THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No. 1108693

Gail Bruce, Employee,.....Appellant,

v.

Columbia Heart Clinic, Employer, and
Hartford Insurance Company of the
Midwest c/o the Hartford, Carrier,.....Respondents.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF THE CASE

Appellant Gail C. Bruce, Claimant below ("Claimant") has a high school education with a two-year radiology technology degree. (Tr. 18, lines 11-13). She is single and lives alone. (Tr. 18, lines 9-10). Between 1995-2011, Claimant worked in various positions for Columbia Heart Clinic. (Tr. 18, line 19 – 19, line 8). Some time prior to her accident, Claimant had been employed by Columbia Heart as a clinical support manager. (Tr. 18, line 22 – 19, line 13). According to Claimant, she managed 21 people as well as patient flow, took X-rays and assisted with patient care. (Tr. 19, line 15 – 20, line 5). Angela Jenkins, Columbia Heart's Human Resources manager, testified that Claimant was also the OSHA officer and the supply manager. (Tr. 89, lines 19-25). Prior to July 15, 2011, Columbia Heart had removed certain administrative responsibilities from Claimant because she was unable to complete many of her assigned tasks. Claimant had been put on a plan of action and her pay had been reduced. (Tr. 91, line 19 – 94, line 8) (Tr. 64, lines 1-22) (Tr. 93, lines 1-9).

Ms. Jenkins explained that all Columbia Heart employees are required to take a minimum 30-minute lunch break every day, during which time employees are free to do whatever they want to do and go wherever they chose. (Tr. 90, lines 1-14). Columbia Heart does not control the way employees come and go from the building, which houses multiple companies. There are multiple ways to come and go from the building. (Tr. 90, line15 – 91, line 18) (Tr. 48, line 22 – 49, line 2). Claimant agreed that Columbia Heart does not instruct employees which doors to use to enter and leave the building where its offices are located. (Tr. 49, lines 3-16). Claimant also agreed that Columbia Heart did not provide her with the means of transportation to come and go from work. (Tr. 49, line 17 – 50, line 5).

Claimant testified that, on July 15, 2011, she went to Angela Jenkins' office to discuss her job situation. (Tr. 22, lines 10-25) (Tr. 94, lines 10-22). She testified that, after the discussion, she texted a coworker to bring her a cigarette. This was around noon, or during the lunch hour. (Tr. 23, lines 1-8) (Tr. 104, lines 8-9) (APA pp. 203, 207).[1] Claimant agreed that her employer had not asked her to go on any errand or do anything work-related. (Tr. 50, lines 6-10). Claimant was leaving the building because she wanted to. (Tr. 50, lines 19-23). Claimant testified that she went outside to a parking area to smoke, (Tr. 24, lines 2-11), and, because it was hot outside, she "took a few puffs and then put it out and started back towards the building." (Tr. 23, line 23 – 24, line 1). Witnesses testified that the area where people generally smoked was in a parking lot some 20 feet from the building. The area was possibly owned by the City but clearly not part of Columbia Heart's premises. (Tr. 9, lines 5-16) (Tr. 24, lines 2-11). Claimant testified that she was walking back to the building when her "foot hit the sidewalk where it had settled," and she fell. (Tr. 24, line 22 – 25, line 9). Various people saw Claimant after she fell, made phone calls, put her in a wheelchair, and took her to the hospital. (Tr. 27, line 17 – 28, line 25). Someone contacted Ms. Jenkins, who checked on Claimant before she was taken to the hospital. (Tr. 29, lines 2-14). Ms. Jenkins testified that it was 20-25 minutes between the time Claimant left her office and when she received the phone call that Claimant had fallen. (Tr. 94, lines 14-20). After her fall, Claimant complained to Ms. Jenkins about her shoulder but did not mention her knees. (Tr. 95, line 17 – 96, line 5).

Notes from Palmetto Health indicate that Claimant presented to the emergency room "with complaints that she tripped and fell, landing heavily on her right arm. She landed on an outstretched right arm and states that her shoulder has been painful ever since this happened ... She denies any other injuries during this fall ... She complains only of pain in the right

[1] Emergency room records also indicate Claimant told them she was on her lunch break when she fell. (APA p. 9).

shoulder." (APA pp. 1, 7). On a return to Palmetto Health on July 17, 2011, Claimant reported that two days previous, "during her lunch break at work, [she] went out to the parking deck at Columbia Heart. She reports that she fell and dislocated her right shoulder." (APA p. 9). Claimant complained to doctors at Palmetto Health that her shoulder had dislocated again twice, but "[s]he states she otherwise has been in good health." (APA p. 15). A physical exam revealed that, other than her right upper extremity, all other extremities had normal strength. (APA p. 16) (*see also* APA pp. 34-35 (no complaints of pain or injury to knees)). The following day, her "main complaint [was] continued shoulder pain. Otherwise, no new issues." (APA p. 22). Dr. David B. Fulton's notes indicate claimant "injured herself when she fell on her shoulder." (APA pp. 36, 46 (office notes indicate Claimant reported that "she fell on a sidewalk while on break at work, which caused her a dislocation and instability of her shoulder")).

Although the emergency room documents reflect only an injury to her right shoulder, (APA pp. 1, 7), Claimant claimed that the reason she did not mention her knees was because "all I could think about was my arm." (Tr. 33, line 22 – 34, line 2) (Tr. 54, lines 16-24). Her explanation as to why she did not report the alleged injury to her knees to Dr. Fulton five days after the accident was that she was on heavy doses of pain medication. (Tr. 54, line 25 – 55, line 18).

Claimant admitted she filled out Short Term Disability forms on which she stated she was injured off the job and that her only injury as a result of the fall was to her right shoulder. (Tr. 57, line 5 – 59, line 4) (APA pp. 200-211). She explained that the reason she did not mention the alleged injury to her knees was because she "was drugged out of [her] min[d] when [she] filled that paper work out." (Tr. 59, lines 5-24).

Claimant underwent surgery on July 22, 2011 with Dr. Fulton for a glenoid fracture, a labral tear, a rotator cuff tear, and a biceps tendon repair, all to the right shoulder. (Tr. 37, lines 5-8) (APA pp. 66-68). After a recovery period, and at Claimant's request, Dr. Fulton released Claimant to return to work without any restrictions. (Tr. 44, lines 18-23) (Tr. 70, lines 6-11) (APA pp. 60, 161-162) (Fulton Dep. p. 9, lines 4-11). Ms. Jenkins confirmed that Claimant was released back to work with no restrictions. (Tr. 99, lines 5-11). She also testified that, if Claimant's physicians had provided any work limitations, Columbia Heart would have accommodated those needs. (Tr. 99, lines 20-23) (Tr. 101, lines 10-12).

Claimant admitted that she had pre-existing osteoarthritis in both knees. (Tr. 31, lines 15-17). From 2005 to 2010, Claimant treated with Dr. Deanna L. Constable for arthritis in both of her knees. (Tr. 61, lines 9-21) (APA pp. 119-152). As early as June 2006, she was diagnosed with "SEVERE BILATERAL KNEE DEGENERATIVE JOINT DISEASE," (APA p. 123), which was treated with medication and injections. (APA pp. 119-152). In August 2006, Dr. Constable noted Claimant "has severe arthritic changes present. Ultimately, she will require joint replacement surgery." (APA p. 127). In March 2007, Claimant presented with "increasing difficulty about her left knee. It just seems to have occurred insidiously." X-rays showed "profound degenerative changes present ..." (APA p. 131). Again in June 2009, Claimant reported that her knees were "more problematic," and that two weeks previous, "her pain seems to have worsened." (APA p. 143). In March 2010, Claimant reported to Dr. Constable that a couple of weeks prior to her appointment, her knees were "profoundly painful." Dr. Constable concluded that Claimant's "arthritis is just changing and worsening in nature." (APA p. 148). In June 2010, Dr. Constable asked Claimant "to consider joint replacement surgery," noting that the "steroid shots, however, did very well until recently." (APA p. 151). Claimant testified Dr.

Constable had been telling her all along that she would need knee replacement surgery. (Tr. 62, lines 14-17).

Dr. Aluric Van Dam began treating Claimant for her knees in September 2010. (APA p. 153). Dr. Van Dam indicated that he initially saw Claimant for her lower back problems and then took over care of her knees as well, as Dr. Constable had left the practice and Claimant was "without a physician." (Van Dam Dep. 9, line 20 – 10, line 4). He noted as early as November 2010 that Claimant has "a history of severe arthritis of her knees," and diagnosed her with "SEVERE ENDSTAGE DEGENERATIVE JOINT DISEASE OF THE BILATERAL KNEES." (APA pp. 154-160) (Van Dam Dep. 6, lines 8-11) (Van Dam Dep. 12, line 4 – 13, line 6). Dr. Van Dam explained that the need for a knee replacement surgery is dependent on "the amount of arthritis in the knee, patient symptoms, and then response to certain treatments ..." (Van Dam Dep. 8, line 11 – 9, line 1). Dr. Van Dam confirmed that Claimant met the radiographic criteria of near or total loss of cartilage between the bone prior to her July 15, 2011 fall. (Van Dam Dep. 9, lines 2-14).

Ms. Jenkins testified that Claimant had been asking for additional time off from work for medical care for her knees prior to the accident. (Tr. 95, lines 2-12). Ms. Jenkins testified that Claimant often complained about pain in her knees prior to the accident. (Tr. 100, lines 13-17).

On September 15, 2011, Claimant saw Dr. Van Dam regarding "her bilateral knees. She has severe osteoarthritis and tricompartmental involvement. She has been doing poorly with her knees overall. ... She states she is having trouble getting around." (APA p. 41). On November 18, 2011, Dr. Van Dam noted that, although Claimant was diagnosed with "SEVERE ENDSTAGE OSTEOARTHRITIS OF THE BILATERAL KNEES," she continued "to be active and able to walk." (APA p. 48). Dr. Van Dam repeated his diagnoses of bilateral endstage

osteoarthritis. (APA pp. 50-53). In January of 2012, Dr. Van Dam concluded that the treatment goal was "to just keep [Claimant] going until ultimately she will require knee replacements ..." (APA pp. 52-53, 214-218). In October, 2012, Dr. Van Dam again noted that Claimant "has had a history of severe osteoarthritis for years." (APA p. 216).

At his deposition, Dr. Van Dam acknowledged that he did not know how Claimant fell or how she landed when she fell, (Van Dam Dep. 13, lines 15-17), or whether Claimant had experienced problems with her knees at work prior to her July 15, 2011 fall. (Van Dam Dep. 27, lines 16-25). He further stated that any conclusions he reached regarding whether Claimant's condition was aggravated by her fall were dependent, in part, on an assumption that Claimant "was working fine and able to do her job and was not experiencing progressively work functional problems" prior to her fall. (Van Dam Dep. 32, line 22 – 33, line 11). Dr. Van Dam also acknowledged that there was nothing different about Claimant's presentation regarding the pain in her knees when he saw her in September 2011, after her fall. (Van Dam Dep. 15, lines 3-15). Dr. Van Dam also agreed that the July 2011 fall did not necessitate any treatment that was not already necessary. (Van Dam Dep. 16, lines 15-23). Claimant's need for a knee replacement did not change from before her fall to after her fall. (Van Dam Dep. 18, lines 3-10) (Van Dam Dep. 28, line 19 – 29, line 22). When asked whether he could "state within a reasonable degree of medical certainty that that ultimate knee replacement was accelerated by the accident in 2011," Dr. Van Dam responded, "No." (Van Dam Dep. 29, lines 19-22) (Van Dam Dep. 31, lines 7-14). Dr. Van Dam confirmed that Claimant's medications did not change. (Van Dam Dep. 16, line 24 – 17, line 9). Dr. Van Dam explained that Claimant's complaints of increased pain after the July 15, 2011 fall were related to her shoulder. (Van Dam Dep. 17, lines 10-14).

Dr. Van Dam agreed with Respondents' counsel that it was possible that Claimant's condition was due to the natural progression of her pre-existing condition and that her course of treatment had not changed. (Van Dam Dep. 25, line 15 – 27, line 15). Dr. Van Dam further agreed that the restrictions he placed on Claimant (limited bending, twisting or turning, and no continuous standing or walking with out temporary breaks (APA p. 54)), would have been appropriate prior to July 2011 if she had been having problems completing her job duties at that time. (Van Dam Dep. 28, lines 1-18).

Ms. Jenkins testified that Claimant did not tell her she was having any problems with her knees as a result of the July 15, 2011 fall until sometime after Claimant's employment had been terminated. (Tr. 96, lines 11-22) (Tr. 102, lines 12-16). Although Claimant complained about the physical therapy being painful, those complaints were related to her shoulder and not her knees. (Tr. 100, lines 9-13) (Tr. 102, line 17 – 103, line 3).

Claimant's last day of work for Palmetto Heart was January 19, 2012. (APA p. 102).

Claimant filed a claim for workers' compensation benefits claiming she sustained compensable an injury to her right shoulder in the July 15, 2011 fall.[2] Claimant initially claimed injury to her right shoulder and right arm, (Claimant's Form 50, dated October 26, 2011), but later amended her claim to include both shoulders, both arms, both legs and both knees. (Claimant's Form 50, dated May 21, 2012). Along with its workers' compensation carrier, Hartford Insurance Company of the Midwest c/o The Hartford,[3] Columbia Heart denied the claim on the basis that Claimant's alleged injuries did not arise out of and in the course and

[2] Prior to the instant claim, Claimant had two previous workers' compensation claims with Columbia Heart. One prior worker's compensation claim involved an injury to her toe, and the other involved injuries to both shoulders for which she underwent surgery and received an impairment rating. (Tr. 50, line 24 – 52, line 7) (APA pp. 117-118, 219-222)). She settled her shoulder claim for $57,417.20. (APA pp. 190-195).

[3] Columbia Heart and Hartford Insurance Company of the Midwest c/o The Hartford are referenced herein jointly as Respondents.

scope of her employment. Respondents further denied the extent of Claimant's alleged injuries. (Respondent's Form 51 dated November 28, 2011) (Respondent's Form 51 dated June 19, 2012).

The parties were heard by Single Commissioner Derrick L. Williams on November 8, 2012. He subsequently issued a Decision and Order dated January 10, 2013 in which he found that her claim was not compensable. (Decision and Order of the Single Commissioner, January 10, 2013, p. 16) ("Single Commissioner Decision"). The Single Commissioner found, among other things, that Claimant had not sustained her burden of proving a compensable injury by accident under the Act, and that the personal comfort doctrine did not apply because, at the time Claimant was injured, she was not "at work or on the Employer's premises ..." (Single Commissioner Decision pp. 16-17).

Claimant timely appealed to the Full Commission, which heard argument on May 21, 2013. On September 3, 2013, an Appellate Panel of the Full Commission ("Commission") rendered its decision, affirming the Single Commissioner Decision. (Decision and Order of the Full Commission, dated September 3, 2013 ("Commission Decision")). After reciting the evidence and testimony in the case, the Full Commission affirmed that Claimant had not met "her burden of proving a compensable injury by accident arising out of and in the course and scope of her employment." (Commission Decision, pp. 21, 24). After noting that Claimant had been injured off Columbia Heart's premises, the Commission held that "case law dealing with [the personal comfort doctrine] relates to acts that occurred on the employer premises, for the most part." (Commission Decision, p. 20). The Commission explained that "if the Claimant's injury, while on a lunch break, had occurred while at work or on the Employer's premises, this claim would have been found compensable." (Commission Decision, p. 21). Although South Carolina recognizes the personal comfort doctrine, "the Claimant was not on a smoke break that

occurred while at work or on the Employer's premises..." (Commission Decision, p. 24). Instead, finding that Claimant was returning to her place of work after an unpaid and unrestricted lunch break, the Commission applied the going and coming rule and denied the claim. (Commission Decision, pp. 22-24).

The Commission also held that, "had this claim been found compensable, the only body part injured was her right shoulder. Claimant had substantial and severely injured bilateral knee problems well before this accident, which already needed to be replaced. Moreover, the earliest medical reports detail only the right shoulder being injured." (Commission Decision, p. 23). In addition, the Commission held that "notice of the accident was given to the Employer for her right shoulder, however notice was not given for her bilateral knees." (Commission Decision, p. 24).

Claimant timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine

the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

ARGUMENT

I. The Commission properly determined that Claimant's injuries did not arise out of and in the scope and course of her employment with Columbia Heart.

In order to be compensable, a claimant must prove his or her injuries arose out of and in the course of employment. S.C. Code Ann. § 42-1-160 (2012). "The phrase 'arising out of'

refers to the injury's origin and cause. Whereas, 'in the course of' refers to the **time**, **place** and **circumstances** under which the injury occurred. [citation omitted] Although the requirements are somewhat overlapping, they are not synonymous and both must exist simultaneously to allow the claimant to recover." Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000) (emphasis added). The determination of whether an injury arose out of and in the course of employment is largely a factual matter to be decided by the Commission. Id. The claimant bears the burden of proving facts that will bring an injury within the provisions of the Workers' Compensation Act ("Act"). Clade v. Champion Lab., 330 S.C. 9, 496 S.E.2d 856 (1998). Here, substantial evidence supports the Commission's determination that Claimant's injury did not arise out of and in the scope and course of her employment. When she fell, Claimant was on an unpaid lunch break, during which she was free to go wherever and do whatever she wanted. She was not on her employer's premises but, instead, was traveling over a public sidewalk, returning to her place of employment.

Respondents note that, although Claimant claims she was only on a brief "smoke break," Columbia Heart employees are required to take a minimum 30-minute lunch break. (Tr. 90, lines 1-14). Substantial evidence supports the findings that Claimant's injury occurred during lunch time and away from her employer's premises. (Tr. 9, lines 5-10) (Tr. 23, lines 1-8) (Tr. 104, lines 8-9) (APA pp. 203, 207). The emergency room records reveal Claimant told them she was on her lunch break when she fell. (APA p. 9). Regardless of what she was doing on her break, the Commission found that Claimant was injured "while on a lunch break," and not on premises that were owned, controlled or maintained by Columbia Heart, (Commission Decision, pp. 20, 21, 24), which findings must be upheld on appeal. *See, e.g.*, Anderson, 343 S.C. at 492-93, 541

S.E2d at 528 (where the evidence is conflicting, "the factual findings of the Commission are conclusive").

South Carolina has adopted the personal comfort doctrine. In Osteen v. Greenville Cnty Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998), the South Carolina Supreme Court explained that the personal comfort doctrine covers "[s]uch acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." 333 S.C. at 46, 508 S.E.2d at 23; *see also* Gibson, 338 S.C. at 520, 526 S.E.2d at 731 (the "personal comfort doctrine aids a court in determining whether, and under what circumstances, entirely personal activities engaged in by an employee at work may be considered incidental to employment"). In Mack v. Branch No. 12, Post Exch., the Supreme Court explained that, "[s]uch acts as are necessary to the life, comfort, and convenience of the servant **while at work**, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. ... That such acts will be done **in the course of employment** is necessarily contemplated, and they are inevitable incidents." 207 S.C. 258, 264, 35 S.E.2d 838, 840 (1945) (emphasis added), *quoting from* Archibald v. Workmen's Comp. Comm'r, 77 W.Va. 448, 87 S.E. 791 (W. Va. 1916). In Mack, the claimant was on his employer's premises before work hours for the purpose of engaging in the employer's work so that "his presence there was clearly incidental to his employment." 207 S.C. at 263, 35 S.E.2d 838 at 840.

Respondents do not dispute that smoking can fall within the personal comfort doctrine; however, the mere fact that a claimant is injured while smoking does not automatically render

those injuries compensable, as Claimant appears to suggest. As is the case with eating or drinking or any of the other activities that have been deemed to fall within the personal comfort doctrine, not all injuries incurred while undertaking personal comfort activities are compensable. In order for the personal comfort doctrine to apply, a claimant must prove that he or she has met **both** the "arises out of" and the "in the scope and course of" prongs. If a claimant fails to prove either of the prongs, the claim is not compensable.

For instance, in Osteen, the Court denied benefits because, although the claimant's injury was incurred on the employer's premises, during normal work hours and while performing an activity allowed by the employer, the act of obtaining ice from the school cafeteria for a family picnic lacked any causal relationship to her job duties. As such, the personal comfort doctrine did not apply and the claimant failed to prove her injuries arose out of her employment. 333 S.C. at 50, 508 S.E.2d at 25. In Dukes v. Rural Metro Corp., 356 S.C. 107, 587 S.E.2d 687 (2003), the Court held that the gun that caused the claimant's injuries during a smoking break was in no way related to his job and, therefore, the claimant's injuries did not arise out of his employment. 356 S.C. at 110, 587 S.E.2d at 689.[4] Similarly, injuries incurred by a claimant outside of work hours, unrelated to the claimant's job and off the employer's premises are not compensable. *See, e.g.*, Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965) (claimant injured in automobile accident caused by a defective steering wheel, while on his own time and driving to a workers' compensation proceeding for his own benefit).

[4] *See also* Bright v. Orr-Lyons Mill, 285 S.C. 58, 62, 328 S.E.2d 68, 71 (1985) (employee's injuries, incurred when he was shot while walking to his car parked on the employer's parking lot after his shift, not compensable because assailant was a nonemployee looking for someone else for personal reasons unrelated to job); Coleman v. Cycle Transf. Corp., 105 N.J. 285, 292, 520 A.2d 1341, 1344-45 (N.J. 1986) (claimant's injuries deemed not compensable where, although they occurred during a lunch break on the premises, the causative factor was the claimant's inattention to the match she was using to light her cigarette which caught her hair on fire when she turned her head).

As noted above, the "in the scope and course" prong addresses the: 1) time, 2) place and 3) circumstances under which an injury occurs. Although Claimant asserts that the "'in the course of' requirement is satisfied if the employee is injured while fulfilling work-related duties or 'something incidental thereto,'" (App. Br. p. 12), her analysis erroneously omits consideration of the elements of time and place. Williams v. South Carolina State Hosp., 245 S.C. 377, 382, 140 S.E.2d 601, 603 (1965) (the fact that the claimant was **on her employer's premises** at the end of the work day "made the act of leaving 'in the course of' her employment"); Broughton, 336 S.C. at 498, 520 S.E.2d at 639 (an injury occurs "in the course of" employment "when it occurs within the period of employment at a place **where the employee reasonably may be in the performance of his duties** and while fulfilling those duties or engaged in something incidental thereto") (emphasis added).[5]

Claimant argues that it is irrelevant that her injuries occurred off Columbia Heart's premises. (App. Br. pp. 9-10). Claimant quotes from 71 C.J. 675, as cited in Mack, for the proposition that smoking is an activity encompassed within the personal comfort doctrine, which Respondents do not dispute. Then, Claimant asserts that the fact that the claimant in Mack was injured on his employer's premises was of no importance, or mere happenstance. However, Claimant's reading of Mack conveniently read the elements of time and place completely out of the analysis. 207 S.C. at 266, 35 S.E.2d at 841. Because the injury in Mack occurred on his employer's premises, 207 S.C. at 263, 35 S.E.2d at 849 (the claimant "had arrived upon the

[5] *See also* Mintz v. Verizon Wireless, 735 S.E.2d 217, 222, 2012 N.C. App. LEXIS 1304 *10-11 (N.C. Ct. App. 2012) (the place portion of the "in the course of" prong "is considered the 'premises of the employer,'" or "adjacent premises that are owned or controlled by the employer"); Spratt v. Duke Power Co., 65 N.C. App. 457, 468, 310 S.E.2d 38, 45 (N.C. Ct. App. 1983) (explaining that, "[w]ith respect to time, the course of employment includes the work period and any intervals during the period for rest and refreshment. [citation omitted] With respect to place, the course of employment includes **the premises of the employer**") (emphasis added).

employer's premises to undertake his regular work ..."), there was no need for the Court to analyze that element of the "in the course of" prong.

Contrary to Claimant's assertion, the determination of whether the injury occurred on or off the employer's premises is a key factor in personal comfort doctrine cases. *See, e.g.*, Eagle Discount Supermarket v. Industrial Comm'n, 82 Ill. 2d 331, 339, 412 N.E.2d 492, 496 (Ill. 1980) (in lunch hour or personal comfort cases, the location of the occurrence is the most critical factor).[6] Professor Larson emphasizes that, "[i]njuries occurring *on the premises* during a regular lunch hour arise in the course of employment ..." *Larson's Workers' Compensation Law* § 21.02(1)(a) (emphasis in original). Professor Larson explains that:

> There are at least four situations in which the course of employment goes beyond an employee's fixed hours of work: the time spent going and coming **on the premises**; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods **taken on the premises**, and unpaid lunch hours **on the premises**. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, **above all, the employee is within the spatial limits of his or her employment**."

Larson's Workers' Compensation Law § 21.02(1)(a) (emphasis added). Professor Larson elucidates that, although the "premises" limitation may seem arbitrary and artificial in certain circumstances:

> ...since some limitation is unavoidable, it is perhaps as good as any that can be devised. It can be defended in part on a sort of presumption that as long as the employee is on the premises he or she is subject to all the environmental hazards associated with the employment, and also that, although he or she may be free to go elsewhere during the interval, the employee is in some degree subject to the control of the employer if the employee actually chooses to remain on the premises, merely by virtue of being present on the employer's property.

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[6] Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005) ("[w]hen there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority").

Larson's Workers' Compensation Law § 21.02(1)(a).

In every South Carolina case where the claimant has been awarded benefits under the personal comfort doctrine, the injury occurred on the employer's premises. Portee v. South Carolina State Hosp., 234 S.C. 50, 106 S.E.2d 670 (1959) (claimant awarded benefits under the personal comfort doctrine where he fatally injured after attempting to obtain relief from a sore throat); McCoy v. Easley Cotton Mills, 218 S.C. 350, 62 S.E.2d 772 (1950) (claimant injured while taking a paid smoking break on the employer's premises); Mack, 207 S.C. at 263, 35 S.E.2d at 840 (injuries compensable where employee was injured during a smoke break before official work hours while on employer's premises). In fact, in McCoy, the South Carolina Supreme Court explained that, "[i]t seems to be well settled that an employee, in order to be entitled to compensation, need not necessarily be engaged in the actual performance of work at the time of injury; **it is enough if he is upon his employer's premises**, occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment." 218 S.C. at 774, 62 S.E.2d at 774 (emphasis added); *see also* Portee, 234 S.C. at 54, 106 S.E.2d at 672 (same).

In fact, in Troutman v. Williams Furniture Corp., 224 S.C. 353, 79 S.E.2d 374 (1953), the South Carolina Supreme Court addressed a situation factually similar to the instant case. In Troutman, the claimant was injured "during his lunch hour, while on his own time, and while performing no duty for his employer ..." 224 S.C. at 356, 79 S.E.2d at 374. Having eaten lunch at home, the claimant and his brother returned to the plant where they worked. His brother parked near the plant entrance and they walked to the gate of the plant; however, the claimant then decided he wanted some chewing tobacco. The claimant walked a block to a store where he purchased the chewing tobacco and was returning to the plant, walking on a public street

adjacent to the plant, when he was struck by an automobile, which threw him into the air. The claimant landed on an automobile parked on a vacant lot owned by his employer where employees parked, but the Court determined the impact of the car that hit the claimant caused his fatal injuries, and that impact occurred on the public road. 224 S.C. at 357-58, 79 S.E.2d at 375-76. As a result, the Court denied benefits because the claimant "was killed while on a public highway and about his own business, was not performing any duty for his employer ... and at a time when he was not paid for the performance of any duty for his employer." 224 S.C. at 358, 79 S.E.2d at 376. This Court should apply the reasoning of Troutman to this case.

In adopting the personal comfort doctrine, the South Carolina Supreme Court quoted extensively from Archibald, which involved an employee who drank a bottle of clear poison that he thought was water. The injury in Archibald occurred on the employer's premises. 77 W.Va. at 449, 87 S.E. at 791. The importance of "place" in the application of the personal comfort doctrine is widely emphasized in other jurisdictions as well. *See, e.g.*, Gold Kist, Inc. v. Jones, 537 So.2d 39, 41, 1988 Ala. Civ. App. LEXIS 355 *5 (Ala. Ct. App. 1988) (awarding benefits to worker injured during lunch break, "[w]hen taken on the employer's premises in an area provided for that purpose..."); Pauley v. Industrial Comm'n, 109 Ariz. 298, 302, 508 P.2d 1160, 1164 (Ariz. 1973) (injury not compensable when incurred during lunch break where the claimant was crossing a ditch separating her employer's property from an adjacent park because "workmen's compensation should not be expanded to injuries sustained while off the employer's premises, when the hazards encountered are not peculiarly within the employer's control"); Eagle Discount, 82 Ill. 2d at 339, 412 N.E.2d at 496 (in awarding workers' compensation benefits to employee injured during lunch hour on the employer's premises while playing frisbee, the Illinois Supreme Court explained that, "[i]n lunch hour cases, the most critical factor

in determining whether the accident arose out of and in the course of employment is the location of the occurrence"); Waycott v. Beneficial Corp., 400 A.2d 392, 1979 Me. LEXIS 605 (Me. 1979) (applying the going and coming rule to off-premises injury sustained during lunchtime and finding it not compensable because, "while outside the business premises and not engaged in any work-related activity an employee is not within the spatiotemporal boundaries of employment ... there is an insufficient connection with the employment context to warrant compensation for an injury occurring in such circumstances"); Spratt, 65 N.C. App. 457, 310 S.E.2d 38 (injuries held compensable under the personal comfort doctrine that were incurred on the employer's premises when the claimant was running toward the company canteen to purchase chewing gum at the end of his lunch break); Bell v. Arthur's Fashions, Inc., 858 S.W.2d 760, 1993 Mo. App. LEXIS 957 (Mo. Ct. App. 1993), *overruled on other gds*, Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 2003 Mo. LEXIS 168 (2003) (claimant injured during 15-minute break not entitled to compensation because she was injured off the employer's premises and, therefore, the personal comfort doctrine did not apply); Clark v. U.S. Plywood, 288 Or. 255, 605 P.2d 265 (Or. 1980) (explaining that "[l]unchtime injuries are normally compensable, if they occur on the premises and arise from premises hazards such as building collapse, tripping on a hole in the floor, or falling on slippery steps"); Piper v. Neighborhood Youth Corps, 90 S.D. 443, 241 N.W.2d 868 (S.D. 1976) (injuries compensable where 16-year old decedent was resting on a raft after lunch and subsequently drowned where the work site was 11 miles from his home and he was "by force of this circumstance, compelled to stay on the employer's grounds"); Carter v. Volunteer Apparel, Inc., 833 S.W2d 492, 1992 Tenn. LEXIS 309 (Tenn. 1992) (injuries incurred during pre-work break on the employer's premises compensable); Marmolejo v. Department of Indus., Labor & Human Rel., 92 Wis.2d 674, 285 N.W.2d 650 (Wis. 1979) (claimant not entitled to

benefits under the personal comfort doctrine where he was injured while traveling to a nearby restaurant during an unpaid lunch break; the court explained that "one characteristic of these applications of the personal comfort doctrine is that the injuries for which compensation is sought have occurred within the *time* (*i.e.*, during specific paid working hours) and *space* (*i.e.*, on the employer's premises) limitations of the person's employment..."), *citing* American Motors Corp. v. Industrial Comm'n, 1 Wis.2d 261, 83 N.W.2d 714 (Wis. 1957) (personal comfort doctrine applied where injuries were incurred during lunch break on the employer's premises).

In Waycott, the Maine Supreme Court stated that it "perceive[d] no reason why an off-premises injury sustained during lunchtime should not be subject to the public street rule and its exceptions." 400 A.2d at 394, 1979 Me. LEXIS 605 at *4. The Court explained that "where the claimant reaches the premises and is then injured, [citation omitted], or where the claimant is injured on the premises during lunchtime, [citation omitted], the injury may warrant compensation. Discussions on where the injury occurs could appear at first blush to be arbitrary, [however,] some line must be drawn if an employer is not to be deemed an insurer from portal to portal, and the bright line of the employer's premises is as definite and reasonable as any that can be devised." 400 A.2d at 395, 1979 Me. LEXIS 605 at *7. When an employee takes an unpaid lunch break off the employer's premises, "he is not exposed to any different risk than that of the public generally," nor is the employee "promoting any interest of the employer nor is he subject to any constraints or control on his freedom of movement." Id., 1979 Me. LEXIS 605 *6. As such, injuries incurred while leaving or returning to the employer's work place, regardless of whether it is at the beginning or end of the work day, or at the beginning or end of a lunch break, are subject to the going and coming rule. In this case, Claimant has not and cannot plausibly claim that her accident occurred on Palmetto Heart's premises, or that she was on an errand for

Palmetto Heart, or that Palmetto Heart directed where or how she could spend her lunch break. As a result, her claim is subject to the going and coming rule and is not compensable.

Claimant erroneously asserts that cases involving traveling employees prove an injury does not have to occur on the employer's premises in order for the personal comfort doctrine to apply. (App. Br. p. 11). While South Carolina courts have awarded compensation under the personal comfort doctrine for injuries incurred off the employer's premises where an employee is traveling out of town on business, *see, e.g.,* Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008), traveling employee cases fall under a distinctly different analytical framework than that which controls in this case. As this Court explained in Ardis, "a traveling employee who dies as a result of a fire or asphyxiation in a hotel or motel during the business trip is within the coverage of the compensation acts ... as there is no difference in principle between the employee who is housed upon the employer's own premises and the employee who is housed in a hotel room paid for by the employer." 380 S.C. at 322, 669 S.E.2d at 633, *quoting Larson's Workers' Compensation Law* § 25.02, 25-2 (2008).[7] Because they are out of town on their employer's business, traveling employees generally receive workers compensation protection where the injury is caused by a "risk created by the necessity of sleeping and eating away from home," including traveling to and from a restaurant. 380 S.C. at 323, 669 S.E.2d at 634; *see also* Merritt v. Smith, 269 S.C. 301, 307, 237 S.E.2d 366, 369 (1977) (explaining that "accidents arising while an employee is eating or traveling to and from an eating establishment

[7] In adopting the so-called "bunkhouse rule," the South Carolina Supreme Court explained that, "it is the obligation of employment to be on the premises that creates the risk of injury to the employee; when the employee is free to leave when he or she pleases, that employment connection does not exist." Pierre, 386 S.C. at 535, 689 S.E.2d at 621, *quoting* Hernandez v. Leo Polehn Orchards, 122 Ore. App. 241, 245, 857 P.2d 213, 215 (Or. Ct. App. 1993) (which, in turn, explains that the personal comfort doctrine addresses "activities that occur on the employer's premises").

while out-of-town are acts within the course and scope of employment"). The same rationale and logic do not apply to unpaid lunch breaks for non-traveling employees.

If this were not the case, a claimant could travel to their home during a lunch break, eat lunch, smoke a cigarette, and claim entitlement to workers' compensation benefits that occurs while smoking inside their own home. Similarly, under Claimant's theory, she would be entitled to benefits if she left the office, drove to a restaurant and was injured at the restaurant or while driving back to Palmetto Heart and smoking a cigarette. Awarding benefits under the instant set of facts would cross the line between workers' compensation coverage and general liability coverage. The Commission recognized this and properly declined to cross that line.

Claimant's focus on the fact that she was smoking on her lunch break and the fact that smoking is prohibited in most indoor public places also is misplaced and does not dictate the result she advocates. It is not the fact that she was smoking that drives the result in this case. The same result would obtain if she had been eating outside, off Columbia Heart's premises. However, the on premises/off premises distinction applies with equal force even where an employer does not provide facilities for eating or smoking. For example, in Bell, the employer did not have facilities on its premises where employees could take their breaks, and had no vending machines to purchase food or drink. As a result, on her break the employee went to Woolworth's, one of two closest locations in the mall where she worked, to purchase a drink. She was injured when she slipped on the floor in Woolworth's. The Court held that, because the claimant was free to go wherever she wished on her break and the employer had no control over either her whereabouts or the location where she was injured, the personal comfort doctrine did not apply and she was not entitled to benefits. Bell, 848 S.W.2d at 762-65, 1993 Mo. App.

LEXIS 957 at *2-10.[8] Here, Claimant was free to smoke or to not smoke; to remain on Columbia Heart's premises or to go wherever she wanted to go during her lunch break. Under Claimant's theory, had she chosen to drive home or to a nearby park to smoke, her injury would be compensable simply because she was smoking outside.

If this Court were to adopt Claimant's theory that she should be awarded workers' compensation benefits because she was smoking outside, even though she was off her employer's premises, where would it draw the line? Ten feet away from the employer's premises? Twenty feet? A block? Two blocks? A mile, or farther? There is no line more logical than the border of the employer's premises. As the Supreme Court explained in Howell v. Pacific Columbia Mills, "[t]he real reason for the premises rule is, and always has been, the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting and applying the rule would not be unmanageable." 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). As Professor Larson explains, if a jurisdiction adopts a "reasonable distance" from the employer's property line as the test, it has merely raised "a new problem without solving the first." Regardless of how a "reasonable distance" is defined, "there will inevitably arise new cases only slightly beyond that point, and the cry of unfairness of drawing distinctions based on only a few feet of distance will once more be heard." *Larson's Workers' Compensation Law* § 13.01(2)(a).

The key facts in this case are that Claimant was on an unpaid lunch break during which Palmetto Heart had no control over where she went or what she did. She was not traveling out of town or performing services in a location that required her to be in a particular place during her lunch break. That she chose to smoke rather than eat is irrelevant. She was injured on premises

[8] The court also noted that the claimant was not on any errand for the employer. Id. The same is true for Claimant in this case.

not owned, maintained or controlled in any way by Palmetto Heart, while returning from an unpaid lunch break, during which what she did, where she went and how she returned were totally under her own independent control. Therefore the going and coming rule applies and the Commission correctly determined that, under the rules set out in Howell and Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (2011), her injuries are not compensable. Claimant has conceded that: 1) her injury occurred off Columbia Heart's premises; 2) there were multiple ways for her to return to Columbia Heart's premises; 3) Columbia Heart does not dictate which entrance she had to use; 4) Columbia Heart did not provide her with transportation to and from work; and 5) she was not on any errand for Columbia Heart when she fell. (App. Br. p. 7) (Tr. 48, line 22 – 50, line 10).

Although Claimant attempts to distinguish Howell and Matute on the grounds that the employees in those cases were either going to work at the beginning of the workday or leaving work at the end, (App. Br. p. 11), the case on which she relies most heavily, Mack, also involved an employee who was not yet "on the clock." The distinction between Mack, on the one hand, and Howell and Matute, on the other, is that Mack was on the employer's premises when he was injured. In Howell and Matute, the employees were not yet on the employer's premises. The importance of this distinction is both highlighted and confirmed by Aughtry v. Abbeville Cnty Sch. Dist. #60, 340 S.C. 604, 533 S.E.2d 885 (2000), and Williams, 245 S.C. 377, 140 S.E.2d 601. In awarding benefits in Aughtry, the Supreme Court held that the going and coming rule was inapplicable precisely because the claimant's car skidded on icy roads and landed **on the employer's premises**, *i.e.*, the school's football field. 340 S.C. at 605, 533 S.E.2d at 885. Similarly, in Williams, the employee had finished work, was leaving for the day and was walking across a sidewalk on the employer's premises to her car, when she slipped and sustained

injuries. The Supreme Court found that the going and coming rule did not apply because the employee was injured on the employer's premises: "the fact that the claimant was rightfully **upon the premises controlled by the employer**, as a result of her employment, and was leaving over the employer's premises as contemplated at the close of the day's work, made the act of leaving 'in the course of' her employment." 245 S.C. at 381-82, 140 S.E.2d at 603 (emphasis added).

Thus, because Claimant's injury was incurred when she was on her unpaid lunch break at a time when she not performing any services for Columbia Heart and was entirely removed from Columbia Heart's premises, the personal comfort doctrine does not apply. Instead, proper application of the going and coming rule bars Claimant from recovering benefits. She was injured on a public sidewalk where she was exposed to the same risks the general population is exposed to. She had total choice as to where she went, what she did and which entrance she would exit from and return to the building. This Court should affirm the Commission Decision in its entirety.

II. The Commission did not err by not specifically addressing whether Claimant's injury occurred during an insubstantial deviation from her work duties.

Relying on language from Mack, Claimant asserts that, having not found her injury compensable under the personal comfort doctrine, the Commission then should have analyzed whether her injury occurred during a slight deviation from her employment. (App. Br. p. 13). What Claimant fails to understand that the discussion in Mack regarding slight deviations from work to "get a chew of tobacco, or to ask a fellow employee the time, or to throw away a cigarette," 207 S.C. at 264, 35 S.E.2d at 840, is the analytical foundation for the South Carolina Supreme Court's adoption of the personal comfort doctrine. Thus, for the very reasons that the

personal comfort doctrine does not apply in this case, there is no need for or value in analyzing the same facts under a separate analytical framework which is, in fact, subsumed in the personal comfort doctrine.

Furthermore, in cases other than those applying the personal comfort doctrine where benefits have been awarded on the basis that the employee's deviation from work was only slight, the employee was actually engaged in his or her work or an employment-related errand prior to the accident, *see, e.g.*, Cauley v. Ross Builders Supplies, Inc., 238 S.C. 38, 118 S.E.2d 1961 (1961), and Gibson, 338 S.C. 510, 526 S.E.2d 725, and not, as is the case here, on an unpaid lunch break. In Cauley, for instance, the employee was engaged in making a leg for a display counter and, after running a board over the table saw, took a few minutes to make a wedge for a fellow employee for his home. The Court found the act "entirely personal to his fellow employee," but confirmed the award of benefits because the deviation from the course of employment was insubstantial. 238 S.C. at 40, 118 S.E.2d at 879-80. In Gibson, the employee was on a work-related errand and injured during a brief deviation from the assigned task. 338 S.C. at 521-23, 526 S.E.2d at 731-32 (employee injured while shopping for supplies for school district and made a slight detour to purchase a lunch box for her child). None of the "slight deviation" cases involve employees on their unpaid lunch break when they are free to go and do whatever they choose to do, and are on no errand for their employer.[9]

The facts remain that Claimant was not performing any services for or running any errands for Columbia Heart when she was injured. Instead, she was on an unpaid lunch break, during which she could choose to go wherever she wanted and do whatever she wanted to do.

[9] The fact that Claimant's supervisor "did not object to her taking a smoke break," (App. Br. p. 14), is irrelevant because Claimant was not only entitled to but was required to take a minimum 30-minute lunch break during which she was free to go and do whatever she pleased. (Tr. 90, lines 5-14).

This Court should hold that the Commission committed no error in not specifically addressing whether Claimant's injury occurred during an insubstantial deviation from her employment.

III. The Commission properly held that Claimant failed to provide proper notice to Columbia Heart for the alleged injury to her bilateral knees.

The Commission properly held that, "notice of the accident was given to the Employer for her right shoulder, however notice was not given for her bilateral knees." (Commission Decision, p. 24). Claimant's challenge to this conclusion relies on a hyper-technical reading of the notice provision of the Act. While she is correct that Section 42-15-20 provides that an injured employee must give "to the employer a notice of the accident," S.C. Code Ann. § 42-15-20, case law applying and interpreting this section indicates that the employee must provide something more than the simple declaration that she fell. "Section 42-15-20 is a policy statement embedded in the Workers' Compensation Act by the South Carolina General Assembly that consolidates and harmonizes the employer and employee under the statutory rubric of notification and accountability." Bass, 365 S.C. at 474, 617 S.E.2d at 380.

As such, the purposes of the Act's notice provisions are, "to enable the employer to investigate the claim and to give prompt medical attention if necessary." Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 164, 64 S.E.2d 396, 398 (1951); *see also* Bass, 365 S.C. at 473, 617 S.E.2d at 379 (explaining that the "purpose of *section* 42-15-20 is two fold: 'first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer'"). As a result, in order for there to be "adequate notice, there must be 'some knowledge of accompanying facts connecting the injury or illness with the employment, and

indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'" Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

Here, although Columbia Heart knew Claimant had fallen on the sidewalk, the only injury of which they were aware was to her right shoulder. Emergency treatment was provided for Claimant's right shoulder, but not for her bilateral knees. (APA pp. 1-35). Claimant did not report or suggest in any way to her employer that she had injured her knees in the July 15, 2011 fall until nearly a year later, in May 2012, when Claimant filed her amended workers' compensation claim. (Claimant's Form 50, dated May 21, 2012). As a result, when she returned to work with no restrictions from Dr. Fulton, Claimant was returned to the work plan that had been instituted prior to her fall which included increased walking. Ms. Jenkins testified that Claimant complained of pain in her knees, but never related that pain to her July 15, 2011 fall, (Tr. 103, lines 14-15), and that Claimant did not tell her she was having any problems with her knees as a result of the July 15, 2011 fall until sometime after Claimant's employment had been terminated. (Tr. 96, lines 11-22) (Tr. 102, lines 12-16).[10]

Thus, Claimant's failure to provide Columbia Heart timely notice of an alleged injury to her knees as a result of the July 15, 2011 accident does not meet the substance or purpose of Section 42-15-20. Not only does this long gap in reporting time raise notice issues, it also strongly suggests that Claimant's attempts to relate her knee problems to her July 15, 2011 fall were a late-conceived fabrication.

Even if this Court determines that the Commission's finding regarding the lack of timely notice of alleged injury to Claimant's bilateral knees was erroneous, it is harmless error, as the

[10] Although Claimant complained about the physical therapy being painful, those complaints were related to her shoulder and not her knees. (Tr. 100, lines 9-13) (Tr. 102, line 17 – 103, line 3).

claim as a whole is not compensable for reasons explained above in Sections I & II. Furthermore, in the event this Court finds that Claimant's injury arose out of and in the scope and course of her employment, only her right shoulder is compensable for the reasons discussed below in Section IV. Therefore, any error on the Commission's part on this issue does not require reversal because the Commission Decision is fully sustainable on other grounds. *See, e.g.*, Narruhn v. Alea London Ltd, 404 S.C. 337, 345, 745 S.E.2d 90, 94 (2013) (explaining that, "[w]here a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous").

This Court should affirm the Commission on the basis of late notice or, in the alternative, hold that, even if the Commission decided the notice issue incorrectly, other grounds sustain the result reached in its Decision.

IV. The Commission correctly held that, had this claim been found compensable, only Claimant's right shoulder was injured in her July 15, 2011 fall.

Claimant takes issue with the Commission finding that, "had this claim been found compensable, the only body part injured was her right shoulder." (Commission Decision p. 23). The Commission went on to explain that, "Claimant had substantial and severely injured bilateral knee problems well before this accident, which already needed to replaced. Moreover, the earliest medical reports detail only the right shoulder being injured. It was clear from the evidence that only her right shoulder was inured in this case." (Id.). Substantial evidence supports these findings which should be upheld on appeal.

Despite Claimant's own self-serving testimony, notes from Palmetto Health indicate that Claimant presented to the emergency room on July 15, 2011, "with complaints that she tripped and fell, landing heavily on her **right arm**. She landed on an outstretched **right arm** and states

that her **shoulder** has been painful ever since this happened ... **She denies any other injuries during this fall** ... **She complains only of pain in the right shoulder.**" (APA pp. 1, 7) (emphasis added). On her return to Palmetto Health on July 17, 2011, Claimant reported that she had fallen and dislocated her **right shoulder**. (APA p. 9). Claimant reported that her **shoulder** had dislocated again twice. "She states she **otherwise has been in good health.**" (APA p. 15) (emphasis added). A physical exam revealed that, other than her right upper extremity, all other extremities had normal strength. (APA p. 16) (*see also* APA p. 34-35 (revealing no complaints of pain or injury to knees)). The following day, her "main complaint [was] **continued shoulder pain. Otherwise, no new issues.**" (APA p. 22) (emphasis added). Dr. Fulton's notes from July 20, 2011 indicate claimant "injured herself when **she fell on her shoulder.**" (APA p. 36) (emphasis added).

Although the emergency room documents only reflect injury to her right shoulder, (APA pp. 1, 7), Claimant claimed that the reason she did not mention her knees was because "all I could think about was my arm." (Tr. 33, line 22 – 34, line 2) (Tr. 54, lines 16-24). Her explanation as to why she did not report the alleged injury to her knees to Dr. Fulton five days after the accident was that she was on heavy doses of pain medication. (Tr. 54, line 25 – 55, line 18). However, on November 16, 2011, nearly four months after her fall, Dr. Fulton's notes still reflect only that Claimant reported that "she fell on a sidewalk while on break at work, which caused her a dislocation and instability of her **shoulder.**" (APA p. 46) (emphasis added).

Claimant admitted she filled out Short Term Disability forms on which she stated she was injured off the job and that her only injury as a result of the fall was to her right shoulder. (Tr. 57, line 5 – 59, line 4) (APA pp. 200-211). She explained that the reason she did not mention the

alleged injury to her knees on these forms was because she "was drugged out of [her] min[d] when [she] filled that paper work out." (Tr. 59, lines 5-24).

In addition, Claimant's medical records indicate that she has suffered from severe, degenerative arthritis in both knees for years prior to July 15, 2011, which Claimant admitted. (Tr. 31, lines 15-17). From 2005 to 2010, Claimant saw Dr. Constable for the arthritis in both of her knees. (Tr. 61, lines 9-21) (APA pp. 119-152) (*see also* Van Dam Dep. 6, lines 8-11) (Van Dam Dep. 12, line 4 – 13, line 6). As early as June 2006, she was diagnosed with "SEVERE BILATERAL KNEE DEGENERATIVE JOINT DISEASE," (APA p. 123), which was treated with medication and injections. (APA pp. 119-152). In August 2006 and again in June 2010, Dr. Constable told Claimant that she would "require joint replacement surgery." (APA pp. 127, 151). Throughout her treatment with Dr. Constable, Claimant experienced increasing difficulty with and "profound" pain in her knees, which showed "profound degenerative changes." (*See* APA pp. 131, 143). Dr. Constable concluded that Claimant's "arthritis is just changing and worsening in nature." (APA p. 148). In fact, Claimant testified Dr. Constable had been telling her all along that she would need knee replacement surgery. (Tr. 62, lines 14-17).

In September 2010, Dr. Van Dam began seeing Claimant for her lower back problems and then took over care of her knees as well, as Dr. Constable had left the practice and Claimant was "without a physician." (Van Dam Dep. 9, line 20 – 10, line 4) (APA p. 153).[11] He noted as early as November 2010 that Claimant has "a history of severe arthritis of her knees," and diagnosed her with "severe endstage osteoarthritis of the bilateral knees." (APA pp. 154-160) (Van Dam Dep. 6, lines 8-11) (Van Dam Dep. 12, line 4 – 13, line 6). Dr. Van Dam explained that the need for a knee replacement surgery is dependent on "the amount of arthritis in the knee,

[11] Although Claimant acknowledged that Dr. Constable had recommended total knee replacements in both knees in 2010, she asserted that that was why she "left" Dr. Constable and began treating with Dr. Van Dam. (Tr. 33, lines 2-9). Dr. Van Dam's account of why he began treating Claimant's bilateral knees is markedly different.

patient symptoms, and then response to certain treatments ..." (Van Dam Dep. 8, line 11 – 9, line 1). Dr. Van Dam confirmed that Claimant met the radiographic criteria of near or total loss of cartilage between the bone prior to her July 15, 2011 fall. (Van Dam Dep. 9, lines 2-14).

Ms. Jenkins testified that Claimant had been asking for additional time off from work for medical care for her knees prior to the accident. (Tr. 95, lines 2-12). Ms. Jenkins also testified that Claimant often complained about pain in her knees prior to the accident. (Tr. 100, lines 13-17).

Tellingly, although Claimant claims she reported the alleged July 15, 2011 injury to her knees to both Drs. Fulton and Van Dam, (Tr. 55, lines 19-23), their medical notes do not contain a single reference linking her knee problems to the accident until her attorney sent them a letter stating that Claimant had fallen at work "tripping and falling forward on a sidewalk and landing on both arms and knees." (APA p. 57) (APA p. 54 (acknowledging receipt of January 31, 2012 letter from Claimant's attorney and referencing, for the first time, any connection between Claimant's knee problems and her fall at work)).[12] For example, notes from Dr. Fulton's office for August 3, 2011 merely indicate Claimant noted she was "having knee pain that she recurrently gets cortisone injections in and is past due." (APA p. 38). There is no mention of an exacerbating accident on this date. Dr. Van Dam's medical notes do not reference a fall or accident affecting Claimant's knees. (APA pp. 41, 48-53). Claimant's reason for this lack of medical documentation referencing any injury to her bilateral knees as a result of the July 15, 2011 fall is that she has no control over what the doctors write down. (Tr. 60, lines 10-20).

[12] Respondents note that this letter was sent soon after Claimant was discharged from Columbia Heart's employ. (APA p. 102 (January 19, 2012 was Claimant's last day of work for Palmetto Heart)) (APA pp. 57-59 (January 31, 2012 letter from Claimant's attorney to Drs. Fulton and Van Dam stating that Claimant "fell at work ,tripping and falling forward on a sidewalk and landing on both arms and knees"))

Claimant points to her September 15, 2011 visit with Dr. Van Dam as evidence that she "sought treatment" from him for worsened knee pain following her July 15, 2011 fall. (App. Br. p. 16). However, notes from that visit do not indicate or reference in any way a fall or injury to her knees. Instead, the notes reveal a regularly scheduled visit for treatment of her "severe osteoarthritis," during which she received routine corticosteroid injections to her knees. (APA p. 41). In fact, on her next visit on November 18, 2011, Dr. Van Dam noted that, although Claimant was diagnosed with "severe endstage osteoarthritis of the bilateral knees," she continued "to be active and able to walk." (APA p. 48). In January of 2012, Dr. Van Dam concluded that the treatment goal was "to just keep [Claimant] going until ultimately she will require knee replacements ..." (APA pp. 52-53, 214-218). In October, 2012, Dr. Van Dam again noted that Claimant "has had a history of severe osteoarthritis for years." (APA p. 216).

Claimant relies on a "check the box" form provided to Dr. Van Dam as proof that Claimant's July 15, 2011 fall aggravated the pre-existing arthritis in her bilateral knees and that the need for restrictions, medications and knee replacements were due to the accident. (App. Br. p. 16). However, in his deposition, Dr. Van Dam clarified that any conclusions he reached regarding whether Claimant's condition was aggravated by her fall were dependent, in part, on an assumption that Claimant "was working fine and able to do her job and was not experiencing progressively work functional problems" prior to her fall. (Van Dam Dep. 32, line 22 – 33, line 11). He also acknowledged that he did not know how Claimant fell or how she landed when she fell, (Van Dam Dep. 13, lines 15-17), or whether Claimant had experienced problems with her knees at work prior to her July 15, 2011 fall. (Van Dam Dep. 27, lines 16-25). He further acknowledged that there was nothing different about Claimant's presentation regarding the pain in her knees when he saw her in September 2011, after her fall. (Van Dam Dep. 15, lines 3-15).

Dr. Van Dam agreed that the July 2011 fall did not necessitate any treatment, including her need for a knee replacement, that was not already needed. (Van Dam Dep. 16, lines 15-23) (Van Dam Dep. 18, lines 3-10) (Van Dam Dep. 28, line 19 – 29, line 22). When asked whether he could "state within a reasonable degree of medical certainty that that ultimate knee replacement was accelerated by the accident in 2011," Dr. Van Dam responded, "No." (Van Dam Dep. 29, lines 19-22) (Van Dam Dep. 31, lines 7-14).

In fact, Dr. Van Dam agreed with Respondents' counsel that it was entirely possible that Claimant's condition was due to the natural progression of her pre-existing condition and acknowledged that her course of treatment did not change after July 15, 2011. (Van Dam Dep. 25, line 15 – 27, line 15). He further agreed that the restrictions he placed on Claimant (limited bending, twisting or turning, and no continuous standing or walking with out temporary breaks (APA p. 54)), would have been appropriate prior to July 2011 if she had been having problems completing her job duties at that time. (Van Dam Dep. 28, lines 1-18).

Because substantial evidence supports the Commission's finding that, even if Claimant's accident is compensable the only body part injured in that fall was her right shoulder, this Court should affirm the Commission Decision on this point.[13]

CONCLUSION

For all the reasons stated herein, this Court should uphold the Commission Decision and find that Claimant failed to prove a compensable claim. In the alternative, should the Court find that Claimant's claim is compensable, it should uphold the Commission's finding that the only

[13] Respondents note that, although Claimant alleged she also injured both shoulders, both arms, both legs and both knees, (Form 50, dated May 21, 2012), she has not argued on appeal that anything other than her shoulder and bilateral knees should be considered compensable. As a result, any argument regarding those other body parts has been abandoned on appeal. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 303, 737 S.E.2d 601, 613 (2013) (failure to argue an issue constitutes an abandonment of the issue on appeal).

body part injured in the fall was her right shoulder and/or that Claimant failed to provide timely notice to Columbia Heart of any injury to her bilateral knees.

Respectfully submitted,

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December 20, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No. 1108693

Gail Bruce, Employee,.....Appellant,

v.

Columbia Heart Clinic, Employer, and
Hartford Insurance Company of the
Midwest c/o the Hartford, Carrier,.....Respondents.

PROOF OF SERVICE

I certify that on the 20th day of December 2013, I served the **Respondents' Initial Brief** and **Designation of Matter to be Included in the Record on Appeal** on Gail Bruce by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record:

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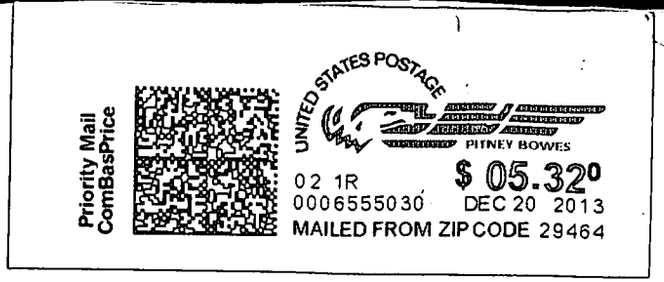

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