

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

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.

PETITIONER'S REPLY AS TO PETITION FOR REHEARING

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TABLE OF AUTHORITIES

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As Respondent's Return makes clear, the dispute in this matter is reduced to this question: At the time that Brian Wofford died, was he simply going to work, where he would then execute his first task of the day by picking up the keys and delivering them to Tracy Ballew at the Swim Center, or was he in the process of executing the task? The answer to this question rests on undisputed facts. Petitioner submits that this is a question of law and should have been decided, without deference to the Full Commission, in favor of Petitioner.

I. Standard of Review

Respondents claim that the Court of Appeals properly considered this case under the substantial evidence standard of review. First, Respondents seem to reverse the position they took in their brief and at oral argument that the case centers on undisputed facts. Now, Respondents claim that, while the facts may be undisputed, difference inferences may be drawn from the facts, such as whether Mr. Wofford intended to start his day at the C.C. Woodson Center, or elsewhere.¹

This misses the point. The question of whether the facts of this case, as applied to the law, meet an exception to the going and coming rule is not a finding of fact. It is the ultimate question of the case and is therefore a conclusion of law. Consequently, the Court's statement that it found that "substantial evidence supports the Appellate Panel's *finding* that Wofford's accident did not meet an exception to the going and coming rule" is in error. (emphasis added). It is clear from this statement, as well as the following citation to Lark v. Bi-Lo, Inc., which references affirming findings of fact, that the Court treated the ultimate question as one of fact rather than law. 276 S.C. 130, 276 S.E.2d 304 (1981). This was error.

¹ Incidentally, this "inference" played no role in the Court's opinion.

The case cited by Respondents, Black v. Barnwell County, provides a clear example of the distinction. The Black case concerned whether a Sheriff who suffered a heart attack on the job sustained a compensable injury. Consequently, the key question was whether the heart attack “was caused by unusual strain and over-exertion in the performance of the duties of his employment and, therefore, was a compensable accident.” Black, 243 S.C. 531, 134 S.E.2d 753 (S.C. 1964). The lower court made a finding that the heart attack was unrelated. This is not the same as the situation in the instant case where the Full Commission made a “finding” that the going and coming rule did not apply.

Where the relevant facts are undisputed, the question is one of law. See Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). At oral arguments, Respondents conceded that the relevant facts are, indeed, undisputed. Even in its Return, Respondents fail to cite a single disputed fact, instead contending only that Petitioner “ignore or attempt to downplay” certain facts. This is, of course, the essence of being a lawyer.

Petitioner respectfully submits that Whitworth is directly on point on this issue and the Court of Appeals erred in analyzing the question as a finding of fact, and therefore giving deference to the Full Commission’s ruling on the matter.

II. Exceptions to the Going and Coming Rule Apply

Petitioner will not rehash all arguments set forth in the Petition for Rehearing, but wishes to address various points raised in Respondents’ Return.

First, Respondents continue to make reference to the fact that Mr. Wofford was not a subordinate of Tracy Ballew. As Petitioner noted at oral arguments, nothing in case law indicates that this is of any importance, and Respondents have cited no authority for such. The key question remains – at the time of his death, was Mr. Wofford “engaged in performing any

service growing out of and incidental to his employment” or was he simply commuting to work? See Matute v. Palmetto Health Baptist, 391 S.C. 291, 296, 294, 705 S.E.2d 472, 475 (Ct. App. 2011).

Second, Petitioner takes issue with Respondents’ assertion in footnote 4 of the Return that the example cited therein was not raised at oral arguments. Respondents did raise the example at oral arguments immediately following the supply store example, and would be glad to make reference to the video of the arguments.

Third, Petitioner disagrees with Respondents’ assertion that there is “no evidence whatsoever” that Mr. Wofford had planned to start his day at the North Liberty Street office. Evidence in the record established that, while he sometimes worked from the C.C. Woodson Center, he had a physical office at North Liberty Street. (R. p.16, lines 12-18). While there was testimony that it was “normal” for Mr. Wofford to go to the recreational centers as part of his job, his physical office was at North Liberty Street. (R. p.67, lines 11-14).

Fourth, Respondents make much of testimony that the act of picking up keys might fall within Mr. Wofford’s job duties. This point actually cuts against Respondents’ arguments. Consider the “electrical lineman” in Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972), who was injured while on an outing to repair electrical lines. Would his duties on that day be considered within his job duties?² Certainly. His claim is compensable for that very reason. In the same way, Mr. Wofford was, at the time of his accident, “engaged in performing [a] service growing out of and incidental to his employment” and his claim should be similarly compensable. See Matute, 391 S.C. at 296, 705 S.E.2d at 475.

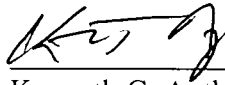
² A similar situation is posed in Gray v. Club Group, Ltd., 339 S.C. 174, 528 S.E.2d 437 (2000), cited in Petitioner’s initial brief to this Court, in which an employee transported documents every day.

CONCLUSION

At the time of his death, Mr. Wofford was not merely commuting to work, but was about the completion of a task. For the reasons set forth above, Petitioner respectfully requests that the Court vacate its opinion affirming the Appellate Panel.

Respectfully Submitted,

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The Honorable Jenny Abbott Kitchings
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RE: *Brian Wofford v. City of Spartanburg and SC Municipal Insurance Trust*
Appellate No.: 2014-001269

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Dear Sir or Madam:

Enclosed for filing please find the Reply of Petitioner's with regard to the Petition for Rehearing.

Very truly yours,



Kenneth C. Anthony, Jr.

KCAjr/msa
Enclosures

cc: Helen Hiser, Esquire-(with enclosures)