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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the South Carolina  
Workers Compensation Commission  
SCWCC File No. 1503413  
\_\_\_\_\_

RECEIVED  
NOV 21 2018  
SC Court of Appeals

James Thorpe, Employee, Claimant, Respondent,

vs.

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

Appellate Case No. 2017-001408

\_\_\_\_\_  
PETITION FOR REHEARING  
\_\_\_\_\_

Pursuant to Rule 221, SCACR, the Appellants respectfully petition this Court for a rehearing in the above-entitled case and submit the following memorandum in support thereof. The basis for this Petition is that the Court misapprehended the Appellate Panel Decision and Order dated May 23, 2017 and by concluding that it is supported by substantial evidence and is not affected by errors of law.

Clarke W. McCants, III  
Nance, McCants & Massey  
Post Office Box 2881  
Aiken, S.C. 29802  
(803) 649-6200 ext. 3  
Counsel for Appellants

November 21, 2018

CITATION OF AUTHORITIES

Cases

Bright v. Orr-Lyons Mill, 285 S.C. 58, 328 S.E.2d.68 (1995). . . . .3,4

Creech v. Ducane Company, 320 S.C. 559, 467 S.E.2d. 114 (S.C. App. 1995). . . . .3

Doe v. South Carolina State Hosp., 285 S.C. 183, 328 S.E.2d.652 (S.C. App. 1985). . . . . 3

Douglas v. Spartan Mills, Startax Division, 245 S.C. 865, 140 S.E.2d.173 (1965). . . . . 3

Fowler v. Abbott Motor Company, 236 S.C. 226, 113S.E.2d.737(1960). . . . . 3

Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). . . . . 4

Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d. 453 (S.C. App. 1999). . . . . 3

Landford v. Clinton Cotton Mills, 204 S.C. 423, 30 S.E.2d.36 (1994). . . . . 3

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

Nicholson v. S.C. Department of Social Services, 411 S.C. 381, 769 S.E.2d 1(2015). . . . . 4

Osteen v. Greenville County School District, 333 S.C. 43, 508 S.E.2d 21 (1998). . . . . 4

Statute

S.C. Code Ann. Section 1-23-380(g)(6) (1976) . . . . . 2

MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING

I. THE DECISION OF THE COMMISSION IS AFFECTED BY ERRORS OF  
LAW AND SHOULD BE REVERSED

In its Opinion for this case the Court of Appeals concludes that the Commission's decision is supported by substantial evidence and will not be disturbed. The Appellants respectfully submit that the Court misapprehended their argument that the Commission's ruling is, in fact, affected by errors of law and should be reversed.

An appeal from a decision of the South Carolina Workers' Compensation Commission is 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 contend that the Commission's decision is flawed from a legal

standpoint. That is, affected by other area 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 Court of Appeals, in fact, cites Bright and Osteen in its decision for this case. In both cases the South Carolina Supreme Court ruled that the claimant is not entitled to benefits under the South Carolina Workers' Compensation Law. The Court also cites Nicholson v. S.C. Department of Social Services, 411 S.C. 381, 769 S.E.2d 1(2015) and Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975) in support of its opinion. In those cases, the Court ruled that the claimant is entitled to benefits.

A common factual thread in all of these four cases cited is that the claimant is engaged in activity within their normal working hours and physically present on their employer's premises at the time of incident in question. A central question in each case is whether or not the claimant is undertaking a task in furtherance of his or her employer's interests.

In the case before the Court there is no question that the Respondent was "off duty" and not working within his regular hours of duty. There is no dispute that the Respondent was not being paid on otherwise "on the clock" at the time of the incident involving Racks, the working dog. Most importantly, there is no dispute that the Town of Bowman did not require the Respondent to use a working dog as part of his official duties, and Racks was the sole personal property of the Respondent. The Respondent, alone, was responsible for Racks.

The Respondent and Racks simply were not working at the time the dog inflicted his bite. Any off-duty training in which the Respondent and Racks were engaged in had been completed by the time the dog escaped from the Respondent's back yard and inflicted his bite. Thus, the

Respondent was not engaged in any activity which might reasonably be perceived as done in furtherance of the Town of Bowman's interests.

From a legal standpoint, therefore, the Respondent, as a matter of law, was not injured as a result of an accident arising out of and in the course of his employment.

#### CONCLUSION

For the reasons stated above the Appellants respectfully submit that this Court should grant their Petition for rehearing in this case.

Respectfully Submitted,



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Clarke W. McCants, III  
Nance, McCants & Massey  
PO Box 2881  
Aiken, SC 29802  
(803) 649-6200 Ext. 21  
Counsel for Appellants

Dated: November 21, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the South Carolina  
Workers Compensation Commission  
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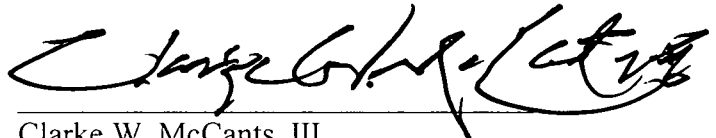
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PROOF OF SERVICE

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I certify that I have served a copy of the Appellants' Petition for Rehearing on counsel for the Respondent, R. Michael Johnson, by depositing a copy of it in the United States Mail, postage prepaid, on November 21, 2018 addressed to R. Michael Johnson, Michael Johnson & Associates, 1201 Carolina Place, Suite 103, Fort Mill, SC 29708

November 21, 2018



Clarke W. McCants, III  
Nance McCants & Massey  
S.C. Bar # 3725  
P. O. Box 2881  
Aiken, SC 29802-2881  
(803) 649-6200  
Attorney for Appellants

**Nance, McCants & Massey**  
Attorneys & Counselors at Law  
218 Newberry Street, S.W.  
Aiken, South Carolina 29802  
Telephone (803) 649-6200

James D. Nance, LLC  
Clarke W. McCants, III, P.C.  
A. Shane Massey, LLC  
Amy Patterson Shumpert

Post Office Box 2881  
Aiken, SC 29802-2881  
Fax: (803) 649-5566  
mccants3rd@aol.com

November 21, 2018

Via Hand-Delivery  
The Honorable Jenny Abbott Kitchings  
Clerk, SC Court of Appeals  
Calhoun Building  
1220 Senate Street  
Columbia, SC 29201

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SC Court of Appeals

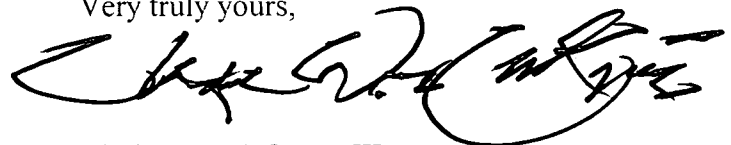
IN RE: James Thorpe v. Town of Bowman and State Accident Fund  
Appellate Case No. 2017-001408  
SCWCC File No. 1503413  
Our File No. MWC15-1349

Dear Ms. Kitchings:

Please file in the above-referenced matter the enclosed original and six copies of the Appellants' Petition for Rehearing and Proof of Service thereof upon Counsel for the Respondent. Also enclosed is this firm's check in the amount of \$50.00 for the filing fee.

With best regards, I remain

Very truly yours,



Clarke W. McCants, III

CWM,III/aps  
Enclosure  
cc: Michael Johnson Esquire (w.encls)