

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

David W. Huffstetler, Commissioner
Andrea C. Roche, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1003812

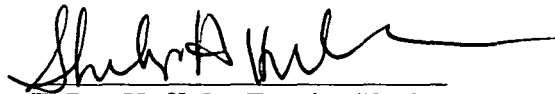
Andrew Marrs,..... Respondent,

v.

1751, LLC d/b/a Saludas and
The South Carolina Uninsured Employer's Fund,..... Defendants,
Of Whom

1751, LLC d/b/a Saludas is theAppellant.

FINAL BRIEF OF APPELLANT



E. Ros Huff, Jr., Esquire #2767
Shelby H. Kellahan, Esquire #74731
HUFF LAW FIRM, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Appellant 1751, LLC d/b/a Saluda's

Blake A. Hewitt, Allison Sullivan, and John S. Nichols
Bluestein, Nichols, Thompson and Delgado, LLC
1614 Taylor St., PO Box 7965
Columbia, SC 29202 Tel.: (803) 779-7599
Attorneys for Respondent
Lisa Glover, Esquire
100 Executive Center, Drive, Santee Building Suite 101
Columbia, SC 29210 Tel: (803) 798-2722
Attorney for Defendant SC Uninsured Employer's Fund

RECEIVED

DEC 20 2012

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities 2

Statement of Issue on Appeal 3

Statement of the Case..... 4

Argument 5

 I. The South Carolina Workers Compensation Commission Appellate Panel erred in determining that Wright v. Bi-Lo does not apply when Andrew Marr’s knee injury is outside the course and scope of his employment (sphere of employment) because that injury occurred on the back steps and Mr. Marr’s was given an instruction of prohibition not to use the back steps.

Conclusion 10

Certificate of Counsel..... 11

TABLE OF AUTHORITIES

STATUTES

SC Code Ann. Section 42-1-160(as amended)..... 7

CASES

Brunson v. Am. Koyo Bearings, 395 S.C. 450 (S.C. Ct. App. 2011)..... 6

Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100 (S.C. Ct. App. 2003)..... 7

Johnson v. Merchs. Fertilizer Co. 17 S.E.2d 695, 198 S.C. 373 (1941)..... 9

Pack v. S.C. DOT, 381 S.C. 526 (S.C. Ct. App. 2009)..... 6

Wright v. Bi-Lo, 442 S.E.2d 186, 314 S.C. 152 (Ct. App. 1994)..... 8

STATEMENT OF ISSUE ON APPEAL

1. Did the South Carolina Workers Compensation Commission Appellate Panel err in determining Wright v. Bi-Lo does not apply when Andrew Marr's knee injury is outside the course and scope of his employment (sphere of employment) because that injury occurred on the back steps and Mr. Marr's was given an instruction of prohibition not to use the back steps?

STATEMENT OF THE CASE

This appeal arises out of a denied workers' compensation claim. The Respondent, Andrew Marrs ("Respondent or "Mr. Marrs") claims that on March 3, 2010, while in the course and scope of his employment, he fell on a broken staircase and injured his left knee. The Respondent sought temporary total disability benefits, medical treatment for his injuries and sanctions against the Appellant, Saluda's, LLC (Saluda's or Appellant) for unreasonable denial of the claim.

A hearing was held before the Single Commissioner on September 23, 2010. By Order dated December 17, 2010, the Single Commissioner found that the Respondent was not entitled to workers' compensation benefits based on instructions from the employer not to use the back broken staircase. The Single Commissioner also found that the Respondent failed to meet his burden of proof that he sustained an accidental injury arising out of and in the course of his employment and was not entitled to Workers Compensation Benefits (disability and medical).

By Form 30 dated December 29, 2010, the Respondent appealed to the SC Workers Compensation Commission Appellate Panel. By order dated July 14, 2011 (Compensability Issue), the Appellate panel reversed the Single Commissioner's finding in a two to one decision that pursuant to Wright v. Bilo, the respondent is entitled to workers' compensation benefits. The Appellate Panel further remanded the matter to a Hearing Commissioner for a determination of benefits.

Appellant appealed that order to the South Carolina Court of Appeals on August 12, 2011. Respondent filed a Motion to Dismiss the appeal on the basis that the order was interlocutory, and this court found that the July 14, 2011 order was not immediately

appealable by Order dated September 12, 2011. The court issued an Order of remittitur on September 29, 2011.

Hearing Commissioner Andrea P. Roche heard the issues on remand as to whether the respondent was entitled to medical and temporary total disability benefits. That hearing took place on November 21, 2011. Commissioner Roche issued an Order on February 13, 2012. This order was not appealed, thus making the July 14, 2011 Order of compensability final and reviewable.

Therefore, Saluda's appealed the July 14, 2011 Compensability Order of the Appellate Panel again to the South Carolina Court of Appeals on March 13, 2012.

ARGUMENT

Mr. Marr's injury is not compensable as the instructions issued by the employer took the injury outside the sphere of employment.

The South Carolina's Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Brunson v. Am. Koyo Bearings, 395 S.C. 450 (S.C. Ct. App. 2011). Under the APA, the court can reverse or modify the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Id. Defendants first submit that the Appellate Panel's determination of compensability is a matter of law. When the evidence is susceptible of but one reasonable inference, the question becomes a matter of law. Pack v. S.C. DOT, 381 S.C. 526 (S.C. Ct. App. 2009). Alternatively, the

defendants would assert that the Record is devoid of substantial evidence. "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 that the administrative agency reached or must have reached in order to justify its action. Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100 (S.C. Ct. App. 2003). Upon review of the Record as a whole in this matter, the Appellate Panel's determination that claimant suffered a compensable injury by accident arising out of the course and scope of his employment, was error.

An accident, as defined in S.C. Code Ann. §42-1-160, must arise out of (origin and cause) AND in the course of (time, place, circumstances) employment. SC Code Ann. Section 42-1-160(as amended). The facts in this case are undisputed (R. p. 130 lns. 21-25). Mr. Marrs was on a smoke break at the time of the alleged accident. (R. p. 133 lns. 21-22). Appellant contends that this break was not even allowed under the personal comfort doctrine because as discussed below he had no reason to be in the dangerous area taking that break after being instructed by his employer not to go on the back staircase. (R. p. 143 lines 9-10). The stairs where Mr. Marr's was taking his smoke break were defective, and this was known by the Respondent (R. p. 8 lns. 3-6). On cross-examination, the Respondent admitted that a co-employee (Ali), his boss (Steven Cook) and the landlord (Richard Burts) all told him that the step on the back stairs was broken (R. p. 91 ln. 12 – p. 92 ln. 5). Mr. Marrs also agreed that tape was placed on the stairs as a warning that the step was defective (R. p. 92 lns. 6-12). Two fellow employees had already been hurt on that step, and Mr. Marrs knew of those incidents. (R. p. 136 lns. 17-18; R. p. 139 lns. 19-20).

Furthermore, the employer had issued a positive order of prohibition directly to the Respondent to refrain from using the back steps (R. pp. 108-109; R. p. 137 lns. 4-7). A member of the Appellate Panel of the Workers Compensation Commission even commented at the appeal hearing that “this was a direct order or prohibition” not to use the steps (R. p. 137 lns. 22-25). There is also evidence to show that the landlord (Richard Burts) placed tape over the stairs on multiple occasions over a three week period to specifically prohibit and restrict the use of the known dangerous staircase (R. p. 117; R. p. 140 lns. 4-5). In Wright v. Bi-Lo 442 S.E.2d 186, 314 S.C. 152 (Ct. App. 1994):

When employer limits sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in scope of employment and, therefore, not compensable under workers’ compensation law.

Mr. Marrs received direct instructions from the employer not to use the steps. Whether the employer knew that Mr. Marrs was continuing to use the stairs or whether Mr. Marrs was disobedient or had an oversight is not a valid defense because he HAD BEEN GIVEN SPECIFIC AND DIRECT ORDERS OF PROHIBITION NOT TO USE THE STEPS/STAIRCASE. The employer issued a specific prohibition and any injury incurred while violating this prohibition is not compensable and in the sphere of his employment.

There is evidence that the landlord instructed the Respondent not to use the stairs; there is evidence that the employer instructed the Respondent not to use the stairs; there is direct testimony that Steve Cook issued a direct positive order in the presence of the executive chef, Blake Farris, for the employees not to use the back steps (R. pp.108-109). When the Respondent was asked a hypothetical question, he even admitted under the facts of this case that if he was the employer like Mr. Cook, he would have instructed his

employees of the danger of the steps and prohibited the use of them. (R. p. 144-145). Commissioner Beck, the Single Commissioner, who sat through the hearing, heard the testimony and observed the demeanor of the witnesses, chose to believe that instructions were given and that the steps were an area of the premises that were off limits and prohibited, much the same as in the Johnson v. Merchs. Fertilizer Co. 17 S.E.2d 695, 198 S.C. 373 (1941):

Where employer and insurance carrier denied liability for compensation for death of employee upon ground that employee's death did not arise out of and in the course of employment, in that employee at time of his death was in a place where he was forbidden to go, burden was upon employer and insurance carrier of establishing that at time of employee's death he had gone into a prohibited place in violation of a positive order.

In Johnson, the foreman **warned** the employee not to go close to the line shaft and belt and the Court held that this was insufficient to establish that the employee's death on the shaft did not arise out on and in the course of the employment. It was the employer's position and they contended that at the time of the death he was in a prohibited area and in a place where he was forbidden to go. Workers' compensation benefits were awarded because the employer did not carry the burden of proof. Basically the Court held that the warning by the employer, Merchant Fertilizer Company, was insufficient. In our case, unlike Johnson, the employee was not warned but the respondent was **specifically instructed** on repeated occasions by Mr. Cook (the owner) and the landlord that the back stairs were dangerous and off limits. The burden is upon the Appellant to establish the facts that at the time of the injury that the employee had gone into a prohibited area in violation of a positive order. The record in our case is replete with numerous testimony, to include the respondent's that the steps were a prohibited area and were off limit. The

Respondent even testified that if he was in the same factual circumstances as Mr. Cook he would have given the same instruction and prohibited his employees from going into this dangerous area.

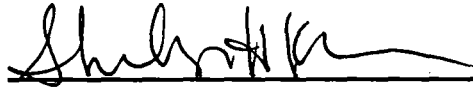
In Johnson, the Court held that the warning given by the foreman to the deceased employee amounted to no more than a general admonition to exercise “due care” when he reached the vicinity of the shaft. In our case, a warning was not given but a **positive direct order of prohibition** that was abundantly clear that the stairs were dangerous; two employees had been previously injured; that tape to bar the use of the steps was put on the stairs and thus this was a prohibited dangerous area that was outside the scope/sphere of Mr. Marr’s employment.

In our case, the employer established that the location of the Respondent’s alleged injury was forbidden as evidenced by verbal instruction and by blocking the stairs with duct tape. Over the course of three to four weeks prior to Mr. Marr’s incident the employer put tape on the stairs and tried to block them for use by the respondent (R. 116 Ins. 2-8). After Mr. Marr’s incident the employer remembers telling the Respondent that he was told not to go on the steps and Mr. Marr’s didn’t refute that (R. pp.121-122).

CONCLUSION

Based upon the above cited arguments, Appellant Saluda’s would respectfully request that the Order of the South Carolina Workers Compensation Appellate Panel be reversed and Workers Compensation benefits be denied as the Respondent under §42-1-160 did not sustain an accidental injury arising out of and in the course of his

employment and is not entitled to workers' compensation benefits as his claim is not compensable under the Act.



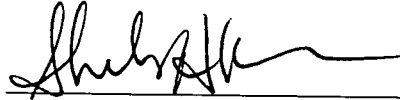
E. Ros Huff, Jr., Esquire Bar # 2767
Shelby H. Kellahan, Esquire Bar # 74731
HUFF LAW FIRM, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232
Attorneys for Employer

December 20, 2012

Certificate of Counsel

In compliance with Rule 211(b), the Final Appellate Brief is identical to the Briefs previously served except for references to the Record and correction of minor typographical errors and misspellings.

December 20th, 2012



E. Ros Huff, Jr., Esquire Bar # 2767
Shelby H. Kellahan, Esquire Bar # 74731
HUFF LAW FIRM, LLC, Attorneys for Appellant.
Post Office Box 1935, 7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232

RECEIVED
DEC 20 2012
SC Court of Appeals