THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

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SC Court of Appeals

Case No. 2014-001269

Boisha Wofford, alleged surviving spouse,
and Kaelyn Wofford, surviving child, on behalf
of Brian Wofford, deceased employee,

Appellants,

v.

City of Spartanburg, through the South Carolina
Municipal Insurance Trust,

Respondents.

BRIEF OF APPELLANTS

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Brian Wofford, an employee with the City of Spartanburg, died in a motor vehicle accident on May 18, 2012. A workers' compensation action was timely filed by his surviving spouse, Boisha Wofford, alleging that, at the time of his death, Mr. Wofford was acting within the course and scope of his employment. Appellant's claim was denied by the single commissioner and his ruling was fully affirmed by the Full Commission. Appellant now appeals the ruling of the Full Commission.

STATEMENT OF CASE

At the time of his death, Brian Wofford was employed as superintendent at the City of Spartanburg Parks and Recreation Department (R. p. 62, lines 19-22). In this capacity, Brian was, as described by his supervisor Mitchell Kennedy, "the ultimate manager over the entire staff for the Parks and Rec for the city, which included [the city's] community centers . . . ." (R. p. 62, lines 22-24).

At the hearing, Appellant presented testimony from eight witnesses, six of whom worked with Brian. It was established that Brian had a physical office at 100 North Liberty Street in downtown Spartanburg (R. p. 16, lines 12-18). However, Brian's job could not be done in the office alone and it was common for him to be out of the office (R. p. 18, lines 9-15; p. 22, lines 19-21; p. 27, lines 10-13; p. 38, lines 14-19; p. 56, lines 9-16; p. 63, lines 22-25).

Brian's job required irregular hours (R. p. 26, lines 22-25) and his hours were therefore flexible (R. p. 30, lines 24-25). On the night before the accident, Brian had worked late at an event (R. p. 27, lines 1-5) and, consequently, did not go to his office immediately (R. p. 49, lines 3-9). Instead, Brian went first to his mother's home in Moore, South Carolina. Id.

While at his mother's house, Brian had multiple work-related conversations (R. p. 47, lines 3-20). The Parks and Recreation Department was involved in two City events taking place on that day – the Spring Fever event and a bicycling event called "Pedaling with Politicians" (R. p. 22, lines 4-10; p. 66, lines 14-20). Various City employees testified that they communicated with Brian on his cell phone regarding those events on the morning of the accident, discussing delivery of a podium to the bicycling event (R. p. 20, lines 10-16), inquiring as to a power source for the same event (R. p. 21, lines 11-16), and providing a music system for the Spring Fever event (R. p. 34, lines 5-14).

Additionally, the City's Aquatics Director, Tracy Ballew, testified that she had also communicated with Brian on the morning of his death (R. p. 40, lines 14-16). Ms. Ballew stated that she and Brian spoke by phone as she needed Brian to sign paperwork regarding a new hire and also needed him to retrieve a key from the C.C. Woodson Recreational Center (R. p. 40, line 17-p. 41, line 4). Ultimately, Brian agreed to go to the C.C. Woodson Center to pick up the key and to then bring the key to Ms. Ballew at the Swim Center, where he would also sign the forms (R. p. 41, lines 5-19). Importantly, Ms. Ballew testified that Brian told her that he was going "directly to CC to get the key, and then coming to the Swim Center to sign the paperwork, and then going to the Spring Fever event . . . ."(R. p. 45, lines 1-7). This conversation began at 10:48 AM (R. p. 157).

After these conversations, Brian left his mother's house (R. p. 51, lines 3-7). His mother recalled that, as he was leaving, Brian was speaking to someone on the phone and stated that he would meet the person at the C.C. Woodson Center. Id. Only minutes later, Brian was killed in a motor vehicle accident (R. p. 51, lines 10-17). It should be noted that the accident took place at 11:15 AM and only minutes after his conversation with Ms. Ballew (R. pp. 129-130).

ISSUES ON APPEAL

I. The Full Commission erred in finding that the death of Brian Wofford did not arise out of and in the course and scope of his employment as Appellant's claim falls within an exception to the "going and coming" rule.[1]

STANDARD OF REVIEW

When reviewing an appeal from the Workers' Compensation Commission, an appellate court may not weigh the evidence and substitute its judgment for that of the appellate panel as to the weight of evidence on questions of fact. See Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894-95 (2006); Matute v. Palmetto Health Baptist, 391 S.C. 291, 294, 705 S.E.2d 472, 474 (Ct. App. 2011). However, the appellate court may reverse the appellate panel's decision if it is based on an error of law. Id. The parties are largely in agreement as to the facts of this case, and the question for the Court is therefore one of law.

ARGUMENT

Appellant respectfully contends that the Commission erred in finding that Brian Wofford's death is not compensable under the Workers' Compensation Act. Decedent was acting in the course and scope of his employment and therefore falls within an exception to the "going and coming" rule. The Commission's decision was based on the Conclusions of Law, holding that Brian's travel "was serving the personal objective of getting Decedent to work" and that "Decedent had no work-related duties to perform on his way to work, nor was he under the control of the City of Spartanburg on his way to work"[2] (R. pp. 118-128).

[1] Appellant has abandoned her second issue stated in the Notice of Appeal.

[2] The Commission included similar language in its Findings of Fact. This Finding of Fact is actually a conclusion of law, as it represents the Commission's *interpretation* of the facts themselves. However, assuming *arguendo* that the Court finds the statements to be Findings of Fact, Appellant submits that these "facts" are unsupported by the evidence, as no evidence was presented to suggest that Brian was driving anywhere other than to the C.C. Woodson Center at the request of Tracy Ballew.

A. "Going and Coming"

To sustain an award under the Workers' Compensation Act, it must appear that the injury or death resulted from an accident which both arose out of and in the course of the employment. See Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 466, 192 S.E.2d 866, 868 (1972). Injuries sustained by an employee on his way to or from work have typically been addressed under the "going and coming" rule. This rule does not represent an independent test for compensability, but instead provides a "shortcut" for assessing compensability when an employee is injured in this situation. This "shortcut" is based on an assumption – that a person on his way to work "is not engaged in performing any service growing out of his employment." See Matute, 391 S.C. at 296, 705 S.E.2d at 475. Given this assumption, "an injury sustained by accident at such time does not arise out of and in the course of his employment." Id.

Of course, this assumption does not always hold true and the various exceptions to the "going and coming" rule are based on the recognition of this fact. Cases assessing the "going and coming" rule demonstrate that courts consider control, discretion, and personal purpose in determining whether a trip arises out of and is in the course and scope of employment. The rule originated in Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942). In that case, the Supreme Court of South Carolina considered the claim of a mill employee who slipped and fell on an icy sidewalk while walking from his home to the mill. See id. at 259-60, 705 S.E.2d at 716. The Court found the claim not compensable, noting:

> We do not consider it at all controlling that the respondent, on the occasion in question, was proceeding from his home to the mill to begin a day's work. *In the course of this trip the respondent was in no sense under the control of his employer.* He could have changed his mind about entering the mill at the appointed time, or in the process of proceeding toward the mill he could have visited with other persons living in the neighborhood, or transacted business, *without in any way impinging on his obligation to his employer.* . . .

Id. at 265, 705 S.E.2d at 718-19 (emphasis added).

Other courts have cited similar elements in assessing the compensability of an injury sustained while traveling. In Locke v. Steele County, 27 N.W.2d 285 (Minn. 1947), the Supreme Court of Minnesota considered an injury sustained by an employee while on the way to retrieve her employer's mail, following her lunch break. See id. at 286. The court noted that the reason for the "going and coming" rule was that, in general, an injury sustained on the way to work was sustained "before and not during his hours of service, *at a time when defendant (employer) had no control over him* . . . ." Id. at 287 (emphasis added). Nonetheless, the court found the claimant's claim compensable given that the employee had been instructed to retrieve the mail and was injured after leaving home, on her way to the post office. Id. at 288. The court noted:

> *In her discretion*, the employee was permitted to eat her lunch at her home, at a restaurant in some other part of the city, or, for that matter, possibly in her own office. *That was a matter of personal choice*. Immediately thereafter, however . . . her services for her employer were resumed. . . . She was not then engaged in her personal affairs, but was acting exclusively for the benefit of her employer and was fulfilling her contract of employment during her required hours of service.

Id. (emphasis added).

B. Comparable Caselaw

The instant case is most similar to two South Carolina cases addressing injuries sustained in travel. In Gray v. Club Group, Ltd., 339 S.C. 174, 528 S.E.2d 437 (2000), an employee who served as a bellman at Harbour Town, on Hilton Head Island, was asked by his employer to transport payroll and other items between Harbour Town and the Henderson Golf Club. See id. at 179, 528 S.E.2d at 438. This was in addition to his usual duties as a bellman. Id. Under this arrangement, the employee would leave his home in Savannah every Friday morning and would travel to the Henderson Golf Club, also located in Savannah. Id. at 180, 528 S.E.2d at 439. He would pick up the necessary documents and then drive to Harbour Town to perform his usual

work, then return to Henderson that afternoon, before going home. Id. The employee performed this task regularly on every Friday for five months before he was involved in a motor vehicle accident. Id. The accident took place one morning after the employee had left his home but before he arrived at the Henderson Golf Club. Id.

The employer argued that the employee's injuries were not compensable as the employee had not yet arrived at work. Id. at 186, 528 S.E.2d at 442. The Court of Appeals disagreed, finding that both requirements of the Workers' Compensation Act – that the injury arose out of and in the course and scope of employment – were met. The Court noted that evidence supported the finding that the employee was required to pick up his deliveries that morning and that the task was causally-related to his presence at the accident site. Id. at 187, 528 S.E.2d at 443. Moreover, the Court noted that the injury occurred in the course and scope of the employment as the employee "was on his way to Henderson to fulfill his employment duties." Id. at 188, 528 S.E.2d at 443.

Similarly, in Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973), the state supreme court considered claims made on behalf of two teachers who died in a car accident while on their way to a meeting, which they were encouraged to attend by their employer. The Court found the claims compensable, noting that the teachers "*were not exercising a personal privilege* wholly apart from their employment or their employer's interest, but were about the performance of an act, *incidental to and recognized as of value* by their superintendent in connection with their duties as high school teachers." Id. at 332, 200 S.E.2d at 86 (emphasis added).

C. Instant Case

The facts of the instant case, like those in Gray and Beam, evince in Brian's travel the factors of control, lack of personal discretion, and lack of personal purpose and therefore is a case that falls outside of the "going and coming" rule. In short, the assumption on which the rule is based – that the employee "is not engaged in performing any service growing out of his employment" – is simply not true here. See Matute, 391 S.C. at 296, 705 S.E.2d at 475. While Brian's time spent at his mother's home was personal time – like the lunch hour of the employee in Locke, *supra* – once he departed his mother's home, he was in the process of executing a specific task given him by Tracy Ballew (R. p. 41, lines 5-19; p. 45, lines 1-7). This task was one of value to the employer – had he not completed the task, another City employee would had to have done so. See Beam, 261 S.C. at 332, 200 S.E.2d at 86 (task recognized as of value to employer). As stated by Ms. Ballew, and confirmed by Brian's mother, Brian agreed to go "directly" from his mother's home to the C.C. Woodson Center to retrieve the spare key.[3] See id. Consequently, upon embarking on this errand, unlike the employee in Gallman, Brian had no discretion – at that point he could not stop, for example, at the grocery store or for coffee without "impinging on his obligation to his employer." See Gallman, 201 S.C. at 265, 705 S.E.2d at 718-19. As in Beam, Brian "[was] not exercising a personal privilege wholly apart from [his] employment or [his] employer's interest, but [was] about the performance of an act, incidental to and recognized as of value by [his employer] in connection with [his] duties as [superintendent of the Parks & Recreation Department]." See Beam, 261 S.C. at 332, 200 S.E.2d at 86. As in Gray, Brian "was on his way to [C.C. Woodson Center] to fulfill his employment duties." See Gray, 339 S.C at 188, 528 S.E.2d at 443. Moreover, as noted, at the time of the accident which resulted in his death, Brian was not traveling to his office at 100 North Liberty Street.

[3] Additionally, based on the conversation overheard by Brian's mother as he departed, it seems Brian agreed to meet another City employee at C.C. Woodson.

Given these facts, it must be concluded that the accident which took Brian's life arose out of and occurred in the course and scope of employment and that the assumption which underlies the "going and coming" rule does not hold true here. Instead, this case falls squarely within an exception to the rule, as Brian's death occurred while Brian was on the way to work, but charged with a duty or task in connection with his employment. See Matute, 391 S.C. at 296, 705 S.E.2d at 475; see also Skinner v. Braum's Ice Cream Store, 890 P.2d 922 (Okla. 1995) (employee tasked with picking up supplies on way to work sustained compensable injury in motor vehicle accident). The Commission therefore erred in determining that, on these facts, Appellant's claim fell outside of the Workers' Compensation Act.

CONCLUSION

The "going and coming" rule serves as a general rule for addressing whether an injury sustained while traveling to or from work qualifies as an injury which arose out of and in the course and scope of employment. The assumption on which the rule is based – that a person on his way to work "is not engaged in performing any service growing out of his employment" is not true under the facts of the instant case. At the time of his death, Brian was not traveling to his office on North Liberty Street. Instead, he was engaged on an errand for his employer, of value to his employer, under the control of his employer, and without personal discretion. His death therefore falls outside of the "going and coming" rule and the Commission erred in finding otherwise.

Respectfully Submitted,

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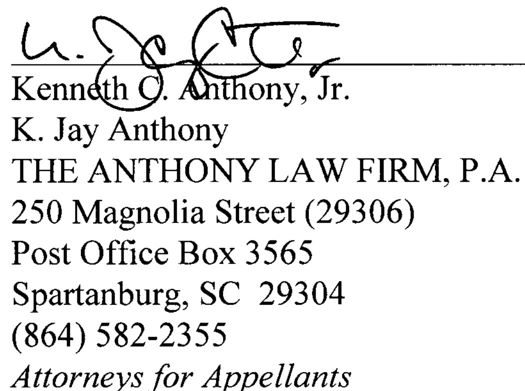
CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellants comply with Rule 211(a), SCACR.



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