The State of South Carolina
In the Court of Appeals

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SC 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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the South Carolina Workers' Compensation Commission correctly excluded the deposition testimony of Juan Ochoa?

II. Whether the South Carolina Workers' Compensation Commission correctly found that Appellant's accident did not arise out of and in the course of his employment?

STATEMENT OF THE CASE

Jorge Lopez-Celestin ("Appellant") filed a Form 50, Request for Hearing, on August 14, 2018, alleging that he sustained compensable injuries by accident to his left lower extremity, left shoulder, back, neck, hip, left knee, chest, ribs, and whole body as a result of a January 5, 2017, motor vehicle accident. Appellant's Form 50 was filed against two employers/carriers, Reeves Young, LLC, insured by Amerisure Insurance Company ("hereinafter Respondents"), and Holder Construction Group, LLC ("Holder"), insured by American Zurich Insurance Company ("American Zurich"). On September 6, 2018, Respondents filed a Form 51 denying that the Appellant sustained any compensable injury by accident arising out of and in the course of employment.

A hearing was held before The Honorable R. Michael Campbell, II on March 21, 2019, in Ninety Six, South Carolina. The main issue before the Commissioner was to determine if the motor vehicle accident arose out of and in the course of the employment. Appellant took the position that the case was compensable on two grounds: (1) the "special errand" exception to the going and coming rule because while Appellant was not working on employer premises, he was sent to a specific job site at the behest of the employer and could not have done the work but for the travel to and from the job site; and (2) the "time or travel compensated for" exception to the going and coming rule because the employer offset the cost of travel and because he could not have afforded the cost of travel but for the addition of $2.00 to his hourly rate and per diem of $35.00 a day.

Respondents asserted that Appellant did not meet any exception to the going and coming rule. Rather, Appellant was involved in an unfortunate motor vehicle accident when he was leaving the Clemson job site, but that he was neither on a special errand, nor compensated for his travel time. Respondents asserted that Appellant received a $2.00 per hour pay increase and $175.00 weekly per

diem, as every worker did on the Clemson job site, regardless of whether they stayed at the employer provided housing, made other lodging arrangements, car pooled, drove to and from the job site in a company provided truck, or chose to drive to and from their homes. Respondents also pointed out that every worker received the $2.00 per hour pay increase and $175.00 weekly per diem no matter how far they had to travel to reach the Clemson job site. Respondents argued that the $2.00 per hour pay increase and the $175.00 weekly per diem did not constitute mileage, payment for travel time, or reimbursement for gas money, but rather was simply a per diem to every employee at the Clemson job site, including Appellant.

Commissioner Campbell issued a Decision & Order on September 6, 2019, finding that the Appellant failed to meet his burden of proving that his situation fit any of the exceptions to the going and coming rule. Thus, Appellant's claim for benefits under the Act was denied.

On September 18, 2019, Appellant filed a Form 30, Request for Commission Review. 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.

STATEMENT OF THE FACTS

Appellant sustained injuries as a result of a motor vehicle accident that took place on January 5, 2017. (R. p. 94, line 24-p.95, line 1). On this date, Appellant was working as a heavy equipment operator on two different jobs in Clemson, South Carolina and lived in Gainesville, Georgia. (R. p. 95, lines 2-10). The motor vehicle accident took place after Appellant left the Clemson area and was traveling back to his home in Gainesville. (R. p. 121, lines 19-25). At the time of the motor vehicle accident, Appellant was driving his personal vehicle. (R. p. 120, line 25-

p.121, line 1). Even though Respondent offered its employees a company provided housing option in Clemson, Appellant elected to drive back and forth daily between Gainesville and Clemson in order to be at home in the evenings to care for his wife, who was ill at the time. (R. p. 120, lines 20-24). Appellant was not assigned any tasks, nor asked to undertake any errands, by the Respondents during his trips to and from his home. (R. p. 121, lines 19-25).

While working on the Clemson job sites, Appellant was paid an extra $2.00 per hour and also received a $175.00 per week per diem. (R. p. 99, line 9-p. 100, line 14). Every worker who worked on the Clemson job sites received the extra $2.00 per hour pay and the $175.00 per week per diem regardless of the distance the worker traveled to get to the job sites, regardless if the worker car pooled with other workers, regardless if the worker chose to lodge overnight in company provided and paid for housing, regardless if the worker drove to and from the job sites in a company provided and paid for vehicle, regardless of the actual number of days worked in any given week as the days worked varied, and regardless if the worker chose to make some other lodging arrangements to stay in the Clemson area. (R. pp. 118-119). The $175.00 per diem bore no relation to travel time, travel distance, or actual transportation expenses incurred by the employees. (R. pp. 118-120).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(6) (1976), establishes the "substantial evidence rule" as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or

> modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> ....
>
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.
>
> ...

In workers' compensation appeals, an appellate court may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transp. Servs., Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise,

conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. The South Carolina Workers' Compensation Commission correctly excluded the deposition testimony of Juan Ochoa.

The South Carolina Workers' Compensation Commission did not commit an error in excluding the deposition testimony of Juan Ochoa. The parties to this claim agree that the South Carolina Rules of Evidence do not apply in Workers' Compensation cases and that the Rules of Civil Procedure are to be followed. *See* S.C. Code Ann. §1-23-330 ("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.") The South Carolina Rules of Civil Procedure only allow the admission of depositions under five specific circumstances. Rule 32(a), SCRCP. The first provision allows for the use of depositions for impeaching the testimony of a deponent as a witness or for any other purposes permitted by the rules of evidence. Rule 32(a)(1), SCRCP. The second provision provides for the use of "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose." Rule 32(a)(2), SCRCP. The third provision allows the use of a deposition of a witness that is unavailable to testify in person. Rule 32(a)(3), SCRCP. The fourth provision allows the full deposition transcript to be introduced if only part of it was previously introduced by an adverse party. Rule 32(a)(4), SCRCP. The fifth provision allows for excerpts from a deposition in the case in chief to be furnished at least one day prior to trial. Rule 32(a)(5), SCRCP.

The federal and state versions of Rule 32 are essentially the same as noted in the official comments of the rule: "This is current Federal Rule 32(a), which is an amended version of the Federal Rule which served as the guide for Circuit Court Rule 87D. There are minor changes in the wording of the rule, but no significant alterations." Rule 32, SCRCP. The Federal Rules of Civil Procedure that allow the use of deposition testimony in place of live testimony "have not changed the long established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person." Gibson v. Wright, 403 S.C. 32, 47, 742 S.E.2d 49, (2013) (citing Loinaz v. EG & G, Inc., 910 F.2d 1, 8 (1st Cir. 1990)).

A. The deposition transcript of Juan Ochoa was properly excluded because it was not used for impeachment purposes and Juan Ochoa was not an officer, director, or managing agent.

Under the five provisions permitting the use of depositions during a hearing, only 32(a)(1) and 32(a)(2) are relevant to this present case. Appellant failed to properly introduce the deposition under either provision because he did not attempt to use it for impeachment purposes and did not establish that Juan Ochoa was either an officer, director, or managing agent. As stated above, Rule 32(a)(1) allows for the use of depositions for impeaching the testimony of a deponent as a witness. The hearing transcript indicates that Appellant did not attempt to use the deposition transcript of Juan Ochoa for impeachment purposes during his cross examination. (R. pp. 142-156). Appellant attempted to introduce Juan Ochoa's deposition transcript to show "that he's given the same answer" (R. p. 144, lines 23-25). However, Rule 32(a) does not allow for the introduction of a deposition transcript to corroborate a consistent statement. Rule 32(a), SCRCP. Respondent objected to Appellant's use of the deposition transcript to corroborate a consistent statement and Commissioner Campbell properly instructed Appellant with regard to this rule. (R. pp. 144-145).

Commissioner Campbell stated, "if you need it for impeachment purposes, I'll allow it to come in, okay?" to which Appellant responded, "thank you." (R. p. 145, lines 15-17). Following that interaction, Appellant never attempted to use the deposition for impeachment purposes. (R. pp. 145-146). Therefore, the deposition transcript does not satisfy Rule 32(a)(1) and the exclusion of such was proper.

In his brief, Appellant also appears to argue that Juan Ochoa's deposition transcript should have been allowed under Rule 32(a)(2), which provides for the use of a "deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose." Rule 32(a)(2), SCRCP. However, this provision is inapplicable because Juan Ochoa was not an officer, director, or managing agent of Reeves Young LLC.

There is little South Carolina case law regarding who falls under the category of "officer, director, or managing agent" under Rule 32(a)(2). However, there is a highly regarded federal standard that provides a three-pronged test for the determination of who is a "managing agent" within Fed. R. Civ. P. 32(a)(2). The test, as formulated in Rubin, is as follows: First, the employee should be a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters. Rubin v. General Tire and Rubber Co., 18 F.R.D. 51, 56 (S.D.N.Y. 1955). Second, the employee should be a person who could be depended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer. Id. Third, the employee should be a person who can be expected to identify himself with the interests of the corporation rather than with those of the other parties. Id. The Rubin test is a commonly accepted and definitive test for determining an employee's status as a

managing agent under Rule 32(a)(2). Reed Paper Co. v. Proctor & Gamble Distributing Co., 144 F.R.D. 2, 4, (D. Me. 1992).

In Reed Paper Co., the deposition in question was that of a sales representative. Id. There was no demonstration in the record that he had any general power to exercise his discretion and judgment in dealing with corporate matters. Id. Thus, it was held that his deposition testimony could not be used during the trial under Rule 32(a)(2). Id. The exclusion of another witness's deposition in the same case was also found not to satisfy Rule 32(a)(2). Id. The second deposition met the second and third prongs of the Rubin test; however, the witness was limited in her power to only making assessments and providing recommendations with respect to a corporate matter. Id. The witness had terminated the Plaintiff at the direction of her supervisor and there was nothing in the record to indicate that she had any authority to terminate the Plaintiff at her own discretion. Id. The court found that neither of the witnesses were managing agents of the corporate defendant, and thus, their prior deposition testimonies could not be used pursuant to Rule 32(a)(2). Id.

In Carolina Chloride, Inc. v. Richland County, Carolina Chloride sought to introduce the deposition it had taken of Brown, who was formerly the County's Zoning Administrator. 394 S.C. 154, 159, 714 S.E.2d 869, 871 (2011). At the time of his deposition, however, Brown was no longer the zoning administrator. Id. at 173. At the time of the hearing Brown had become a member of the Board of Adjustment. Id. The trial judge rejected Carolina Chloride's only argument that Brown met the requirements of Rule 32(a)(2) because he was currently a member of the Board of Adjustment. Id. The trial judge excluded the deposition based on the County's objection pursuant to Rule 32(a)(2), SCRCP. Id. The Court of Appeals found no abuse of discretion, stating Carolina Chloride "did not lay any foundation as to why Brown's role on the Board qualifies under Rule 32(a)(2)." Id. at 174. The Court observed that Carolina Chloride could have attempted to

demonstrate that Brown qualified as an unavailable witness under Rule 32(a)(3), SCRCP or, if Brown was available, he should have been called as a witness at trial. Id. The South Carolina Supreme Court upheld this ruling and confirmed that the trial court did not abuse its discretion in excluding Brown's deposition at trial in the absence of the requisite foundation. Id.

In the present case, Juan Ochoa was a Foreman for Respondent at the time of his deposition and hearing. Rule 32(a)(2) permits the use of deposition testimony of officers, directors, or managing agents. However, Appellant provided no foundation on the record that Mr. Ochoa was an officer, director, or managing agent, or that he had any general power to exercise his discretion and judgement when dealing with corporate matters. Even assuming arguendo Mr. Ochoa would have met those requirements, Appellant failed to demonstrate this on the record which, as noted above, is required. Therefore, in accordance with Carolina Chloride, the Commission did not abuse its discretion when it excluded Juan Ochoa's deposition testimony due to the absence of the requisite foundation provided by Appellant to establish his role as an officer, director, or managing agent.

B. No attempt was made on the record to introduce the deposition testimony of William Reeves; therefore, there was no improper exclusion of such transcript.

Appellant's argument regarding the exclusion of William Reeves's deposition transcript is invalid because Appellant made no attempt to introduce Reeves's deposition at the hearing. (R. pp. 94-112, 128-131, 142-156, 165-173). It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000); Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998). Without an initial ruling by the trial court,

a reviewing court simply would not be able to evaluate whether the trial court committed error. Staubes v. City of Folly Beach, 529 S.E.2d 543 (S.C. 2000).

During oral arguments to the Full Commission, Appellant stated "I was attempting to introduce evidence from the deposition while I was questioning Mr. William Reeves. There was an objection raised. It was sustained." (R. p. 56, lines 21-24). Additionally, Appellant's Brief to the Court of Appeals argues "Appellant sought to introduce testimony of both Juan Ochoa and William Reeves..." (Appellant Br. 11).

After thorough review of the hearing transcript, it is clear that Appellant counsel's recollection of the hearing is incorrect. At no point during Appellant counsel's cross-examination of William Reeves did he attempt to introduce any evidence from Reeves's deposition. (R. pp. 165-173). Additionally, during this cross-examination there was no objection made regarding the introduction of William Reeves's deposition transcript. Id. As such, the issue of excluding the testimony was not ruled upon by either the Single Commissioner, nor the Full Commission. Consequently, the issue is not preserved for appellate review by this Court, and such argument is considered waived. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003).

Furthermore, the transcript of William Reeves's deposition was admitted into the record without objection and was in evidence, but again, Appellant's counsel made no attempt to use the same during his cross-examination of Reeves. (R. pp. 165-173). Thus, the Court should therefore deny Appellant's request for a new hearing because an issue cannot be raised for the first time on appeal.

II. **The South Carolina Workers' Compensation Commission correctly found that Appellant's accident did not arise out of and in the course of his employment.**

It is well settled law that as a general rule an employee going or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment. Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964). However, there are recognized exceptions to this rule, two of which are at issue in this appeal: 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 and 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.

In his brief, Appellant argues that his claim should be compensable because the facts of this case line up with the facts in the case of McMillan v. Huntington & Guerry Electric Co., 277 S.C. 552, 290 S.E.2d 810 (1982). However, Appellant's reliance on McMillan is misplaced.

In McMillan, McMillan's employer was based in Greenville, South Carolina and the nature of the work required McMillan to travel to nearby towns for the purpose of installing electrical equipment. Testimony provided at the McMillan hearing showed, " . . . if you work within a 15 mile radius of our office, you draw a standard basic wage scale. Any distance beyond that, we increase the man's hourly wage-rate, depending on the number of miles away from Greenville so that he may commute or board at the job site, any way he chooses." McMillan at 553, 810-811. Further testimony in McMillan indicated that the purpose of the increase in pay was to compensate McMillan for the time that it took him to travel to and from the job site daily. *See* id. at 556, 812. Finally, in McMillan the Hearing Commissioner found and the Full Commission agreed as

follows: " . . . **I find that the additional increment which the Appellant 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 . . . .**" Id. at 555, 811 (emphasis added). Most importantly, McMillan states that " . . . in each instance the agreement of the employer to pay travel expenses, either as an incident to or concomitant to the employment agreement, is **a question or fact to be determined in the light of the circumstances of each particular case.**" Id. at 555, 812 (emphasis added).

It is clear that Appellant's reliance on McMillan is misplaced. In McMillan, the employer admitted the increase in hourly pay was intended to compensate the Appellant for either commuting or boarding. There is no such evidence in this case. In McMillan, the Appellant testified the increase in hourly pay was to compensate him for the time he actually spent commuting to and from the job site. There is no such evidence in this case. In McMillan, the employer did not offer employer paid for lodging to employees who chose to stay overnight close to the job site. In the instant case, the employer did offer employer paid for lodging.

In McMillan, the amount of the increase in the hourly wage depended on the number of miles the work was being conducted away from Greenville. This was key to the Court's holding that the "scheme of payment and the amount thereof bears a definite relation to the travel involved . . . ." Id. at 556, 812. In the instant case, Respondents did not have a similar scheme. Each and every employee received the same amount without regard to the distance traveled.

McMillan demonstrates a unique situation that resulted in a finding that an increase in hourly pay for working out of town was for the purpose of covering the injured worker's travel time. Appellant did not make that argument at the hearing and has not put forth evidence to support

the same. It is noted that McMillan (a case that the Appellant did not refer to at all at the hearing) is the case cited by the Appellant in his brief and his reliance on the same is misplaced.

Appellant seems to argue that McMillan stands for the proposition that payment of additional hourly compensation for out of state work comes within an exception to the going and coming rule. This is not what McMillan stands for. Payment of additional hourly compensation resulted in an exception to the going and coming rule in McMillan, but it is clear that the court did not intend for the finding in McMillan to be a blanket rule. As pointed out above, McMillan states that each and every case involving travel expenses, or alleged travel expenses, creates a **question of fact** to be determined in the light of the circumstances of each particular case. **Appellant did not present any evidence that the increase in Appellant's hourly wage was intended to compensate him for his travel time. Therefore, any argument based on McMillan is irrelevant to the instant case.**

The Hearing Commissioner also correctly determined that the $175.00 weekly per diem was not for travel expenses of gas money. As correctly found by the Hearing Commissioner, the $175.00 weekly per diem was paid to every employee working in Clemson regardless of how far they drove to get to Clemson, regardless of how many days the employee actually travelled, regardless of if they even travelled, as some employees stayed in company provided and paid for housing (which was offered to the Appellant). The $175.00 weekly per diem was also paid to certain employees who were also provided a company vehicle and a company gas card to pay for fuel – such as Juan Ochoa. The $175.00 weekly per diem was provided to all employees, even those who carpooled, or hitched a ride with Mr. Ochoa. Reeves Young received no tangible benefit as a result of providing their employees the increased hourly wage or the $175.00 per diem. The

weekly per diem did not bear any relation to the travel time, distance travelled, or transportation expense incurred.

Appellant presented no testimony as to the actual costs associated with his travel to and from Clemson. There was no testimony as to the maintenance costs associated with his travel, or as to what kind of vehicle the Appellant drove. What is undisputed is that Reeves Young did not provide the Appellant with a gas card, pay for any of his insurance costs, pay for any of his maintenance costs, or require him to keep any documentation regarding the distance travelled, or expenses associated with his travel. Again, the weekly per diem did not bear any relation to the travel time, distance travelled, or transportation expense. Moreover, Appellant testified at the hearing that he was not compensated for his travel time:

Q. (Respondents' counsel) During that time you were in the car did they pay you your hourly wage?

A. (Appellant) The driving time, no.

(R. p. 121, lines 6-8).

Notably, Appellant also incorrectly states in his brief that his brother (also a Reeves Young employee) did not receive the $175.00 weekly per diem while working in Clemson. There is no evidence to support this assertion, as the Appellant offered no such testimony during the hearing. Respondents have scoured the hearing transcript and cannot find any such testimony. **In fact, Appellant testified that every Reeves Young employee on the site received the per diem.** *See* R. p. 119, lines 7-9. As such, Appellant's reference to this at page 5 of his brief represents an argument or statement of alleged facts outside of the record and should be stricken from the brief.

Appellant appears to have abandoned his argument that the facts of the case also fit within the "special errand" exception to the going and coming rule, as it was not argued in his brief to the

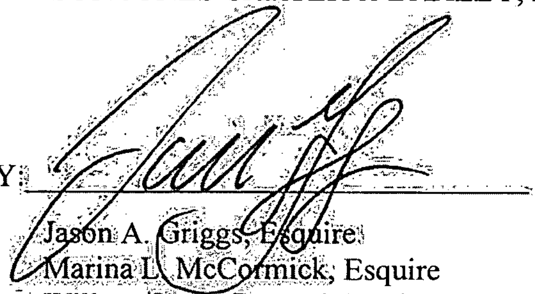
Full Commission or mentioned during oral arguments before the Full Commission. It is easy to ascertain why this argument has been abandoned. There is simply no evidence to support an argument under the "special errand" exception. Appellant admitted that he was not charged with any tasks, nor did he ever engage in any errands for Respondent, while driving to Clemson or back home to Gainesville. Moreover, Appellant did not even have a company provided cellular phone in case Respondents wanted to contact him for the purpose of requesting he actually perform an errand while en route to the job site or on the way home. Again, there is simply no evidence to support a finding that this case falls under the "special errand" exception.

CONCLUSION

The Hearing Commissioner correctly excluded the deposition transcript of Juan Ochoa pursuant to Rule 32(a) and correctly found that the Appellant failed to meet his burden of proving that his accident fit within one of the exceptions to the going and coming rule. Based on the foregoing, Respondents respectfully request the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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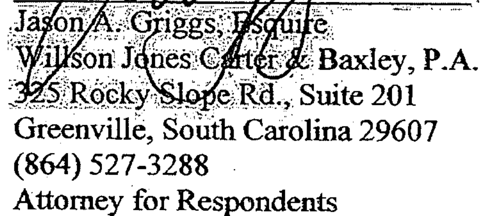
CERTIFICATE OF COUNSEL

I certify that Respondents' Final Brief complies with Rule 211(b), SCACR.



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