THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1207113

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

v.

City of Spartanburg, Employer and Self-Insurer,
through the South Carolina Municipal Insurance Trust,..... Respondents.

RETURN IN OPPOSITION TO
PETITION FOR REHEARING

MCANGUS GOUDELOCK & COURIE, LLC
Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Stephanie Lamb Pugh
55 East Camperdown Way, Suite 300 (29601)
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Respondents

Pursuant to Rules 221 and 240, SCACR, Respondents the City of Spartanburg and the South Carolina Municipal Insurance Trust hereby oppose Petitioners, Decedent Brian Wofford's surviving spouse and child, Boisha and Kaelyn Wofford's Petition for Rehearing of this Court's Opinion No. 5369 in this matter. This Court did not overlook or misapprehend any points raised by Petitioners, nor did this Court apply an incorrect Standard of Review. Instead, this Court properly and correctly upheld the Commission's determination that Decedent "was not acting within the course and scope of employment at the time of his death." Wofford v. City of Spartanburg, Opinion No. 5369, 2015 S.C. App. LEXIS 250 (Dec. 9, 2015).

I. This Court applied the correct Standard of Review.

Petitioners incorrectly assert that this Court utilized an incorrect Standard of Review. First, this Court set forth the proper Standard of Review in its Opinion, which is that a reviewing court "may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Murphy v. Owens Corning, 393 S.C. 77, 81-82, 710 S.E.2d 454, 456 (Ct. App. 2011).

Second, the substantial evidence standard applies, not only where there is a conflict between witnesses or evidence, but also where conflicting inferences arise from the facts. *See* Black v. Barnwell County, 243 S.C. 531, 535, 134 S.E.2d 753, 756 (1964) (where "conflicting inferences may be reached from the evidence, ... the findings of the Commission thereabout [are] binding on this Court ... "). In fact, "[i]t is only when the evidence gives rise to but one reasonable inference that the question becomes one of law for the court to decide." Id., 134 S.E.2d at 755. In this case, to the extent there is a

conflict in the reasonable inferences that can be drawn from the facts, as is suggested by Petitioners' reliance on a narrowly tailored set of facts and continued attempts to downplay the importance of other key facts, the Commission Decision must stand. To the extent there is only one reasonable inference that can be drawn from the facts of this case, again, the Commission Decision must be upheld, as it accounts for all of the facts, and not, as is the case with Petitioners' position, just a narrow subset of the facts that requires speculation[1] in order to prevail.

In Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333 (2008), there is no indication that there was any conflict in the inferences drawn from the facts. Here, in contrast, there is. For example, both sides agree and there is absolutely no dispute that, at the time of Decedent's accident, he was on his way to the C.C. Woodson Center to pick up a key and take it to the Swim Center. (R. p. 40, line 19 – p. 41, line 19) (R. p. 43, lines 10-12) (R. p. 41, lines 8-18). However, Petitioners alternatively ignore or attempt to downplay the significance of the fact that undisputed testimony in the Record of at least three witnesses establishes that Decedent did not work solely out of his downtown office but, instead, often worked out of the various recreation facilities, including the C.C. Woodson Center. (R. p. 16, line 25 – p. 17, line 15 (Mr. Page)) (R. p. 63, lines 8-11 (Mr. Kennedy)) (R. p. 69, lines 5-24 (Mr. Kennedy)) (R. p. 56, lines 9-16 (Ms. McClary)). In fact, as Mr. Page testified, and Petitioners acknowledged at oral argument, Decedent had an office at the C.C. Woodson Center where he worked at times. (R. p. 17, lines 1-3). The inference this Court, the Commission and Respondents drew from these facts is that Decedent planned to start his work day at the C.C. Woodson Center and was on his way to work when the accident occurred. Whether reasonable or

[1] Discussed in more detail in Section II below.

not, the inference Petitioners draw is that Decedent was on some sort of duty or special errand as he was headed to the C.C. Woodson Center.[2] The Commission's resolution of the conflict between these inferences is supported by substantial evidence in the record and was properly upheld as such by this Court.

Petitioners' assertion that Respondents, who drafted a proposed order for the Commission, somehow disguised Conclusions of Law as Findings of Fact is both unsupported and incorrect. First, the Commission Decision provides that the "findings of Fact set forth above are construed to be conclusions of law, if applicable." (Commission Decision, R. p. 126). Second, the Commission's Finding of Fact No. 7 provides, in pertinent part, that "Decedent was not charged with any work related duties at the time of his accident but instead was on a purely personal mission to get to work .... He was merely on his way to work to engage in his typical job responsibilities." The Commission's Finding of Fact No. 8 provides "that Decedent was not performing a special task, service, mission, or errand for the City of Spartanburg at the time of his accident. Whether Decedent was headed to his office, the City's employee appreciation lunch, or to one of the recreation centers that he supervises, all of these activities were a customary part of his employment with the City of Spartanburg. The evidence establishes that Decedent was on his way to work to perform his typical job duties, duties that fell within his job description and duties that were expected of him on a regular basis." (Id., R. p. 125). Not only are these factual findings by the Commission, they are supported by overwhelming evidence, as stated herein and in the Final Brief of Respondents.

[2] It is Respondents' position that this inference is unreasonable but discuss it here for the sake of argument.

Regardless of the Standard of Review applied, this Court reached the right conclusion, *i.e.*, Decedent's fatal accident is not compensable because it does not fall within any of the exceptions to the going and coming rule. *See* Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 434, 315 S.E.2d 123, 125 (1984) (upholding intermediate appellate decision even though the wrong standard of review was applied because the court reached the correct decision); Gray v. The Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 441-442 (Ct. App. 2000) (harmless error where intermediate appellate court applied the wrong standard of review but reached the right conclusion).

II. This Court properly held that this claim does not fall within the duty or task exception to the going and coming rule.

Petitioners argue that this Court "misapprehended the going and coming rule." Inexplicably, Petitioners take the position that, at the time of his accident, Decedent was not "going to the place 'where his work is to be performed ....'" Petitioners argue that Decedents actual job was "traveling to the C.C. Woodson center to retrieve the keys, then taking them to Ms. Ballew at the Swim Center" as opposed to "the physical act of picking the keys up off of a desk or out of a drawer." Illogically, they assert that Decedent "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." Riding his motorcycle to work, where his first task was to retrieve some keys, does not magically convert his work commute into the work itself. Such sophistry belies the difficulty even Petitioners have of describing Decedent's activity at the time of the accident as something other than simply going to work.

Like the claimant in Whitworth, here Decedent was tasked with job duties once he arrived at work but was injured during his commute to work. The fact that Decedent

chose to start his day by picking up keys at one of his regular places of work and taking it to another of his regular places of work does not somehow transform his normal commute into an exception to the going and coming rule. Decedent was not tasked with any duty until he arrived at work at the C.C. Woodson Center. Driving or riding his motorcycle to work in the morning was not part of any of his work duties. (R. p. 71, lines 13-21). There is no evidence that suggests otherwise.

Petitioners speculate that Decedent "would have presumably traveled to his main office at 100 North Liberty Street in downtown Spartanburg," the morning of his accident. (Pet. p. 7). First, that conclusion is nothing more than pure speculation and it is well-established that a workers' compensation award may not be based on speculation. *E.g.*, Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (explaining that "[w]orkers' compensation awards must not be based on surmise, conjecture or speculation"). Second, there is no evidence whatsoever that Decedent planned to start his day on May 18, 2012 at the North Liberty Street office. Instead, the evidence overwhelmingly establishes that he worked at the various recreation facilities and sometimes started his day at a location other than the downtown office, and in particular the C.C. Woodson Center office. (R. p. 16, line 25 – p. 17, line 15) (R. p. 56, lines 9-16) (R. p. 63, lines 8-11) (R. p. 69, lines 5-24).

Even if, for the sake of argument, he had planned to start his day at the downtown office on May 18, 2012 but changed his mind after speaking with Ms. Ballew,[3] both the C.C. Woodson Center and the Swim Center are regular workplaces for Decedent and the

[3] Petitioners continue to imply that Ms. Ballew was in a position to "give" Decedent tasks to perform, with the further implication that he had no option but to comply. However, Decedent was Ms. Ballew's supervisor, not the other way around. (R. p. 42, lines 20-22). As a result, he was not obligated to follow her "orders." Instead, she asked and he agreed to do what are normal parts of his job once he arrived at work. (R. p. 42, line 23 – p. 43, line 9).

tasks he was going to perform once he arrived at work were part of his normal job duties. (R. p. 16, line 25 – p. 17, line 15) (R. p. 63, lines 8-11) (R. p. 69, lines 5-24) (R. p. 56, lines 9-16) (R. p. 42, line 16 – p. 43, line 18) (R. p. 67, line 15 – p. 68, line 12). Thus, even if Respondents' speculation was correct, which Respondents do not concede, all that would have changed was what Decedent was going to do once he got to work, and at which of his normal workplaces he would start his day. Under Petitioners' theory, an employee who normally supervised three different offices would fall within the duty or task exception if he planned to start his day at Location #1 but was asked to pick up something at Location #2 and take it to Location #3, all of which were a normal part of his job duties, and was injured on his way to work. Under the example, the hypothetical claimant's claim is clearly barred by the going and coming rule, as is Petitioners' claim here.

As Petitioners suggest, had Decedent been traveling to some other location, such as a personal residence, to retrieve the needed keys, this case might (or might not) have had a different outcome.[4] However, those are not the facts of this case and the fact that he was going to one of his normal places of work to do a routine task once he arrived at work does control the analysis here. This Court correctly upheld the Commission's

[4] Respondents' recollection of the hypothetical suggested by Petitioners at oral argument was where a law clerk stopped by a Staples (or similar office supply store) for paper on her way to the office, not where a clerk stopped at the courthouse itself to pick up supplies. Despite the fact that a party cannot raise a new argument on rehearing, McClurg v. Deaton, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("[i]t is axiomatic that an issue cannot be raised for the first time on rehearing"), Petitioners' hypothetical still fails. Here, Decedent supervised all of the City's recreation facilities, had an office at the C.C. Woodson Center where he routinely worked, and the tasks he planned to perform once he got to work were a normal part of his job. In Petitioners' hypothetical, if the courthouse was one of the clerk's normal (even if occasional) workplaces, it is not by any means a given that an injury that occurred after she picked up paper there would "plainly fall within an exception to the going and coming rule ..." (Pet. p. 8).

finding that Decedent's accident does not come within the duty or task exception to the going and coming rule.

III. This Court properly held that this claim does not fall within the special errand exception to the going and coming rule.

Petitioners appear to continue to argue that Decedent's accident falls within the special errand exception to the going and coming rule. They are incorrect on this point as well. Addressing only one of the two "special errand" cases cited by this Court, Petitioners attempt to distinguish McDaniel v. Bus Terminal Rest. Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978) on the basis that Decedent was asked that morning to pick up the keys at C.C. Woodson Center as opposed to having been notified in advance of this request. This is a distinction without any substantive impact. In McDaniel, the employee meeting was "a normal, customary aspect of [the claimant's] job ..." 271 S.C. at 303, 247 S.E.2d at 323. Here, picking up items at the C.C. Woodson Center to take to other recreation department facilities was a routine and normal part of Decedent's job. (R. p. 43, lines 7-9) (R. p. 69, lines 19-21). In McDaniel, the claimant was performing no service or task for her employer while on the trip to her workplace or on the return trip. 271 S.C. at 303, 247 S.E.2d at 323. In the case at hand, Decedent was not tasked to perform any work-related responsibilities until he arrived at work at the C.C. Woodson Center.

Tellingly, Petitioners do not even attempt to distinguish this case from Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972), wherein the Supreme Court adopted the "special errand" exception to the going and coming rule. In Bickely, the Supreme Court described the rule as:

> When an employee, having identifiable time and space limits on his employment, makes an off premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

259 S.C. at 469, 192 S.E.2d at 869. To begin with, Decedent did not have "identifiable time and space limits on his employment." Instead, he set his own hours and worked out of multiple facilities. (R. p. 17, line 7 – p. 18, line 25) (R. p. 26, line 22 – p. 27, line 13) (R. p. 63, line 14 – p.74, line 3) (R. p. 67, lines 3-10) (R. p. 68, lines 19-24). In addition, Decedent was not making an "off premises journey" but simply was going to work. (R. p. 50, line 14 – p. 51, line 16). Further, Decedent was not injured while making "emergency calls or to perform[ing] service at times other than during his regular working hours ..." 259 S.C. at 470, 192 S.E.2d at 870. Instead, it was well established that Decedent's accident occurred during his normal working hours on a normal working day and, in fact, a number of people thought he was or should have already been at work. (R. p. 29, lines 13-18 (Mr. Rice)) (R. p. 44, lines 19-21 (Ms. Ballew)) (R. p. 65, line 20 – p. 66, line 2 (Mr. Kennedy)) (R. p. 68, lines 13-16 (Mr. Kennedy)) (R. p. 70, line 17 – 71, line 5 (Mr. Kennedy)). Thus, there is no element of the special errand exception that would apply in the instant case.

Finally, Petitioners again confuse and attempt to merge case law dealing with whether injuries incurred by traveling employees are within the course of employment, with the going and coming rule. However, the analysis used to determine whether a traveling employee is within the course of employment is not an additional exception to

the going and coming rule.[5] As a result, Petitioners' reliance on Beam v. State Workmen's Compensation Fund, 261 S.C. 327. 200 S.E.2d 83 (1973) is misplaced. In Beam, the claimant was not traveling to or from work; instead, she was injured while traveling out of town to attend a conference that her supervisor not only encouraged but expected that she attend. 261 S.C. at 332-333. 200 S.E.2d at 86. It is undisputed that Decedent's trip to Moore, SC on the morning of May 18, 2012 was purely for personal reasons. His commute to work was simply that, his commute to work.

[5] For example, the fact that retrieving and delivering the key to the Swim Center once he arrived at work provided a service or benefit to the City does not make this claim compensable. Presumably, every task Decedent intended to accomplish once he arrived at work was intended to benefit his employer.

CONCLUSION

This Court did not apply the wrong Standard of Review, or misapprehend or misapply the law concerning the going and coming rule and its exceptions. On the contrary, both this Court and the Commission correctly held that, under the facts of this case, Petitioners' claims are barred by the going and coming rule and no exceptions apply. As a result, this Court should deny Petitioners' Petition for Rehearing.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

December 30, 2015

Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Stephanie Lamb Pugh
S.C. Bar No.: 78483
55 East Camperdown Way, Ste. 300 (29601)
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1207113

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 on the 30th day of December 2015, I served the Respondents' **Return in Opposition to Petition for Rehearing** on Boisha Wofford, alleged surviving spouse, and Kaelyn Wofford, surviving child, on behalf of Brian Wofford by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record:

Kenneth C. Anthony, Jr., Esq.
K. Jay Anthony, Esq.
The Anthony Law Firm, P.A.
P.O. Box 3565
Spartanburg, SC 29304

Vicki Volponi

Vicki Volponi
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents

mgc

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

December 30, 2015

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Brian Wofford v. City of Spartanburg and SC Municipal Insurance Trust
Date of Accident: May 18, 2012
WCC File No.: 2014-001269
Our File No.: 20788.14005
Claim No.: 63-80506
Appellate Tracking No.: 2014-001269

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return in Opposition to Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Kenneth C. Anthony, Jr., Esq.
K. Jay Anthony, Esq.