THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2015-000486
W.C.C. File No. 1219902

Anthony Ransom, Claimant,.. Respondent,

v.

John Clark, Employer, Builders Firstsource, and Liberty Mutual Insurance Co., Carrier, and S.C. Uninsured Employers Fund, Defendant,

of whom Builders Firstsource and Liberty Mutual Insurance Co. are the .... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. RESPONDENT DID NOT SUSTAIN A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

Ransom's injuries are not compensable because he was given explicit instructions by his employer not to report for duty on the date of his accident and not to climb onto a wet roof. He was aware of the prohibition against climbing onto a wet roof but nevertheless proceeded to violate his employer's direct prohibition. *See Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004). In that case, employee was involved in an automobile accident while driving a company vehicle in direct contravention of his employer's order not to take the truck home. These facts were established by testimony from the co-owners of the company and another employee, and the South Carolina Supreme Court agreed that the employee "left the scope of his employment by violating the specific order not to drive the company vehicle home." *Pratt*, 357 S.C. at 623, 594 S.E.2d at 274 (citing *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) (grocery bagger's death not compensable where bagger violated employer's prohibition against approaching or apprehending suspected shoplifters); *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950) (police chief's death not compensable where police chief violated City's express prohibition against riding a fire truck)).

Ransom, like the employee in *Pratt*, disregarded his employer's prohibition against climbing onto a roof in the rain and, as a result, removed himself from the course and scope of his employment prior to sustaining injury. Indeed, the record in this case supports a finding that Ransom's employer ("Clark") instructed Ransom not to work on roofs in the rain prior to the date of the alleged incident. (July 9, 2013 Hr'g Trans., p.

105, lines 3-13) He also repeated this prohibition during a telephone call with Ransom the morning of his injury. (*Id.*, Defs.' APA p. 36) Clark testified that this policy was consistent with OSHA regulations and was well known to Ransom. (July 9, 2013 Hr'g Trans., p. 105, lines 3-13) The single commissioner's findings on this issue, as affirmed by the Full Commission, simply are not supported by substantial record evidence. Ransom testified he never spoke with Clark on the morning of the alleged accident until he was confronted with phone records showing a four-minute call Ransom made to Clark at 7:23 a.m., at which point Ransom testified "[Clark] says we [talked]." (July 9, 2013 Hr'g Tr., p. 53, line 19 – p. 54, line 6; Defs.'APA, p. 36) Based on a preponderance of the evidence, however, the Full Commission should have found Clark's testimony more credible than Ransom's with regard to the phone call on the morning of the alleged accident. Clark and Ransom spoke for four minutes that morning, and a preponderance of the evidence supports Clarks' testimony that they discussed the rain and the policy of not working on the roof in the rain.

Ransom removed himself from the course and scope of employment when he violated a direct command from Clarke that he not climb onto a wet roof. As such, he is not entitled to workers' compensation benefits, and the Orders of the single commission and the Full Commission to the contrary should be reversed.

II. BUILDERS FIRST SOURCE MET ITS BURDEN TO TRANSFER LIABILITY TO THE UNINSURED EMPLOYERS' FUND.

The single commissioner erroneously concluded "there is ***no*** evidence that John Clark provided his 'Certificate of Liability Insurance' at the time he commenced work at the project at Lafayette Park" and that the certification does not indicate coverage in

South Carolina. (February 18, 2014 Order, Finding of Fact no. 22) (emphasis added). This finding is erroneous and should be reversed.

It is sufficient to transfer liability to the Uninsured Employers' Fund when: (1) the lower tier contractor has represented himself to a higher tier contractor as having coverage at the time he is engaged to perform the work; and (2) the higher tier contractor has collected documentation of insurance on a "standard form acceptable to the commission. . . ." S.C. Code Ann. § 42-1-415.

In this case, Appellants provided proof of Clark's representation of having insurance for the period prior to and including the date of accident for Clark's company to work as a subcontractor for Defendants. The certificate was prepared September 27, 2012, well before commencement of work at Lafayette Park on or around November 1, 2012. Clark's workers' compensation insurance did not lapse until one week prior to Ransom's injury eleven days after the project started.

The proof of insurance Clark presented to Appellants was on a form acceptable to the Commission. (Defs.' APA, p. 35) The insurance notes South Carolina for the producer's state and the insured's state, which satisfies the condition that the workers' compensation coverage includes South Carolina. *Contra Hopper v. Terry Hunt Construction*, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) (Pleicones, J., dissenting) (contractor did not meet the burden to transfer liability because the insured, certificate holder, and coverage producer were in Georgia with no mention of South Carolina on the certificate); *Barton v. Higgs*, 381 S.C. 367, 674 S.E.2d 145 (2009) (reversing order finding Uninsured Employers' Fund responsible for payment of benefits where certificate

of insurance did not comply with Commission regulation as it was not signed in the blank listed for "Authorized Representative").

Because Appellants received a valid proof of insurance that was in effect until *after the start* of the Lafayette Park project, Appellants met their burden of proving liability should be transferred to the Uninsured Employers' Fund. Liability for the alleged accident should transfer to the Uninsured Employers' Fund, and the Orders on this issue should be reversed.

III. RESPONDENT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE ARE NOT SUPPORTED BY THE EVIDENCE.

The finding that Ransom's average weekly wage should be based on working 54 hours per week, with fourteen hours of overtime pay at time and a half, violates the long-standing cardinal rule that an award may not be based solely upon surmise and conjecture. *See Rudd v. Fairforest Finishing Company, et al.*, 189 S.C. 188; 200 S.E. 727 (1939) (an award must be based on more than surmise or conjecture). In addition to the materials referenced in Appellants' Initial Brief, the single commissioner's calculation of Ransom's average weekly wage rests heavily upon a log of hours that was unreliable and that should have been excluded as an unauthenticated, inadmissible recreation of his hours.[1]

When asked if he knew how many hours, on average, he would work, Ransom responded that he did not know. (July 9, 2013 Hr'g Trans., p. 50, lines 16-20) He also agreed he was paid straight time and that he was not paid overtime. (*Id.*, p. 50, lines 21-

[1] At the outset of the hearing before the single commissioner, Appellants lodged an objection to Ransom's log of hours to the extent it lacked foundation and was not an original document. (July 9, 2013 Hr'g Trans., p. 5, line 16 – p. 6, line 16) This objection was renewed and overruled. (*Id.*, p. 60, lines 1-10; p. 61, line 9 – p. 62, line 14)

23; p. 51, lines 11-19) He could not say how much he expected to earn for the year in which his accident occurred or for the prior year. (*Id.,* p. 51, lines 20 – p. 52, line 12) Regarding the typewritten log of hours, Ransom also admitted under cross-examination that it was prepared after-the-fact by his fiancée. (*Id.,* p. 60, line 14 – p. 61, line 8) Given the scant evidence supporting the single commissioner's calculation of Ransom's average weekly wage, it becomes clear that the award is based on conjecture and cannot stand. *Barnes v. Charter 1 Realty*, 411 S.C. 391, 395, 768 S.E.2d 651, 652 (2015) (quoting *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation.")).

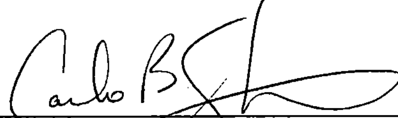
Inasmuch as the Orders below rely upon surmise and conjecture, bolstered by the inadmissible log of hours typed by Ransom's fiancé, to re-create Ransom's average weekly wage, the Orders below should be reversed.

CONCLUSION

The record evidence does not support a finding that Ransom sustained an injury in the course and scope of employment because he acted against his employer's instructions. Even if the claim is compensable, Builders FirstSource received proper proof of insurance indicating South Carolina coverage prior to the commencement of work at Lafayette Park. Thus, Builders FirstSource met its burden to transfer liability for Ransom's claim to the Uninsured Employers' Fund. Additionally, the calculation of Ransom's average weekly wage and compensation rate is based on surmise and conjecture and does not use the methods prescribed in S.C. Code § 42-1-40. Therefore, a

preponderance of the evidence supports a reversal on these issues.

March 17, 2016

By: 

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