THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEALS

Opinion No. 5369

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

v.

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

RETURN IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

MCANGUS GOUDELOCK & COURIE, LLC
Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Stephanie Lamb Pugh
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Respondents

Questions Presented[1]

1. WHETHER THE COURT OF APPEALS UTILIZED THE CORRECT STANDARD OF REVIEW?

2. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT DECEDENT'S DEATH IS NOT COMPENSABLE AS IT OCCURRED WHILE HE WAS ON HIS WAY TO WORK AND DOES NOT FALL WITHIN AN EXCEPTION TO THE "GOING AND COMING" RULE?

Pursuant to Rule 242, 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 a Writ of Certiorari ("Petition") review of the Court of Appeals' Opinion No. 5369 in this matter. Petitioners present no issues or arguments that warrant this Court's review. This case does not present a novel question of law; there was no dissenting opinion at the Court of Appeals; the Court of Appeals' decision is not in conflict with any prior decision of this Court; and, no federal or constitutional issues are involved. Furthermore, the Court of Appeals did not apply an incorrect Standard of Review. Instead, the Court of Appeals properly and correctly upheld the Workers' Compensation Commission determinations that Decedent "was not acting within the course and scope of employment at the time of his death," and that his "accident did not meet an exception to the going and coming rule." Wofford v. City of Spartanburg, Opinion No. 5369, 2015 S.C. App. LEXIS 250 (Dec. 9, 2015).

STATEMENT OF THE CASE

Decedent Brian Wofford was involved in a fatal motorcycle accident on May 18, 2012, in Moore, South Carolina. He is survived by his wife, Boisha Wofford, and minor

[1] Respondents note that Petitioners did not include a statement of the questions presented for review per Rule 242(d)(2), SCACR, but assume, based on their table of contents and arguments in their Petition, that the above statement represents the opposite side of the arguments Petitioners wish to present to this Court.

daughter, Kaelyn, who filed the instant case seeking workers' compensation death benefits. At the time of his fatal accident, Decedent was separated from his wife and living in an apartment in Spartanburg. (R. p. 154, lines 1-7).

Decedent was employed by the City of Spartanburg as the Parks and Recreation Superintendent. In that capacity, he was responsible for overseeing and managing the "the development and delivery of all programs related to Parks and Recreation," including personnel, facilities, grounds, and programs, and assisting and leading Special Events activities. (R. p. 162). Mitch Kennedy, the City's Director of Community Services, was Decedent's supervisor. (R. p. 60, lines 16-18). Decedent was a salaried employee. Although his normal working hours were 8 a.m. to 5 p.m., Monday through Friday, he was allowed to flex his schedule if necessary for work activities. (R. p. 30, line 16 – p. 32, line 2).

On May 18, 2012, Decedent did not go directly to work at 8 a.m.[2] but, instead, drove in the opposite direction from his apartment to his mother's house in Moore, South Carolina, where his motorcycle was garaged. (R. p. 155, lines 6-9)) (R. p. 154, lines 6-7)) (R. p. 46, lines 16-19) (R. p. 48, line 1 – p. 49, line 2) (R. 49, lines 10-13) (R. pp. 151-153). Mr. Kennedy testified that Decedent had no work-related duties in Moore, South Carolina, nor did his work require him to pick up his motorcycle or visit his mother. (R. p. 71, lines 2-23). Decedent stayed at his mother's house between two and three hours. (R. p. 53, lines 2-11). While there, he visited with his mother and ate something. (R. p. 54, lines 9-10). During that time, he had some brief work-related phone conversations

[2] Decedent had attended an event the evening before and then gone to restaurant afterwards. (R. p 31, lines 3-13).

and text messages. He also had personal calls and messages. (R. pp. 157-161) (R. p. 76, lines 6-15).

The Parks and Recreation Department was involved in or assisting with two events on May 18, 2012: 1) an employee appreciation "Spring Fever" lunch, and 2) a bicycle event sponsored by an unrelated non-profit organization. Early on the morning of May 18, Decedent had a brief email conversation with Sonya Culbreth, Communications and Marketing Specialist with the City of Spartanburg, about providing a podium for the bike event. (R. p. 8, line 9 – p. 12, line 4). Scott Page, the City's Parks Manager, texted and had a short phone conversation with Decedent that morning about the podium for the bike event. (R. p. 20, line 10 – p. 22, line 10) (R. p. 24, line 21 – p. 25, line 2).

Mr. Page stated that Decedent was his direct supervisor. (R. p. 16, lines 9-11). Mr. Page testified that he "didn't always go into the office first thing in the morning and [Decedent] also worked out of the office at Recreation Center, CC Woodson .... I know that [Decedent] might go straight to CC Woodson sometimes if he was working out of that Rec Center office or if he had a meeting or something." (R. p. 16, line 25 – p. 17, line 15). Mr. Page confirmed that both he and Decedent traveled to the various parks that fell under their department. (R. p. 18, lines 16-20).

Tracy Ballew testified that she was the aquatics director for the City. Decedent oversaw her, her staff and the Swim Center. (R. p. 37, lines 6-24) (R. p. 42, lines 20-22). Ms. Ballew agreed that it was common for Decedent to go to the Swim Center as well as the other Parks and Recreation facilities. (R. p. 38, lines 14-19) (R. p. 42, lines 16-25). On May 18, Ms. Ballew spoke briefly with Decedent on the phone about signing some forms for her and retrieving a key from the C.C. Woodson Center for the Swim Center.

(R. p. 40, line 19 – p. 41, line 19) (R. p. 43, lines 10-12). According to Ms. Ballew, Decedent agreed/volunteered to come by the Swim Center with the key and sign the forms. (R. p. 41, lines 8-18).

Mr. Kennedy testified that Decedent was "directly responsible for the day to day operations of Parks and Recreation ... which included our community centers, which was, at the time of Brian's death, that would have been four locations[:] CC Woodson Community Center, TK Gregg Community Center, Northwest Community center, and the Swim Center," as well as "over 20 parks." (R. p. 62, line 20 – p. 63, line 7) (R. p. 69, lines 22-24). He confirmed that Decedent's normal job required travel among the different locations "based upon what was needed from a manager." (R. p. 63, lines 8-11). He testified that it would have been normal for Decedent to go to the Swim Center or pick up keys for his employees, as his job was not strictly a desk job. (R. p. 69, lines 5-24). Mr. Kennedy also testified that Decedent did not have any work-related duties in Moore, South Carolina on that date, or any work-related reasons to travel to Moore to visit his mother or pick up his motorcycle. (R. p. 71, lines 6-23).

Deborah McClary, Administrative Assistant for the Parks, Recreation, and Special Events Department, (R. p. 55, lines 17-19), testified that, although both she and Decedent had offices in the North Liberty Street building, Decedent did not always work out of that office.

> Q: But was his work always done there physically in the office or did he get out of the office?
>
> A: Not necessarily, he had several different locations he would be at at times.
>
> Q: Okay. Did his job really require him to go from –

A: From place to place, because we had center – recreation centers; CC Woodson, Northwest, we had the Swim Center, and we also have park locations.

(R. p. 56, lines 9-16).

Decedent left his mother's house in Moore at about 11:15 a.m. on the morning of May 18. He told his mother he was going to work. (R. p. 50, lines 6-13) (R. p. 156, lines 8-12). Not long after, he was involved in an accident at the corner of Reidville Road and Plateau Street in Moore, which resulted in fatal injuries. (R. pp. 129-153). The accident occurred approximately two miles from his mother's house in Moore. (R. p. 51, lines 16-18) (R. pp. 129-130) (R. pp. 131-135).

Petitioners filed for benefits under the South Carolina Worker's Compensation Act ("Act"). Respondents denied that their claim was compensable because Decedent was not acting within the course and scope of his employment at the time of his accident.

The Single Commissioner denied workers' compensation benefits on the basis that Decedent's fatal accident did not arise out of and in the course of his employment. The Single Commissioner found that Decedent was not charged with any work-related duties at the time of his accident and was not performing a special task, service, mission or errand for his employer. (Order of the South Carolina Workers' Compensation Commission, T. Scott Beck, filed November 7, 2013, R. pp. 80-92).

Petitioners appealed to the Full Commission, which upheld the Single Commissioner's findings of fact and conclusions of law in their entirety. (Appellate Panel Decision & Order of the South Carolina Workers' Compensation Commission, filed May 12, 2014 ("Commission Decision"), R. pp. 118-128). Specifically, the Commission found as a matter of fact that Decedent "was not working at the time of his death," and that, "[i]nstead of coming to work on the day of his accident, Decedent drove

approximately nine miles from his apartment in the opposite direction to his mother's home in Moore, South Carolina to pick up his motorcycle and visit with his mother ... This visit to his mother's house was of a purely personal nature." Among other things, the Commission found that the claim was barred by the going and coming rule, from which "there are no applicable exceptions." Decedent was not charged with any work related duties but was "on a purely personal mission to get to work," at the time of his accident. The Commission also found that "Decedent was not performing a special task, service, mission, or errand for the City of Spartanburg at the time of his accident," but instead, all of the activities he planned to engage in once he got to work "were a customary part of his employment," which were job duties "that fell within his job description" and "expected of him on a regular basis." (Commission Decision, R. pp. 123-125).

The Commission concluded as a matter of law that, because none of the exceptions to the going and coming rule applied, Petitioners' claim was barred by that rule as the Decedent was on his own "personal mission" to get to work when the accident occurred. "Decedent had no work-related duties to perform on his way to work, nor was he under the control of the City of Spartanburg ..." The Commission held that the special errand exception is not applicable because "Decedent was not charged with any task on his way to work," but instead, the only job duties Decedent had on the day of his accident were his typical and customary job duties. (Commission Decision, R. pp. 126-127).

Petitioners timely appealed to the Court of Appeals, pursuing the sole issue of whether their claim "falls within an exception to the 'going and coming' rule." (Id., p. 3).

The Court of Appeals heard oral argument on October 14, 2015 and issued its Opinion No. 5369, affirming the Commission finding that Petitioners' claim is barred by the going and coming rule. The Court of Appeals analyzed the claim under both the duty or task exception and the special errand exception and agreed with the Commission that Decedent's accident does not fall within either exception.

Petitioners sought rehearing, which was denied on January 21, 2016. Petitioners timely petitioned this Court for review.

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. 2012). 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. Id., 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 an error of law. S.C. Code Ann. § 1-23-380(A)(5).

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. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). 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). It is not within the appellate court's 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).

It is well-established that, "the burden is upon the claimants to prove such facts as will render the injury and ensuing death compensable within the provision of the Workmen's Compensation Act, and such award must not be based upon surmise or conjecture or speculation." Sola v. Sunny Slope Farms, 244 S.C. 6, 10, 135 S.E.2d 321, 324 (1964). A key element of this burden is proving that the injury arose out of and in the course of the claimant's employment. *See, e.g.*, Falconer v. Beard-Laney, Inc., 215 S.C. 321, 330, 54 S.E.2d 904, 909 (1949) (the "burden of supplying evidence from which the inference can be legitimately drawn that [the claimant's] death arose out of and in the course of his employment rests upon [the claimant]").

I. The Court of Appeals applied the correct Standard of Review.

Petitioners incorrectly assert that the Court of Appeals utilized an incorrect Standard of Review. First, the Court of Appeals 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," *citing* 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[3] in order to prevail.

There is no indication in Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333 (2008), relied on by Petitioners for this principle, that there was any conflict in the inferences to be drawn from the facts in that case. 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

[3] Discussed in more detail in Section II.A below.

C.C. Woodson Center where he worked at times. (R. p. 17, lines 1-3). The inference the Court of Appeals, the Commission and Respondents drew from these facts is that the C.C. Woodson Center was where Decedent would start his work day, by picking up a key and possibly meeting with someone, and was on his way to work when the accident occurred. (R. p. 69, lines 5-24) (R. p. 40, line 19 – p. 41, line 19) (R. p. 51, lines 1-9). Whether reasonable or not, the inference Petitioners draw is that Decedent was performing sort of duty or task or on some special errand as he was headed to the C.C. Woodson Center.[4] The Commission's resolution of the conflict between these inferences is supported by substantial evidence in the record, cited immediately above, and was properly upheld as such by the Court of Appeals.

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 clearly allows 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

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

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." (R. p. 125). Not only are these factual findings by the Commission, they are overwhelmingly supported by evidence and by the reasonable inferences that can be drawn from the evidence, as is stated herein and in the Final Brief of Respondents.

Furthermore, after holding that "substantial evidence supports the Appellate Panel's finding that Wofford's accident did not meet an exception to the going and coming rule," the Court of Appeals proceeded to analyze the law governing both the duty or task exception and the special errand exception as applied to the facts of this case. Under both analyses, the Court of Appeals found Decedent's accident did not fall within either exception: "First, we agree with the Appellate Panel's finding that the duty or task exception did not apply .... Second, we agree with the Appellate Panel's finding the special errand exception did not apply."

Finally, even if the Court of Appeals applied the incorrect standard of review, which Respondents do not concede, it nonetheless 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).

Because the Court of Appeals applied the correct standard of review in this case and, even if it did not, which Respondents do not concede, it reached the correct result, this Court should deny review of the first issue raised in Petitioners' Petition.

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

"As a general 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, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment." Medlin v. Upstate Plaster Serv., 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998). There are five well-recognized exceptions to the going and coming rule: 1) where the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; 2) "[w]here the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment"; 3) where the way to work is inherently dangerous and is either the exclusive way or constructed and/or maintained by the employer; 4) where the injury is incurred in close proximity to the workplace and there is an "implied requirement" that the employee use that approach to go to and come from work; and 5) where an employee is injured "while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work." Id. at 95-96, 495 S.E.2d at 449.

As they did below, Petitioners are somewhat vague as to which exception they assert applies in this case.[5] As an alternative, they describe the going and coming rule as simply a "shortcut" – an analysis that has not been adopted by any court. Rather than address the specific exceptions to the going and coming rule, Petitioners focus on a self-devised test composed of elements of "control, discretion, and personal purpose," in their attempt to prove their claim is compensable. As is discussed in more detail below, their claim fails even under their self-devised test.

A. The duty or task exception does not apply.

Petitioners argue that their claim falls within the duty or task exception. First, the weakness in their argument is belied by their illogical assertion that "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." (Pet. p. 14). As the Court of Appeals correctly found, "retrieving the key was Wofford's first task of the day ..." 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, which the Court of Appeals found was similar to this case, and like every employee in every other job, Decedent had job duties to perform once he arrived at work. He was injured during his commute to work. The fact that Decedent had work to do once he arrived at his place of employment does not convert his

[5] Although Petitioners argued the duty or task exception and the special errand exception almost interchangeably before the Court of Appeals, their Petition appears to only address the duty or task exception. However, Respondents address both exceptions here for completeness sake.

commute into an exception to the going and coming rule. 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 one of his normal places of work – 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.

Like the employee in Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942), Decedent was merely on his way to work and could have changed his mind about going to work at that precise time, stopped for coffee, stopped by his apartment or transacted other business. To say that he would have impinged on his employer if he had not picked up and delivered the key as he had agreed/volunteered to do is tantamount to saying that a worker who was scheduled to work at the mill "at the appointed time" would not have impinged on his employer by not showing up for his shift. 201 S.C. at 265, 22 S.E.2d at 718-719. As was the case with the claimant in Gallman, no duty was required of Decedent until he arrived at work, which was in Spartanburg. Decedent was not tasked with picking up anything in Moore, or anywhere else, until he arrived at his regular place of work, which included both the C.C. Woodson Center and the Swim Center. *See* (R. p. 38, lines 14-19) (R. p. 42, lines 16-25) (R. p. 69, lines 5-24 (R. p. 56, lines 9-16) (R. p. 71, lines 2-23); *see also* (R. p. 162). There is no evidence in this record that the tasks of picking up and delivering the key and signing papers were time sensitive. (R. p. 40, line 19 – p. 41, line 19) (R. p. 43, lines 1-12). Rather, Decedent could have

stopped to perform any number of personal tasks on his way back to Spartanburg to start work.[6]

Petitioners continue to erroneously assert that Gray supports their argument that the duty or task exception applies to Decedent's accident. What they fail to note is that Gray was decided on the basis of the first exception to the going and coming rule: "We find that the circumstances in this case fit into the first exception to the 'going and coming rule.' Gray was paid for both his travel time and for mileage. His time and mileage began when he left his home on Friday mornings." 339 S.C. at 189, 528 S.E.2d at 444. Although the theory of their case has been unclear and evolving, Petitioners have never asserted that Decedent's accident falls within the first exception to the going and coming rule. There is no evidence that Decedent was being paid either for travel time or for mileage for the trip from Moore to Spartanburg when then accident occurred, as was the case in Gray.

Furthermore, the instant case is distinguishable from Gray because the claimant in Gray was performing the payroll transport duties on his regularly-scheduled day off, 339 S.C. at 179-180, 528 S.E.2d at 438-439;[7] whereas, here, Decedent's accident occurred during normal working hours when his superior and most of his subordinates thought he was already 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 – p. 71, line 5 (Mr. Kennedy)).

---

[6] Thus, Petitioners' assertion that "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," (Pet. p. 7) (emphasis added), is not accurate.

[7] Respondents note that Petitioners' characterization of the facts in Gray, where they state that the claimant "would pick up the necessary documents and then drive to Harbour Town **to perform his usual work**, then return to Henderson that afternoon," (Pet. p. 11) (emphasis added), is incorrect.

The Minnesota case relied on by Petitioners, Locke v. Steele County, 27 N.W.2d 285 (Minn. 1947), is readily distinguishable from the case at hand. In Locke, the employee was instructed by her supervisor that, at the end of her normal lunch hour from 12 noon to 1 p.m., she was to travel to the post office and pick up the office mail. On the day she was injured, she had lunched at home and was traveling in the direction of her job in order to go to the post office. The Minnesota Court held that the claimant's injuries were compensable because, due to her employer's specific instructions, "at 1 p.m., her services for her employer were resumed," which required her to be on the public streets and consequently subjected her to ordinary street risks while she was performing those services. Id. at 288. In contrast, here Decedent was under no direction from his supervisor, who did not even know he was not in the office on the morning of May 18, (R. p. 70, lines 17-22), to go anywhere.

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. 15). 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.*, Sola, 244 S.C. at 10, 135 S.E.2d at 324 (workers' compensation awards "must not be based on surmise or 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 including, 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).

Furthermore, Petitioners' assertion that there is no evidence that, absent the request from Ms. Ballew, Decedent would not have traveled to the C.C. Woodson Center is flatly contradicted by their admission that Decedent's mother testified that she overheard him tell someone he would meet them at C.C. Woodson. (Pet. p. 12, n.3) (R. p. 51, lines 1-9).

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, both the C.C. Woodson Center and the Swim Center are regular workplaces for Decedent and the 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 Petitioners' speculation was correct, which Respondents do not concede, all that would have changed would have been what Decedent was going to do once he got to work, and at which of his normal workplaces he would start his work day. Under Petitioners' theory, an employee who normally supervised and worked out of three different offices would fall within the duty or task exception if he planned to start his day at Office #1 but agreed/decided to pick up something at Office #2 and take it to Office #3, all of which were a normal part of his job duties, and was injured on his way from his home to Office #2. Under the example, the hypothetical claimant's claim is clearly barred by the going and coming rule, as is Petitioners' claim here.

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). Petitioners argued at the Court of Appeals that it was irrelevant that Decedent was Ms. Ballew's supervisor; however, the employment relationship goes to control and personal discretion, elements in Petitioners' self-devised "shortcut" test for compensability. For example, in Locke, the employee, a stenographer in the Steele County superintendent of schools' office "was instructed that as part of her duties she was to go to the post office each noon to get the mail." 27 N.W.2d at 286. The Locke claimant's supervisor gave her a task to perform which she testified it was her "duty" to perform. Id. While Decedent, as Ms. Ballew's supervisor, could provide her with instructions as to how and where she was to perform her job, and expect that she would comply, the reverse is not true.

Respondents' suggested hypothetical, involving a law clerk stopping by a courthouse to pick up supplies, fails for this and other reasons. In Petitioners' hypothetical, it is a subordinate (law clerk) being tasked by a supervisor (the judge) to pick up paper at a courthouse where she and her supervisor "occasionally held court." Here, in contrast, it is a supervisor (Decedent) agreeing to pick up an item at one of his regular places of work which he supervises (the C.C. Woodson Center) and take it to another one of his regular places of work which he also supervises (the Swim Center) in order to facilitate the work of a subordinate (Ms. Ballew). As noted above, the employment relationship does matter, as it goes to the issue of employer control and personal discretion. In addition, 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 on her way to pick up paper there would "plainly fall within an exception to the going and coming rule ..." (Pet. p. 15).

As Petitioners suggest, had Decedent been traveling to some other location, such as Ms. Ballew's personal residence, to retrieve the needed keys, this case might have had a different outcome. Ms. Ballew's personal residence is not Decedents' normal place of work, he has no office there and he has no supervisory responsibility over that location. However, those are not the facts of this case. Instead, the facts that he was going to one of his normal places of work to perform a routine task once he arrived at work controls the analysis here. The Court of Appeals correctly upheld the Commission's finding that Decedent's accident does not come within the duty or task exception to the going and coming rule.

B. The Court of Appeals properly held that this claim does not fall within the special errand exception to the going and coming rule.

It is unclear whether Petitioners are continuing to argue that Decedent's accident falls within the special errand exception to the going and coming rule. To the extent they are, they are incorrect on this point as well. This Court adopted the special errand exception to the going and coming rule in Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972), which is clearly distinguishable from the case at hand.[8] In Bickley, the decedent had been called out in the middle of the night to travel

[8] Tellingly, Petitioners do not even attempt to argue that the facts in this case are similar to those in Bickley. They cannot plausibly do so.

from Columbia to Charleston to repair storm-damaged electrical lines. This Court held that:

> [w]hen 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. In other words, "[w]here an employee is obligated to make emergency calls or to perform service at times other than during his regular working hours and goes on a special errand or mission for the employer, he is entitled to the protection of the compensation law from the time he leaves home until his return thereto." 259 S.C. at 470, 192 S.E.2d at 870.

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 from his mother's house. (R. p. 50, line 14 – p. 51, line 16). Further, Decedent was not injured while making "emergency calls or ... 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 already was or should have 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)).

Furthermore, there was nothing unusual or special about the tasks Decedent was going to perform once he arrived at work; instead, were part of his normal job duties and fell well within his job description. *See* (R. p. 18, lines 16-20) (Mr. Page testifying that it was not unusual for either him or Decedent to travel to the various parks that fell within their department) (R. p. 38, lines 14-19) (R. p. 42, lines 16-25) (Ms. Ballew testifying that it was normal for Decedent to go to the Swim Center as well as the other Parks and Recreation facilities) (R. p. 69, lines 5-24) (Mr. Kennedy testifying that it would have been normal for Decedent to go to the Swim Center or pick up keys) (R. p. 56, lines 9-16) (Ms. McClary testifying that Decedent did not always work out of his physical office but, instead, traveled among the various recreation centers and parks); *see also* (R. p. 162) (Decedent's job description).

As the Court of Appeals correctly found, this case is substantively similar to McDaniel v. Bus Terminal Rest. Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978), where 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. Thus, the special errand exception does not apply to this case.

C. Petitioners' other arguments are without merit.

Petitioners continue to confuse and conflate case law dealing with injuries incurred by traveling employees with the going and coming rule. However, the analysis used to determine whether injuries incurred by traveling employees are compensable does not constitute an additional exception to the going and coming rule, nor does it apply in cases where an employee is merely traveling to work. As a result, Petitioners' heavy 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 after his visit with his mother was simply that, his personal mission to get to work. 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 transform this into a compensable claim. Presumably, every task Decedent intended to accomplish once he arrived at work was intended to benefit his employer.

Petitioners also continue to rely on Skinner v. Braum's Ice Cream Store, 890 P.2d 922 (Okla. 1995). Not only is Skinner not a South Carolina case, it is not even a workers' compensation case. The issue in Skinner was whether the injured plaintiff could hold the employer vicariously liable for an automobile accident caused by the employer's employee while she was en route to a store location other than the one where the she normally worked. 890 P.2d at 923. Skinner is not applicable, let alone

controlling. In fact, the key issue of whether the employee's supervisor had instructed her to go pick up supplies, as opposed to the employee voluntarily doing so, was never decided by the court. Instead, the case was remanded for factual findings on that issue. 890 P.2d at 925. Here, the testimony is uncontroverted that Decedent agreed and/or volunteered to pick up a key from one of his normal work locations and deliver it to another normal work location. (R. p. 41, lines 8-18).

Because the Court of Appeals correctly found that Petitioners' claim is barred by the going and coming rule and does not fall within any exception, this Court should deny review of the second issue raised in Petitioners' Petition.

CONCLUSION

Petitioners have presented no issues or arguments that warrant this Court's review. The Court of Appeals did not apply the wrong Standard of Review, or misapply the law concerning the going and coming rule and its exceptions. On the contrary, both the Court of Appeals and the Commission correctly held that, under the facts of this case, Petitioners' claims are barred by the going and coming rule and no exception applies. As a result, this Court should deny Petitioners' Petition.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

February 25, 2016

Helen F. Hiser
S.C. Bar No.: 76124
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

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

Attorneys for Respondents

RECEIVED

FEB 29 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEALS

Opinion No. 5369

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

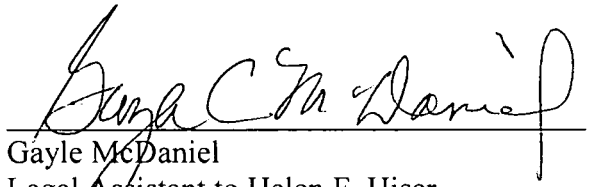
v.

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

PROOF OF SERVICE

I certify that on the 25th day of February 2016, I served the Respondents' **Return in Opposition to Petition for a Writ of Certiorari** 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



Gayle McDaniel
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