

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO.: 2015-001606

RECEIVED

AUG 19 2015

SC Court of Appeals

Jenna Foran, Claimant.....Appellant,

vs.

Murphy USA, Employer, and
Liberty Insurance Corporation, Carrier.....Respondents.

INITIAL BRIEF OF APPELLANT

C. Scott Masel
S.C. Bar No. 12497
Newby, Sartip, Masel & Casper, LLC
4593 Oleander Drive
Myrtle Beach, SC 29577

TABLE OF CONTENTS

Table of Authorities.....	i
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Facts.....	1
Argument	
1. THE APPELLATE PANEL ERRED BY FINDING FORAN'S INJURY WAS IDIOPATHIC.....	6
2. THE APELLATE PANEL ERRED BY FINDING FORAN DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT.	10
Conclusion.....	11

TABLE OF AUTHORITIES

CASES

<i>Barnes v. Charter 1 Realty</i> , 411 S.C. 391 (2015).....	6,9
<i>Crosby v. Wal-Mart</i> , 330 S.C. 489 (1998).....	6
<i>Grant v. Grant Textiles</i> , 372 S.C. 196 (2007).....	6
<i>Crisp v. SouthCo.</i> , 401 S.C. 627 (2013).....	6
<i>James v. Anne's Inc.</i> , 390 S.C. 188 (2010).....	6
<i>Nicholson v. S.C. Dept. Social Services</i> , 411 S.C. 381 (2015).....	6, 10
<i>Pierre v. Seaside Farms, Inc.</i> , 386 S.C. 534 (2010).....	6
<i>Pratt v. Morris Roofing, Inc.</i> , 357 S.C. 619 (2004).....	6

STATUTES

S.C. Code Ann. § 42-1-160(A) (Supp. 2013).....	10
--	----

STATEMENT OF ISSUES ON APPEAL

1. DID THE COMMISSION'S APPELLATE PANEL ERR BY FINDING APPELLANT'S INJURY WAS IDIOPATHIC?
2. DID THE COMMISSION'S APPELLATE PANEL ERR BY FINDING APPELLANT DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT?

STATEMENT OF THE CASE

Appellant Jenna Foran ("Foran") suffered an ankle injury while working as a cashier at her employer's convenience store, asserting she stumbled on the edge of a floor mat and rolled her ankle. After a hearing, the single commissioner denied Foran's claim for workers' compensation benefits, deeming her injury to be idiopathic and not caused nor aggravated by her work or any special risk found in her employment. By Decision and Order dated July 14, 2015, the Commission's Appellate Panel affirmed the single commissioner's decision in full and this appeal follows.

FACTS

Foran's injury was captured by store surveillance video, which is time stamped and offers two views of Foran suffering her injury while working, one from the cashier's perspective and one from the customer's perspective. [Hearing Exhibit C]. In the video, Foran is seen carrying cartons of cigarettes without physical limitation and then bending down on one knee to restock a low shelf. [Id., time stamp 5:33:45 a.m. to 5:33:46, viewed from the customer's perspective]. Foran then rises and turns toward the cash register, and when stepping forward to a floor mat with her left foot, she suffers her ankle injury. [Id. at 5:33:46 a.m. and 5:33:47 a.m., viewed from the cashier's perspective].

Freeze frames from those last two seconds depicting her injury are shown below:

CASHIER PERSPECTIVE
(Video Still Shots)



The mat upon which Foran stepped is a cushiony floor mat, of some thickness, which according to the Respondent was placed behind the cash register to assist the cashiers because they would otherwise be standing on concrete all day. [Hearing Exhibit D; Hearing Transcript p. 46, line 18 through Pg. 47, line 7]. The Commissioner viewed the mat to be a “possible a quarter to half an inch thick at most.” [Decision p. 4].

At the hearing, Foran said that while stocking cigarettes, she “stumbled on the mat” as her “foot was half on, half off of the mat” causing her ankle to roll, further explaining:

A: “I noticed I had grabbed - - grabbed too many cartons of cigarettes to put up at the time; therefore I was going to - - I was getting up to put them on the table or the counter behind - - on the other side of me to see what else I needed to grab from the back room; so, I would put those away as well while I was trying to get the others. And I went to get up and my foot was half on, half off, of the mat and my ankle just rolled underneath me.”

....

Q: Of course I want - - I want it to be as - - as clear as I can make it. So, tell me again, what caused your ankle to roll; what caused you to suffer an injury on that day? **A:** Being half on, half off the mat. I had rolled towards where the linoleum floor was; my foot wasn't completely flat.”

Q: Okay. So, we're - - we're talking about your left foot. And which side of your foot was on the mat and which side of your foot was on the linoleum floor? **A:** The big toe was on the mat and the other toes were on the floor.

Q: If that cushiony mat was not there do you believe that you would have rolled your ankle? **A:** No.

[Hearing Transcript, p.12, line 18- p.13, line 12; p. 14, line 24 – p. 15, line p. 28, lines 8-10; p. 14, lines].

The single commissioner and Appellate Panel found the following testimony by Foran on cross examination as confusing and unclear:

Q: But were you kneeling right where the mat is or were you kneeling behind the mat on the opposite side where the cartons go? **A:** I was near it.

Q: But you weren't on the mat when you were kneeling? **A:** No.

Q: Okay. So, just so that the record is clear, you were not kneeling down over the top of the mat; you were on the, from what the video shows, the opposite side --.

A: Yes. Q: -- behind you? A: Yes.

Q: Okay. And you had actually stood up already from your kneeling position; is that right? A: I was in the process of it.”

Q: Okay. Would you agree that the video shows that you had already stand – stood up and had turned around and gone over to where the cashier area was? A: I haven’t – I – what I’ve seen was I was in the process of on the way up.

Q: So, it’s your testimony that in the video you’re not already standing up, turned around, and stepped over to the cashier - - A: I was - - Q: - - to the register? A: - in the process of standing up and my foot was half on, half off, and my ankle had rolled.”

Q: Okay. Are still saying that you were standing up from a kneeling position when you were injured? A: Yes.

[Hearing Transcript, p. 22, line 1 - p. 23, line 7].

Foran repeatedly and unambiguously testified that the video accurately shows her suffering the injury, and no party disputes the accuracy of the video. [Hearing Transcript, p. 18, lines 7-20; p. 25, lines 2-4; p. 26, lines 10-15]. When her direct manager “Jean” later arrived to the store, Foran told her how the injury occurred, even physically demonstrating to Jean with her hand how her left foot stepped on the edge of the mat causing her to roll her ankle. [Hearing Transcript, p. 16, lines 6-25, p.17, lines 1-12].

This was not Foran’s first ankle injury. At the age of 15, Foran was diagnosed with chronic instability of her left ankle and underwent reconstructive surgery in 2005. The surgery resulted in “good tension and stability” and “the reconstructed lateral ligament complex was nice and stable at the conclusion.” [APA, p. 4.]. Notably, the record is devoid of any subsequent medical record reflecting recurrent or ongoing instability or treatment for Foran’s left ankle. Indeed, following her childhood surgery, Foran felt “fully healed” and “was able to do

everything and anything” with no physical limitations. [Hearing Transcript, p. 10, lines 10-25; p. 11, lines 1-3].

After her repair surgery, Foran worked as a lifeguard without limitation, she played volleyball and softball without limitation and she worked as a cashier for Respondent without limitation since 2013. [Hearing Transcript, p. 11, lines 1-25, p.12, lines 1-22]. On the other hand, the store manager testified Foran limped all the time prior to her work injury, but he admitted Foran’s ankle never precluded her from doing any of her job duties and she always told him that she was fine. [Hearing Transcript, p. 30, lines 23-25, p. 45, lines 1-14].

After her injury, Foran was directed to go to Doctors Care, where Dr. Baens noted Foran was injured when she “stood up and may have caught on a mat twisting her left ankle” and completed a return to work form stating Foran’s work limitations were due to “acute injury”. [Transcript p. 18, lines 21-25 through p. 19, line 2; APA p. 12, 16]. When her symptoms did not improve, Dr. Baens referred Foran to Orthopedic Surgeon Ross Taylor, who concluded her “previous ligament repair was ruptured at the time of her most recent injury.” [APA, p. 36-39, 53]. Dr. Taylor states Foran needs ligament reconstruction surgery and cannot return to work until further notice. [APA, p. 53, 55].

Foran still needs surgery and continues to wear an orthopedic boot every day. [Transcript p. 20, line 10-25, p.21, line 1-3].

STANDARD OF REVIEW

Workers' compensation law is to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; therefore, only exceptions and restrictions on coverage are to be strictly construed. *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). On appeal from an appellate panel of the Workers' Compensation Commission, this Court can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "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." *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

ARGUMENT

1. THE APPELLATE PANEL ERRED BY FINDING FORAN'S INJURY WAS IDIOPATHIC.

An idiopathic injury is one that is brought on by purely a personal condition unrelated to the employment or the result of some internal breakdown of the body that does not stem from an accident. *Barnes v. Charter 1 Realty*, 411 S.C. 391 (2015); *Nicholson v. S.C. Dept. Social Services*, 411 S.C. 381 (2015). While workers' compensation law is to liberally construed in favor of coverage, an idiopathic injury is an exception to coverage that is to be strictly construed. *Id.*

The Commission failed to construe the law as required and its finding that Foran's injury was idiopathic is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. In this regard, the Commission concluded Foran's ankle injury was solely the result of an internal breakdown or weakness, basing this conclusion on the following erroneous findings: Foran suffered "chronic instability" in her left ankle, Foran's ankle gave out while simply standing on both feet at the register, and her limp.

a. Chronic Instability. The Appellate Panel relies on the 2005 diagnosis of chronic instability given by her surgeon *prior* to repair surgery. By relying on this pre-surgical diagnosis, the Panel essentially presumes the repair surgery failed, leaving Foran to live with a chronically unstable ankle since she was 15 years old. This is speculation and at odds with the surgeon's post-surgery records which state the procedure resulted in "good tension and stability" and "the reconstructed lateral ligament complex was nice and stable at the conclusion." After surgery, there is no medical record reflecting that Foran's ankle was thereafter chronically unstable – or even occasionally unstable - in any way whatsoever. Indeed, while focusing on a pre-surgery diagnosis, the Panel virtually ignores the remainder of the medical evidence on this issue which shows Foran suffered an "acute" injury that ruptured her previous repair.¹

The Panel's presumption of an unsuccessful surgery resulting in ongoing instability also finds no support in Foran's testimony that following her surgery, she worked as a lifeguard, played volleyball and softball and worked as a cashier without physical limitation. This is without contradiction and even her employer admits her left ankle did not preclude her from doing any job duty whatsoever.

¹ *Merriam-Webster Dictionary* defines "chronic" as being marked by long duration or frequent recurrence or always present, while "acute" is characterized by sharpness or severity and having a sudden onset, sharp rise and short course.

The Commission's finding of "chronic instability" is based on an eight year old diagnosis for a condition that was surgically repaired. It is clearly erroneous in light the substantial evidence of record showing Foran's reconstructive surgery was successful, permitting her to work and play without restriction, and that she suffered an "acute" injury at work.

b. Video Surveillance. The Appellate Panel acknowledged the video surveillance is key to the compensability of this case, and Foran agrees, if the video is viewed with an eye for accuracy. The Panel concludes the video surveillance reflects Foran was "merely standing at the register with both feet forward when her left ankle rolls." [Decision p. 21]. A plain viewing of the video reveals this finding is objectively erroneous. Indeed, the video shows Foran in constant motion stocking cigarettes, and at 5:33:46 - 5:33:47 a.m., Foran is seen rising from one knee while turning toward the cash register and stepping forward with her left foot to the edge of the mat when she suffered her ankle injury.² Contrary to the Panel's interpretation, Foran was not simply standing there with both feet on the mat. In fact, Foran's right foot never even made it to the mat, and the Panel's finding that the injury occurred with both feet planted on the mat is unsupportable.

In this regard, the Appellate Panel's finding that the video shows Foran standing still as her ankle rolls is clearly erroneous and inconsistent with the substantial evidence of record contained on the video showing her in movement and just stepping on the mat with one foot when suffering her injury.

c. Foran's Limp. The Appellate Panel also places great emphasis on Foran's limp to support its conclusion she suffered from chronic instability and therefore her injury was idiopathic. This is a leap of logic unsupported by the substantial evidence of record. Indeed, there

² The Panel found Foran's testimony describing her injury unclear. [Decision, p. 21]. Notably, the "unclear" part is her description of *how* she stepped on the mat, not *if* she stepped on the mat suffering injury, and any confusion is readily clarified by simply watching two seconds of the video which all parties agree accurately depicts the incident.

is no evidence that a limp equates to chronic instability and no evidence that a limp proves a future internal breakdown or failure. To the contrary, Foran had reconstructive ankle surgery when she was 15 years old, and as discussed above, that surgery was a success, permitting her to work and be active without physical limitation for eight years. A far more fair reasonable view of the substantial evidence of record reflects that any limp was a result of undergoing successful ankle reconstructive surgery as a teenager rather than a failed surgery that left her chronically unstable for the past eight years.

The Appellate Panel treats this case similar to the injury in *Crosby v. Wal-Mart*, 330 S.C. 489 (1998), as the Panel determines there is no work related explanation for Foran's fall and therefore she must have suffered an internal breakdown of her ankle due to the chronic instability as diagnosed prior to repair surgery. However, Foran's injury is not unexplained, it is readily observed on the video and described by Foran as being caused by her misstep on the edge of the floor mat, just the same as she physically described to her direct manager immediately thereafter. The *Crosby* Court relied heavily upon the employee's statement that "my leg just gave out" and that she didn't know why she fell. Conversely, Foran has never claimed her ankle inexplicably "gave out". In fact, Foran has consistently maintained that her ankle rolled due to a specific work accident, which is not contradicted by any witness and is supported by video.

Also unlike *Crosby*, Foran's medical records show her injury was "acute" and the result of a specific work accident. On the day of injury, the Doctors Care history reflects Foran "stood up and may have caught on a mat twisting her left ankle" and noted she required work restrictions "due to acute injury", and Dr. Taylor concluded her "previous repair was ruptured at the time of her most recent injury."

Foran's injury is more like *Barnes v. Charter 1 Realty*, 411 S.C. 391 (2015), where an employee was walking to go check emails when she inexplicably stumbled, fell and sustained severe injuries. The Supreme Court reversed the finding that the employee must have suffered an idiopathic injury because there was no alternate known cause, stating:

“In our view, the appellate panel's finding does not support its ultimate conclusion. **As the panel acknowledged, Barnes 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.** [citations omitted]. Barnes clearly established that she was performing her job when she sustained an accidental injury; we therefore hold her injuries arose out of her employment as a matter of law.” (Emphasis added).

Foran was undeniably performing a work task when she stepped on the mat and injured her ankle. The substantial evidence in this case shows that Foran's injury was not brought on by purely a personal condition unrelated to the employment nor the result of an internal breakdown in her ankle, but instead that Foran suffered an “acute” injury. The Commission failed to construe the evidence liberally for coverage and strictly to the exception, and its decision should be reversed for legal error and as clearly erroneous in view of the reliable, probative, and substantial evidence of record.

2. THE APPELLATE PANEL ERRED BY FINDING FORAN DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT.

For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2013). “An injury is not compensable absent some causal connection to the workplace. In other words, but for the claimant being at work, the injury would not have occurred.” *Nicholson v. S.C. Dept. Social Services*, 411 S.C. 381 (2015). Workers' compensation law is to be liberally construed in favor of coverage in order

to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed. *Id.*

In *Nicholson*, the employee's injury claim was initially denied after tripping on the carpet while walking to a meeting because it was not the result of a hazard or special condition. The Supreme Court reversed, holding that it is immaterial whether there was any objects or conditions posing a special risk or hazard, concluding the employee:

“was at work on the way to a meeting when she tripped and fell. The circumstances of her employment required her to walk down the hallway to perform her responsibilities and in the course of those duties she sustained an injury. We hold these facts establish a causal connection between her employment and her injuries—the law requires nothing more.”

In this case, Foran was stocking cigarettes when she tripped on the edge of the mat and the circumstances of her employment required her to walk about the cashier's area to perform her responsibilities and in the course of those duties she sustained an injury. Pursuant to *Nichols*, these facts alone establish a causal connection between her employment and her injuries and the law requires nothing more.

The Commission concluded Foran did not suffer a compensable injury by accident within the course and scope of her employment because her injury was idiopathic and not caused or aggravated by her work or any special risk found in her employment. [Order, p. 22]. While the idiopathic finding is discussed above, the remainder of the Commission's conclusion continues to use the criteria now abolished by *Nichols*.

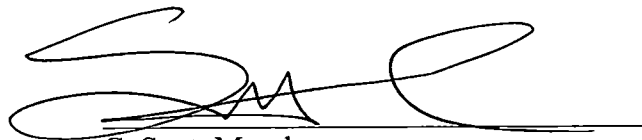
As more comprehensively discussed above, the substantial evidence of record shows Foran rose, turned and stepped on the edge of the floor mat with her left foot causing it to roll and cause injury. The Appellate Panel failed to construe the evidence liberally for coverage and

strictly to the exception and its decision should be reversed for legal error and as clearly erroneous in view of the reliable, probative, and substantial evidence of record.

CONCLUSION

The Panel's Decision is clearly erroneous in light of the substantial evidence showing Foran suffered an acute injury in the course of and arising from her employment and the decision should therefore be reversed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Scott Masel', written over a horizontal line.

C. Scott Masel
S.C. Bar# 12497
PALMETTO INJURY LAWYERS, LLC
P.O. Box 808, Myrtle Beach, SC 29578
(843) 449-9417 / smasel@newbylaw.com
Attorneys for Appellant Jenna Foran

August 18, 2015

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA COURT OF APPEALS

RECEIVED

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AUG 19 2015

SC Court of Appeals

APPELLATE CASE NO.: 2015-001606

Jenna Foran, ClaimantAppellant,

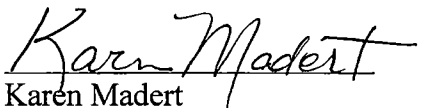
vs.

Murphy USA, Employer, and
Liberty Insurance Corporation, CarrierRespondents.

CERTIFICATE OF SERVICE

I certify that I am an employee of the law firm of Palmetto Injury Lawyers, LLC, and that I have served a copy of the Initial Brief of Appellant, upon counsel for the Respondent named below, by depositing a copy of the same in the United States Mail, postage prepaid, on August 18, 2015, addressed as follows:

Anne Veatch Noonan
Wilson Jones Carter & Baxley
421 Wando Park Boulevard, Suite 100
Mount Pleasant, SC 29464


Karen Madert