

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM  
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

**RECEIVED**

JUL 11 2016

Appellate Case No. 2016-000512

**SC Court of Appeals**

Adrian Adame Salgado,

Respondent,

v.

Patterson Construction, Inc.,

Appellant.

INITIAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUES ON APPEAL**

1. WHETHER THE COMMISSION'S FINDING THAT RESPONDENT HAD NOT DEVIATED FROM HIS NORMAL WORK ROUTE WHEN HE WAS INVOLVED IN THE MAY 4, 2015 MOTOR VEHICLE ACCIDENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE WHERE THE RECORD CLEARLY ESTABLISHES THAT WHEN RESPONDENT WAS INVOLVED IN THE SUBJECT MOTOR VEHICLE ACCIDENT HE HAD BEGUN TO TAKE A LEFT HAND TURN ONTO A ROAD THAT WAS NOT PART OF HIS NORMAL WORK ROUTE, THE PURPOSE FOR SUCH TURN BEING FOR PERSONAL REASONS AND NOT IN FURTHERANCE OF HIS JOB DUTIES.
  
2. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT RESPONDENT WAS IN THE COURSE OF HIS EMPLOYMENT WHEN HE WAS INVOLVED IN THE MAY 4, 2015 MOTOR VEHICLE ACCIDENT WHERE THE RECORD CLEARLY ESTABLISHES THAT WHEN RESPONDENT WAS INVOLVED IN THE SUBJECT MOTOR VEHICLE ACCIDENT HE HAD BEGUN TO TAKE A LEFT HAND TURN ONTO A ROAD THAT WAS NOT PART OF HIS NORMAL WORK ROUTE, THE PURPOSE FOR SUCH TURN BEING FOR PERSONAL REASONS AND NOT IN FURTHERANCE OF HIS JOB DUTIES.

## **STATEMENT OF THE CASE**

This case arises from a denied workers' compensation claim. Respondent alleges that on or about May 4, 2015, he was involved in a work-related motor vehicle accident, such accident causing injury to his back and legs. Appellant denies compensability of the motor vehicle accident under the South Carolina Workers' Compensation Act on the basis that any injuries sustained as a result of the motor vehicle accident did not arise out of and in the course of his employment with Appellant. In response to the denial, Respondent requested a hearing seeking a determination of compensability, causally related medical treatment for his back and legs, and temporary total disability benefits (TTD) from the date of injury and continuing until reaching maximum medical improvement (MMI).

A hearing was held on August 31, 2015, before the Hon. R. Michael Campbell, II (hereinafter the single Commissioner), at which Respondent testified. The single Commissioner also considered documentary evidence submitted by the parties under the South Carolina Administrative Procedures Act. Having considered Respondent's testimony and the documentary evidence, the single Commissioner issued a Decision and Order on October 27, 2015, concluding as a matter of law that Respondent had failed to meet his burden that his injuries occurred within the course and scope of his employment; therefore, Respondent is not entitled to any benefits under the South Carolina Workers' Compensation Act. In reaching this conclusion, the single Commissioner specifically found that while on his way to work in a vehicle owned by Appellant, Respondent deviated from his normal route to work in order to drop his son off at school, and because the motor vehicle accident took place during such deviation, the injuries sustained by Respondent in the motor vehicle accident are not compensable under the South Carolina Workers' Compensation Act.

Respondent timely appealed the Decision and Order of the single Commissioner. A Full Commission panel hearing was held before the South Carolina Worker's Compensation Commission on January 12, 2016. On February 23, 2016, based upon the stipulations of the parties, Respondent's testimony and evidence from the hearing before the single Commissioner, the Full Commission panel reversed the decision of the single Commissioner, finding that Respondent was involved in a motor vehicle accident on his regular route to work, and that he did not deviate from his normal route when he was struck by another vehicle, thereby sustaining the injuries alleged. The Full Commission further concluded as a matter of law that any deviation by Respondent was so small that it is to be disregarded as insubstantial, such that Respondent's accident and injuries

occurred within the course of his employment for Appellant, and as such, are compensable under the South Carolina Workers' Compensation Act.

On March 7, 2016, Appellant timely appealed from the decision of the South Carolina Workers' Compensation Commission (hereinafter the Commission). The Commission's decision should be reversed because the South Carolina Workers' Compensation Act does not apply to the Respondent's accident and injuries, its findings of fact are unsupported by the substantial evidence, and its related conclusions of law regarding the undisputed facts of this case constitute errors of law.

### **FACTS**

The relevant facts are not in dispute. On or about May 4, 2015, Respondent was an employee of Appellant working in the construction industry. Hr. Tr. p. 9. That morning, Respondent left his home headed for work in a Ford 250 van owned by Appellant that was provided to Respondent for driving to work. The van only had two passenger seats, and the remaining portion of the van behind the seats was for tools and materials. Because his 15-year-old son had missed the bus that morning, Respondent took his son with him in the work van. Hr. Tr. p. 9-11, 16, 19-20; APA p. 54.

After he and his son left their home, they picked up Respondent's brother to take him to work as well. Respondent's brother was also doing work for Appellant's at that time. Hr. Tr. p. 11; APAs p. 11-2. From Respondent's brother's house, with his son and brother as passengers, Respondent drove down Joe Frazier Road, which was a common route for him to take when going to work. Hr. Tr. p. 18. Off Joe Frazier Road is a road called Possum Hill Road that leads to Battery Creek High School, which is where Respondent's son is enrolled. Hr. Tr. p. 12. Possum Hill Road is not a road that Respondent would use to travel to work. Hr. Tr. p. 20.

While Respondent was making a left off Joe Frazier Road to get on Possum Hill Road in order to take his son to Battery Creek High School, the van was struck on the driver's side by another vehicle, resulting in injury to Respondent. Hr. Tr. p. 13 & 20; APAs p. 184. Respondent would not have been attempting a left onto Possum Hill Road were it not for the fact he needed to drop off his son at Battery Creek High School, and therefore would not have been struck by another car. Hr. Tr. p. 21. Additionally, Appellant had not sent Respondent to Battery Creek High School for any reason. Hr. tr. p. 22.

### STANDARD OF REVIEW

On appeal from an appellate panel of the Commission, the Court of Appeals can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "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." *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). And, the Court of Appeals will not set aside the Commission's findings unless they are not supported by substantial evidence. However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). While workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act, exceptions and restrictions on coverage are to be strictly construed. *See Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 769 S.E.2d

1, 3 (S.C. 2015) (*citing James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010)).

### ARGUMENTS

The facts of this claim and the issues on appeal focus on Respondent's status at the time he was trying to turn onto Possum Hill Road and subsequently struck by another vehicle, specifically whether he was in the course of his employment with Appellant at the time of the motor vehicle accident. Another way of framing the question is whether Respondent's conduct at the time of the accident pertained to his employment. The evidence of the case reveals that when Respondent was struck by another vehicle while driving a van furnished by Appellant, he was in the process of making a left turn off of Joe Frazier Road, a road that is part of his route to work, onto Possum Hill Road, which was not on the way to work, in order to take his son to school. Attempting the left turn was entirely for personal reasons, namely to take his son to school, not in furtherance of his job duties for Appellant, and was substantial in that he was providing transportation for a third person who had neither a relationship to Appellant, nor was there even enough proper seating for such a third person.

Given these facts, the South Carolina Workers' Compensation Act does not apply to Respondent's accident and subsequent injuries. Respondent's action placed him outside the course of employment and he is, therefore, not entitled to benefits under the South Carolina Workers' Compensation Act. Furthermore, the Commission's findings of fact with respect to compensability were not supported by substantial evidence. Accordingly, the Commission's decision should be reversed and Respondent's claim for benefits under the South Carolina Workers' Compensation Act should be denied.

- I. THE COMMISSION'S FINDING THAT RESPONDENT HAD NOT DEVIATED FROM HIS NORMAL WORK ROUTE WHEN HE WAS INVOLVED IN THE MAY 4, 2015 MOTOR VEHICLE ACCIDENT WAS NOT SUPPORTED BY SUBSTANTIAL

EVIDENCE BECAUSE THE RECORD CLEARLY ESTABLISHES THAT WHEN RESPONDENT WAS INVOLVED IN THE SUBJECT MOTOR VEHICLE ACCIDENT HE HAD BEGUN TO TAKE A LEFT HAND TURN ONTO A ROAD THAT WAS NOT PART OF HIS NORMAL WORK ROUTE, THE PURPOSE FOR SUCH TURN BEING FOR PERSONAL REASONS AND NOT IN FURTHERANCE OF HIS JOB DUTIES THEREFORE TAKING RESPONDENT OUTSIDE THE COURSE OF EMPLOYMENT AT THE TIME OF THE ACCIDENT.

The Commission reached a conclusion that was not supported by the substantial evidence by finding that Respondent had not deviated from Joe Frazier Road, Respondent's normal route to Appellant's worksite, and was thereby within the course of his employment at the time of the motor vehicle accident on May 4, 2015. *See* Full Commission Order p. 14. Put another way, the Commission found at the time of the subject motor vehicle accident Respondent was engaged in a work-related activity, a finding for which there is no evidence.

To be compensable under the Workers' Compensation Act, an injury by accident must both "arise out of" and be "in the course of" employment. S.C. Code Ann. § 42-1-160 (2016). The phrase "arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the time, place and circumstances under which the injury occurred. *Gibson v. Spartanburg Sch. Dist.* # 3, 338 S.C. 510, 517-8, 526 S.E.2d 725 (Ct. App. 2000) (citing *Baggott v. Southern Music, Inc.*, 330 S.C. 1, 496 S.E.2d 852 (1998)). "[A]n employee, to be entitled to compensation, need not be in the actual performance of the duties for which he was expressly employed in order for his injury or death to be in the 'course of employment' [*as long as*] *the employee is engaged in a pursuit or undertaking ... which in some logical manner pertains to ... his employment.*" *Beam v. State Workmen's Comp. Fund*, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (emphasis added).

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 conclusion the administrative agency reached in order to justify its

action. *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, (Ct. App. 1999).

Contrary to the Commission's finding, the evidence firmly establishes Respondent's accident and subsequent injuries are not work-related. In addition to the testimony and evidence referenced in the Facts section above, relevant portions of Respondent's testimony are as follows:

Q: Okay. Well, where were you headed at this point in the trip?

A: To work.

Q: Okay. Is your son still in the vehicle with you yet?

A: Before -- just a little bit before that light again is where I was going to turn to go to school.

Q: Which school?

A: Battery Creek High School

Q: Is that where your son is enrolled?

A: Yes.

Q: Okay. Tell us what happened when you-- when you had the accident. Tell us how that occurred.

A: Before I was going to turn to the road towards left there was a bus that was going in front of me. From there I waited for that bus to go first when it was my turn. The road on the opposite side coming the other way was completely free and so behind me there was a big truck, one of those big ones, long ones of 18 wheels. And there was another car more behind and behind that car a truck from one of those policemen that are covered-- undercover. And behind that another little car, then that's when I started turning towards the left. When I all of a sudden heard a horn, very small quiet horn...that Toyota passed everybody and hit me.

Hr. Tr. p. 12-3

Q: Your accident happened while you were turning left from Joe Frazier onto Possum Hill Road, correct?

A: Yes, but I had not been into Possum Road yet.

Q: You were turning left though, correct?

A: Yes.

Q: That's when the accident happened, correct?

A: Yes.

Q: If you continued on Joe Frazier you would have continued to work, correct?

A: Yes.

Q: Driving down Possum Hill Road would not take you to your worksite, correct?

A: No, if I turned -- no, because it goes out the other side of the school also.

Q: Battery Creek High School is not on Joe Frazier, right?

A: No.

Q: If you weren't dropping off your son on May 4, 2015 you would not have been turning left on Possum Hill Road?

A: No.

Q: That's a yes you would not have been turning or no that you would have been turning? So let's -- let's ask the question again. On May 4, 2015 the reason you were turning left on Possum Hill Road was to take your son to school, correct?

A: Yes.

...

Q: The only reason you turn left on Possum Hill Road was for personal reasons?

A: It was I needed to come drop off my son.

Hr. Tr. p. 20-2.

Respondent's own testimony and other evidence of the case establishes the following with respect to the conditions at the time of the accident: Respondent, in the business of construction, was driving a two-seater van owned by Appellant. Respondent's brother and son were also in the car, bringing the total number of persons in the van to three (3). After picking up his brother, Respondent drove the van on Joe Frazier Road, which is a route that Respondent had taken to work

in the past. While travelling on Joe Frazier Road, Respondent attempted to, and was in the process of, making a left turn on Possum Hill Road. Possum Hill Road is not a route Respondent would normally take to work. The only reason for attempting the left onto Possum Hill Road was to take his son to school. There is no evidence that Respondent was told to go down Possum Hill Road by Appellant for any reason. When the accident took place, Respondent had deviated from the course of his employment, physically and subjectively. Physically in that he was in the process of turning off Joe Frazier Road and onto Possum Hill Road at the time of the collision. Subjectively in that Respondent's professed reason for attempting the turn was to fulfill an activity that had no relation to his employment with Appellant. And, there was no evidence offered to show a work related purpose associated with Respondent taking his son to school. In sum, the motor vehicle accident that Respondent was involved in on May 4, 2015, was not work-related.

Given these facts, the Commission's conclusion that Respondent had not deviated from Joe Frazier Road, his normal work route, and was thereby in the course of his employment during the accident, was not supported by any of the evidence in the case. Accordingly, the Commission's finding on the issue of deviation should be reversed.

II. THE COMMISSION ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT RESPONDENT WAS IN THE COURSE OF HIS EMPLOYMENT WHEN HE WAS INVOLVED IN THE MAY 4, 2015 MOTOR VEHICLE ACCIDENT BECAUSE THE RECORD CLEARLY ESTABLISHES THAT WHEN RESPONDENT WAS INVOLVED IN THE SUBJECT MOTOR VEHICLE ACCIDENT HE HAD BEGUN TO TAKE A LEFT HAND TURN ONTO A ROAD THAT WAS NOT PART OF HIS NORMAL WORK ROUTE, THE PURPOSE FOR SUCH TURN BEING FOR PERSONAL REASONS AND NOT IN FURTHERANCE OF HIS JOB DUTIES.

After having found as fact that at the time of the accident Respondent had not deviated from Joe Frazier Road, his normal route to Appellant's worksite, the Commission concluded as a matter of law that "[a]ny deviation by Respondent was so small that it is to be disregarded as

insubstantial, such that [Respondent's] accident and injuries occurred within the course and scope of employment and, as such, are compensable under the Workers' Compensation Act." In support of this conclusion, the Commission cited *Gibson v. Spartanburg Sch. Dist.# 3*. The Commission's reliance on *Gibson* is misplaced, and its conclusion that Respondent was in the course of his employment at the time of the accident should be reversed as an error of law.

For a workers' compensation claim to be compensable, the injury must arise out of and have occurred during the course of the employee's employment. *See* S.C. Code Ann. §42-1-160 (2016). "[A]n injury occurs within the course of employment when it occurs within the period of employment, a place with the employee reasonably may be in performance of his duties, and while fulfilling those duties are engaged in something incidental thereto." *Nicholson v. S.C. Dept. of Soc. Servs.*, 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2014).

Generally, 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. *See Gray v. Club Group, Ltd.*, 339 S.C. 173, 188, 528 S.E.2d 435 (Ct. App. 2000). However, an exception to this rule exists where, in going to and returning from work, the means of transportation is provided by the employer. *Id.*

Here, there is no dispute that Respondent was driving a van provided for his use by Appellant with which to get to and from work at the time of the accident. However, that is not the end of the analysis. The next required determination is whether Respondent was engaged in performing any service growing out of or incidental to his employment at the time of the accident while driving Appellant's van. *See Fowler v. Abbott Motor Co.*, 236 S.C. 226, 234, 113 S.E.2d 737, 741 (1960).

The claim at issue in *Fowler* arose from the employee's death while driving a car provided to him by his employer. *Id.* at 228 and 738. Similar to this claim, the Court had no difficulty in concluding the employee suffered an injury by accident, but stated the real question for determination was whether the accident arose out of and in the course of employment. *Id.* at 230 and 739. Some of the key evidence in that case was as follows: (1) the employee's wife testified that shortly after arriving home from work, her husband left the house, saying, "I'll be back in a minute," leaving in the company car, and she did not know what prompted her husband to leave home on the night of his death; (2) the employee's daughter testified that when her father came home, she answered a telephone call and the person on the other line asked for her father, and when her father took the call, she heard him say "I'll see about it," and he then left the house saying "I'll be back in a minute,"; (3) a local store owner testified that on the night of the employee's death, employee visited his store for three or four minutes and asked if the store owner had seen his uncle whom he was looking for regarding a car motor; (4) the employer's owner testified that the employee was his service manager and that phone calls received after 6:00 PM were referred to the employee if there was no one at the office, and with reference to the fatal trip made by the employee, he stated "it's possible that he was on company business or it's possible that he was on personal business." *Id.* at 230-1 and 739-40.

In concluding the employee had not sustained a compensable accident, the Court in *Fowler* stated, "the evidence here fails to disclose or to warrant a reasonable inference that there was any causal connection between the employment and any injury to the claimant. To hold the claimant's injury, which occurred by accident, arose out of and in the course of his employment, or that there was a causal connection between the injury and the employment would be to engage in surmise, conjecture and speculation." *Id.* at 232 and 740.

Similar to *Fowler*, in the present case there is no dispute that Respondent was involved in an accident while operating a vehicle furnished by Appellant, and the real question is whether Respondent, at the time of the injury, was “performing any duty for his employer.” 236 S.C. at 235, 113 S.E.2d at 742. However, unlike in *Fowler*, where determining the employee’s purpose in driving the company car at the time of the accident was a fact in dispute, here there is no dispute as to what Respondent was doing at the time of the accident: he was in the process of making a left turn to take his son to school onto a road that was not his route to work, such act not growing out of or being incidental to his employment.

Under *Fowler*, after determining the potential applicability of the “employer provided transportation” exception to the going to and coming from work rule, the Commission should have next determined whether Respondent was performing any service growing out of or incidental to his employment. Because there is no dispute that Respondent was not performing any service growing out of or incidental to his employment while taking a left to get to his son’s school, as a matter of law, it was error for the Commission to conclude Respondent’s accident and subsequent injuries occurred within the course of his employment.

*Gibson* does not support a conclusion of compensability under the facts of this case. In *Gibson*, the South Carolina Court of Appeals considered the compensability of an injury sustained in the context of a business trip taken by the employee at the direction of the employer. 338 S.C. at 515. In addition to other differences, notably *Gibson* does not address employee provided transportation and its effect on compensability. The employee in *Gibson*, as one of her duties, was required to purchase school supplies at a local Walmart. *Id.* While selecting items listed on a purchase order, the employee saw a lunchbox that she thought would be ideal for her son. *Id.* After having paid for the employer’s items, the employee returned to where the lunchbox was, and

when she reached to retrieve it, an opened box cutter fell from a shelf, injuring her right eye. *Id.* At the time of the accident, the employee was still in possession of the supplies she purchased for her employer, and she would have returned to work but for her accident. *Id.*

In upholding compensability of the employee's injury, the Court of Appeals in *Gibson* concluded the employee's accident took place during a "slight deviation" from her assigned task of purchasing school supplies. 338 S.C. at 521. The Court of Appeals, quoting Prof. Arthur Larson, explained the consequences of a "slight deviation": "An identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, *unless the deviation is so small as to be disregarded as insubstantial.*" *Id.* at 522 (quoting 1 Arthur Larson & Lex K. Larson, *Workers' Compensation Law* §§17.01 to 17.06 (Introductory Scope) (1991)) (emphasis added).

The *Gibson* court properly focused on the fact the employee was only in the Walmart because her employer directed her to obtain the school supplies, stating "Gibson's decision to make a school purchase for her own child while carrying out the purchase request of her employer is not unreasonable. Gibson did not attempt to go to another store to engage in a personal shopping errand, nor was she wandering through the store in search of unrelated items for her own use. Rather, Gibson picked up an item of like kind, an item in the school supplies aisle, in the same aisle that her employment required her to be." *Id.* at 522-3.

The *Gibson* employee's situation was deemed a "slight deviation" because the personal component of her business trip bore a close relationship and similarity to what she was already doing at the Walmart: she was buying school supplies for children as part of her employment, and she was attempting to purchase a school supply item for her own child when she got hurt.

Here, unlike the employee in *Gibson*, nothing about the Respondent's reasons for being on

the road that day bore any relation or similarity to dropping off his son at school. Respondent is in the business of performing construction work, and he was afforded the use of Appellant's van to drive to and from work, and to various worksites. Furthermore, his decision to take his son to school in Appellant's van was not reasonable, as there were only two passenger seats, making his conduct arguably against the law.

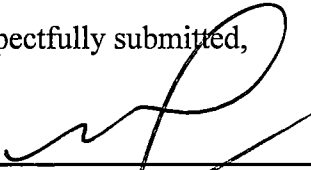
For these reasons, while in the process of making a left turn on Possum Hill Road to take his son to school, Respondent's action was a substantial deviation from his work responsibilities, and he was injured during the course of that deviation, taking his injury outside the course of his employment. Accordingly, the Commission's conclusion that Respondent's injuries are compensable should be reversed as an error of law.

#### CONCLUSION

For the reasons stated, this Court should reverse the judgment of the South Carolina Workers' Compensation Commission.

July 7, 2016

Respectfully submitted,



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