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.

REPLY BRIEF OF APPELLANT

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Samuel D. Harms
Harms Law Firm, P.A.
33 Market Point Drive
Greenville, SC 29607
(864) 277-0102
Attorney for Appellant

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STANDARD OF REVIEW

The Respondents' analysis of the standard of review is incorrect in this case. The issue before this Court is a jurisdictional issue. The South Carolina Workers' Compensation Act specifically states that an "employer and employee" are "bound thereby" only "for personal injury or death by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-310 (Supp. 2010)(Presumption of acceptance of provisions of Title)(emphasis added). In addition, the terms "injury" and "personal injury" are defined by the Act to "mean only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2010)(emphasis added). The term "only" means "only" and was inserted into the statute to preclude the Commission from having jurisdiction over other types of non-work related injuries.

If the Claimant's actions or injuries did not arise out of and in the course of her employment, than the Workers' Compensation Commission does not have jurisdiction over the injury and cannot award any benefits because it lacks jurisdiction (the employer or employee have not consented to jurisdiction per S.C. Code Ann. § 42-1-310 (Supp. 2010). Instead, the Claimant would have the opportunity to file a tort action against the Employer in the Circuit Court (if there was any basis to a negligence claim). For example, it is undisputed that the Claimant was an employee of the Employer on the day of the injury; however, if the Claimant was in a vehicle driven by a co-worker and the two employees were traveling to work, and the Claimant was injured due to the negligence of the co-worker, the Claimant would not be in the scope of her employment even though she was an employee of the Employer. Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (1998)(travel to work is not in the course of employment). The Claimant would not be able to receive benefits under the Workers' Compensation

Act because the Act does not grant the Commission jurisdiction over the automobile accident. Instead, the Claimant would have to bring a tort action against her co-worker in the Circuit Court.

In this case, the issue of whether the Claimant was acting in the course and scope of her employment is a jurisdictional issue. As such, 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). The Court is free to make its own findings of fact.

ARGUMENTS

THE LANGUAGE OF THE ORDER IS STILL UNKNOWN

In the Claimant's Brief, the Claimant points out that the Decision of the Single Commissioner and the Decision of the Appellate Panel of the Workers' Compensation Commission never sets forth the order of the Employer that the Claimant allegedly violated in this case. The Claimant also pointed out that the Respondents, during arguments before the Commission, could not articulate the exact wording of the Employer's order. In response, the Respondents state in their Brief that: "Defense counsel quite ably and concisely pointed out the safety policy that Claimant violated," and they cite to pages 12-13 of the transcript of the oral argument before the Appellate Panel. (Resp. Br. fn. 13). The Respondents told the Appellate Panel the following:

> It was Page 25 of the employee handbook. Every employee gets one. Every employee goes through indoctrination induction into the employment. Always use common sense.
>
> ***
>
> But the one that we raise as to defend this claim ... "Never operate any machinery or equipment without express

> authority to do it and the required training and necessary participation to do so." (R. pp. 214-215; App. Tr. pp. 11-12).

The Claimant agrees that the Employer had a policy that required employees to "always use common sense." However, the Employer never had a policy regarding machinery as articulated by counsel for the Respondents ("training and necessary participation"). The Court can look at the 2008 Safety Policy and/or the 2009 Memorandum and see that the wording of those policies is very different than the words used by counsel to describe the policy to the Appellate Panel. The Respondents do not mention the word "certification" in their description to the Appellate Panel. They don't use the word "walkie-rider." The words used by the Respondents at the Appellate Panel are different that the words used in their Brief to this Court. In the Respondents' Brief, the Respondents repeatedly state that in order to operate the walkie-rider, a person had to have "certification and authority," however, that phrase does not appear anywhere in the Employer's 2009 Memorandum (which modified the 2008 Safety Policy). In addition, during oral arguments before the Appellate Panel, the Respondents did not mention "certification" as a requirement of the Employer's order. In addition, the Respondents' Brief occasionally states that the Claimant was "never" to operate the walkie-rider; however, no one testified at the hearing that the Claimant was "never" to operate the walkie-rider and the Respondents cannot cite to any place in the Record to support that claim. In contrast, Ms. Janice Kutkus, the Human Resources Manager for the Employer, testified that the Claimant was allowed by the management to operate the walkie-rider, even though she was not certified. (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29). In summary, the Respondents cannot articulate the exact language of the Employer's order in this case. How can the Claimant be removed from the

protections of the Workers' Compensation Act when the Respondents do not even know the wording of the policy that they are using to deny benefits to the Claimant?

IMPORTANT FACTS

In analyzing the legal arguments of the Respondents, it is important for the Court to keep in mind the factual differences between the cases cited by the Respondents in which the injured workers' actions took them outside the scope of their employment and the case *sub judice*. In this case, there was a timespan of two (2) years and four (4) months between the 2009 Memorandum and the July 15, 2011 work injury. (R. p. 100; Def. APA p. 66). The Claimant intended for the walkie-rider to just "roll a couple of feet." (R. p. 172, line 12, p. 197; Hr. Tr. p. 10, line 12; p. 35). The Claimant's decision to move the walkie-rider was so fast that she did not have time to "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). 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). The facts of this case demonstrate that the Claimant acted without thinking. She wanted to get to her work station so that she could continue with her job assignments. She was injured on the property of the Employer. There was a two (2) year delay between the order and the injury and she did not intend to violate any policy of the Employer.

Compare those facts to the facts in the cases relied upon by the Respondents:

Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct.App. 1994), Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950), and Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). In all three (3) of those cases, the Claimant was injured far away from the property of the Employer: Wright – found dead on the side of the road next to his scooter; Black – fell while riding on a fire truck traveling on a road; Pratt – traveling on a road from his home to work. All three (3) cases deal with a Claimant traveling on a road. Isn't it an important fact that the Claimant in this case was injured in a building owned by the Employer, performing work for the Employer?

In the Wright and Black cases, the workers were told by their managers to immediately stop their actions before the injury ("stop chasing the shoplifter and get back into the store;" "I called him off and said 'Mr. Black, you should not ride on that fire truck'") Ibid. In Pratt, the injured worker was specifically warned to not drive the vehicle home just a few minutes before he got in the vehicle and drove it home. In the instant case, the Claimant had no contemporaneous warnings by management, and in fact, it had been over two (2) years since she received the 2009 Memorandum. Isn't it an important fact that years or months went by from the time of the order to the time of the work 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.

Claimant's Argument: The burden should be on the Respondents to establish that the Claimant should be removed from the protections of the Workers' Compensation Act.

Respondents' Argument: The burden should be on the Claimant to establish that her

conduct was within the scope of her employment.

Claimant's Reply: The facts of this case are unique, and different from the cases in which the Claimant was found to be acting outside the scope of his or her employment. In this case, the Respondents stipulated 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). The Claimant is arguing that under the specific facts (and stipulations) in this case, the burden should be on the Respondents to remove the Claimant from the scope of her employment. After reading the Brief of the Respondents, the Claimant believes that the Claimant has adequately addressed this issue in her Brief.

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.

Claimant's Argument: 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).

Respondents' Argument: The Claimant violated a company policy on the operation of the walkie-rider, so the Claimant's conduct was outside the scope of her employment. (Resp. Br. pp. 14-15).

Claimant's Reply: The Respondents' Brief never address the central issue in the case. The Respondents assume, and they ask the Court to agree, that every violation of an order of the Employer removes the Claimant from the protections of the Workers' Compensation Act. However, that is not the law. If every violation of an order of the Employer removes the Claimant from the protections of the Workers' Compensation Act, then the concept of "fault" has been inserted into a no-fault system.

It is undisputed that a Claimant can violate an order of an Employer, and still receive workers' compensation benefits. In this case, the policy regarding the operation of the walkie-rider "with certification and authorization" concerned conduct *within the scope* of her employment. The Respondents admit, on several occasions, that the Claimant was authorized on occasions to operate the walkie-rider (even though she was never certified). (Resp. Br. p. 6, 14). As such, the violation of the policy, if any, must have been *within the scope* of her employment. In addition, the Claimant wants to reiterate that the policy on use of equipment at issue in this case is surrounded in the Safety Policy by orders that clearly define conduct within the scope of the Claimant's employment, such as "always use common sense." Therefore, her violation of the walkie-rider policy, if any, does not remove her from the protections of the Workers' Compensation Act.

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.

Claimant's Argument: 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.

Respondents' Argument: The Respondents argue that the language of the order was clear and explicit and the conflicting testimony does not change the outcome. (Resp. Br. p. 22).

Claimant's Reply: The Respondents, themselves, cannot agree on the wording of the policy or order that applies in this case. At the oral argument before the Appellate Panel, counsel for the Respondents used different wording for the policy than the Respondents are now using in their Brief. *See* discussion under Section "The Policy Language is Still Unknown." Since the Respondents keep changing the wording of the order in their legal documents, how can the order be clear and explicit? And, what is the source of the order. The 2008 Safety Policy uses different language than the 2009 Memorandum. Ms. Janice Kutkus, the Human Resources Manager for the Employer, testified that the Claimant was allowed by the management to operate the walkie-rider even though the Claimant was not certified to operate the walkie-rider. (R. p. 190, line 25 – p. 191, line 5; Hr. Tr. pp. 28-29). Which order controls: the 2008 Safety Policy, the 2009 Memorandum, or the oral instructions by the management allowing the Claimant

to operate the walkie-rider? The order was not clear and explicit, and the source of the order is unclear, and it does matter that there is conflicting evidence over the wording of the order.

PART IV

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

Claimant's Argument: The Claimant denies that she violated any safety policy or order of the Employer because she never "operated" the walkie-rider, she had authority to operate it, and the walkie-rider was not covered by the policy.

Respondents' Argument: The Respondent argues that the Claimant operated the walkie-rider without authority or certification.

Claimant's Reply: The Claimant testified that she never "operated" the walkie-rider because she only intended for it to roll about 2 feet. (R. p. 179, lines 7-11; Hr. Tr. p. 17, lines 7-11). 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 to operate it. The 2008 Safety Policy and the 2009 Memorandum do not mention walkie-riders. The Claimant did not violate any order of the Employer.

PART V

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

Claimant's Argument: The Respondents are estopped from removing the Claimant from the protections of the Workers' Compensation Act because the Respondents violated their own safety policy by allowing the Claimant to operate the walkie-rider

before she was certified.

Respondents' Argument: The Respondents argue that they are not estopped from denying the claim because the Claimant's operation of the walkie-rider in the past was with permission. (Resp. Br. pp. 29-30).

Claimant's Reply: The Respondents miss the point of this argument. The Respondents assert over and over in their Brief that the Claimant had to have "permission and certification" in order to operate the walkie-rider. It is undisputed that the Employer allowed the Claimant to operate the walkie-rider without "certification." The Employer violated the Employer's policy. So, is it fair to allow the Employer to deny a worker's compensation claim when the Claimant later violates the same policy? No, it is not fair, and the Respondents should be estopped from denying benefits to the Claimant.

PART VI

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

Claimant's Argument: The Commission held that any violation of an order of the Employer removed the Claimant from the protections of the Workers' Compensation Act, and that is the wrong legal standard.

Respondents' Argument: The Respondents argue that the violation of the order of the Employer removes the Claimant from the protections of the Act. (Resp. Br. pp. 29-30). The Respondents use all of their time trying to prove that the Claimant violated an order, there is never any discussion as to whether the order concerned the conduct of the worker within the scope of her employment.

Claimant's Reply: The Respondents and the Commission use the wrong legal

analysis. In this case, the Employer's safety policy concerned the conduct of the worker within the scope of her employment. A violation of an order of the Employer only removes the Claimant from the Act if the order limits the scope of the Claimant's employment.

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.

Claimant's Argument: The Decision of the Commission does not contain adequate Findings of Fact.

Respondents' Argument: The Decision of the Commission does have adequate Findings of Fact.

Claimant's Reply: After reading the Brief of the Respondents, the Claimant believes that the Claimant has adequately addressed this issue in her Brief.

PART VIII

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

Claimant's Argument: The Decision of the Appellate Panel does not contain all of the stipulations of the parties set forth at the hearing before the Single Commissioner and in the Decision of the Single Commissioner.

Respondents' Argument: The Respondents agree that the stipulations of the parties are binding on the Respondents.

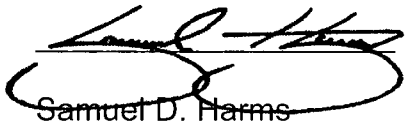
Claimant's Reply: The parties are in agreement so there is no need for further

argument.

CONCLUSION

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.

August 16, 2013



Samuel D. Harms
S.C. Bar No: 13537
Harms Law Firm, P.A.
33 Market Point Drive
Greenville, SC 29607
(864) 277-0102
Attorney for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Reply 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

Samuel D. Harms
S.C. Bar No: 13537
Harms Law Firm, P.A.
33 Market Point Drive
Greenville, SC 29607
(864) 277-0102
Attorney for Appellant