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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

Op. No. 2011-UP-131 (S.C. Ct. App. refiled June 3, 2011)

Ricky Burton, ... Petitioner,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Statement of Questions Presented for Review 2

Statement of the Case 2

Facts 3

Arguments 10

I. The Court of Appeals Erroneously Affirmed the Workers' Compensation Commission Decision That Claimant's Injuries Were Not Compensable Within the Scope of His Employment 10

A. The Workers' Compensation Commission Misapplied the Holding in *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999) to this Matter 11

B. The Court of Appeals Erroneously Declined to Address Claimant's Argument Concerning the "Private Errand Rule" on the Basis That it Was Not Raised to the Appellate Panel 19

C. The Workers' Compensation Commission Erred in Finding That Employer Received No Direct or Indirect Benefit from Claimant's Activities So as to Preclude the Compensability of His Injury 20

Conclusion 25

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA

Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E.2d 526 (2001) 24

Brown v. Morehead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (1962) 11

Burton v. Hardaway Concrete Co., Op. No. 2011-UP-131
(S.C. Ct. App. Re-filed June 3, 2011) 3

Carolinas Recycling Group v. South Carolina Second Injury Fund,
398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012) 24

Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973) 16

Cauley v. Ross Builders Supplies, Inc., 238 S.C. 38, 118 S.E.2d 879 (1961) 25

Curiel v. Environmental Management Services (MS),
376 S.C. 23, 655 S.E.2d 482 (2007) 16

DeBerry v. Coker Freight Lines, 234 S.C. 304, 108 S.E.2d 114 (1959) 11

Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946) 12

Foggie v. General Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008) 14

Fountain v. Hartsville, 207 S.C. 119, 32, S.E.2d 11 (1945) 14, 22

Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) 26

Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995) 24

Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999) . . . . . *passim*

Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975) 16

Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950) 11

Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975) 25

McCraw v. Mary Black Hosp., 350 S.C. 229, 565 S.E.2d 286 (2002) 24

Moore v. Family Service of Charleston County,
269 S.C. 275, 237 S.E.2d 84 (1977) 25

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) 24

O'Briant v. Daniel Constr. Co., 279 S.C. 254, 305 S.E.2d 241 (1983) 11

Pee Dee Reg'l Transp. v. South Carolina Second Injury Fund,
375 S.C. 60, 650 S.E.2d 464 (2007) 9

Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962) 11

Sexton v. Freeman Gas Co., 258 S.C. 15, 187 S.E.2d 128 (1972) 25

Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) 14

Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002) 12

Thompson v. J.A. Jones Constr. Co., 199 S.C. 304, 19 S.E.2d 226 (1942) 12

West v. Alliance Capital, 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006) 25

White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720 (1964) 11

OTHER JURISDICTIONS

Begel v. Wisconsin Labor and Industry Review Com'n,
631 N.W.2d 220 (Wisc. Ct. App. 2001) 16

Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939) 15

Cook v. A.H. Davis & Son, Inc., 567 A.2d 29 (Del. Sup. Ct. 1989) 17

Ferragino v. McCue's Dairy, 128 N.J.L. 525, 26 A.2d 730 (Sup.1942) 16

Floyd v. First Citizens Bank, 132 N.C. App. 527, 512 S.E.2d 454 (1999) 15

Keene v. Insley, 26 Md. App. 1, 337 A2d 168 (Ct. App. 1975) 18

Nichols v. Davidson Hotel Co., 333 S.W.2d 536 (Mo. Ct. App.1960) 17

Nugent Sand Co. v. Hargesheimer, 254 Ky. 358, 71 S.W.2d 647 (1934) 16

Pollock v. Reeves Brothers, Inc., 313 N.C. 287, 328 S.E.2d 282 (1985) 15

Pridgen v. Industrial Commission, 70 Ariz. 149, 217 P.2d 592 (1950) 18

Stewart v. North Carolina Dep't of Corrections,
29 N.C. App. 735, 225 S.E.2d 336 (1976) 15, 16

Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) .. 24

Wilson & Co., Inc. v. Curry, 259 Ala. 685, 68 So.2d 548 (1953) 18

Zapos v. Demas, 106 Pa.Super. 183, 161 A. 753 (1932) 17

STATUTES

S.C. Code Ann. § 1-23-380(A)(6) (Supp.2008) 24

S.C. Code Ann. § 42-1-160 (Supp. 2009) 9

OTHER AUTHORITIES

Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law*
§ 27.02[1] at 27-12 (2004) 20

Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law*
§ 27.04[1] at 27-39 (2004) 17

INTRODUCTION

The Court of Appeals affirmed the decision of an appellate panel of the Workers' Compensation Commission, which held Claimant's injury was not compensable because he failed to establish that his employer, Hardaway Concrete Co., Inc. ("Employer"), benefitted from Claimant's activity during the time in which he was injured. The Court of Appeals declined to address Claimant's argument concerning the "private errand rule" on error preservation grounds. The Court of Appeals also held the Appellate Panel did not erroneously apply this Court's holding in *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999).

Claimant asserts the following in this Brief: (1) The Court of Appeals erred in finding the Commission did not misapply this Court's holding in *Hicks*; (2) The rule set out by the *Hicks* majority does not accord with the modern trend of finding the type of activity in this case is compensable; (3) The Court of Appeals erred in ruling that the Claimant's argument regarding the "private errand rule" was not presented to the Appellate Panel of the Commission; and (4) The Court of Appeals erred in affirming the Appellate Panel's factual finding that Employer did not benefit from Claimant's activity.

QUESTIONS PRESENTED

I. Did the Court of Appeals Erroneously Affirm the Workers' Compensation Commission's Decision That Claimant's Injuries Were Not Compensable Within the Scope of His Employment?

A. Did the Workers' Compensation Commission Misapply the Holding in *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999) to this Matter?

B. Did the Court of Appeals Erroneously Decline to Address Claimant's Argument Concerning the "Private Errand Rule" on the Basis That it Was Not Raised to the Appellate Panel?

C. Did the Workers' Compensation Commission Err in Finding That Employer Received No Direct or Indirect Benefit from Claimant's Activities So as to Preclude the Compensability of His Injury?

STATEMENT OF THE CASE

Claimant filed a claim on November 21, 2007, before the Workers' Compensation Commission asserting he sustained a work-related injury removing debris with his supervisor while working for Employer. Employer denied Claimant suffered a compensable injury by accident arising out of and in the course of his employment, contending under *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999), Employer received no direct or indirect benefit in the activity through which Claimant was injured.

A hearing commissioner heard the matter on March 19, 2008 and denied the claim, holding Claimant's injury was not compensable under *Hicks*. Claimant sought review and on January 30, 2009, an appellate panel of the Workers' Compensation Commission entered an order sustaining the hearing commissioner's decision, with one commissioner dissenting.

On February 6, 2009, Claimant served a notice of appeal to the Court of Appeals. The case was submitted without argument on March 1, 2011 and on March 29, 2011, the Court entered an opinion affirming the appellate panel's decision. *Burton v. Hardaway Concrete Co.*, Op. No. 2011-UP-131 (S.C. Ct. App. Re-filed June 3, 2011). Claimant filed a petition for rehearing and on June 3, 2011, the Court of Appeals denied the petition but issued a new opinion addressing several points it had previously overlooked. Claimant filed a petition for rehearing as to the substituted opinion, and on August 24, 2011, the Court denied that petition.

This Court granted Claimant's petition for writ of certiorari on October 31, 2012.

FACTS

Claimant worked for almost eleven (11) years for Employer, driving and operating a cement mixer truck. (App.p. 93, ll. 20-22; p. 94, ll. 12-19; p. 118, l. 2). He worked for the same supervisor, Scott Jones, the entire time. (App.p. 94, l. 20 - p. 95, l. 7). Claimant stated, "Well, [Mr. Jones] gives us our orders, you know, where we're to go every day, and where to run, and take deliveries at." (App.p. 95, ll. 13-14; p. 123, ll. 22-24). Mr. Jones also had the ability to fire Claimant. (App.p. 96, ll. 18-21).

Claimant had a previous workers' compensation claim against Employer that the company denied and which the Commission ultimately found to be compensable. (App.p. 93, l. 23 - p.94, l.10; p.114, ll. 9-18).

Claimant reported to work on the afternoon of Saturday, August 18, 2008, and took one load of concrete to a job site at Amick Farms, then returned to the company premises. (App.p.97, ll. 2-22; p.109, ll. 20-22; p.124, ll. 9-11; p.125, ll. 9-13). Upon his return to Employer's premises, Claimant asked Mr. Jones for ten ($10.00) dollars in gas money, but Mr. Jones told Claimant he did not have any money. (App.p.98, ll. 3-6; p.115, ll. 18-24). Mr. Jones then told the Claimant to "come on and go with him." (App.p.98, ll. 6-7; p.116, ll. 2-4, 16). They both got into the company pickup truck. (App.p.98, ll. 8-10; p.162, l. 25 - p.163, l. 3). When Claimant asked Mr. Jones where they were going, Mr. Jones replied "I got a little job I want to do." (App.p.98, ll. 14-16).

Claimant was still on the clock when Mr. Jones took Claimant off the premises in Employer's truck. (App.p.98, ll. 18). When asked why he went with Mr. Jones, Claimant answered, "He was my boss and I felt like what he told me to do, I did what he asked me

to do; he's my supervisor." (App.p.98, ll. 19-22). They drove a couple of blocks to the house of Pickens Hare "and worked out there loading debris from a big tree into the company truck and took the debris back to the company premises and we dumped it back there in the back back there." (App.p.98, l. 24 - p.99, l. 7; p.117, ll. 3-23; p.118, ll. 3-10). They used a company shovel and a pitchfork provided by Mr. Hare, the third party. (App.p.99, ll. 21-25). Claimant stated Mr. Jones and he made two trips to Mr. Hare's property. (App.p.100, ll. 4-8).

Claimant testified that while unloading the debris from the company truck on the Employer's premises after the second trip:

> I said, Scott, I said, look I've got to take a break, man. I said, man, I've got pain man, running down in both of my legs and in my back. . . . [t]hen I started back working on and the more I kept turning and shoveling and unloading the truck, and I kept feeling the pain running down my legs and my back.

(App.p.100, ll. 13-20).

Mr. Jones gave Claimant twenty-five ($25.00) dollars after the debris-moving job was complete. (App.p.105, ll.13-17; p.120, ll.1-3). Claimant did not know in advance of performing the work that he would receive any money other than his normal wages. (App.p.106, ll.12-17; p.107, ll.2-16; p.107, l.25 - p.108, l.1; p.116, ll.22-23). This was something Mr. Jones gave him "after the fact." (App.p.106, ll.20-22). After Claimant and Mr. Jones finished unloading the company truck at the back of the company property, Claimant clocked out at 4:54 p.m. (App.p.100, ll.21-23; p.103, l.19 - p.104, l.1; p.107, ll. 17-23; p.118, l.11 - p.119, l.11; p.121, ll.4-21; p.163, ll.7-9). When asked why he did the work, Claimant answered, "[b]ecause I was instructed by my boss to go with him... I did

what he told me to do."(App.p.105, l.23 - p.106, l.2; p.116, ll.7-8; p.116, l.24 - p.117, l.2).

Claimant called his supervisor, Mr. Jones, on the following Monday and notified Mr. Jones, "I hurt myself back there in the back when I was unloading that truck." (App.p.101, ll.14-16; p.111, ll.21-24). Claimant went to the Batesburg-Leesville Family Practice, where he was scheduled for an MRI after being examined. (App.101, ll.17-24).

Claimant called Mr. Jones back to let him know what was going on and why he was not at work and Mr. Jones told him to "just be quiet." (App.p.102, ll.5-11). Claimant added, "He said don't say nothing about it. He said the company ain't got a damn thing to do with it. He told me don't say nothing." (App.p.102, ll.11-14). Claimant further testified that Mr. Jones, his supervisor, told him that if he was not quiet about how he was injured, that he would lose his job, and that if he kept "messing with Hardaway and Workman's Comp, you're going to lose your job." (App.p.103, ll.9-12). Thereafter Jay Metts, who handles benefits for the company (App.p.110, ll.1-3), met with Claimant and accused him of attempting insurance fraud. (App.p.112, l.1 - p.113, l.7).

Mr. Jones testified Claimant asked for twenty ($20.00) dollars, and Mr. Jones offered to let Claimant help haul the wood shavings and earn twenty-five ($25.00) dollars. (App.p.126, ll.3-9; p.167, ll.19-22). He also stated Claimant had clocked out before they went to haul the wood, and they left around 5:00 to go to Mr. Hare's home to do the hauling. (App.p.126, ll.10-23). He agreed they were in a company truck. (App.p. 127, ll.8-18; p.133, ll.20-23). Mr. Jones denied Claimant complained to him about injuring himself during the two trips to haul the wood chips. (App.p.128, ll.10-15; p.129, ll.14-15; p.134, l.18 - p.135, l.3). Mr. Jones stated Employer did not benefit in any way

from Claimant's activity in moving the wood chips. (App.p.136, l.21 - p.137, l.1).

Mr. Jones denied he had the right to hire or fire employees. (App.p.129, l.19 - p.130, l.3). He agreed he was the manager of the Batesburg-Leesville plant, supervising five (5) employees. (App.p.131, ll.14-25; p.137, l.16 - p.138, l.4). He also agreed he could communicate information to Mr. Metts that would result in an employee's termination. (App.p.132, l.1- p.133, l. 6). Mr. Jones expects the employees to do what he tells them to do, and he has made that clear to them. (App.p.138, ll.12-18).

Joe Butler, the other driver on August 18, 2007, finished the main job at Amick Farms at 4:00 p.m. and told Mr. Jones he was finished when Mr. Jones called him. (A.p. 142, ll.2-24; p.145, l.25-p.146, l.7; p.147, ll.14-18; p.148, l.1-p.149, l.5). Mr. Jones then told Mr. Butler he was taking Claimant with him to do the job at Mr. Hare's property. (A.p.143,l.14-16). When Mr. Butler returned to the plant sometime after 5:00 p.m. neither Mr. Jones nor Claimant were there, and Mr. Jones's truck was gone. (A.p.144, ll.12-19). Mr. Butler cleaned out his truck, parked it, punched out and went home. (A.p.144, ll.20-22). When Mr. Butler called Mr. Jones at 4:00 p.m., Mr. Jones could have released Claimant because he did not need Claimant to return to the job site.(A.p.149, l. 2-5).

Pickens Hare testified he asked Mr. Jones to remove the wood shavings from his property and would pay Mr. Jones fifty ($50.00) dollars to do the job. (App.p.150, l.15 - p.151, l.6). Mr. Hare claimed they arrived after 5:00 p.m. on that day. (App.p.151, l.21 - p.152, l.2). He agreed he had no reason to recall that time until Mr. Jones called him and told him Claimant had been hurt. (App.p.154, l.11 - p.155, l.5). Mr. Hare paid the money to Mr. Jones and not to Employer. (App.p.152, ll.7-11).

Jay Metts is Employer's human resources manager. (App.p.156, ll.22-24). Mr. Metts stated that Mr. Jones is allowed to use his company vehicle to load up trash. (App. p.157, ll.1-6). He stated Claimant told him the back pain was from "old age." (App.p.157, ll.22-24; p.158, ll.21-25). Mr. Metts confronted Claimant and accused Claimant of trying to perpetrate a fraud. (App.p.159, ll.12-20). Mr. Metts added that Claimant told him he did not report the accident because Mr. Jones had threatened Claimant. (App.p.160,l.2-8). Mr. Metts agreed that Employer had unsuccessfully contested Claimant's prior workers' compensation claim. (App.p.161, ll.11-17).

Hearing Commissioner's Ruling

The hearing commissioner reviewed the testimony and made the following findings of fact:

1. On August 18, 2007, Mr. Jones instructed Claimant to accompany him in a company-owned vehicle to Mr. Hare's property to assist in removing and disposing of tree debris.
2. The debris was loaded in Employer's company-owned vehicle and transported back to and disposed of at the Employer's premises.
3. While removing the debris, Claimant sustained injuries to his back, and Claimant informed Mr. Jones of his back pain.
4. Mr. Hare compensated Claimant and Mr. Jones twenty-five ($25.00) dollars each for removing and disposing of the tree debris from the property. Mr. Hare owned the property and had no connection with Employer.
5. Claimant's testimony was credible. "Kevin Jones (supervisor) is less so."

6. Employer is a concrete operation that does not nor ever has partaken in the business of tree and/or tree debris removal.

7. Pursuant to *Hicks v. Piedmont Cold Storage, Inc.*, Claimant's injury was outside the scope of his employment "because the Employer was neither directly nor indirectly [benefitted] by the debris removal work performed by the Claimant and his manager."

8. Employer is not liable to Claimant for any injury that may have occurred while Claimant was performing the tree debris removal and disposal.

9. Mr. Hare paid Claimant twenty-five ($25.00) dollars at the completion of the debris removal. Claimant did not expect to be given additional payment for this task outside of his normal employment compensation.

(App.pp.80-81, ¶¶ 1-9). The hearing commissioner concluded that Claimant did not sustain an injury arising out of and in the course of his employment pursuant to S.C. Code Ann. § 42-1-160 (Supp. 2009) because under *Hicks v. Piedmont Cold Storage*, Employer did not receive a direct or indirect benefit by the tree removal and disposal. (App.p.81).

Appellate Panel Decision

Claimant sought appellate review. Following a hearing, a majority of the appellate panel adopted the findings of the hearing commissioner and affirmed. Commissioner Andrea C. Roche dissented, stating "I would find the case compensable. I would find the activities of the Claimant did benefit the Employer." (App.p.87).

Because the injury in the case occurred after July 1, 2007, Claimant appealed to the Court of Appeals. *See Pee Dee Reg'l Transp. v. South Carolina Second Injury Fund,*

375 S.C. 60, 650 S.E.2d 464 (2007) (appeals from the Commission are now to the Court of Appeals for injuries occurring on or after July 1, 2007). The Court submitted the case without argument and affirmed the Appellate Panel majority's decision.

Claimant thereafter sought review by this Court and on October 31, 2012, the Court granted Claimant's petition and issued a writ of certiorari to review the Court of Appeals decision.

ARGUMENTS

I. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE WORKERS' COMPENSATION COMMISSION DECISION HOLDING CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF HIS EMPLOYMENT

The Court of Appeals held that the Commission did not misapply the holding of *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999) in finding the injury in this matter was outside the scope of Claimant's employment "because the Employer was neither directly nor indirectly benefit[t]ed by the debris removal work performed by the Claimant and his manager." (App.p.80, ¶ 7). This ruling misapplied *Hicks* and was erroneous as a matter of law, and further lacked support in the evidence.

The basic purpose of the Workers' Compensation Act is inclusion of employers and employees and not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. *Horton v. Baruch*, 217 S.C. 48, 59 S.E.2d 545 (1950); *DeBerry v. Coker Freight Lines*, 234 S.C. 304, 108 S.E.2d 114 (1959); *Brown v. Morehead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962); *Pyett v. Marsh Plywood Corp.*, 240 S.C. 56, 124 S.E.2d 617 (1962). South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employees within Workers' Compensation coverage. *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241 (1983); *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720 (1964).

The words "arose out of" refer to the origin or the cause of the accident while the words "in the course of employment" refer to the time, place and circumstances under which the accident occurs. Although an injury may not be one that could have been

foreseen or expected, it may be that after the event the injury may be seen to have had its origin the nature of the employment. *Thompson v. J.A. Jones Constr. Co.*, 199 S.C. 304, 19 S.E.2d 226 (1942); *Dicks v. Brooklyn Cooperage Co.*, 208 S.C. 139, 37 S.E.2d 286 (1946).

To be entitled to workers' compensation benefits, an employee need not necessarily be engaged at the time of injury in the actual performance of his work; it is sufficient if he is upon the employer's premises, occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment. *Simmons v. City of Charleston*, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002).

A. THE WORKERS' COMPENSATION COMMISSION MISAPPLIED THE HOLDING IN *HICKS V. PIEDMONT COLD STORAGE, INC.*, 335 S.C. 46, 515 S.E.2D 532 (1999) TO THIS MATTER

The Commission purported to apply the holding of *Hicks v. Piedmont Cold Storage, Inc.* in denying benefits in this matter. Claimant contended this was a misapplication of the law as set forth in *Hicks* and the law of this State, but the Court of Appeals disagreed. This Court should reverse.

In *Hicks*, Mr. Hicks was killed while repairing the personal vehicle of the plant manager on a Saturday at Piedmont Cold Storage. The commission denied the claim, finding: (1) Hicks did not work regularly on Saturdays; (2) Hicks did not clock in on the date of the accident; (3) Hicks did not benefit Piedmont in any way on the day of the accident; and (4) Hicks worked for the personal benefit of his supervisor and therefore his death did not result from an injury by accident arising out of and in the course of his

employment with Piedmont. The circuit court reversed, finding the tasks Hicks performed at the time of his death were incidental to his employment. The court also found the accident occurred (1) on Piedmont premises; (2) with Piedmont tools; and (3) while Hicks performed tasks under the direction and supervision of his superior. The Court of Appeals affirmed the circuit court's decision.

This Court reversed. The Court noted the "key factor in determining the children's entitlement to compensation here is whether the work benefitted the employer." *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. at 49, 515 S.E.2d at 533. The Court stated:

> * * * Here, the decedent was being paid by his supervisor for work done on the supervisor's personal vehicle on a non-work day at the employer's business. The record shows that Hicks did not regularly work on Saturdays and did not clock in on the day of the accident.
>
> There is substantial evidence in the record supporting the commission's finding that the work performed by Hicks did not benefit Piedmont and was for the personal benefit of the plant manager.

Id. This Court held the accident was outside the course of Hicks's employment, and that the circuit court and Court of Appeals substituted their judgment for the commission in finding that Hicks conferred some benefit on Piedmont, adding "[t]he supervisor did not lose any time from work as the repair was being done on a Saturday."

The facts of *Hicks* are readily distinguishable from this case:

1. Mr. Hicks was paid by his supervisor for the work on the car. In this case, Claimant was paid $25.00 by his supervisor, but he was also paid his regular salary by his Employer. The hearing commissioner found "Claimant did not expect to be given additional payment for this task outside his normal

employment compensation." which Claimant received since he did not clock out until after the removing the debris from the company truck. (App.p.81, ¶ 9). The appellate panel concurred. (App.p.86, ¶ 9).

2. Mr. Hicks was injured on a "non-work day." Claimant was injured on a work day.

3. Mr. Hicks did not clock in on the day of his injury. Claimant clocked in and was still on the clock at the time of his injury.[1]

4. The only evidence in *Hicks* was that the work done was for the personal benefit of the supervisor, whereas in this case, Claimant's presence on the Employer's premises and availability to take a second load of cement to the job at Amick Farms, if needed, directly benefitted Employer, and his assistance of Mr. Jones in performing the task on Mr. Hare's property and completing it at Employer's premises by cleaning out the Employer's vehicle they used indirectly, if not directly, benefitted Employer. See Argument C, p. 20, below.

Hicks does not mandate denial of benefits in this matter.

Furthermore, in her dissent in *Hicks*, Justice Toal noted the majority relied almost exclusively on the 1945 case of *Fountain v. Hartsville*, 207 S.C. 119, 32, S.E.2d 11 (1945), while ignoring the Court's trend toward awarding compensation in these cases. Justice Toal stated:

> In *Fountain*, this Court relied heavily on, and quoted extensively

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[1] Although Claimant's supervisor, Mr. Jones, testified contrary to Claimant on this point, both the hearing commissioner and appellate panel found Claimant to be credible and Mr. Jones "less so." (A.p.80, ¶ 5; p.85, ¶ 5). In South Carolina, witness credibility is specifically reserved to the Commission's Appellate Panel. E.g., Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Foggie v. General Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008).

> from, the North Carolina Supreme Court's decision in *Burnett v. Palmer-Lipe Paint Co.*, 216 N.C. 204, 4 S.E.2d 507 (1939). Since *Burnett*, however, North Carolina courts have recognized the impossible situation in which an employee is placed when a superior asks the employee to perform personal work for the superior. In *Pollock v. Reeves Brothers, Inc.*, 313 N.C. 287, 328 S.E.2d 282 (1985), the North Carolina Supreme Court, in reversing its court of appeals, stated that an employee is "entitled to recover under the workers' compensation principle that when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable." *Pollock*, 328 S.E.2d at 287. One of the cases relied upon by *Pollock* was *Stewart v. North Carolina Dep't of Corrections*, 29 N.C. App. 735, 225 S.E.2d 336 (1976), the same case cited by our Court of Appeals in the instant case. While these North Carolina decisions do not totally jettison the "employer benefit" requirement, they do hold that *even a slight, indirect benefit to the employer will suffice where the employee is acting pursuant to instructions by his superior*. See *Stewart*, supra (noting that the employer would benefit indirectly because it was anticipated the morale of the employees would improve).

Hicks, 335 S.C. at 50, 515 S.E.2d at 533-534 (Toal, J, dissenting) (emphasis added).

While this language is from the dissent in *Hicks*, Justice Toal's discussion finds support in more recent authority from North Carolina. See *Pollock* (when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable); *Stewart v. North Carolina Dept. of Corrections*, 29 N.C. App. at 738, 225 S.E.2d at 338 (when a superior directs a subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Workers' Compensation Act expands to encompass injuries sustained in the course of such labor; were the rule otherwise, employees would be compelled to determine in each instance and, no doubt at their peril, whether a requested activity was beyond the ambit of the act); *Floyd v. First Citizens Bank*, 132 N.C. App. 527, 512 S.E.2d 454 (1999) (claimant slipped and fell while buying

bagels for an office Christmas breakfast that her boss had instructed her to coordinate for defendant's entire city office, including all department heads; commission found injury arose in course of employment and Court of Appeals affirmed, applying *Stewart* and noting that plaintiff's injury occurred while plaintiff was engaged in activity directly related to defendant's request that she coordinate the Christmas breakfast).

Our Workers' Compensation Act was fashioned upon that of North Carolina and the opinions of the North Carolina appellate courts construing the Act are entitled to great weight. *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 405, 211 S.E.2d 220, 222-223 (1975); *Carter v. Penney Tire & Recapping Co.*, 261 S.C. 341, 200 S.E.2d 64 (1973). See also *Curiel v. Environmental Management Services (MS)*, 376 S.C. 23, 655 S.E.2d 482 (2007) (Court noted North Carolina workers' compensation statute contained same language as South Carolina's Act and held North Carolina decision persuasive).

The rule discussed in *Stewart* is sometimes referred to as the "private errand" rule. Under this doctrine, if a person in authority over the employee asks the employee to perform a service for the personal benefit of the employer or the employee's superior, and the employee is injured during the performance of the task, his injury is one that grew out of and was incidental to his employment unless the request is "clearly unauthorized." *Begel v. Wisconsin Labor and Industry Review Com'n*, 631 N.W.2d 220 (Wisc. Ct. App. 2001). *Compare Nugent Sand Co. v. Hargesheimer*, 254 Ky. 358, 71 S.W.2d 647 (1934) (employee of sand and gravel company sent by company president to do work on the furnace in the president's home was covered for resulting injury); *Ferragino v. McCue's Dairy*, 128 N.J.L. 525, 26 A.2d 730 (Sup.1942) (dairy employee instructed to help move

a piano in a church that was a customer of the dairy was covered when injured); *Zapos v. Demas*, 106 Pa.Super. 183, 161 A. 753 (1932) (waiter injured when he was sent to deliver groceries to the employer's home was covered); *Nichols v. Davidson Hotel Co.*, 333 S.W.2d 536, 546 (Mo. Ct. App.1960) (holding that a bellhop's driving several girls who were friends of the hotel owner's wife to a party suffered an injury compensable under worker's compensation when he was killed in an automobile accident on his return trip). *Accord* Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law* § 27.04[1] at 27-39 (2004) ("when any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable"). As Professor Larson's treatise notes:

> The technical reason for these holdings is that, whatever the normal course of employment may be, the employer and his supervisory staff have it within their power to enlarge that course by assigning tasks outside the ususal area. If they do not assign these tasks on the strength of the employer-employee relation on which compensability depends, then what is the source of authority by which the task is assigned?
>
> The practical reason for the rule is that any other view places the employee in an intolerable dilemma: if he complies with the order, he forfeits compensation protection; if he does not comply, he gets fired.

Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law* § 27.04[5] at 27-42 through 27-43 (2004). *See also Cook v. A.H. Davis & Son, Inc.*, 567 A.2d 29, 33 (Del. Sup. Ct. 1989) (applying the rule despite an argument that the supervisor of home siding crew exceeded his own authority in ordering the employee to repair the supervisor's truck, noting "even where the order is a gross excess or even abuse of

authority, surely the employee, who has no choice but to comply, should not be made to pay the price of his superior's wrong"); *Pridgen v. Industrial Commission*, 70 Ariz. 149, 217 P.2d 592 (1950) (where an employee is injured or killed while performing an act beyond the usual scope of his employment, which act is being done at the direction or request of his employer, then any resultant injury or death from an accident while so performing such act arises out of and in the course of his employment); *Wilson & Co., Inc. v. Curry*, 259 Ala. 685, 68 So.2d 548 (1953) (in case where employee injured while carrying out task for private benefit of supervisor but not for employer Alabama Supreme Court noted "the trend of the recent cases seems to be to uphold awards made in cases of this kind" and quoting *Larson* that "the cases denying compensation seem wrong"). As the Maryland Court of Appeals stated in *Keene v. Insley*, 26 Md. App. 1, 12, 337 A2d 168, 174-175 (Ct. App. 1975):

> * * * [W]e now hold that whenever, by virtue of a contract express or implied, an employer-employee relationship exists between two parties, and the employer, or his agent as the employee's supervisor, directs the employee to perform services outside of or beyond his customary or usual duties and/or of a nature not ordinarily required in the employer's business for the private benefit of the employer or his agent, rather than for the benefit of the business, *the order constitutes a permissible exercise of the employer's authority to enlarge or extend the scope of employment and expands the existing employment contract.* It does not create a new employment contract. Because the existing employer-employee relationship is not terminated but continues to exist while the employee is performing such work, any injury resulting from the performance of such work is compensable under the act. It would be inconsistent with the purposes of the act to relieve an employer, who directs an employee to perform an unusual task, from liability for injuries incurred while the employee was performing that task. Nor would it be consistent with the policies of the act to compel an employee to ascertain whether the task assigned lies within the scope of his customary duties and, if not, to risk being fired if he refuses to perform, or to lose the benefit of insurance

coverage if he does perform.

(Emphasis added). The Maryland Court noted "had he not obeyed...(the) claim would have been for unemployment rather than for workers' compensation benefits." *Id.*, n 8.

In this case, Claimant was on the clock and on the Employer's premises when his direct supervisor, who had the right to recommend hiring and firing of employees and to direct their work, directed Claimant to get into the company truck and accompany him to Mr. Hare's property. (App.p.98, ll.6-7, 8-10; p.116, ll.2-4,16; p.127, ll.8-18; p.133, ll.20-23; p.162, l.25 - p.163, l.3). Claimant was also instructed to unload the debris on the Employer's premises and clean the truck out before he clocked out. (App.p.100, ll.21-23; p.103, l.19 - p.104, l.1; p.107, ll.17-23; p.118, l.11 - p.119, l.11; p.121, ll.4-21; p.163, ll. 7-9). As Claimant stated, he did as he was told because Mr. Jones was his supervisor. (App.p.98, ll.19-22; p.105, l.23 - p.106, l.2; p.116, ll.7-8). He did not expect payment beyond his salary (App.p.81, Finding No. 9; p.106, ll.12-17; p.107, ll.2-16; p.107, l.25 - p.108, l.1; p.116, ll.22-23), and the fact of the payment from Mr. Hare does not change the nature of the task. Claimant was, in fact, paid his regular pay and there is no evidence he was docked for the time they spent on the task clearing the debris from Mr. Hare's property, transporting it to Employer's premises, dumping it on the premises, and cleaning out Employer's truck. There was no prohibition from employees performing tasks for third parties and using company equipment to do so. (App.p.157, ll.1-6). Additionally, the supervisor Mr. Jones benefitted by receiving money for the effort.

Furthermore, it makes no difference that Mr. Jones instructed Claimant to perform a private task for a third party. As Professor Larson's treatise notes, "when assistance is

given to a third party at the direction of the employee's own supervisor, the course of employment is obviously expanded to include the directed act." Arthur Larson & Lex K Larson, 2 *Larson's Workers' Compensation Law* § 27.02[1] at 27-12 (2004).

Accordingly, *Hicks* does not preclude coverage for Claimant's injury in this matter. The Court should reverse the Court of Appeals' decision that affirmed the Commission's ruling that Claimant could not recover as a matter of law under the facts of this case, and should remand for further proceedings consistent with this Court's mandate.

B. THE COURT OF APPEALS ERRONEOUSLY DECLINED TO ADDRESS CLAIMANT'S ARGUMENT CONCERNING THE "PRIVATE ERRAND RULE" ON THE BASIS THAT IT WAS NOT RAISED TO THE APPELLATE PANEL

In a footnote, the Court of Appeals stated it declined to address Claimant's argument concerning the "private errand rule" because "it is unpreserved for our review. [Claimant] failed to raise the argument to the Appellate Panel." (Slip, p. 2 n. 2). This ruling was in error.

Under the "private errand rule," if a person in authority over the employee asks the employee to perform a service for the personal benefit of the employer or the employee's superior, and the employee is injured during the performance of the task, his injury is one that grew out of and was incidental to his employment unless the request is "clearly unauthorized." (App.p.39). The Court of Appeals overlooked that Claimant made this argument to the hearing commissioner, who addressed it in his order. (App. p.76, ¶ 3,

noting "Claimant contends he was instructed by his manager to leave the work premises while still 'on the clock' to assist his manager in the removal and disposal of leftover tree debris."). The commissioner also made a finding that the supervisor "instructed the Claimant to accompany him in a company owned vehicle to Pickens Hare's property to assist in removing and disposing of tree debris." (App.p.80, Finding of Fact No. 1). The commissioner ruled this was not a sufficient basis for coverage under the Act. (App.p.81, Conclusion No. 2). The majority of the Appellate Panel adopted the hearing commissioner's findings of fact in their entirety. (App.pp.84-85, Finding of Fact No. 1).

Furthermore, the Employer addressed the merits of Claimant's argument regarding the "private errand rule" without contending the argument had not been raised to the Commission. (App.pp.64-68). The "private errand rule" is discussed in the dissent in *Hicks*, and is another way of describing the result in the more modern view of this doctrine. Claimant raised this point to the hearing commissioner and to the appellate panel so that it was in fact preserved for appellate review.

Accordingly, this Court should vacate this conclusion by the Court of Appeals, address the "private errand rule" argument and reverse the commission's finding that Claimant's injury is not compensable under the Act.

C. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT EMPLOYER RECEIVED NO DIRECT OR INDIRECT BENEFIT FROM CLAIMANT'S ACTIVITIES SO AS TO PRECLUDE THE COMPENSABILITY OF HIS INJURY

The commissioner found that Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant and his manager, Mr. Jones. (A.p.80-81,¶¶1-9). The Court of Appeals held this "factual finding" was supported by evidence, even though the Court recognized that the Commission's credibility determinations favored Claimant. The Court of Appeals pointed to three factors in making this ruling: (1) the supervisor's friend who owned the property from which the debris was removed "had no connection with Employer"; (2) Employer's business did not provide debris removal services; and (3) there was no evidence in the record that Employer received the direct benefit of a clean truck or an indirect benefit of goodwill.

In relying on the *Fountain* decision, this Court in *Hicks* stated the "key factor in determining the children's entitlement to compensation here is whether the work benefitted the employer." *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. at 49, 515 S.E.2d at 533 (emphasis added). The modern trend discussed above is to permit recovery regardless of some direct or indirect benefit to the Employer where the supervisor directs the employee to engage in the task. However, even in light of this "key factor," the only reliable, probative and substantial evidence in this record as a whole is that Employer benefitted directly and indirectly from the task supervisor Jones directed Claimant to perform while Claimant was on the clock.

Employer, through the direction of supervisor Jones, used its company truck,

employees and equipment to perform a job for a potential customer and respected member of the community. Mr. Hare, the landowner whose debris Employer's employees removed, testified to the fact that he had injured his back, was unable to remove the debris, and had been unsuccessful in having it removed. (App.p.150, ll.18-25; p.151, ll. 1-6). Mr. Jones volunteered (according to his testimony – App.p.167, ll.10-12) or was hired (according to Mr. Hare's testimony) to remove the debris. Mr. Hare's property was only a few blocks from Employer's facility. Moreover, the injury to the Claimant occurred while the debris was being removed from Employer's truck on Employer's premises. (App.p.100, ll.4-20). Without the removal of the debris from the truck, Employer could not have used the truck. Since Employer permitted the use of the truck to help with the debris removal (App.p.127, ll.19-25; p.157, ll.4-18), the readying of the truck for company use by unloading the debris from it was a direct benefit to the company. Additionally, Mr. Jones, the supervisor, directly benefitted by receiving money.

The task also had an indirect benefit similar to sponsoring a Little League baseball team or making a donation to a community cause. Companies use company equipment and donations of time and money to promote a positive image, to generate goodwill within the community, and to improve their image with potential customers.

By assisting Mr. Jones, Claimant's efforts also reduced the time Mr. Jones had to spend away from Employer's premises while another driver (Mr. Butler) was on a job at Amick Farms. This enabled Mr. Jones to return to Employer's business more quickly in the event Mr. Butler needed assistance or the customer called for more cement. (App.p. 124, l.22 - p.125, l.13; p.141, l.23 - p.142, l.1; p.146, l.25 - p.147, l.4).

The Commission's finding that there was no direct or indirect benefit to Employer has no support in the record, as the only evidence is that Employer benefitted both directly and indirectly from the activity. The finding is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Tiller v. National Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999); S.C. Code Ann. § 1-23-380(A)(6) (Supp.2008). *See also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002) (Court reversed commission finding the Court found was clearly erroneous and not supported by substantial evidence); *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1995) (holding there was no evidence to support commission's finding in upholding reversal of commission); *Anderson v. Baptist Medical Center*, 343 S.C. 487, 541 S.E.2d 526 (2001) (upholding Court of Appeals' reversal of commission's finding where the only substantial evidence in the record clearly showed finding incorrect); *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012) (where only reasonable inference to be drawn from substantial evidence in the record was that Claimant's preexisting condition was a hindrance to his employment and that he sustained a subsequent work-related injury that combined with or aggravated the preexisting condition to cause 'substantially greater' disability and medical costs than would have been caused by the subsequent injury alone, Court of Appeals reversed commission finding to the contrary); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) (reversing commission finding that had no evidentiary support).

There is no evidence that Claimant was not under Mr. Jones's instruction, even

command, at the time the two of them performed the tasks for Mr. Hare, and that Claimant's direct supervisor, Mr. Jones, and his Employer benefitted directly and indirectly from those acts. Hence, the only reliable, probative and substantial evidence in this record as a whole is that Employer benefitted directly and indirectly from the task supervisor Jones directed Claimant to perform.

Lastly, as Justice Toal noted in her dissent in *Hicks*, this Court has awarded compensation in circumstances where an employee acted outside the scope of his normal duties and the benefit to the employer was only slight or indirect. *See, e.g., Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E.2d 821 (1975) (holding that the injury was compensable where the employee was injured while chasing two boys who had stolen a customer's purse); *Sexton v. Freeman Gas Co.*, 258 S.C. 15, 187 S.E.2d 128 (1972) (holding that the injury was compensable where employee was injured while driving company truck to help put out brush fire); *Cauley v. Ross Builders Supplies, Inc.*, 238 S.C. 38, 118 S.E.2d 879 (1961) (holding that the injury was compensable where employee was injured while using the company's table saw to fashion a table leg for a fellow employee)" *Hicks*, 335 S.C. at 50-51, 515 S.E.2d at 534 (Toal, J, dissenting).

Other recent South Carolina cases are instructive. For instance, in *West v. Alliance Capital*, 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006), the South Carolina Court of Appeals held an injury the claimant sustained while he performed repairs on his own truck during working hours for which he was paid, and while using tools furnished by his employer "arose out of" his employment. In *Moore v. Family Service of Charleston County,* 269 S.C. 275, 237 S.E.2d 84 (1977), this Court found an injury arose out of and

in the course of employment and was thus compensable when the injury occurred off company property but while the claimant was carrying books that the claimant's supervisor required her to take home "for a particular task required by the employer." In the case *sub judice*, at the time of his injury, Claimant was on the clock, on company property, using company tools to unload a company truck at the direction of his direct supervisor.

In *Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (2007), this Court found the claimant's injury from a collision with a truck while removing debris from the road outside the entrance to property to be used for a meeting with customers arose out of and in course of his employment as vice president in charge of sales. The Court recognized claimant chose in good faith to remove the hazard to advance employer's interest, and the accident would not have happened but for claimant's business trip to the property to meet customers. The Court acknowledged that the employee in *Grant* was acting outside of his normal scope of employment and not under supervision by a supervisor when he was injured while moving debris, but the injury was found to be compensable. The *Grant* Court observed that there are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable, and these circumstances have been applied to: (1) acts benefitting co-employees; (2) acts benefitting customers or strangers; (3) acts benefitting the claimant; and (4) acts benefitting the employer privately.

In this case, the only evidence is that the acts, though outside the scope of Claimant's regular duties, benefitted a co-employee (Mr. Jones) as well as a stranger (Mr.

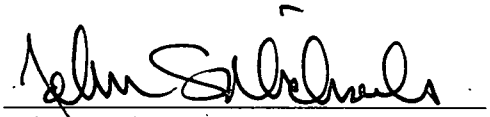
Hare) and the Employer itself. Thus, under South Carolina law, Claimant's injury was, in fact, compensable.

Accordingly, this Court should reverse the Court of Appeals decision that affirmed the Commission's decision, and remand the matter for further proceedings consistent with this Court's direction.

CONCLUSION

For the reasons stated this Court should reverse the decision of the Court of Appeals, which affirmed the Workers' Compensation Commission, and should find the only evidence in the record does not support the Commission's ruling that Claimant's injury is not compensable. The Court should remand this matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,



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Attorneys for Petitioner

November 19, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

Op. No. 2011-UP-131 (S.C. Ct. App. refiled June 3, 2011)

Ricky Burton, ... Petitioner,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Brief of Petitioner* and *Appendix* by depositing a copy in the United States Mail, postage prepaid to the following address:

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November 28, 2012

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
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RE: Ricky Burton v. Hardaway Concrete Co., Inc., and Liberty Mutual Fire Insurance
Case Tracking No. 2011-199766

Dear Mr. Shearouse:

Please find enclosed for filing the original and fourteen (14) copies of the Brief of Petitioner and thirteen (13) copies of the Appendix in regards the referenced case. I have also enclosed a Proof of Service of these documents on counsel of record.

Thank you for your assistance with this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,
Erin Bridges
Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Luther Battiste, Esquire
William T. Toal, Esquire
Michael W. Burkett, Esquire