THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
South Carolina Workers' Compensation Commission

Commissioner Avery B. Wilkerson, Jr., Chair of Appellate Panel

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Case Number 1503413

Appellate Case Number 2017-001408

James Thorpe, Employee, Claimant, Respondent,

vs.

Town of Bowman, Employer, and State Accident Fund, Carrier, Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is a workers' compensation case. The Respondent James Thorpe sustained an injury to his left hand on February 27, 2015 as a result of a dog bite, which he contends occurred by accident arising out of and in the course of his employment as a police officer for the Town of Bowman, South Carolina. (R. p. 22). He further contends that he is entitled to receive compensation and benefits under the South Carolina Workers Compensation Law (hereafter referred to as "the Act"), including payment for certain medical treatment he received and compensation for a permanent disability. (Id.).

The Appellants deny that the Respondent sustained an injury by accident arising out of and in the course of his employment. (R. p. 23). In that regard they contend that he is not entitled to compensation and benefits under the Act. (Id.).

A hearing to consider the issues presented by the Parties' Forms 50 and 51 was held before Commissioner Melody L. James on February 3, 2016 in St. Mathews, South Carolina. Following that hearing Commissioner James issued her Decision and Order for this matter and by which she denied the Respondent's claim for compensation and other benefits. (R. pp. 1 - 12).

The Respondent then requested that the Full Commission review Commissioner James' decision in this case. (R. pp. 108 - 110). The Parties submitted written briefs to the Commission as part of that review. (R. pp. 111 - 132). An Appellate Panel of the Commission then

conducted a hearing for this matter, following which it issued its Decision and Order reversing Commissioner James' decision. (R. pp. 13 - 21).

The Appellants then timely filed a Notice of Appeal of the Commission's decision for this case. For the reasons set forth below the Appellants respectfully submit that the Commission's decision should be reversed.

ARGUMENT

I. THE COMMISSION ERRED IN FINDING AS A FACT AND IN CONCLUDING AS A MATTER OF LAW THAT THE RESPONDENT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

An appeal from a decision of the South Carolina Workers' Compensation Commission is, of course, governed by the Administrative Procedures Act, S.C. Code Ann. §1-23-380(g) (1976), which provides:

> (g) the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision as substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other area of law:
>
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious are characterized by abuse and discretion are clearly unwarranted exercise of discretion.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 SE 2d 304 (1981).

The Appellants here recognize that this Court does not typically disturb findings of fact made by the Commission. Without even challenging the factual findings made by the Appellate Panel in this case, however, the Appellants respectfully contend that the Panel's decision is affected by errors of law.

In order to be entitled to workers' compensation benefits in South Carolina, a covered worker must show he or she sustained an "injury by accident arising out of and in the course of the employment." Doe v. South Carolina State Hosp., 285 S.C. 183, 328 S.E.2d.652 (S.C. App. 1985). The three elements of a compensable injury are: (1) an accident; (2) arising out of employment; and (3) arising in the course of employment. The determination whether an employee sustained a compensable injury by accident is a mixed question of law and fact. Creech v. Ducane Company, 320 S.C. 559, 467 S.E.2d. 114 (S.C. App. 1995). The accident is defined as an unlooked for or toward event which is not expected or designed by the person who suffers the injury. Landford v. Clinton Cotton Mills, 204 S.C. 423, 30 S.E.2d.36 (1994). An accident arises "out of the employment" when the employment is a contributing proximate cause. Fowler v. Abbott Motor Company, 236 S.C. 226, 113S.E.2d.737(1960). In Douglas v. Spartan Mills, Startax Division, 245 S.C. 865, 140 S.E.2d.173 (1965) the Court defined the phrase "arising out of" as follows:

> it (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. 245 S.C. 865, 140 S.E.2d 173 (1965).

Likewise, the phrase, "in the course of the employment" refers to the time, place, and circumstances under which the accident occurs. The time, place and circumstances of the accident determine whether the accident occurred "in the course of employment." Bright v. Orr-Lyons Mill,

285 S.C. 58, 328 S.E.2d.68 (1995). An injury occurs "in the course of" employment if it happens within a period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties. Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d. 453 (S.C. App. 1999). Both prongs of this test must be met in order for an injury to be considered compensable under the Act. Osteen v. Greenville County School District, 333 S.C. 43, 508 S.E.2d 21 (1998).

The Respondent was employed as a policy officer by the Town of Bowman during the time period involved in this case. (R. p. 22; R. p. 138, line 14 - p. 194, line 13). His duties included the regular patrol of the Town and other law enforcement services for the citizens residing there. (R. p. 138 , line 14 - p. 194, line 13).

The actual incident forming the basis for this case, however, occurred at the Respondent's home on a Friday morning, and while he was not performing his regular patrol or law enforcement duties. (Id.). There is no dispute that the Respondent was not being paid on otherwise "on the clock" at the time of the incident. (Id.).

During the week before the incident involved took place the Respondent spoke with Kevin Pendarvis, the Chief of Police for the Town of Bowman, and asked if he would allow him to use a working-police dog as part of his duties. (Id.). While the Town does not own or require its officers to use such dogs, or "K-9s" as they are normally called, Chief Perndarvis indicated to the Respondent that he could use such a dog if he chose to do so. (Id.). That is, the Respondent voluntarily chose to obtain on his own and use a dog as part of his work, even though his employer did not require him to do so.

The evidence in this case shows that such dogs have been used in the past by police

officers employed by the Town. (Id.). The Town provides no care or boarding for the dogs, who are considered to be the personal property of the officer. (Id.). A local animal feed store has donated dog food to the Town for individual officer's use in feeding their dogs. (Id.). There is evidence that the Town may have paid for some veterinary care for dogs in the past, but has not done so for the animal involved in this case. (Id.).

Shortly thereafter the Respondent did obtain a dog, whose name is "Racks", from a colleague who works as a Deputy for the Orangeburg County Sheriff's Department. (Id.). The Respondent did not pay any sum of money for Racks. (Id.). Most importantly there is no dispute with respect to the fact that Racks became the personal property of the Respondent here and the Town possessed no ownership interest in him. (Id.).

Racks is a breed of German Shepherd which is commonly used as K-9 working dogs. (Id.). Such working dogs are typically trained in one or more of the following three areas to assist their law enforcement partners: apprehension, search and rescue and drug detection. (Id.). When he obtained possession of Racks the Respondent learned from the Orangeburg Deputy that Racks was, in fact, trained in "apprehension". (Id.). This means that a K-9 has been trained specifically to attack, apprehend and hold, by biting, a person upon receiving a verbal command from an attending officer. (Id.). Further, the Respondent was advised that Racks did not like to be grabbed around his neck area. (Id.).

The Respondent then presented Racks to Chief Pendarvis, and they discussed his use for the Town's law enforcement needs. (Id.). At that time Racks was tested for his ability to detect drugs. (Id.). The Chief also then learned that Racks had been trained in "apprehension". (Id.). There is a factual dispute between the Parties as to what the Respondent and the Chief discussed next.

The Chief testified that when he learned that Racks was trained in apprehension, he told the Respondent that he could not use him as part of carrying out his law enforcement duties with the Town. (R. p. 195, line 7 - p. 218, line 6). Part of the reasoning behind this prohibition is that the Town does not have liability insurance to cover K-9's who are trained in apprehension. (Id.). The Town, in fact, has a written policy in this respect. (R. pp. 243 -244). Chief Pendarvis stated he trusted that the Respondent understood the Town's position and would not use Racks in any capacity as part of his work for the Town. (R. p. 195, line 7 - p. 218, line 6).

The Respondent does not dispute that he told Chief Pendarvis that Racks was, in fact, trained in apprehension. (R. p. 138, line 14 - p. 194, line 13). He contends, however, that the Chief did not tell him that he could not use Racks. (Id.). He related that the Chief said he could use Racks, but not for apprehension purposes and under no circumstances could the verbal command for Racks to attack be used. (Id.). The Respondent further testified that he was unaware of any written policy implemented by the Town and which prohibits the use of dogs trained in apprehension. (Id.).

The conversation between the Respondent and the Chief took place on the Wednesday before the Friday morning incident in this case. (Id.). Between those days the Respondent performed his regular work duties, and contends that he used Racks as part of the same. (Id.). He testified that he brought Racks by the Bowman Police Department and the Chief was aware that Racks was being used as part of his job. (Id.). The Respondent stated that he removed one of the seats in his patrol car to accommodate a dog kennel which the Chief gave to him. (Id.). The Chief denies that he was aware that Racks was being used by the Respondent. (R. p. 195, line 7 - p. 218, line 6).

The Respondent then testified that on the following Friday morning at his home he spent time working with Racks in his fenced backyard. (R. p. 138, line 14 - p. 194, line 13). After

finishing the Respondent exited his backyard by way of his fence gate and went to his car to retrieve food for the dog. (Id.). The Respondent left the fence gate open and Racks suddenly escaped through the open gate, ran into a neighbor's backyard and then into the neighbor's screened back porch. (Id.). The Respondent gave chase to Racks and cornered him on the porch. (Id.).

When Racks was cornered the Respondent grabbed him by his neck. (Id.). When that occurred Racks immediately turned his head and bit the Respondent on his left hand. (Id.). After a struggle with Racks the Respondent was able to free his hand from the dog's grip. (Id.). The Parties do not dispute that the Respondent sustained a bite injury to his hand.

Commissioner James focused on the timing of the event involving the Respondent and Racks when she decided that a compensable injury did not occur in this case. (R. pp. 1 - 12). While she found that the Respondent, contrary to the Appellants' position, was allowed to use Racks as part of his job, she found that at the time of the incident the Respondent and Racks were not working. That is, while the injury may have "arose out of" the Respondent's employment, it did not occur "in the course" of such employment. (Id.). As noted above both of these requirements must be established for an injury to be considered compensable under the Act. Osteen v. Greenville County School District, supra.

Commissioner James concluded that whatever training, formal or informal, being performed by the Respondent on the morning in question - and while he was "off duty" - had been completed at the time Racks escaped from the Respondent's back yard and he gave chase and apprehended him. (Id.). Contrary to the Appellate Panel's Finding of Fact Number 31, the Respondent was not training Racks at the time he was bitten. (R. p. 19). However close in time the Respondent's injury may have occurred to the end of that training, the evidence in this case clearly

supports Commissioner James' finding and conclusion.

Counsel for the Respondent, however, relies on the Town of Bowman's policy for the use of K-9 animals which provides that an officer is responsible for the health and welfare of a canine "both on and off duty." And in fact, the Appellate Panel of the Commission relied on this policy in making its decision to reverse Commissioner James' decision.

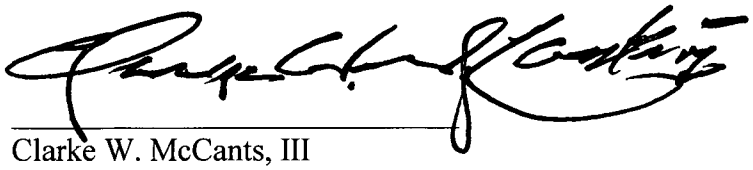
Such a policy certainly seems reasonable as someone must be available to oversee the health and welfare of any animal around the clock. Indeed, Racks was the personal property of the Respondent and his sole responsibility. However, such a policy cannot create an non-existent liability under the Act in the absence of a reasonable connection between a worker's injury and a service that worker performs for his employer.

Otherwise, any injury at any time while taking care of an animal such as Racks is "an accident arising out of and in the course of one's employment." Such a result cannot logically be extended to circumstances where, for example, Racks were to escape the hands of the Respondent while the two of them were together during a vacation being taken by the Respondent and his Family. Or, if the Respondent were to be injured while he and Racks were enjoying playful activity, which served as a bonding exercise between them.

Thus, and while the Respondent's injury in this case was very close in time to the end of activity which might reasonably be viewed as connected to his employment with the Town of Bowman, that end had occurred. A line has to be drawn somewhere under such circumstances, and the Defendants respectfully submit that Commissioner James did so correctly in this case.

CONCLUSION

For the reasons stated above the Appellants respectfully submit that the Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission dated May 23, 2017 should be reversed and this matter should be dismissed.



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CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of the Appellants and the Final Reply Brief of the Appellants comply with Rule 211(b), SCACR.

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November 16, 2017

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