THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA COURT OF APPEALS

Opinion Number 5369 (S.C. Ct. App. filed December 9, 2015)

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

Petitioner,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 21, 2016.

Petitioner, Brian Wofford, deceased, by and through Boisha Wofford, the surviving spouse, pursuant to Rule 242, SCACR, respectfully submits this Petition for a Writ of Certiorari to the Supreme Court of South Carolina. Petitioner submits that, in its opinion affirming the ruling of the Appellate Panel denying worker's compensation benefits to the Estate of Brian Wofford, the Court of Appeals applied the wrong standard of review and misapplied the Going and Coming Rule to the facts of the case. Petitioner therefore requests that this Court grant certiorari to consider the opinion of the Court of Appeals.

STATEMENT OF CASE

Brian Wofford, an employee with the City of Spartanburg, died in a motor vehicle accident on May 18, 2012. A workers' compensation action was timely filed by his surviving spouse, Boisha Wofford, alleging that, at the time of his death, Mr. Wofford was acting within the course and scope of his employment. This is an appeal from the denial of benefits.

At the time of his death, Brian Wofford was employed as superintendent at the City of Spartanburg Parks and Recreation Department (R. p. 62, lines 19-22). In this capacity, Brian was, as described by his supervisor Mitchell Kennedy, "the ultimate manager over the entire staff for the Parks and Rec for the city, which included [the city's] community centers . . . ." (R. p. 62, lines 22-24).

At the hearing, Appellant presented testimony from eight witnesses, six of whom worked with Brian. It was established that Brian had a physical office at 100 North Liberty Street in downtown Spartanburg (R. p. 16, lines 12-18). However, Brian's job could not be done in the office alone and it was common for him to be out of the office (R. p. 18, lines 9-15; p. 22, lines 19-21; p. 27, lines 10-13; p. 38, lines 14-19; p. 56, lines 9-16; p. 63, lines 22-25).

Brian's job required irregular hours (R. p. 26, lines 22-25) and his hours were therefore flexible (R. p. 30, lines 24-25). On the night before the accident, Brian had worked late at an event (R. p. 27, lines 1-5) and, consequently, did not go to his office immediately (R. p. 49, lines 3-9). Instead, Brian went first to his mother's home in Moore, South Carolina. Id. While at his mother's house, Brian had multiple work-related conversations (R. p. 47, lines 3-20). The Parks and Recreation Department was involved in two City events taking place on that day – a Spring Fever event and a bicycling event called "Pedaling with Politicians" (R. p. 22, lines 4-10; p. 66, lines 14-20).

The City's Aquatics Director, Tracy Ballew, testified that she communicated with Brian on the morning of his death (R. p. 40, lines 14-16). Ms. Ballew stated that she and Brian spoke by phone as she needed Brian to sign paperwork regarding a new hire and also needed him to retrieve a key from the C.C. Woodson Recreational Center (R. p. 40, line 17-p. 41, line 4). Ultimately, Brian agreed to go to the C.C. Woodson Center to pick up the key and to then bring the key to Ms. Ballew at the Swim Center, where he would also sign the forms. (R. p. 41, lines 5-19). Importantly, Ms. Ballew testified that Brian told her that he was going "directly to CC to get the key, and then coming to the Swim Center to sign the paperwork, and then going to the Spring Fever event . . . ."(R. p. 45, lines 1-7). This conversation began at 10:48 AM (R. p. 157).

After these conversations, Brian left his mother's house (R. p. 51, lines 3-7). His mother recalled that, as he was leaving, Brian was speaking to someone on the phone and stated that he would meet the person at the C.C. Woodson Center. Id. Only minutes later, Brian was killed in a motor vehicle accident (R. p. 51, lines 10-17). It should be noted that the accident took place at 11:15 AM and only minutes after his conversation with Ms. Ballew (R. pp. 129-130).

Petitioner's claim was denied by the single commissioner and his ruling was fully affirmed by the Full Commission. Petitioner appealed to the Court of Appeals, which affirmed the decision of the Full Commission in an opinion filed December 9, 2015. Petitioner submitted a Petition for Rehearing, which was denied by an Order filed January 21, 2016.

DISCUSSION

I. THE COURT OF APPEALS UTILIZED AN INCORRECT STANDARD OF REVIEW

In affirming the Appellate Panel, the Court of Appeals 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)." Wofford v. City of Spartanburg, et al., No. 5369 (Ct. App. filed December 9, 2015) (citations in original). 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 of Appeals 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 under 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]

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE DEATH OF BRIAN WOFFORD DID NOT ARISE OUT OF THE COURSE AND SCOPE OF HIS EMPLOYMENT AS PETITIONER'S CLAIM FALLS WITHIN AN EXCEPTION TO THE "GOING AND COMING" RULE

A. Going and Coming Rule

To sustain an award under the Workers' Compensation Act, it must appear that the injury or death resulted from an accident which both arose out of and in the course of the employment. See Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 466, 192 S.E.2d 866, 868 (1972). Injuries sustained by an employee on his way to or from work have typically been addressed under the "going and coming" rule. This rule does not represent an independent test for compensability, but instead provides a "shortcut" for assessing compensability when an employee is injured in this situation. This "shortcut" is based on an assumption – that a person on his way to work "is not engaged in performing any service growing out of his employment." See Matute Matute v. Palmetto Health Baptist, 391 S.C. 291, 296, 705 S.E.2d 472, 475 (Ct. App. 2011). Given this assumption, "an injury sustained by accident at such time does not arise out of and in the course of his employment." Id.

Of course, this assumption does not always hold true and the various exceptions to the "going and coming" rule are based on the recognition of this fact. Cases assessing the "going and coming" rule demonstrate that courts consider control, discretion, and personal purpose in determining whether a trip arises out of and is in the course and scope of employment. The rule

[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.

originated in Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942). In that case, the Supreme Court of South Carolina considered the claim of a mill employee who slipped and fell on an icy sidewalk while walking from his home to the mill. See id. at 259-60, 705 S.E.2d at 716. The Court found the claim not compensable, noting:

> We do not consider it at all controlling that the respondent, on the occasion in question, was proceeding from his home to the mill to begin a day's work. *In the course of this trip the respondent was in no sense under the control of his employer.* He could have changed his mind about entering the mill at the appointed time, or in the process of proceeding toward the mill he could have visited with other persons living in the neighborhood, or transacted business, *without in any way impinging on his obligation to his employer.*

Id. at 265, 705 S.E.2d at 718-19 (emphasis added).

Other courts have cited similar elements in assessing the compensability of an injury sustained while traveling. In Locke v. Steele County, 27 N.W.2d 285 (Minn. 1947), the Supreme Court of Minnesota considered an injury sustained by an employee while on the way to retrieve her employer's mail, following her lunch break. See id. at 286. The court noted that the reason for the "going and coming" rule was that, in general, an injury sustained on the way to work was sustained "before and not during his hours of service, *at a time when defendant (employer) had no control over him . . . .*" Id. at 287 (emphasis added). Nonetheless, the court found the claimant's claim compensable given that the employee had been instructed to retrieve the mail and was injured after leaving home, on her way to the post office. Id. at 288. The court noted:

> *In her discretion*, the employee was permitted to eat her lunch at her home, at a restaurant in some other part of the city, or, for that matter, possibly in her own office. *That was a matter of personal choice.* Immediately thereafter, however . . . her services for her employer were resumed. . . . She was not then engaged in her personal affairs, but was acting exclusively for the benefit of her employer and was fulfilling her contract of employment during her required hours of service.

Id. (emphasis added).

B. Comparable Caselaw

The instant case is most similar to two South Carolina cases addressing injuries sustained in travel. In Gray v. Club Group, Ltd., 339 S.C. 174, 528 S.E.2d 437 (2000), an employee who served as a bellman at Harbour Town, on Hilton Head Island, was asked by his employer to transport payroll and other items between Harbour Town and the Henderson Golf Club. See id. at 179, 528 S.E.2d at 438. This was in addition to his usual duties as a bellman. Id. Under this arrangement, the employee would leave his home in Savannah every Friday morning and would travel to the Henderson Golf Club, also located in Savannah. Id. at 180, 528 S.E.2d at 439. He would pick up the necessary documents and then drive to Harbour Town to perform his usual work, then return to Henderson that afternoon, before going home. Id. The employee performed this task regularly on every Friday for five months before he was involved in a motor vehicle accident. Id. The accident took place one morning after the employee had left his home but before he arrived at the Henderson Golf Club. Id.

The employer argued that the employee's injuries were not compensable as the employee had not yet arrived at work. Id. at 186, 528 S.E.2d at 442. The Court of Appeals disagreed, finding that both requirements of the Workers' Compensation Act – that the injury arose out of and in the course and scope of employment – were met. The Court noted that evidence supported the finding that the employee was required to pick up his deliveries that morning and that the task was causally-related to his presence at the accident site. Id. at 187, 528 S.E.2d at 443. Moreover, the Court noted that the injury occurred in the course and scope of the employment as the employee "was on his way to Henderson to fulfill his employment duties." Id. at 188, 528 S.E.2d at 443.

Similarly, in Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973), the state supreme court considered claims made on behalf of two teachers who died in a car accident while on their way to a meeting, which they were encouraged to attend by their employer. The Court found the claims compensable, noting that the teachers "*were not exercising a personal privilege* wholly apart from their employment or their employer's interest, but were about the performance of an act, *incidental to and recognized as of value* by their superintendent in connection with their duties as high school teachers." Id. at 332, 200 S.E.2d at 86 (emphasis added).

C. Instant Case

The facts of the instant case, like those in Gray and Beam, evince in Brian's travel the factors of control, lack of personal discretion, and lack of personal purpose and therefore is a case that falls outside of the "going and coming" rule. In short, the assumption on which the rule is based – that the employee "is not engaged in performing any service growing out of his employment" – is simply not true here. See Matute, 391 S.C. at 296, 705 S.E.2d at 475. While Brian's time spent at his mother's home was personal time – like the lunch hour of the employee in Locke, *supra* – once he departed his mother's home, he was in the process of executing a specific task given him by Tracy Ballew (R. p. 41, lines 5-19; p. 45, lines 1-7). This task was one of value to the employer – had he not completed the task, another City employee would had to have done so. See Beam, 261 S.C. at 332, 200 S.E.2d at 86 (task recognized as of value to employer). As stated by Ms. Ballew, and confirmed by Brian's mother, Brian agreed to go "directly" from his mother's home to the C.C. Woodson Center to retrieve the spare key.[3] See

[3] Additionally, based on the conversation overheard by Brian's mother as he departed, it seems Brian agreed to meet another City employee at C.C. Woodson.

id. Consequently, upon embarking on this errand, unlike the employee in Gallman, Brian had no discretion – at that point he could not stop, for example, at the grocery store or for coffee without "impinging on his obligation to his employer." See Gallman, 201 S.C. at 265, 705 S.E.2d at 718-19. As in Beam, Brian "[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 as [superintendent of the Parks & Recreation Department]." See Beam, 261 S.C. at 332, 200 S.E.2d at 86. As in Gray, Brian "was on his way to [C.C. Woodson Center] to fulfill his employment duties." See Gray, 339 S.C at 188, 528 S.E.2d at 443. Moreover, as noted, at the time of the accident which resulted in his death, Brian was not traveling to his office at 100 North Liberty Street.

Given these facts, it must be concluded that the accident which took Brian's life arose out of and occurred in the course and scope of employment and that the assumption which underlies the "going and coming" rule does not hold true here. Instead, this case falls squarely within an exception to the rule, as Brian's death occurred while Brian was on the way to work, but charged with a duty, task, or errand in connection with his employment. See Matute, 391 S.C. at 296, 705 S.E.2d at 475; see also Skinner v. Braum's Ice Cream Store, 890 P.2d 922 (Okla. 1995) (employee tasked with picking up supplies on way to work sustained compensable injury in motor vehicle accident). The Court of Appeals therefore erred in affirming the Commission's denial of benefits.

D. Petitioner was executing a duty or task at the time of his death

In considering the "duty or task" exception to the going and coming rule, the Court of Appeals 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 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 a coil around the window. In contrast, on the day of his death, the "work . . . to be performed" by 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.

E. No evidence to suggest that Petitioner would have traveled to C.C. Woodson center absent the duty, task, or errand

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

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 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.

CONCLUSION

Applying the proper standard of review, the evidence makes clear that, at the time of his death, Brian Wofford was not merely commuting to work, but was about the completion of a task or errand. For the reasons set forth above, Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari and consider the opinion of the Court of Appeals.

Respectfully Submitted,

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February 19, 2016
Spartanburg, South Carolina

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Commission

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

Petitioner,

v.

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

Respondents.

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I certify that I have served the Brief of Appellants by U.S. Mail, postage pre-paid, on February 19, 2016, addressed to Respondents' attorneys of record and the South Carolina Court of Appeals, at the following address:

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