THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE FULL COMMISSION OF THE SOUTH CAROLINA WORKERS' COMPENSTION COMMISSION

WCC FILE NO.: 1206355
Appellate Tracking No.: 2013-002666

FRANCES BARON, EMPLOYEE CLAIMANT/APPELLANT,

V.

SANCTUARY HOSPICE EMPLOYER,

AND

GUARANTEE INSURANCE COMPANY C/O PATRIOT NATIONAL INSURANCE GROUP, CARRIER, RESPONDENTS.

INITIAL BRIEF OF APPELLANT

January 10, 2014

William G. Jenkins, Jr. (SC Bar No.: 02982)
JENKINS & ESQUIVEL, P.A.
P.O. Box 6855
Hilton Head, SC 29938
Phone: (843) 785-8800
Fax: (803)785-5811
Attorney for Appellant

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STATEMENT OF THE ISSUE ON APPEAL

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STATEMENT OF THE CASE

Appellant was involved in a single car accident on May 21, 2012 when she was driving an automobile within the scope of her employment for Respondent and ran off the roadway as a result of a syncopal episode, hit a tree, and sustained injuries as a result thereof. A hearing was held before the Single Commissioner on February 27, 2013 pursuant to Appellant's Form 50, dated November 6, 2012, to determine the compensability of Appellant's injuries. Respondent's Form 51, dated December 5, 2012, denied the compensability of the claim, upon numerous grounds, including, but not limited to, that the accident failed to arise out of Appellant's employment pursuant to S.C. Code Ann. §42-1-160 (A). The Hearing Commissioner issued an Order dated June 14, 2013 denying the compensability of Appellant's claim in that the accident failed to arise out of Appellant's employment pursuant to S.C. Code Ann. §42-1-160 (A). The Hearing Commissioner's Order was appealed to the Full Commission by the timely filing of a Form 30 Request for Commission Review dated June 18, 2013. The Appellate Panel issued its Order dated December 12, 2013 affirming the Hearing Commissioner's Order. Appellant filed her Notice of Intent to Appeal on Respondent on December 13, 2013. The amount in controversy has never been ruled on in that the compensability of the claim was denied in its entirety in that it failed to arise out of Appellant's employment pursuant to S.C. Code Ann. §42-1-160 (A). It is Appellant's contention that the case should be reversed and remanded to the Worker's Compensation Commission for a determination of the amount in controversy.

STATEMENT OF THE FACTS

It is stipulated that Appellant was involved in an automobile accident on May 21, 2012 and further that this accident occurred within the course of her employment. December 12, 2013 Decision and Order Findings of Fact page 8, lines 10-11 and page 9, lines 5-6. The Claimant lost consciousness, ran off the road, and hit a tree. This fact is not in dispute by either party. December 12, 2013 Decision and Order Findings of Fact page 8, lines 12-13.The only issue on appeal is whether the accident arose out of her employment pursuant to S.C. Code Ann.§42-1-160 (A). See December 12, 2013 Decision and Order Finding of Fact page 9, lines 7-8. It is further stipulated that the cause of the accident was a syncopal episode of an idiopathic nature. October 15, 2013 Transcript page 10, lines 18-21. Claimant alleges injuries to her head, eyes, face, both legs, both ankles and both feet as per her timely filed Form 58. December 12, 2013 Decision and Order Finding of Fact, page 8, lines 18-19, and Appellant's Form 58.

ARGUMENT

1. DID THE FULL COMMISSION ERR IN FINDING THAT APPELLANT FAILED IN HER BURDEN OF PROOF THAT HER INJURIES AROSE OUT OF HER EMPLOYMENT PURSUANT TO S.C. CODE ANN. §42-1-60 (A) OF THE SOUTH CAROLINA CODE OF LAWS.

The South Carolina Administrative Procedures Act (APA) establishes the standard of review of decisions of the Workers Compensation Commission. *Hamilton v. Bob Bennett Ford*, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999). In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. §1-23-380(A)(6). The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Appellate Panel. *Grice v. National Cash Register*, 250 S.C. 1, 156, S.E.2d 321 (1967); however, where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law. *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 61 S.E.2d 654 (1950). It is the contention of Appellant that, as such, the Commission erred as a matter of law for the reasons hereinafter set forth. Initially it should be noted that the fact that an injury is caused by an idiopathic condition is most often interposed as a defense in Workers Compensation cases such as in a floor-level fall; it should, however, be pointed out that an injury precipitated by such an idiopathic condition can be compensable in certain circumstances. It is the position of Appellant that those circumstances are present in the case at bar as will be hereinafter discussed.

An injury is compensable under the South Carolina Workers Compensation Act if it occurs accidentally arising out of and in the course and scope of an employee's employment. See

S.C. Code Ann. §42-1-160(A). The term, "arising out of," refers to the cause or origin of the accident, while the term, "in the course of," refers to the time, place and circumstances under which the accident occurred. See *Owings v. Anderson County Sheriff's Department*, 315 S.C. 297, 433 S.E.2d 869 (1993). The question before the Court is whether an idiopathic syncopal episode, occurring during the course and scope of an employee's employment, which gives rise to an automobile accident, and causally related injuries, is compensable under the South Carolina Workers Compensation Act. Idiopathic has been defined by the Court of Appeals as arising from some mental or physical condition personal to the Claimant. *Nicholson v. S.C. Dept. of Social Services*, 405 S.C. 537, 748 S.E.2d 256 (Ct .App. 2013). A syncopal episode or a syncope is a medical term for a feinting spell. The question more specifically posed is whether Appellant's injuries, despite her accident being precipitated by an idiopathic condition, arose out of her employment with Respondent pursuant to S.C. Code Ann. §42-1-160 (A). Both the Hearing Commissioner, and the Full Commission denied compensability under principles enunciated in *Edge v. Dunean Mills*, 202 S.C. 189, 24 S.E.2d 268 (1943).

The *Edge* case dealt with the Claimant having suffered an epileptic seizure while exiting the mill where he was employed, and collapsing on the steps outside. The case presented two questions, to wit: (1) Does the failure to file a claim with the Industrial Commission within one year from the date of the injury, without legal excuse being shown, bar the Claimant from all compensation, and (2) Did the injury suffered by the Claimant result from an accident or disease. The Court, in *Edge*, initially, addressed the timeliness of the claim, and, after finding the claim was not timely filed, volunteered comment on the remaining issue as to whether the injury was caused by accident or disease. A close reading of *Edge* reveals that the issue of whether the conditions of employment served to enhance, or exacerbate the injury, was never argued in the

case. *Edge* was subsequently called into question by the South Carolina Supreme Court in *Bagwell v. Burwell*, 227 S.C. 444, 88 S.E.2d 611 (1955) wherein the Court referred to the *Edge* Court's discussion of whether the Claimant had suffered injury by accident, arising out of his employment as *dicta*, and pointed out that the Claimant in *Edge* did not seek to establish compensability on the theory that even though the origin of the fall was not related to his employment, the employment conditions contributed to the effect of the fall, and, as a result, this theory of compensability was never discussed by the Court. The *Bagwell* Court, for the first time in South Carolina, embraced the holding in *Rozek's Case*, 294 Mass 205, 200 N.E. 903 (1936) which held that it must be shown that either the cause of the fall, or the resulting injury, bore some special relation to his work, or the conditions under which it was performed. The *Bagwell* Court went further, quoting the New York case of *Connelly v. Samaritan*, 259 N.Y. 137, 181 N.E.76 (1932), in saying that if, except for the employment, the fall, though due to a cause not related to the employment, would not have carried the consequences it did but for the conditions of employment, then a causal connection is established between the injury and the employment, and the incidental injury arose out of the employment. The employment has then subjected the workman to a special danger which, in fact, resulted in the injury. The *Bagwell* reasoning was adopted by the Court of Appeals in the case of *Crosby v. Wal-Mart*, 330 S.C. 489, 499 S.E.2d 253 (Ct.App.1998) wherein the Court, quoting *Larson* stated where an employee suffers an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, furniture, or any other objects such as would contribute to the effect of the fall, the majority of jurisdictions deny compensation. 1 *Arthur Larson & Lex K. Larson, Workers Compensation Law*, Section 12.14(a) (1997). Citing *Bagwell*, the Court of Appeals reiterated this view by alluding to the fact that compensation should be denied for idiopathic level floor falls in the

absence of special conditions or circumstances. It should be pointed out that the case at bar is factually distinct from an idiopathic floor level fall in that Appellant was traveling in a moving vehicle at the time of the accident. It is Appellant's contention that the act of traveling in a moving vehicle constitutes the special circumstances contemplated by *Crosby*. The South Carolina Supreme Court next dealt with this question of idiopathic falls in the case of *Turner v. Campbell Soup*, 252 S.C. 446, 166 S.E.2d 817 (1969). The *Turner* case involved a situation in which the Claimant suffered a fall as a result of an idiopathic fall (feinting) and struck her head on a pipe causing a concussion. The Full Commission denied compensation on grounds that the fall resulted from a cause unrelated to her employment. The Supreme Court remanded the case to the Full Commission on grounds that the Full Commission failed to make findings of fact as to whether the conditions of Claimant's employment (the fact that Claimant hit her head on a pipe after a feinting spell) contributed to the effect of the fall, that is, whether or not the fall bore with it consequences as would not have occurred except for the employment, or, in other words, whether the employment contributed to the effect of the fall.

The modern rule alluded to in *Bagwell, Crosby and Turner* has come to be known as the "Increased Danger Rule." The rule is set forth in *Larson § 9.01 [1]* as follows:

> When an employee, solely because of a non-occupational heart, epileptic fit, or feinting spell, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture (as distinguished from the internal effects of the heart attack or disease, which of course are not compensable) is an injury arising out of the employment. The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable, if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.

And further in *Larson § 9.01 [2]* as follows:

> Awards are uniformly made when the employee's idiopathic loss of his, or her faculties took place while he, or she was in a moving vehicle, as in the case of a delivery worker whose job required the employee to be at the wheel of a truck, and who blacked out during as asthmatic attack and went into the ditch, and an employee who was on a motor scooter when he lost

consciousness. It seems obvious that the obligations of employment had put these employees in a position where the consequences of blacking out were markedly more dangerous than if they were not so employed.

The "increased danger rule" has come to be adopted by all jurisdictions which have considered the issue of the compensability of idiopathic falls which give rise to injury while the employee is traveling in a moving vehicle within the scope of his or her employment, although this factual scenario is one of first impression in South Carolina. Other jurisdictions have, however, ruled on this precise question. See *Deturk v. Charlotte County*, 642 So.2d 779 (Fla. App. 1994) where Claimant was injured in an automobile while driving to a local bank; *Phillips v, A & H Construction*, 134 S.W.3d 145 (Tenn. Sup.Ct. 2004) where Claimant suffered an idiopathic episode while driving to pick up some co-workers; *Dubose v. St. Louis*, 210 S.W.3d 391 (Mo. App. 2006) where Claimant, an airport police officer suffered a seizure while driving his patrol vehicle; *Hill v. Faircloth*, 245 Mich. App. 710, 630 N.W.2d 640 (2001) where Claimant was driving a delivery truck, and had a diabetic seizure causing injuries; *Tapp v. Tapp,* 192 Tenn. 1, 236 S.W.2d 977 (1951) where Claimant blacked out while driving an automobile to deliver parts pursuant to his employer's instructions; *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E.2d 476 (N.C. Sup. Ct. 1960); where Claimant, while driving an automobile, blacked out and struck a pole; *Bennett v. Wichita*, 16 Kan. App. 458, 824 P.2d 1001 (1992) where a worker blacked out in a company vehicle, and hit a tree; *Williams v. Gallup*, 77 N.M. 286, 421 P.2d 804 (1966) where Claimant blacked out while on a motor scooter; *Aetna v. Bourgoin*, 252 Miss 852, 174 So.2d 495 (Miss. Sup. Ct. 1965) where Claimant suffered an epileptic seizure while driving a car for his employer; *Marshall v. Kimmel*, 108 Ore. App. 101, 817 P.2d 1346 (1991) where Claimant suffered an unexplained loss of consciousness while driving his employer's truck; *CNA v. Sullivan*, 844 P.2d 1259 (Colo. App. 1992) where

Claimant, a salesperson, had a seizure and hit a utility pole; *Immer v. Brosnahan*, 207 Va. 720, 152 S.E.2d 254 (1967) where Claimant blacked out due to a pre-existing vascular condition, and ran into a tree. In addition numerous other jurisdictions, in cases not containing a factual situation precisely analogous to the present case, have adopted the rule enunciated in *Larson* as it applies to injuries sustained by an employee due to an idiopathic episode while operating a moving vehicle while in the scope of his or her employment. *Irby v. Republic,* 228 F.2d 195 (1955); *Burdette v. Perlman-Rocque,* 954 N.E.2d 925 (2011); *Workman v. Wesley Manor,* 462 S.W.2d 898 (1971); *Youngblood v. Fallston,* 180 Md. App. 389, 951 A.2d 118 (2008); *Svehla v. Beverly,* 5 Neb. App. 765, 567 N.W.2d 582 (1997); *Flanner v. Tulsa,* 2002 Ok. 8, 41 P.3d 972 (2002); *Kennecott v. Industrial Commission,* 675 P.2d. 1187 (1983); *PYA Monarch v. Harris,* 22 Va. App. 215, 468 S.E.2d 688 (1996); and *Ware v. State Workers Compensation Commission,* 160 W.Va. 382, 234 S.E.2d 778 (1977). Appellant could find no case, in any jurisdiction, where compensability was denied where claimant was traveling in a moving vehicle within the scope of his or her employment, and suffered an idiopathic episode causing injuries. While the South Carolina Courts have not adopted the "increased danger rule" by name, it is clear from the discussions in both *Bagwell, Crosby and Turner* that the South Carolina Courts have adopted its core principles as law. Of special note is that the Supreme Court in *Bagwell*, as well as in numerous other cases, pointed out that decisions of the Supreme Court of North Carolina are always helpful and persuasive because the South Carolina act was taken from the North Carolina act, although they have not always been followed in a few instances when contrary to our Courts own view of the proper interpretation of the Act. It might therefore be instructive to examine the position of the North Carolina Courts when they have examined the compensability of accidents, idiopathic in their origin, which have occurred while driving a motorized vehicle. The most

recent case involving a precisely analogous factual situation is *Billings v. General Parts*, 187 N.C. App. 580, 654 S.E2d 254 (2007). This case involved a 73 year old employee, while operating a motorized vehicle while in the scope of his employment, who suffered a syncopal episode, ran off the road and struck a telephone pole. The Court found that an injury does arise out of the employment if the idiopathic condition of the employee combines with the risks attributable to the employment to cause the injury. It further found that if the employment aggravates, accelerates or combines with the employee's pre-existing disease or infirmity to produce the injury, that injury arises out of the employment; where the accident and resultant injury arise out of both the idiopathic condition of the workman and the hazards incident to the employment, the employer is liable. The Court went on to say that when an employee's duties require him to travel, the hazards of the journey are risks of the employment.

It should be noted that the Iowa Supreme Court has addressed the issue of whether expert testimony is required to show that the driving of an automobile at the time of the syncopal episode resulted in an aggravation or enhancement of a Claimant's injuries; in *Koehler Electric and Continental Western Insurance v. Wills*, 608 N.W. 2d 1 (Iowa Sup. Ct. 2000). The Court held that such testimony was not required, in that, the fact finder could conclude based on common experience whether the conditions of employment increased the risk of injury. The Court, further, stated that in no case applying the "increased danger rule" while the employee was traveling in a moving vehicle within the scope of his or her employment, was such testimony required. There can be no doubt upon even a cursory inspection of the photos of Claimant's vehicle that the presence of the Plaintiff in a moving vehicle clearly exacerbated her injuries. Claimant's APA, pages 328 – 332. See also *Larson* 9.01 [2] stating the act of traveling a moving vehicle obviously increases the dangers of blacking out.

CONCLUSION

For the foregoing reasons stated herein, Appellant Frances Baron respectfully submits that the Commission erred in determining that Appellant failed in her burden of proof that she sustained an injury arising out of and in the course of her employment pursuant to South Carolina Code §42-1-160 (A). Appellant further submits that the decision of the Appellate Panel should be reversed and the case be remanded to the Worker's Compensation Commission for a determination of what benefits are due Appellant.

January 10, 2014

William G. Jenkins, Jr. (SC Bar No.: 02982)
JENKINS & ESQUIVEL, P.A.
P.O. Box 6855
Hilton Head, SC 29938
Phone: (843) 785-8800
Fax: (843) 785-55811
Attorney for Appellant

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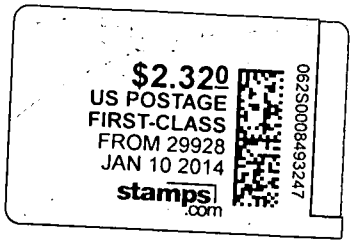
PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on January 10, 2014, addressed to the attorney of record, Helen F. Hiser, Esquire, McAngus, Goudelock & Courie, LLC, P.O. Box 650007, Mt. Pleasant , South Carolina 29465.

January 10, 2014

William G. Jenkins, Jr.
Post Office Box 6855
Hilton Head Island, South Carolina 29938
(843) 785-8800
Attorney for Appellant

JENKINS & ESQUIVEL, P.A.
P.O. BOX 6855
HILTON HEAD ISLAND, SC 29938



Ms Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211-1629