefitted her employer. It was her actions in following a patron to her car and placing her body in front of a vehicle in order to block it in the parking lot that were of no benefit to Waffle House.

parking lot, were detrimental to the interests of her employer and violated all of Waffle House's policies about how to interact with customers. (R. p. 216, lines 4-18) (*see also* R. p. 191, lines 10-13). Thus, there is no "admission" by Mr. Kearse or anyone else in this record that would support a finding that, by following a customer into the parking lot and attempting to block her vehicle, Claimant's actions benefitted her employer.

Claimant cites Mr. Strong's deposition as "corroboration" of Mr. Kearse's testimony regarding how her actions may have benefitted Waffle House.[3] First, Mr. Strong primarily was discussing obtaining a tag number in order to secure payment for a ticket. Second, he only said they needed the tag number – which Ms. Green had already gotten. Further, Ms. Green advised Claimant that she had the tag number when she attempted to get Claimant to go back inside the restaurant. (R. p. 172, lines 1-6).

Finally, Claimant incorrectly asserts that Waffle House's actions after the incident confirm that it approved of her conduct. This is a patently unsubstantiated claim, as Mr. Kearse testified that she had been written up for going outside but that the reprimand had not been given to her because she was out of work for so long. (R. p. 189, lines 11-22). As explained by Mr. Kearse, Claimant's performance review had been written prior to March 14, 2010 and dated for March 18 because that was the date it was due. (R. p. 210, lines 7-23) (R. p. 213, lines 5-9). Despite Claimant's assertions that Mr. Kearse's statements are "palpably false," she presents absolutely no evidence that his answers are anything other than completely honest. Simply because Mr. Kearse's testimony is

[3] In this respect and others, Claimant attempts to use Mike Strong's deposition testimony to prove the *truth* of her version of events. (*See* App. Br. p. 16, 18). Although Mr. Strong's deposition testimony was accepted into the record, it was admitted specifically only for impeachment purposes and not for "scope of the deposition." (R. p. 135, line 24 – p. 136, line 10). Thus, Claimant's attempted substantive use of Mr. Strong's deposition testimony on page 16 of her Brief and elsewhere is improper and should be disregarded by this Court.

contrary to what Claimant would have liked for him to say does not mean he is lying and Claimant should weigh her accusations in this regard more carefully. The Commission determined that Mr. Kearse provided credible testimony "as it relates to all aspects of this claim . . ." (Commission Decision, R. p. 63).

Because the Commission's determination that Claimant's activities that gave rise to her injuries did not benefit Waffle House is supported by substantial evidence in the record, this Court should uphold that finding.

III. The Commission properly found that the testimony of James Kearse was credible as it relates to all aspects of this claim.

The Commission determined that Mr. Kearse's testimony "is credible as it relates to all aspects of this claim." (Commission Decision, R. pp. 63, 64). Despite various allegations by Claimant to the contrary, the Commission's determination on this point should be upheld on appeal. First, the Commission is the final arbiter of witness credibility. *E.g.*, Anderson, 343 S.C. at 492-93, 541 S.E.2d at 529; *see also* Shealy, 341 S.C. at 455, 535 S.E.2d at 442. Second, the fact that there is conflicting evidence in the record does not mean, as Claimant asserts, that Mr. Kearse is lying or not credible. Instead, where there is a conflict in the evidence, the Commission's factual findings may not be disturbed on appeal so long as there is substantial evidence to support them. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528; Hall, 376 S.C. at 348, 656 S.E.2d at 758.

Claimant's sole support for her assertion that the Commission's determination that Mr. Kearse's testimony was credible is somehow arbitrary and capricious is dicta from a dissent in a North Carolina case from 1940, Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (1940). Even looking beyond the fact that this is dicta in

a dissent, a major distinction between this case and Stallcup is that, in Stallcup, the facts were not in dispute and therefore the issue of whether the injury arose out of and in the course of employment became a legal matter. 217 N.C. 307, 7 S.E.2d at 552. Here, there are facts in dispute and the Commission's findings are supported by substantial evidence in the record. Our courts have long held that, "[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive," and "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999); *see also* Watt v. Piedmont Automotive, 384 S.C. 203, 211-12, 681 S.E.2d 615, 619-20 (Ct. App. 2009) (this Court held that it could not question the credibility determination of the Commission even where other testimony in the record conflicted with the employer's version of events).

Furthermore, there are numerous key points on which Mr. Kearse's testimony is supported by other testimony in the record. For example, Mr. Kearse's testimony that he had raised the specific issue of going outside after dark in an employee meeting where Claimant 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. Kearse'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. Kearse's testimony that employees who were caught going outside the restaurant at night

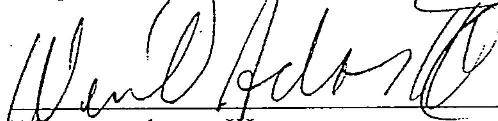
were either written up or reprimanded is supported by the testimony of both Mr. Strong and Ms. Green. (R. p. 151, lines 18-25) (R. p. 167, lines 5-16) (R. p. 168, lines 2-9) (R. p. 181, lines 11-22).

Thus, the Commission's determination that Mr. Kearse was a credible witness is supported by substantial evidence and therefore should be upheld by this Court. However, even if this Court should find Mr. Kearse's testimony not credible, the Commission's findings are supported by other evidence in the record, including the testimony of Claimant herself, and should be upheld on appeal.

CONCLUSION

Because the Commission's Decision is supported by substantial evidence in the record, this Court should affirm its findings that: 1) Claimant's injuries did not occur in the course and scope of her employment, 2) that Claimant's actions that led to her injuries did not benefit Waffle House, and 3) that, therefore, her injuries are not compensable. Although not necessary to the above holdings, this Court should also affirm the Commission's finding that Mr. Kearse's testimony was credible as it relates to all aspects of this claim.

Respectfully submitted,



Weston Adams, III
Helen F. Hiser
McAngus, Goudelock & Courie LLC
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300
Attorneys for Respondents Waffle House, Inc. and Brentwood Services, Inc.

October 24, 2011

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,

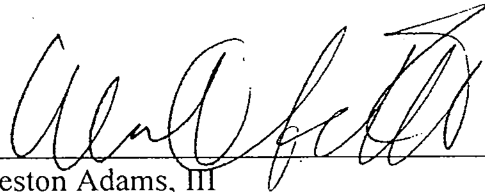
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents Waffle House, Inc. and Brentwood Services, Inc. comply with Rule 211(b), SCACR. The undersigned further certifies that this Final Brief of Respondents Waffle House, Inc. and Brentwood Services, Inc. comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

October 24, 2011



Weston Adams, III
Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Attorneys for Respondents Waffle House, Inc. and Brentwood Services, Inc.