RECEIVED
Dec 21 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2020-001236

Ryan Cook, Employee, ... Appellant,

v.

Condustrial, Inc., Employer, and
Benchmark Insurance Company,
Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

Malcolm M. Crosland, Jr.
J. Kevin Holmes
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for the Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Facts 3

Standard of Review 5

Arguments

1. The Commission erred in failing to rule the Workers' Compensation Act is liberally construed in favor of coverage 6

2. The Commission erred in failing to rule Respondent was the Appellant's statutory employer 8

3. Even in the absence of a finding Respondent was Appellant's Statutory employer, the Commission erred in failing to rule Appellant's admitted accident arose out of and in the course of his employment under the premises rule 9

4. In the alternative, the Court should rule Appellant's admitted Accident was compensable under the forth exception to the Going and coming rule 15

Conclusion 16

TABLE OF AUTHORITIES

CASES

Baggott v. S. Music, Inc., 330 S.C. 1, 496 S.E.2d 852 (1998) 6
Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 200 S.E.2d 83 (1973) 6
Bentley v. Spartanburg County, 398 S.C. 418, 730 S.E.2d 296 (2012) 6
Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S. Ct. 221, 72 L.Ed. 507 (1928) 11
Burke v. Wilfong, 638 N.E.2d 865 (Ind. Ct. App. 1994) 11
Camp v. Spartan Mills, 302 S.C. 348, 396 S.E.2d 121 (Ct. App.1990) 9
C*udahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 44 Sup. Ct. 153, 68 L. Ed 366 (1923) 11
Davaut v University of South Carolina, 418 S.C. 627, 795 S.E.2d 678 (2016) 5
Davis v. Chemical Constr. Co., 232 Ark. 50, 334 S.W.2d 697 (1960) 13
Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965) 5
Downey v. Vanderlinde Electric Corp., 276 App. Div. 1044, 95 N.Y.S.2d 685 (1950) 11
Eargle v. S.C. Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944) 6
E. I. DuPont De Nemours Co. v. Hall, 237 F.2d 145 (4th Cir. 1956) 13
Employer's Ins. Co. of Alabama v. Bass, 81 Ga. App. 306, 58 S.E. 2d 516 (1950) 13
Faber v. R.J. Frazier Co., 72 Ohio App.3d, 593 N.E.2d 410 (1991) 12
Fireman's Fund Ins. v. Sherman & Flecter, 705 S.W.2d 459 (1986) 2
Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942) 13
Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) 5
Hayes v. Gibson Hart Co., 789 S.W.2d 775 (Ky. 1990) 12
Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987 14
Keene v. CNA Holdings, 426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019) 18
Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) 17
McDonald v. E. I. DuPont De Nemours Co., 223 S.C. 217, 74 S.E.2d 918 (1953) 13
Medlin v. Upstate Plater Serv.,329 S.C. 92, 495 S.E.2d 447 (1998) 15
Owings v. Anderson Cty. Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993) 6
Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 747 S.E.2d 430 (2013) 5
Proaccino v. Horton & Sons, 95 Conn. 408, 111 A. 594 (1920) 11
Shealy v. Aiken County, 3341 S.C. 448, 535 S.E.2d 438 (2000) 17
Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) 15

Starr Piano Co. v. Industrial Accident Commission, 181 Calif 433, 194 P. 860 (1919) 10
Stewart v. United States, 716 F.2d 755 (10th Cir. 1982, cert. denied 469 U.S. 1018,105 S.Ct 432, 83 L.Ed. 2d 359 (1984) 13
Sundine v. Dunne & Co., 218 Mass 1, 105 N.E. 433 (1914) 10
Whigham v. Jackson Dawson Communications, 410 S.C. 131, 763 S.E.2d 420 (2014) 7
Williams v. S.C. State Hosp., 245 S.C. 377, 140 S.E.2d 601 (1965) 7

STATUTES

S.C. Code Ann. § 1-23-380(5) (Supp. 2015) 5

OTHER AUTHORITY

Larson, The Law of Workers' Compensation, § 13.04[4] (1985) 14

Larson, The Law of Workers' Compensation, § 15.12 (b) (1985) 14

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE COMMISSION ERR IN FAILING TO CONSIDER THE WORKERS' COMPENSATION ACT IS LIBERALLY CONSTRUED IN FAVOR OF COVERAGE?

II. DID THE COMMISSION ERR IN FAILING TO RULE RESPONDENT WAS APPELLANT'S STATORY EMPLOYER?

III. DID THE COMMISSION ERR IN FAILING TO RULE THE APPELLANT'S ADMITTED ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT UNDER THE PREMISES RULE?

IV. DID THE COMMISSION ERR IN FAILING TO RULE THE PRIVATE ROAD WHERE APPELLANT WA INJURED WAS BROUGHT WITHIN THE COVERAGE BY THE FOURTH EXCEPTION TO THE GOING AND COMING RULE?

STATEMENT OF THE CASE

On September 27, 2017, Appellant was involved in an admitted motor vehicle accident leaving the BP plant in Berkeley County where he was working as a contract industrial painter. (R. p. 162). On October 4, 2017, Appellant filed a Form 50, Request for Hearing, alleging injuries to multiple body parts. (R. p. 163). On November 2, 2017, Respondent filed a Form 51 denying the accident arose out of and in the course of Appellant's employment. (R. p. 164).

A hearing was scheduled of February 8, 2018. On January 22, 2018, Appellant moved for a continuance because BP had refused to produce a Rule 30(b)(6), SCRCP, discovery witness. (R. p. 165). The hearing was reset as a status conference on March 6, 2018. By Order dated April 12, 2018, the hearing was continued and BP ordered to comply with the deposition subpoenas. (R. p. 37).

A hearing was reset for September 12, 2019. By Decision and Order dated December 11, 2019, the Hearing Commissioner found the claim compensable, awarded temporary total disability benefits, and additional medical treatment. (R. p. 18). On December 23, 2019, Respondent filed a Form 30, Request for Commission Review. (R. p. 173). A review hearing was held on June 9, 2020. By Decision and Order dated September 2, 2020, an Appellate Panel reversed the Hearing Commissioner and denied the claim. (R. p. 1).

On September 4, 2020, Appellant filed Notice of Appeal and this appeal follows. (R. p. 177).

FACTS

Appellant was an industrial painter. He was employed by the Respondent to do painting, sandblasting, pressure washing, and related jobs. (R. p. 58). Respondent assigned Appellant to Phillips Industrial which had a contract to perform work for BP, a chemical manufacturer located in Berkeley County located in Berkeley County.

When assigned to the BP plant Appellant was told how to come and go from the worksite:

> Q: And when you started the job, were you given any instruction as to how to get on to the work site or how to leave the work site?
>
> A: Yes. The rule was you come – when you're coming in you take Amoco Drive. When you leave you take Flag Creek if you're going to 526.

(R., pp. 24 - 25). Appellant's supervisor, Bogar Anderson, confirmed the instructions:

> Q: Okay. So the road, the exit road would be, the fork, if you're leaving, the road to the right?
>
> A: Yes.
>
> Q: And that was the road on which Mr. Cook was traveling when he had his accident?
>
> A: Yes.
>
> Q: And that was the road that you were told to take when leaving the plant?
>
> A: Yes.

(R. p. 138).

Appellant testified at the end of the day he would clean his equipment and store it in a trailer. His supervisor would then pick him up and drive him to the security gate where he would sign out and return his security pass. His supervisor would then drive him to the designated subcontractor parking lot. Appellant would leave the parking lot traveling on Amoco Road, turn onto Flag Creek Road, and follow Flag Creek Road to the public highway. (R. pp. 66 – 67; R. p. 68). Both Amoco Road and Flag Creek Road roads were constructed and maintained by BP. (R. p. 80; R. p. 157). Neither road served any general public transportation purpose other than ingress to and egress from the plant. (R. p. 179).

On September 27, 2017, Appellant applied a protective coating a new concrete HBR truck ramp used to deliver corrosive raw materials used in the plant's manufacturing process. (R. p. 66). BP's corporate designee, Kathleen O'Mara, testified the protective coating was applied to prevent a spill of hydrobromic acid from "eating up" the cement. (R. pp. 154 – 155). She further testified protecting the plant infrastructure was an integral part of plant's manufacturing process. (R. p. 156).

On that same day Appellant suffered an admitted accident while leaving the BP plant. Appellant followed the normal routine at the end of the day. He was leaving the plant driving on Flag Creek Road as instructed when his truck ran off the road and flipped over into a ditch. (R. pp. 67 – 68). He was transported to MUSC where he underwent fusion surgery and fixation of his 5th, 6th, 7th, and 8th

vertebrae. (R. p. 70). He also suffered left hand and pelvis fractures. (R. p. 76 – 77).

STANDARD OF REVIEW

The structural framework for Appellant's argument was laid out by Justice Kittrell in his decision in the case of *Davaut v Univ. of S.C.*, 418 S.C. 627, 795 S.E.2d 678 (2016). "Under the Administrative Procedures Act (APA), ... '[the appellate court] will not overturn a decision by the [Workers' Compensation] Commission unless the determination is unsupported by substantial evidence.'" *Id.,* 418 S.C. at 632, 795 S.E.2d at 680 (2016) (citing *Pollack v. S. Wine & Spirits of Am.*, 405 S.C. 9, 13 – 14, 747 S.E.2d 430, 432 (2013) quoting S.C. Code Ann. § 1-23-380(5) (Supp. 2015)). Where the facts are not in dispute, the appellate court is free to decide whether an accident is compensable as a matter of law. *Id.*, 418 S.C. 632, 795 S.E.2d at 681; *See*: *Grant v. Grant Textiles,* 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) ("Where there are no disputed facts, the question of whether an accident is compensable is a question of law." (citing *Douglas v. Spartan Mills,* 245 S.C. 265, 266, 140 S.E.2d 173, 173 (1965))).

ARGUMENT

In oral argument before the Appellate Panel Respondent conceded the facts are undisputed. (R. p. 102). Appellant was contracted to work at the BP plant and the work was ongoing. He was leaving the BP plant at the end of his work day. He followed the instructions he was given and was driving on a private road constructed and maintained by BP that provided the only means of ingress to and egress from the plant and served no general public

transportation purpose. The question whether Appellant's claim is compensable under these undisputed facts is a question of law for the Court to decide.

The Workers' Compensation Act pays benefits for personal injury or death arising out of and in the course of the employment. *Davaut, supra.*, 418 S.C. at 633, 795 S.E.2d at 681 quoting *Bentley v. Spartanburg County*, 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012) and citing S.C. Code Ann., § 42-1-310 (2015)). "'Arising out of' refers to the origin of the cause of the accident; while 'in the course of' refers to the time place, and circumstances under which the accident occurred. *Id.* (citing *Baggott v. S. Music, Inc.*, 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) and *Owings v. Anderson Cty. Sheriff's Dep't*, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993); *Eargle v. S.C. Elec. & Gas Co.*, 205 S.C. 423, 429, 32 S.E.2d 240, 242 (1944)). "An injury occurs in the course of employment 'when it o curs within the period of employment at a place where the employee reasonably be in the performance of his duties and while fulfilling those duties *or engaged in something incidental thereto.*'" (Emphasis added). *Id.*

1. The Commission erred in failing to consider the Workers' Compensation Act is liberally construed in favor of coverage.

The Appellate Panel asserted, "[t]here is no legal authority in South Carolina for extending the 'premises rule' to the off-site premises of a third-party where a claimant's employment caused him to be. (R. p. 8). The legal authority for this proposition is found in the liberal construction of the Workers' Compensation Act in favor of coverage, the language of the premises ruler itself, and in the almost universally accepted case law.

"In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward provided coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Davaut, supra. 418 S.CV. at 633, 795 S.E.2d at 681* (citing *Whigham v. Jackson Dawson Communications*, 410 S.C. 131, 135, 763 S.E.2d 420, 422 (2014) and *Shealy v. Aiken County*, 3341 S.C. 448, 455 – 56, 535 S.E.2d 438, 442 (2000); see also: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639, 641 (1992)).

It is the liberal construction of the Act Justice Kittrell recognized that the South Carolina Courts to adopt the premises rule:

> Employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and in relation to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment...

Id., 418 S.C. at 633, 795 S.E.2d at 681; *Williams v. S.C. State Hosp.*, 245 S.C. 377, 381, 140 S.E.2d 601, 603 (1965) (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, 48 S. Ct. 221, 72 L.Ed. 507 (1928)). Thus, the act of leaving the employer's premises is 'in the course of one's employment if the employee leaves the premises as contemplated at the close of the work day." *Id.*; *Camp v. Spartan Mills*, 302 S.C. 348, 350, 396 S.E.2d 121,122 (Ct. App.1990) (citing *Williams, supra.*, 245 S.C. at 381 – 82, 140 S.E2d. at 603)). There is no dispute Appellant was leaving the BP plant as contemplated at the close of his work day.

2. **The Commission erred in failing to rule Respondent was Appellant's statutory employer.**

In oral argument before the Appellate Panel, Respondent conceded the premises rule would apply, if BP was Appellant's statutory employer. (Tr. Appellate Panel hearing 6/9/20, p. 7, lines 18 - 24). The Appellate Panel, however, ruled BP was not Appellant's statutory employer citing the Court of Appeals decision in *Keene v. CNA Holdings*, 426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019). Appellant respectfully submits *Keene* is distinguishable because Appellant was more directly involved in BP's chemical manufacturing process than the employee performing "general maintenance" was at the Celanese fiber manufacturing plant in *Keene*. As the Court observed in *Keene*, "[g]eneral maintenance of equipment is not part of the fiber manufacturing process." *Id.*, 426 S.C. at 367-68; 827 S.E.2d at 187. Appellant was applying a protective coating to a new concrete HBR truck ramp used to deliver corrosive raw materials used in BP's manufacturing process. BP's corporate designee, Kathleen O'Mara, explained the protective coating was applied to prevent a spill of hydrobromic acid from "eating up" the cement and admitted protecting the plant infrastructure was an integral part of plant's manufacturing process. Appellant does not wish to belabor the point but notes the Supreme Court granted certiorari to review the *Keene* decision on November 1, 2019. Appellant desires to preserve the issue pending the Supreme Court's decision. If the Supreme Court reverses, the Court should remand the claim to the Commission for further consideration consistent with the Supreme Court's ruling unless the Court finds other sufficient grounds to reverse the Commission as argued below.

3. **Even in the absence of a finding Respondent was Appellant's statutory employer, the Commission erred in failing to rule the Appellant's admitted accident arose out of and in the course of his employment under the premises rule.**

The premises rule is not based on property rights but on the common sense notion employment includes a reasonable margin of time and space necessary for passing to and from the place where the work is to be done. "The act of leaving the employer's premises is 'in the course of' one's employment if the employee leaves the premises as contemplated at the close of the workday." *Devaut, supra.*, 418 S.C. at 634, 795 S.E.2d at 681 (citing *Camp,* 302 S.C. at 350, 396 S.E.2d at 122 and *Williams,* 245 S. C. at 381 – 82, 140 S.E.2d at 603)).

Application of the premises rule has never been dependent on the employer's ownership or control of the place where the injury occurred. The express language of the premises rule itself illustrates this point when it states the rule can be applied to property "of another in such proximity and in relation to be in practical effect a part of the employer's premises." *Id.,* 418 S.C. at 633, 795 S.E.2d at 681. The application of the premises rule to property neither owned nor controlled by the employer was almost immediately recognized in the workers' compensation case law. In *Sundine v. Dunne & Co.,* 218 Mass 1, 105 N.E. 433 (1914), an employee of Olsen, a subcontractor of Dunne & Co., was injured walking up the stairs in a building where Dunne & Co. leased space. The Massachusetts Court ruled:

> Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen or Dunn & Co. had control, though they and their employees had the right to use them. These stairs were the only means available for going to and

> from the premises, where she was employed, the means of which she practically was invited by Olsen and by Dunne & Co. to use.

Id., 105 N.E. at 434. Similarly, in *Starr Piano Co. v. Industrial Accident Commission,* 181 Cal. 433, 194 P. 860 (1919), an employee fell down an elevator shaft in a building where his employer leased space. The California Court ruled:

> Under the [premises rule], if the employer were the owner of the building and the employe were injured on the elevator or stairs in reaching his place of work on a certain floor, it cannot be doubted that compensation is payable under the statute. The employe has reached the employer's premises and is using a means of access specially provided for that very purpose. It would seem to follow that if the employer did not own the building, but rented it all, compensation would still be payable, even though the employer did not operate or control, or have the control or care of the stairs, but such operation, control, and care remained with the owner of the building. The operation, control and care of the elevator and stairs in such a case would seem to be a matter wholly between the employer and the owner of the building. It would not enter as between the employer and employe and would be entirely extraneous to the employment. ... There would seem to be no reason for allowing compensation where the employer controls the elevator for instance, and refusing it where he does not, when the fact as to who controls it is extraneous to the employment and the theory upon which compensation is now allowed under the Workers' Compensation Act... (spelling of "employe" in original)

Id, 181 Cal. at 435 – 6, 184 P. at 861 -62).

Over the years the premises rule has been applied in a variety of locations neither owner nor controlled by the employer. It has been applied to footbridges over canals and footpaths over railroad tracks neither owned nor controlled by the employer. *Proaccino v. Horton & Sons,* 95 Conn. 408, 111 A. 594 (1920). It has been applied to rail road tracks over roads leading to factories. *Cudahy Packing Co. of Nebraska v. Parramore,* 263 U.S. 418, 44 Sup. Ct. 153, 68 L. Ed 366 (1923). *Bountiful*

Brick Co., supra., the case cited by the South Carolina Supreme Court when it adopted the premises rule, involved an injury on a railroad track neither owned nor controlled by the employer. In South Carolina the premises rule has been applied to places neither owned nor controlled by the employer. In *Eargle, supra.*, the premises rule was applied when an employee drown crossing a lake there is no indication was owned or controlled by the employer. In *Devaut, supra.*, the premises rule was applied when an employee was injured crossing a public street neither owned nor controlled by the employee while walking to an employer parking lot.

Although not as fully developed in the case law, the premises rule has also been applied to contract workers whose employers do not own or control the premises where the work is performed. In *Burke v. Wilfong*, 638 N.E.2d 865, 868 – 70 (Ind. Ct. App. 1994), the Indiana Court of Appeals applied the premises rule to a contract employee and ruled:

> [C]ourts in other jurisdictions have held that when a contractor's employee is performing work pursuant to a contract on another company's property, that property is considered the employer's property for worker's compensation purposes. *Downey v. Vanderlinde Electric Corp.*, 276 App. Div. 1044, 95 N.Y.S.2d 685 (1950) (place where the employer's contract was being performed is deemed the employer's plant for ingress and egress while the work is in progress). (citations omitted). In a more recent opinion the Ohio Court of Appeals held that the administratrix of the estate of a contractor's employee who was killed in an automobile accident on a private road on a private employee access road was entitled to workers' compensation benefits. *Faber v. R.J. Frazier Co.*, 72 Ohio App.3d, 593 N.E.2d 410 (1991). In *Faber*, the decedent Fabre was employer by Frazier, a contractor which supplied general tradesman for work at a nuclear plant owned by Cleveland Electric Illuminating Company. Faber completed his shift, clocked out, and was exiting CEI's premises on an employee access road in a car driven by the employee of another contractor.

> The court found the CEI property, including the plant, parking lot, and access road, comprised the employment premises of Faber regardless of actual ownership and control. *Id.*, 593 N.E.2d at 413.

Similarly, in *Hayes v. Gibson Hart Co.,* 789 S.W.2d 775, 777 – 79 (Ky. 1990) the Kentucky Supreme Court applied the premises rule to a contract employee and ruled:

> In the present case the appellant argues that the crucial fact weighing in favor of applying the "operating premises" rule to the place where this injury occurred is that the employee was within the gate on the private premises of the T.V.A. at a place where he would not have been but for his employment. We agree. This case does not involve the "common risks of streets" (citing Larson). This is one of a common class of cases involving subcontractors and independent contractors doing construction and repair work on the private premises of an owner/contractor. In such cases it would be difficult, if not impossible, to define the physical limits of the "operating premises" of the employer if the term is confined to the physical limits of the job site where the work is being performed. The fact is, as the appellant claims, that this employee was injured at a position or location where he could not have been but for the authorization provided by his employer, Gibson Hart, who issued him a badge to be on the private premises of the T.V.A. We recognize that physical control of the area and responsibility for the condition of the sidewalk remained with T.V.A., but we do not consider this to be a controlling factor. If that were so, then the employees of a subcontractor or independent contractor working on the premises would be excluded from coverage everywhere but the precise location where work is in progress. Neither party has provided us with authority precisely on point, and our own research albeit limited to Larson's treatise and cases cited therein, indicates a surprising dearth of cases discussing the coverage of employees of independent contractors and subcontractors injured on the private premises of the owner/contractor while on their way to report to work. Two cases suggest that coverage should be provided in such situations, and in present circumstances, are *Davis v. Chemical Constr. Co.*, 232 Ark. 50, 334 S.W.2d 697 (1960) and *Employer's Ins. Co. of Alabama v. Bass*, 81 Ga. App. 306, 58 S.E. 2d 516 (1950)

In *Davis, supra.,* compensation was awarded to a construction worker employed in a large industrial complex who was injured alighting from truck at the end of a one

mile private access road to the complex. In *Bass, supra.*, compensation was awarded to a carpenter who suffered a heart attack carrying a heavy tool box 380 yards before reaching the building where he was assigned to work in a large apartment complex. *See also*: *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied 469 U.S. 1018,105 S.Ct 432, 83 L.Ed. 2d 359 (1984); *Fireman's Fund Ins. v. Sherman & Flecter*, 705 S.W.2d 459 (1986) (exclusive remedy defense applied to employees of subcontractors on premises of owner/contractors). Both *McDonald v. E. I. DuPont De Nemours Co.*, 223 S.C. 217, 74 S.E.2d 918 (1953), cited in the Appellate Panel Order, and *E. I. DuPont De Nemours Co. v. Hall*, 237 F.2d 145 (4th Cir. 1956), involved employees of subcontractors working at the Savannah River Plant. Coverage was denied under the facts of each because the injured employees had left the fenced in areas where their work was performed and were injured on a public highway. It is apparent coverage would have been afforded, however, if the employees had been injured in either the "400 area" or the "area 100-P" where they were contracted to work. Appellant was still on the operating premises of BP when he had his admitted accident.

The Appellate Panel Order deprives all contract workers like Appellant of common sense benefit of premises rule. It leaves unanswered where Appellant would have had to have been injured in order for his claim to have been compensable. Professor Larson addresses this problem with trying to constrict the application of the premises rule to less than the employer's premises boundary by giving an example:

> Suppose we follow the movements of a miner who has quit active work in the mine and postulate various possible places and casual circumstances of injury. The miner begins to dismount form a coal-digging machine, and falls off. He starts walking towards the mine elevator and is stung by a wasp which has managed to get in the elevator. He gets in a mine car and falls out due to a dizzy spell. He starts to change his clothes in the locker room and is injured when a fellow-employee playfully pulls his shirt over his head. He starts to take a shower and slips on a bar of soap. On the way to punch the time clock he is punched by an eccentric fellow-employee. He rides from this point to the plant gate in a truck owned by the union and paid for by employees, and is involved in an accident. Or he falls on the employer's parking lot on the way to his car. In a jurisdiction with the normal rules on premises and arising out of the employment, all of these cases would be compensable. In jurisdictions which have taken on themselves the task of defining an unorthodox narrower rule, it is difficult to foresee anything but interminable controversy over where the line is to be drawn both positionally and causally.

Larson, The Law of Workers' Compensation, § 13.04[4] (1985). Professor Larson reminds us, "[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. Larson, The Law of Workers' Compensation, § 15.12 (b) (1985) quoted in *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 473, 354 S.E.2d 384, 386 (1987).

Appellant was injured leaving BP's premises where he was contracted to work. The work was ongoing. He was driving on the private road constructed and maintained by BP he was instructed to use that provided the only means of ingress to and egress from the BP plant. The private road served no general public transportation purpose. Appellant would not have been driving on Flag Creek Road but for his employment. He was leaving the BP plant at the end of his workday as

contemplated. Interpreting the Workers' Compensation Act liberally resolving all doubts in favor of coverage, the Court should rule Appellant's admitted accident arose out of and in the course of his employment under the premises rule as a matter of law.

4. **In the alternative, the Court should rule Appellant's admitted accident was compensable under the forth exception to the going and coming rule.**

In the alternative, the Court should rule Appellant's admitted accident was compensable under the forth exception to the going and coming rule. As Justice Kittrell explained, "... this Court has long held that 'an employee going to or coming from the place where is work is to be performed is not engaged in performing any service growing out of and incidental to his employment' *Sola v. Sunny Slope Farms*, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964). Therefore, '[t]he general rule in South Carolina is that an injury sustained by an employee away from the employer's premises while on his way to or from work does not arise out of and in the course of employment.'" *Howell*, 291 S.C. at 471, 354 S.E.2d at 385 (citing *Gallman v. Springs Mills*, 201 S.C. 257, 263, 22 S.E.2d 715, 717-18 (1942). This is the well-known going and coming rule. *See, e.g., Medlin v. Upstate Plater Serv.*,329 S.C. 92, 95-96, 495 S.E.2d 447, 449 – 50 (1998). However, there are several recognized exceptions to the going and coming rule, including where although an employer's injuries are incurred away from the employer's premises, 'the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the [employee] in going to and coming from his work." *Sola*, 244 S.C. at 14, 135 S.E.2d at 326 (citations omitted). We refer to this as 'the fourth Sola

exception.' *See Howell,* 291 S.C. at 472 n.1 354 S.E.2d at 385, n.1." *Devaut, supra.*, 795 S.E.2d at 682.

Appellant was instructed to take Flag Creek Road when leaving the BP if he was headed to I 526. The instructions were confirmed by Appellant's supervisor. The private access roads were the exclusive means of ingress to and egress from the BP plant. Their use by the Appellant was brought with the scope of his employment by an express or implied requirement in his contract of employment for their use by the in going to and coming from the plant to perform his work. In the alternative, the Court should rule Appellant's admitted accident leaving the BP plant on the private road he was instructed to use was compensable under the fourth exception to the going and coming rule.

CONCLUSION

The operative facts in this appeal are not in dispute. The Court should decide whether Appellant's admitted accident leaving the BP plant where he was contracted to work arose out of and in the course of his employment as a matter of law. Liberally construing the Workers' Compensation Act, applying the language of the premises rule itself, and in accordance with the established case law, the Court should rule Appellant's admitted accident was compensable as a matter of law. In the alternative, the Court should rule Appellant's admitted accident was compensable under the fourth exception to the going and coming rule for the same reasons.

Respectfully submitted,

By:____________________

J. Kevin Holmes

Malcolm M. Crosland, Jr.
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for the Appellant

Charleston, South Carolina
December 21, 2020

RECEIVED
Dec 21 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2020-01236

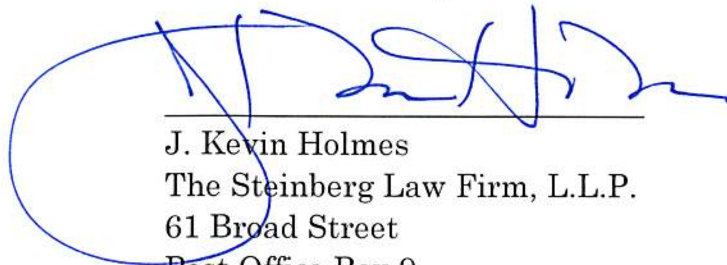
Ryan Cook, Employee, ... Appellant,

v.

Condustrial, Inc., Employer, and
Benchmark Insurance Company,
Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

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



J. Kevin Holmes
The Steinberg Law Firm, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for the Appellant

Charleston, South Carolina

December 21, 2020.