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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2020-001236

Ryan Cook, ... Appellant

v.

Condustrial, Inc, Employer and
Benchmark Insurance Company,

Carrier, ...Respondents.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

EVIDENCE OF THE CASE.....4

STANDARD OF REVIEW.....6

ARGUMENTS.....7

I. THE PREMISES RULE IS NOT APPLICABLE TO THE INSTANT BECAUSE THE ACCIDENT IN QUESTION DID NOT OCCUR ON PREMISES OWNED, MAINTAINED, OR CONTROLLED BY APPELLANT'S EMPLOYER, OR IN CLOSE PROXIMITY AND RELATION HERETO.....7

II. BP IS NOT APPELLANT'S "STATUTORY EMPLOYER;" THEREFORE, LIABILITY UNDER THE ACT CANNOT BE VICARIOUSLY IMPUTED TO HIS DIRECT EMPLOYER VIA THE PREMISES RULE.....14

III. SUBSTANTIAL EVIDENCE IN THE RECORDS SUPPORTS THE PANEL'S CONCLUSION THAT APPELLANT'S ACCIDENT DOES NOT FALL UNDER THE EXPRESS OR IMPLIED REQUIREMENT OF THE EMPLOYMENET CONTRACT EXCEPTION TO THE "GOING AND COMING" RULE.....20

IV. ADDITIONAL SUSTAINING GROUNDS IN THE RECORD SUPPORT THE PANEL'S DENIAL OF COMPENSABILTIY OF THIS CLAIM UNDER THE ACT.....24

CONCLUSION.....26

TABLE OF AUTHORITIES

South Carolina Cases

Abbott v. The Limited, Inc.

338 S.C. 161, 526 S.E.2d 513 (1998).....15, 17

Ardis v. Combined Insurance Co.

380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008).....25

Aughtry v. Abbeville County School District

340 S.C. 604, 533 S.E.2d 885 (2000).....4, 10, 13, 24

Davaut v. University of South Carolina

418 S.C. 627, 795 S.E.2d 678 (2016).....10, 13

Dicks v. Brooklyn Cooperage Co.

208 S.C. 139, 37 S.E.2d 286 (1946).....25

Eargle v. South Carolina Electric & Gas Co.

32 S.E.2d 240 (1944).....22

Edens v. Bellini

359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004).....18

E.I. DuPont De Nemours Co. v. Hall

237 F.2d 145 (1956).....13, 24

Fortner v. Thomas M. Evans Constr. And Development LLC

402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013).....6

Gallman v. Springs Mills

201 S.C. 257, 266, 22 S.E. (2d) 715, 719 (1942).....12, 20

Gattis v. Murrells Inlet VFW No. 10420

353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2002).....7

Hairston v. Re: Leasing, Inc.

286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985).....17

Holston v. Allied Corporation

300 S.C. 174, 386 S.E.2d 798 (Ct. App. 1989).....2

Houston v. Deloach & Deloach

378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).....7

Howell v. Pacific Columbia Mills

291 S.C. 469, 354 S.E.2d 384 (1987).....11, 21

Keene v. CNA Holdings

426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019).....15, 17, 18, 19

Lark v. Bi-Lo, Inc.

276 S.C. 130, 276 S.E.2d 304 (1981).....7

Matute v. Palmetto Health Baptist

391 S.C. 291, 705 S.C. 472 (Ct. App. 2011).....11, 12

McDonald v. E.I Dupont & Co.

223 S.C. 217, 74 S.E.2d 918 (1953).....12, 13

Medlin v. Upstate Plaster Service

329 S.C. 92; 495 S.E.2d 447 (1998).....6

Miller v. Lawrence Robinson Trucking

333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998).....2, 14

Nicholson v. S.C. Dept. of Social Services

405 SC. 537, 748 S.E.2d 256 (Ct. App. 2013).....8, 25

Pierre v. Seaside Farms

386 S.C. 534, 689 S.E.2d 615 (2010).....2

Raines v. Gould, Inc.

288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986).....17

Sola v. Sunny Slope Farms

244 S.C. 6, 135 S.E.2d 321 (1964).....20, 21, 22

Turner v. SAIIA Construction

419 S.C. 98, 796 S.E.2d 150 (Ct. App. 2016).....14

Williams v. South Carolina State Hospital

245 S.C. 377, 140 S.E.2d 601 (1965).....2, 7, 9, 25

North Carolina Cases

Strickland v. King

293 N.C. 731, 239 S.E.2d 243 (1977).....11

South Carolina Statutes

S.C. Code §42-1-400 *et seq*.....4

Treatises

1 Larson, The Law of Workmen's Compensation

§ 15.12(b) (1985).....14

Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation

§ 49.16(e) (1996).....16

A. Larson, The Law of Workmen's Compensation

§ 49.12 at 9-25 (1982).....16

STATEMENT OF THE CASE

This case arises out of multiple injuries sustained by Ryan Cook ("Appellant") 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, Appellant was assigned to work as a painter 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 BP property.

On the date of injury, Appellant 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, Appellant 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. Appellant 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, Appellant 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. Condustrial countered that the "premises rule" does not apply here because it does not own, maintain, or control the road in question, BP does. Since Appellant was injured on premises owned, controlled, or maintained by a third-party, his accident occurring while leaving home at the end of the workday is, therefore, not compensable under the Act.

In the alternative, Appellant 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). Appellant reasons that if an injured worker elects to proceed directly against his purported 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 can move to add the immediate employer as a party to the claim and request the Commission to impose liability directly upon the immediate employer. In either scenario, Appellant argues that his recovery under the Act would ultimately

come at Condustrial's expense, so BP's premises equate to Condustrial's premises for compensation purposes. Notwithstanding the procedural issue raised by Appellant never filing a claim against BP in the first instance, Condustrial countered that BP is not Appellant'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 single commissioner awarded the claim on the grounds that Appellant's motor vehicle accident "occurred on the Defendant employer's premises as the Claimant was leaving the plant at the end of the workday." (R. p. 28). The single commissioner also specifically found that the road in question was "owned, controlled, and maintained by BP." (R p. 28). 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. (R. p. 35). Condustrial thereafter appealed to the Full Workers' Compensation Commission Appellate Panel ("Panel"), contending the commissioner's findings of fact are patently erroneous and based upon a misapplication of law. [2] (R. p. 173).

The Panel reversed the single commissioner's compensability award. (R. p. 1). Specifically, the Panel concluded that 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 compensability determinations of accidents occurring off the employer's

[1] Defendants did not raise an objection to 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, Appellant 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.

premises. Aughtry v. Abbeville County School District, 340 S.C. 604, 533 S.E.2d 885 (2000). Based on this guiding principle, the Panel, further found, *inter alia,* that a) the premises rule was not applicable because Condustrial did not own, maintain or control the road where the accident occurred; b) that BP was not otherwise Appellant's statutory employer for purposes of imputing liability under the Act to Condustrial because the work he was performing was not part of the BP's essential business functions; and c) no exceptions to the "going and coming" rule apply to the facts of this case.

EVIDENCE OF THE CASE

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. (R. p. 193). In contrast, Appellant 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 brand-new cement service ramp accessed by trucks unloading hydrobromic acid used in BP's processes. (R. p. 154). It is significant to note that BP employed onsite "resident contractors" located in a separate building on the BP property to perform essential plant maintenance and other essential plant functions. (R. p. 154). When these resident contractors "can't handle something," that task would be contracted out. There is no evidence that Phillips was a resident contractor 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. (R. pp. 155-56).

Regarding the going and coming issue, Appellant acknowledged under cross-examination that his choice to use Flagg Road was primarily dictated by the location of his home rather than instructions from BP:

Q: Were you using a road that you had a choice to use?

A: **Yeah.**

Q: You could have gone either way, Amoco Road or Flag Creek?

A: Yeah but the rule was always to take Flag Creek.

Q: And why would you always take Flag Creek?

A: **Because it was – the way it's close, closest way to home.**

Q: Right, because it was the closest way home, not because you had to?

A: I guess not.

Q: If you lived the other way you could go down Amoco Road?

A: Yeah, I guess. (R. p. 43) (emphasis added).

Even under direct examination Appellant testified that he only took Flag Creek Road in order to access I-526 because he lived in Mount Pleasant. (R. p. 63). Appellant responded in the affirmative when asked whether taking Flag Creek Road was "the most efficient way to go home." (R. p. 63).

Similarly, Appellant's supervisor confirmed the use of Flag Creek or Amoco roads to leave BP's premises depended on which direction Appellant wanted to go, not an inherent requirement of his employment:

Q: Okay. Has anybody ever told you which road you needed to take to get in?

A: Yes, security.

Q: They have?

A: Yeah.

Q: And what did they tell you?

A: Use the road, the second road to get in; and the way out, you can take -- *it depends which way you're going*. If you're going to Mount Pleasant you go to the right, if you go the other way, you can take the left. (R. p. 138)(emphasis added).

Mr. Anderson explained further under cross-examination by defense counsel:

Q: So-was Mr. Cook going to the right because he lived down near Mount Pleasant?

A: Yes.

Q: Okay. But you didn't have to go that way if you didn't -

A: If you didn't want to.

Q: Because if you were living north, it would be longer?

A: Yes. (R. pp. 146-47).

STANDARD OF REVIEW

Condustrial generally agrees with the Appellant's recitation of the applicable standard of review insofar as it pertains to the Court's jurisdiction to decide compensability of an accident as a matter of law when the underlying facts are undisputed and/or stipulated. Condustrial further agrees this is the applicable standard for adjudication of the premises rule issue but notes that the standards of review for the statutory employment and going and coming rule issues are a bit more nuanced. To clarify, the existence of an employment relationship is jurisdictional; therefore, the Court's standard of review of whether BP is Appellant's statutory employer is actually *de novo.* *See* Fortner v. Thomas M. Evans Constr. And Development LLC, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013) (determination of whether a worker is a statutory employee under the Act is jurisdictional; therefore, the question on appeal is a matter of law and the Court has the power to review the entire record to decide the jurisdictional facts in accordance with its own view of the preponderance of the evidence).

Next, Condustrial submits that analysis of the going and coming issue is governed by the "substantial evidence" rule to the extent it turns, at least in part, on a factual determination of whether Appellant's route home on the date in question was an "implied requirement of his employment for Respondent" and/or whether such route was "exclusive and inherently dangerous." *See* Medlin v. Upstate Plaster Service, 329 S.C. 92; 495 S.E.2d 447 (1998) (South

Carolina recognizes five exceptions to the "going and coming" rule, which may render an accident compensable, including: (a) 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 and b) the place of injury was brought within the scope of employment by an express or implied requirement in the employment contract.

Under the substantial evidence rule, the Court may not substitute its judgement for that of the Commission as to the weight of the evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case; rather, it is evidence, when considering the record as whole, allows reasonable minds to reach the same conclusion as the Commission. Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2002). The possibility of drawing two inconsistent conclusions from the same evidence does not preclude the Commission's findings from being supported by substantial evidence. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).

ARGUMENTS

For all the foregoing reasons, Respondent submits the Court must AFFIRM the Panel's Order in its entirety.

I. The premises rule is not applicable to the instant because the accident in question did not occur on premises owned, maintained, or controlled by Appellant's employer, or in close proximity and relation thereto.

Reasonable time and opportunity to depart from the employer's premises at the end of the workday is sufficiently incidental to employment to fall within the scope of risks associated with that employment. *See* Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965) (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 [internal citations omitted]). Therefore, accidents sustained on the employer's premises when the employee has completed his work and is departing for the day are generally compensable. *Id.* (if the employee is injured while passing, with the express or implied consent of the employer, to or from his work by way over the employer's premises, or over those of another in such proximity and relation as 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 as much as though it had happened while the employee was engaged in his work at the place of its performance [internal citations omitted]) (emphasis added).

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 strict test of whether the worker was getting paid and/or was performing principal or essential job duties at the time of the accident. For purposes of satisfying the "arising out of" prong of the compensability test, it is also logical to presume that a causal connection exists between the conditions of employment and an accident occurring on, or in reasonably close proximity to, the primary work area. [3] 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, or in close proximity thereto, when the employee is arriving to, or departing from, his workplace.

Here, Appellant erroneously equates the BP owned road where his 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

[3] "Arising out of employment" prong of compensability test refers to the *cause* of the accident. Nicholson v. S.C. Dept. of Social Services, 405 SC. 537, 748 S.E.2d 256 (Ct. App. 2013).

the employer actually owns, maintains, and/or controls, or in such close proximity to the employer's actual premises that they are in practical effect a part of the employer's premises. In this case, it is undisputed that BP owned, controlled, and maintained the road where the accident occurred, not Condustrial. As such, the first prong of the premises rule test annunciated by Williams *supra* has not been met. The issue, therefore, becomes whether BP's road constitutes premises of "another in such proximity and relation as to be in practical effect a part of the employer's premises." As Appellant himself acknowledges, Condustrial's actual premises are not in close proximity to the BP owned road where his accident occurred; therefore, the "proximity" prong of the premises rule does not apply here either. Appellant's contention that the rule still applies because Condustrial in fact has no premises is not supported by any evidence in the Record. Further, even if this assertion is correct, it still would not render the premises rule applicable because it fallaciously begs the question. In other words, Appellant's argument in this regard merely presumes that he must have a remedy under the Act instead of actually offering support proving that point.

Appellant curiously proclaims that "application of the premises rule has never been dependent on the employer's ownership or control over the place where the injury occurred" (Appellant's Brief p. 9) when the plain language of the rule requires precisely that. Moreover, he cites no South Carolina authority extending the "premises rule" to confer compensability against an employer for accidents occurring on the private property of a third-party. Expansion of the premises rule to cover accidents occurring on premises over which an employer exercised no maintenance or control, and/or did not create the actual risk causing the accident, is also inconsistent with the most recent holding on the bounds of the premises rule from the South Carolina Supreme Court.

In Davaut v. University of South Carolina, 418 S.C. 627, 795 S.E.2d 678 (2016) the injured worker was struck by a vehicle while crossing a public street after leaving her place of employment in the library and in route to her car parked in a university owned lot at the end of her workday. The Court carved out a narrow exception for compensability of such accidents by adopting the majority "divided premises rule." The Court stated, "because this case implicates the divided premises rule in the context of an employer-maintained parking lot, we specifically hold that "employees who must cross a public way that bisects an employer's premises, and who are injured on that public way while traveling a direct route between an employer's ... facility and parking lot, are entitled to workers' compensation benefits." [internal citations omitted]. Obviously, BP's premises at issue in this case are not "divided within the meaning of Davaut, therefore, it is not directly controlling here. Further, the Court specifically noted that the "divided premises rule" is especially warranted when the *employer creates the risk causing the accident*. Davaut, 418 S.C. at 638. This impetus for the "divided premises rule" is likewise not implicated in the instant case because there is no evidence Condustrial, as Appellant's employer, created any risk that actually caused the accident.

Nevertheless, Davaut is still instructive to this case because it essentially reaffirms the fundamental holding of Aughtry v. Abbeville County School District *supra* that the "premises rule" applies to accidents occurring on premises owned, maintained, or controlled by a defendant employer, whereas exceptions to the "going and coming rule" apply to accidents occurring off the employer's premises. *See* Davaut 418 S.C. at 634 ("the 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" [internal citations omitted]) (emphasis added). In so doing, the Court distinguished its rationale for adoption of the "divided premises"

rule from the issue presented in Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987), where the "going and coming" rule was implicated because claimant had not yet arrived at work. The Panel in the instant case analyzed the circumstances of Appellant's accident under the same framework and concluded that compensability of the claim had to fall under either the premises rule or going and coming rule.

To the extent that an employer's control over the place where the accident occurred, and/or the employer's creation of the risk causing the accident, indeed define the bounds of the premises rule under South Carolina law, application of the rule is even further attenuated in the instant case because Condustrial had no more right of control over the conditions of BP's private road than it did over any public highway. *See* Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977) (coverage under the North Carolina Workers' Compensation Act is not applicable when employees were injured in a motor vehicle accident occurring on an employer owned road while departing for the day because such accident occurred a mile and a half away from the employer's plant and the risks the employees were exposed to in going and coming from the plan on such road were not materially different than those encountered on a public highway). [4]

Moreover, numerous South Carolina courts have specifically denied application of the premises rule to accidents occurring on public roads or sidewalks, even when immediately adjacent, or in close proximity, to employer owned premises. One South Carolina case, Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.C. 472 (Ct. App. 2011), in fact unequivocally rejects the notion that the premises rule extends to premises not owned, maintained, or controlled by the employer. The claimant in that case clocked out, exited the hospital where she was employed, and

[4] The South Carolina Worker's Compensation Act was fashioned after the North Carolina act; therefore, the opinions of North Carolina courts construing its Act are entitled to great respect by South Carolina courts. Carter v. Penney Tire and Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973).

fell on a public sidewalk running adjacent 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.*" (emphasis added). The circumstances compelling compensability of this case are even more attenuated 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 security gate of the parking lot of the plant where he worked.

Further, in Gallman v. Springs Mills, 201 S.C. 257, 266, 22 S.E. (2d) 715, 719 (1942), the Court rejected a similar extension of coverage to an area in close proximity to the employer's premises by stating:

> In the present case the respondent at the time of the accident was within a comparatively short distance of the building to which he was proceeding. If the distance had been somewhat longer, and he had used an automobile or other vehicle, and in consequence of negligence of his own or somebody else's part was injured, certainly it would be deemed clear that the accident arose out of the negligence in question rather than the employment, and in principle there is no difference between such a case and the present case, or between the present case and a case in which the employee lives many miles from his place of employment, and is injured in the course of his trip to the mill while using a bus or other type of public vehicle, or a private conveyance.

The Supreme Court in McDonald v. E.I Dupont & Co., 223 S.C. 217, 74 S.E.2d 918 (1953) also 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 parked on the side of the road 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 neither case was the employer exerting any control over the location where the accident occurred.

Finally, in facts remarkably similar to the instant case, the U.S. Fourth Circuit Court of Appeals held in E.I. DuPont De Nemours Co. v. Hall, 237 F.2d 145 (1956) that plaintiff's accident was not covered under the South Carolina Worker's Compensation Act when a) plaintiff was employed by the defendant's subcontractor at a facility located on property comprising two hundred thousand acres at the Savannah River Site (SRS); b) plaintiff finished his shift, clocked out, and was leaving for home in a friend's car when he was injured in a motor vehicle accident negligently caused by defendant's employee; and c) the accident occurred on a former public highway acquired by SRS for access to its facilities by its employees, vendors, contractors, and for other business purposes. Regarding the defendant's attempt to apply the premises rule to limit plaintiff's remedy to benefits under the Act, the Court stated, "we see no basis upon which it can logically be applied to the area of more than 200,000 acres, over which *the control exercised by defendant* was merely for security purposes, except as to the limited areas in which work was being carried on." *Id.* at 237 F.2d 149 (emphasis added). The defendant in that case at least exercised some measure of control over the area where the accident occurred, whereas Condustrial in the instant case exercised absolutely no control over BP's private road.

Again, all South Carolina cases applying the "premises rule" (as opposed to the "divided premises" rule specially carved out by Davaut) to confer compensability have drawn a line between premises over which the employer exercises at least some modicum of control and those of another party. *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."). Extension of the "premises rule" to the offsite premises of a third-party is not justified in this case, especially in light of the remoteness of the accident's location relative to BP's plant where Appellant performed his actual work and Condustrial's lack of control over the area and circumstances of Appellant leaving to go home. Finally, Appellant's prayer for extension of the premises rule to confer compensability of this case under the guise of "liberal construction" of the Worker's Compensation Act cannot override South Carolina law directly or substantially on point compelling a different conclusion.

For these reasons, extension of the premises rule to the private property of a third-party over which a defendant employer has no control is contrary to well-established South Carolina law. As such, the Court should affirm the Panel's Order denying compensability of the claim against Condustrial.

II. BP is not Appellant's "statutory employee;" therefore, liability under the Act cannot be vicariously imputed to his direct employer via the premises rule.

Appellant 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." *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). However, Appellant has failed to meet his burden of proving that BP is his statutory employer in the first instance. *See* Turner v. SAIIA Construction, 419 S.C. 98, 796 S.E.2d 150 (Ct. App. 2016) (the burden is on a

worker's compensation claimant to prove every fact upon which a finding of compensability can be based and such award cannot be based on speculation, surmise, or conjecture). Therefore, the house of cards upon which Appellant's theory rests inevitably falls.

Generally, Appellant correctly laid out the traditional three-part legal test for statutory employment liability in his Brief to the Panel. However, there has been a fundamental shift by the South Carolina courts tightening the analysis of statutory employment issues. *See* 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 *part of* the retailer's business; therefore, a truck driver injured while delivering inventory was found not be a statutory employee); and 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).

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- "[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).

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. (R. p.

153). In contrast, Appellant is an industrial painter who was assigned by his direct employer staffing company to work for Phillips Industrial ("Phillips"). BP subcontracted Phillips to apply a protective coating onto a brand-new cement service ramp accessed by trucks unloading hydrobromic acid used in BP's processes. (R. p. 154). It is significant to note that BP employed onsite "resident contractors" located in a separate building on the BP property to perform essential plant maintenance and other essential plant functions. (R. pp. 154-55). When these resident contractors "can't handle something," that task would be contracted out. There is no evidence that Phillips was a resident contractor 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. (R. pp. 155-56). In sum, Phillips' application of a protective coating on a brand-new 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).

Moreover, to the extent that application of the protective coating by Phillips can be considered part of the construction of the BP plant, the statutory employment nexus is even more attenuated. Again, the evidence is clear that the cement ramp Phillips was working on was brand new, so application of the protective coating was not merely routine maintenance. 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). Even if the nature of the work Phillips was performing for BP can be more aptly characterized as "maintenance" than "construction," Appellant is still not BP's statutory employee.

Keene *supra* is the most recent reported South Carolina case addressing statutory employment issues and follows the new analysis established by the Supreme Court in Abbott and Olmstead. Keene is especially analogous and instructive to the instant case. First, Appellant proclaimed in his Brief to the Panel that "routine maintenance and painting have long been recognized as part of an owner's trade, business, or occupation ... ." However, he cites no authority for such a broad proposition. In fact, this contention is squarely contradicted by Keene, which 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 (this type of sweeping statement contradicts longstanding precedent that cautions that cases must be determined on their own facts).

Appellant also grossly overstates the nature of the work he performed for BP when he states that protection of plant infrastructure was necessary "to deliver raw materials used in the manufacturing process." The Record simply does not support the proposition that BP's operations could not function without application of the protective coating to the service ramp by Phillips. *Cf.* Hairston v. Re: Leasing, Inc., 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985)(if the nature of the work being done is such an integral part of the operations of the company for which it is done that the company cannot function without it, then the company falls under the statutory employee situation).

Second, Keene 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. Finally, the instant case has an extra factual distinction establishing that Phillips was not performing part of BP's business- 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 again, further removes it from the orbit of BP's essential business purpose.

Finally, Keene utterly rejects the rationale employed in the court's own prior decision in Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004). In Edens, the court affirmed the granting of summary judgement to a defendant manufacturer asserting workers' compensation exclusive remedy as an affirmative defense. The Court relied upon affidavits from the purported statutory employer's representatives attesting that the work being performed by the injured worker was an important and necessary part of the manufacturer's business. Keene specifically rejected such superficial analysis, stating "going forward we decline to automatically assign probative value to any self-serving affidavit of a party's representative when determining whether the preponderance of the evidence shows a worker's activity is actually part of the trade, business, or

occupation of the owner. **Simply asserting that an activity is part of the owner's trade, business, or occupation does not make it so.**" *Id.* (emphasis added).

Here, Appellant similarly relies upon testimony from BP's representative to the effect that work being performed by Phillips was important or necessary to BP's operations. Condustrial argues that this cursory affirmative response to a leading question from opposing counsel regarding the ultimate fact in issue does not satisfy Appellant's burden of proof per the standard annunciated in Keene. A complex analysis of statutory employment liability requires a more detailed evidentiary record supporting the award than what has been presented here.

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's representative testified the contractor employing the injured worker was hired for its specialized expertise. 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 specifically 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 to the extent the plant could not function without it.

For these reasons, Appellant was not BP's statutory employee and his accident occurring on BP's access road is not vicariously compensable against Condustrial via the "premises rule." The Court should affirm the Panel's ruling in this regard.

III. Substantial evidence in the Record supports the Panel's conclusion that Appellant's accident does not fall under the express or implied requirement of the employment contract exception to the "going and coming" rule.

After initially arguing before the Hearing Commissioner that this is not a going and coming case, Appellant argued in the alternative that it is before the Panel. It is elementary 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). However, South Carolina recognizes five specific exceptions to this rule that will confer compensability:

> (1) The means of transportation is provided by the employer, or the time spent traveling is paid for or included in the wages;
>
> (2) The employee is performing some duty or task in connection with their employment;
>
> (3) The way used is inherently dangerous and is either (a) the exclusive way of ingress and egress to and from his work; or (b) constructed and maintained by the employer;
>
> (4) The place of injury was brought within the scope of employment by an express or implied requirement in the employment contract; or
>
> (5) 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.

Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964).

Appellant argues this case falls under the amorphous exception known as the express or implied employment requirement. Condustrial initially reiterates the elementary premise 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 render every other noted 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."). In Howell, the injured worker was struck by a vehicle while crossing the street in a crosswalk to enter his employer's plant. He alleged that crossing the road at that point was the only way he could get to work; thus, it was at least an implied requirement of his employment to do so. The Supreme Court rejected such a broad application of the express or implied requirement of the employment exception and denied compensability in that case.

Appellant's reasoning here is similarly erroneous. The essence of his argument is that BP instructed him how to leave work via one of the two access roads- ergo using such roads for ingress and egress was an express requirement of his employment. In addition to going down the slippery slope of this exception swallowing the going and coming rule, his 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." *See* Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E. 2d 321 (1964) ("the way used is inherently dangerous AND is either a) the exclusive way of ingress and egress….."). Because there is no evidence that the route and road in the instant case were "inherently dangerous," that exception does not apply.

Further, the facts of the instant case are imminently distinguishable from the only South Carolina case applying the fourth Sola exception to award compensability. In Eargle v. South Carolina Electric & Gas Co., 32 S.E.2d 240 (1944) the Court held that "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. There is certainly nothing in the instant case rising to the level of "unusual" and peculiar" that warrants application of the express or implied requirement of employment exception.

Essentially, Appellant attempts to piggyback the alleged exclusivity of Claimant's route to satisfy the express requirement of employment exception. However, Appellant's route home on the day of his accident was not exclusive. He acknowledged under cross-examination that his choice to use Flagg Road was primarily dictated by the location of his home rather than instructions from BP:

Q: Were you using a road that you had a choice to use?

A: **Yeah.**

Q: You could have gone either way, Amoco Road or Flag Creek?

A: Yeah but the rule was always to take Flag Creek.

Q: And why would you always take Flag Creek?

A: **Because it was – the way it's close, closest way to home.**

Q: Right, because it was the closest way home, not because you had to?

A: I guess not.

Q: If you lived the other way you could go down Amoco Road?

A: Yeah, I guess. (R. p. 83) (emphasis added).

Even under direct examination by his own counsel Appellant testified that he only took Flag Creek Road in order to access I-526 because he lived in Mount Pleasant. (R. p. 63). Claimant responded in the affirmative when asked whether taking Flag Creek Road was "the most efficient way to go home." (R. p. 63).

Similarly, Appellant's supervisor confirmed the use of Flag Creek or Amoco roads to leave BP's premises depended on which direction Claimant wanted to go, not an inherent requirement of his employment:

> Q: Okay. Has anybody ever told you which road you needed to take to get in?
> A: Yes, security.
> Q: They have?
> A: Yeah.
> Q: And what did they tell you?
> A: Use the road, the second road to get in; and the way out, you can take -- *it depends which way you're going*. If you're going to Mount Pleasant you go to the right, if you go the other way, you can take the left. (R. p. 138) (emphasis added).

Mr. Anderson explained further under cross-examination by defense counsel:

> Q: So-was Mr. Cook going to the right because he lived down near Mount Pleasant?
> A: Yes.
> Q: Okay. But you didn't have to go that way if you didn't -
> A: If you didn't want to.
> Q: Because if you were living north, it would be longer?
> A: Yes. (R. pp. 146-47).

There is simply 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 Appellant'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 by 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.

On a final related note, Appellant's arguments regarding BP's ownership of the road is a thinly disguised red herring that plays no role in the going and coming analysis. As discussed previously, the premises rule only applies to accidents occurring on premises owned or controlled by the 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) ("going and coming rule" not applicable because claimant's injuries occurred on school districts premises"). For the reasons sated previously, BP was not Appellant's statutory employer. Therefore, the fact the accident occurred on BP's premises is immaterial when the premises rule is not applicable. Again, Appellant conflates two distinct concepts that have no application to this case.

Because no exceptions to the going and coming rule barring claim compensability apply to this case, the Court must affirm the Panel's ruling.

IV. Additional sustaining grounds in the Record support the Panel's denial of compensability of this claim under the Act.

SCACR provides that the Court may affirm any ruling of the lower court or tribunal based upon any ground(s) appearing in the Record on Appeal. Condustrial submits that Appellant's accident does not even meet the most fundamental tenets of claim compensability because it does not "arise out of" and occur during the "course of" Claimant's employment for Condustrial. *See* E.I. Du Pont De Nemours Co. v. Hall *supra* (the terms injury by accident "arising out of" and "in the course of" employment requires not only that the injury occur with the period of employment, or incidental thereto, but also that it happen because of the employment as when the employment

is a contributing proximate cause); *See also* Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946) (the phrases arising out of and in the course of employment are used conjunctively; one of these elements without the other will not sustain an award).

Again, Appellant'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 Appellant'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 causal connection exists under the "premises rule" for accidents occurring on or in reasonably close proximity to the primary work area like a parking lot or other employer owned/controlled premises. However, the work connection here is simply untenable for a blanket application of the rule, especially as it pertains to Condustrial when it had absolutely nothing to do with conditions or circumstances of Appellant's accident.

In addition, Claimant's accident occurred after he had a reasonable time and opportunity to depart from BP's premises at the end of his work shift. *See* Williams v. South Carolina State Hospital, *supra* (the course of employment includes a reasonable margin of *time and* space to use in passing to and from the place where the work is done). Here, Appellant clocked out, exited the plant, smoked a cigarette, made a telephone call and/or text, was dropped off at his car, exited the parking area and was over a mile down the road on the way home when he flipped his car. Given the time and distance that elapsed between the time he clocked out the occurrence of the accident, he was not within the "course of his employment" either. *See* Ardis v. Combined Insurance Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008) (course of employment prong of the compensability

test refers to the time, place and circumstances of the accident and encompasses where the claimant may reasonably be expected to be in the performance of his job duties or something incidental thereto). Again, the "premises rule" recognizes that course of employment encompasses a reasonable opportunity to depart the premises. However, stretching the "course of employment" prong to this extreme simply thwarts that fundamental underpinning of workers' compensation compensability.

Therefore, the Court should affirm the Panel's denial of the claim on the additional sustaining grounds that Appellant's accident did not arise out of and in the course of his employment for Condustrial.

CONCLUSION

For all the aforementioned grounds and reasons, the Court must AFFIRM the Full Commission Appellate Panel's Order denying compensability of this claim under the Act. To do otherwise, would flout well-established South Carolina law and policy governing the bounds of the "premises rule" and the "going and coming rule." Expansions of the existing law on these areas are simply not warranted under the relatively unremarkable facts and circumstances presented in this case.

Respectfully Submitted,

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