THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. No. 1003812

Andrew Marrs, ... Respondent,

v.

1751, LLC d/b/a Saluda's, and
the South Carolina Uninsured Fund, ... Defendants,

Of Whom

1751, LLC d/b/a Saluda's is the .... Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the Instruction That Andrew Marrs Avoid Using the Back Steps While at Work Was an Order That Governed His Conduct Within the Sphere of Employment (In Which Case His Injury Is Compensable) or Set a Limit on the Sphere of Employment Itself (In Which Case His Injury Is Not).

STATEMENT OF THE CASE

Andrew Marrs injured his left knee when he fell while walking down the back staircase at Saluda's restaurant, where he worked as a cook. The question presented is whether the commission erred in holding that this injury was compensable despite the fact that Mr. Marrs and the other employees of the restaurant had been instructed not to use this particular staircase.

Mr. Marrs's knee injury occurred on March 3, 2010, when he stepped on a metal stair that had rusted and broken away from the staircase on one side, but remained attached on the other side. See (R.p.77, line 6 - p.78, line 24) (describing the broken stair). Mr. Marrs was originally diagnosed with a knee sprain, but a later examination revealed tears to his ACL and meniscus. (R.p.81, lines 3-16).

Mr. Marrs's injury occurred in relatively ordinary circumstances. Right before his injury, Mr. Marrs had been given permission to go on a "smoke break." (R.p.73, lines 11-20). Mr. Marrs walked out onto the platform at the top of the back stairs to smoke his cigarette. *Id.* The executive chef at Saluda's had dismissed one of Mr. Marrs's co-workers to go home early, and when Mr. Marrs saw this co-worker still standing at the bottom of the back stairs, Mr. Marrs initiated a conversation to see if there were other things that needed to be done in the kitchen. (R.p.72, lines 16-25; p.73, lines 13-20). According to Mr. Marrs,

he could not understand what his co-worker was saying, so he began walking down the stairs. (R.p.73, lines 21-22). Mr. Marrs injured his knee when he stepped on the broken stair and the stair gave way. (R.p.73, lines 22-1). He was able to avoid completely falling by grabbing the staircase rail. *Id.*

Ms. Marrs commenced this action on March 23, 2010, by filing a Form 50. He requested temporary total disability benefits, and he also alleged that he needed medical treatment for his left knee, leg, and foot. (R.p.52).

An investigation by the workers' compensation commission revealed that Saluda's was subject to the Workers' Compensation Act, but was uninsured. See (R.p.184). Mr. Marrs then served the Uninsured Employer's Fund, which filed a general denial answer on May 20, 2010. (R.p.53).

Six days before the case was scheduled to be heard by a hearing commissioner, Saluda's appeared in the case and filed a motion to postpone the hearing. See (R.p.55). Saluda's never filed an answer, but its Form 58 pre-hearing brief outlined that it contested whether Mr. Marrs's injury was compensable, whether he was entitled to temporary disability benefits, whether he was entitled to medical care, and the amount of his compensation rate. (R.p.229).

A hearing commissioner heard the case on September 23, 2010, and in an order filed December 17, 2010, he found that Mr. Marrs was not entitled to workers' compensation benefits. The hearing commissioner based this on his finding that Mr. Marrs was instructed not to use the back stairs, and he cited *Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) as authority for denying Mr. Marrs's claim. (R.p.16).

On December 29, 2010, Mr. Marrs filed a Form 30 requesting that the commission review this order. (R.p.57). An appellate panel of the commission heard the case on April 19, 2011, and in an order dated July 14, 2011, a majority of the panel reversed the hearing commissioner's decision. (R.p.9). Among other things, the panel majority held that Mr. Marrs was injured during a smoke break and while he was talking to another chef about work, and that those activities fell within the course and scope of his employment. (R.p.21, ¶4). The panel remanded the case to a hearing commissioner to determine the particular benefits to which Mr. Marrs was entitled.

The dissenting member of the panel voted to affirm the hearing commissioner's decision. Beyond the vote to affirm, the panel's order does not list any reasoning for the dissenting vote. (R.pp.12, 24).

Saluda 's appealed the panel's order to this Court, but Mr. Marrs moved to dismiss the appeal on the grounds that the panel's order was not immediately appealable because the order was not the agency's final decision and could be adequately reviewed after the agency's final decision. See S.C. Code Ann. § 1-23-380 (Supp. 2011) (describing the types of immediately appealable orders in administrative cases). This Court dismissed the appeal in an order dated September 12, 2011.

On November 21, 2011, a hearing commissioner conducted a hearing to determine Mr. Marrs's benefits. In an order dated February 13, 2012, the hearing commissioner determined that Mr. Marrs was entitled to medical treatment and temporary total disability benefits. Saluda's did not ask the commission to review that decision, and on March 13, 2012, Saluda's initiated this appeal.

ARGUMENT

There do not appear to be any factual disputes in this case. Everyone seems to agree that Mr. Marrs tore his ACL while he was talking with a co-worker, about work, during a smoke break, and forgot to avoid the stair that he had known for a few weeks was broken. Because the facts are not in dispute, the question presented is one of law. See, e.g., *Douglas v. Spartan Mills*, 245 S.C. 265, 266, 140 S.E.2d 173, 173 (1965) (where facts are not contested, compensability is a question of law). This Court reviews questions of law *de novo*, *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008), and the Court may reverse the commission's decision if it is affected by an error of law. S.C. Code Ann. § 1-23-380 (5)(d) (Supp. 2011).

This Court should affirm the commission's decision. A work-related injury may still be compensable even though the injured employee was disobeying the employer's instructions when he or she got hurt. If the employer's broken instructions were instructions that limited the course and scope of the worker's employment, the injury is not compensable. If, however, the instructions were instructions that governed the employee's conduct while in the sphere of employment, the injury is covered. This Court's decision in *Wright v. Bi-Lo* applies this rule, and this rule has also been applied in other cases, which are instructive. In simple terms, the rule recognizes that an employer has the right to tell a worker what is and is not a part of the worker's job, but it also recognizes that a worker will sometimes forget or disobey instructions about how to go about doing his or her job. Injuries that occur while violating the first type of order are not compensable; injuries that occur while violating the second type of order are covered.

The commission's decision followed a faithful application of this principle. When the management at Saluda's told the staff not to use the back stairs, it was giving the staff a rule that governed their conduct while at work. It was not telling everyone that the sphere of their employment ended immediately outside the kitchen door.

A. A Work-related Injury Is Compensable So Long as the Injured Employee Was Disobeying Instructions That Governed the Employee's Conduct Inside the Sphere of Employment.

Wright v. Bi-Lo involved a grocery store clerk who could not help but chase after shoplifters. Mr. Wright was employed at Bi-Lo as a "courtesy clerk" and "[h]is principal duty was bagging groceries." 314 S.C. at 153, 442 S.E.2d at 187. Bi-Lo had a specific policy regarding shoplifters and which employees could interact with them: hourly wage earners like Mr. Wright were prohibited from approaching suspected shoplifters. Although Mr. Wright was allowed only to observe suspects and report those observations to management, he violated this prohibition on at least three occasions. In the first encounter, Mr. Wright confronted a suspected shoplifter inside the store. In the second encounter, Mr. Wright pursued a suspected shoplifter outside the store. Following each incident, Mr. Wright's manager told him to never again confront a suspected shoplifter. In the third encounter, Mr. Wright followed a shoplifting suspect outside the store, and despite his manager's instructions to go back inside, Mr. Wright stated he was "going after" the suspect. Mr. Wright hopped on his moped and gave chase, and he apparently died of a heart attack shortly thereafter. *Id.* at 153-54, 442 S.E.2d at 187-88.

This Court's decision stated the question presented as "whether Wright stepped outside the scope of his employment by violating the store's rule on shoplifters." *Id.* at 155,

442 S.E.2d at 188. The Court wrote "[o]ur Supreme Court has succinctly stated the applicable law on this question," and the Court explained:

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act .... "Certain rules concern the conduct of the workman within the *sphere of his employment*, while others *limit the sphere itself.* A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied."

Id. at 155, 442 S.E.2d at 188 (emphasis in original) (quoting *Johnson v. Merchs. Fertilizer Co.*, 198 S.C. 373, 378-79, 17 S.E.2d 695, 697-98 (1941)).

Mr. Wright ultimately lost the case because the evidence established that he "left the sphere of his employment by violating the specific orders not to confront, pursue, or apprehend suspected shoplifters," *Wright*, 314 S.C. at 155, 442 S.E.2d at 188, and the analysis in the Court's decision explains that the important question is whether the rule the employee violated governs conduct inside the sphere of employment, or whether the rule limits the sphere itself.

The reason this principle draws a distinction between rules that set the limits of work and rules that govern conduct while at work is that in order to be compensable, all that is needed is for an injury to arise out of and in the course and scope of employment. The Workers' Compensation Act generally excludes questions of an employee's negligence or assumption of the risk from consideration, *Johnson*, 198 S.C. at 378, 17 S.E.2d at 697, and when a worker breaks a rule about conduct while at work, that infraction is, among other things, evidence of the worker being negligent or assuming of the risk of an injury. But a

violation of a rule that sets the sphere of employment is different. That sort violation means that the worker is no longer going about the employer's business. Mr. Wright was not supposed to be chasing shoplifters — no matter his intentions, chasing shoplifters was not a part of his job. Another example of this principle is the police chief who rode on the side of a fire truck, and unfortunately fell off, despite repeated instructions that no member of the police department was to ride on the fire truck. See *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950). In both cases, the injured workers had no business being where they were or doing what they were doing under the terms of their work.

B. A Faithful Application of this Principle Compelled the Commission to Hold That Mr. Marrs's Injury Is Compensable.

Applying this principle to Mr. Marrs's case required the commission to hold that Mr. Marrs's injury is compensable. As the commission found, Mr. Marrs was injured while engaged in activities that were in the course and scope of his employment. Mr. Marrs was engaged in a conversation with a co-worker about the tasks he would have to perform when he re-entered the kitchen, and he was on a smoke break, a comfort that was personal to Mr. Marrs but incidental to his work and within the course and scope of his employment. See (R.p.23, ¶6). Mr. Marrs was not doing something that he had been told was not a part of his job. Instead, he was standing out on the back stoop on a smoke break and forgot to avoid the stair that he had known for weeks was broken. See (R.p.86, lines 2-6). This was not an example of an employee willfully disregarding an instruction that a particular *task* was not a part of his job. It was an oversight about *conduct* while *at* work. Saluda's had asked Mr. Marrs (and others) to avoid the back stairs while doing their jobs.

This sort of oversight is a first-cousin to the mere negligence that will not defeat a workers' compensation claim, and the Court would be justified in noting that the evidentiary record presented to the commission showed that Saluda's shared fault in this situation. While there was evidence that management asked employees not to use the back stairs and routinely stretched tape diagonally across the space over the broken step, there was also evidence that employees continued to use these stairs with the tacit approval of their supervisors. Mr. Marrs's co-worker who had been dismissed early had obviously just finished using the stairs, see (R.p.97, lines 4-19) (testimony of Robert Helvey) ("I was on the lower platform of the stairs smoking a cigarette"); and both this co-worker and the executive chef at the restaurant testified to *routinely* using the stairs. See (R.p.99, lines 18-2) (Robert Helvey); (R.p.107, lines 25-18) (testimony of Blake Ferris). The executive chef was Mr. Marrs's direct supervisor. (R.p.106, lines 24-25). According to the owner of the restaurant, there was nothing wrong with the stairs other than this particular step. (R.p.116, lines 22-1). Employees also routinely used the back stairs to remove trash from the kitchen and for food deliveries. (R.p.47, lines 20-2). What is more, the door to the stairs had to remain unlocked to satisfy the fire code; it was the only door from the kitchen directly to the outside of the building. See (R.p.118, lines 15-19) (fire code prevented locking door); (R.p.75, lines 15-2) (describing the entrances to the restaurant). Under the theory of the case offered by Saluda's, Mr. Marrs could not flee from a fire in the front of the kitchen without stepping outside the scope of his job.

Wright v. Bi-Lo and *Black v. Town of Springfield* are cases where the employers' rules truly limited the sphere of employment. It was not Mr. Wright's job to chase after

shoplifters, and the police chief in *Black* had no job responsibilities on the fire truck. Mr. Marrs's case is meaningfully distinguishable. He was standing on the platform outside the back of the kitchen — a place where it was reasonable for him to be — and he forgot to step over a broken stair. This is a "conduct within the sphere of employment" case, and the commission correctly held that Mr. Marrs's injury is compensable.

C. The Appellant's Arguments Do Not State the Facts Correctly, Do Not Discuss the Controlling Principle of Law, and Rely on a Case That Actually Supports the Commission's Decision.

In arguing for reversal, Saluda's suggests that because Mr. Marrs had been instructed not to use the back steps, his smoke break was not allowed under the personal comfort doctrine. (Brief of Appellant, p.7). Saluda's also argues that Mr. Marrs was given a "specific prohibition" not to use these stairs and contends that the Supreme Court's decision in *Johnson v. Merchants Fertilizer Co.* suggests that Mr. Marrs's case is not compensable. (Brief of Appellant, pp.8-9). None of these arguments should be persuasive.

i. The Facts Do Not Support the Argument That Mr. Marrs's Smoke Break Was Not Allowed.

The record does not support the argument that the back stoop was off limits and that Mr. Marrs's smoke break was not allowed. According to the owner of the restaurant, this particular step was the only step in the flight of stairs that was in disrepair. (R.p.115, line 15 - p.116, line 1). There is no evidence that Saluda's ordered employees to stay completely off the platform at the top of the stairs; in fact, during the trial in front of the hearing commissioner, the lawyer representing Saluda's suggested that the employees could avoid the defective stair when removing trash from the kitchen by standing on this platform and

throwing the trash into the dumpster below. (R.p.99, line 12 - p.100, line 12). On this point, the argument Saluda's is advancing is not supported by the evidence.

ii. The Appellant's Brief Never States the Applicable Principle of Law, and the Primary Authority Relied-on Actually Supports the Commission's Decision.

At no point in its principle brief does Saluda's state the relevant principle of law. Saluda's never describes that a violation of a rule concerning conduct while in the sphere of employment will not bar the right to compensation. Instead, Saluda's brief seeks to draw a distinction between a "warning" to a employee and a "specific instruction" or "order" to an employee. (Brief of Appellant, pp.4-5).

The rule draws no such distinction. The rule assumes that an employee has violated an employer's order and asks whether the order governed the employee's conduct while engaged in work or whether the order set the boundary of work itself. If the existence of a specific order of prohibition was all that mattered, any violation of any rule would bar compensation. The rule would be written differently.

The case on which Saluda's places its principle reliance — *Johnson v. Merchants Fertilizer Co.* — actually helps to make Mr. Marrs's point. The circumstances that led to the *Johnson* case were tragic; the injured worker in *Johnson* was killed when he went in to an area of the fertilizer plant that he had been warned to avoid and he got caught in a piece of machinery. This worker had been employed at the plant for four or five years prior to his injury, but he had only worked the floor where the accident occurred on one previous occasion. The employer argued that the accident was not compensable because it had

forbidden the employee from going in this area, but the commission rejected that argument and the Supreme Court affirmed. The Court wrote "there was evidence before the Commission which justified the conclusion that the death of Willis Johnson arose 'out of and in the course of the employment.'" 198 S.C. at 378, 17 S.E.2d at 696-97.

Some of the circumstances present in *Johnson* are similar to the circumstances of Mr. Marrs's case. For example, although the employer in *Johnson* explained that he had warned the employee not to go near the machinery, the court observed that there was no actual line of division on the factory floor beyond which the employee was forbidden to go. *Id.* at 377-78, 17 S.E.2d at 696-97. The Court also observed that the circumstances suggested that the warning to the employee amounted to "nothing more" than a warning to exercise due care when in the vicinity of the dangerous machinery. *Id.* at 377-78, 17 S.E.2d at 697.

This is comparable to Mr. Marrs's case in that there was nothing wrong with the back staircase at Saluda's except for the single defective step. Put differently, there was no clear separation between a permissible area and a "forbidden" area. And not only was there no clear separation, Saldua's chose to keep the stairs accessible to employees; the kitchen door had to remain unlocked in order to satisfy the fire code. It is one thing for an employer to make a relatively small area — one step, or, the steps but not the stoop — off limits. It is another thing to keep an off-limits area accessible for the specific purpose of allowing employees to use that area as the escape route. It would be like the employer in *Johnson* telling the worker to avoid the drive shaft so long as things are normal, but to jump through the hole next to the shaft in the event of a fire.

For another example, the *Johnson* court wrote that it was possible that the injured worker had been in the area of the shaft because he was reasonably going about his work. The court wrote that the worker had work-related responsibilities on that particular floor of the factory and could have been taking a view of the floor area he was going to sweep. *Id.* at 379-380, 17 S.E.2d at 698.

In a similar fashion, there was nothing wrong with Mr. Marrs standing on the back stoop to take his smoke break, and Saluda's did not contest that Mr. Marrs began traveling down the stairs because he was engaged in a conversation about the work he needed to do in the kitchen. See (R.p.23, ¶6). Just as it was not unreasonable as a matter of law for the worker in *Johnson* to be near the drive shaft, so too was it not unreasonable as a matter of law for Mr. Marrs to have been where he was when he suffered his injury. The Court should accordingly reject the argument that the *Johnson* decision counsels against the finding that Mr. Marrs's injury is compensable.

CONCLUSION

The commission was correct when it held that Mr. Marrs's injury occurred while he was within the course and scope of his employment. He was engaged in activities that were a part of his job, and his violation of his employer's request that he not use the back stairs did not take him outside the sphere of his employment. This Court should affirm the commission's decision.

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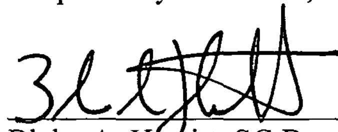
Respectfully submitted,

December 12, 2012



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Final Brief of Respondent* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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December 18, 2012
Columbia, South Carolina

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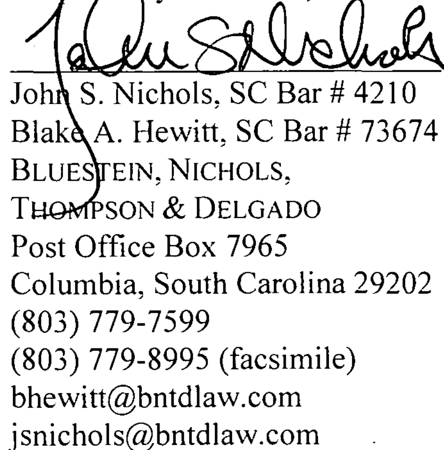
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

December 18, 2012

Respectfully submitted,



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