THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Appellate Case No. 2019-000060

Matthew Green, Appellant,

v.

Bishop Forest Products, Inc., Employer, and Forestry Mutual Insurance Company, Carrier, Defendants,

Of Which Bishop Forest Products, Inc., is the Respondent.

FINAL BRIEF OF RESPONDENT

Matthew A. Schonfeld
349 W. Coleman Boulevard, Suite 300
Mount Pleasant, South Carolina 29464
(843) 278-0488
Attorney for Respondent
SC Bar No. 0076999

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STATEMENT OF THE CASE

This workers' compensation claim is denied by Respondent on the basis that the injuries sustained by Appellant did not arise out of and in the course of his employment. When the subject car accident took place on September 13, 2017, Matthew Green ("Appellant") was in the process of traveling home in his personal car, not on the clock, and with no remaining work-related obligations or responsibilities.

Although the single Commissioner concluded that the injuries Appellant sustained on September 13, 2017, are compensable, Respondent sought review of that decision. Having reviewed the decision of the single Commissioner, by Order dated December 18, 2018, the appellate panel of the Commission reversed the single Commissioner's decision, correctly deciding that Appellant's injuries were sustained while he was in the process of going home, and none of the exceptions to the "going to and coming from" rule applied; therefore, Appellant's injuries are not compensable under the South Carolina Workers' Compensation Act (hereinafter "the Act").

FACTS

At all relevant times, Appellant was a truck driver for Respondent, primarily responsible for transporting chipped wood to a paper mill multiple times a day. (R.p. 144, lines 2-15). Respondent's wood chip truck drivers would normally begin their shift around 7:00 AM, with an occasional day starting at 6:00 AM if there was work left over from the day before. (R.p. 210, lines 19-24).

In addition to physically transporting wood chips, Appellant's employment with Respondent required him to keep up with paperwork throughout the week and return/deposit the paperwork to the company's office on a weekly basis. (R.p. 144, line 16–p. 147, line 8). Specifically, it was Appellant's responsibility to *retain*, and in some cases personally complete, specific paperwork and receipts associated with his daily truck driving activities. *Id.* Each week he was responsible for returning turning in mill tickets, pre-inspection checklists, time sheets, and trip log sheets. *Id.* He kept all of these documents in a file folder provided to him by his employer. *Id.* Respondent's office has a mail slot on its front door, as well as a mailbox, so employees can deposit paperwork if the office is closed. (R.p. 151, line 22–p. 152, line 11).

Appellant was responsible for ensuring the office received his weekly mill/load tickets either at the end of the day on Tuesday or by 8:00 AM the following Wednesday. (R.p. 174, line 25–p. 175, line 3). As for the remaining paperwork (pre-inspection checklists, timesheets, and trip logs), there was no deadline set in stone for when it had to be delivered to Respondent's office. (R.p. 223, lines 5-20). Not all of the paperwork for which Appellant was responsible required any action on his part other than retaining it and turning it in within the given timeframe. Specifically, the information recorded on the truck pre-inspection checklist, timesheets, and travel logs were

placed there by Appellant. (R.p. 144, line 22–p. 146, line 16). The pre-inspection checklist required Appellant to fill out the truck's safety checklist before starting work each morning. The load sheets required Appellant to record things like the times he arrived/left the logging site, and the timesheets required him to enter his starting and stopping times each day. (R.p. 145, lines 3-19, and p. 181, line 3–p. 182, line 11).

In contrast to the other documents that required manual recording of information on the part of the drivers, the mill tickets required no action on Appellant's part to be considered complete, as they were merely receipts generated by a computerized scale recording the weight of each load received by the paper mill. (R.p. 163, line 14–p. 164, line 17). Appellant would receive tickets printed from the mill computer which he would retain and later deposit at Respondent's office. *Id.* This was further confirmed when Appellant was presented with a photo copy of some mill tickets. *Id.*

Respondent has been in business long enough to experience a situation where, for some reason or another, an employee was unable to deposit his/her tickets by the deadline. (R.p. 178, line 25–p. 179, line 15). When this would happen, the employee usually notified a supervisor, and if asked by the employee, the supervisor would go and retrieve the paperwork for them. *Id.*

It was Appellant's normal Tuesday routine to return from a day of hauling and park his work truck at Respondent's property where the office was located. (R.p. 161, line 19–p. 162, line 7). He would then gather all of his paperwork for that week, depart with it in his personal vehicle from Respondent's premises, and take it home to ensure that all his paperwork and mill tickets were in order. (R.p. 146, line 24–p. 147, line 25). Appellant admits that, if he had wanted to, he

could very well have completed and ensured the accuracy of his papers every Tuesday evening before leaving Respondent's property instead of taking it home. (R.p. 164, line 25–p. 165, line 15).

Appellant had planned to go into work late on Wednesday morning, September 13, 2017, the date of the accident, because he had an appointment scheduled with his lawyer and planned to report to work about 11:00 AM. Appellant had discussed his delayed arrival with his supervisor who had agreed to let him off work. (R.p. 152, line 23–p. 153, line 21).

On the morning of Wednesday, September 13, 2017, the day of the accident, Appellant woke up earlier than usual at 3:30 AM because he "couldn't sleep." (R.p. 154, lines 1-5). At about 4:00 AM, Appellant left his home in his personal car to deposit his paperwork. (R.p. 154, lines 18-20). He arrived at Respondent's office at approximately 4:15 AM and completed the task by depositing his paperwork in the mail slot in the office door. He did nothing else incidental to his employment while on Respondent's property, he was not on the clock driving to and from the office, was not paid for his mileage, and was not paid for his time while on Respondent's property. (R.p. 154, line 24–p. 155, line 14).

After depositing the paperwork, Appellant got back into his personal car and left for home. *Id* at lines 4-16. He drove in his car towards home for approximately 10 minutes, when he was struck head on by another vehicle, causing the accident and subsequent injuries. (R.p. 155, line 23–p. 156, line 17). Appellant was transported to a local hospital and treated for his injuries. (R.p. 157, lines 2-5).

No individual associated with Respondents, including his supervisor, directed or instructed Appellant to take his paperwork home any night, much less on Tuesday, September 12, 2017, the night before his accident. (R.p. 165, line 16–p. 168, line 6). Appellant admits that his employment

with Respondent did *not require* him to take his documents home, and nobody at Respondent knew he routinely took the documents home with him. *Id.* This was further reinforced by the presentation of a portion of his deposition testimony taken prior to the hearing, wherein Appellant was asked "did anybody know that you had brought the paperwork home with you that night [prior to the accident]," his response was "No." *Id.* When Appellant was presented at the hearing with Respondent's question, "So at least on the night of September 12th, 2017, would you agree it's your response that nobody even knew that you brought it home that night? Is that correct?," to which he responded, "Yeah." (R.p. 167, lines 12-19).

STANDARD OF REVIEW

On appeal from an appellate panel of the Commission, the Court of Appeals can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

It is Appellant's burden to prove facts that will bring his injuries within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

ARGUMENT

In order to be a compensable work accident, the injury/injuries must arise out of and in the course of employment. As a general rule, any injuries sustained by an employee while going to or coming from the place where his/her work is to be performed are not compensable as they do not arise out of and in the course of employment.

South Carolina case law has recognized five exceptions that allow employees the possibility of compensation even though the accident in question took place while going to or coming from work: (1) the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment; (3) the way to work is inherently dangerous and is either the exclusive way or is constructed and maintained by the employer; (4) the injury occurred in close proximity to the workplace and there is an express or implied requirement that the employee use that approach in going to and coming from work; and (5) an employee is injured while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day which he does not ordinarily work. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 495 S.E.2d 447 (1998).

The facts of this claim eliminate exceptions (1), (3), and (4) as referenced above. Respondent's transportation was not provided or paid for by the employer, he was not paid for his travel to deposit the documents, his way to work was not inherently dangerous, and Respondent was not injured in close proximity to his workplace nor was he required to use a certain approach. Therefore, the only exceptions that potentially apply are the "continuing duty" exception and the "special errand" exception. These exceptions do not apply to the facts of this case either; therefore, Respondent's injuries are not compensable under the Act.

THE COMMISSION CORRECTLY DECIDED THAT APPELLANT'S INJURIES DID NOT ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT BECAUSE APPELLANT DID NOT HAVE ANY REMAINING WORK-RELATED DUTIES OR RESPONSIBILITIES WHILE TRAVELING TO HIS HOME IN HIS PERSONAL VEHICLE, AND THE TRIP WAS UNDERTAKEN FOR PERSONAL REASONS.

1. The "Continuing Duty" Exception Does Not Apply Because Respondent Did Not Have Any Remaining Work-Related Duties or Responsibilities While Traveling to His Home in His Personal Vehicle.

The general coming and going rule does not apply if, among other things, the employee, on his way to or from his work, *is still charged* with some duty or task in connection with his employment. *Stough v. Westinghouse Savannah River Co.*, 311 S.C. 129, 130, 427 S.E.2d 716, 717 (S.C. Ct. App. 1993) (emphasis added). Moreover, an injury incurred during a trip which serves both a business and a personal purpose is within the scope of employment if the trip involves the performance of a service for the employer *which would have caused the trip to be taken* by someone even if it had not coincided with the personal journey. *Id.* (citing *Corley v. South Carolina Tax Commission*, 237 S.C. 439, 117 S.E.2d 577 (1960)) (emphasis added). This exception does not apply to the facts of this case because Appellant was not still charged with any work related duties or tasks when he got into the accident, and Appellant's work obligations did not cause the trip to be taken – his personal commitments did.

In *Stough*, the court held that when an employee's primary business responsibility is to deliver documents to an office, he is considered to still be charged with a duty or task connected to his employment while on his way home, *if he has yet to deliver the documents*, and his trip home is located along the route necessary to complete his delivery. *Stough*, at 131, 427 S.E.2d at 717-18.

In *Stough*, the employee lived in Columbia and commuted in his personal car to his main office in North Augusta. *Id.* at 130, 427 S.E.2d at 717. He received no compensation for driving to and from his home and his office in North Augusta. *Id.* One of his primary business responsibilities was to transport business documents from his North Augusta office on a regular basis of once a week to an auxiliary office in Charlotte, NC. *Id.* His travel expenses for these document transport trips were paid for by his employer. *Id.*

The employee's accident occurred during one of these required document transport trips from North Augusta to the Charlotte office. *Id.* at 131, 427 S.E.2d at 717. On the date of the accident, he left his office in North Augusta with the documents and was hit and killed while on his way to stop at home before continuing on to Charlotte the next day. *Id.* at 131, 427 S.E.2d at 717. The Court noted that he would have traveled the same route to Charlotte regardless of whether he stopped in Columbia along the way. *Id.* The court determined that the purpose of his trip from North Augusta to Charlotte was *necessitated* by his work at Westinghouse, and even had he not stopped at home that evening, he would have made the same trip to Charlotte to perform his duties on behalf of Westinghouse. *Id* at 131, 427 S.E.2d at 718. The critical fact from *Stough* is that the focal job-related task – the delivering of the documents – had yet to be completed when the claimant in that case got in the car accident. Because he had yet to complete his delivery of the documents, his employment duty had yet to cease during his trip home from work, and his resulting death arose out of and in the course of employment. *Id* at 131, 427 S.E.2d at 718. The corollary to the *Stough* scenario is that if the claimant in that case had already dropped the paperwork off in Charlotte and instead got into a car accident on the return trip to his home in Columbia, the resulting injuries would not have been compensable.

In the facts of the present case, Appellant had *already completed* whatever duty he may have been charged with, i.e. depositing the documents, when his accident occurred. Thus, because Appellant's continued duty was completed when he deposited the paperwork, the duty ceased to exist, and he was not covered by the "continuing duty" exception.

Additionally, the facts of this case establish that Appellant's employment did not require him to make any separate trips related to the delivering of the paperwork, and his employer was not even aware of his practice of taking the paperwork home. On the contrary, the only reason why the paperwork left Respondent's property on Tuesday evenings was because Appellant preferred to take it home and get it in order at his own convenience. Furthermore, Appellant, during oral argument before the Commission, conceded that the trip in question would not have been made at 4:00 AM that morning but for Appellant's preplanned appointment with his attorney. (FC Hr. Tr. pg. 18:21-24).

Indeed, Appellant's injuries were an accident, so there is absolutely no injection of fault into the analysis as suggested by Appellant in his arguments on appeal. However, it was Appellant's decision made out of personal convenience and his personal plans that led to the taking of the trip in question; therefore, he was not covered under the Act at the time the accident happened. Accordingly, the exceptions to the "going to and coming from" rule as discussed in *Stough* do not apply.

2. The "Special Errand" Exception Does Not Apply Because the Facts Do Not Meet the Elements of the Rule.

There is no dispute that Appellant was going home when he got into the car accident, and he had no work-related duties yet to be performed on his way home, so Appellant's primary

argument is that his facts fall under the "special errand" exception to the coming and going rule. Appellant's reasoning and rationale that the "special errand" rule applies to this claim fully exposes why Appellant's injuries should not be covered under the Act.

The "special errand" exception overrides the general coming and going rule and brings an injury within the scope of employment if it can be shown that an employee: (1) although not at his regular place of employment; (2) is doing, or is on the way from his home to perform, or *on his way home after performing*; (3) some *special or unusual* service, errand, or discharge of some duty incidental to the nature of his employment; (4) the service or incidental duty is not a *habit* or for the *convenience* of the employee; and (5) is in the interest of, or under the direction of, his employer. *See Moore v. Family Service of Charleston Cnty.*, 269 S.C. 275, 237 S.E.2d 84 (1977); *see, also Bickley v. South Carolina Electric & Gas Co.*, 259 S.C. 463, 192 S.E.2d 866 (1972). Notably, these elements are conjunctive, and all must be met for the exception to apply. This rule, when applicable, protects an employee during both the trip to complete the errand, as well as the return trip after the errand is complete.

In *Bickley,* due to hurricane damage, the powerline worker in that case was requested by his employer to work in Charleston over the weekend, which was outside his normal working area in Columbia and outside his normal working hours. *Id.* at 470, 870. Given these circumstances, the South Carolina Supreme Court found that Bickley was covered under the Act when he was in an accident while on his way home after completing the work in Charleston. *Id.* Notably, there was no personal latitude or personal convenience component to Bickley's decision to perform work related duties that weekend – he was required to do so as a condition of his employment.

In *Moore*, the Court held that because the employee was performing an unusual service at the behest of her employer, her injuries arose out of and in the course of employment, and thus compensable. Specifically, the employee was *directed* by her supervisor to take home and study four large text books in preparation for a type of family abuse case for which she had no experience. 269 S.C. at 278, 237 S.E.2d at 85-86. On her way to work the following morning, the employee fell down some stairs while carrying the books and sustained an injury. *Id.* at 277, 237 S.E.2d at 85. It was undisputed that the *books* were the cause of her fall. *Id.* The court noted the *most important* evidence was the testimony of the employer that it was "not a habit for [employees] to take books and files home and that this was an unusual case and [the employer] requested the claimant to take home the books." *Id.* at 278, 237 S.E.2d at 86.

In arriving at its decision, the Court in *Moore* distinguished the employee's compensable injury and factual scenario from the non-compensable injury and factual scenario in *Sylvan v. Sylvan Bros.*, 225 S.C. 429, 82 S.E.2d 794 (1954). *Id.* at 279, 237 S.E.2d at 86. In doing so, the Court clarified further that if an employee is "in the *habit* of doing 'paperwork'" outside of regular work hours, or is doing it for "[the employee's] own *convenience*," the employee's actions do not qualify for the protections afforded by the "special errand" rule. *Id.*

In *Sylvan*, the Court held that if a journey would be made to work, irrespective of homework from the night before, the journey is not in the course of employment. *Sylvan,* 225 S.C. 429, 82 S.E.2d 794 (1954). In *Sylvan*, the claimant was injured when he slipped on ice while on his walk from home to work. *Id.* at 433, 82 S.E.2d at 795. He was in the *habit* of doing paperwork at night, and at the time of his injury, he had business papers in his pocket which he had been working on at home the night before. *Id.* He testified that he was unable to do certain paperwork

during regular business hours because of interruptions from customers, "but no reason is suggested why he could not have remained in the privacy of the store after closing hour." *Id.* at 433-34, 82 S.E.2d at 795-96. The court reasoned that therefore the taking of the paperwork home was for his own *convenience*, and the fact that he had paperwork on him when he was injured does not convert his trip to work to within the course of employment. *Id.*

Similar to the employee in *Sylvan*, Appellant admitted under oath, on multiple occasions, that he was in the *habit* of doing paperwork outside of his normal business hours, as opposed to being told to do so. Additionally, like the employee in *Sylvan*, Appellant took his paperwork home the night before for his own *convenience* so that instead of having to sit in his truck and do the paperwork before departing the company's premises, Appellant would review his timesheets, load sheets, and pre-inspection checklists in the comfort of his own home.

The record makes clear that Appellant was not performing a "special errand" for Bishop Forest Products when he delivered his paperwork to the company office on the morning of September 13, 2017. Unlike the employers in *Bickley* and *Moore,* neither the owner nor any supervisor for Respondent directed Appellant to take his paperwork home the night before his accident, or any night for that matter. The evidence furthermore reinforces this fact when Appellant testified that none of the management with Respondent were even aware he took his paperwork home the night before the accident, much less that he took his paperwork home every night.

Although Respondent did not prohibit Appellant from taking his paperwork home, having the latitude to do something is not the equivalent of being directed to do something as demonstrated in *Sylvan*. The Respondent's owner did not know Appellant took the paperwork home with him. Unlike the circumstances in *Bickley* and *Moore*, Appellant here made the choice to take the

paperwork home, and he was not directed to do so nor did the terms of his employment require him to do so. Appellant had an identifiable timeframe for completing job related tasks, but he was not directed to perform work at a time and place other than at Respondent's premises or while operating one of Respondent's trucks.

The evidence also establishes that Appellant would normally arrive at Respondent's place of business between 6:00 am -7:00 am, and he normally would return from his last haul between 5:00 pm and 6:00 pm. These normal working hours fall within the timeframe allotted to turn in the paperwork. Accordingly, there was no requirement that Appellant perform any work-related responsibilities outside of normal working hours.

The fundamental fact that existed in the "special errand" exception cases of *Bickley* and *Moore*, which does not exist within the facts of this claim, is that the employees in those cases were required by their employers, either by pre-established terms of employment or direct instruction, to go outside their normal routine and engage in work-related activity that was "unusual" or "special," thereby covering them under the Act despite the fact they were in the process of going to or coming from work at the time they were injured.

Here, the timing of Appellant's trip to and from work the morning of the accident was entirely personal to him and done for his own convenience. Relevant portions of the hearing transcript are as follows:

Q: All right. And on your return trip back, you didn't have that paperwork with you anymore, correct?

A: Correct.

Q: 'Cause it was already at Bishop Forest Products. And your plans at that point were to go back home, correct?

A: Correct.

Q: And then the next event you had that day was an appointment with your attorney, correct?

A: Yes.

Q: Now your normal routine, had you not had the appointment, would have been to drive to work, park your own personal vehicle, put the paperwork in the slot and get in the truck and clock in, correct?

A: Correct.

Q: That was your normal routine. But you didn't follow your normal routine that morning, did you?

A: No.

Q: Because you had an appointment with your attorney, correct?

A: Correct.

Q: Which was a personal appointment, correct?

A: Correct.

(R.p. 169, line 3–p. 170, line 3).

Under *Bickley* and *Moore*, being authorized or allowed by your employer to change your schedule for a personal reason is not what expands the scope of coverage under the Act and creates a "special" or "unusual" condition that amounts to a "special errand." The underpinning of these cases is that the origin of the "special" or "unusual" condition needs to come from the employer or the terms of employment in order for the "special errand" exception to apply. Put another way, the employee's needs do not create a "special errand." As the examples in the case law reveal, it is the instructions of the employer or obligations of employment that creates the "special errand" exception to the general rule.

In this case, the trip taken the morning of the accident could not have been a "special errand" as the timing of the trip was chosen by Appellant at a time convenient for him because he had an appointment with his lawyer later that morning. Appellant conceded during the hearing

that he could have completed the paperwork the night before the accident and turned it in before leaving his employer's premises, which would have completely eliminated the need for the fateful trip in the first place. (R.p. 168, lines 7-18). This fact, in and of itself, eliminates the possibility that Appellant's trip to and from his home was covered under the "special errand" exception, because unlike the employees in *Bickley* and *Moore*, Appellant was neither instructed, nor did the terms of his employment require him, to take the paperwork home or take the trip when he took it.

For these reasons, the "special errand" exception does not apply, and Appellant's injuries did not arise out of and in the course of employment as they were sustained while on his way home in his personal vehicle.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

June 13, 2019

/s/ Matthew A. Schonfeld
Matthew A. Schonfeld
349 W. Coleman Boulevard, Suite 300
Mount Pleasant, South Carolina 29464
(843) 278-0488
Attorney for Respondent
SC Bar No. 0076999

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with requirements of Rule 211(b), SCACR.

June 13, 2019

Matthew A. Schonfeld
HOLDER PADGETT LITTLEJOHN + PRICKETT
349 West Coleman Boulevard, Suite 300
Mount Pleasant, South Carolina 29464
(843) 278-0100
Attorney for Respondent
SC Bar No. 76999

Other Counsel of Record:
Andrea C. Roche, Esquire
Mickle & Bass
Post Office Box 5639
Columbia, South Carolina 29250
(803) 929-0029
Attorney for Appellant Matthew Green