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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

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SC Court of Appeals

Case No. 2014-001269

Brian Wofford, deceased
Employee, by and through Boisha
Wofford, surviving spouse,

Appellant,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

PETITION FOR REHEARING

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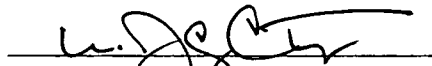
Respondent Brian Wofford, deceased, by and through Boisha Wofford, his surviving spouse, hereby petitions this Court for rehearing of this case pursuant to Rule 221, SCACR. Respondent respectfully submits that the Court overlooked matters in the Record and misapprehended the law in this case for the reasons set forth in the attached Memorandum in Support of the Petition for Rehearing. As more fully set forth in the Memorandum, Respondents submit that the Court erred in (1) applying the incorrect standard of review; (2) the Court misapprehended the law regarding the going and coming rule; (3) the Court overlooked that there was no evidence in the record to suggest that Mr. Wofford would have traveled to the C.C. Woodson Center but for the duty, task, or errand; and (4) the Court erred in finding that Mr. Wofford was not on a duty, task, or errand at the time of his death such that he met an exception to the going and coming rule.

Respectfully Submitted,

THE ANTHONY LAW FIRM, P.A.



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December 23, 2015
Spartanburg, South Carolina

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City of Spartanburg,

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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TABLE OF AUTHORITIES

CASES

OPINIONS

Petitioner, Brian Wofford, deceased, by and through Boisha Wofford, the surviving spouse, pursuant to Rule 221, SCACR, respectfully submits this Memorandum in Support of the Petition for Rehearing. Petitioner submits that, in its opinion affirming the ruling of the Appellate Panel, the Court of Appeals applied the wrong standard of review and misapplied the Going and Coming Rule to the facts of the case.

A. The Court Utilized an Incorrect Standard of Review

In affirming the Appellate Panel, the Court held as follows: "We find substantial evidence supports the Appellate Panel's finding that Wofford's accident did not met an exception to the going and coming rule. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981) (providing this court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence)." Analysis of the applicability of the going and coming rule to the instant case under a "finding of fact" standard of review was error, as the issue was instead a question of law for the Court. Consequently, the Appellate Panel's conclusion regarding the applicability of the going and coming rule should have been provided no deference.

As Petitioner noted in brief, and as Respondent conceded in oral arguments (and as the Record on Appeal makes clear), the parties are in agreement as to the facts of the matter. Respondents called no witnesses at the hearing and no witness testimony conflicted as to the underlying issues. For this reason, it is undisputed that, at the time of his death, Brian Wofford was traveling "directly" to the C.C. Woodson Center to retrieve keys and then to convey them to Tracy Ballew at the Swim Center. See Brief of Respondent, p. 18 ("It is also undisputed that he agreed/volunteered to pick up a key from one of his normal work locations (the C.C. Woodson Center), and deliver it to a subordinate at another location (the Swim Center).").

In this circumstance, the question for the Court is one of law. In its opinion, the Court relied upon the case of Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333 (2008). In addition to a discussion on the applicability of the going and coming rule, the opinion also includes discussion of the standard of review that would apply to this case. In Whitworth, the employer argued that the Court of Appeals had erred in its decision because it failed to apply the "substantial evidence" standard of review. The Supreme Court disagreed:

> Window World first argues that substantial evidence in the record supports the full commission's finding that Respondent was not charged with a duty or task in connection with his employment at the time of his accident, and therefore, the court of appeals exceeded its scope of review in reversing this finding. We disagree.
>
> The relevant facts in this case were not disputed, and thus, whether Respondent's injuries are compensable is a question of law. See Grant v Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) (holding that where there are no disputed facts, the question of whether an accident is compensable is a question of law). For this reason, regardless of whether the court of appeals reached the correct conclusion, the court did not exceed its scope of review. See SC. Code Ann. § 1-23-380(A)(5)(d) (2006) (an appellate court may reverse the full commission's decision if affected by an error of law).

Whitworth, 377 S.C. at 640, 661 S.E.2d at 335. As is common practice, Respondents drafted a proposed order for the Appellate Panel, which was submitted to the Appellate Panel for its approval, and included conclusions of law within the guise of Findings of Fact, presumably for the purpose of taking advantage of the heightened standard of review. However, the case law is clear that the proper standard of review for the Court on this ultimate issue was as a question of law. Consequently, Petitioner respectfully submits that the Court erred in applying the

"substantial evidence" standard of review and in giving deference to the Appellate Panel's conclusion as to the application of the going and coming rule.[1]

B. The Court Misapprehended the Law Regarding the Going and Coming Rule

Petitioner respectfully submits that, in affirming the Appellate Panel, the Court misapprehended the going and coming rule, as applied to the instant case. Petitioner therefore contends that the decision should be vacated.

In considering the "duty or task" exception to the going and coming rule, the Court held that "[s]imilar to Whitworth, the primary purpose of Wofford's trip was a personal objective to travel to the recreational center where he performed his work. See 377 S.C. at 641, 661 S.E.2d at 336 (holding a window installer did not meet an exception to the going and coming rule when he was involved in an accident transporting a piece of equipment to a job site)." Yet, in relying on Whitworth, the Court missed a key point to the case.

In Whitworth, the Supreme Court noted: "Under the going and coming rule, an employee going to or coming from *the place where his work is to be performed* is not engaged in performing any service growing out of and incidental to his employment. Therefore, an injury sustained by accident at such time is not compensable under the Workers Compensation Act because it does not arise out of and in the course of his employment." See Whitworth, 377 S.C. at 641, 661 S.E.2d at 336 (emphasis added). The key question, therefore, in analyzing a case under the going and coming rule is whether the employee was merely going to the place "where his work is to be performed . . . ." In the case of the window installer, the "work . . . to be performed" was the installation of the window on a residence, specifically, on that day, to install

[1] Assuming, *arguendo*, that the "substantial evidence" standard of review applies, Petitioner submits that the Appellate Panel's finding regarding application of the going and coming rule is not supported by competent evidence.

a coil around the window. In contrast, on the day of his death, the "work . . . to be performed" by Brian Wofford was not the physical act of picking the keys up off of a desk or out of a drawer, but of traveling to the C.C. Woodson center to retrieve the keys, then taking them to Ms. Ballew at the Swim Center.[2] Consequently, unlike the window installer in Whitworth, Wofford was not traveling to the place where his work was to be performed at the time of his death, he was in the process of performing the work. In this case, the "duty or task" exception to the going and coming rule should have applied.

C. There Was No Evidence in the Record to Suggest that Brian Wofford Would Have Otherwise Traveled to C.C. Woodson Center

In affirming the Appellate Panel, the Court seemed to place great emphasis on the fact that Brian Wofford sometimes worked from the C.C. Woodson Center. However, there is no evidence in the Record to suggest that Wofford was planning to work out of an office at the C.C. Woodson Center that morning or that he would have otherwise been traveling to the Center. Instead, all of the evidence shows that Wofford's only reason for traveling to the C.C. Woodson Center on the morning of his death was to take care of the task given him by Tracy Ballew. Had he not been given this task, he would have presumably traveled to his main office at 100 North Liberty Street in downtown Spartanburg, which is where Ms. Ballew testified she believed him to be when they spoke that morning.

Moreover, the fact that Wofford was traveling to a location where he sometimes worked does not change the underlying analysis of the going and coming rule. Had the keys been located at Ms. Ballew's house, there would be no doubt that an exception to the going and coming rule applied. As Petitioner suggested at oral argument – if a circuit court judge's law

[2] As the Court noted in its opinion, Mr. Wofford was tasked with "retrieving" the keys.

clerk was asked to stop by a courthouse on her way to the office to pick up copy paper, such an errand would plainly fall within an exception to the going and coming rule, even if the clerk and judge occasionally held court at the courthouse as part of the judge's circuit. Why is the instant case any different?

In the analysis of the various cases regarding the going and coming rule, our courts have looked at a variety of factors. The key question is whether the employee was merely going to the place where his work is to be performed, per his regular commute, or was engaged in performing any service growing out of his employment. In this case, Mr. Wofford was engaged in performing a service for his employer – the City of Spartanburg – at the time he was killed, and his death should be found compensable.

D. Wofford Met Exceptions to the Going and Coming Rule

Petitioner submits that the actions of Brian Wofford, at the time of his death, met the duty or task and/or special errand exceptions to the going and coming rule.

In affirming the Appellate Panel, the Court relied on Whitworth and McDaniel v. Bus Terminal Restaurant Management Corp., 271 S.C. 299, 247 S.E.2d 321 (1978). Petitioner respectfully submits that neither is on point with the facts of this case. As noted in section A, above, Whitworth involved an employee whose job it was to install windows at a residence. He was plainly traveling to "the place where his work is to be performed" unlike Mr. Wofford, who was performing the act of retrieving the keys at the time of his death. The McDaniel case, too, is inapplicable. In finding that the case did not meet an exception, the Court noted: "Mrs. McDaniel was notified of the November 5 meeting in advance. She was not called out by her employer to perform an emergency service. She performed no service to her employer while enroute to or from her place of employment and the trip itself was not a substantial part of the

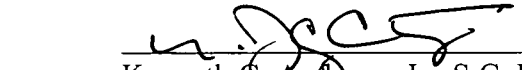
service for which she was employed." See McDaniel, 271 S.C. at 302, 247 S.E.2d at 323. In contrast, Mr. Wofford was not notified of Ms. Ballew's request in advance, but instead on the morning of, and he proceeded "directly" to accomplish it. His travel did provide a service to his employer – the City of Spartanburg – as he was in the act of retrieving the keys and, if he did not do so, another employee would have been required to travel to C.C. Woodson for this purpose. At the time of his death, Brian Wofford was not "exercising a personal privilege wholly apart from [his] employment or [his] employer's interest, but [was] about the performance of an act, incidental to and recognized as of value by [his employer] in connection with [his] duties . . . ." See Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973). Petitioner respectfully submits that the Court misapprehended the law regarding the going and coming rule and that the claim meets exceptions.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court vacate its opinion affirming the Appellate Panel.

Respectfully Submitted,

THE ANTHONY LAW FIRM, P.A.



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Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
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Workers' Compensation Commission

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Boisha Wofford, alleged surviving spouse,
and Kaelyn Wofford, surviving child, on behalf
of Brian Wofford, deceased employee,

Appellants,

v.

City of Spartanburg, through the South Carolina
Municipal Insurance Trust,

Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by depositing a copy of it in the United States Mail, on December 23, 2015, addressed to Respondents' attorneys of record, at the following address(es):

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December 23, 2015

The Honorable Jenny Abbott Kitchings
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RE: Brian Wofford, deceased Employee, by and through Boisha Wofford, surviving spouse, vs. City of Spartanburg and South Carolina Municipal Insurance Trust Carrier
Appellate Case No.: 2014-001269

Dear Ms. Kitchings:

Enclosed for filing is an original Petition for Rehearing and six (6) copies, along with your filing fee of $25. I am also enclosing a Certificate of Service as to opposing counsel in the above matter.

Very truly yours,

Kenneth C. Anthony, Jr.

KCAjr:akl
Enclosures

cc: Stephanie Lamb Pugh, Esq.
Helen F. Hiser, Esq.

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