The State of South Carolina
In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner
Gene McCaskill, Commissioner

Appellate Case No.: 2020-000739

Jorge Lopez-Celestin.....Claimant, Appellant,

v.

Reeves Young, LLC, and
Holder Construction Group.....Employers,

And

Amerisure Insurance Company, and
American Zurich Insurance Company.....Carriers, Defendants

of whom Reeves Young, LLC, and
Amerisure Insurance Company are the .....Respondents.

Brief of Appellant

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Table of Contents

Table of Authorities

South Carolina Cases

Statutes and Rules

Other Sources

Statement of the Issues on Appeal

1. Whether the S.C. Workers' Compensation Commission erred in excluding deposition testimony of officers, directors, and managing agents of the adverse party.
2. Whether the S.C. Workers' Compensation Commission erred in denying Appellant's workers' compensation benefits under the "going and coming" rule, when the evidence of record demonstrates Appellant's injury by accident meets the exception to the rule.
3. Whether the S.C. Workers' Compensation Commission erred as a matter of law in denying Appellant's workers' compensation benefits under the "going and coming" rule.

Statement of the Case

Claimant Jorge Lopez-Celestin (hereinafter "Appellant") suffered severe orthopedic injuries to his left knee, left ankle, left shoulder, and right forearm when he was involved in a motor vehicle collision while traveling from a work site for his employer Reeves Young, LLC, on January 5, 2017.[1] Appellant sustained a left open knee injury, closed left ankle fracture, left renal injury, multiple fractures of the anterior left ribs, closed left shoulder fracture dislocation, and a right forearm wound. Appellant's injuries required two left knee surgeries, left shoulder surgery, left ankle surgery, and physical therapy for his neck, left shoulder, cervical spine, and lower left extremity.

Appellant's claim arises from a motor vehicle accident that occurred as Appellant was travelling from work at a job site in Clemson, South Carolina, to his home in Gainesville, Georgia on January 5, 2017. While working in Clemson, Appellant worked at two projects: a dormitory project at Clemson University and an apartment project on Earle Street. The dormitory project's general contractor was Holder Construction Group, LLC, which obtained a CCIP insurance policy through American Zurich to cover the project's workers. The Earle Street Apartment job was covered by employer Reeves Young under its general workers' compensation insurance policy through Amerisure Insurance. Both employers and both carriers denied Appellant Lopez-Celestin's claim for benefits. Appellant filed a Form 50, Request for Hearing, and Defendants filed a Form 51, wherein Defendants denied Appellant sustained his injuries arising out of and in the course of his employment.

On March 21, 2019, the parties appeared before Commissioner R. Michael Campbell, II to determine compensability. Appellant Lopez-Celestin argued that his case fell under an exception

[1] While fault is not relevant to a determination of compensability, it is worth noting that the Lopez-Celestin did not cause or contribute to the collision.

to the "going and coming" rule because while Appellant was not physically present on the job site, he had been specifically sent to that job site per his employer's orders and traveling to the job site was therefore a prerequisite to being able to complete the work. Appellant further argued that the "time or travel compensated for" exception to the "going and coming" rule applied to Appellant's case because Respondent-Employer provided its employees traveling out of state with a per diem of $35.00 per day in addition to a $2.00 per hour pay increase to offset the additional costs of traveling out of state, and Appellant could not have otherwise afforded to pay for the extra travel.

Conversely, Respondent Employer/Carrier argued Appellant's accident did not meet any of the exceptions to the "going and coming" rule. Respondents asserted Appellant was not on a special errand, was not compensated for his travel time, and that all of Respondent-employer's out-of-state employees were paid the extra compensation regardless of their travel situations, so the extra compensation was a per diem but did not constitute payment for travel time, mileage, or reimbursement for gas money.

On September 6, 2019, the Single Commissioner issued a Decision and Order, finding the Appellant did not a sustain a compensable injury by accident arising out of and in the course of his employment, and was thus not entitled to any benefits under the Act.

On September 19, 2019, Appellant filed an appeal to the Appellate Panel of the Workers' Compensation Commission. The appeal contained twenty-six questions presented which generally argued the Single Commissioner erred in not allowing the deposition testimony of officers, directors and managing agents of the adverse party and argued the Single Commissioner erred in denying Appellant benefits under the exceptions to the "going and coming" rule. Oral arguments were heard before the Appellate Panel on February 10, 2020. On April 7, 2020, the Appellate Panel issued its Decision and Order, which fully affirmed the Single Commissioner's Order. On May 6,

2020, pursuant to S.C. Code Ann. § 42-17-60, Appellant timely submitted his petition for review to this Court.[2]

Statement of Facts

Appellant Jorge Lopez-Celestin is a former employee of Reeves Young who has resided in his home in Gainesville, Georgia since 1996. (R. p. 305). Appellant's wife passed away in September 2015, and he now resides with his son and with his brother, who is a current employee of Reeves Young. (R. pp. 307 - 308). Appellant has been a heavy machine operator since 1996. (R. p. 95, ll. 4-5). Appellant testified that at the time of his accident, he was employed by Reeves Young, a construction company. He was temporarily working on projects for Reeves Young in Clemson as a heavy machine operator doing grading work. (R. p. 95, ll. 13-15). At this job site, he worked in two locations, one located at Clemson University and the other at an apartment complex nearby. (R. p. 77).

Appellant testified that as of January 5, 2017, he was being paid eighteen dollars fifty cents ($18.50) per hour. (R. p. 90, ll. 10). Appellant was also paid an additional per diem of thirty-five dollars ($35.00) per day, in the form of weekly deposits amounting to an extra one hundred seventy-five ($175.00) dollars per week. (R. p. 100, ll. 4-7). Appellant testified that his normal base wage was sixteen dollars fifty cents ($16.50) per hour, but his rate was increased by two dollars ($2.00) per hour when he worked out-of-state on the Clemson jobs in South Carolina. (R. p. 316, ll. 15-25). Appellant testified his supervisor, Juan Ochoa, told him the $175.00 per week per diem was being paid for gas. (R. p. 318, ll. 3-11; R. p. 100, ll. 4-7). Appellant testified when

[2] The Single Commissioner and the Commission dismissed Holder Construction Group, LLC and American Zurich Insurance Company because Claimant spent less time on their job site, thus holding they were improper parties. The Claimant appealed this decision to the Commission but has now abandoned that argument. Likewise, Reeves Young, LLC and Amerisure Insurance Company did not appeal that dismissal. Holder Construction Group, LLC and American Zurich Insurance Company are not parties to the appeal.

his work crew was moved back to working in Georgia, Appellant was no longer paid the per diem of $175 per week, and his hourly rate went back down to his base wage of sixteen dollars fifty cents ($16.50) per hour. (R. p. 100, ll. 9-11). Appellant worked at this Georgia job site under Juan Ochoa between March 6, 2016, and March 21, 2016, before leaving the crew to return to the Clemson projects. For the two weeks that Appellant was not working on the Clemson projects, he did not receive a per diem. (R. p. 100, ll. 17-24). However, the per diem of $175 per week returned once Appellant returned to work on the Clemson projects. (R. p. 100, ll. 17-24). These extra payments were not paid when he was working in Marietta and Atlanta, despite the fact both cities are each over an hour's distance from Gainesville, Georgia. (R. p. 100, ll. 17-24).

Appellant testified Reeves Young sent him to work on the Clemson jobs, which were eighty-five (85) miles from his home in Gainesville, Georgia. (R. p. 103, ll. 15-16). While working in Clemson, Appellant would drive back and forth every day from the site to his home. (R. p. 103, ll. 15-16; R. p. 318, ll. 16-18). Appellant had the option to stay in Clemson at company-provided housing while working on the project, but he was never given an official offer and the apartment was never provided. (R. p. 319, ll. 1-14; R. p. 120, ll. 16-19). Appellant testified he would not have been able to afford the travel costs associated with the Clemson job had he not been paid the per diem and the higher hourly rate. (R. p. 104, ll. 1-4). Appellant felt it benefitted the company for him to be available in Clemson. (R. p. 104, ll. 9-11). While Appellant and his brother were working in Clemson, they would ride together to the job site. Appellant testified his brother was not being paid the extra $175 per week, but he did not know why his brother was not paid the per diem. Appellant did not negotiate the extra $175 he received while working in Clemson. (R. p. 335, ll. 11-24). He received the extra $175 every week that he worked in Clemson. (R. p. 336, ll. 24-25). Appellant testified the extra $175 was a separate payment from his paycheck. When Appellant

went on vacation, the extra per diem payments stopped until he returned to work. (R. p. 336, ll. 1-9). Appellant believed the per diem and increase in wage was compensation for gas. (R. p. 355, ll. 1-8). Appellant always went straight home from work and did not make any personal stops. (R. p. 355, ll. 5-9). The first time Appellant drove to the Clemson job site, Appellant followed a Reeves Young employee to the job site. After that, Appellant would use that same route to drive back and forth from Gainesville to the job site every day. (R. p. 355, ll. 12-25).

William Reeves has worked for Reeves Young for eleven years and is the Vice President, and Leader (or "President") of the Civil Engineering Unit, which oversees the operations involving site development. Reeves has an ownership interest in Reeves Young. Reeves testified Appellant was employed with the company until December 2017, once Appellant was unable to return to work following a certain period of time after the motor vehicle accident. Reeves stated that Appellant was a good employee whom the company enjoyed having employed. (R. p. 213, ll. 7-22). Reeves recognized that Appellant was working at the Clemson University project site on Juan Ochoa's crew. (R. p. 214, ll. 11-15). Reeves testified a per diem of $175 per week was paid to employees working on the project at Clemson because the project was out of state. (R. p. 215, ll. 9-17). Reeves also testified he and Matthew McCormack made the decision to pay the per diem to employees working out-of-state. (R. p. 216, l. 1). Appellant's counsel asked Reeves:

Q: ". . .when you announced that . . . you were going to have a project in Clemson, how did you let the employees know they would be receiving a per diem?

A: We said that, based on the project being out of town, each of the employees would receive $175 per week."

(R. p. 227, ll. 18 – 24).

Q: "Why did the company choose to pay a per diem to those [Clemson] employees?

A: That project was out of state."

(R. p. 215, ll. 13 – 15). Reeves stated that he and McCormack selected the number for the per diem based on a "word of mouth" industry standard. They spoke to other firms and based their amount of per diem on that information. (R. p. 216, ll. 7-25; p. 217, ll. 1-6). There was no requirement on how the employees spent the per diem. The employees did not have to provide receipts to show how they spent the money. (R. p. 217, ll. 12-19). Reeves stated that any employee on the Clemson project was offered some form of temporary housing while working on the project. (R. p. 218, ll. 19-24). Reeves confirmed Appellant was driving to the project at Clemson University and not staying in the temporary housing. (R. p. 220, ll. 4 -11). The decision to end the employment of Appellant at Reeves Young was made by the employees at Reeves Young, but Reeves testified he was not a part of the decision. (R. p. 221, ll. 23-25; p. 222, ll. 1-5).

When Appellant's crew was transferred to a project in Atlanta, Georgia, Appellant was no longer paid a per diem. (R. p. 226, ll. 1-5). According to Reeves, the decision to pay an employee a per diem is an in-state and out-of-state decision in terms of where the employee is working. (R. p. 226, ll. 6-16). There was never a toolbox meeting about the per diem. Reeves stated the per diem was the employee's money and they could spend it however they chose. (R. p. 227, ll. 8-17). Employees were told they were receiving a weekly per diem for the Clemson project through verbal communication. There was no official paperwork prepared by the financial office of Reeves Young regarding the per diem. (R. p. 228, ll. 4-14).

Juan Ochoa testified he is a foreman for Reeves Young. (R. p. 134, ll. 12-16). He stated that every day while working on the Clemson projects he drove back and forth from Gainesville. (R. p. 135, ll. 9-13). Ochoa had a company truck and a company issued gas card to pay for his travel. (R. p. 135, ll. 14 – 25; p. 136, ll. 1 – 9). Mr. Ochoa also received a per diem of $175 per

week when he worked in Clemson, but not for in-state jobs. (R. p. 136, ll. 10 – 25; p. 137, ll. 1 – 11). Mr. Ochoa did not testify as to any other increase in wages for his travel and testified no one else on his crew had a gas card. (R. p. 152, ll. 10 – 25; p. 153, ll. 1 - 11).

Standard of Review

The Administrative Procedures Act ("APA") sets forth the standard for judicial review of decisions made by the Workers' Compensation Commission ("the Commission"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The substantial evidence standard of review permits this Court to reverse the Commission's findings when those findings are unsupported by substantial evidence. S.C. Code Ann. § 1-23-380(A)(5)(e). The Appellate Courts may reverse or modify a decision of the Commission if the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Nicholson v. South Carolina Dept. of Social Services,* 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013). An issue regarding statutory interpretation is a question of law. *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53 (2011). "This court is free to decide matters of law with no particular deference to the fact finder." *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011). The question of whether the facts of a case were correctly applied to a statute is a question of fact, which is subject to the substantial evidence standard. *Hopper v. Terry Hunt Const.*, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) (Receiving negative treatment on other grounds). Hearsay testimony may be admissible in workers' compensation matters if the testimony is corroborated by facts, circumstances, or other evidence. *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 528 S.E.2d 667 (2000).

Argument

The Appellant Jorge Lopez-Celestin's argument here is simple: The Commission erred in the exclusion of deposition testimony from Reeves Young, LCC employees, and the Commission erred as a matter of fact and as a matter law in its determination that the Claimant's injuries did not arise out of and in the course and scope of his employment. Before the single Commissioner, the Appellant properly offered deposition testimony of Juan Ochoa, a Reeves Young Foreman, but was restricted by the Commissioner. Counsel for Respondents objected to the use of the deposition stating, "You can't use the deposition transcript unless he wants to try to impeach him somehow." R. p. 145. Commissioner Campbell agreed, and limited Appellant's use of the transcript only to impeachment purposes. As explained further below, the Rules of Evidence do not apply to Workers' Compensation cases; the transcript could be used for many purposes beyond impeachment, as they are not prohibited.

Moreover, the Commission erred in its determination that Lopez-Celestin was not in the course and scope of his employment when the automobile collision occurred. The general rule that an employee is not in the course of her employment when traveling to and from work is riddled with multiple exceptions. Of relevance here are the special errand exception and the time and travel compensation exception. The Appellant was specifically sent to an out of state job and was compensated with a $2.00 per hour increase in wages and $175.00 per week for his travel and time. The Commission's conclusions of law and findings of fact to the contrary are erroneous. Lopez-Celestin suffered grievous injuries as a result of the automobile collision and should be compensated for those injuries, as he was in the course and scope of his employment when the collision occurred.

I. The Commission Erred in Excluding and Limiting the Use of the Deposition Testimony of Reeve's Young Officers, Directors, and Managing Agents.

The Commission erred in excluding deposition testimony of Juan Ochoa. The evidentiary standard of review is abuse of discretion for most evidentiary issues on appeal; however, the Commission wrongly applied the Rules of the Evidence to this case. By statute, the Rules of Evidence do not apply to Workers' Compensation cases. "Except in proceedings before the Industrial Commission, the rules of evidence as applied in civil cases in the court of common pleas shall be followed." S.C. Code Ann. §1-23-330. An issue regarding statutory interpretation is a question of law. *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53 (2011). Thus, the Commission's applying the Rules of Evidence to this matter should be reviewed with no deference to the Commission. *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011).

Appellant's counsel introducing Mr. Ochoa's deposition testimony on the record during the hearing with Commissioner Campbell should not have been prohibited because the evidence rules do not apply in workers' compensation matters. Correspondingly, hearsay is permitted in a workers' compensation matter even if it does not otherwise meet a hearsay exception. *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 528 S.E.2d 667 (2000). "Great liberality is to be exercised in allowing the introduction of evidence in workers' compensation proceedings." *Trotter v. Trane Coil Facility*, 384 S.C. 109, 116, 681 S.E.2d 36, 40 (Ct. App. 2009). Furthermore, the Rules of Procedure for the Administrative Law Courts state the Rules of Civil Procedure, Rules 26-37, SCRCP, shall apply. Rule 21, SCRALC. Rule 32, SCRCP provides that "the deposition of a party or of anyone who at the time of the taking the deposition was an officer, director, or managing agent, . . . may be used by an adverse party for any purpose."

While cross examining witness and supervisor of Reeves Young, Juan Ochoa, Appellant's counsel asked Mr. Ochoa to confirm statements he had previously made in his deposition conducted by Appellant's counsel on March 5, 2018. Respondents' counsel objected, stating Appellant's counsel could only do so to try to impeach the witness. Appellant's counsel advised the practice was allowed pursuant to the rules, but the Single Commissioner instructed Appellant's counsel that "if [you] need to for impeachment purposes, I'll – I'll allow it to come in, okay?" R. p. 145, ll. 15 – 16. The Commissioner would not otherwise allow the use of the deposition.

Appellant sought to introduce testimony of both Juan Ochoa and William Reeves in which they testified that the additional funds paid to the Appellant were compensation for travel. Appellant sought to introduce "Q. All right. When you were at Clemson, were you paid extra money?" A. I was, yea. Q. and what was the extra money you were paid? A. It was $175 a week." R. p. 281, ll. 15-19. He further intended to introduce that Juan Ochoa had agreed "Q. Okay. All right. And even though you were provided a company vehicle and had a gas card, you were still paid the per diem? A. Yes." Appellant was prejudiced by the exclusion of this evidence and other testimony, and the Commission had no basis for the exclusion of that testimony. The disregard for the rules allowing the deposition testimony tainted the entirety of the cross-examination of the witnesses. Therefore, the Appellant respectfully requests this court reverse the order of the Commission and remand for a new hearing wherein the Appellant may present the evidence found in the depositions of Juan Ochoa and William Reeves.

II. The S.C. Workers' Compensation Commission erred in denying Appellant's workers' compensation benefits under the "going and coming" rule, when the evidence of record demonstrates Appellant's injury by accident meets the exception to the rule.

The Commission erred in its factual determinations, and there is not substantial evidence to support the Commission's findings of fact. The evidence of the case supports no other conclusion than that the facts and circumstances here are parallel to the facts and circumstances of the governing precedent. *See generally McMillan v. Huntington & Guerry Electric Co.*, 277 S.C. 552, 290 S.E.2d 810 (1982).

The coming and going rule does not apply "where in going to and returning from work . . . the time that is consumed is paid for or included in the wages . . .." *Sola v. Sunny Slope Farms*, 244 S.C. 6, 135 S.E.2d 321 (1964). The testimony of record and factual similarities between the present case and *McMillan* show the additional increment of pay Claimant received for working out of town was intended to compensate for time traveled. As discussed below, McMillan was in the course and scope of his employment when he was involved in a collision while leaving the job site.

McMillan demonstrates a uniquely parallel situation where the court and Commission held, based on the facts and circumstances, an increase in hourly pay for an employee's out of town work was for the purpose of covering the employee's travel time. Despite the fact McMillan was driving his own vehicle, was offered the choice to live near the worksite and chose not to, and had no express agreement stipulating the extra compensation was for travel, the Commission still found that "the additional increment which the Claimant received for working out of town was for the purpose of covering his travel time and in payment of his travel time to and from the job site . . .." *McMillan* at 555, 290 S.E.2d at 811. McMillan's employer appealed, arguing "[the] additional compensation had no relation to the distance or time traveled and that he was paid merely because

of the inconvenience employees suffered from being away from home." *McMillan* at 555, 290 S.E.2d at 812. The Supreme court nevertheless concluded "[t]he scheme of payment and the amount thereof bears a definite relation to the travel involved and warrants the finding made by the commission," and awarded the claimant benefits. *McMillan* at 556, 290 S.E.2d at 812.

The Commission so found, and the supreme court affirmed, because McMillan was paid an increased hourly wage for his out of town work. *McMillan*, at 554, 290 S.E.2d at 811. It made no difference whether he choose to commute each day or board at the job site, it made no difference if he drove or rode with a co-worker, and it made no difference if there was a direct relationship between the distance traveled and the compensation paid. In *McMillan* the court found the travel time compensable when the employer increased the wages 50 cents per hour when claimant worked farther than 15 miles to the job site. *McMillan* at 556, 290 S.E.2d at 812. Thus, payment of additional hourly compensation for out of state work came within the exception to the rule stating an employee's injury sustained while commuting to work does not arise out of and in the course and scope of his employment. *McMillan* at 554, 290 S.E.2d at 811. The time consumed provision constitutes an exception to the general rule, even if there is merely an implied agreement to furnish transportation or pay a sum in lieu thereof for out-of-state work. *Id.* In its holding, the court stated: "There need not be a finding of expressed agreement to furnish the transportation or pay a sum in lieu thereof in order to bring a claim within the exception. It is sufficient if the agreement be implied." *McMillan* at 555, 290 S.E.2d at 811.

Similarly, to the Claimant in *McMillan*, the Claimant here sustained an injury by accident while commuting home from an out-of-state job for which his employer furnished an additional increment of pay to work. The Appellate Panel misapplies the holding of *McMillan* in its fact finding by ignoring the overwhelming factual parallels between the two cases. *McMillan* is

applicable in the present case because the facts and circumstances here are identical to the specific facts and circumstances the *McMillan* court considered in finding there existed an implicit agreement to furnish transportation or pay a sum in lieu thereof for out-of-state work.

The Appellate Panel erred in agreeing with the employer's argument the method of payment demonstrates they did not intend to compensate for time traveled. The Employer's means of furnishing extra compensation merely reflects an individual company's choice of business practice. Claimant was paid an additional two dollars ($2.00) per hour, in addition to a weekly per diem of one hundred seventy-five dollars ($175.00) per week only when he worked out of state at the Clemson University projects. This was compensation for his travel. Regardless of Reeves Young's methodology for reaching these numbers, the compensation was only paid for its employees working on out-of-state jobs. Reeves Young Vice President and Business Unit Leader of the Heavy Civil Group, William Reeves, testified the company management had decided "based on the project being out of town, each of the employees would receive $175 per week." R. p. 227, ll. 22 – 24.

It is of no consequence Appellant did not utilize the housing offered by the Employer. The Employer in *McMillan* similarly included an option for employees to board near the work site, and the Supreme court did not consider this significant in its analysis because McMillan also did not choose to live in that housing. The fact of the matter is Reeves Young paid its employees working out-of-state extra compensation. Moreover, if the per diem was meant to be used "however [the employees] saw fit" and was not compensation for time or travel, (R. p. 227, l. 17), the extra $2.00 per hour is compensation for time traveled. This fact is most obvious when the payment scheme for the Appellant is compared with that for Juan Ochoa. Mr. Ochoa was paid a per diem and was given a company gas card for his travel. He received no other wage increase for his out-of-state

work. Appellant, in contrast, was paid a per diem and was also given an increase of $2.00 per hour for his work out-of-state. Juan Ochoa had a company truck, and the Employer-Respondent provided gas for that vehicle. Appellant did not have a company truck and was provided an increase in wages for his travel time and expenses. Therefore, it is evident that the employer was compensating Appellant for his travel and time and was, consequently, in the course and scope of his employment. The Commission's conclusion to the contrary is not supported by substantial evidence and must be reversed.

III. The Commission Erred as a Matter of Law in Concluding Appellant Was Not in the Course and Scope of His Employment when the Collision Occurred.

The Commission erred as a matter of law in concluding Appellant was not in the course and scope of his employment when the collision occurred. The Commission concluded as a matter of law that "Under [section] 42-1-160, [Appellant] did not sustain a compensable injury by accident arising out of and in the course of his employment on January 5, 2017." Section 42-1-160 provides, in part, that "'injury' and 'personal injury' mean only injury by accident arising out of and in the course of employment." There are several circumstances in which an employee's injuries sustained while traveling from his home to his place of employment arise out of and are in the course of his employment:

> (1) Where, in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) Where the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment

Sola v. Sunny Slope Farms, 244 S.C. 6, 14, 135 S.E.2d 321, 327 (1964). When determining whether the means of transportation are provided by the employer, "a factor supporting compensation is whether a provision of transportation is held out as an inducement to employment." *Byrd v. Stackhouse Sheet Metal Works*, 317 S.C. 35, 39, 451, S.E.2d 405, 407

(1994). Larson's Workers' Compensation Law correspondingly states that "employment should be deemed to include travel when the travel itself is a substantial part of the services performed." 2 Larson's Worker's Compensation Law § 14.07. Moreover, "the sheer size of the journey is frequently a factor supporting this conclusion." *Id.*

The South Carolina Supreme Court has held that an employer and employee need not have an explicit agreement that extra compensation is being given to furnish transportation for purposes of employment "in the course and scope of" one's employment. In *McMillan v. Huntington & Guerry Electric Co.*, 277 S.C. 552, 290 S.E.2d 810, the claimant worked for Huntington & Guerry Electric Co. based in Greenville, South Carolina, but often did jobs requiring travel. *Id.* at 810, 553. When McMillan would work jobs requiring out of state travel, he was paid a higher hourly wage than he was paid for Greenville area jobs worked. *Id.* at 810-11, 553-54. On the day McMillan was injured, he was driving back from a job in Hendersonville, North Carolina, which is about an hour from Greenville. *Id.* at 811, 553. The supreme court looked to the facts on the record, especially the extra compensation McMillan was paid for working out-of-state, and the fact that his wage would correspondingly decrease for local jobs. *Id.* at 811-12, 555-56. Despite the fact McMillan was driving his own vehicle, was offered the choice to live near the worksite and chose not to, and had no express agreement stipulating the extra compensation was for travel, the court still concluded that "[t]he scheme of payment and the amount thereof bears a definite relation to the travel involved and warrants the finding made by the commission," and awarded the claimant benefits. *Id.* at 812, 556.

Appellant Lopez-Celestin and Respondent Reeves Young, LLC did not need to expressly agree the extra compensation being paid was to furnish transportation because it can be implied from the facts. It is undisputed Employer-Respondent paid Appellant a per diem of thirty-five

($35.00) dollars per day and an additional two ($2.00) per hour in exchange for his work on the Earl Street Apartments project. It is also undisputed the extra compensation was provided because the Earl Street Apartment Complex project was in Clemson, South Carolina, which was an hour and forty-five-minute drive from Appellant's home, and Appellant's normal work locations with Employer-Respondent were in Georgia. Employer-Respondent offered this extra compensation to workers on the Earl Street Apartment Complex project because the workers came from out-of-state to work on the project. Employer-Respondent only began to pay Appellant the $35.00 per diem and the additional $2.00 per hour once he began to work in Clemson. While Employer-Respondent argues housing was offered near the Clemson job site for its workers, Appellant was never actually provided housing. Further, the fact Appellant had declined to live in housing near Clemson and the fact Appellant was driving his own car at the time of the accident are immaterial and not determinative of whether his injuries were sustained in the course and scope of his employment.

The *McMillan* Court found these factors to be of no consequence in its nearly identical inquiry, so here too these factors should not bear any weight in the present inquiry. Employer-Respondent and Appellant's agreement for additional hourly pay and a per diem in exchange for daily additional travel was implied. Accordingly, Appellant requests the order of the Commission be reversed and a new order be issued finding Appellant's injuries by accident fall within the exception to the going and coming rule as a matter of law.

Conclusion

Based upon the foregoing, the Appellant respectfully requests this Court reverse the opinion of the Commission. The Commission erred in the exclusion of evidence and a new hearing is warranted on that basis. Further, the Commission erred as a matter of law in its application of

the coming and going rule and there is not substantial evidence to support the findings of fact of the Commission. Therefore, Appellant further requests this Court find as a matter of law that Appellant was in the course and scope of his employment when the subject collision occurred and requests this court award benefits for the injuries he sustained.

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