

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellate Panel

WCC #1118193

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MAY 07 2013

SC Court of Appeals

Patricia Johnson, Employee, ... Appellant,

-VS-

Staffmark, Employer, and New Hampshire Insurance
Company, Carrier, ... Respondent.

BRIEF OF APPELLANT

Paula Howker Amick
Patrick S. Scarlett
1440 Broad River Road (29210)
P.O. Box 21567
Columbia, South Carolina 29221
(803) 929-1920
Attorneys for the Appellant

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P.O. Box 21567
Columbia, South Carolina 29221
(803) 929-1920
(803) 929-1911 facsimile
Attorney for the Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. THE COMMISSION ERRED IN FINDING THE APPELLANT/CLAIMANT'S FALL WAS NOT AN INJURY BY ACCIDENT ARISING OUT OF THE SCOPE OF HER EMPLOYMENT.
- II. THE COMMISSION ERRED IN FINDING THE APPELLANT/CLAIMANT'S FALL WAS IDIOPATHIC IN NATURE.
- III. THE COMMISSION ERRED IN FINDING THAT A JUNE 2010 EMERGENCY ROOM VISIT ESTABLISHED THE APPELLANT/CLAIMANT'S NOVEMBER 2011 FALL WAS THE RESULT OF AN IDIOPATHIC FAILURE OF THE LEFT ANKLE WITHOUT ANY MEDICAL EVIDENCE TO THAT EFFECT.

STATEMENT OF THE CASE

The Claimant, Patricia Johnson, is forty-nine years old, with a high school diploma. Her prior work experience consists primarily of manufacturing and machine operations and assembly-line work.

On or about December 21, 2011, the Claimant was working through her employer Staffmark at the Lang Mekra plant, and was returning from the parking lot and slid and fell while stepping over a raised threshold in the doorway. (R. 150, lines 2-3). Co-workers came to her aid and an ambulance was called. (R. 152, lines 19-25). She was subsequently determined to have a "left fibula spiral fracture" and "posterior malleolar fracture" (R. 29) for which she underwent surgery on January 3, 2012. (R. 59).

When efforts to have the carrier pay for her medical treatment and provide other ongoing benefits were unsuccessful, the Claimant filed a Form 50 on January 19, 2012, requesting a hearing, and requesting benefits. The Defendants filed a Form 51, dated February 2, 2012, denying all aspects of the claim.

A hearing was held March 27, 2012, before the single commissioner. At the hearing, the Claimant maintained she suffered a compensable injury to her leg. The Defendants maintained the claim was not compensable as not arising out of her employment pursuant to S.C. Code Ann. § 42-1-160, and that her injuries were idiopathic in nature. (The Defendants also argued benefits should be denied based on an intoxication defense and on the basis she failed to acknowledge a pre-existing disability. These arguments were apparently made simply to confuse the proceedings, however, as no evidence was offered to support those arguments, and

the commissioner's findings of fact and conclusions of law, from which the Defendants did not appeal, were all based on issues related to the idiopathic defense.)

The single commissioner issued an Order on May 16, 2012, finding the Claimant suffered a fall on December 21, 2011, while working for Staffmark at Lang Mekra, but that there was a "lack of any evidence to a work-related fall" and that her fall was idiopathic in nature, and not compensable. The Claimant appealed the single commissioner's order to the Full Commission, and a hearing was held on September 18, 2012. The Full Commission subsequently affirmed the decision of the single commissioner, issuing its order on November 15, 2012 finding again that her fall was idiopathic and not compensable.

The Claimant timely filed and served Notice of Appeal on November 21, 2012.

ARGUMENT

I. THE COMMISSION ERRED IN FINDING THE APPELLANT/CLAIMANT'S FALL WAS NOT AN INJURY BY ACCIDENT ARISING OUT OF THE SCOPE OF HER EMPLOYMENT.

The Commission held the Appellant/Claimant failed to meet her burden of proving she sustained a compensable injury by accident. The Commission found "While she now says she slipped and fell on a wet concrete floor, she reported on the day of the injury that . . . she was walking through a doorway when she felt a twisting sensation and had a sharp pain in her left ankle." (R. 15-16). Finally, the Commission concluded her injuries were the result of an idiopathic fall. Not only are these findings not supported by the evidence, they are entirely inconsistent with the evidence submitted at the hearing.

First of all, at no point did the Claimant maintain she fell on a wet concrete floor. What she actually stated was that there were wet footprints in the doorway, and that she entered the doorway from outside where it had been raining. (R. 151, line 6; R. 149, lines 23-24). There was unequivocally a causal connection between the conditions of the Appellant/Claimant's workplace, and her twisting her ankle and falling on December 21, 2011, as she entered the doorway of the employer's building with shoes that had been in contact with wet ground. The Appellant/Claimant offered direct, uncontradicted testimony she stepped over and down as she crossed over a raised threshold in the doorway (R. 150, lines 2-3) which was approximately two to three inches high and two inches wide. (R. 206, lines 4-5 & 23-24). She went on to testify that while doing so she "slid and . . . fell" and fractured her lower leg. (R. 150, line 3). Again, the Appellant/Claimant testified

it had been raining earlier in the day (R. 149, line 24), and testified there were wet footprints on the floor where she fell. (R. 151, line 6). In her deposition testimony of February 22, 2012, she similarly testified she slipped because her shoes were wet from the outside (R. 121-24), that she stepped over the threshold at the doorway after being outside, and that she "just slipped and went down[.]" (R. 121, line 24). The Defendants' own witness, Mr. Terrence Green, also testified it had been raining earlier that day. (R. 199, line 19). Mr. Green went on to also confirm the area outside the doorway was wet (R. 200, lines 1-2), and that there was a raised threshold. (R. 205, lines 2-14). Finally, Mr. Green confirmed he saw a visible footprint after one of the employees went out to get the ambulance and returned back in the doorway. (R. 203, lines 11-13). Not only is the Claimant's testimony not contradicted, it is actually corroborated by the Defendants' own witness. Moreover, to ascribe the language in the medical records as a precise quote of how she described the fall as occurring is disingenuous to say the least. Compounding this error, the Commission meanwhile disregarded the portions of the medical records which describe the nature of the injury. The medical personnel during triage noted the basic tenets of her description of the accident for purposes of diagnosis and treatment. The Appellant/Claimant obviously reported a fall at work. The Commission should have considered her consistent description of the accident throughout the hearing and in her previous deposition as well as the entirety of the medical records.

A Claimant is entitled to workers' compensation benefits if she sustains an "injury by accident arising out of and in the course of employment. . . ." S.C. Code

Ann. § 42-1-160(A) (Supp. 2009)). “An injury arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances.” *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996). Finally, “compensation laws should be given a liberal construction in furtherance of the beneficent purposes for which they were enacted. . . .” *Stokes v. First Nat. Bank*, 298 S.C. 13, 22, 377 S.E.2d 922, 927 (Ct. App. 1988), *aff’d* 306 S.C. 46, 410 S.E.2d 248 (1991).

The medical reports do not contradict the Appellant/Claimant’s testimony, and in fact support the Appellant/Claimant’s testimony she slid and twisted her ankle, causing her to fall. The initial Providence Hospital report of December 21, 2011 refers to the Appellant/Claimant describing a “twisting sensation” (R. 26) and subsequently characterizes her injury as being from a “mechanical fall.” (R. 28). A “mechanical fall” is inherently a fall caused by external forces. See American Heritage Dictionary of the English Language 776 (2d ed. 1982) (Mechanical is defined in part as “Pertaining to, produced by, or dominated by physical forces.”). Finally, the x-ray reports from that same initial visit refer to the malleolus fracture for which she required surgery, but it also refers to a “left fibula spiral fracture” (R. 29), the nature of which is a fracture line spiraling around the bone occurring from a traumatic twisting motion. Spiral fractures are “Indirect fractures, which are produced by a torsional force acting at a distance, [and] have a typical spiral pattern[.]” 2 B. Browner et al., *Skeletal Trauma: Basic Science, Management and Reconstruction* Chapt. 57, p. 2139 (3d. ed. 2003). There is a relationship between

fracture pattern and injury mechanism, and a spiral pattern is caused by torsion. *Id.* at 2144. As further support of the relationship between the torsion or twisting required to cause a spiral fracture, is the recognition that a spiral fracture is often identified as evidence of abuse. See *State v. Smith*, 705 S.E.2d 491, 494, 391 S.C. 353, 359 (S.C. App. 2011) (radiologist expert witness testified a spiral fracture is "a twisting type injury that causes the bone to fracture in a spiral rather than just a crack").

The evidence, including the nature of the injuries themselves, points **not** to an idiopathic fall but rather to a fall caused when the Appellant/Claimant's foot slipped as she stepped over a raised threshold after walking on wet ground, resulting in a twisting motion, which led to her fractures.

A Claimant has the burden of proving facts that will bring the injury within the workers' compensation law. *Sola v. Sunny Slope Farms*, 244 S.C. 6, 10, 135 S.E.2d 321, 324 (1964). The Appellant/Claimant has most certainly met that burden. She has established an injury by accident arising out of her employment.

II. THE COMMISSION ERRED IN FINDING THE APPELLANT/CLAIMANT'S FALL WAS IDIOPATHIC IN NATURE.

The skewed standard applied by the single commission and affirmed by the Full Commission placed on this Appellant/Claimant a standard for proving compensability which is inconsistent with South Carolina law. See *Baggott v. Southern Music, Inc.*, 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) ("The general policy is to construe the Workers' Compensation Act in favor of coverage rather than exclusion."). Moreover, the Commission's decision changes the definition of an

idiopathic fall. To be idiopathic the fall must be unexplained and the employment must not contribute to either the cause or the effect of the fall. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 452-53, 88 S.E.2d 611, 614-15 (1955).

The facts of this case demonstrate that the fall was first of all explained where the Appellant/Claimant's shoes were wet, causing her foot to twist as she stepped over the threshold. Moreover, the employment contributed to the cause of the fall where the employer's premises outside the building were wet from the recent rain, and where Appellant/Claimant had to step up and over a raised threshold to enter the building. The facts of this case are entirely inconsistent with an idiopathic fall, and are completely dissimilar to the facts from the idiopathic injury line of cases.

In *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998), the Claimant fell while walking across a clear, clean, level floor. The Claimant herself testified in that case there was nothing on the floor which caused her to fall, and that her leg simply "gave out." Again, Crosby was walking on a level floor clear of debris, and had no explanation for why she fell. In *Bagwell*, 227 S.C. 444, 88 S.E.2d 611, the Claimant fell to the concrete floor from a standing position, causing him to suffer a cerebral hematoma which resulted in his death. According to witnesses, there was nothing present that in any way contributed to his fall. In finding the Claimant's death was the result of injuries from an idiopathic fall, the *Bagwell* Court stated, "[t]here is no evidence that deceased while standing at the desk slipped or lost his balance, nor is there any showing that his fall was caused by any hazards of his employment. An examination of the floor shortly after the occurrence disclosed no evidence of grease or other foreign substance. The floor

was dry. The body of the deceased was rigid as he fell and the testimony indicates that he made no effort to catch himself or otherwise break the fall.” *Id.* S.C. at 450, 88 S.E.2d at 613. In *Miller v. Springs Cotton Mills*, 225 S.C. 326, 82 S.E.2d 485 (1954), the Claimant suffered an injury to her knee when she stood up from a sitting position. Miller testified in that case that her feet were flat on the floor, and as she started to stand up her knee twisted. *Id.* at 329, 82 S.E.2d at 458-59. Miller went on to testify she understood “it was a ligament that got fastened under my knee cap.” *Id.* at 329, 82 S.E.2d at 459. Miller offered no testimony of a peculiar hazard or any other causal connection with her work environment. The facts of these idiopathic fall and idiopathic injury cases are in no way similar to the facts of this case.

In this case, the floor was **not** level. The Appellant/Claimant again had to step over a raised threshold. The peculiar hazard of the raised threshold combined with the fact she had just come from the outside where her shoes were in contact with the wet ground, caused her to slip as she stepped over the threshold. There may have been no witnesses to the fall itself, but there were numerous witnesses who came to her aid and thereby saw her on the floor, just inside the doorway and just past the raised threshold. Furthermore, the employer’s witness confirmed the ground outside was wet (R. 200, lines 1-2), and confirmed there was a raised threshold (R. 206, lines 4-5).

It is also important to note the direct employer subsequently put up a sign prohibiting employees from coming in that doorway, requiring them to instead go in and out of the main entrance so “it won’t happen again.” (R. 204, lines 4-5). The fact Lang Mekra implemented remedial measures establishes the company itself

considered the nature of the doorway as presenting a hazard causing the Appellant/Claimant's fall. The remedial measures are compelling evidence that the conditions of employment contributed to the cause of the fall within the standard enunciated in *Bagwell*, and it was error for the Commission to fail to consider this evidence. Remedial measures, by definition, would not be necessary and certainly would not be taken in a situation such as in *Crosby* or *Bagwell* or *Miller* where there was truly no condition of employment contributing to those respective idiopathic injuries.

At the hearing, the Defendants argued it was "illegal" and "improper" for the Appellant/Claimant to argue that the Commission consider remedial measures. (R. 224, lines 13-19) On the contrary, while remedial measures may not be offered as evidence to establish negligence, negligence is irrelevant to the issue of whether a workers' compensation injury is compensable. Accordingly, it is entirely appropriate to consider remedial measures in the context of this case to help determine whether there are outside forces contributing to the Appellant/Claimant's injury. "While not admissible to prove negligence, evidence of subsequent remedial measures is admissible for other purposes[,] such as . . . to show the conditions existing at the time of the accident, **to prove the cause of the injury**; to establish the defendant's control of the premises or instrumentality involved; and to demonstrate the feasibility of taking certain precautions." *Reiland v. Southland Equipment Service, Inc.*, 500 S.E.2d 145, 150, 330 S.C. 617, 626 (S.C. App. 1998) (emphasis added), citing Thomas M. Fleming, Annotation, *Admissibility of Evidence of Repairs, Change of*

Conditions, or Precautions Taken After Accident--Modern State Cases, 15 A.L.R.5th 119, 158 (1993).

The Appellant/Claimant would furthermore refer the Court to the case of *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010). In that case, aside from the Defendants main argument that the bunkhouse rule should not apply, they further argued the Claimant's accident in that case did not arise out of his employment because the wet outside sidewalk where the Claimant fell was no different in character or design from any other sidewalk. The Court rejected that argument, finding "the injury arose from a hazard existing on the employer's premises" of which the Claimant was making reasonable use. *Id.* at 549, 689 S.E.2d at 623. The hazards present in this case include the wet premises outside combined with the raised threshold on the employer's property of which the Appellant/Claimant was making reasonable use.

In the present case, the Appellant/Claimant's injuries were certainly not the result of an idiopathic fall. They were the result of an injury by accident arising out of her employment, and it was error for the Commission to otherwise hold.

III. THE COMMISSION ERRED IN FINDING THAT A JUNE 2010 EMERGENCY ROOM VISIT ESTABLISHED THE APPELLANT/CLAIMANT'S NOVEMBER 2011 FALL WAS THE RESULT OF A IDIOPATHIC FAILURE OF THE LEFT ANKLE WITHOUT ANY MEDICAL EVIDENCE TO THAT EFFECT.

The Commission, adopting the findings of the single commissioner, found "[g]iven the past medical history of the left ankle" the fall was "the result of an idiopathic failure of the left ankle." (R. 16). The only evidence regarding an alleged "prior injury" was an emergency room visit a year and a half earlier for complaints of

pain and swelling at which time the Appellant/Claimant was ultimately diagnosed with a “[sprained] foot.” (R. 101). There was absolutely no evidence of any fracture at that time. (R. 102). The Appellant/Claimant testified she had no ongoing problems with her ankle (R. 157, lines 14-15 & 22-24), and the Defendants offered absolutely no testimony or medical evidence to contradict her testimony. There was no medical evidence offered to document a correlation between the Appellant/Claimant’s complaints in the emergency room visit eighteen months prior and the December 21, 2011 fall at work. Accordingly, there was no evidence which would support the Commission’s finding Appellant/Claimant suffered an “idiopathic failure” of the left ankle pursuant to the June 2010 sprain. Such a finding by the Commission inherently amounts to an improper medical opinion, of the kind rejected by this Court in *Burnette v. City of Greenville*, Op. No. 5059, (S.C. Ct. App. filed December 5, 2012). In that case, when the Commission affirmed the single commissioner’s opinion there was no greater pathology between a 2008 MRI and a prior 2004 MRI without evidence that opinion originated from a medical provider, the Commission erred in affirming what was tantamount to an improper “medical opinion of the single commissioner.” The Commission has similarly erred in this case by finding the 2010 emergency room records supported a finding of an idiopathic failure of the left ankle without any opinion whatsoever from a medical provider which remotely supports there was pre-existing weakness in the Appellant/Claimant’s ankle resulting in a supposed idiopathic failure. All of the medical records relating to the Appellant/Claimant’s injury refer to an acute malleolus fracture and spiral fracture caused by the fall on December 21, 2011. There is absolutely no connection

between that acute injury and a resolved ankle sprain a year and a half prior, and it was gross error for the Commission to draw a connection between the two events without any medical report on which it could possibly base such a finding.

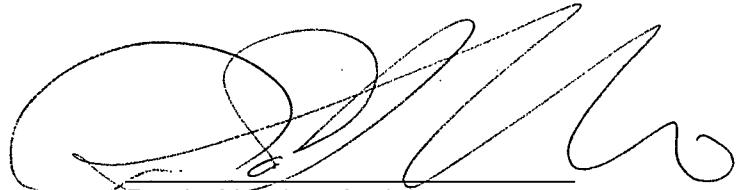
"The compensability of a particular event as an accident within the purview of the workers' compensation law is a question of law to be decided by the courts, while the commission's factual determination as to whether an accident occurred is conclusive if supported by competent evidence." *Stokes*, 298 S.C. at 18, 377 S.E.2d at 924-225, *citing Grayson v. Gulf Oil Co.*, 292 S.C. 528, 357 S.E.2d 479 (Ct. App. 1987). Here the Commission's finding that the Appellant/Claimant's fall was not an accident but rather was an idiopathic failure of the left ankle is simply not supported by competent evidence and should be reversed as a matter of law. Upon review of the evidence in this case, the Court should make findings of fact and conclusions of law consistent with the undisputed facts of this case, and hold that the Appellant/Claimant suffered a compensable injury.

CONCLUSION

The evidence in this case, including the testimony of the Appellant/Claimant and that of Terrance Green, and the medical records, establishes that the Appellant/Claimant suffered a compensable injury, and not injuries pursuant to an idiopathic fall.

The Commission's Order of November 15, 2012 should be reversed, and the Court should find the Claimant did not suffer an idiopathic fall, but rather suffered a compensable injury, and otherwise remand this case to the Commission to

determine to which benefits Appellant/Claimant is entitled pursuant to her work-related injury.

A handwritten signature in black ink, appearing to read 'Paula Howker Amick', written over a horizontal line.

Paula Howker Amick
1440 Broad River Road (29210)
P.O. Box 21567
Columbia, South Carolina 29221
(803) 929-1920
(803) 929-1911 *facsimile*
Attorney for the Appellant

Columbia, SC
April 25, 2013

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Appellate Panel

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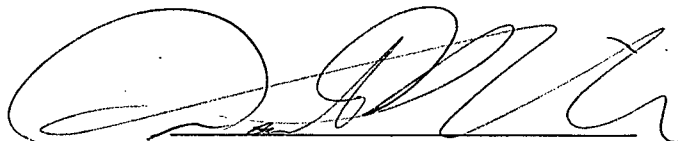
-vs-

Staffmark, Employer, and New Hampshire Insurance
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PROOF OF SERVICE

The undersigned hereby certifies that she has on this day served a copy of the Appellant's final brief on each party who has served a brief, along with an additional copy of the record on appeal as filed with the Court of Appeals, by having same hand-delivered to Respondents' attorney, Grady L. Beard, Esq., Sowell Gray Stepp & Laffitte, L.L.C., 1310 Gadsden Street, P. O. Box 11449, Columbia, SC 29211.

Dated this 7th day of May, 2013.



Paula Howker Amick
1440 Broad River Road
P.O. Box 21567
Columbia, South Carolina 29221
(803) 929-1920
(803) 929-1911 *facsimile*
Attorney for the Appellant

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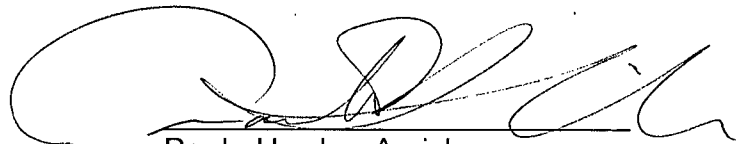
Patricia Johnson, Employee, ...Appellant,

-VS-

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CERTIFICATE OF COUNSEL

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



Paula Howker Amick
1440 Broad River Road
P.O. Box 21567
Columbia, South Carolina 29221
(803) 929-1920
(803) 929-1911 *facsimile*
Attorney for the Appellant

April 24, 2013

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