THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

Op. No. 2011-UP-131 (S.C. Ct. App. Refiled June 3, 2011)

Ricky Burton, ... Petitioner,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance, ... Respondents.

BRIEF OF RESPODNENTS

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A. Did the Workers' Compensation Commission correctly apply Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999), to the present case?

B. Did the Court of Appeals correctly decline to address Claimant's argument concerning the "Private Errand Rule" on the basis that it was not raised to the Appellate Panel?

C. Did the Workers' Compensation Commission correctly find the employer received no benefit from Claimant's activities so as to preclude compensability of his injury?

STATEMENT OF THE CASE

The Claimant alleged he sustained a work-related injury on August 18, 2007. The Claimant is employed by the Defendant Hardaway Concrete. After completing a job on August 18, 2007, the Claimant and his supervisor left Hardaway Concrete to remove debris from a private individual's property. The Claimant sustained a back injury while removing and disposing of the debris.

It is the Defendants' position the alleged injury did not arise out of and in the course of the Claimant's employment because the Claimant's assistance in debris removal and disposal provided the Employer no direct or indirect benefit pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

A hearing was held on March 19, 2008 in Columbia, South Carolina. The Hearing Commissioner found that Hardaway Concrete was a concrete operation and was not in the business of debris removal or disposal. The Commissioner determined the alleged injury was outside the scope of employment because the Employer did not directly or indirectly benefit from Claimant's work of moving and disposing of debris.

An Appellate Panel Review was held on October 29, 2008 in Columbia, South Carolina. The Appellate Panel affirmed the Hearing Commissioner's Findings of Fact and Conclusions of Law.

The Claimant filed a Notice of Appeal to the Court of Appeals. On March 29, 2011, the Court of Appeals entered an opinion affirming the Appellate Panel's decision. Burton v. Hardaway Concrete Co., Op. # 2011-UP-131(S.C. Court of Appeals refiled June 3, 2011). The

Claimant filed a Petition for Rehearing, and the Court of Appeals denied the Petition but issued a new opinion. The Claimant filed a Petition for Rehearing as to the substituted opinion, and the Court denied the Petition on August 24, 2011.

This Court granted the Claimant's Petition for Writ of Certiorari on October 31, 2012.

FACTS

The Claimant was forty-three years old at the time of the hearing, and he has a high school diploma (App. p. 92, lines 5-19). At the hearing, he testified he had been employed with the Employer as a cement truck driver for the past eleven years (App. p. 93, lines 20-22). On August 18, 2007, the Claimant alleged that after he returned to the Employer's facility from a jobsite, he asked his supervisor Scott Jones for gas money (App. p. 98, lines 2-7). Rather than give the Claimant money, the Claimant testified Mr. Jones asked the Claimant to accompany him to the home of a third-party to remove some tree debris (App. 98, line 5-p. 99, line 7). The Claimant testified he and Mr. Jones then drove to a third party's property in the company vehicle and loaded tree debris with a shovel and pitchfork (App. p. 98, line 24-p. 99, line 23). Upon loading the vehicle with debris, the Claimant and Mr. Jones returned to the Employer's place of business and discarded the debris behind the company premises (App. p. 99, lines 1-7). The Claimant testified he and Mr. Jones made two trips to the third party's property to load debris and then returned to the Employer's place of business to discard the debris (App. p. 100, lines 4-7). The Claimant added that while loading and unloading the truck, he informed Mr. Jones that he felt pain in his legs and back, but he continued to work until the job was complete (App. p. 100, lines 8-20).

The Claimant testified he clocked out at 4:54 P.M. on August 18, 2007, after he completed the tree removal and disposal (App. p. 100, lines 21-23). The Claimant testified he received a cash payment of twenty-five dollars ($25.00) for helping with the removal (App. p. 105, lines 13-17). He also testified he received his normal pay from the Employer consistent with his time records (App. p. 105, lines 18-22). The Claimant testified this work, which entailed "shoveling wood

chips on the company pickup truck," had nothing to do with his usual employment in which he performed the work of a cement truck driver (App. p. 117, line 19-p. 118, line 2). In describing his typical daily work duties, the Claimant stated that after he takes the truck back to the plant, he clocks out and goes home if he does not have anything else to do. (App. p. 96, lines 3-17).

On August 20, 2007, the Claimant was unable to report to work as a result of his back being "stiff and sore." The Claimant was out of work on August 21, 2007, but he reported to work on August 22, 23, and 24, 2007. The Claimant's last day of work was August 24, 2007.

The Defendants called Scott Jones, Joe Butler, Pickens Hare, and Jay Metts as witnesses. Scott Jones testified he had worked for the Defendant for the past twelve years at the Batesburg plant and was the Claimant's supervisor. (App. p. 122, line 11). Mr. Jones testified that on August 18, 2007, the Claimant and Joe Butler were pouring concrete for a job contracted at Amick's Poultry. (App. p. 124, lines 22-25; p. 125, lines 1-2). Mr. Jones testified he originally asked Mr. Butler if he would like to accompany him to remove tree debris from Mr. Pickens Hare's residence. (App. p. 126, lines 12-20). However, after the Claimant asked Mr. Jones to borrow money and because Mr. Butler had not returned from his last concrete pour at the Amick's Poultry work site, Mr. Jones decided to ask the Claimant whether he would be interested in the debris removal job. (App. p. 126, lines 6-9). At approximately 4:45 P.M., Mr. Jones spoke with Mr. Butler and informed him that he and the Claimant were going to travel to Mr. Hare's residence to remove the debris. (App. p. 143, lines 2-16). Mr. Jones and the Claimant clocked out at approximately 5:00 P.M. (App. p. 126, lines 10-23). At the hearing, there was a dispute as to whether the Claimant clocked-out before removing the debris. However, the Hearing Commissioner determined that although the Claimant was on the clock when he removed the debris, such a finding was not outcome determinative.

Mr. Jones testified he and the Claimant used the company vehicle to transport the tree debris. (App. p. 127, lines 8-21). Mr. Jones confirmed he and the Claimant made two trips back and forth from the company premises to Mr. Hare's residence. (App. p. 128, line 11). The tree debris was loaded onto the company vehicle, transported back to and discarded behind the company premises. (App. p. 101, lines 1-7). Mr. Jones testified he and the Claimant completed the tree debris removal and were each paid twenty-five dollars by Mr. Hare. (App. p. 130, lines 4-11).

Joe Butler testified he had worked for the Employer for approximately six years as Mr. Jones' assistant and at times as a cement truck driver (App. p. 139, lines 21-25). Mr. Butler testified that on August 18, 2007, he and the Claimant were delivering cement to Amick's Poultry. (App. p. 140, lines 5-7). According to Mr. Butler, the job consisted of three trips to Amick's Poultry, of which he personally made the first and third trips while the Claimant made the second trip. (App. p. 141, lines 1-3). At 4:40 P.M., Mr. Butler placed a telephone call to Mr. Jones confirming he had not completed the job, but he was close to completion. During that telephone conversation, Mr. Jones told Mr. Butler that he and the Claimant were leaving shortly to remove tree debris. (App. P. 143, lines 2-19). When Mr. Butler arrived at the company premises after 5:00 P.M., neither Mr. Jones nor the Claimant was present. (App. p. 144, lines 15-17).

Pickens Hare testified he owns the property at which the tree debris was removed. (App. p. 150, lines 15-19). Mr. Hare testified he is not an employee of the Defendant, but that he is a personal acquaintance of Mr. Jones. (App. p. 150, lines 11-12; p. 152, line 25; p. 153, lines 1-5). Mr. Hare testified that Mr. Jones and the Claimant arrived at his property after 5:00 P.M. (App. p. 151, line 21). Upon completion of the work, he testified he paid Fifty dollars for the debris removal. (App. p. 152, lines 6-8).

Jay Metts testified he is the Manager of Human Resources, Safety, and Environmental Affairs for the Defendant. (App. p. 156, lines 23-24). Mr. Metts testified that following August 18, 2007, the Claimant approached him to report a back injury. When asked how the Claimant injured his back, the Claimant reported that the back injury was attributed to "old age." (App. p. 157, lines 22-24). Mr. Metts testified he was later made aware of the events that took place on August 18, 2007 after the Claimant filed the workers' compensation. (App. p. 159, lines 21-23).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> * * * * *
>
> (d) affected by other error of law; [or]
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by 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 in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is

no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). An award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). See also, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979). Furthermore, a court "may reverse where the decision is affected by an error of law." Stephens v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Finally, the question of whether an accident arises out of and in the course and scope of employment is largely a question of fact for the Appellate Panel. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999).

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE WORKERS' COMPENSATION COMMISSION'S DECISION THAT THE CLAIMANT'S INJURIES WERE NOT COMPENSABLE WITHIN THE SCOPE OF HIS EMPLOYMENT.

A. The Workers' Compensation Commission Correctly Applied *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999) to the Present Case.

The Commission correctly held that pursuant to Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 525 S.E.2d 532 (1999), "the injury sustained on August 22, 2007 is outside the scope of employment because the Employer was neither directly nor indirectly benefited by the debris removal work performed by the Claimant and his manager." (App. p. 80). Pursuant to Hicks, the "key factor in determining the [Claimant's] entitlement to compensation . . . is whether the work benefitted the employer." Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)). Therefore, because the evidence did not establish any benefit conferred upon the Employer, the injury was correctly found not to be compensable, and this Court should affirm this conclusion.

As a prelude to his argument, the Claimant cited basic case law for the proposition that the purpose of the Workers' Compensation Act is inclusion of employers and employees and not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950); Deberry v. Coker Lines, 234 S.C. 304, 108 S.E.2d 114 (1959); Brown v. Morehead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (1962); Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962). Respondents note, however, the aforementioned policy relates to jurisdiction. In this case, the dispute entails compensability. Thus, the policy of inclusion noted by the Claimant does not apply to the present case. The question, instead, is whether the Claimant showed, by a preponderance of the

evidence, that his activity benefited his employer. In short, the *jurisdiction* of the Workers' Compensation Commission is not an issue in this case, and nothing in the case law cited by the Claimant provides a mandate that once jurisdiction with the Workers' Compensation Commission is established, questions of compensability should be read in favor the employee. As noted above, the substantial evidence supports the Commission's finding that the activity in question did not benefit the employer, and the cases cited by the Claimant do not change the underlying employer benefit rule in South Carolina.

The Claimant distinguished the facts of Hicks from the facts of the present case in an attempt to support his argument that the Commission should have found his injury to be compensable. Respondents have addressed those distinguishing facts below, but assert that regardless of factual differences, the rule in South Carolina with regard to whether an injury is compensable remains the same: the injury is compensable as within the scope of employment if the work benefitted the employer. Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)). Thus, regardless of the distinguishing facts noted by the Claimant and unless the Commission's findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," this Court should affirm the Commission's decision, finding no benefit to the Employer and thus no compensable injury. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

To show the present case differs from Hicks, the Claimant emphasized the Commission's finding that he was paid twenty-five dollars ($25.00) for removing debris, payment the Claimant did not anticipate receiving (App. p. 80). It is important to note that both the Claimant and his supervisor received this payment from Pickens Hare, the property owner who "had no connection with the Employer" (App. p. 79). At best, both the Claimant and his supervisor's

actions functioned to benefit themselves as individuals, not each other, and not the Employer. The Claimant also noted that unlike the claimant in Hicks, he was injured on a work day and clocked in before he was injured. The Respondents do not argue with these distinctions, but the Respondents note these differences do not change the Commission's findings that the work the Claimant performed did not benefit the employer. The fourth difference the Claimant attempted to show is not supported by the evidence. In fact, the Claimant introduced for the first time at the Court of Appeals and *without citing any support in the Record* the idea that he benefitted the employer by being present on the premises and by assisting his supervisor. This assertion directly contradicts the Commission's findings that "the Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant and his manager" (App. p. 79). More importantly though, the argument amounts to nothing more than speculation since there is no basis in the record for it. By making such blind assertions at the appellate level without any factual support in the Record, the Claimant is doing nothing more than asking this Court to make findings without any foundation in the Record and substitute its judgment for that of the Workers' Compensation Commission.

The Claimant cited the dissent in Hicks which noted the majority opinion relied on Fountain, an opinion in which North Carolina courts were heavily cited. The dissent noted that "[w]hile these North Carolina decisions *do not* totally jettison the 'employer benefit' requirement, they do hold that even a slight, indirect benefit to the employer will suffice where the employee is acting pursuant to instructions by his superior." Hicks, 335 S.C. at 50, 515 S.E.2d at 534 (Toal, J., dissenting)(emphasis added). Although Appellant relies on this dissent, the dissent nevertheless acknowledges the employer benefit requirement remains the key to a finding of compensability in South Carolina. In the present case, the Commission did not find a

benefit; in fact, it expressly found no benefit was conferred, either direct or indirect (App. p. 79). Because the Claimant failed to establish any benefit to the employer, the Court should affirm the Commission's decision.

The Appellant cited three cases from North Carolina in order to reason that because these cases were found to be compensable, the present case should also be found compensable. The Appellant failed to note, however, that in each of these cited cases, the Court found the evidence reflected *some* benefit was conferred upon the Employer in order to justify compensability. Additionally, the argument that North Carolina opinions should be persuasive in South Carolina does not change the well-established law in South Carolina that compensability depends on whether the work benefitted the employer. Hicks, 335 S.C. 46 at 49, 515 S.E.2d at 535 (citing Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)).

In Pollock v. Reeves Brothers, Inc., 335 N.C. 287, 291, 328 S.E.2d 282, 285 (1985), where a North Carolina employee died during a plane trip in which he was returning from having new numbers put on an aircraft used primarily for Employer's business, the North Carolina Industrial Commission made the following finding of fact: "[a]t the time complained of, [the Claimants] were engaged in the discharge of a function which was calculated [to] further indirectly the employer's business." The North Carolina Supreme Court found a benefit was conferred upon the Employer, and thus an award of workers' compensation benefits was appropriate, basing the decision on the "well-settled rule" that "compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred." Id. at 292, 328 S.E.2d at 285 (citing Guest v. Iron & Metal Co., 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955)).

In Stewart v. N.C. Dept. of Corrections, 29 N.C.App. 735, 737, 225 S.E.2d 336, 337

(1976), where a correctional officer helped build a shelter for a picnic area during off hours, the North Carolina Industrial Commission found "the State would . . . benefit indirectly by the completion of this project." The North Carolina Court of Appeals affirmed the finding of an injury by accident arising out of and in the course of Plaintiff's employment with Defendant based on the rule that "[w]here the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation." Stewart, 29 N.C.App. at 737, 225 S.E.2d at 338 (citing Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968)). The Court of Appeals further reasoned, "[s]o long as ordered to perform by a superior, acts beneficial to the employer which result in injury to performing employees are within the ambit of the act. Stewart, 29 N.C.App. at 738, 225 S.E.2d at 338 (citing Aldridge v. Foil Mtr. Co., 262 N.C. 248, 136 S.E.2d 591 (1964)).

In Floyd v. First Citizens Bank, 132 N.C. App. 527, 512 S.E.2d 454 (1999), the employee injured her back while buying breakfast for her office at the direction of her supervisor. The North Carolina Court of Appeals found the claim compensable because there was evidence the employee's actions were beneficial to the employer. Id. at S.E.2d 456 (holding that "[s]o long as ordered to perform by a superior, acts beneficial to the employer which result in injury to the performing employees are within the ambit of the act."

Pollock, Stewart, and Floyd involve awards of compensation based on the finding of a *benefit* conferred upon the employer. Once again, the findings in the present case that there was no benefit to the employer are supported by the substantial evidence in the record.

The Claimant also cited several cases from other jurisdictions that based the award of compensation on the "private errand rule," a rule which allows for compensation for an injury that results from a task which benefits the employer or the superior who ordered the task. South

Carolina has not adopted this rule to expand the benefit rule to include superiors. Regardless, though, of the legal concept followed in the jurisdictions the Claimant cited, the Claimant failed to establish any evidence that his work provided a direct benefit to his supervisor.

In Begel v. Wisconsin Labor and Industry Review Comm'n, 246 Wis.2d 345, 362, 631 N.W.2d 220, 228 (2001), the Court of Appeals of Wisconsin reversed the Labor and Industry Review Commission's denial of benefits, reasoning that "the service rendered benefitted [the Claimant's] supervisor." The Court acknowledged the rule that "[g]enerally, service is incidental to employment when 'its performance inured to the benefit of the employer." Id. at 356, 631 N.W.2d at 225. Although the Court of Appeals extended this rule to include "private errands," or "a service for the personal benefit of the employer or the employee's superior," the award of compensation in the case was still based on a finding of a benefit as established by the evidence. Id. at 357, 631 N.W.2d at 225.

In Wilson & Co., Inc. v. Curry, 259 Ala. 685, 68 So.2d 548 (1953), and Keene v. Insley, 26 Md.App. 1, 337 A.2d 168 (1975), the Courts awarded compensation solely based on the private errand rule. In Wilson, where the Claimant was injured while performing a task for the private benefit of one of his superiors, the Maryland Supreme Court held the injury was compensable. Curry, 259 Ala. at 687, 68 So.2d at 549. In Keene, the Alabama Court of Special Appeals held that where the "employee of a partnership which was engaged in pier business performed various duties for [the] partnership on Saturday," including having cut grass at one partner's garage on previous Saturdays and was injured while cutting a third party's grass so the third party could assist the partner, the injury was compensable. Keene, 26 Md.App. 1, 337 A.2d at 168.

Begel, Curry, and Keene address the "private errand rule" in the context of a benefit to

the supervisor who ordered the task. Because South Carolina has not adopted the "private errand rule" and requires a showing of a benefit to the employer, Respondents maintain the Claimant's reliance on these cases is misguided. Even if this court expanded the rule set forth in Hicks to include a benefit to the superior who ordered the task, there is no evidence the Claimant's actions rendered a personal benefit to his supervisor. Specifically, the Claimant offered for the first time in his brief to this Court the argument that his supervisor benefitted by receiving money for the debris removal. Other than the fact that, like the Claimant, the supervisor received money, there is no specific finding by the Commission that it was a benefit to the supervisor. It is also important to note that even if it was a benefit to the supervisor, it was a benefit he created for himself since he too performed the same work as the Claimant and received the same pay. In short, any purported benefit received by the supervisor was independent of the actions of the Claimant.

In the remaining case cited by the Claimant and discussed below, the courts either concluded there was a benefit to the employer or that an analysis of the employer benefit rule was not necessary.

In Pridgen v. Industrial Comm'n, 70 Ariz. 149, 217 P.2d 592 (1950), the Supreme Court of Arizona held that where a journeyman glazier was fatally injured while helping corral horses at a ranch owned by his employer, his injuries were compensable. The Pridgen Court based its holding on Arizona's workers' compensation law which provided that an employee who performs services outside the duties of his usual employment pursuant to the employer's instructions "is within the protection of the act while performing such services." Id. at 152, 217 P.2d at 594. Further, the workers' compensation insurance policy in question covered both the owner's glass and mirror operations and the ranch operations. Id. Because Arizona's Workers'

Compensation Act does not turn on the question of whether there was a benefit, the holding of the Pridgen case is not persuasive in the present case.

In Ferragino v. McCue's Dairy, 128 N.J.L. 525, 26 A.2d 730 (1942), the Supreme Court of New Jersey affirmed the award of workers' compensation benefits to a retail milk employee injured in a car accident while on the way to move a customer's piano. The Supreme Court acknowledged the employee was benefitting the Employer by helping build goodwill and retaining "the customer's friendly interest." Id. at 527, 26 A.2d. at 731. Similarly in Nichols v. Davidson Hotel Co., 333 S.W.2d 536 (1960), the Court affirmed the award of compensation to the employee of a hotel who worked as a bellhop and handyman but was killed in an automobile accident on the way to chauffeur girls to a party. The Court supported its holding by emphasizing the fact that the claimant's employer "benefitted from the errand in that he was able to remain at the hotel and work while the errand was being carried out." Id. at 545. In Cook v. A.H. Davis & Son, Inc., 567 A.2d 29 (1989), the Delaware Superior Court held injuries sustained by the claimant while repairing his supervisor's truck had occurred within the course of employment. Where the truck was used in performing daily job functions, the Court explained that the Claimant's injuries occurred within the course of employment because the "truck was necessary to do the job." Id. at 31. Thus, the Claimant's repair was recognized as a benefit to the employer by the Court. All three of these cases apply the employer benefit rule, so presumably, they would be compensable in South Carolina.

In Zapos v. Demas, 106 Pa.Super. 183, 189, 161 A. 753, 756 (1932), the employee of a restaurant proprietor was killed in a car accident on the way to the restaurant after purchasing groceries for both the restaurant and his own household and delivering his portion to his house. Id. at 185, 161 A. at 754. The Zapos Court noted that compensable injuries included those

"sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer." Id. at 186, 161 A. at 754. The Court further reasoned the employee left to perform "an errand, the main purpose of which . . . was most intimately connected with his employer's business." Id. at 188, 161 A. at 755. Such an errand seemed to fall within the purview of the benefit rule, even if the Pennsylvania court did not use the same language that is employed in Hicks.

In Nugent Sand Co. v. Hargesheimer, 254 Ky. 358, 360, 71 S.W.2d 647, 649 (1934), the Kentucky Court of Appeals affirmed the award of compensation, reasoning the claimant, a mechanic who occasionally went to the home of his Employer to "do odd jobs and make minor repairs on the property," was "working in the sphere of activity in which he was employed." Thus, in this case there was no substantial question of whether or not the work was outside of the normal scope so as to warrant the benefit inquiry. The Court of Appeals further reasoned that "it was . . . regarded in respect both to the employer and the employee as incidental to such business, rather than as a departure or a distinct engagement." Id. As such, an analysis of a "benefit" was not necessary, so it is not persuasive to the present case.

B. The Court of Appeals Correctly Declined to Address the Claimant's Argument Concerning the "Private Errand" Rule on the Basis that it was not Raised to the Appellate Panel.

The Claimant argues the Court of Appeals wrongly concluded his "private errand rule" argument discussed above was not preserved for appellate review. However, the Court of Appeals' ruling was proper because the Claimant failed to raise this argument to the Appellate Panel.

The Claimant first argues the Hearing Commissioner's Order noted that "Claimant

contends he was instructed by his manager to leave the work premises while 'still on the clock' to assist his manager in the removal and disposal of leftover tree debris." (App. p. 76, ¶ 3). This notation by the Hearing Commissioner in the Statement of the Case (App. p. 76) is relevant to the Claimant's argument during the hearing that his injury was compensable because he was still on the clock at the time he sustained his injury. The Claimant did not rely on this fact to support a "private errand rule" argument. The Claimant also notes the Hearing Commissioner's Order found the supervisor "instructed the Claimant to accompany him in a company owned vehicle to Pickens Hare's property to assist in removing and disposing of tree debris." (App. p. 80, Finding of Fact No. 1). This fact was relevant to determining whether the work the Claimant performed benefitted the employer, the sole focus of the hearing. The Claimant also contends the Commissioner's ruling that these facts were insufficient to provide coverage under the Act proves the he raised "private errand rule" argument, and the Commissioner ruled upon it. However, Conclusion of Law #2 (App. p. 81) only addressed the "employer benefit rule" set forth in Hicks.

Despite there being no mention of the "private errand rule," the Claimant now requests this Court infer from the Findings of Fact and Conclusions of Law that the Commissioner distinctly addressed this issue on the grounds that the private "private errand rule" is discussed in the Hicks dissent. However, the "private errand rule" is never discussed in the Hicks dissent. Instead, the minority focused on its interpretation of South Carolina cases in which compensation had been awarded in circumstances in which "the benefit to the employer was only slight or indirect." Hicks, 335 S.C. at 51, 515 S.E.2d at 534 (Toal, J., dissenting). The dissent did not advocate supplanting the "employer benefit rule" with a 'special errand rule" that required no finding of a benefit to the employer. Instead, the minority simply disagreed with the majority's

application of the evidence in the case to the employer benefit rule, concluding the employee "conferred an indirect benefit on his employer." Id.

It is evident the "private errand rule" issue was not raised to the Workers' Compensation Commission, and the Court of Appeals properly found that the issue was not preserved for appellate review. Had the issue been raised and argued, the Commission's Order would have addressed it. At the very least, the Claimant would have raised the purported failure of the Appellate Panel to address the issue as a ground for his appeal to the Court of Appeals. Rather, a discussion or finding regarding the "private errand rule" does not appear a single time in the Order of the Hearing Commissioner or of the Appellate Panel because the Claimant raised it for the first time at the Court of Appeals.

The Claimant next argues the Respondents briefed the "private errand rule" argument in their Final Brief to the Court of Appeals and did not contend in that Brief that the issue was not preserved for review. First, the Claimant failed to cite any authority that required the Respondents to make such an objection. Second, and perhaps more importantly, the Respondents were required to respond to the arguments set forth by the Claimant. See Turner v. South Carolina Dept. of Health and Environmental Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008)(holding failure to respond to argument was confession that Commission ruled incorrectly and remanding for specific findings consistent with reversal); First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996)(noting if Respondent fails to respond to an issue in his brief, the Appellate Court may treat the failure to respond as a confession that the Appellant's position is correct), *reversed on other* grounds, 328 S.C. 290, 494 S.E.2d 429 (1997). In short, the Respondents' briefing of the "private errand rule" argument set forth by the Claimant for the first time at the Court of Appeals does not lead to an

inference that the Claimant presented this argument to the Appellate Panel. In briefing the argument, Respondents were merely fulfilling their duty to argue their position in opposition to the Claimant's Court of Appeals Brief and were in no way admitting or portraying the "Private Errand Rule" argument had been preserved for review or raised at any prior time in the case. There is simply no evidence in the record that the issue was ever raised at any level of the Workers' Compensation Commission.

C. The Workers' Compensation Commission Correctly Found the Employer Received No Benefit from Claimant's Activities so as to Preclude Compensability of his Injury.

The Claimant argued the Workers' Compensation Commission was incorrect in finding the Employer received no benefit from the Claimant's activities. An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Because the Claimant failed to support his argument by citing any testimony in the Record that established a benefit, this Court should affirm the Full Commission's findings.

The Claimant asserted the debris removal by the Employee conferred a direct benefit upon the Employer. Specifically, the Claimant argued that without the removal of the debris, the Employer could not have used the truck. The Claimant, however, failed to cite testimony evidencing that the Employer needed debris to be removed in order to use the truck. In fact, the *only* hearing testimony addressing a benefit involved Mr. Jones' response when asked whether moving chips with the Claimant benefitted the Employer, to which Mr. Jones responded, "No, Sir." (App. p. 136, lines 21-23). The Claimant also argued his work benefitted the Employer

indirectly by generating good will and improving its image with potential customers, and the work reduced Mr. Jones' time away from the Employer's premises. Finally, the Claimant argues for the first time in his brief to this Court that by providing assistance to his supervisor, he enabled his supervisor to spend less time away from the facility, thereby benefitting the employer. In making these arguments, however, the Claimant failed to cite any support in the record. In fact, the Claimant cannot show where any of these issues were explored with any of the witnesses during the hearing. In making these arguments at this stage, the Claimant assumes facts that were not established at the hearing.

The Claimant also cited South Carolina cases for guidance. In West v. Alliance Capital, 368 S.C. 246, 628 S.E.2d 279 (2006), this Court held that where the Claimant sustained an injury while repairing his own truck during working hours, the injury was compensable. The Court reasoned the injury "arose out of employment because the truck was being repaired for [the Employer's] benefit." Id. at 253, 628 S.E.2d at 283. Further, this Court noted the injury occurred in the course of employment because the work was performed "for the purpose of remedying the employer's vehicle shortage." Id. at 254, 628 S.E.2d at 283.

In Moore v. Family Service of Charleston County, 269 S.C. 275, 277, 237 S.E.2d 84, 85 (1977), this Court held that where the employee was injured while trying to balance "four volumes of professional books which . . . she had taken home for a specific business purpose in furtherance of a special service to be rendered for her employer," the determination that Claimant's injuries did not arise out of and in the course of employment was contrary to and unsupported by evidence.

In Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007), this Court held that where an Employee was injured while removing debris from a road, the injury arose out of and

in the course of employment. The Grant Court concluded the Claimant chose to remove a hazard "to benefit himself, his co-worker father, and his customers." Id. at 202, 641 S.E.2d at 872.

In West, Grant, and Moore, there was a finding of a benefit to the employer in each. However, the Claimant cannot cite evidence reflecting a benefit was conferred upon the Employer in the present case without the use of speculative facts not established during the hearing, so his reliance on these South Carolina cases is misguided.

It is important to note the underlying employer benefit rule is not in dispute in this argument presented by the Claimant, and he has not asserted the Commission made a legal error. Instead, the Claimant has simply asked this Court to find the work he performed benefited the employer and was, thereby, in the scope of his employment. As noted above, the question of whether an accident is in the course and scope of employment is a question of fact for the Appellate Panel. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999). In the present case, the substantial evidence in the record supports the findings reached by the Commission.

CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court affirm the decision of the Court of Appeals and conclude the Appellant's injury was outside the scope of his employment because the Employer was neither directly nor indirectly benefitted by the debris removal work performed by the Claimant.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY: _____

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January 28, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
G. Bryan Lyndon, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

Op. No. 2011-UP-131 (S.C. Ct. App. Refiled June 3, 2011)

Ricky Burton,.....Petitioner,

v.

Hardaway Concrete Co., Inc., Employer, and
Liberty Mutual Fire Insurance,.....Respondents.

CERTIFICATE OF SERVICE

I, Michael W. Burkett, do hereby certify that I am the attorney for the Respondents with **WILLSON JONES CARTER & BAXLEY, P.A.** in Columbia, South Carolina, and that on the 28th day of January, 2013, I mailed the foregoing Brief of Respondents to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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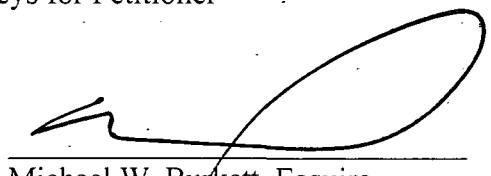

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January 28, 2013

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ricky Burton vs. Hardaway Concrete
WCC File No.: 0717674 DOI: 8/18/2007
Carrier: Liberty Mutual Fire Insurance Company - Claim No.: WC550-575832
WJC&B File No.: 0010.01718
Case Tracking No.: 2011-199766

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the *Brief of Respondent's* in this case. I have also enclosed a Certificate of Service of these documents on opposing counsel of record. Please return the additional copies to me via our courier.

Thank you for your assistance with this matter. If you need any addition information please do not hesitate to contact me.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Michael W. Burkett

MWB/twc
Enclosure(s)
cc: John S. Nichols, Esquire (w/enclosures)
Luther J. Battiste, III, Esquire (w/enclosures)