

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No.: 1118193
Appellate Case No.: 2012-213494

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JUL 17 2014

S.C. Supreme Court

Patricia Johnson, Employee.....Appellant,

v.

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

**RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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SC Court of Appeals

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QUESTION PRESENTED

1. Whether the decision of the Commission is affected by an error of law because it fails to consider that the injury occurred as a direct result of condition existing on the premises of the employer?

STATEMENT OF THE CASE

Patricia Johnson, the claimant, appeals the Decision and Order of the South Carolina Workers' Compensation Commission finding she was not entitled to benefits under the South Carolina Workers' Compensation Act, as the accident in question did not constitute a compensable injury by accident. The Respondents, Staffmark and New Hampshire Insurance Company, ("defendants") maintain the Commission properly denied the claimant benefits pursuant to the Act.

The claimant alleges she sustained a compensable injury to her left foot and left leg on December 21, 2011, when she slipped and fell while walking into the workplace. The defendants deny the claimant sustained an injury within the course and scope of her employment. The defendants further maintain the claimant failed to prove she sustained a compensable injury by accident and that any alleged injury she sustained was the result of an idiopathic fall or internal failure of her ankle due to a non-work related personal condition.

A Hearing on the matter was held on March 27, 2012, before the Hearing Commissioner pursuant to the Forms 50 and 51 filed on behalf of the parties. By way of Decision and Order dated May 16, 2012, the Hearing Commissioner determined the claimant failed to meet her burden of proving she sustained a compensable injury by accident arising out of and in the course of her employment. Rather, the Hearing Commissioner found her alleged injury was the result of an idiopathic failure of her left ankle and determined the claimant was not entitled to benefits under the Act. (R. p. 10).

On May 16, 2012, the claimant filed a Form 30 appeal to the Full Commission contending the Hearing Commissioner erred in concluding that the Appellant did not sustain a compensable injury by accident and was not entitled to benefits under the Act;

that the fall was the result of an idiopathic failure of the left ankle; and that there was no evidence that the fall arose out of her employment. By way of Decision and Order filed November 15, 2012, the Full Commission Appellate Panel affirmed the Hearing Commissioner's determination in its entirety. The claimant timely appealed to the Court of Appeals. The Court of Appeals affirmed the decision of the Full Commission Appellate Panel in an unpublished *per curiam* Decision dated March 5, 2014. The claimant filed a Petition for Rehearing En Banc with the Court of Appeals which was denied by the Court on May 20, 2014. The Appellant timely filed a petition for Writ Certiorari on June 17, 2014. The Respondents take the position that the Appellant's Petition for Writ of Certiorari should be denied based upon the following grounds.

FACTS

Despite an assertion by the Petitioner to the contrary, the defendants contest all facts as to the mechanism of injury in this case as there were no witnesses to the incident in question. The defendants acknowledge the claimant was found on the floor inside the rear doorway and suffered a fractured left ankle. How this injury actually occurred is not known. The claimant provided inconsistent reports as to the mechanism of injury to the emergency room physicians on the date of accident; in subsequent medical reports; as well as during her deposition and at the Hearing. As such, the facts surrounding the mechanism of injury has been in question from the outset.

ARGUMENT

1. **THE COURT OF APPEALS PROPERLY AFFIRMED THE COMMISSION'S DETERMINATION THAT THE CLAIMANT FAILED TO MEET HER BURDEN OF PROVING A CAUSAL RELATIONSHIP BETWEEN HER INJURIES AND HER EMPLOYMENT.**

The Respondents maintain the Court of Appeals properly determined there was substantial evidence to support the Commission's denial of benefits in this case. The

Court correctly found the substantial evidence in the record, including but not limited to, conflicting witness testimony regarding the condition of the concrete floor, supported the Commission's determination that the claimant failed to meet her burden of proving a causal relationship between her injuries and employment. First, there were no witnesses to corroborate the mechanism of the alleged fall. (R. pp. 174-175, 201). Additionally, the claimant's testimony regarding the alleged incident is inconsistent at best. During her deposition, the claimant alleged she returned to the building and "just slipped and went down." (R. p. 121). Throughout the Hearing, however, the claimant testified she slipped and fell when she returned to the building. (R. p. 181). Furthermore, the fact that several employees found the claimant lying on the ground provides no evidence relating the nature of the injury to her employment. (R. pp. 175-181). The medical records from the ER on the date of the accident only mention a twisting sensation and pain in her ankle. No slip or fall is mentioned. (R. p. 26).

The claimant also alleged that the bottoms of her shoes were wet. There is no credible evidence, however, establishing there was any substance on the floor aside from the claimant's own self-serving testimony. On the other hand, Terrance Green, the claimant's supervisor, testified at the Hearing that he and others completed an investigation of the incident after the claimant's fall which confirmed that the area where the claimant fell inside the building was completely dry on the date of the alleged accident. (R. p. 199) (emphasis added). The Commission obviously afforded more weight to the testimony of Mr. Green in determining there was no causal connection between the fall and claimant's employment. In coming to its ultimate determination, the Court appropriately determined the weight of evidence is a matter for the trier of fact. As such, the Respondents respectfully request the Petition for Writ of Certiorari be denied.

A. The Court's decision does not create a high burden on injured workers to prove the existence of a hazard.

The Petitioner contends the Court's decision expands the idiopathic injury cases and imposes a high burden on injured workers to prove a hazard. The Petitioner also contends the underlying decision of the Commission is affected by an error of law because it considered fault in denying compensation and improperly focused on whether the floor was wet rather than on whether the fall was causally-connected to employment. In fact, the Petitioner maintains the condition of the floor was not a material fact in this case.¹ This position is quite peculiar as a review of the claimant's appeal to the Full Commission reveals the claimant maintained the Hearing Commissioner erred in failing to find the floor was wet or slick and erred in failing to find she fell on a wet cement floor. If this fact is not material to the case, why was it appealed in the first place? Finally, the Petitioner contends a reading of the Court's decision imposes a standard of proof required in premises liability and sets out an argument distinguishing the concepts of causation in workers' compensation and tort law, arguing it is not incumbent on the claimant to prove the existence of a hazardous condition.² None of these specific arguments were raised or argued before the Full Commission. As such, they cannot be raised at this time and should be barred.

Regardless, a thorough review of the Court's Decision fails to reveal any evidence to support this position. The burden of proof required of the claimant in this case is no higher than that of any other employee seeking benefits under the Act. The claimant was

¹ The claimant previously argued that the Hearing Commissioner erred in not finding the floor was wet or slick and finding nothing in the record to support the claimant fell on a wet cement floor. (R. 249). Therefore, it must have been material at that point in time. Additionally, the claimant argued in her brief to the Court of Appeals that there were hazards in this case: the wet premises outside combined with the raised threshold. (R. 285).

² The Respondents maintain that any argument or case law pertaining to the premises liability issue was not raised below and not properly preserved for review.

only required to meet her burden of proving her injury arose out of or was causally-connected to her employment. It is well established to be compensable under the Act, a claimant must prove an injury by accident that “arose out of” and “in the course of” her employment with an employer. *See* S.C. Code Ann. § 42-1-160 (Supp. 2007). An injury ‘arises out of employment’ when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.” *Owings v. Anderson County Sheriff’s Department*, 315 S.C. 297, 433 S.E. 2d 869 (1993). The Court properly addressed the “arising out of standard” required by the Act and appropriately found that the substantial evidence in the record supported the Commission’s decision that she did not meet her burden.

The Petitioner also argued the facts of the present case can be distinguished from the line of idiopathic or unexplained fall cases. In so doing, she noted the recent Court of Appeals case *Nicholson v. South Carolina Department of Social Services*, 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013). However, this case did not involve an unexplained fall case as indicated in the Petition. Rather, it involved a level floor fall that was allegedly caused by friction from a carpet at work. The carpet was found to be free of defect. The Court in *Nicholson* found that this incident did not arise out of employment as it was common to the neighborhood and not peculiar to employment. In coming to this decision, the Court relied upon the Supreme Court case of *Bagwell v. Ernest Burwell*, 227 S.C. 444, 88 S.E.2d 611 (1955). *Bagwell* involved an unexplained fall from a standing position onto a concrete floor. The Court required a special condition in *Bagwell* because the fall could not be tied to the employment without otherwise proving a special condition of the employment contributed to the effect of the fall. The Court explained,

“[w]e are not prepared to accept the contention that, in the absence of special condition or circumstances, a level floor in a place of employment is a hazard. Cement floors or other hard floors are as common outside industry as within it. The floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.” *Id.* at 454, 88 S.E.2d at 615.

What the claimant does not discuss is that excluded from compensability under the Workers' Compensation Act is an injury that comes from a hazard to which the workmen would have been equally exposed apart from the employment. *Crosby v. Wal-Mart*, 330 S.C. at 493, 499 S.E.2d at 255. In other words, as the Bagwell Court noted, a claimant's injury is only compensable if the source of the injury was a risk "peculiar to the work and not common to the neighborhood." *Bagwell, supra*. When applied to the facts of the instant case, no special condition of employment existed which contributed to the effect of the fall. There is increased burden in these types of cases, the claimant simply has to establish that the source of the injury was peculiar to her employment. However, in the instant case, the Court never had to address that issue as there was conflicting evidence as to the alleged mechanism of injury. The Court properly found this constituted substantial evidence to support the Commission's denial.

B. The Court properly applied the arising out of standard in coming to its ultimate determination that the claimant did not meet her burden of proving her injury was causally-related to her employment.

The Petitioner further contends the Court's Decision improperly focused on the condition of the floor as opposed to whether the fall was causally-connected to employment and alleges the Court ignored the *obvious* connection between the conditions on the premises which resulted in the claimant's injury. To the contrary, there is no evidence supporting an *obvious* causal connection in this case. There are; however,

multiple questions surrounding the alleged mechanism of injury. In fact, on appeal to the Court of Appeals the claimant improperly attempted for the first time to characterize the fall as the result of a violent twisting motion, submitting medical treatise in support of same. The defendants maintain this argument was not argued to the Full Commission and was not preserved for review. According to the claimant's inconsistent testimony during her deposition and at the Hearing, "she just slipped and went down" and "she slipped and fell." As previously noted, the medical evidence in the record contradicts both of the mechanisms of injury and reveals evidence of an idiopathic fall; the employer witness testimony contradicted that of the claimant; and there were no witnesses to the fall to corroborate the claimant's testimony. Simply put, the claimant provided no credible evidence to support a compensable injury by accident.

The Petitioner further contends the Court improperly based its decision on the conflicting testimony as to whether the concrete floor was wet which is immaterial to the case. Moreover, the Petitioner stresses that she never testified that the floor was wet and that the combination of stepping over a raised threshold; the twisting nature of her injury; and that she had entered the building from outside where her shoes had been in contact with wet ground support a compensable injury by accident. However, the Court did not simply base its decision on the testimony about the condition of the concrete floor. Rather, the Court noted in detail that the claimant presented evidence that the premises around the workplace was wet from a recent rain, and that she had to step over a raised threshold to enter the building. The Court further noted the claimant admitted she did not trip over the raised threshold, but testified there were *wet footprints on the floor* which it found was inconsistent with the employer representative's testimony that the floor was dry. (R. 151, ll. 5-6; 199-200). The "combination of factors" alleged by the claimant,

including but not limited to, stepping over a door threshold, are not peculiar to her employment and do not constitute a compensable injury by accident under the Act.

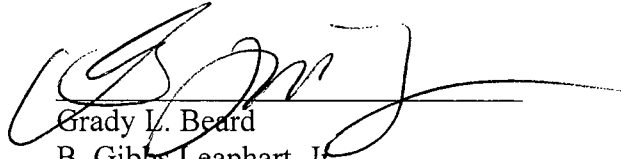
C. The defendants have contested all allegations from the outset of this claim.

The Respondents also note that the Petitioner indicated it was “uncontested that the claimant was entering the building from the parking lot where it had been raining and that she stepped over a raised threshold.” As noted above, because there were no witnesses to the incident in question, the Respondents have contested all allegations from the outset. Furthermore, while the testimony of the claimant and employer representative confirmed it had rained earlier and there were some wet grassy areas away from the concrete pad, there is no evidence to confirm the claimant actually walked through any of those areas or that her shoes were wet.

CONCLUSION

Any employee seeking to establish a compensable workers’ compensation claim must prove the injury “arose out of” and “in the course of” their employment. *See* S.C. Code Ann. § 42-1-160 (Supp. 2007). The Court correctly found the substantial evidence in the record supported the Commission’s determination that the claimant failed to meet her burden of proving she sustained a compensable injury by accident. The defendants also noticed that for the first time during this claim or the appellate process, the Petitioner alleges in the Conclusion of her Petition that she was *hurrying* to perform her job when she fell. There is no evidence to support this contention. For these reasons, the Respondent submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Grady L. Beard", written over a horizontal line.

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July 17, 2014

July 17, 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Patricia Johnson v. Staffmark
Appellate Case No.: 2012-213494
WCC File No.: 1118193
Date of Accident: 12/21/11
Claim No.: 20110010156939
Our File No.: 6179/8037

Dear Mr. Shearouse:

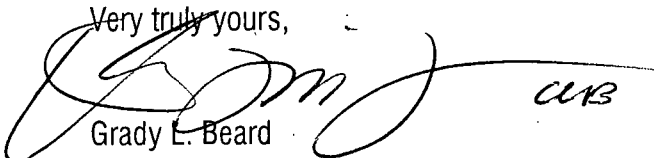
This law firm represents the Respondents, Staffmark and New Hampshire Insurance Company, in the above-referenced matter.

Enclosed for filing are an original and 10 copies of Respondents' Return to Petition for Writ of Certiorari, regarding the above-referenced matter. Please file the original and six copies and return the remaining clocked-in copies to our courier.

By copy of this letter and aforementioned document to Paula Howker Amick, Esquire and Patrick S. Scarlett, Esquire, attorneys for the Appellant, we are serving them with a copy of the Respondents' Return to Petition for Writ of Certiorari, as evidenced by the enclosed Proof of Service.

With kindest personal regards, I remain

Very truly yours,


Grady L. Beard

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GLB:jlj

Enclosures

cc: ✓ Ms. Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals
(w/enclosure)(via hand delivery)
Paula Howker Amick, Esquire and Patrick S. Scarlett, Esquire (w/enclosure)
Mr. Jerry Peebles (w/enclosure)(via e-mail only)
Ms. Terri Ousley (w/enclosure)(via e-mail only)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No.: 1118193
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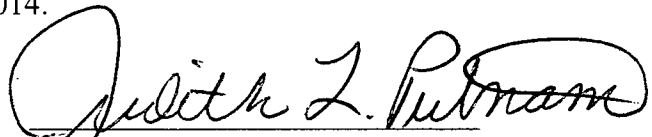
Patricia Johnson, Employee Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Return to Petition for Writ of Certiorari on Patricia Johnson, by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record, Paula Howker Amick, Esquire and Patrick S. Scarlett, Esquire, George Sink, P.A., 1440 Broad River Road, Post Office Box 21567, Columbia SC 29221, on July 17, 2014.



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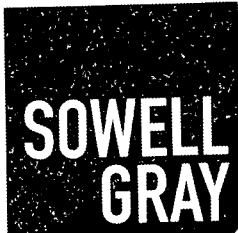
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SC Court of Appeals

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Business.

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