THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Jr.; Susan S. Barden; and T. Scott Beck, Commissioners

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W.C.C. File No. 08100407

Judy Marie Barnes, Employee/Claimant .....Petitioner,

v.

Charter 1 Realty, Employer and Technology
Insurance Company, Carrier.....Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

1. **WHETHER SUBSTANTIAL AND RELIABLE EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DETERMINATION THAT THE PETITIONER DID NOT SUSTAIN AN INJURY ARISING OUT OF HER EMPLOYMENT WITH CHARTER 1 REALTY ON JULY 8, 2008.**

STATEMENT OF THE CASE

This claim arose upon the filing of a Form 50 by the Claimant (hereinafter "Petitioner") to which the Employer/Carrier (hereinafter "Respondents") replied by way of a Form 51. The Petitioner alleged in her Form 50, as well as at the hearing, that she sustained injuries to her left hip and to her left shoulder as a result of tripping and falling at work on July 8, 2008. As a result of her claim for these injuries, the Petitioner sought temporary total disability compensation benefits from July 9, 2008, and continuing, as well as medical treatment and care, including treatment by Dr. Nicholas Michelic as authorized treating physician. The Respondents denied that the Petitioner sustained an injury by accident arising out of and in the course of her employment or that there was a causal connection with her employment, as set forth in Section 42-1-160. Additionally, the Respondents took the position that the Petitioner's injury did not "arise out of" her employment as it was due to an "idiopathic" incident.

Commissioner Williams presided over a hearing on the merits pursuant to the Forms 50 and 51 on December 1, 2008. A Decision and Order was filed on January 13, 2009, finding the Petitioner did not sustain a compensable injury by accident "arising out of" her employment and that there is no causal connection between her fall and her employment. Further, the Hearing Commissioner determined that the Petitioner sustained an idiopathic fall. From this Decision and Order, Petitioner filed a Form 30 Request for Commission Review. The Appellate Panel of the South Carolina Workers' Compensation Commission heard oral arguments on May 27, 2009. Thereafter, the Commission issued a Decision and Order dated December 23, 2009, affirming the Hearing Commissioner's Order in its entirety. Petitioner subsequently filed a Notice of Appeal before the Court of Appeals. By unpublished opinion dated January 25, 2012, the Court of

Appeals affirmed the Appellate Panel of the South Carolina Workers' Compensation Commission. On May 31, 2012, The Court of Appeals denied Petitioner's Petition for Rehearing. This appeal follows.

STATEMENT OF FACTS

The Petitioner testified that she is 65 years old and a college graduate. She received her Bachelor of Arts degree from Colorado State University and conducted some post-graduate work at Northern Colorado University. She moved from Colorado to South Carolina in 1993. She worked as a real estate assistant for various companies since moving to South Carolina. She began working as a real estate assistant at Charter 1 Realty in 1998. She testified the physical requirements of her job consisted of lifting, bending, pushing, and pulling. She performed computer work primarily, such as preparing listing agreements, developing marketing and advertising strategies for MLS listings, and contacting the agent who showed a property to get a comprehensive report that the agent could then present to a client.

The Petitioner had myriad personal health problems throughout her employment with Charter 1 Realty. In fact, the Petitioner had even had an accidental trip and fall or accident when she fell in a Bi-Lo parking lot in 2006. (App., p.251, lines 16-18, 25; p.252, lines 1-3; p.258, lines 1-3; App., 58, lines 15-18). The Petitioner also told a co-worker, Mary Aiana (hereinafter "Aiana"), that she had fallen at home on at least one occasion before the July 8, 2008, accident. (App., p.60, lines 21-23), and confirmed, at the hearing, that she had two occasions of losing her balance and falling, including at Bi-Lo and at Charter 1 Realty. (App., p.60, lines 9-14). While the Petitioner testified that she only complained of symptoms in her left elbow due to the Bi-Lo parking lot fall, at the hearing she was confronted with a medical report that established she also

reported left knee pain. Similar to the facts in the case at hand, when asked about the accident at Bi-Lo, the Petitioner testified: "I just tripped and fell." (App., p.251, line 18; App., 59, lines 1-3). The Petitioner explained the trip and fall at Bi-Lo occurred, in part, because she lurched forward and could not catch her balance, but did not trip over anything. (App., 251, lines 23-24; App., p.59, lines 14-18) There were no liquids or anything in the parking lot that caused her to fall. (App., 62, lines 1-3) Petitioner also admitted, in her deposition, she testified her feet or legs were not swollen since she began taking medication in March of 2008. (App., 59, lines 19-23). While at the hearing, she conceded that she has had occasional swelling in her legs and feet since she was thirty years old. (App., 60, lines 3-8).

The Petitioner testified that her fall at Charter 1 Realty occurred at approximately 11:30 a.m. on July 8, 2008. When she was wearing Crocs, she claims she got up hurriedly from her desk to rush back to Betty Melkon's office to check her emails before noon. (App., p.47, lines 20-23). When, initially, asked at the hearing what caused her fall, she replied: "Tripped and fell. I tripped and fell." (App., 48, lines 4-5). She claimed that, as a result, she sustained injuries to her left femur, left humerus, and tore her left rotator cuff. (App., 48, lines 13-14). She went to the emergency room the same day, at which time she began receiving medical treatment from Dr. Mihelic. The Petitioner told Dr. Mihelic the day of the accident that she tripped and fell. (App., p.51, lines 11-13). On cross-examination, the Petitioner admitted that she was given the assignment to check Betty Melkon's email at 9:00 that morning and she was under no time constraints to complete the assignment as long as it was done before lunch. (App., p.65, lines 18-20). She also admitted that the real estate market was not doing well the day of her accident so she was not busy. (App., 66, line 2). Furthermore, she admitted that, when asked in her

deposition, what part of her job caused her fall she said "walking from my desk to Betty's office" and when asked if she knew what caused her fall she said: "No." (App., 257, line 20; p.258, line 10; App., p.66, lines 12-18).

Petitioner also agreed that she told the insurance investigator who visited her at Coastal Carolina, Tracy Brown, that on some occasions her husband had told her she needed to pick up her feet. (App., p.68, line 15). The Petitioner denied telling Aiana that her husband hated her wearing Crocs because it affected her ability to keep her balance. (App., p.61, line 8). The Petitioner also denied telling Aiana that her husband was always on her about needing to pick up her feet. (App., p.61, line 25). After additional questioning, the Petitioner admitted her husband did remind her to pick up her feet because he didn't want her to repeat the trip and fall she had in the Bi-Lo parking lot. (App., p.61, lines 23-25) Additionally, she was also confronted at the hearing with her deposition testimony in which she stated the insurance investigator started the workers' compensation process and that in reference to whether she told anyone at Charter 1 Realty that she believed her fall was work-related she responded in accordance with her deposition testimony: "I never notified anybody." (App., p.71, lines 9-17; App., pp.263-267) The Petitioner also confirmed her deposition testimony that her husband, not her, contacted a workers' compensation attorney after the July 8, 2008 fall. (App., p.71, lines 2-4; App., p.267, lines 19-22) The Petitioner further elaborated at the hearing: "It happened at work. Everyone at Charter 1 saw that it was work-related." (App., p.71, lines 15-17) The Hearing Commissioner then asked the Petitioner whether she thought just because she fell at work that it was automatically work-related and the Petitioner replied that she did. (App., p.72, lines 21-24)

The Petitioner, further, testified that the hallway where she fell had a level surface and

that nothing obstructed her view. (App., p.73, lines 2-8; App., p.259, line 24) She was confronted with conflicting medical records from the day of the accident. One stated she reported tripping over a box and falling while in another she reported the accident occurred because she tripped and fell. (App. R., p.74, lines 7-15; App., p.158; App., p.201) She testified that she didn't hit a wall or any other objects as a consequence of her fall. (App., p.261, lines 17-22) Moreover, she was confronted with the fact that, in the medical record she submitted into evidence, there was no mention of her hurrying. (App., p.74, lines 2-6). The Petitioner agreed that she had not filed any job applications since Charter 1 Realty told her in May of 2008, that she would have to retire on December 31, 2008. She also admitted that for some time prior to May of 2008, her husband had been wanting her to retire and that she would just go ahead and retire on December 31, 2008. The Petitioner did not return to work at Charter 1 Realty after July 8, 2008.

Angie Toth-Mullin (hereinafter "Toth-Mullin"), who has been working at Charter 1 Realty for approximately twenty years and serves as the business manager, also testified. She has known the Petitioner for ten years, but was out of town when the Petitioner's fall occurred. (App., p.78, lines 6-17) She first received word about the fall from a co-worker, Nancy Simmons. (App., p.78, lines 20-21) When she returned to the office on July 15, 2008, Toth-Mullin contacted Charter 1 Realty's workers' compensation carrier because she believed they should determine how the fall would be handled, although she did not believe the Petitioner's fall was work-related. (App., p.79, lines 20-23). Toth-Mullin testified that while she was at home on July 14, 2008, the Petitioner's husband, Bill Barnes, contacted her inquiring about workers' compensation; however, neither Bill nor Judy Barnes claimed the fall was work-related during this conversation. (App., p.80, lines 17-25, p.60, lines 1-8).

Approximately one and a half to two weeks later, Bill Barnes arrived at Toth-Mullin's office and advised that he believed his wife was due 66 percent of her income. (App., p.81, lines 18-22). She spoke with the Petitioner on several occasions soon after the accident and the Petitioner did not report her injury was work-related. (App., p.82, lines 10-12) Toth-Mullin also testified the Petitioner told her Crocs were the only shoes comfortable for her feet and legs and that she had noticed the Petitioner's feet and legs were swollen some time from a couple of weeks to as long as a month or two prior to the accident. (App., p.83, lines 2-6)

Toth-Mullin testified she was involved in a meeting in May of 2008 in which it was determined that the Petitioner would be the next employee to be laid off. (App., p.83, lines 19-24) Several employees were previously laid off due to the sluggish real estate market. Charles Reed, was also present at the meeting and suggested to Toth-Mullin that they advise the Petitioner that they would keep her until the end of December, at which time she would be eligible for Medicare. (App., p.84, lines 1-6) Charter 1 Realty was losing money by keeping the Petitioner on from May of 2008 until December 31, 2008, but they wanted to try to help her avoid a hardship since Petitioner's husband didn't work. The Petitioner was a loyal employee, but would not described an individual who hurried around the office.

Toth-Mullin testified the Petitioner was very appreciative about being allowed to stay on for the remainder of the year and told Toth-Mullin that her husband had wanted her to retire anyway since her and her husband's health wasn't good. (App., p.84, lines 20-22 and p.85, lines 1-9) Toth-Mullin testified that, based on her close relationship with the Petitioner, she would have expected her to tell her if her fall was work-related, Toth-Mullin confirmed the Petitioner did not report to her that the fall was work-related.

Tracy Brown (hereinafter "Brown"), an adjuster/investigator, testified that she received an assignment from Amtrust to investigate a possible claim in July of 2008. On July 18, 2008, she visited the Petitioner and inspected the Charter 1 Realty premises. (App., p.90, lines 11-13, 16-17). Brown's inspection of the hallway where the Petitioner fell revealed a level surface without anything in the carpet such as bubbling that would cause someone to fall. (App., p.91, lines 13-15) She independently recalled interviewing the Petitioner because it was out of the ordinary for her to receive an assignment involving a slip and fall on a carpeted surface. (App., p.91, lines 21-25 and p.92, lines 1-2).

Ms. Brown reviewed her handwritten notes of the interview, as well as a summary thereafter, and there was no mention of the Petitioner being in a hurry. (App., p.92, lines 3-10) Brown testified that the Petitioner never told her she believed her job caused her to fall, nor that she was in a hurry. (App., p.91, lines 4-9). Furthermore, Brown testified, that on more than one occasion, during the July 18, 2008, interview the Petitioner said she felt stupid because "I just stumbled over my own feet." (App., p.93, lines 10-13). The Petitioner also mentioned to Brown that her husband wanted her to retire. Her husband was not present during the interview. (App., p.93, lines 2-3, 14-16).

Finally, Aiana, the co-worker, testified she had worked at Charter 1 Realty for the past four years; she had known the Claimant since she began working there; and they are friends. (App., p.98, lines 23-24 and p.99, line 1). Aiana testified the Petitioner told her that the July 8, 2008, fall occurred because she tripped over her own feet. (App., p.99, lines 10 and 17). Also, Aiana testified the Petitioner told her about a prior fall at Bi-Lo in 2006, and that she had fallen at home before July 8, 2008. (App., pp.100-101, lines 3-8). Aiana noticed that the Petitioner's

feet and legs were swollen prior to the July 8, 2008 accident. She had conversations with the Petitioner, in which the Petitioner shared that her husband did not like her wearing Crocs and that she was worried about him. (App., p.100, lines 9-14). Finding out about the July 8, 2008, fall because he had told her to pick up her feet when she walked, that is why the Petitioner believed that she fell on July 8th—she told Aiana she felt like she tripped over her own feet. (App., p.101, lines 5-12). Under cross-examination, Aiana explained that a July 21, 2008 report was intended as a chronology of events and that she did not mention all of the details to which she testified at the hearing. (App., p.102, lines 23-25 and p.103, lines 3-9) Further, she testified that she has never been a party to anything like this, and was not sure what should be mentioned in the report. (App., p.102, lines 18-21).

For the sake of judicial economy, the parties agreed and the undersigned Commissioner consented to read Charles Reed's deposition transcript subsequent to the hearing and consider his testimony as evidence. Charles Reed (hereinafter "Reed") served as Charter 1 Realty's Rule 30(b)(6) representative. Reed first met the Petitioner in 1998 during her job interview. The Petitioner was hired by Charter 1 Realty as a sales assistant. (App., p.211, line 1) The Petitioner worked directly for Sonny Hunley and Betty Melkon. (App., p.211, line 20) Reed testified that before July 8, 2008, he was aware the Petitioner had medical problems that could prevent her from coming to work all the time. (App., p.212, lines 24-25).

Reed was not present on July 8, 2008, and testified there were no witnesses to the Petitioner's fall nor did he know what caused her fall. (App., p.213, lines 13-18) Charter 1 Realty co-workers assisted after the fall while the Petitioner was waiting for her husband to take her to the emergency room. Reed testified that the area in the hallway, where the fall took place, was

flat and clear and the floor was covered with industrial grade carpet. (App., p.215, lines 2-4; p.216; p.223, lines 9-14) There were no bubbles or separations in the carpet where the Petitioner's fall occurred. (App., p.223, line 12) There is carpet on the floor throughout the hallway and the Petitioner's desk was approximately fifteen feet away from Betty Melkon's office. (App., p.215, line 17) Reed believes the wall is flat in the hallway where the Petitioner fell and without a chair rail. Reed also testified that, in his experience, the Petitioner was an honest employee with a good work ethic, although she was not an efficient worker. (App., p.215, lines 15-25; p.217, line 13) The Petitioner is no longer an employee of Charter 1 Realty as she stopped working after the July 8, 2008 incident. (App., p.218, lines 22-25) Further, Reed testified that Charter 1 Realty does not have to believe that someone is injured at work to contact their workers' compensation carrier. (App., p.221, line 3) Based on Reed's experience with the Petitioner, would not describe the Petitioner as an individual who normally hustles around the office. As of the date of Reed's deposition on November 20, 2008, to his knowledge the Petitioner has not told him or anyone else at Charter 1 Realty that she believes her fall was due to her job. (App., p.221, line 12; p.223, line 18)

Reed was present at the May 14, 2008, meeting with the Petitioner, as well as the owner's meeting earlier that day when it was decided that they needed a lay off due to the slow real estate market. It was determined the Petitioner would be laid off and, since the Petitioner's husband only had insurance through her Charter 1 Realty policy, they would allow her to stay on until December 31, 2008, at which time she was expected to begin receiving Medicare. (App., p.221, lines 15-25; p.222, lines 1-25) Specifically, Reed recalled one of the owners asking what Jesus would do and that is when the decision was made to continue her employment until the end of

2008. (App., p.222, lines 4-6) Reed recalled the Petitioner telling him, at the May 14, 2008, meeting that her husband wanted her to retire anyway so she would just retire at the end of the year. (App., p.222, lines 15-23) The Petitioner never told Reed that she planned on working anywhere after December 31, 2008. (App., p.225, line 22).

STANDARD OF REVIEW

The Appellate Panel of the South Carolina Workers' Compensation Commission shall review an award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown make its own Findings of Fact and Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner. S.C. Code Ann. §42-17-50 (2010).

While the Full Commission may act as findings of fact, Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2nd 304 (1981) establishes the Administrative Procedures Act as governing the scope of jurisdictional review of determinations by the South Carolina Workers' Compensation Commission. S.C. Code Ann §1-23-380 (A)(6)(Supp. 2010) [The Administrative Procedures Act] provides:

> The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedures;
>
> (d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or uncharacterized by abusive discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(A)(6)(2003 Supp.). Instead, judicial review of a Workers' Compensation decision beyond the Full Commission is governed by the substantial evidence rule. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344 (Ct. App. 2003). It is the well-settled rule of law that the court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, and may only reverse a decision that is affected by an error of law. *Id.* In reviewing the Workers' Compensation Commission decision, the court may only review the decision to assess whether the Commission's decision is supported by substantial evidence or whether the decision is controlled by error of law. *Id.* Substantial evidence is evidence, which, considering the record as a whole, would allow reasonable, minds to reach the conclusion the administrative agency reached in order to justify its action. *Id* at 345. The court may reverse the Commission when its decision is affected by an error of law. Stephen v. Evins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

An Appellate Court in a workers' compensation case has the authority to review the facts only to determine whether or not there is competent evidence to support the Commission's findings. Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E.2d 830 (1971). To this end, an award of the South Carolina Workers' Compensation Commission may not be reversed unless there is an absence of substantial competent evidence supporting it. *See* Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d (1960).

In assessing the term "substantial evidence," South Carolina Appellate Courts have ruled that such is not a mere scintilla of evidence, nor 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 conclusions the administrative agency reached in order to justify its action. *See* Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); and Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

The Petitioner filed this appeal contending that the Commission's findings are not supported by substantial evidence and that the Orders of the Hearing Commissioner and Appellate Panel contain errors of law. Respondents assert the Orders of the Hearing Commissioner and Appellate Panel are supported not only the reliable, competent, and substantial evidence, but by overwhelming evidence, and therefore request the Commission's Orders to be affirmed in their entirety. Although Petitioner asserts that the facts are "admitted or established," (Brief of Petitioner p. 3) as is evident from the discussion herein, Petitioner's assertion is inaccurate. Moreover, the "question of whether an injury arises out of employment is largely a question of fact for the Commission." Nicholson v. Dep't of Soc. Servs., 405 S.C. 537, 544, 748 S.E.2d 256, 260 (Ct. App. 2013) (citing Ervin v. Richland Mem'l Hosp., 386 S.C. 245, 249, 687 S.E.2d 337, 339 (Ct. App. 2009)).

ARGUMENTS

1. **The Commission correctly found as fact and concluded as a matter of law that the Petitioner sustained an idiopathic fall and thus did not sustain a compensable injury by accident and this finding is amply supported by the substantial evidence in the record.**

A claimant has the burden of proving such facts as will render an injury compensable under the Workers' Compensation Act. Holman v. Bulldog Trucking Co., 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). The right to benefits must be proven by the greater weight or preponderance of the evidence. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965). The Petitioner did not prove that she sustained a compensable injury by accident as defined in §42-1-160. S.C. Code Ann §42-1-160 (2010). It is undisputed Petitioner's fall was "in the course of" her employment. "In the course of" refers to the time, place, and circumstances under which the accident occurs. Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946). The Petitioner was at work, and in a place she was expected to be.

The Commission correctly determined that the Petitioner did not prove her fall "arose out of" her employment. For an injury to be compensable, a two-prong test must be satisfied: the injury must arise out of *and* in the course of employment. *Id.* For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007). The "arising out of" employment prong requires a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Id.*

As part of determining whether a causal relationship exists, an injury must be traced to the employment as a contributing proximate cause. Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965) and Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64

(1973). Respondents assert the substantial evidence in the record, including the testimony presented, support the Commission's determination that the Petitioner's fall did not "arise out of" her employment. There is substantial evidence in the record to find that the Petitioner tripped over her own feet and fell while at work. The Hearing Commissioner, specifically, noted at the hearing and, in the Decision and Order, that simply because the Petitioner was at work in and of itself did not make her fall compensable. (*See* App., p.72, lines 19-24; Finding of Fact #7 of Decision and Order App., p.13). The Hearing Commissioner properly considered this issue in formulating his decision. *See* Evans v. Jones-Wilson, Inc., 235 S.C. 219, 110 S.E.2d 851 (1959) (stating that an accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises and that the accident must be connected to the employment). Moreover, even assuming Petitioner was walking down the hallway to check work e-mails when she fell, there is no competent evidence in the record that the Petitioner's employment contributed to her trip and fall.

The substantial evidence in the record establishes the Petitioner's fall could have happened anywhere. The record is replete with evidence supporting that Petitioner's fall was idiopathic in nature. It is a well settled rule in South Carolina that idiopathic falls are not compensable unless the employment contributed to the fall or its effect. *See also* 99 C.J.S. Workers' Compensation § 466 (2008) (discussing law and policy of falls). By way of, if an employee fell due to a wet floor or, in an idiopathic fall, hits machinery, furniture, or other objects that would contribute to the effect of the fall, then the resulting injuries are compensable. Here, is undisputed that the Petitioner did not fall because of a defect in the carpet or hallway, nor did she hit anything while falling.

In Crosby v. Wal-Mart, an employee was walking through a Wal-Mart store when her feet came out from under her. *Id,* 330 S.C. 489 at 493. There were no problems with the floor surface and the employee did not experience further injury because of anything around the area where she fell. She had no evidence that her employment contributed to her fall or its effect, even though she was at work at the time. Clearly, this is analogous to the case at hand where the Petitioner could not explain her fall nor that her employment contributed to her fall or the effect on her. In effect, Petitioner is asking this court re-write South Carolina law by deleting the fundamental requirements of the "arising out of" prong. The Commission properly considered the testimony of various credible witnesses, including the Petitioner, when issuing its decision, and there is substantial evidence to support it.

Contrary to Finding of Fact #8 in the Decision and Order, Petitioner misstates the record by claiming the Hearing Commissioner completely ignored the Petitioner's testimony that she was hurrying. A review of the record reveals the Hearing Commissioner specifically considered this issue, but ultimately found that based upon a greater weight of the evidence, including the Petitioner's own testimony, there was no evidence her fall was caused by any hazards of her work. The Hearing Commissioner further explained his reasoning in Finding of Fact #8: "Therefore, the greater weight of the evidence, including the Claimant's own testimony, indicates the Claimant's injuries were caused by an idiopathic fall." (*See* Decision and Order App., p. 13).

Additionally, contrary to Petitioner's statement that the facts in this case were admitted, the fact, particularly about whether the Petitioner's job required her to hurry, are in dispute. Therefore, Petitioner's counsel is actually asking this court to substitute their judgment for that of the Commission.

2. **The Commission correctly found as a fact and concluded as a matter of law that the Petitioner did not sustain a compensable injury by accident "arising out of" her employment with Charter 1 Realty and substantial evidence supports this finding in view of the reliable, competent, and probative evidence in the record.**

There is substantial evidence in the record to support the Commission's decision that the Petitioner's fall did not "arise out of" her employment. Even in the Petitioner did not have an idiopathic fall, the Petitioner failed to satisfy "arising out of" prong under §42-1-160. As discussed in Respondent's brief, Petitioner testified in her deposition that she did not know what caused her fall. Further if the Petitioner really knew what caused her fall, the Court has made clear the resulting injuries also must be the result of a natural consequence and not an intervening cause. Whitfield v. Daniel Construction Co., 226 S.C. 37, 83 S.E.2d 460 (1954); *see also* Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) and S.C. Code Ann §42-1-160 (2010). The Petitioner's tripping over her own feet with resultant injuries was not the natural consequence of a work accident. Rather, in the case at bar the Petitioner tripping over her own feet constitutes an intervening cause.

Petitioner essentially contends that because there is a possibility she was walking down a hallway at work while she was working any fall must be work-related. Petitioner is mistaken. It has long been established in South Carolina that in order for an injury to "arise out of" employment, a hazard or danger to which an employee is exposed must be peculiar to the work and not common to the neighborhood. *Id*; *see also* Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002). Furthermore, if an employee would be equally exposed to a hazard apart from the employment then an injury does not arise out of employment. *Id.* The record establishes Petitioner experienced difficulties walking when she wore her Crocs; that her

decision to wear Crocs was a personal one, that, prior to the July 8, 2008 fall, she had a history of not picking up her feet and imbalance, and that she could have been walking anywhere when her fall occurred. Clearly, the Petitioner's fall did not result from a hazard or special condition peculiar to her employment and the Commission appropriately determined that no causal relationship exists between the Petitioner's fall and her employment. *See* Nicholson v. Dep't of Soc. Servs., 405 S.C. 537, 551, 748 S.E.2d 256, 264 (Ct. App. 2013) (carpet on which employee tripped and fell "was not a hazard, a special condition, or peculiar to her employment"); Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) (employer's placement of sink and lack of drainage created wet conditions causing fall). The mere fact that Petitioner was injured on her employer's premises is insufficient to establish the requisite causal connection between her injuries and her employment. *Id.*; Bright v. Orr-Lyons Mills, 285 S.C. 58, 60, 328 S.E.2d 68, 70 (1985) ("An accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises. To so hold, would be to abandon the requirement that an accident bear some logical causal relation to the employment.") Further, Petitioner's employment with Charter 1 Realty did not increase the risk of her fall.

It is well settled that the Commission cannot base its award on surmise, conjecture or speculation. Lorick v. S.C. Elec. and Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965). For the Commission to have ruled in Petitioner's favor in this case, they would have based the decision upon surmise or conjecture. Instead, based upon the evidence in the record, the Commission appropriately found that the Petitioner did not sustain a compensable injury by accident arising out of and in the course of her employment on July 8, 2008. Here, the competent and substantial evidence in the record supports the Commission's ruling. Much like in Crosby, the Commission

to have ruled that the Petitioner's fall was work-related, would be "wholly conjecture." *See* Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998). *See* also Baker v. Graniteville Co., 197 S.C. 21, 14 S.E.2d 367, 369 (1941) (holding that the appellant did not sustain a work-related condition when the purported causal relationship amounts to nothing more than an inference upon an inference upon an inference.)

The scattered suggestions in Petitioner's brief are nothing more than asides. Petitioner contests the weight the Commission assigned the evidence and asks the Court to substitute its judgment. The Petitioner's brief would lead one to believe that the only evidence in the record is that she claimed her injury was because she was in a "hurry" due to the amount of work she had to do the day of the incident. She claims that she was hurrying to accomplish her work which would leave only one conclusion that her work contributed to her fall. In fact, that evidence is controverted by substantial evidence, and even the Petitioner's own testimony is contradictory between what she advised the Commissioner at the time of the hearing, as compared to her testimony in her discovery deposition, and her report to various representatives of the employer.

The substantial evidence including from her testimony is contrary to the Petitioner's claim that she "tripped and fell" (by reports to other employer representatives', doctor; and by the Petitioner's discovery deposition, Petitioner's report to Dr. Michelic was only that she "tripped and fell".) (App., p.51, lines 16-17). Petitioner's also, admitted on cross-examination, that she was under "no time constraints" to complete an assignment of checking emails as long as it was done before lunch. (App., p.65, lines 18-20). She also admitted that, at the time of this incident, the real estate market was not doing well, and she was not busy. (App., p.66, line 2). Finally and most significantly, the Petitioner testified that she did not know what caused her fall,

and that the only part of her job involved was walking from her desk to the agent's desk. (App., p.66, lines 3-8; pp.257-258)

Other evidence constituting substantial evidence controverting the Petitioner's testimony included her report to the insurance investigator, who investigated the accident scene. The Petitioner told Tracy Brown that her husband told her to pick up her feet. (App., p.68, lines 10-15). The Petitioner admitted that she had a prior trip and fall in a Bi-Lo parking lot following which, in her testimony, her husband reminded her to pick up her feet, because he did not want her to fall again. (App., p.61, lines 23-25). The Petitioner also agreed that her testimony in her discovery deposition had been that she did not notify anyone she believed that her fall was work related. The only reason she believed falling was related to her work was because it happened there. (App., p.71, lines 15-17; p.72, lines 8-16). Again, the investigator, Tracy Brown, testified that the Petitioner never told her she believed her job caused the fall, nor that she was in a hurry. (App., p. 91-92, lines 4-9). The Petitioner also told Ms. Brown that she felt stupid because she "just stumbled over my own feet". (Supp. R.p.93, lines 10-13).

Further substantial evidence was the testimony of Toth-Mullin, who testified that the Petitioner told her that she could only wear Crocs because of problems with swelling of her feet and legs. The Petitioner never told her that her fall was "work related".

Other evidence supporting the Commission's decision, was the testimony of Maryanne Aiana, an employee of Charter 1 Realty. Ms. Aiana testified that the Petitioner told her that she fell because she "tripped over her own feet". (App., p.96, lines 1-2). Additionally, the Petitioner told her, not only about the fall at Bi-Lo, but also that she had fallen at home in the past. (App., pp.100-101, lines 3-7). The Petitioner also discussed with Ms. Aiana that her

husband did not like her wearing Crocs, and that he had told her to pick up her feet, which is why she believed she fell. (App., p.101, lines 5-9).

Other substantial evidence was the testimony of Charles Reed, a representative of the employer, that the Petitioner was not someone who normally rushed around the office. (App., pp.221-223).

The Commission's decision properly took into account Petitioner's history of imbalance, her wearing Crocs, and her inability to explain her fall. The Petitioner did not hit any objects during her fall. It is also undisputed the hallway where the Petitioner fell was clear without obstructions and without any rips, tears, defects, chair rails, or bubbling in the carpeting. *See* (App., p.73, lines 2-8; p.259, lines 21-24).

While this Court is not required to accept the Commission's decisions at face value without requiring the agency to explain its reasoning. Kiawah Property Owners Group v. Public Service Com'n of South Carolina, 338 S.C. 92, 525 S.E.2d 863 (1999) and S.C. Code Ann. Section 1-23-350 (1976), the Commission provided a sufficient explanation of its decision.

It is well settled that the final determination of witness credibility and the weight to be afforded evidence is reserved to the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999) (holding that it is not for the court to substitute its view of the evidence but that there needs to be ample evidence in the record supporting the Commission's decision). The Commission may also find someone credible, but assign weight to certain portions of testimony. Here, the Commission appropriately issued credibility findings and the basis for the weight afforded the evidence pertaining to the Petitioner and the Respondents' witnesses. Substantial evidence in the record demonstrates that no causal connection exists between the

Petitioner's injuries and her work at Charter 1 Realty and the Orders of the Commission should be affirmed.

Ultimately, the Petitioner failed to satisfy her burden of proof. Although it is an established rule in South Carolina that the Workers' Compensation statute shall be liberally construed, liberal construction of the statute does not mean that, if there are doubts, compensability should be found. *See* Cross v. Concrete Materials, 236 S.C. 440 114 S.E.2d 828 (1960). The overwhelming evidence in the record demonstrates that it is reasonable to infer the Petitioner's wearing of Crocs, as well as her personal health condition, contributed to her fall. Even assuming *arguendo* that Petitioner's conditions did not contribute to her being injured, the fact remains that there is sufficient competent and substantial evidence upon which the Commission reasonably concluded the Petitioner's fall was not work-related.

As the Petitioner did not sustain a work-related condition, the finding that the Petitioner was not temporary totally disabled must be affirmed as a matter of law. Pursuant to the South Carolina Workers' Compensation Act, the Petitioner's entitlement to temporary benefits rests on whether the incapacity to work arises from a work-related injury. Section 42-9-10 of the South Carolina Code delineates when temporary total disability compensation benefits are payable: "When the incapacity for work resulting from [emphasis added] an injury is total, the employer shall pay or cause to be paid, as provided in this chapter, to the injured employee during the total disability . . ." The Petitioner's purported incapacity for work is not the result of a work-related injury and therefore it falls outside of Section 42-9-10. S.C. Code Ann §42-9-10 (2010). The Respondents also assert that since the Petitioner did not sustain a compensable injury by accident as defined in §42-1-160, that the Commission correctly determined she is not entitled to causally

related medical treatment under §42-15-60. S.C. Code Ann §42-15-60 (2010).

CONCLUSION

The Commission's decision should be affirmed when its factual findings are supported by substantial evidence in the record. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999) (stating that factual findings must be supported by substantial evidence in the record). Further, since the Commission's decision does not contain errors of law the decision should be affirmed in its entirety. *See* Larke v. Bi-Lo, Inc. 276 S.C. 130, 276 S.E.2d 304, 306 (1981) and Stephen v. Evins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Based upon the foregoing, the Commission's decision is supported by substantial evidence and therefore the Respondents respectfully request full affirmation of the Commission's Orders and the Court of Appeals.

Dated: June 9, 2014

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Jr.; Susan S. Barden; and T. Scott Beck, Commissioners

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W.C.C. File No. 08100407

Judy Marie Barnes, Employee/Claimant .....Petitioner,

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CERTIFICATE OF COUNSEL

The undersigned attorney certified that the Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 9th day of June, 2014, she served a copy of the Brief of the Respondent by United States Postal Service, postage prepaid addressed to J. Kevin Holmes, Esquire, The Steinberg Law Firm, P.O. Box 9, Charleston, SC 29402-0009

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