THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James, Avery B. Wilkerson, Jr., Commissioners

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Appellate Case No. 2013-000358
WCC File No. 1110704

Claudia Bryant-Perreira, Claimant,.....Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier, Defendants,.....Respondents.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 15, 2011, Claudia Bryant-Perreira was injured while working for her employer IMSCO/TFE Logistics Group, Inc. (R. p. 6 ¶¶ 3, 7; Order of the Appellate Panel FOF Nos. 3, 7). The Claimant/Appellant established a claim by filing a Form 50 on October 26, 2011. (R. p. 20; Form 50). Initially, the Defendants/ Respondents accepted the claim and paid for medical treatment, but then the Defendants decided to deny the claim. (R. pp. 30-41; Cl. APA pp. 1-12). On November 8, 2011, the Claimant requested a hearing by filing another Form 50. (R. p. 22; Form 50). The Defendants filed a Form 51 on December 6, 2011. (R. p. 24; Form 51). A hearing was held before Commissioner Andrea P. Roche on February 9, 2012 in Spartanburg, South Carolina. (R. p. 10; Decision of Single Commissioner 06/15/12). On June 15, 2012, the Single Commissioner issued a Decision and Order holding that the Claimant violated a safety policy of the Employer and therefore denied the claim. (R. p. 18; Decision of Single Commissioner p. 9). The Claimant served a Request for Commission Review (Form 30) on June 29, 2012. (R. p. 126; Form 30). The Appellate Panel of the Workers' Compensation Commission heard oral arguments on November 14, 2012 and issued a Decision and Order on February 5, 2013. (R. p. 2; Order of the Appellate Panel p.1). The Appellate Panel's Decision found that the Claimant violated a safety policy of the Employer and denied the claim. (R. p. 8; Order of the Appellate Panel p.7). In short, the Appellate Panel focused at the negligence or fault of the Claimant in a no-fault workers' compensation system. On February 19, 2013, the Claimant/Appellant served a Notice of Appeal on the Respondents. (R. pp. 160-162; Notice of Appeal, Certificate of Service).

FACTS

On July 15, 2011, the Claimant/Appellant, Claudia Bryant-Perreira, was working for IMSCO/TFE Logistics Group, Inc. (R. p. 168; Transcript of Hearing before the Single Commissioner (hereinafter "Hr. Tr.") p. 6). Prior to July 15, 2011, the Claimant had operated a walkie-rider on several occasions in the presence of her Employer, at work, and without any disciplinary action by the Employer. (R. pp. 175-176; Hr. Tr. pp. 13-14). In fact, in the past, the Employer had supervised the Claimant's operation of a walkie-rider. (*Id.*). She had training on a walkie-rider by the safety manager. (R. p. 176; Hr. Tr. p. 14). At the hearing, Ms. Janice Kutkus, the Human Resources Manager for the Employer, admitted the following:

> Q. She [Claimant] was allowed by the management to operate the machinery [walkie-rider] before she was certified, correct?
> A. Yes, sir.
> Q. She wasn't disciplined for doing that, right?
> A. No, sir.
> (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29).

The Claimant was a Quality Assurance Warehouse Associate for the Employer. (R. p. 168; Hr. Tr. p. 6). As part of her job, she would take boxes of apparel for Adidas and Reebok and stack them onto a pallet. (R. pp. 168-169; Hr. Tr. pp. 6-7). She would then use a pallet jack to pull the pallet to her work table. (*Id.*). At the work table, she would check the UPC codes and to make sure nothing was wrong with the clothing. (R. pp. 169, 177; Hr. Tr. pp. 7, 15).

On July 15, 2011, the Claimant injured her right shoulder and left hand/arm. The Defendants admit that the Claimant injured, at work, her right shoulder and left hand/arm on July 15, 2011. (R. p. 165, line 24 – p. 166, line 9; Hr. Tr. pp. 3-4). The

Claimant injured herself at work while attempting to move a walkie-rider that was blocking her path. (R. p. 170; Hr. Tr. p. 8). The Claimant was pushing a pallet jack that was stacked with boxes of merchandise. (R. pp. 169-171; Hr. Tr. pp. 7-9). She was trying to get to her work station to sort and inspect the clothing. (*Id.*). The corridor was too narrow for her pallet jack to pass by the walkie-rider that was blocking her path. (R. p. 170; Hr. Tr. p. 8). She only needed to move the walkie-rider two (2) feet to get her pallet jack through the corridor. (R. p. 171; Hr. Tr. p. 9). The Claimant, with both feet still on the floor, reached out with her right hand and turned the throttle on the walkie-rider so that "it would roll a couple of feet." (R. p. 172, line 12, R. p. 197; Hr. Tr. p. 10, line 12; p. 35). She only touched it with her right hand. (R. p. 172, line 25; Hr. Tr. p. 10, line 25). She did not stand on the walkie-rider. (R. p. 173, lines 14-15; Hr. Tr. p. 11, lines 14-15). It was the Claimant's intention to have the walkie-rider move forward just two (2) feet. (R. p. 173, lines 12-13, R. p. 174, line 6; Hr. Tr. p. 11, lines 12-13, p. 12, line 6). The Claimant said that she "didn't think about" her decision. (R. p. 179, lines 6-7; Hr. Tr. p. 17, lines 6-7). Her co-worker, Leslie Roberson, said [i]t happened so quick ... I didn't have time to say anything to her." (R. p. 197; Hr. Tr. p. 35). Unfortunately, when the Claimant turned the throttle on the walkie-rider, the walkie-rider suddenly jerked forward and the Claimant was yanked to the ground by the walkie-rider. (R. pp. 175, 181; Hr. Tr. pp. 13, 19). The jerking motion caused an injury to the Claimant's right shoulder, and the Claimant injured her left hand when she let go of the walkie-rider and fell to the floor. (R. p. 193; Hr. Tr. p. 31).

The Claimant never got onto the walkie-rider. (R. p. 173, lines 14-18; Hr. Tr. p. 11, lines 14-18). As such, the Claimant testified that she never "operated" the walkie-rider. (R. p. 179, lines 7-11; Hr. Tr. p. 17, lines 7-11). She testified that: "I didn't feel

like I was operating the machinery just by turning my hand because I didn't get up on it." (R. p. 182, lines 9-12; Hr. Tr. p. 20, lines 9-12). She never intended to ride on the walkie-rider or to use the walkie-rider to transport any merchandise. (R. pp. 173-174; Hr. Tr. pp. 11-12). Her co-workers came to her aid, and accident reports were filled out by the Employer. (R. pp. 175, 181, 194; Hr. Tr. pp. 13, 19, 32). The Claimant testified that if she had not been injured by the walkie-rider, she would have gone to her table and performed an inspection on the clothing for Adidas and Reebok. (R. p. 174, lines 19-22; Hr. Tr. p. 12, lines 19-22).

Initially, the Defendants/Respondents accepted the claim and paid for medical treatment at Regional Occupational Medicine and for an MRI. (R. pp. 30-41; Cl. APA pp. 1-12). The Defendants than denied the claim and alleged that the Claimant violated a safety policy of the Employer. Essentially, the Employer inserted the concept of fault into the no-fault structure of the workers' compensation system. The Employer has a company Employee Handbook. The Employee Handbook was given to the Claimant on November 3, 2008, two (2) years and seven (7) months before the work accident. (R. p. 102; Def. APA p. 68). On page twenty-five (25) of the Employee Handbook there is a Section 13, "Health and Safety," which contains a Safety Policy. (R. p. 103; Def. APA p. 69). There is no evidence in the record that the Claimant actually read through the Employee Handbook and got to the Safety Policy contained on page twenty-five (25). The Safety Policy, at page twenty-five (25), states that: "This list is by no means inclusive and is intended to serve as a guide." (R. p. 103; Def. APA p. 69)(emphasis added). Also, the Safety Policy states that: "It is subject to change." (*Id.*)(emphasis added). The list of rules in the Safety Policy is written in a small font (smaller than 12 points). The Safety Policy states, among other things, that Employees should: "Always

use common sense." (*Id.*). Also, the Safety Policy states: "Always maintain a neat and organized workspace, free from trash and debris" and "unless otherwise instructed by your supervisor, food and drink are not permitted on the warehouse floor. If an exception for drinks exists at your facility, only drinks in approved containers will be allowed." (*Id.*). In addition, the Safety Policy states: "Never operate any machinery or equipment without express authority and the required training and necessary certification to do so." (*Id.*). The Safety Policy does not define the term "operate" and the policy does not define the terms "required training" or "necessary certification." As such, there were a lot of unanswered questions in the policy about who could operate machinery or equipment. The policy did not state if an employee needed "authority" only one time, or if the employee had to get authority to use the equipment every time the Employee needed to use the equipment (i.e. multiple times each day). The policy did not state who could give the employee authority to operate the machinery.

Three months after receiving the Employee Manual, the Employer, on February 25, 2009, radically changed the Safety Policy regarding equipment in a Memorandum (R. p. 100; Def. APA p. 66). The February 2009 Memorandum told employees to: "Be conscious of where bicycles, power equipment, etc. . . . are at all times. Only authorized personnel are allowed to operate the above named equipment. (*Id.*). As the Court can see, the Employer dropped the requirement that a person must have "the required training and necessary certification" to operate power equipment (compare 2009 Memorandum language to November 2008 Safety Policy). In addition, the Claimant was never told that a walkie-rider was considered "power equipment" and there is nothing in the November 2008 Employee Handbook or February 2009 Memorandum stating that a walkie-rider was considered "power equipment." Finally,

the company policy went from covering all "machinery or equipment" to only "power equipment." In addition to the changes to the operation of "power equipment," the Employer also created policies that instructed employees to "Stay within the designated walk areas as designed" and "Maintain a 10 foot distance from equipment that is in operation." (R. p. 100; Def. APA p. 66).

The Safety Policy, again at page twenty-five (25) of the Employee Manual, states that: "Employees who violate any of TFE's safety rules, included on this list or not, will face disciplinary action, up to and including termination." (R. p. 103; Def. APA p. 69). There is nothing in the Safety Policy or 2009 Memorandum that states that employees who violate the Safety Policy are acting outside the course and scope of their employment. There is a time span of two (2) years and four (4) months, from the date of the February 25, 2009 Memorandum until the July 15, 2011 work injury. There is nothing in the Record indicating that the Employer gave any warnings or restrictions to the Claimant in the two (2) years and three (3) months immediately before the work injury. Or to put it another way, the Employer must go back in time more than two (2) years before the work accident to find a policy of the Employer that the Claimant allegedly violated at the time of the work accident.

After initially paying benefits on the claim, the Defendants reversed course and denied the claim because the Defendants alleged that the Claimant violated a safety policy of the Employer. The Defendants "apparently" take the position that the Claimant violated a provision of the Safety Policy, on page twenty-five of the Employee Manual, that states: "Never operate any machinery or equipment without express authority and the required training and necessary certification to do so." The Claimant uses the word "apparently" in the previous sentence because the Defendants and the Decision of the

Appellate Panel never identifies the exact wording of the policy of the Employer that was allegedly violated in this case. See detailed discussion *infra*. The Claimant denies that the Employer had that policy, or any relevant policy, in effect on the day of the work injury. Also, the Claimant denies that a walkie-rider is "power equipment" as defined by the policy. The Claimant alleges that she had authority to operate the walkie-rider at the time of the accident since she was given authority to operate the walkie-rider in the past by the management. In addition, the Claimant denies that she operated the power equipment within the meaning of the policy.

In short, the Claimant's injury occurred in the course and scope of her employment. It was error for the Appellate Panel to look at the fault or negligence of the Claimant in a no-fault system. Finally, the Claimant asserts that the Defendants are estopped from enforcing the policy against the Claimant to prevent her from receiving workers' compensation benefits since the Employer allowed the Claimant to operate the walkie-rider in the past with the permission of the Employer.

POLICY LANGUAGE UNKNOWN

In the Order of the Single Commissioner, filed June 15, 2012, the Single Commissioner never makes a Finding of Fact regarding the exact language of the safety policy of the Employer that the Claimant allegedly violated on July 15, 2011. (R. pp. 10-19; Order of Single Commissioner 06/15/12). Instead, the Commissioner simply made vague references to "instructions not to operate the walkie-rider" and "knowledge of the policy." (*Id.*). There is no place in the Order in which the exact, verbatim words of the policy are written down in the Order.

The Order does not discuss the differences in language between the 2008 Safety Policy on page twenty five (25) of the Employee Manual and the 2009 Memorandum. In fact, the Order never mentions the 2008 Safety Policy or 2009 Memorandum in the Findings of Fact or Conclusions of Law. The Order never discusses or defines the terms "power equipment," "operate," "authority," "required training," or "necessary certification" and their significance. In addition, there are no specific citations as to the source of the safety policy language (i.e. the 2008 Safety Policies vs. 2009 Memorandum).

On review before the Appellate Panel, the Claimant pointed out in her Brief to the Appellant Panel that the Claimant does not know the wording of the safety policy which she allegedly violated and the Claimant asked the Appellate Panel to identify the wording of the policy at issue in this case. (R. p. 135; Claimant's/Appellant's Brief to the SCWCC p. 7). At oral argument, the Claimant pointed out to the Appellate Panel that the Order of the Single Commissioner does not contain the language of the policy that was allegedly violated and its source. (R. p. 221; Transcript of Hearing before the Appellate Panel p. 18). At oral argument, counsel for the Defendants was not able to identify the wording of the safety policy. (R. pp. 221-222; Transcript of Hearing before the Appellate Panel pp. 18-19). Unfortunately, the Appellate Panel fully affirmed the Order of the Single Commissioner without changing any of the Findings of Fact or Conclusions of Law in the original Order. Therefore, on appeal to the Court of Appeals, the Claimant still does not know the exact wording of the safety policy of the Employer that the Claimant allegedly violated on July 15, 2011. As such, this Brief must use the terms "policy," "order," and related terms in a general manner because it is not possible

to determine, from the Decision and Order of the Appellate Panel, the wording of the Employer's policy.

STANDARD OF REVIEW

In this case, the Defendants stipulated at the hearing that "the Claimant had an incident at work in which she was injured." (R. p. 165, lines 24-25; Hr. Tr. p. 3, lines 24-25). There are no material facts disputed in this case. In a case in which the facts are undisputed, whether an accident is compensable is a question of law. Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct.App.2007). The primary issue is whether the Claimant was acting in the course and scope of her employment, thus, the issue is jurisdictional and a question of law. Because the question is jurisdictional, the Court may take its own view of the preponderance of the evidence. Wilkinson v. Palmetto State Transportation Company, 382 S.C. 295, 676 S.E.2d 700 (2009). 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 ... affected by other error of law; [or] are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. S.C.Code Ann. § 1-23-380(A)(5)(d)(e)(Supp. 2012).

If the question before the Court is one of law, the Court is not bound by the substantial evidence standard and the Court is not bound by the Commission's findings of fact upon which jurisdiction is dependent. Lake v. Reeder Const. Co., 330 S.C. 242, 246, 498 S.E.2d 650, 653 (Ct.App.1998). White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964). On appeal from the Workers' Compensation Commission, the Court may reverse where the decision is affected by an error of law. Lake v. Reeder

Const. Co., 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct.App.1998). An injured workers' employment status, as it affects jurisdiction, is a matter of law for decision by the Court and includes the findings of fact which relate to jurisdiction. Id. If the factual issue before the Full Commission involves a jurisdictional question, this Court's review is governed by the preponderance of the evidence standard. Lake v. Reeder Const. Co., 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct.App.1998).

It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964). Any reasonable doubts as to construction should be resolved in favor of the claimant. Hall v. Desert Aire, Inc., 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct.App.2007)

In workers' compensation cases, "it is the duty of the Commission to make specific findings ... we have held that awards without such specific findings do not comply with the requirements of the Act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). It is the duty of the Commission to make findings of fact regarding the essential factual issues and the Commission is required to make findings of fact which are sufficiently definite and detailed to enable the appellate Court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970); Campbell v. La-Z-Boy East, 295 S.C. 384, 368 S.E.2d 679 (Ct.App.1988). If the findings of fact are conclusory, then the findings of fact are insufficient. Baldwin v. James River Corporation, 304 S.C. 485, 405 S.E.2d 421 (Ct.App.1991).

ARGUMENTS

In the South Carolina Workers' Compensation Act, fault has no bearing upon an employee's right to recover workers' compensation benefits. Ziegler v. South Carolina Law Enforcement Division, 250 S.C. 326, 157 S.E.2d 598 (1967). In this case, the Commission inserted the concept of fault into its analysis and held that if a claimant violated *any* safety policy of the Employer at the time of the injury, then the claimant cannot recover benefits. Additionally, the Commission but the burden on the Claimant to prove that she did not violate any safety policy of the Employer at the time of the injury. The Court should reverse the decision of the Workers' Compensation Commission because the decision was the result of an error of law and the preponderance of the evidence clearly indicates that the Claimant was in the course and scope of her employment at the time of the injury.

PART I

I. The burden is on the Defendants to establish that a violation of a safety policy of the Employer removes the Claimant from the protections of the Workers' Compensation Act, and the Act is to be liberally construed in favor of providing coverage to the Employee.

It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964). In addition, as stated in James v. Anne's Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010):

> [T]he Commission regularly exercises its flexibility in making compensation awards to ensure the best interests of the workers are protected to the extent the award is not otherwise prohibited by the Workers' Compensation Act. This is consistent with the general rule **that workers' compensation law is to be liberally construed in favor of**

> **coverage** in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed. See Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("[W]orkers' compensation statutes are construed liberally in favor of coverage. It follows that **any exception to workers' compensation coverage must be narrowly construed**." (internal citation omitted)); Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960) (stating workers' compensation law will be construed liberally to effect its beneficent purpose); Olmstead v. Shakespeare, 348 S.C. 436, 559 S.E.2d 370 (Ct.App.2002) (noting the law is liberally construed to apply coverage, while exceptions are strictly construed). (emphasis added).

Id. The Workers' Compensation Act is to liberally construed in favor of providing benefits to a Claimant. Also, any exceptions to coverage are to be narrowly construed by the Court. Therefore, it is the position of the Claimant that the burden is on the Defendants in this case to establish that a violation of a safety policy of the Employer removes the Claimant from the protections of the Workers' Compensation Act. The Defendants' position in this case is in the form of an affirmative defense, or exception to coverage, and thus, the burden is on the Defendants to establish the defense and the facts for the defense. For example, the defense of intoxication and the defense of "willful intent" to injure oneself is on the Employer if it claims it as a defense. S.C.Code Ann. § 42-9-60 (Supp. 2012). Otherwise, if the burden is put on the Claimant in this case, the Claimant essentially has to prove that she was not in violation of any command and safety policy of the Employer at the time of the injury. This is trying to prove a negative, a practical impossibility – "prove that there is no spider in your office," or in this case, "prove that you did not violate any of our safety policies and orders at the time of the injury." As a practical matter, the Claimant cannot prove a negative, especially when the Defendants and the Commission won't specify the exact words of

the policy that the Claimant allegedly violated in this case.

The distinction is important in this case. The Worker's Compensation Commission held that the burden was on the Claimant to prove that her conduct was in the course and scope of her employment. (R. p. 8 ¶ 8; Appellate Decision, Conclusion of Law No. 8). This was an error of law because **the parties stipulated that there was an Employer/Employee relationship** in existence on July 15, 2011 and that the Claimant was injured on July 15, 2011 at work, and the Court converted those stipulations into Findings of Fact. (R. p. 6 ¶¶ 3, 7, R. p. 165, line 24 – p. 166, line 9; Appellate Decision, Findings of Fact Nos. 3 and 7, Stipulations at Hr. Tr. p. 3, line 24 to p. 4, line 9). The Single Commissioner, at the beginning of the hearing, put on the record that "the parties agree that the Claimant had an incident at work in which she was injured." (R. p. 165, lines 24-25; Hr. Tr. p. 3, lines 24-25). Once the Court put on the record that the injury occurred at work, and the parties stipulated to an employer/employee relationship, it is the position of the Claimant that the burden then shifted to the Defendants to establish that the Claimant's conduct and alleged violation of a safety policy took her out of the protections of the Act. Since the Claimant contends there was no "clear and explicit order" and contends there was "conflicting testimony," the issue of who has the burden becomes important. The burden should have been put on the Defendants to establish the exact wording of the order and that the Claimant violated the order. It was an error for the Commission to put the burden on the Claimant and require the Claimant to prove that she did not violate any order of the Employer (a negative).

In addition, the Decision of the Commission never mentions that it is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than

exclusion. Also, the Decision never mentions that workers' compensation law is to be liberally construed in favor of coverage and exceptions and restrictions on coverage are to be strictly construed. The Commission, in the Decision, resolved all doubts in favor of the Defendants. The Commission, in the Decision, construed the exclusion from coverage very liberally and made any perceived violation of the Employer's safety policy a bar to benefits. This too was an error of law. Had the Commission resolved any doubts in favor of coverage, and strictly construed the Employer's defense and policy language, the Claimant's claim would have been found compensable by the Commission. The Claimant asks that this Court apply the correct standard and burden and find the claim compensable.

PART II

II. The Employer's safety policy concerned the conduct of the worker within the scope of her employment; the safety policy did not limit the scope of her employment.

The primary issue in this case is whether the Employer's safety policy concerned the conduct of the worker within the scope of her employment, or did the Employer's safety policy limit the scope of her employment.

> **Not every violation of an order given to a workman will necessarily remove him from the protection of the Workers' Compensation Act** ... "Certain rules concern the conduct of the workman within the sphere of his employment, while other 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 the transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied."

Wright v. Bi-Lo, Inc., 314 S.C. 152, 155, 442 S.E.2d 186 (Ct.App.1994)(quoting Johnson

v. Merchants Fertilizer Co., 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941)(emphasis added).

In this case, the resolution of the issue is simple and straightforward. The employer's policy concerned the conduct of the worker within the scope of her employment for the following reasons:

(1) First, the Claimant was allowed by the management to operate a walkie-rider in the past. (R. pp. 175-176, 190; Hr. Tr. pp. 13-14, 28). She was not disciplined for operating the walkie-rider in the past, and she operated it in front of her supervisors. (*Id.*). Obviously, there were circumstances in which the Employer allowed the Claimant to operate the walkie-rider. There does not need to be a long analysis of whether the Claimant had "authority" or "certification," because it is undisputed that the Claimant could have gotten "authority" and "certification" to operate the walkie-rider *under certain circumstances*. So, it is possible for her to operate the walkie-rider within the scope of her employment as a Quality Assurance Warehouse Associate. In fact, it is undisputed that she had training on how to operate a walkie-rider as part of her job duties and she operated a walkie-rider as part of that training.

Compare the present situation to the situations in which the Courts held an order of the employer took the employee's conduct outside of the scope of his employment:

1. A courtesy clerk at Bi-Lo, Inc. All courtesy clerks were prohibited from approaching or apprehending suspected shoplifters. There were no clerks who were allowed to engage in that conduct, and there were no circumstances or training that would authorize a clerk to perform the activity. Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct.App. 1994).

2. Police Officers, including the Chief of Police. All police officers were not allowed

to ride on the town's fire truck. There were no police officers who were allowed to engage in that conduct, and there were no circumstances or training that would authorize a police officer to perform that activity. Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950).

Since the Claimant was trained on how to operate the walkie-rider, any restrictions or instruction on her use of the walkie-rider *must have concerned her employment*. Likewise, since the Claimant had in fact operated the walkie-rider in the past with permission of the management, any orders regarding the use of the walkie-rider must have concerned her employment. Therefore, the order in this case did not limit the scope of the Claimant's employment, but instead, the order concerned the conduct of the Claimant within her employment.

(2) Second, five (5) of the nine (9) workers in the Claimant's "work group" operated the walkie-riders. Ms. Leslie Roberson worked with the Claimant and she said there were nine (9) people in "our group" and five (5) had "certification" to operate the walkie-riders. (R. p. 196; Hr. Tr. p. 34). Since the co-employees in the Claimant's work "group" had permission or "certification" to operate the walkie-rider, than the company policy regarding walkie-riders must concern conduct within the scope of her employment. If the order limited the scope of the employment, it would have prevented the people in her work group from operating the walkie-rider. The fact pattern in this case is very different than the situation found in the Black v. Town of Springfield in which no police officers were allowed to ride on fire trucks.

(3) Third, the Courts have used a test to determine if the employees conduct was within the scope of her employment, and in this case, the test would indicate that the Claimant's conduct was within the scope of her employment. The test is: Did the Claimant's actions provided a benefit to the Employer? Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). The Claimant, James Howell, was a checking clerk and stock boy for the Employer. The Claimant, while in the parking lot of the Employer, witnessed two boys snatch the purse of a customer and the Claimant gave chase. He ran into a low fence, fell and broke his arm. In Howell, the Court recognized that the Claimant's actions were within the scope of his employment if the Claimant's actions benefited the Employer ("there is obvious and substantial benefit flowing to a merchant") Howell, 264 S.C. 302. According to the Howell Court, the benefit to the Employer can either be a "financial interest" (the customer could spend her money with the Employer if her purse was returned) or through "increasing goodwill" in the community ("the employer ultimately profited as a result of the good will thus created"). Id.

In Portee v. South Carolina State Hospital, 234 S.C. 50, 106 S.E.2d 670 (1959), the Court found a claim compensable because the violation of the company policy created a benefit to the employer ("ward off any possibility of passing the infection on to the patients"). A co-worker, in violation of hospital policy, gave an injection of penicillin to another co-worker and the co-worker died of acute anaphylactic shock.

In this case, the Claimant's alleged violation of company policy created a benefit to the Employer. She testified that she needed to move the walkie-rider two feet so that she could get her pallet of merchandise to her work station to begin inspecting the clothing. Her employer makes money though its employees sorting and inspecting clothing, and thus, the Claimant's conduct to keep the inspection process moving

forward created a financial benefit to the Employer. Therefore, the conduct of the Claimant was within the scope of her employment.

(4) Fourth, the Courts have discussed another test to determine if the Claimant's conduct was within the scope of her employment. The test is: Was the Claimant's conduct reasonably related to the accomplishment of the task for which the employee was hired? Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct.App.2003), aff'd as modified 357 S.C. 619, 594 S.E.2d 272 (2004), referencing Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982), and noting that the opinions of the Supreme Court of North Carolina construing the Workers' Compensation Act are entitled to great weight. Hines v. Hendricks Canning Co., 263 S.C. 399, 405, 211 S.E.2d 220, 222-23 (1975). In this case, the Claimant's conduct of moving the walkie-rider two (2) feet so that she could get her clothing cart to her sorting station was conduct reasonably related to the accomplishment of the task for which the employee was hired. She was hired to move, sort, inspect, and box clothing, and she needed to move the walkie-rider out of the way to accomplish her tasks. Therefore, her conduct was in the scope of her employment.

(5) Fifth, the 2008 Safety Policy and 2009 Memorandum contain orders that do not remove the Claimant from her sphere of employment, and therefore, the Employer's policies on operation of power equipment did not intend to limit the scope of the Claimant's conduct. For example, the Employer's November 2008 Safety Policy states employees must "Always use common sense" and "Always maintain a neat and organized workspace, free from trash and debris." (R. p. 103; Defs. APA p. 69). These

orders are right next to the order on operation of equipment. The February 2009 Memorandum told employees to "Stay within the designated walk areas as designed" and "Maintain a 10 foot distance from equipment that is in operation." (R. p. 100; Defs. APA p. 66). These orders are right next to the policy on power equipment. If the Claimant got hurt because she did not "use common sense," she would still get workers' compensation benefits. If the Claimant had dropped some trash near her workstation, and then slipped on the trash, she would be covered by the Act. If the Claimant stepped one foot outside of a designated walk area, and got hit by a moving forklift, the Claimant would be covered by the Act. If the Claimant got hit by a moving pallet jack, by definition she would be less than 10 feet away from the "equipment in operation," however, she would be covered by the Act. *Since the policy on use of equipment at issue in this case is surrounded by policies that define conduct within the scope of the Claimant's employment, the policy on equipment was not intended by the Employer to limit the scope of the Claimant's employment*.

(6) Sixth, the Safety Policy states that it is only a "guide" and it is "subject to change." The Defendants are arguing that an injured worker should be denied workers' compensation benefits because of violating a guide that is subject to change. Since the company policy was only a guide, and subject to change, how could the Claimant possible know the boundaries of her sphere of employment from the policies? Therefore, the policies must concern her conduct within her sphere of employment.

Clearly, the Employer's order or safety policy concerns conduct within the scope of the Claimant's employment. At this time, the analysis ends and the work injury is

covered by the Act. However, if the Court finds that the Employer's policy limits the sphere of the Claimant's employment, than the Court's analysis moves onto part number three (3).

PART III

III. The safety policy of the Employer was not "clear and explicit" and there was "conflicting testimony" on the applicability of the policy.

If the safety policy of the Employer did attempt to limit the scope of the employment, the safety policy must be "clear and explicit" and there cannot be "conflicting testimony" regarding the safety policy.

A. Was There A Clear and Explicit Safety Policy?

First, the burden in on the Defendants to establish that the order was a "clear and explicit" order. Wright, at 314 S.C. 156-157; Johnson, 198 S.C. 373, 17 S.E.2d 695. In this case, the order was not clear and explicit. The following are some examples of clear and explicit orders, according to the Court:

1. Do not ride on the fire truck. Prior to the day of the accident, the Claimant had been told of the order. In addition, less than 5 minutes before the injury the Claimant was told of the order. Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950).

2. Do not drive the company vehicle home. Prior to the day of the accident, the Claimant had been told of the order. In addition, the Claimant asked the employer if he could drive the company vehicle home, and the employer told him "no." The Claimant then got into the company vehicle and drove it home. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct.App.2003), aff'd as modified 357 S.C. 619, 594 S.E.2d 272 (2004).

3. Do not apprehend shoplifters, and "Get back into the store." Prior to the day of the accident, the Claimant had been told of the order to not apprehend shoplifters. On the day of the accident, the manager told the Claimant to "get back into the store." The Claimant refused. When the Claimant started to chase after the shoplifter, the manager yelled "no" and again told the Claimant to get back into the store. Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct.App.1994).

Here are some examples of orders that were not considered clear and explicit by the Courts:

1. Do not give penicillin to patients except when direct to do so by one of the physicians. Portee v. South Carolina State Hospital, 234 S.C. 50, 106 S.E.2d 670 (1959). The Court found the claim compensable. A co-worker, in violation of hospital policy, gave an injection of penicillin to another co-worker and the co-worker died of acute anaphylactic shock. The Employer argued that the co-worker should be considered a "patient," and therefore the injection was given in violation of hospital policy. The Claimant pointed out that other injections had been given to other non-patients by the staff without authority by a physician. Thus, there was confusion over the terms of the order.

2. "Do not go across to the belt and line shaft." Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 17 S.E.2d 695 (1941). The Court held that "those instructions lacked much of being clear and explicit." Id. at S.E.2d 698. The Court noted that there was no printed notice or other warning posted by the employer at or near the line shaft, nor anywhere on the wall of the room.

B. Was There Conflicting Evidence?

Second, the Courts will not deny compensation to an employee if there is conflicting evidence on the applicability of the order. Wright, at 314 S.C. 156; Johnson, 198 S.C. 373, 17 S.E.2d 695. On the other hand, in Black, compensation was denied because the Court noted that there was a "lack of substantial conflict in the testimony." Black, at 217 S.C. 422. (emphasis added).

In this case, there is substantial conflict between the 2008 Safety Policy and the 2009 Memorandum, discussed *infra* in the Statement of Facts. It is completely unclear which policy the Employer is attempting to enforce in this case. In addition, the conflicting orders were given to the Claimant over two (2) years before the work injury, and the passage of time could understandable create uncertainty in the terms of the order. Also, at the hearing, Ms. Janice Kutkus, the Human Resources Manager for the Employer, admitted the following:

> Q. She [Claimant] was allowed by the management to operate the machinery [walkie-rider] before she was certified, correct?
> A. Yes, sir.
> Q. She wasn't disciplined for doing that, right?
> A. No, sir.
> (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29).

This testimony creates a conflict in the evidence as to the applicability of the order to the Claimant. Since the order was not clear and explicit, and there was conflicting evidence regarding the applicability of the order, the Court should not hold that the order was sufficient to remove the Claimant from the protections of the Workers' Compensation Act.

PART IV

IV. The Claimant did not violate the safety policy of the Employer.

The Claimant denies that she violated any safety policy or order of the Employer. The policy language in the 2008 Safety Policy states that Employees are not to "operate" any machinery or equipment without express authority." Because of the lack of definitions and specificity within the 2008 Safety Policy or 2009 Memorandum, and their conflicting language, there is insufficient evidence to conclude that the Claimant violated any order of the Employer. In fact, the policy language is never mentioned in the Findings of Fact of the Commissioner because the Defendants and the Commission are uncertain about the exact terms of the order.

A. The Claimant did not operate the walkie-rider.

The Claimant testified on several occasions that she did not believe she was operating the walkie-rider at the time of the injury. The Claimant never got onto the walkie-rider. (R. p. 173, lines 14-18; Hr. Tr. p. 11, lines 14-18). As such, the Claimant testified that she never "operated" the walkie-rider. (R. p. 179, lines 7-11; Hr. Tr. p. 17, lines 7-11). The Claimant, with both feet still on the floor, reached out with her right hand and turned the throttle on the walkie-rider so that "it would roll a couple of feet." (R. p. 172, line 10, R. p. 197; Hr. Tr. p. 10, line 12; p. 35). She only touched it with her right hand. (R. p. 172, line 25; Hr. Tr. p. 10, line 25). She did not stand on the walkie-rider. (R. p. 173, lines 14-15; Hr. Tr. p. 11, lines 14-15).

Now, after the work injury, could a lawyer or a Court come up with a definition of "operate" that would encompass the Claimant's conduct – of course. However, that is not the issue. The issue is that the Employer did not define the term "operate" for the

Claimant or instruct the Claimant as to the meaning of the term prior to the injury. This confusion over the term is similar to the confusion found in the order: "Do not give penicillin to patients except when direct to do so by one of the physicians." Portee v. South Carolina State Hospital, 234 S.C. 50, 106 S.E.2d 670 (1959). The Claimant did not believe she was violating an order of the Employer at the time of her injury.

B. The Claimant had authority to operate the walkie-rider.

It is undisputed that the Employer allowed the Claimant to operate a walkie-rider in the past, without discipline. (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29). As such, she was given authority in the past. The policy does not state how authority can be taken away, or that authority must be given each and every time an employee operates the walkie-rider (i.e. several times a day). Therefore, the Claimant still retained the authority she had in the past to use the walkie-rider and had authority at the time of the accident to use the equipment.

C. The walkie-rider is not covered by the policies.

The 2008 Safety Policy and the 2009 Memorandum do not mention walkie-riders. In the 2009 Memorandum, the term "power equipment" is not defined and no one testified that a walkie-rider is "power equipment." Is human powered equipment covered by the policy (dollies, scissors, push carts, etc.)? Does the equipment have to have a self-contained power unit to be "power equipment," (i.e., an iPad or a forklift) or can the equipment draw power from an electrical outlet (i.e., a lamp, a desktop computer). Did the Claimant have to have authority to turn on a lamp at her work station? Since the policy does not cover a walkie-rider, the Claimant's use of a walkie-

rider at the time of the injury was not in violation of any policy.

PART V

V. The Defendants are estopped from asserting that the Claimant's conduct removed her from the scope of her employment.

An employer and carrier may be estopped, in a workers' compensation proceeding, from asserting a legal position if the conduct of the employer or carrier misled or deceived the employee. Clements v. Greenville County, 246 S.C. 20, 142 S.E.2d 212 (1965)(defendants estopped from asserting the statute of limitations because of employer's conduct). The Clements court stated:

> We have held that estoppel in such cases will arise from conduct on the part of the employer or carrier from which it may be reasonably inferred that the claimant was misled or deceived, whether intentionally or not, to believe that the claim is compensable ...

Id. at 246 S.C. 23. The Claimant asks that the Court apply the principles of estoppel to the facts of this case. The Defendants are attempting to deny benefits to an injured worker based on an alleged violation of a company policy regarding the operation of a walkie-rider without the correct "certification." However, the Defendants admit that they violated their own company policies. According to the plain language of the policy, there are no exceptions to the operation of the equipment without certification. Specifically, there are no exceptions given for training sessions by instructors before a person is certified. In short, the Employer has to violate its own policy in order to train employees on the walkie-riders. What if the Claimant had been injured during a training session on the walkie-rider? According to the Defendants, they could deny the claim because the Claimant was violating a company policy, even though the safety manager

allowed the Claimant to violate the policy. The Claimant did not write the policy; the Employer wrote a policy, and the policy has no exceptions for training sessions. The Employer should not be allowed to violate the policy that the Employer wrote, and at the same time, use the policy to deny the Claimant her benefits.

At the hearing, Ms. Janice Kutkus, the Human Resources Manager for the Employer, admitted the following:

> Q. She [Claimant] was allowed by the management to operate the machinery [walkie-rider] before she was certified, correct?
> A. Yes, sir.
> Q. She wasn't disciplined for doing that, right?
> A. No, sir.
> (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29).

Therefore, the Defendants should be estopped from removing the Claimant from the protections of the Act when the Employer had instructed the Claimant to violate their own Safety Policy prior to the injury.

PART VI

VI. The Commission uses the wrong legal standard throughout the Decision of the Commission.

In the Decision of the Commission, the Commission uses the wrong legal standard to determine if the conduct of the Claimant removed her from the protections of the Workers' Compensation Act. Throughout the Decision, the Commission states in the Findings of Fact and Conclusions of Law that the Claimant "in direct contradiction of company policy" or "in direct violation of the employer's directions/instructions" operated the walkie-rider. (R. p. 6 ¶ 8, R. p. 7 ¶ 11, R. p. 8 ¶ 9; Appellate Decision Findings of Fact Nos. 8, 11, Conclusion of Law No. 9). The Commissioner essentially held that **any**

violation of a company policy/instruction removed the Claimant from the course of her employment. This was an error of law. As discussed in Part II, not every violation of an order of an employer removes the Claimant from the protections of the Act. In addition, this inserted fault into a no-fault system.

For example, the Employer's November 2008 Safety Policy states employees must "Always use common sense" and "Always maintain a neat and organized workspace, free from trash and debris." (R. p. 103; Defs. APA p. 69). The February 2009 Memorandum told employees to "Stay within the designated walk areas as designed" and "Maintain a 10 foot distance from equipment that is in operation." (R. p. 100; Defs. APA p. 66). If an employee got hurt because he or she did not use common sense, according to the decision of the Commission, the employee would not get workers' compensation benefits. If the Claimant had dropped some trash near her workstation, and then slipped on the trash, she would not be covered by the Act. If the Claimant stepped one foot outside of a designated walk area, and got hit by a moving forklift, the Claimant would not be covered by the Act. If the Claimant got hit by a moving pallet jack, she would have to be less than 10 feet away from the "equipment in operation," therefore, she would not be covered by the Act. These examples illustrate the error of the Commission's holding that any violation of any order of the employer removes the Claimant from the Act.

PART VII

VII. The Decision of the Commission does not contain Findings of Fact which are sufficiently definite and detailed to enable the appellate Court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings.

In workers' compensation cases, "it is the duty of the Commission to make specific findings ... we have held that awards without such specific findings do not comply with the requirements of the Act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). It is the duty of the Commission to make findings of fact regarding the essential factual issues and the Commission is required to make findings of fact which are sufficiently definite and detailed to enable the appellate Court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970); Campbell v. La-Z-Boy East, 295 S.C. 384, 368 S.E.2d 679 (Ct.App.1988). If the findings of fact are conclusory, then the findings of fact are insufficient. Baldwin v. James River Corporation, 304 S.C. 485, 405 S.E.2d 421 (Ct.App.1991).

In the Decision of the Commission, the Commission does not make sufficient Findings of Fact. There are no findings regarding the exact language of the order allegedly violated by the Claimant. There are no Findings of Fact regarding the source of the order or the date of the order. There are no Findings of Fact regarding the 2008 Safety Policies. There are no Findings of Fact regarding the 2009 Memorandum changing the 2008 Safety Policies. There are no Findings of Fact regarding the terms "operate," "authority, "certification," "equipment," "machinery" or other terms contained in the policies. There are no Findings of Fact regarding the actual conduct of the Claimant, and the Claimant's argument that she was not operating the equipment because she did not get on it or use it to move merchandise. Therefore, the Court should reverse the Decision of the Commission due to the lack of sufficient Findings of Fact in the Decision.

PART VIII

VIII. The Decision of the Commission does not contain all of the stipulations of the parties.

Finally, the Claimant raises the issue that the Decision of the Commission does not contain all of the stipulations of the parties made at the time of the hearing before the Single Commissioner. The Claimant raises this issue to prevent the limited Findings of Fact from becoming the law of the case on remand. For example, at the hearing, the parties stipulated that the Claimant suffered an injury to her 1) right shoulder, 2) left hand, and 3) left arm. (R. p. 166, lines 5-6; Hr. Tr. p. 4, lines 5-6). In addition, the parties stipulated that the Claimant was in need of surgery and payment for past causally related treatment. (R. p. 166, lines 7-9; Hr. Tr. p. 4, lines 7-9). Finally, the parties stipulated that the Claimant "had in incident at work in which she was injured. The parties agree that if I find the case compensable that she would be entitled to temporary total disability [TTD] benefits from August the 3rd, 2011." (R. p. 165, line 24 – p. 166, line 3; Hr. Tr. pp. 3–4). *The original Decision of the Single Commissioner contains all these stipulations in the Decision at page two (2); however, even though the Appellate Panel fully affirmed the decision of the Single Commissioner, all of the important stipulations were left out of the Decision of the Appellate Panel.* (R. p. 11; Single Commissioner Decision p. 2). For example, in Finding of Fact No. 7, the Commission states only that "the Claimant suffered an injury to her shoulder on July 15, 2011." (R. p. 6 ¶ 7; Appellate Decision, FOF #7). The Decision fails to specify that the injury is to the *right* shoulder and the injury to the left arm and left hand are not mentioned in the Findings of Fact even though the Defendants stipulated that the two

body parts were injured in the accident. There is no mention in the Findings of Fact that the Claimant is in need of future surgery and compensation for past medical treatment, or that the Defendants agreed that the Claimant is entitled to TTD benefits beginning August 3, 2011. Finally, the Findings of Fact do not contain the stipulation that the Claimant had an incident at work in which she was injured. Instead, Finding of Fact No. 7 states that the Finding regarding the injury at work is based "on the testimony of the witnesses." The Claimant asks that this Court enter a Decision consistent with the stipulations of the parties so that the limited Findings of Fact do not become the law of the case on remand.

CONCLUSION

It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. At the hearing, the parties stipulated and agreed on all of the essential issues except as to whether the Claimant's conduct took her outside of the course and scope of her employment due to an alleged violation of a safety policy. The Commission's Decision inserts fault into a no-fault system because it held that any violation of a safety policy was grounds to deny benefits. For the reasons stated, this Court should reverse the Decision and Order of the Workers' Compensation Commission and find that the Claimant's injuries occurred in the course and scope of her employment and award benefits as stipulated and agreed to at the hearing.

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August 16, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Melody L. James, Avery B. Wilkerson, Jr., Commissioners

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Appellate Case No. 2013-000358
WCC File No. 1110704

Claudia Bryant-Perreira, Claimant,.....Appellant,

v.

IMSCO/TFE Logistics Group, Employer, and
Zurich American Insurance Company, Carrier, Defendants,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

August 16, 2013

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