DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION APPELLATE PANEL

Ryan Cook, Employee, vs. Condustrial, Inc., Employer, and Benchmark Insurance Company, Carrier, Defendants	WCC FILE NO: 1714378 **FULL COMMISSION APPELLATE PANEL ORDER**

HEARING DATE: June 9, 2020, in Columbia, South Carolina.

APPEARANCES: Claimant represented by Malcolm M. Crosland, Jr., Esquire of The Steinberg Law Firm or Charleston, South Carolina.

Defendants represented by George D. Gallagher, Esquire of Columbia, South Carolina.

PANEL: Commissioner T. Scott Beck, Chair
Commissioner Susan S. Barden
Commissioner Avery B. Wilkerson, Jr.

FILED: September 2, 2020

STATEMENT OF THE CASE

This matter comes before the Full Commission Appellate Panel ("Panel") via appeal by the Defendants from the Hearing Commissioner's Order dated December 11, 2019. This case arises out of multiple injuries sustained by Ryan Cook ("Claimant") in a single motor vehicle accident allegedly arising out of and in the course of his employment as an industrial painter with Condustrial, Inc. ("Condustrial") on September 27, 2017. Condustrial is a specialized staff leasing company providing skilled labor and staffing solutions to a variety of industrial clients in South Carolina. The relevant facts surrounding the accident are essentially undisputed: At the time in question, Claimant was assigned to work as a painter for an industrial contractor for Condustrial's client company, Phillips Industrial ("Phillips"). Phillips was hired by British Petroleum ("BP") to apply a protective coating onto a newly constructed cement service ramp accessed by trucks unloading hydrobromic acid at its facility off in Berkley County. The essential function of that BP plant is to process a liquid byproduct from the refining of gasoline called paraxylene into a powder form. This end product is then sold to various companies for multiple uses, including textiles, plastics, and clothing. BP's plant is located on a parcel of land encompassing several hundred acres. The plant is accessible from the public highway (Cainhoy Road- State Rd. S-8-98) by two private roads- Amoco Drive and Flag Creek Road- traversing the property.

On the date of injury, Claimant clocked out, left his immediate work area, smoked a cigarette and made a text/telephone call, before proceeding to the parking lot to enter his personal vehicle to go home for the day. After passing through the guard gate to exit the parking lot, Claimant traveled approximately one (1) mile down Flag Creek Road when his car swerved for unknown reasons, causing him to lose control and flip the car. Claimant was not wearing his

seatbelt and was ejected from the vehicle. It is undisputed that the accident occurred on a private road owned and maintained by BP that accessed a public highway.

At the Hearing before the Single Commissioner, Claimant argued for compensability under a long line of cases generally holding that coverage under the Act extends to allow an employee reasonable time and opportunity to depart his employer's premises following the end of the workday. *See generally* Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965); Pierre v. Seaside Farms, 386 S.C. 534, 689 S.E.2d 615 (2010); and Holston v. Allied Corporation, 300 S.C. 174, 386 S.E.2d 798 (Ct. App. 1989). These cases generally affirm compensability findings where the accidental injuries occurred on *premises owned, controlled, or maintained by the employer* while the employee was exiting said premises to go home. Defendants conceded that an employer owned private road would be considered "premises" for application of this rule. However, Defendants contend the "premises rule" still does not apply here because BP owns the road in question, not Condustrial. It is undisputed that Claimant was not directly employed by BP.

Claimant next contends that BP is his "statutory employer" per S.C. Code §42-1-400 *et seq*; therefore, the premises rule extends vicariously to cover his accident occurring on the road owned and controlled by BP. *See* Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998) (under statutory employment doctrine an employee of a subcontractor may seek and recover benefits from *either* his direct employer or the upstream contractor). Claimant further reasons that if an injured worker elects to proceed directly against his statutory employer instead of his immediate employer, then S.C. Code §42-1-440 allows the purported statutory employer to either a) seek indemnity from the immediate employer via a separate cause of action; or (b) the statutory employer may simply move to add the immediate employer as a party

to the claim and request the Commission to impose liability directly upon the immediately employer. In either scenario Claimant argues that his recovery under the Act would ultimately come at Condustrial's expense. Notwithstanding the procedural issue raised by Claimant never pursuing a claim against BP in the first instance, Defendants countered that BP is not Claimant's statutory employer anyway.[1] Therefore, BP and Condustrial cannot be considered synonymous or interchangeable employers under the Act for compensation purposes, and liability under the Act cannot be imputed to Condustrial under the premises rule.

By Order dated December 11, 2019, the Hearing Commissioner awarded the claim, finding, *inter alia,* that Claimant's motor vehicle accident "occurred on the Defendant employer's premises as the Claimant was leaving the plant at the end of the workday." (Single Commissioner Order Finding of Fact # 2). The Commissioner also specifically found that the road in question was "owned, controlled, and maintained by BP." *Id.* Based on these findings, the Commissioner awarded running temporary total disability benefits (TTD) from the date of accident, as well as ordered further medical evaluation and treatment. Defendants now appeal to the Full Commission Appellate Panel ("Panel"), contending the Commissioner's findings of fact are patently erroneous and based upon a misapplication of law. [2]

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[1] Defendants did not raise an objection any procedural deficiencies raised by Claimant's election not to pursue his claim under the Act against BP.

[2] After submitting that this is NOT a "going and coming rule" case before the Hearing Commissioner, Claimant argued in the alternative in his Brief to the Panel that it is. Specifically, he argues this case falls under the exception commonly known as the express or implied requirement of the employment contract exception as additional sustaining grounds for the Hearing Commissioner's award. He also acknowledged in his Brief that the Hearing Commissioner erred in his Order and requested that the Panel affirm with amendments to reflect the Defendants' imputed liability under the premises rule via the statutory employment doctrine.

STANDARD OF REVIEW

Under the South Carolina Workers' Compensation Act, the Full Commission Appellate Panel is the ultimate finder of fact and arbiter of the claim and is not bound by a single commissioner's findings of fact and conclusions of law. *See* Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (SC 1989). The Panel is empowered to make its own findings and conclusions consistent or inconsistent with those of the single commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (SC 1992). Upon review of a single commissioner's Order and award, the panel may "reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award." S.C. Code §42-17-50. Finally, when the facts of a case are undisputed, the issue of claim compensability becomes a matter of law. Jordan v. Dixie Chevrolet, 218 S.C. 73, 61 S.E.2d 654 (1950).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard by the Panel at a Review Hearing on June 9, 2020. After careful consideration of Briefs from the parties, able arguments by counsel, and review of the evidentiary Record and applicable law, the Panel concludes that the Hearing Commissioner's Order dated December 11, 2019 must be **REVERSED** and Claimant's claim for medical and compensation benefits, and all other relief under the Act, is hereby **DENIED.** Specifically, the Panel is hereby entering the following Findings of Fact and Conclusions of Law in support of its determination [3]:

1) Claimant was employed by Condustrial as an industrial painter and assigned to work for Phillips. Phillips was contracted by BP to apply a protective coating on a cement

[3] Since the essential facts of this case are undisputed as reflected in the Statement of the Case, the Panel has dispensed with an immaterial recitation of the evidence of the case. *See* Jordan v. Dixie Chevrolet *supra.*

service ramp at its facility in Berkley County. Claimant was not directly employed by BP. Condustrial is the defendant Employer in this claim, not BP.

2) On the date of injury, Claimant clocked out, left his immediate work area, smoked a cigarette and made a text/telephone call, before proceeding to the parking lot to enter his car and go home for the day. After passing through the guard gate to exit the parking lot, Claimant traveled approximately one (1) mile down Flag Creek Road when his car swerved for unknown reasons, causing him to lose control and flip the car. Claimant was not wearing his seatbelt and was ejected from the vehicle.

3) Claimant's accident occurred on BP's premises. Condustrial did not own, maintain, or control the road where Claimant's accident occurred. Therefore, the Commissioner's finding that the accident "occurred on the Defendant employer's premises" is erroneous.

4) Further, the Hearing Commissioner erroneously equates the BP owned road where Claimant's accident occurred as Condustrial's premises for compensation purposes. This conflation of the "premises rule" confounds its very purpose to provide coverage under the Act for accidents occurring on premises the employer actually owns, maintains, and/or controls.

5) It is logical to extend coverage to accidents sustained on the employer's premises when the employee has completed his work and is departing for the day. The policy benefits of this rule extend to both the employee *and* the employer. For the employee, it recognizes the common-sense notion that coverage under the Act should not turn on a bright line test of whether the worker was getting paid and/or was performing principal or essential job duties at the time of the accident. Reasonable time and opportunity to

depart from the premises at the end of the workday is sufficiently incidental to employment to fall within the scope of risks associated with that employment. *See generally* Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965); Pierre v. Seaside Farms, 386 S.C. 534, 689 S.E.2d 615 (2010); and Holston v. Allied Corporation, 300 S.C. 174, 386 S.E.2d 798 (Ct. App. 1989). As for the benefit to the employer, it creates an exclusive remedy under the Act for injuries sustained on the premises it actually owns, controls, and or maintains when the employee is arriving or departing.

6) These dual purposes of the "premises rule" are not furthered by its extension to the premises of a third-party, especially in this case given the remoteness of the accident's location relative to BP's plant and claimant's primary work area, as well as Condustrial's total lack of control over, and connection to, the circumstances surrounding the accident. In short, it is simply illogical to impute liability under the premises rule to Condustrial when Claimant's accident occurred on BP's premises.

7) Claimant's accident occurred on an access road to a state highway a full mile beyond the guard shack and gated entrance to the plant parking lot. Although BP owned and maintained the access road, there is no evidence in the Record establishing how BP's mere ownership of the road that far removed from its plant and Claimant's primary work area actually *caused* Claimant's accident. *See* Nicholson v. S.C. Dept. of Social Services, 405 SC. 537, 748 S.E.2d 256 (Ct. App. 2013) ("arising out of employment" prong of compensability test refers to the *cause* of the accident). It is logical to presume that such a causal connection exists under the "premises rule" for accidents occurring

on premises actually owned, maintained, or controlled by a defendant employer. However, the work connection with Condustrial is simply untenable under these facts.

8) There is no legal authority in South Carolina for extending the "premises rule" to the off-site premises of a third-party, even if that third-party location is a place where a claimant's employment caused him to be.

9) One South Carolina case, Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.C. 472 (Ct. App. 2011), in fact specifically rejects the notion that the premises rule extends to offsite premises. The claimant in that case clocked out, exited the hospital where she was employed, and fell on a public sidewalk running next to the hospital. The Full Commission appellate panel denied the claim on the grounds that 1) claimant was not on the employer's premises at the time of her injury; 2) the accident did not fall within any recognized exception to the "going and coming" rule; and 3) there was otherwise no causal connection between the fall and her employment- i.e. did not arise out of her employment. The Court of Appeals affirmed the denial, finding "Palmetto Baptist does not own, maintain, or control the sidewalk on which Matute fell."

10) The arguments for compensability of this case are less compelling than those presented in Matute. The Court rejected extension of the premises rule to an area immediately adjacent to the employer's premises in that case, whereas Claimant's accident here occurred a mile beyond the parking lot to the plant where he primarily worked and at least several minutes after he had clocked out. Again, all South Carolina cases applying the "premises rule" to confer compensability have drawn a line between the employer's actual premises and another's property. *See* Aughtry v. Abbeville County School District, 340 S.C. 604, 533 S.E.2d 885 (SC 2000) ("going and coming rule" is not

applicable because claimant's injuries occurred on school districts premises"); *See also* 1 Larson, The Law of Workmen's Compensation § 15.12(b) (1985) ("[t]he real reason for the premises rule is, and always has been, the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting and applying the rule would not be unmanageable."

11) Next, Claimant contends BP is his statutory employer; therefore, his accident occurring on a road owned or controlled by BP is vicariously compensable against Condustrial under the "premises rule." However, the preponderance of the evidence in the Record confirms BP was not Claimant's statutory employer under S.C. Code §42-1-400 *et seq,* so this argument fails to confer compensability of the claim.

12) In Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (1998), the Supreme Court held that the fact it was important for a retailer to receive goods to stock its store does not render the delivery of goods to the store by a common carrier *part of* the retailer's business. As such, a truck driver injured while delivering inventory was found not be a statutory employee of the retailer.

13) Likewise, in Olmstead v. Shakespeare 354 S.C. 421, 581 S.E.2d 483 (2003), the Court took the Abbott holding one step further in concluding that delivery of goods *from* a manufacturer is not an important part of the manufacturer's business either, even though such delivery was required to complete the sale. Therefore, an employee of the company delivering goods from the manufacturer was not a statutory employee and could maintain a suit in tort against the manufacturer.

14) Relying on these precedents, the Court of Appeals in Keene v. CNA Holdings, 426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019) summed up the statutory employment test as

follows: "[u]ltimately, the guidepost is whether or not that which is being done is or is not a *part of* the general trade, business, or occupation of the owner. " (emphasis original) (internal citations omitted). The court expounds on this principle further, stating "[s]imply put, employees who work for the subcontractor but are *not employed to do work that the owner would normally do* would not have a statutory employment relationship with the owner." *Id* (emphasis added).

15) In the instant case, the essential function of the BP facility in question is to process a liquid byproduct from the refining of gasoline called paraxylene into a powder form. This end product is then sold to various companies for multiple uses, including textiles, plastics, and clothing. (O'Mara Depo. Tr. p. 12 ll. 1-16).

16) In contrast, Claimant is an industrial painter who was assigned by his direct employer staffing company, Condustrial, to work for Phillips Industrial ("Phillips"). BP subcontracted Phillips to apply a protective coating onto a newly constructed cement service ramp accessed by trucks unloading hydrobromic acid used in BP's processes. (O'Mara Depo. Tr. p. 16 l. 25- p. 17 ll. 1-4).

17) BP employed onsite "resident contractors" located in a separate building on the BP property to perform essential plant maintenance and other essential plant functions. When these resident contractors "can't handle something," that task would be contracted out. (O'Mara Deposition p. 14 ll. 23-25-p. 15 ll. 1-22).

18) There is no evidence that Phillips or Condustrial were resident contractors for BP. Likewise, there is no evidence that BP is in the business of industrial painting. Finally, there is no evidence in the Record that direct employees of BP did any industrial

painting tasks such as applying the protective cement coating Phillips was hired to do. (O'Mara Depo. Tr. p. 20 ll. 21-25-p. 21 ll. 1-3).

19) Phillips was specifically hired for its expertise in the application of this protective coating. This is expertise that BP's resident contractors "could not handle," which further removes it from the orbit of BP's essential business purpose.

20) Phillips' application of a protective coating on a newly constructed cement service ramp is simply not part of BP's business. *See* Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 49.16(e) (1996) (where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business).

21) Ordinarily, construction work is considered outside the trade of business of manufacturer. A. Larson, The Law of Workmen's Compensation § 49.12 at 9-25 (1982). Every manufacturer must have an operable plant to produce its product, but this fact alone does not make the work of constructing the plant part of the trade, business, or occupation of a manufacturer who engages a contractor to construct all or a portion of its plant. *See* Raines v. Gould, Inc., 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986).

22) Keene *supra* specifically rejected the overly broad argument that contract workers in a maintenance setting should generally be considered statutory employees of a manufacturer merely because "maintenance is an important and essential part of a manufacturing business." Keene 426 S.C. at 371-372.

23) Keene further reiterates the Supreme Court's distinction in Olmstead between an activity that is important or necessary to a manufacturer's business and activity that is

actually **"part of"** the manufacturer's business. Specifically, the Court in Olmstead found that delivery of a manufacturer's product to its customer to complete its sale was obviously "important" and "necessary" for its business, but "it does not follow that such delivery was part or process of its manufacturing business." Olmstead 354 S.C. at 426. Likewise, application of the protective coating to the cement service ramp in the instant case, while important to BP to the extent that any endeavor taken by a company to protect its property is important, is not a part of BPs core business of reprocessing paraxylene.

24) Ultimately, Keene held that the defendant manufacturer in that case was NOT the injured maintenance worker's statutory employer when none of the manufacturer's employee's performed maintenance work and the manufacturer hired the subcontractor for its specialized expertise.

25) Although every purported statutory employment situation must be decided on a case by case basis, the aforementioned critical factors relied upon in Keene are certainly analogous to the instant case: 1) BP's direct employees never engaged in the same type of work in question; 2) Phillips was hired for its expertise in applying the protective coating to the cement ramp because its onsite resident contractors could not handle the project; and 3) there is no evidence that application of the protective coating was part of BP's core business.

26) As such, BP was NOT Claimant's statutory employer and liability for the accident occurring on BP's premises therefore cannot be imputed to Condustrial under the "premises rule."

27) After arguing before the Hearing Commissioner that this is not a "going and coming rule" case, Claimant now argues in the alternative that it is as additional sustaining grounds for affirmance of the Commissioner's compensability award. The general rule in South Carolina is that "an employee going to or coming from the place where his work is to be performed is not engaged in . . . employment, and therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment." Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942).

28) However, South Carolina recognizes five exceptions to the "going and coming" rule which may render an accident compensable: (a) The means of transportation is provided by the employer, or the time spent traveling is paid for or included in the wages; (b) The employee is performing some duty or task in connection with their employment; (c) The way used is inherently dangerous and is either: (i) the exclusive way of ingress and egress to and from his work; or (ii) constructed and maintained by the employer; (d) The place of injury was brought within the scope of employment by an express or implied requirement in the employment contract; or (e) The employee sustains an injury while performing a special task, service, mission or errand for the employer, even before or after customary working hours, or on a day he does not ordinarily work. Medlin v. Upstate Plaster Service, 329 S.C. 92; 495 S.E.2d 447 (1998) (emphasis added).

29) Claimant argues that his accident falls under exception (d) above known as the express or implied employment requirement. Specifically, Claimant contends BP instructed him on how to leave work via one of the two private access roads to the public highway. Therefore, using such roads for ingress and egress onto the BP property was an

exclusive and express requirement of his employment for Condustrial. This argument is without merit.

30) It is elementary that getting to and from one's work site is obviously an implied requirement of everyone's employment contract. As such, this exception must be strictly applied or else this exception alone would swallow the entire rule and in fact render every other exception to the going and coming rule superfluous. *See* Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987) ("there would be nothing to prevent this line of reasoning from being extended to mean that since all employees must leave home in order to come to work, coming to work is an implied requirement of their employment. All accidents occurring on the way to work are compensable. This kind of reasoning would permit the exceptions to swallow the rule."); *cf.* Eargle v. South Carolina Electric & Gas Co., 32 S.E.2d 240 (1944) ("under the unusual and peculiar facts" of that case a maintenance worker instructed to report to work on Christmas morning to address an emergency situation at the plant was deemed covered under the Act via an express or implied requirement of his employment contract when he drowned while attempting to report to work via boat in dense fog.).

31) Claimant's argument also conflates two exceptions to the rule that would not otherwise be applicable on their own. The exclusive ingress/egress exception is not applicable here because it requires that the exclusive route also be "inherently dangerous." This exception only applies when the way used are both inherently dangerous AND the exclusive way of ingress and egress. *See* Medlin *supra.* Therefore, even if the route used by Claimant to depart BP's premises was exclusive, there is still no evidence in the Record that it was "inherently dangerous." As such, this exception does not apply to this case.

32) Claimant's route home on the day of his accident was not exclusive either. Claimant acknowledged that his choice to use Flagg Creek Road was dictated by the quickest and most efficient route home rather than instructions from BP.

33) Likewise, Claimant's supervisor confirmed that use of Flag Creek or Amoco roads to leave BP's premises depended on which route Claimant wanted to take to go home, not an inherent or express requirement of his employment.

34) There is no evidence in the Record as to why BP would require subcontractor employees to take an exclusive route home from its plant. Rather, the evidence is clear that Claimant's decision to use Flag Creek Road where his accident occurred after leaving work was dictated by the fact such route was the most direct route home, not a mandate of his employment. Therefore, the express or implied requirement of the employment exception to the going and coming rule does not apply here.

35) The Supreme Court in McDonald v. E.I Dupont & Co., 223 S.C. 217, 74 S.E.2d 918 (1953) denied compensability of an accident when the claimant clocked out and exited his immediate place of employment and was struck by a vehicle while crossing a public road to reach his car and leave for the day. The Court found that there was no express or implied requirement for the employee to use the particular road where the accident occurred. The fact the accident in McDonald occurred on a public road, where the accident here occurred on a private one, is a distinction without a difference because in both cases the employer was not exerting any control over the route taken to leave for home.

36) BP's ownership of the road in question plays no role in the going and coming analysis. The "premises rule" only applies to accidents occurring on premises owned or

controlled by a defendant employer, whereas exceptions to the going and coming rule apply to accidents occurring off the employer's premises. Aughtry v. Abbeville County School District, 340 S.C. 604, 533 S.E.2d 885 (SC 2000) (the "going and coming rule" is not applicable because claimant's injuries occurred on school districts premises"); *See also* Matute v. Palmetto Health Baptist *supra.* For reasons sated previously, BP was not Claimant's statutory; thus, the premises rule has no application to this case. If ownership of the road by BP cannot stand on its own to confer compensability of this claim under the premises rule, then it cannot be smuggled in the back door to confer compensability as an exception to the going and coming rule either. The conflation of these separate concepts is simply not applicable to the analysis of this case.

37) In sum, the Panel concludes the following: a) that Claimant's accident and injuries sustained on September 27, 2017 are not compensable and/or covered under the South Carolina Workers' Compensation Act via the "premises rule," either directly or vicariously against Condustrial under the statutory employment doctrine; and b) Claimant's accident occurred while he was journeying home from his workplace at the end of his workday, and no exceptions to the "going and coming rule" barring coverage/compensability of such accidents are applicable to the facts of this case.

CONCLUSION AND ORDER

For all the aforementioned reasons, it is **ORDERED, ADJUDGED, AND DECREED** that the Hearing Commissioner's Decision and Order dated December 11, 2019 is hereby **REVERSED** and Claimant's claims for compensation and medical benefits, and all other relief under the Act, are hereby **DENIED.**

IT IS SO ORDERED!

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION:

T. Scott Beck, Commissioner

Appellate Panel Chair

Susan S. Barden

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on September 2, 2020

Order Served via E-Mail:

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