

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

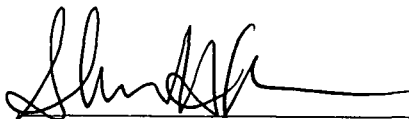
Andrew Marrs,..... Respondent,

v.

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

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

FINAL REPLY BRIEF OF APPELLANT



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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 known defective stairs and Mr. Marr's was given an instruction of prohibition not to use the stairs?

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.

ARGUMENTS

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

(Respondent's Arguments A&B)

The Respondent contends that his injury was compensable because he was disobeying instructions that governed the employee's conduct inside the sphere of employment. The Respondent quotes the case of Wright v. Bilo, to support his position. In Wright v. Bi-Lo 442 S.E.2d 186, 314 S.C. 152 (Ct. App. 1994) the court stated that:

When the employer limits the 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.

It is clear that the Wright v. Bilo case actually supports the Appellant's position as the prohibition of the respondent to not use the known and defective stairs was a rule of

prohibition of the sphere of the respondent's employment and not conduct of the Respondent within the sphere of employment.

In Wright v. Bilco, a Widow sought workers' compensation benefits for the death of her husband from a heart attack while pursuing suspected shoplifter. The Court of Appeals held that evidence established that the employee left the sphere of his employment as a grocery bagger by violating specific orders not to confront, pursue, or apprehend suspected shoplifters and, thus, the widow was not entitled to benefits. Wright v. Bi-Lo 442 S.E.2d 186, 314 S.C. 152m (Ct. App. 1994).

The claimant was a cook. His job duties did not involve using known dangerous and defective stairs to smoke. The Appellant's smoke break was not even allowed under the personal comfort doctrine because he had no reason to be in the dangerous area taking that break after being instructed by his employer not to go in that area. (R. p. 143 lns. 2-10). The stairs where the respondent was taking his smoke break were defective, and this was known by him: *Cross Examination of Marrs*

Q. Okay. Got that clear. Thank You. Appreciate that. **You were aware anywhere from two to four weeks before you went down the stairs that the stairs were broken correct?**

A. **Yes, sir.**
(R. p. 86 lns. 2-6).

Moreover, the area of the stairs was prohibited from use and the employer ran tap across the area to prevent access: *Cross Examination of Andrew Marrs*

Q. you testified to me earlier and told me did you not, that there was a tape that ran down just on the stair itself, but criss-crossed running from the top rail down to warn people about this broken stair is that correct?

A. sir, the tape ran from the top of the rail to the bottom of the opposite side at the step. It wasn't from the top of the stairs to where the step was.

Q. That is your testimony?

A. I'm sorry. I was just trying got clarify what you were saying.

Q. Okay. It's your testimony There will be other witnesses but your testimony then it wasn't just on the stair itself. **It's running from the top at an angle down to the bottom to the left correct?**

A. At the step.

(R. p. 86 lns. 24-25; R. p. 87 lns. 1-16).

As evidenced by the testimony at the hearing, the Appellant Saluda's did not limit the claimant's conduct as a cook, but rather limited his sphere of employment by instructing him not to use the dangerous and defective stairs and taping off the area. The claimant was clearly aware that this area was dangerous: *Cross Examination of Andrew Marrs*

Q. You were aware that at least two other employees had fallen on these stairs or had some incident on the stairs is that correct?

A. Yes, sir.

(R. p. 86 lns. 7-10)

The respondent contends that the cases of Black v. Town of Springfield and Wright v. Bilu support his position. In the Black case, the claimant was a police officer who was specifically told not to ride on the fire truck while helping the fire department because of his age and health conditions even though some of the other police officers could ride on the trucks. The claimant did so any way and suffered an injury resulting in death and his claim was denied.

In this case, the claimant as well as his co-workers, were instructed not to use the known defective stairs. The claimant used the stairs and an injury resulted from that use. Therefore, it is clear that the Black case actually supports the Appellant's position.

The respondent next contends that he was not doing something that he had been told was not 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 were broken. It is clear that standing on the defective stairs while smoking is not a part of the claimant's job as a cook. Moreover, the claimant was specifically prohibited from using the defective stairs as they had been taped off. Therefore, it is clear that the claimant was outside of the sphere of his employment when this accident occurred. There was evidence that management instructed employees not to use the back stairs and routinely stretched tape diagonally across the space of the broken step. While as the Respondent argues that employees routinely used the back stairs to remove trash from the kitchen and for food deliveries, there was no evidence that the claimant's job duties involved doing either activity. Actually, there was evidence that employees would simply go to the top platform before reaching the stairs and throw their trash over the railing into the dumpster. (R. p. 100 lns. 3-10).

II. The Appellant's brief does state the applicable principle of law

(Respondent's Argument C)

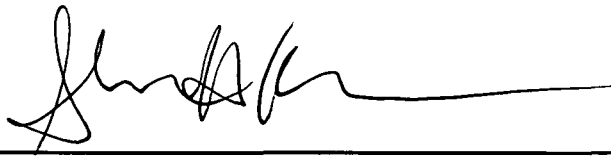
The Respondent also argues that the Johnson case, which was used by the Appellants, supports his position and that the Appellants did not state the applicable principle of law. Johnson v. Merchs. Fertilizer Co. 17 S.E.2d 695, 198 S.C. 373 (1941). The Johnson case was used as an example of the difference between merely warning an

employee not to do something and specifically instructing or prohibiting an employee not to do something. Basically the Court in the Johnson case held that the warning by the employer, Merchant Fertilizer Company, was insufficient as the instructions were not clear and the claimant was not educated. In Johnson, the court determined that it was not unreasonable for an employee to be near the drive shaft because there was no separation of the permissible area and forbidden area. The Respondent then states that as in the Johnson case, there was no clear separation between a permissible area and forbidden area of where the claimant stepped.

However, it was unreasonable for the claimant to be there. He was told not to be there. His job duties did not involve smoking or conversing with employers on the dangerous and defective stairs, and he was specifically instructed not to use the stairs. The stairs were clearly separated by a permissible area of where he could be by the tape. What else could the employer do? They gave multiple instructions not to use the stairs and barricaded the stairs. They did everything short of hiring an armed guard to monitor the stairs.

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.



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December 20, 2012

Certificate of Counsel

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

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