THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2014-002416

William Lee Turner, Employee, ... Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

By way of Reply to the Standard of Review set out by the Defendants as part of their Respondents' Brief, this appeal involves an appeal from the SC Workers' Compensation Commission and therefore is not only an appeal filed under the SC Administrative Procedures Act, SC Code §1-23-380, but is also an appeal filed under the Workers' Compensation Act under SC Code §42-17-60. The Workers' Compensation Act is a statutorily created scheme of benefits in derogation of the common law which takes away the right to trial by jury and replaces it with an appointed Commissioner system for which our Appellate Courts have set out specific fundamental review principles that apply to appeals from the Commission. In that regard, the Respondents do not set out the entire Standard of Review applicable in a workers' compensation case, which principles must be added to any recitation of the Standard of Review recited by any party or by the Court. Those fundamental principles of law that apply specifically in workers' compensation cases as part of the Standard of Review are:

First, it is the established law of this State that the Act must be liberally construed and that any reasonable doubts as to the construction of the Workers' Compensation Act must be resolved in favor of the injured worker and,

> "its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage . . ."

> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws **shall be liberally construed in favor of the employees and their dependents**, in furtherance of the beneficent purposes for which they were enacted and to avoid any incongruous or harsh results." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emphasis added).

Second, since the workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the reviewing Court must strictly construe such statutes, leaving it to the Legislature to amend and define any ambiguities. Cox v. BellSouth Communications, 356 S.C. 468, 589 S.E.2d 766 (SC App. 2003, reh. den., cert. den.).

ARGUMENTS

BY WAY OF REPLY TO ARGUMENT #I RAISED BY THE RESPONDENTS:

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.

B. ISSUES NOT ADDRESSED IN CLAIMANT'S BRIEF ARE ABANDONED.

This argument and the arguments made are not responsible to the issues raised on appeal and should be stricken from the Brief. Further, the Respondents have not appealed these issues and have thus abandoned these issues. Finally, the arguments are in error in that the Appellant has preserved for argument all of the issues presented to the Court for consideration.

The Respondents have not filed an appeal pursuant to SCACR, Rule 203(b) nor have they filed a cross appeal under subsection (c). The Respondents in making this argument allege that the Appellant did not specifically challenge certain findings and conclusions in his arguments to the Full Commission. However, the Appellant would submit that this Court will find from a review of the Record absolutely no argument made on that basis to the Full Commission, either in brief or in oral argument, by the Defendants/Respondents. Therefore, in the first instance this issue having not been appealed from the Full Commission Decision to this Court for review; this argument should be stricken as not being an issue properly preserved and submitted to the Court for review.

The very case cited by the Respondents, that being Green v. City of Columbia, 311 S.C. 78, 427 S.E.2nd, 685 (SC App. 1993), supports this Reply argument being made by the

Appellant. In Green the Full Commission went outside of the issues raised for review and the Findings of Fact and Conclusions of Law that had been made by the Hearing Commissioner and made a decision based on an issue that had not been appealed and remanded to the Hearing Commissioner. The Respondents before the Full Commission in Green appealed and were the Appellants before this Court and alleged in part that the Full Commission had gone outside of the Record and outside of the issues that had been presented to them for review and specifically alleged that those issues had become the law of the case. In other words, those issues were specifically presented to this Court by an appeal by the Respondents in Green as Appellants whereas there has been no such appeal in this case.

Next, not only did the Respondents not raise this as an issue for decision before the Full Commission nor did they appeal, but also they misstate and comingle the law as to appeals from the Hearing Commissioner to the Full Commission versus from the Commission to our Appellate Courts.

SC Code §42-17-50 applies to appeals to the Full Commission and simply requires that a request for review of the Decision be made. While it is true that the parties must be given notice of the issues to be addressed by the Full Commission, Green, supra, there is simply no requirement that each individual Finding of Fact or Conclusion of Law be appealed to the Full Commission but only that the issue that

the party wants addressed can readily be determined and is clear from the exceptions and arguments of the party and that the this issue was ruled upon by the Hearing Commissioner. Holston v. Allied Corp, 300 S.C. 174, 386 S.E.2d 793 (SC App. 1989). In this case not only did the Claimant file a request for review, but specifically listed in his request a request for review of all of the Findings of Fact and Conclusions of Law and decisions made by the Hearing Commissioner. He then addressed the issues of law and fact and the Decision of the Hearing Commissioner in his Brief and at oral argument before the Full Commission to which a responsive Brief was filed by the Respondents concerning the specific legal and factual issues that the appellant wanted to have reviewed under which and to which all of the Findings of Fact and Conclusions of Law were made.

Again, the Respondents in reality mix apples and oranges as there is the distinct difference between a request for review by the Full Commission and the requirements as to that review versus an appeal to this Court on specific issues. It is completely sufficient, and there is no case law to the contrary, in requesting a review by the Full Commission to allege, not a vague general exception but a specific general exception asking the Commission to review all Findings of Fact and Conclusions of Law and decisions made by the Hearing Commissioner. In fact in the case of Clark v. Aiken County Gov., 366 S.C. 102, 620 S.E.2nd 99 (SC

App. 2005) which is also cited by the Respondents, the Court in its decision refers to several cases including White v. Medical Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003) holding that even very general, vague exceptions, not specific general exceptions as is contained here, are sufficient to provide for review before an Appellate Court, much less before the Full Commission. Those cases also cite back to the Green decision and chastise parties for not raising that type of issue (issue preservation) at the Full Commission and then raising it at the Appellate Court noting that, "all parties should raise all necessary issues and arguments to the lower Court and attempt to obtain a ruling." They also note that the Appellate Court Rules of Procedure should not be, "interpreted to create a trap for the unwary." The Respondents chose not to raise this issue before the Full Commission; did not appeal this issue but now attempt to raise it as a separate argument to this Court.

Next, as to the assertion of the Respondents that issues not addressed in the Claimant's Brief are abandoned, first all of the cases cited by the Respondents refer to cases where an Appellant has not addressed the issues the Appellant wants addressed in their Appellate Brief and then tries to bootstrap those into consideration in a Reply Brief. A review of the issues that are alleged not to have been addressed by the Appellant in his Initial Brief will show to

the Court that all of these are incorporated into the arguments as to the legal issues that the Appellant wants addressed by the Court, including whether or not the Claimant is entitled to the application of unexplained injury presumption; whether or not the Commission erred as a matter of law in its application of that presumption; and whether or not there is any evidence in the Record that is disputed concerning the facts surrounding the injury, which if there are none, would make the decision an issue of law for decision by this Court as a matter of law based on those undisputed facts.

BY WAY OF REPLY TO ARGUMENT #II RAISED BY THE RESPONDENTS:

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.

The Respondents in the caption of this Argument II. A. confuse the holding in the line of cases applying the unexplained injury presumption with the line of cases applicable to unexplained (idiopathic) fall cases. Not only is that an improper citation but our Supreme Court in the recent decision of Barnes v. Charter 1 Realty, _____ S.C. _____, 768 S.E.2d 651 (2015) soundly rejected the concept of an idiopathic fall meaning a fall for which the Claimant

did not know the cause.

In reference to the further argument that the presumption only applies to death situations, this Court has only to review the presumption as cited in Owens v. Ocean Forest, Inc., 196 S.C. 979, 12 S.E.2d 839 (1941) and refer to Larson's on workers' compensation and the cases cited in Larson's wherein the presumption has been applied across the United States to find that the presumption applies to all situations where the injury is unwitnessed and the injured worker is, "found **injured** at a place where his duty may have required him to be". (Owens). In those situations the worker is presumed to be, "**injured**" as a result of an accident arising out of and in the course of his employment. The Court will find no variance or deviation in our Appellate Court decisions, citations or recitations of the principle set out in Owens than that it applies to all unwitnessed injury situations. Also, a review of Larson's as cited by the Court repeatedly will show that it has been applied across the United States to all unwitnessed injury situations such as we have here. It is simply error for the Respondents to allege that the Appellant is trying to create some new presumption.

Finally since, Steed v. Mount Pleasant Seafood Co., 236 S.C. 253, 113 S.E.2d 827 (1960) was not cited by the Appellant in his Brief other than by reference to it as being one of the decisions under the unexplained injury

presumption, the Appellant will address it here. The Appellant has absolutely no earthly idea why the Respondents are citing the Steed case or Buff v. Columbia Baking Co., 215 S.C. 41, 53 S.E.2d 879 (1949) because both the Steed case and the Buff case involve conflicting evidence situations and the Commission made a decision based on that conflicting evidence. In this case, there is absolutely no evidence and there is no conflict in the evidence as to what occurred. Also, and the Appellant will not belabor this point as it is well cited in Appellant's Initial Brief, where the evidence is not conflicting or in other words is uncontradicted as it is in this case, the Decision as to whether or not the injured worker sustained injury by accident becomes a decision as a matter of law for the Court.

BY WAY OF REPLY TO:

C. THE TESTIMONY AND EVIDENCE RELIED ON BY THE CLAIMANT DOES NOT WARRANT OVERTURNING THE COMMISSION DECISION.

The Appellant would simply point out again as he does in his Brief that there is simply no evidence that the Claimant was not in tip-top shape and in fine physical condition with absolutely no problems on the date of the accident. There is simply no contrary evidence.

In addition, in making this argument the Respondents make the argument that the, "Claimant's co-workers admittedly are not "medical professionals" and also make the argument that because, "he has no memory, he doesn't know if he was

light-headed or not". However they do not cite to any medical evidence in the Record nor did they put in any medical evidence at the hearing stating any medical opinion contrary to that submitted by the Claimant/Appellant. In reference to the co-workers not being "medical professionals", it is Black Letter law that any witness may testify to observed facts and you don't have to be a medical expert to testify to that. The argument is without support from the evidence in the Record or under law. Finally, the Defendants try to make some kind of argument in reference to the Appellant's recitation of the undisputed evidence and then make blanket statements that are unsupported by the evidence that for example, "it was just as likely that he was standing on the ground and something internal happened to him". They submit no factual evidence nor do they submit any medical opinion evidence to support that proposition.

Also in making this factual argument they ignore the Brown decision and mistake the very definition of injury by accident by inferring that proof of "cause" is required under our definition. In 1939 in the case Layton v. Hammonds, Brown, Jennings, Inc., 190 S.C. 425, 3 S.E.2d 492 (1939) our Supreme Court chose between the two competing concepts of the definition of injury by accident rejecting the concept that requires an looked for, untoward event in the, "cause" of the injury to be compensable, and chose instead the definition of injury by accident that it is the "unexpected result" from

the work-activity that constitutes injury by accident.

Quoting from Layton:

> "**An effect** which does not ordinarily follow and cannot be reasonably be anticipated from the use of those means, **an effect** which the actor did not intend to produce and cannot be charged with the design of producing is produced by accidental means." (Emphasis added).

Then, after quoting from Layton, in the precedential case defining injury by accident, Hiers v. Brunson Constr. Co., 221 S.C. 212, 70 S.E.2d. 211 (1952), the Court held in pertinent part:

> "no slip, fall or other fortuitous event or accident in **the cause** of the injury is required; **the unexpected result** or industrial injury **is itself considered the compensable accident**." (Emphasis added)

The Respondents as the insurance industry has done for years try to change the definition of injury by accident and switch to the definition that our Courts have rejected for over 75 years. Our definition of injury by accident is diametrically opposed to and contrary to the position that the Respondents take in their Brief, that be, "question at issue here is what caused the Claimant's fall?". Cause is not the issue and never has been.

BY WAY OF REPLY TO ARGUMENT #III RAISED BY THE RESPONDENTS:

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.

In simply reply to this argument, the Respondents cite to absolutely no factual or medical opinion evidence related to the day of the accident.

BY WAY OF REPLY TO ARGUMENT #V RAISED BY THE RESPONDENTS:

V. THE COMMISSION COMMITTED NO ERROR IN THE MANNER IN WHICH ITS DECISION AND ORDER WAS DRAFTED.

In reference to that part of this argument, that this case and issue is controlled by this Court's decision, in the Brown v. Peoplease Corp., 402 S.C. 476, 485 S.E.2d 761 (SC App. 2013) the Decision written by the Respondents for the Full Commission in this case is totally different from the Decision written in Brown, in that the Decision in this case made additional Findings of Fact and Conclusions of Law not contained in the Hearing Commissioner's decision or anywhere in the Commission Record. This Court must deal with the requirements of the Administrative Procedures Act, the Workers' Compensation Act, and the Commission's own Regulations and the responsibility of every appellate body to write its own Decisions, and particularly in reference to the mandate that the Commission must make detailed Findings of Fact and Conclusions of Law. Finally in reference to this part of the argument, Counsel for Appellant is incensed and takes great exception to footnote 17 which goes outside of the Record. Counsel for the Appellant would respectfully request that the Court direct Counsel for the Respondents to

cite to any reference in the Record that justifies or factually supports that footnote.

In reference to due process, Appellant's Counsel is not confused. Quoting the Supreme Court from Sloan v. SC Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006):

> "the requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally includes adequate notice, the opportunity to be heard and at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts **and the right to meaningful judicial review.**"

The Appellant would submit that this process denies the Appellant meaningful judicial review.

CONCLUSION

Having fully replied to the Arguments, the Decision should be reversed and this worker provided benefits.

Respectfully submitted,

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Attorney for the Appellant

March 26, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
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Appellate Panel

Appellate Case No. 2014-002416

William Lee Turner, Employee, ...Appellant,

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

PROOF OF SERVICE

I certify that I have served the **INITIAL REPLY BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on March 26, 2015, addressed to: Helen F. Hiser, Attorney, McAngus Goudelock & Courie, 735 Johnnie Dodds Blvd., Suite 200, Post Office Box 650007, Mt. Pleasant, SC 29465.

Dated: March 26, 2015

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March 26, 2015

Honorable Jenny Abbott Kitchings
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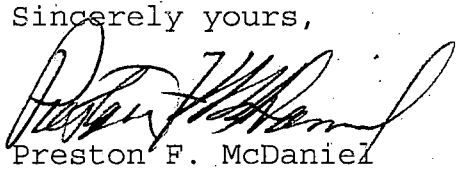
RE: William Lee Turner, Employee, Appellant, v. SAIIA Construction, Employer, and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc., Carrier, Respondents.
Appellate Case No.: 2014-002416

Dear Ms. Kitchings:

Please find attached the original and two (2) copy of the **INITIAL REPLY BRIEF OF APPELLANT** in the above-referenced matter. I would appreciate your returning the clocked-in copies to me in the enclosed self-addressed, stamped envelope.

By copy of this letter I am hereby serving Counsel of Record with a copy of this document.

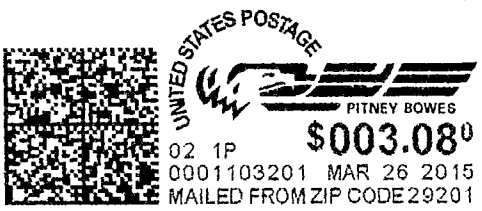
Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: John K. Koon, Esquire
Helen F. Hiser, Attorney at Law
Mr. William Lee Turner



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