THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2012-212389
Opinion No. 27479 (Filed January 14, 2015)

Judy Marie Barnes, Employee, Petitioner,

v.

Charter 1 Realty, Employer, and
Technology Insurance Co. AmTrust South, Carrier, Respondents.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondents South Carolina Department of Social Services and State Accident Fund respectfully petition this Court for a rehearing in the above-entitled matter. This Court issued its Opinion on January 14, 2015, reversing the decision of the Court of Appeals, and holding that, because "Barnes clearly established that she was performing her job when she sustained an accidental injury; . . . her injuries arose out of her employment as a matter of law." Respondents respectfully submit that in so holding, the Court overlooked or misapprehended the applicable standard of review; overlooked the burden of proof; overlooked or misapprehended the definition of idiopathic fall; overlooked or misapprehended existing judicial precedent interpreting the "arising out of" causal requirement for compensability; and also overlooked or misapprehended legislative intent of the South Carolina Workers' Compensation Act. Moreover, in its January 14, 2015 Opinion, the Court overlooked the

overwhelming competent evidence in the records that supports the findings and holdings of the lower proceedings.

ARGUMENTS

I. The Court Overlooked or Misapprehended the Applicable Standard of Review.

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). Moreover, the "question of whether an injury arises out of employment is largely a question of fact for the Commission." Ervin v. Richland Mem'l Hosp., 386 S.C. 245, 249, 687 S.E.2d 337, 339 (Ct. App. 2009) (citing Broughton v. South of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999)).

In finding Petitioner's injury as compensable as a matter of law, the Court disregarded not only the reliable, competent, and substantial evidence, but the overwhelming competent evidence in the record supporting the Commission's factual determination that Petitioner's fall was idiopathic. (Findings of Fact ##8-9 of Decision and Order, App., pp. 16-17). Moreover, the Court disregarded the Commission's factual determination that Petitioner failed to "prove by a preponderance of the evidence that her injuries were caused by an accident 'arising out of' her employment and, that her employment 'caused' her fall. . . ." (Finding of Fact #6 of Decision and Order, App. p. 16).

II. The Court Overlooked the Appropriate Burden of Proof.

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). As stated above, the Court disregarded

the Commission's factual determination that Petitioner failed to "prove by a preponderance of the evidence that her injuries were caused by an accident 'arising out of' her employment and, that her employment 'caused' her fall. . . ." (Finding of Fact #6 of Decision and Order, App. p. 16).

As a result of the Court's Opinion of January 14, 2015, the Court, in effect, eliminates a claimant's burden of proof to causally relate her injuries to her employment. In holding that a claimant meets her burden of proof merely by offering some evidence "that she was performing her job when she sustained an accidental injury," the Court inexplicably shifts the burden to the employer to prove that a claimant's injuries *did not* "arise out of" a claimant's employment. Moreover, in so holding, the Court acted as a finder of fact disregarding the Commission's finding that the overwhelming evidence in the record supporting the Commission's factual determination that Petitioner's injuries did not, in fact, arise out of her employment.

III. The Court overlooked or misapprehended the definition of idiopathic fall.

The substantial evidence in the record establishes the Petitioner's fall could have happened anywhere. The record is also replete with evidence supporting that Petitioner's fall was idiopathic in nature. As acknowledged in the Court's Opinion of January 14, 2015, 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). However, the Court's conclusion that the Commission's holding is a "departure from settled jurisprudence regarding idiopathic falls" overlooks or misapprehends the settled jurisprudence and the definition of idiopathic.

According to its common definition, "idiopathic" means: "1. arising spontaneously or from an obscure or unknown cause: 2. peculiar to the individual." MERRIAM-WEBSTER

DICTIONARY. The overwhelming evidence supports the conclusion that Petitioner's fall arose from an obscure or unknown cause. This is also supported by the Court's acknowledgment that Petitioner could not identify the cause of her fall. Although the established facts and evidence with respect to Petitioner's fall clearly fall within the common definition of idiopathic, the Court's Opinion would require an employer to prove that a claimant's fall "arises from an internal breakdown personal to the employee. . . ."

The second common definition of idiopathic means "peculiar to the individual." Id. The record is replete with competent evidence that Petitioner's fall was not caused by any circumstances or conditions of her employment, but, rather, from causation perspective, Petitioner's fall was peculiar to the Petitioner. Although, in its Opinion, the Court dismissed "clumsiness" out of hand as possible an exception to workers' compensation, when considered in light of the substantial evidence in the present case, Petitioner's history of health problems, and her propensity to trip, stumble, lurch or even fall without tripping over anything, is sufficient to establish by a preponderance of the evidence that Petitioner's fall was the result of a "pre-existing physical condition" as discussed in Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998), which was certainly "peculiar to the individual"—if not exactly an internal breakdown. The record establishes that Petitioner had myriad personal health problems throughout her employment. She had fallen at home on at least one occasion (App., p.60, lines 21-23); she had two occasions of losing her balance and falling (App., p.60, lines 9-14); she has had occasional swelling in her legs and feet since she was thirty years old (App., 60, lines 3-8); she had told she needed to pick up her feet to avoid tripping and falling (App., p.68, line 15); and on the date of injury made the personal decision to wear ill-fitting Crocs that further affected her balance. Additionally, there is a factual dispute as Petitioner's claim that she was hurrying, in spite of being under "no time constraints" (App., p.65, lines 18-20); when she was not busy

(App., p.66, line 2); and 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)

In its Opinion of January14, 2015, the Court attempts to distinguish the facts in the matter at bar from the ruling in Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998). In doing so, the Court stretched the nearly indistinguishable difference into a canyon of divergence. 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 Petitioner could not explain her fall nor that her employment contributed to her fall or the effect on her. The Court's attempt to distinguish Crosby v. Wal-Mart from the case at bar leads to an inapposite result. In Crosby v. Wal-Mart, there was no medical evidence that the claimant suffered from an internal breakdown, and the claimant testified, "I was just walking on the floor and my feet went from under me." The Court relied upon the testimony of a safety leader, who did not witness the fall, stating that the claimant told her, "My leg just gave out." By requiring an employer to prove that an injured claimant's otherwise unexplained fall was the result of an internal breakdown, the Court has re-written South Carolina law well outside of "settled jurisprudence."

IV. The Court misapprehended the "arising out of" employment requirement under S.C. Code Ann. §42-1-160.

In the matter at bar, the Court's Opinion of January 14, 2015, specifically states, "[Petitioner] was performing a work task when she tripped and fell. Those facts alone clearly establish a causal connection between her employment and the injuries she sustained." The

Court's holding that Petitioner's unexplained fall "arose out of" her employment focuses solely on the fact that Petitioner was at work and walking down a hallway to perform her job duties when her fall occurred. 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. However, 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). Rather, in the case at bar the Petitioner tripping over her own feet constitutes an intervening cause.

Moreover, the Court's decision re-writes previously settled judicial precedent interpreting the "arising out of" requirement. *See* Osteen v. Greenville Cnty. Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998) (The two parts of the phrase "arising out of and in the course of employment" are not synonymous); Lorick v. S.C. Elec. & Gas, 245 S.C. 513, 141 S.E.2d 662 (1965) (The mere fact that an injury occurred in the course of employment is not a basis for an award); Bright v. Orr-Lyons Mills, 285 S.C. 58, 328 S.E.2d 68 (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"); 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); Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) ("To say that an injury arises out of the employment in every case where an employee was required to be at the place where the injury occurred would effectively eliminate an essential requirement of the statute"); Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) ("[M]erely being on an employer's premises, without more, does not automatically confer compensability for an injury").

V. The Court has Overlooked and Misapprehended the Legislative Purpose and Intent of the South Carolina Workers' Compensation Act.

The three most common lines of interpretation of the phrase "arising out of" are: (1) the increased-risk doctrine, (2) the positional risk doctrine, and (3) the actual-risk doctrine. Larson §3.01. Under the "increased-risk doctrine," an injury arises out of employment when the employment increases the risk of an injury. Id. The "positional-risk doctrine" provides that "[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured." Larson §3.05. The "actual-risk doctrine" ignores whether the risk is common to the public and focuses on whether it is a risk of the particular employment. Larson § 3.04. Under this doctrine, an injury arises out of employment as long as the employment subjected the claimant to the actual risk that caused the injury. Id.

South Carolina has never formally adopted, or rejected, any of these doctrines; however, based on this Court's interpretation of the language in Douglas, it is apparent that the Court is embracing the "positional-risk doctrine." Respondents contend that this Court misapprehended the language in Douglas and has erroneously accepted the "positional-risk doctrine."

First, the "but for" test employed in the positional-risk analysis, and by this Court, ignores the "arising out of" requirement since it focuses only on time and location, but completely ignores whether the injury was actually caused by the employment. If merely being at work was sufficient to justify compensation, the legislature would not have required the "arising out of" test. Additionally, the "positional-risk doctrine" improperly treats the employment like a personal insurance policy since nearly every injury that occurs at work and that is not personal to an employee will be deemed to "arise out of" the employment. Under the "positional-risk doctrine" nearly every injury that occurs while an employee is at work performing his or duty will be compensable; the potential results are illogical.

Finally, workers' compensation laws increases the incentive for employers to prevent industrial accidents since an employee's negligence and fault were no longer material. Employers have the ability to prevent employee negligence through training, supervision, and safety rules; thus, there no issue assigning liability to employers when an employee's injury is due to his own negligence. However, the "positional-risk doctrine" inefficiently allocates liability since it assigns liability to employers for situations in which the employer has no control.

While the Court appears to embrace the "positional-risk doctrine" in its interpretation of the "arising out of" language in Douglas, Respondents respectfully assert that the Court has misapprehended or overlooked the fact that the language in Douglas is more consistent with the "increased-risk doctrine." The "increased-risk doctrine" is the prevalent test in the United States. Larson §3.03. Under the increased-risk doctrine, benefits are awarded "where there has been evidence that the conditions or nature of the employment increased the risk of injury beyond which the general public was exposed."

Further, under the "increased-risk doctrine," an injury is compensable even if it resulted from a risk "common to the neighborhood" as long as the quantity of exposure to the risk exceeds the quantity faced by the general public. *See* Larsons 3.03. The Court's examples in its Opinion of a chef cutting himself with a knife or a carpenter falling off of a ladder would clearly be compensable under the "increased-risk doctrine" since a chef uses a knife and a carpenter uses a ladder more than the general public.

CONCLUSION

In conclusion, the Court's decision misapprehended the applicable standard of review; overlooked the burden of proof; overlooked or misapprehended the definition of idiopathic fall; overlooked or misapprehended existing judicial precedent interpreting the "arising out of" causal requirement for compensability; and also overlooked or misapprehended legislative intent of the South Carolina Workers' Compensation Act. The Commission's decision should be affirmed as 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. Therefore, Respondents request the Court grant this Petition, rehear this matter, withdraw its previous decision, and issue a new opinion affirming the Court of Appeals' decision.

Natalie Byars Fisher

Natalie Byars Fisher
Fisher Law Firm, LLC
Post Office Box 2484
Mt. Pleasant, South Carolina 29465
(843) 352-7334
Attorney for Respondents

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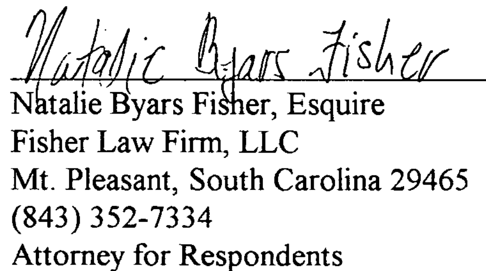
PROOF OF SERVICE

The undersigned hereby certifies that on the 29th day of January, 2015, she served a copy of the Petition for Rehearing by *Hand Delivery* addressed to Michael J. Jordan, Esquire, and J. Kevin Holmes, Esquire, The Steinberg Law Firm, P.O. Box 9, Charleston, SC 29402-0009



Natalie Byars Fisher, Esquire
Fisher Law Firm, LLC
Mt. Pleasant, South Carolina 29465
(843) 352-7334
Attorney for Respondents

January 29, 2015

FISHER LAW FIRM, LLC

NATALIE BYARS FISHER

POST OFFICE BOX 2484
MT. PLEASANT, SC 29465

Phone: (843) 352-7334
Email: nbyarsfisher@comcast.net

January 29, 2015

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JAN 29 2015

S.C. Supreme Court

Via Hand Delivery
Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Judy Marie Barnes v. Charter 1 Realty
WCC File No.: 0810407
Appellate Case File Number: 2012-212389

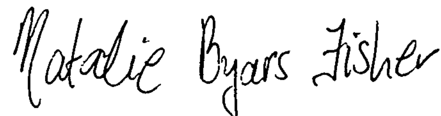
Dear Mr. Shearouse:

Please find enclosed for filing an original and six (6) copies of the Petition for Rehearing, and the Proof of Service, together with a Twenty-Five Dollar ($25.00) filing fee. If you should have any questions, please do not hesitate to contact me.

By copy of this letter to Michael J. Jordan, Esq., attorney for the Petitioner, I am serving upon Petitioner the Petition for Rehearing in the above-referenced matter with Proof of Service. I certify that the Petitioner has received a copy of the Petition for Rehearing by copy of this correspondence.

With kindest regards, I remain

Very truly yours,



Natalie Byars Fisher

NBF/
Enclosure

Cc: Michael J. Jordan, Esq. (w/ Enclosures)