yTHE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1204039

William Lee Turner, Employee, ... Appellant,

v.

SAIIA Construction, Employer, and
Old Republic General Insurance Corporation
c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE[1]

Appellant William Lee Turner ("Claimant") filed a Form 50 alleging that, on April 19, 2012, he suffered a compensable injury to his back head and thoracic spine. Claimant requested temporary total disability benefits from that date until January 2, 2013, and sought ongoing medical care. (Cl. Form 50, dated Nov. 25, 2013). His employer, SAIIA Construction and their insurer, Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc., Respondents herein, filed a Form 51 denying that Claimant's alleged injuries were the result of an accident that arose out of and in the course and scope of Claimant's employment. In addition, Respondents asserted that any ongoing need for medical care was not causally related to Claimant's alleged April 19, 2012 accident. (Resp. Form 51, dated Dec. 5, 2103).

The parties were heard by Single Commissioner Susan S. Barden on February 4, 2014, who subsequently filed her Decision and Order on April 14, 2014. (Decision and Order of the Single Commissioner, filed April 14, 2014 ("Single Commissioner Decision")). Among other things, the Single Commissioner found that "Claimant failed to carry his burden of proving that he sustained a compensable injury by accident within

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[1] In his Statement of the Case, Claimant presents argumentative and contested matters in violation of Rule 208(b)(1)(C), SCACR, which instructs that the statement of the case "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters ..." For example, Claimant misconstrues the Single Commissioner's Conclusion of Law with respect to the applicability of Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941) (App. Br. p. 2). In addition, Claimant misleadingly asserts that it is admitted that his injury both arose out of and in the course of his employment. (App. Br. p. 3). The inquiry in this case centers precisely on the questions of whether his injuries were the result of an accident, as that term is used in the Act, and whether they arose out of his employment. Claimant's contentions on both points have been consistently denied by Respondents. This Court should disregard such argumentative and contested statements in Claimant's Statement of the Case.

the course and scope of his employment with the [Respondents] on April 19, 2012." (Single Commissioner Decision, pp. 9, 15). The Single Commissioner also found that Claimant's alleged accident was unwitnessed and that he did not remember anything that happened on April 19, 2012 or the day after, (id., pp. 10-13), and that co-workers found Claimant laying on his back next to his truck. (Id., p. 10). The Single Commissioner also held that Claimant was impeached at least twice: 1) at a 2012 deposition, Claimant testified that he had been told by witnesses that he had been climbing up in the truck, that they had seen him up on the truck, and then they had seen him lying on the ground, (Transcript of 2012 Deposition of William Lee Turner ("Cl. 2012 Dep.") 26, lines 18-24) (Id. 33, lines 7 – 34, line 3), whereas the referenced co-workers denied ever seeing Claimant on the truck; and 2) at the hearing, he testified that his fall off the horse in [2013] "didn't hurt or anything like that," which statement was contradicted by medical records showing he sought medical treatment for a fall from a horse that caused "pain in the same T3/4 area and [he] has muscle spasm," (Transcript of Hearing before Single Commissioner Susan S. Barden, held Aug. 20, 2012 ("Hr'g Tr.") 53, line 24 – 55, line 24) (Def. APA pp. 12-14, 16, 18). (Transcript of Deposition of Paul Barnette ("Barnette Dep.") 28, lines 9-11) (Transcript of Deposition of David Bolden ("Bolden Dep." 4, lines 22-24). The Single Commissioner concluded that Claimant had failed to meet his burden of proving a compensable injury and that, as a result, he was not entitled to temporary total disability benefits or medical treatment associated with his alleged accident. (Single Commissioner Decision, pp. 16-19).

Claimant filed a timely Form 30 raising 11 separate points of appeal. (Cl. Form 30 with Attachment, dated April 28, 2014). An Appellate Panel of the Full Commission

heard oral argument on August 11, 2014 and issued its Decision on October 10, 2014, affirming the Single Commissioner Decision in its entirety. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Oct. 10, 2014 ("Commission Decision")). In addition to reciting the Findings of Fact and Conclusions of Law reached by the Single Commissioner, the Commission Decision set forth its standard of review (Conclusion of Law Nos. 3 and 4), responded to Claimant's reliance on prior case law (Conclusion of Law Nos. 9 and 10), and affirmed the Decision and Order of the Single Commissioner in its entirety (Conclusion of Law No. 16). (Commission Decision, pp. 15-18).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Claimant began working for SAIIA Construction in 2007, at age 21, as a heavy equipment operator, which involved "bulldozers, trackhoes and dump trucks and backhoes." (Hr'g Tr. 20, line 18 – 21, line 6) (Id. 50, lines 12-25) (Cl. 2012 Dep. 10, lines 9-11).[2] Claimant testified that he is between 5'6" and 5'7" in height. (Hr'g Tr. 46, lines 18-22).

On March 27, 2012, a few weeks before his alleged work-place injury, Claimant sought medical care for his lower back, which he had injured lifting logs while working on a house he was building. (Cl. 2012 Dep. 13, lines 16-22). Dr. Meha Minhas prescribed Ultram 50MG two times daily and Flexeril, 5MG two times daily. (Def. APA pp. 25-26).

[2] Claimant's Brief asserts that "he drove dump trucks exclusively," (App. Br. p. 4), which is not supported by the testimony in this case and is plainly incorrect.

On April 16, 2012, three days before his alleged work-place injury, Claimant saw Dr. Minhas again with complaints of both lower and upper back pain. Dr. Minhas changed Claimant's medicine to Ultram ER 100MG two times daily and Neurontin 300MG three times daily. (Def. APA pp. 27-29).

On April 17, 2012, two days before his alleged work-place injury, Claimant was seen at the Palmetto Health Baptist Emergency Department with complaints of vomiting and diarrhea and suspicion of dehydration. (Def. APA pp. 30-32) (Hr'g Tr. 27, line 18 – 28, line 2) (Cl. 2012 Dep. 15, lines 5-13).

Claimant testified repeatedly that he had no memory of the day he fell, April 19, 2012. (Hr'g Tr. 34, lines 10 – 12) (Id. 37, lines 14-16) (Id. 44, lines 2-12). It is undisputed that no one saw Claimant fall. (Cl. 2012 Dep. 33, line 3 – 34, line 11) (Barnette Dep. 28, lines 9-11) (Bolden Dep. 4, lines 22-24) (Transcript of Deposition of James Speegle ("Speegle Dep.") 5, lines 21-22) (Id. 11, lines 13-15). Although Claimant testified under oath at a deposition that his co-workers saw him "up in the truck" before he fell, (Cl. 2012 Dep. 26, lines 18-24) (Id. 33, line 7 – 34, line 3), both Paul Barnette and David Bolden testified that they never saw Claimant in or on the truck prior to his fall. (Barnette Dep. 8, line 15 – 10, line 8) (Bolden Dep. 13, line 2 – 14, line 7).

Mr. Barnette testified that, at the end of the work day, Claimant had washed his truck, which typically was done with a high pressure washer. (Barnette Dep. 14 lines 12-25). Claimant then went into what they call "the hut" to do some paperwork and retrieve his lunch backpack and Mr. Barnette's 12-pack cooler. (Id. 12, lines 9-12). Mr. Bolden testified that he saw Claimant walking from the trailer toward his truck, carrying the backpack and the cooler. Claimant acknowledged that, by the end of the day, his

backpack "more than likely" would be emptier and lighter than it would have been at the beginning of the day, because he would have eaten and drunk the food and water or Gatorade he brought with him to work. (Hr'g Tr. 47, line 4 – 48, line 17).

Mr. Bolden saw Claimant put items in the truck. He specifically testified, "I never saw [Claimant] on the steps of the truck," but only "standing on the ground, placing [the cooler] in the truck. I did not see him on the steps." (Bolden Dep. 13, line 2 – 14, line 7) (*see also* Def. APA p. 1).

> Q: If that cooler had been on the seat when he fell, you didn't see him move it from the floorboard to the seat?
>
> A: No, sir.

(Bolden Dep. 14, lines 11-13).

Mr. Barnette finished washing his truck and walked around to the tailgate and saw Claimant on the ground, on his back with arms outstretched and his palms up. Mr. Barnette said Claimant appeared to want to vomit. (Id. 21, line 4 – 23, line 2) (*see also* (Speegle Dep. 12, lines 2-6). Mr. Bolden confirmed that Claimant was lying on the ground. (Bolden Dep. 4, line 22 – 5, line 7). Although Mr. Barnette thought the door to Claimant's truck was open, (Barnette Dep. 28, lines 2-6), Mr. Bolden was not sure. (Bolden Dep. 5, lines 10-17). Claimant had an abrasion on the back of his head that did not require stitches. (Cl. APA pp. 20-21) (Cl. 2012 Dep. 42, lines 11-15). Although Mr. Barnette could not say for certain how long Claimant had been lying on the ground before he saw him, he estimated it would not have been more than three or four minutes. (Barnette Dep. 24, lines 21-25). Mr. Bolden testified that he did not go over immediately to where Claimant was lying on the ground. (Bolden Dep. 6, lines 14-18).

Mr. Barnette testified that, although the truck Claimant had been driving had been washed, the truck step would not be soapy because the cleaning was done by a high pressure hose, and the steps were perforated with "little things sticking up like that ... for traction." (Barnette Dep. 14 lines 12-25). Mr. Barnette engaged in what he termed "speculation," using that term no fewer than eight times in his explanation of what he believed might have happened, suggesting that Claimant may have been on the top step when he fell backwards, based on the amount of injury on the back of Claimant's head and the way he fell on the ground. (Id. 15, line 17 – 16, line 23) (Id. 25, lines 12-15). Mr. Barnette testified that he did not know of anyone falling off the steps of the trucks. (Id. 17, line 24 – 18, line 2) (*see also* Bolden Dep. 10, line 12 – 11, line 3 (testifying that he never fell from the steps of the truck)).

Although Mr. Barnette indicated that he believed Claimant would "freely discuss if he was having a problem," (Barnette Dep. 5, lines 16-17), when asked about Claimant's two medical visits prior to his fall, Mr. Barnette only could say, "I knew he had went to the emergency room and got some medications or something like that. I don't know all the details. You know, your records show that. But he worked a few days and he was off checking with the doctors in the two or three weeks before that." (Id. 6, lines 11-18). In fact, the only lower back problem Mr. Barnette was aware of was that Claimant had "discussed he had a back problem when he was a teenager, younger, a teenager, you know, and I knew that." (Id., 6, lines 19-23).[3]

[3] Thus, Claimant's assertion that Mr. Barnette "knew about Mr. Turner's past back problems," (App. Br. p. 6), is misleading at best. There is no evidence that Mr. Barnette knew that Claimant had been to the doctor twice recently complaining of low back pain, or that he had been prescribed Ultram (50MG) and Flexeril (5MG) on March 27, 2012, (Def. APA pp. 25-26), and/or that he had been prescribed Ultram ER (100MG) and Neurontin (300MG) on April 16, 2012. (Def. APA pp. 27-28).

Mr. Barnette testified that Claimant was only 5'3" or 5'4" in height, (Barnette Dep. 17, lines 22-23),[4] whereas in reality, Claimant is 3"- 4" taller than that. (Hr'g Tr. 46, lines 18-22). Mr. Barnette also admitted that his memory of what transpired on April 19, 2012 was not as clear at the time of his deposition as it was when he wrote a statement for his supervisor a few days after Claimant's injury. (Barnette Dep. 26, line 4 – 27, line 23 (first testifying that the fall could not have been as late as 4:15 or 4:30, but then conceding that that might have been the case based on the statement he wrote a few days after April 19, 2012)).

Mr. James Speegle, Claimant's supervisor at the time of the injury, testified that just days before Claimant fell, "[h]e was complaining he wasn't feeling well, I want to say like on a Monday and the Tuesday of that – I think it was Thursday that this accident took place." He said Claimant said "just didn't feel well, stomach messed up, couldn't eat. He had ... said he was wanting to drink all the time. I had recommended to him like on Tuesday or Monday or one of those days, I can't remember which one exactly, that, you know, he's probably dehydrated. He needed to drink plenty of fluids. He just ... looked like he was dry-mouthed and just seemed like to me signs of dehydration. I told him that I thought he was dehydrating .... He had had little sicknesses here and there prior to this incident, but the week of the incident is what I'm referring to, is that he was not feeling well, sick." (Speegle Dep. 6, line 17 – 7, line 11). Mr. Speegle said Claimant seemed to be okay and that he was unaware of any particular signs that anything was wrong with Claimant on the day he fell. (Id., 8, lines 3-10). He described Claimant as " a very agile individual." (Id. 8, line 17).

[4] It is perplexing that Claimant asserts he is "5'3" to 5'4" tall" in his Brief, (App. Br. p. 8), in light of the fact that, at the hearing before the Single Commissioner, he testified that he is around 5'6½" tall. (Hr'g Tr. 46, lines 18-22).

After Claimant fell, he was taken to Palmetto Health Richland, where he was provided emergency treatment and admitted. He was diagnosed with a "small subdural hemorrhage," "intraparenchymal contusion left lobe," and "endplate compression deformity of T3 and T4." (Cl. APA pp. 1-6).[5] Claimant was treated and released, not to a rehabilitation facility, but to home, given his rapid improvement. (Cl. APA pp. 7-9, 22-23). His discharge diagnosis included "small subdural hemorrhage, traumatic," and "T3 to T4 endplate fractures." Medical notes indicate that the April 19 CT of Claimant's head "showed small hemorrhagic contusion left temporal lobe anteriorly in the middle cranial fossa with a tiny amount of acute appearing extra axial blood in this location .... Mild to moderate size subdural hematoma left occipital region. No mass effect. There is no midline shift or any herniation. No skull fracture." A CT of his thoracic region showed "minimal superior endplate compression deformities of T3 and T4 ..." (Cl. APA p. 23).

At a follow-up appointment, Dr. James Selph noted that claimant "has a history of back pain and in fact was taking Ultram prior to his fall." (Cl. APA p. 25). All of Claimant's remaining follow-up treatment was with Dr. Peterson, his family doctor. (Cl. 2012 Dep. 39, lines 14-25) (Def. APA pp. 2-10). Included in the exhibits Claimant filed with the Commission is a statement by Dr. Peterson indicating that Claimant's head injuries were caused by the fall on April 19, 2012, and that the fall caused Claimant to have seizures, not the other way around. (Cl. APA p. 37). The first page of the questionnaire presented by Claimant's counsel to Dr. Peterson (omitted from Claimant's exhibits filed with the Commission) stated, as though it were an established fact, that Claimant "fell from the cab of his employer's truck on April 19, 2012." (Def. APA p. 6).

[5] Although the medical notes from his initial care indicate variously that Claimant fell from a ladder or from on top of a truck, Claimant testified that those assumptions were inaccurate. (Hr'g Tr. 44, line 17 – 45, line 5).

The letter does not request and the questionnaire does not express any verification by Dr. Peterson that his opinions are to a reasonable degree of medical certainty.

During the time Claimant was out of work as a result of his injuries, he engaged in farming activities, including bailing hay, driving his tractor, and "bush hogging." He also worked on a house he was building with his father, went hunting, and drove a four-wheeler. (Hr'g Tr. 60, line 23 – 64, line 12) (Transcript of 2014 Deposition of William Lee Turner ("Cl. 2014 Dep.") 33, line 10 – 34, line 19).

On December 27, 2012, Dr. Peterson released Claimant to go back to work without any restrictions. On January 2, 2013, Claimant resumed his same position with SAIIA Construction, working the same number hours and at the same rate of pay. (Hr'g Tr. 52, line 18 – 53, line 18) (Cl. 2014 Dep. 13, line 25 – 14, line 20). Claimant testified that he is fully capable of performing his job as a heavy equipment operator and that he has missed no time from work due to the injuries he received in his April 19, 2012 fall. (Hr'g Tr. 49, line 19 – 52, line 17). His current supervisor, Mr. Robert Bennett, confirmed. (Hr'g Tr. 71, line 23 – 72, line 19).

On September 18, 2013, and again on October 17, 2013, Claimant sought medical treatment from Dr. Gisele Girault for a fall from a horse. Her medical notes indicate Claimant "was doing well until he fell off a horse a few weeks ago and he has pain in the same T3-4 area and has severe muscle spasm." (Def. APA pp. 11-19). Although Dr. Girault recommended injections and a back brace, Claimant "declined the injections" and "didn't accept the back brace." (Hr'g Tr. 56, lines 7 – 57, line 3). His visit to Dr. Girault in October 2013 was the last time he sought any treatment for his alleged work-related injuries. (Id. 65, lines 9-18) (Cl. 2014 Dep. 23, line 1 – 25, line 1).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. Packer v. Corbett Canning Co., 238 S.C. 431, 435, 120 S.E.2d 398, 400 (1961). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519

S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

"It is axiomatic that in a Workmen's Compensation case the [Commission] is the fact-finding body, and that in their review of a factual finding by the Commission the courts may not weigh the evidence, their function being limited to determination of whether or not such finding is supported by [substantial] evidence." Walker v. City of Columbia, 247 S.C. 241, 247, 146 S.E.2d 856, 859 (1966). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted").

Although the Act must be construed liberally in favor of coverage, it "must not be construed so as to work a hardship on the employer and/or the carrier by the interpolation of words or conditions not found in the act .... The act must be construed in justice to both parties and must not impose a burden on either." Hill v. Skinner, 195 S.C. 330, 340,

11 S.E.2d 386, 390 (1940). Furthermore, although "compensation *law* will be construed liberally in order to effect its beneficent purpose .... the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are." Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 831-32 (1960). In other words, "our rule which is applicable to the finding of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts." 236 S.C. at 446, 114 S.E.2d at 832.

ARGUMENTS

I. Claimant failed to appeal and/or preserve certain Commission findings and holdings, which are now binding on him.

A. Claimant failed to appeal certain Findings of Fact and Conclusions of Law by the Single Commissioner which are now the law of the case.

Although Claimant prefaced his Form 30 appeal to the Full Commission with a broad, sweeping request for review of the entire Single Commissioner Decision, he failed to challenge certain Findings of Fact and Conclusions of Law, which are now the law of the case. *E.g.*, Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (unappealed findings by the Single Commissioner are and become the law of the case), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). Section 42-17-60 requires that the "Notice of appeal must state the grounds of the appeal or the alleged errors of law." S.C. Code Ann. § 42-17-60. An issue not raised in the application for review to the Full Commission is not preserved for further appellate review. Clark v.

Aiken County, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005). "General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue." Id.; *cf.* White v. Medical Univ. of South Carolina, 355 S.C. 560, 564-65, 586 S.E.2d 157, 160 (Ct. App. 2003) (general challenge to the only ruling in the case "was sufficient to direct the circuit court to the error complained of ..."). Here, the attempt at a catchall appeal of an entire order with multiple findings and conclusions is particularly objectionable where Claimant raised 11 detailed and specifically-targeted appeal points.

In particular, Claimant did not appeal Conclusion of Law Nos. 6 & 11, which held that, "Claimant failed to carry his burden of proving that he sustained a compensable injury by accident within the course and scope of his employment with the Defendants," No. 7, that Claimant is not entitled to any temporary total disability benefits for the period of time during which the Claimant's incapacity for work was total ...", No. 8, that "Defendants are not responsible for the provision of treatment nor the payment of medical bills arising out of the Claimant's alleged work-related accident," or Nos. 9 & 10 that Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941) does not render his claim compensable and is distinguishable from this case. (Single Commissioner Decision, pp. 17-18). Claimant also failed to challenge Finding of Fact No. 22, which held that "Claimant was impeached at the hearing testimony with his initial deposition testimony that he had sustained no accidents since the date of the alleged work accident." (Single Commissioner Decision, p. 14). By failing to appeal these findings and conclusions, they are the law of the case and cannot be disputed now. *E.g.*, Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). This Court should hold that Claimant's failure to appeal Conclusion of Law Nos. 6, 7, 8, 9, 10

& 11, and Finding of Fact No. 22 means that they are the law of this case and cannot be challenged on appeal.

An appellate court may affirm on any ground appearing in the record. Wright v. Bi-Lo, Inc., 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same). This Court can and should dispose of this appeal by ruling that Claimant failed to challenge the Single Commissioner's ruling that Claimant failed to meet his burden of proving he suffered a compensable injury and, as a result, that decision is the law of this case, and that Defendants are not responsible for paying him compensation benefits or for his medical care. Such a ruling would completely resolve this appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (an "appellate court need not address remaining issues when disposition of prior issue is dispositive").

B. Issues not addressed in Claimant's Brief are abandoned.

In the event this Court considers other issues in this appeal, issues raised by Claimant in his Form 30 and/or Notice of Appeal but not addressed in his Brief are deemed abandoned on appeal. Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief); Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E2d 449 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief"). These include, among other issues, whether the Single Commissioner or the Commission erred by not considering

itself bound by the Circuit Court's unpublished decision in Windham v. Sears Roebuck & Co., Docket No. 2007-CP-21-1391, or "erred as a matter of law by failing to apply the concept of circumstantial evidence to the facts of this case," or "by applying in fact the wrong burden of proof." (Cl. Form 30, pp. 1, 4). These also include whether the "Commission is duty bound to apply the law as dictated by a higher Court until it is changed," and "by failing to make detailed Conclusions of Law on the issues presented to it for review." (Cl. Notice of Appeal, pp. 3, 7). In his reply brief, Claimant cannot address these and other issues not addressed in his Brief as they are deemed abandoned. Emerson Elec., 395 S.C. at 489 n.6, 719 S.E.2d at 654 n.6; Simmons, 402 S.C. at 173 n.2, 739 S.E.2d at 634 n.2.

In addition, it appears that Claimant does not dispute the actual findings in the Commission's Findings of Fact No. 4 (finding that Claimant "alleges that he injured his head, brain, and thoracic spine in a work-related accident on April 19, 2012"), No. 5 (finding that "Claimant is 28 years of age"), No. 6 (finding that "Claimant is a high school graduate"), No. 9 (finding that "claimant admits that he remembers nothing about (a) the day prior to the date of the alleged accident, (b) the day of the alleged accident, including '*absolutely no memory of it or what might have precipitated the fall*,' or (c) the day after the date of the alleged accident"), No. 10 (finding that "the alleged accident was unwitnessed"), and No. 11 (finding that "no witness claims to have seen the Claimant's alleged accident"), as he recites most of these same facts in his Brief. Instead, Claimant appears to take the position that the above-referenced findings conclusively and viewed in isolation from the other evidence in this case, establish conclusively that he is entitled to the presumption that may apply in certain unwitnessed death cases. (App. Br. pp. 17-

18). This is not the law in South Carolina, and his conclusory argument on this basis should be rejected.

II. Claimant is not entitled to a presumption that he suffered an accident that arose out of and in the course of his employment.

A. The so-called unexplained death presumption does not and should not apply to unexplained fall cases.

Whether there is any causal connection between employment and an injury is a question of fact for the Commission. Sharpe, 336 S.C. at 159, 519 S.E.2d at 105; Jennings v. Chambers Dev. Co., 335 S.C. 249, 258-59, 516 S.E.2d 453, 458 (Ct. App. 1999). Section 42-1-160 defines "injury" to "mean only injury by accident arising out of and in the course of employment ..." S.C. Code Ann. § 42-1-160; Doe v. South Carolina State Hosp., 285 S.C. 183, 187, 328 S.E.2d 652, 654 (Ct. App. 1985). Although various courts have stated the analysis in different terms, all three elements must exist simultaneously: 1) that an accident occurred, which both 2) arises out of, and 3) in the course of employment. Doe, 285 S.C. at 187-88, 328 S.E.2d at 654-55; Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007) (in order "to be compensable, an injury by accident must be one 'arising out of and in the course of employment'"). "'Arising out of' refers to the injury's origin and cause, whereas 'in the course of' refers to the injury's time, place, and circumstances ... For an injury to 'arise out of' employment, the injury must be proximately caused by the employment." Id.

"Unwitnessed deaths have posed grave problems for many learned judges. The distinction between reasonable inferences (which are compensable) and speculation, conjecture and surmise (non compensable) often baffle the wisest. The courts however, usually abide by the decision of the fact-finding body unless it can be said that taking all

(1962) (employee found deceased where his job required him to be); Eagles v. Golden Cove, Inc., 260 S.C. 113, 194 S.E.2d 397 (1973) (claimant died from bee sting).[7]

Claimant wrongly suggests that, "where the injury is such that the worker has no memory the Supreme Court has held that this establishes and entitles the worker to a presumption of fact." (App. Br. p. 12). Claimant provides no Supreme Court or even published South Carolina authority for such a proposition – because there is none. This Court should reject Claimant's efforts to infer or imply precedent that does not exist. Such slight-of-hand does not constitute authority and does not justify the outcome Claimant seeks. As is discussed below, what Claimant is suggesting would drastically alter the balance struck by the Legislature in the Act.

Other states,[8] including North Carolina, have limited the presumption to cases where the worker is deceased and have specifically refused to apply it where the worker is alive but has no memory of the events leading up to the injury. Janney v. J.W. Jones Lumber Co., Inc., 145 N.C. App. 402, 550 S.E.2d 543 (N.C. Ct. App. 2001), involved a claimant who had no memory of falling and hitting the floor. The North Carolina Industrial Commission applied the so-called unexplained death presumption and awarded benefits. The Appellate Court reversed the Industrial Commission, specifically declining to apply the presumption in cases where the claimant's injuries did not result in death. In Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (N.C. 1988), the North

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[7] The key issue in Eagles was not whether the claimant's fatal injury was witnessed or not but, rather, whether the bee sting, which was clearly connected with his employment (as he was stung while cutting grass with a swing blade), was capable of causing death. Finding sufficient evidence supported the Commission decision, the Court upheld the Commission's award of benefits. 260 S.C. at 116, 194 S.E.2d at 398.

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

Carolina Supreme Court adopted the presumption, explaining that the "theoretical justification" underlying the presumption in death cases is that "those in the best position to speak to this question are the employee, whom death has silenced, and the employer. Under such circumstances, a presumption of compensability is theoretically and practically justified." 322 N.C. at 369, 368 S.E.2d at 585. However, "[t]he same cannot be said for an employee who has survived his injury, even an employee who cannot remember the details of his accident. In the present case, there is no reason to believe that defendant employer could have known any more about the circumstances of plaintiff's fall than did plaintiff himself. Because we see no potential inequality of information, we decline to adopt the Pickrell presumption in this workers' compensation case not resulting in death." Janney, 145 N.C. App. at 406, 550 S.E.2d at 546; *see also* Holloway v. Tyson Foods, Inc., 193 N.C. App. 542, 549, 668 S.E.2d 72, 77 (N.C. App. 2008) (refusing to apply the presumption in case where worker fell for no known reason and who survived but could not remember the fall that caused his brain injury).

Other states are in accord. In Pinkerton's Inc. v. Helmes, 242 Va. 378, 410 S.E.2d 646 (Va. 1991), the Virginia Supreme Court pointedly refused to extend the application of the presumption to non-death cases. There, the claimant was injured in her vehicle which had run off the roadway. The claimant suffered permanent brain damage, was confined to a nursing home, and could recall no facts regarding the accident. The Commission found that, although her injuries occurred in the course of her employment, the claim was not compensable because she failed to prove that her injuries arose out her employment. In upholding the Commission, the Virginia Supreme Court rejected

arguments that the claimant's situation was no different than an employee who dies as the result of an accident:

> Every unexplained accident, by definition, means that no one can relate how the accident happened. The reason for the inability to recall may be based on a preexisting or resulting, temporary or permanent, physical condition of the claimant, as well as mere inattention at the moment of the accident. If mere inability to recall the events is the rationale for application of the presumption, then it would also be logical that the claimant should be entitled to the benefit of the presumption in any of these circumstances, or whenever there is an unexplained accident.

242 Va. at 381, 410 S.E.2d at 648. However, such an expansion of the presumption "significantly alters the jurisprudence of workers' compensation law," which the Virginia Supreme Court correctly recognized is the prerogative of the legislature, not the courts. Id.

In Husvar v. Engineered Prods, Inc., 2000 ME 132, 755 A.2d 498 (Me. 2000), the Maine Supreme Court refused to extend the presumption to cases where the claimant had no memory of the incident leading to his injuries, despite statutory language embodying the presumption that indicated it applied where "the employee has been killed or is *physically or mentally unable to testify* ..." 755 A.2d at 501. The Court noted that, although the claimant had no memory of the incident, he was both physically and mentally able to testify. The Maine Court also declined to usurp what is a legislative prerogative, refusing to equate the inability to recall the circumstances of an injury with the physical or mental inability to testify. Id.

This Court also should refuse to expand workers' compensation jurisprudence as Clamant suggests, as that is an issue reserved to the Legislature.

B. Case law relied on by Claimant does not compel the result he seeks.

Claimant relies heavily upon the Supreme Court's recent decisions in Barnes v. Charter 1 Realty, 2015 S.C. LEXIS 4 (Jan. 14, 2015) and Nicholson v. South Carolina Dept. of Soc. Services, 2015 S.C. LEXIS 3 (Jan. 14, 2015), even though neither case dealt with an unwitnessed or unremembered fall.[9] Both Barnes and Nicholson are factually distinguishable from the case at hand because, in both of those cases, the claimant testified that she was performing some task for the employer when she fell. Barnes, 2015 S.C. LEXIS 4, **1-2, 9 (the claimant was performing a work-related task to check a realtor's email when she tripped and fell, which "clearly established that she was performing her job when she sustained an accidental injury"); Nicholson 2015 S.C. LEXIS 3, **1, 13 (the claimant was walking down a hallway to a work-related meeting when she scuffed her foot on the carpet and fell). Here, there simply is no evidence that Claimant was performing any work-related function or activity when he fell. Furthermore, in neither Barnes nor Nicholson was there any evidence that the claimant was taking medication that had side effects, such as seizures, dizziness, fainting, loss of balance, etc., that could cause a fall, whereas here, it is undisputed that Claimant had been taking Ultram (50MG) and Flexeril (5MG) weeks prior to his fall and, was taking Ultram ER (100MG) and Neurontin (300MG), at the time of his fall. (Def. APA pp. 25-28).

In the case at hand, despite Claimant's unsupported assertion that he "was performing the duties of his employment at the time that the injury occurred," (App. Br. p. 15), unlike the claimants in both Barnes and Nicholson, there is no evidence of what

[9] Respondents also note that, at the time of the filing of this Brief, the decisions in both Barnes and Nicholson are under reconsideration by the Supreme Court.

Claimant was doing at the time of his injury. Instead, the evidence leads to the reasonable inference that he was simply standing beside the truck and became dizzy, nauseous, fainted or had a seizure connected with the medications he was taking for his lower back pain. Again, Claimant's mistaken assertion that, "[t]here is absolutely no evidence that the injury was caused by something personal to the Claimant," (App. Br. pp. 15-16, *see also* pp. 17, 18, 19, 21), overlooks this key information regarding the medications he was taking, a fact that was emphasized twice by the Commission. (Commission Decision, pp. 10, 13).

Furthermore, neither Barnes nor Nicholson purport to eliminate a claimant's burden "to prove a causal connection between the conditions under which the work is required to be performed and the resulting injury." Nicholson 2015 S.C. LEXIS 3, *11. And, although Claimant notes statements in Nicholson to the effect that "[w]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act," 2015 S.C. LEXIS 5, *4, that rule does not absolve a claimant of the burden of proving he is entitled to benefits. ." Hill, 195 S.C. at 340, 11 S.E.2d at 390 (the rule of liberal construction does not apply to the evidence required to prove entitlement to benefits); Cross, 236 S.C. at 446, 114 S.E.2d at 831-32 (a claimant must prove he is entitled to benefits by a preponderance of the evidence and cannot prevail by the resolution of doubts).

In Cross, the Supreme Court addressed what it saw as "an inadvertent confusion with the rule that the compensation law will be construed liberally in order to effect its beneficent purpose. [citations omitted] However, our rule which is applicable to the findings of facts is that a claimant must establish by the preponderance of the evidence

the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts .... A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other." 236 S.C. at 446-47, 114 S.E.2d at 831-32.

In Barnes, the Supreme Court distinguished this Court's ruling in Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998), by pointing out that there, a co-worker stated that the claimant had indicated that her leg "gave out" on her as evidence that the fall was idiopathic. Barnes, 2015 S.C. LEXIS 4, *5. In the case before the Court, there is evidence that the Claimant was taking Ultram and Neurontin, medications that have serious side effects, including seizures, dizziness, loss of balance, etc., which constitutes evidence that his fall was idiopathic as opposed to work-related.

Finally, some of the cases on which Claimant relies denied benefits despite application of what this Court has referred to as the "unexplained death" presumption. *See* Jennings, 335 S.C. 249, 258-59, 516 S.E.2d 453, 458 (upholding Commission's denial of benefits despite application of "unexplained death" presumption because substantial evidence supported the Commission's determination that the cause of death was not work related); Packer, 238 S.C. at 438, 120 S.E.2d at 401 (presumption insufficient to prove fact of accident even though claimant was found deceased at his place of employment).

C. The testimony and evidence relied on by Claimant does not warrant overturning the Commission Decision.

Although Claimant argues that, had he been suffering from any ailment or dizziness or any condition at all, he would have told his co-workers, Mr. Barnette and/or Mr. Bolden, there are a number of places where their testimony did not accurately reflect key information about Claimant. The testimony of Claimant's co-workers regarding what they observed on the day of his injury simply supports the conclusion that they did not **notice** anything unusual. However, his co-workers were inconsistent in their memory of the events of April 19, 2012 and, in addition, were not as aware of Claimant's physical condition as they might have implied or even believed.

- *Compare* Barnette Dep. 26, line 4 – 27, line 23 (first testifying that the fall could not have been as late as 4:15 or 4:30, but then conceding that might have been the case based on the statement he wrote a few days after April 19, 2012);
- *With* Bolden Dep. 6, lines 4-13 (Mr. Bolden insisting the injury occurred "before three" in the afternoon).
- *Compare* Barnette Dep. 13, lines 17-19 (insisting both the backpack and cooler were placed on the seat of the truck);
- *With* Bolden Dep. 13, lines 8-25 (testifying he only saw a cooler, and not a backpack, placed on the floorboard of the truck).
- *Compare* Barnette Dep. 6, lines 19-23 (the only lower back problem Mr. Barnette was aware of was when Claimant "discussed he had a back problem when he was a teenager, younger, a teenager, you know, and I knew that");
- *With* Def. APA pp. 25-28 (medical notes chronicling Claimant's lower back problems in the weeks leading to his fall).
- *Compare* Barnette Dep. 17, lines 22-23 (Mr. Barnette testified that Claimant was only 5'3" or 5'4" in height);
- *With* Hr'g Tr. 46, lines 18-22 (Claimant testifying that his height is approximately 5'6½").

Finally, Claimant's co-workers admittedly are not medical professionals. Because he has no memory of the event, Claimant cannot remember if he felt dizzy or lightheaded or

nauseous or was having any problems with balance or had a seizure immediately before he fell.

Claimant places great emphasis on the position of his body when he was found. (App. Br. pp. 8-9, 11, 20-21). Contrary to claimant's intimation otherwise, the fact that he was laying on his back with the back of his head flat against the ground does not indicate that he fell from the steps of the truck, or that he experienced a work-related accident. Respondents note that Mr. Barnette's speculation as to how Claimant might have fallen from the steps of the truck is based on the injury to the back of Claimant's head. (Barnette Dep. 15, lines 17-25). However, there was only a small abrasion on the back of Claimant's head[10] which did not require stitches. (Cl. 2012 Dep. 42, lines 11-15). None of the medical reports from his initial medical treatment even mention an abrasion on the back of Claimant's head. (Cl. APA pp. 1-11). In fact, the Emergency Department report from April 19, 2012 specifically notes, "SKIN: Void of all rashes, bruises, lesions." (Cl. APA p. 2). A consultation report, printed on June 14, 2012, notes only "[s]everal abrasions." (Id., pp. 20-21).

Claimant opines that it is significant that he was diagnosed with a "subdural hematoma of the anterior lateral (front left) temporal lobe." (App. Br. pp. 11, 21). Not only does Claimant not explain how this diagnosis advances his claim but, more importantly, he can point to no medical evidence in the record of this case that would support any conclusion that this diagnosis indicates he suffered a work-related accident.

Claimant frames many of his arguments based on the ultimate, but unproven, conclusion he wishes this Court to reach, *i.e.*, that his injuries were the result of an

[10] Claimant's Brief acknowledges there was only "a small amount of blood on the back of his head ..." (App. Br. p. 8).

accident as that term is used in the Act. For example, he relies on cases "where the cause was accidental in nature," (App. Br. p. 17 n.1), asserts that there is "undisputed evidence ... that his injury stemmed from an accidental physical type injury," (App. Br. p. 18), and describes the injury at issue here as one that "resulted from a physical injury type cause." (App. Br. p. 17). In reality, this is one of the core factual issues that the Commission decided against him. The Commission held that the evidence produced was insufficient to show Claimant had suffered a compensable injury by accident that arose out of his employment. (Commission Decision, pp. 8-19).

Clearly, Claimant's injuries resulted from his fall; however, the question at issue here is what caused Claimant's fall? If, in fact, he fell from the steps of the truck, as the Commission recognized, this may well have been a very different case. Here, however, the evidence is just as likely, if not more likely, that he was standing on the ground and fell due to something internal to himself.[11] Given the fact that he was taking medications with serious side effects, some of which he appears to have suffered just days before his fall, (Speegle Dep. 6, line 17 – 7, line 11), then it is more likely than not that the cause was internal to Claimant himself.

This Court should hold that the so-called unexplained death presumption does not apply in this case, and uphold the Commission's finding that Claimant is not entitled to workers' compensation benefits.

[11] For example, although Claimant emphasizes that the door to the truck was open when Claimant was found on the ground, (App. Br. pp. 9, 10, 11, 20), that does not prove anything, least of all that he was on the truck steps when he fell. It is equally likely that the door to the truck would have been left open if Claimant had just placed items on the floor of the truck cab or tossed them onto the seat, as it would have been if he had climbed the steps to the truck to place items in it.

III. Even if such a presumption were to apply to unremembered events, there is sufficient and substantial evidence in this case to rebut any such presumption.

Claimant would apply the presumption in all cases where an injury is unwitnessed or not remembered, except "where the injury and death is caused by a medical condition such as heart attack or thrombosis." (App. Br. pp. 18, 21). Claimant's statement of the law is unreasonably narrow and must be rejected. Instead, the rule that compensation is denied where the cause of injury was something personal to the claimant, as opposed to arising out of the employment, is not limited to heart attacks or thrombosis. *See, e.g.*, Dukes v. Rural Metro Corp., 356 S.C. 107, 110, 587 S.E.2d 687, 689 (2003) (holding that the gun that caused the claimant's injuries during a smoking break was in no way related to his job and, therefore, the claimant's injuries did not arise out of his employment); Bright v. Orr-Lyons Mill, 285 S.C. 58, 62, 328 S.E.2d 68, 71 (1985) (employee's injuries, incurred when he was shot while walking to his car parked on the employer's parking lot after his shift, not compensable because assailant was a nonemployee looking for someone else for personal reasons unrelated to job). Likewise, Claimant's assumption that he has proven his fall "was not caused by a condition peculiar to him," (App. Br. p. 16), presumes the precise outcome he has failed to prove.

Claimant would phrase the inquiry narrowly as whether he had a personal medical condition that might have caused dizziness, imbalance, fainting, etc. He studiously ignores the facts that he was taking strong pain medication – Ultram and Neurontin – at the time of his fall and that he sought treatment from the Emergency Room two days before the accident for stomach/dehydration issues, facts highlighted by the Commission. (Commission Decision, pp. 10, 13).

Specifically, on March 27, 2012, a few weeks before his fall, Claimant had been prescribed Ultram (50MG) and Flexeril (5MG). (Def. APA pp. 25-26). Ultram is a narcotic pain reliever. Side effects include, among other things:

- seizure (convulsions);
- weak or shallow breathing;
- high levels of serotonin in the body--agitation, hallucinations, fever, fast heart rate, overactive reflexes, nausea, vomiting, diarrhea, loss of coordination, fainting;
- headache, dizziness, drowsiness, tired feeling; and
- constipation, diarrhea, nausea, vomiting, stomach pain.

According to Drugs.com, "Ultram can slow or stop your breathing ... Seizures (convulsions) have occurred in some people taking this medicine." http://www.drugs.com/ultram.html.[12] In fact, seizures "may be more likely" if a patient is also "taking certain medicines such as ... muscle relaxers ... or medicine for nausea and vomiting." Id. Flexeril, which Claimant had been prescribed on March 27, 2012, (Def. APA pp. 25-26), is a muscle relaxer. http://www.drugs.com/flexeril.html.

On April 16, 2012, three days before his fall, Dr. Menhas changed Claimant's prescription from Ultram 50MG to Ultram ER 100MG. (Def. APA pp. 27-28). Possible side effects of Ultram ER, an opioid analgesic, include, among other things:

- change in walking and balance;
- abdominal pain;
- nausea;
- convulsions (seizures);
- lightheadedness; and
- loss of consciousness.

[12] *See also* http://www.janssenpharmaceuticalsinc.com/assets/ultram.pdf from the manufacturer of Ultram, Janssen Pharmaceuticals, Inc., pp. 7-8.

http://www.drugs.com/cons/ultram-er.html.[13] Dr. Menhas also dropped the Flexeril and added Neurontin (300MG). Neurontin is "is an anti-epileptic medication, also called an anticonvulsant. It affects chemicals and nerves in the body that are involved in the cause of seizures and some types of pain." Side effects of Neurontin include "dizziness, drowsiness, and diarrhea." http://www.drugs.com/neurontin.html.

On April 17, 2012, two days before his fall, Claimant sought emergency medical treatment for vomiting and diarrhea and concerns about dehydration. (Def. APA pp 30-32) (Speegle Dep. 6, line 17 – 7, line 11). Thus, even if Claimant had the benefit of the so-called explained death presumption, there is substantial evidence in this case, highlighted by the Commission, that Claimant was taking medication that can cause dizziness, drowsiness, diarrhea, abdominal pain, nausea, seizures. Loss of consciousness, change in walking and balance, etc., and that he sought emergency medical care two days before his fall for some of those symptoms.

Even if the presumption applied in cases where a claimant was injured but not deceased, which Respondents do not concede, the presumption still "may not be availed of to establish the incident of accident," as opposed to some internal cause of the injury. Packer, 238 S.C. at 438, 120 S.E.2d at 401. In fact, in both Packer and Jennings, the decedents were found where their work required them to be. However, in both cases, the Court determined that the decedents were not entitled to benefits because, despite the presumption, because there was no evidence that an accident had caused the fatal injuries. Packer, 238 S.C. at 437, 120 S.E.2d at 401; Jennings, 335 S.C. at 256, 516 S.E.2d at 457.

[13] *See also* http://www.janssenpharmaceuticalsinc.com/assets/ultramer.pdf from the manufacturer or Ultram ER, Janssen Pharmaceuticals, Inc., p. 9.

In the case before the Court, there is no evidence (only speculation) that Claimant suffered an accident, as opposed to something internal to himself. There is, on the other hand, undisputed evidence that Claimant was taking medications that have multiple and serious side effects, including seizures, dizziness, fainting, loss of balance, diarrhea, nausea, vomiting, etc., as is discussed in more detail above.

Dr. Peterson's statements, on which Claimant relies, do not address what precipitated Claimant's fall. (Cl. APA p. 37). Furthermore, the statements lack any probative value because they assumed a key fact in dispute, which is whether Claimant "fell from the cab of his employer's truck ..." (Def. APA p. 6).[14] *See* Glenn v. Dunean Mills, 242 S.C. 535, 542, 131 S.E.2d 696, 699 (1963) (probative value of an expert's opinion "stands or falls with the existence or non-existence of the facts upon which it is predicated").

Thus, even if the presumption applied in this case, which Respondents do not concede, Respondents presented evidence of a cause internal to Claimant to explain his fall. (Def. APA pp. 25-28). As a result, this Court should uphold the Commission's denial of benefits.

[14] Claimant's reliance on Barnes and Nicholson for the proposition that, where there is no dispute as to material facts, the case becomes one for the reviewing court to decide is inapplicable in this instance. There are a number of key facts in dispute including whether Claimant fell from the truck or from a standing position and whether his fall was due to something personal and internal to himself. The Commission noted twice and with emphasis the fact that Claimant was taking both Ultram and Neurontin at the time of his fall. (Commission Decision, pp. 9-14).

IV. Claimant failed to meet his burden of proving his injuries were the result of an accident that arose out of his employment.

The Commission properly held that Claimant failed to meet his burden of proving his injuries are compensable.[15] Beyond admitted speculation on the part of his co-workers, Claimant has identified no causal link between his employment and his fall. The last action witnessed by a co-worker was Claimant walking back to his truck and placing a cooler on the floorboard of the truck. (Bolden Dep. 13, line 2 – 14, line 13). Although Mr. Barnette felt sure that both the cooler and Claimant's backpack had been placed (rather than tossed) on the seat of the truck prior to Claimant's fall, (Barnette Dep. 13, lines 17-25), Mr. Bolden could only remember seeing a cooler. (Bolden Dep. 13, lines 17-25). Even if Claimant had climbed the steps to the truck to "place" the cooler and/or back pack on the seat, there still is no evidence whatsoever that Claimant fell from the steps of his truck. It is just as likely that, even assuming Claimant climbed the steps to place the items on the truck seat, he climbed back down before he fell to the ground. As Mr. Barnette testified:

> On the record now, I don't know. I know **speculation** is not really a thing, but my **speculation** is that he got on the first step, got on the second step, put the lunch box up there and my **speculation** is he was on the second – you make sure this is **speculation**, but my **speculation** is he was on the top step when he fell backwards because of the amount of injury on the back of his head and the way he fell on the ground.

(Barnette Dep. 15, lines 17-25) (emphasis added). An award cannot be based on surmise, conjecture or speculation. *E.g.*, Packer, 238 S.C. 435, 120 S.E.2d at 400.[16]

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[15] Claimant's failure to appeal this Conclusion of Law by the Single Commissioner is addressed above in Section I.

[16] Claimant's attempt to turn this rule on its head, (App. Br. pp. 18-19), should be rejected. Where a claimant fails to meet his burden of proving an accidental injury that arises out of and in the course of employment, benefits should be denied.

Claimant places much weight on the fact that "in the opinion of his co-workers [Claimant] was 100%" the day of his injury. However, Claimant has not even attempted to assert that his co-workers have any medical training or background. They could report only what they saw and perceived as lay persons. Although Claimant asserts he was experiencing no dizziness or weakness or balance problems on the day of his fall, he also acknowledges taking medications for his lower back pain. Those medications have recognized side effects that include seizures, dizziness, fainting, loss of balance, diarrhea, nausea, vomiting, etc.

Furthermore, Mr. Barnette's deposition testimony reveals that he was not as familiar with Claimant's recent medical issues as Claimant would have this Court believe. For example, when asked about Claimant's recent trips to the emergency room, Mr. Barnette could only say, "Yeah, you know, I knew he had went to the emergency room and got some medications or something like that. I don't know all the details. You know, your records show that. But he worked a few days and he was off checking with the doctors in the two or three weeks before that." (Barnette Dep. p. 6, lines 14-18). When asked specifically whether Claimant had complained about any back problems, Mr. Barnette could only point to problems Claimant had had when he was a teenager. (Id., p. 6, lines 19-23).

This Court should hold that Claimant failed to prove he suffered a compensable injury by accident that arose out of and in the course of his employment.

V. The Commission committed no error in the manner in which its Decision and Order was drafted.

Claimant's counsel has raised this exact same argument to this Court before, which this Court has rejected. Brown v. Peoplease Corp., 402 S.C. 476, 485-86, 741

S.E.2d 761, 766 (Ct. App. 2013). Tellingly, Claimant cites absolutely no authority whatsoever for his assertion that the Full Commission is required by law "to write its Order ..." (App. Br. p. 22). That is because there is none and Claimant's entire argument should be rejected.

The various cases cited by Claimant do not support his assertions. Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991), Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), and Walker v. City of Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966), merely state that the Commission is the fact finder and that, where there is a dispute in the facts, the Commission's resolution is binding on reviewing courts so long as it is supported by substantial evidence in the record before the Commission.

Likewise, the various statutory sections listed by Claimant do not support his assertions. To begin with, Claimant's reliance on S.C. Code Ann. § 1-23-340 is perplexing, as there is no evidence, or even an assertion by Claimant, that a "majority of the officials" of the Appellate Panel, who rendered the final decision, did not also hear the case. (Transcript of Full Commission Hearing before Commissioners Wilkerson, McCaskill and James, on August 11, 2014). Section 1-23-350 requires that a final decision "shall be in writing or stated in the record." S.C. Code Ann. § 1-23-350. It does not specify who should write the first draft of the decision. S.C. Code Ann. § 42-17-40 addresses the conduct of the hearing before the Single Commissioner, and Claimant admittedly has no problem with a prevailing party drafting a proposed order in that instance. (App. Br. p. 22). Section 42-17-50 simply requires the Commission to "review the award and, if good grounds be shown therefor, reconsider the evidence, receive

further evidence, rehear the parties or their representatives and, if proper, amend the award." S.C. Code Ann. § 42-17-50. There is no evidence that the Commission failed to comply with this provision.

Claimant correctly notes that the Full Commission requested that counsel for Respondents draft a proposed Appellate Panel Order finding "a FULL AFFIRMATION of the Single Commissioner Decision and Order." However, what Claimant fails to note is that the Commission also, "reserve[d] the right to modify and/or delete any or all portions of the submitted Decision and Order." (Request for a Proposed Decision and Order, dated August 29, 2014 ("Request")). Thus, the Commission plainly reserved the right to correct any errors or omissions in the proposed order submitted to it.

In addition, the Commission's request directed counsel to "make sure the Appellate Panel Decision and Order recites the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order," (Request), which counsel did. Even if, solely for the sake of argument, counsel had misstated the Single Commissioner's factual findings or legal conclusions, the Full Commission clearly reserved its "right to modify and/or delete any or all portions of the submitted Decision and Order." (Request). Therefore, there simply is no basis for Claimant's allegations that the Commission somehow abdicated its duty to make its own findings of fact and conclusions of law.

Although Claimant cites S.C. Reg. 67-709(E)(2), mandating that the reviewing "Commissioners together, shall agree on a modification if any and record their findings of fact and conclusion of law on a vote sheet," there is no evidence whatsoever in this

record that the Commission did not do precisely that.[17] In addition, that regulation does not prohibit the Commission from requesting a party to draft a proposed order which it then reviews before issuing.

The Commission Decision recites the history of the proceeding, the evidence presented below, and notes that its Decision is "[b]ased upon the testimony and exhibits submitted before the Single Commissioner." (Commission Decision, p. 8). Not only did the Commission fully affirm the Single Commissioner Decision but, as noted above, its Decision restates the Single Commissioner's Findings of Fact and Conclusions of Law almost verbatim. (Commission Decision, pp. 8-18). There is no evidence that the Commission did not completely fulfill its duty to determine the factual and legal issues in this case, and to set them out in its Decision.

Claimant's assertion that the proposed order, "went beyond the direction of the Full Commission," (App. Br. p. 23), is baseless.[18] As can be seen by a simple comparison of the Single Commissioner Order and the Commission Decision, the discussion of the evidence, the findings of fact and conclusions of law are practically identical. (Single Commissioner Order) (Commission Decision). The additional Conclusions of Law that Claimant appears to find problematic include Conclusions of Law Nos. 3 and 4, which simply set forth the standard of review at the Full Commission level, (Commission Decision, p. 15), Conclusions of Law Nos. 9 and 10, which respond

[17] Claimant's counsel has requested and been provided a copy of the "vote sheet" in other cases decided by the Commission. The fact that he may not have requested the vote sheet in this case does not mean the reviewing Commissioners did not comply with their own regulations, as Claimant surreptitiously suggests.

[18] At the same time, Claimant complains that the Commission Decision failed to address all of the legal and factual issues raised in his Form 30. The Commission is under no obligation to specifically address in writing each argument raised by a party in its Form 30. Instead, as noted above, Section 42-17-50 requires the Commission to "review the award." S.C. Code Ann. § 42-17-50.

to Claimant's reliance on Packer v. Corbett Canning Co., 238 S.C. 431, 120 S.E.2d 398 (1961), (Commission Decision, p. 16-17), and Conclusion of Law No. 16, which simply affirms the Single Commissioners Decision. At the end of the day, by preserving its right to "review and modify and/or delete any of all portions of the submitted Decision and Order," the Appellate Panel had the final word on the content of the Commission Decision, which was individually signed by the members of the Appellate Panel.

Claimant asserts that, because the Commission Decision is a "consensus" decision, it is improper for it to request a party to draft a proposed decision. According to Claimant, such a process abdicates the Commission's responsibility and denies Claimant due process. Although Claimant apparently attempts to distinguish the "time-honored tradition of a singular judge or commissioner requesting that the prevailing party present a proposed Order for the Judge's or Commissioner's consideration, (App. Br. p. 22), from a request for counsel to draft a Full Commission consensus decision, it is a distinction without any meaningful difference. A decision by a judicial decision maker – whether a single commissioner, a single judge or a panel of the same – must comport with appropriate statutory and legal standards, which the Commission Decision in this case does. As noted above, the Commission reserved the right to review, modify or completely disregard the proposed order as drafted by Respondents' Counsel. The fact that each reviewing Commissioner signed the order indicates clearly and unequivocally each Commissioner's approval of the Commission Decision as issued. (Commission Decision, p. 19).

Finally, Claimant appears confused about the distinction between procedural due process and substantive due process. On one hand, procedural due process simply

entitles him to the right to adequate notice, adequate opportunity for a hearing, the right to introduce evidence and the right to confront and cross-examine witnesses. Adams v. H.R. Allen, Inc., 397 S.C. 652, 657, 726 S.E.9, 13 (Ct. App. 2012). Substantive due process, on the other hand, "enquires into the conceivable outer limits of legitimate government power." Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 829 n.7 (4th Cir. 1995). Substantive due process essentially protects against the uncommon situation of truly egregious government conduct as opposed to failure to comply with state law. *See* Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992) (stating that the Due Process Clause is designed "to prevent government from abusing its power, or employing it as an instrument of oppression"). The Commission committed no error in requesting a party to submit a proposed order, which the reviewing Commissioners reviewed prior to issuance. Claimant's substantive or procedural due process rights have not been violated, and this Court should so hold.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision that Claimant failed to meet his burden of proving his injuries were the result of an accident that arose out of and occurred in the scope of his employment.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1204039

William Lee Turner, Employee, ... Appellant,

v.

SAIIA Construction, Employer, and
Old Republic General Insurance Corporation
c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

PROOF OF SERVICE

I certify that on the 6th day of March 2015, I served the **Initial Brief of Respondents** and **Designation of Matter** on William Lee Turner by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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