THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

WCC FILE NUMBER: 1403134
APPELLATE CASE NO. 2015-002300

Clyde Williams..... Appellant

v.

Bowman Gin Co., Employer, and American Interstate Ins. Co., d/b/a Amerisage Risk Services, Carrier of whom Bowman Gin Co., is the..... Respondent

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REPLY BRIEF OF APPELLANT

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2. THE SCWCC ERRED IN PLACING UNJUSTIFIABLE CREDIBILITY OF THE EMPLOYER'S EXPERT, DR. PRITCHARD, ON THE BASIS THAT HIS OPINION CONCERNING THE NON-COMPENSABILITY OF THE CLAIMANT'S INJURIES WAS BASED IN PART ON AN OPINION OF THE ACTIVITIES SURROUNDING THE FALL OF THE CLAIMANT? (SEE EMPLOYER'S APA EXHIBIT #12, REPORT OF DR. PAUL PRITCHARD) THIS OPINION WAS BASED UPON THE PARTIAL REVIEW OF THE DEPOSITION OF THE CLAIMANT, WITHOUT THE TRIAL TESTIMONY OF THE CLAIMANT, AND ADDITIONALLY FLAWED BY DR. PRITCHARD'S OPINION WHICH WAS PARTIALLY BASED UPON HIS OPINION OF THE CAUSE OF THE FALL, WHICH WAS BEYOND HIS COMPETENCE OR EXPERTISE AND WOULD BE MORE PROPERLY WITHIN THE OPINION OF A QUALIFIED EXPERT AND WITHOUT A PRIOR QUALIFICATION OR VOIR DIRE EXAMINATION OF DR. PRITCHARD COULD NOT BE QUALIFIED AS AN ACCIDENT RECONSTRUCTIONIST AND THAT PORTION OF HIS REPORT SHOULD BE STRICKEN.

The Respondent admits in arguments, that the Appellant was injured in the course of his employment, but centers its' argument in affirming the decision of the Single Trial Commissioner and the panel of the Full Commission on whether or not this accident was arising out of employment S.C. Code §42-1-160(a). We learn from *Barnes v. Charter 1 Realty*, 411 SC 391, 767 SE 2d 651; 215 SC. Lexus 4, idiopathic injuries are generally non-compensable absent evidence the workplace contributed toward the severity of the injury. *Bagwell v. Ernest Burwell Inc.*, 227 S.C. 444, 452, 88 SE 2d 611, 614 (1955). The record is clear from the only eyewitness, affirmed and corroborated by the severity of the Appellant's injuries that the Appellant fell while washing his employer's truck windshield elevated at a distance of two (2) feet while standing on top of the right front tire. Assuming that the Appellant was 5'5" tall, his head would have at the moment of the fall been over seven feet above the ground. This is not a level surface fall and all of the evidence, testimony, and physical evidence indicate that the Appellant was placed in a

special danger occasioned by his employment and his attempts to clean his windshield. In addition, the Appellant was using soapy water, dripping a long handled wash brush in a bucket of soapy water, wearing rubber shoes while perched precariously on the front tire to reach the truck windshield. This was not a level surface fall and the enhanced danger rule applies.

The Court has clarified once again that the Claimant is not required to prove his injury is entirely unique to his employment. Any other interpretation would seriously undermine the law of worker's compensation. For example, a chef may cut himself with a knife, or a carpenter may fall off a ladder just as easily while at home, rather than at work. However, this possibility alone does not remove such an accident from the scope of compensation if the accident occurred at work. Alleging that an accident is not unique to employment without more is not a viable basis for denying compensation. *Nicholson v. S.C. Department of Social Services*, 411 S.C. 381. The Court observed the well settled notion that [a] physical seizure unrelated to employment is not such an accident as is compensable "id. at 450-451 88 S.E. 2nd at 614." HOWEVER IT IS NOTED THAT SIMPLY CONCLUDING THE FALL AS IDIOPATHIC WAS NOT THE END OF THE INQUIRY, AND THAT IF, EXCEPT FOR THE EMPLOYMENT, THE FALL, THOUGH DUE TO A CAUSE NOT RELATED TO EMPLOYMENT, WOULD NOT HAVE CARRIED THE CONSEQUENCES IT DID, THEN CAUSAL CONNECTION ESTABLISHED BETWEEN THE INJURY AND EMPLOYMENT AND THE ACCIDENTAL INJURY AROSE OUT OF EMPLOYMENT. (emphasis added) Id. at 453, 88 S.E. 2nd 615. Accordingly, the Court proceeded to consider whether a special danger or hazard of the Claimant's employ contributed to the resultant injury. Id. the Court ultimately held that the concrete floor was not a hazard of employment capable of bringing his idiopathic fall within the ambient of coverage. However, in

this case the Appellant did not fall from a level surface. He fell attempting to clean his employer's truck's windshield. The fall began with the Appellant's head elevated approximately 7.5' above the concrete pavement. Additionally, corroborative of the severity of the fall contrasting to a level surface fall is the degree of injury the large puddle of blood and the diagnosed and documented brain injury. The *Bagwell* Court inquired whether it was a work related hazard only after concluding the injury was not otherwise compensable. It therefore did not examine whether some hazard caused the fall but looked at the effect of the fall on the resulting injury and whether a hazard increased the severity of the injury. See Modern Workers's Compensation §110:8 [1], in an idiopathic fall, if employment does not cause the fall but significantly contributes to the injury, by placing the employee in a position which increases the dangerous effects of the fall, these injuries are compensable. It is respectfully submitted that the Trial Commissioner and the panel of the Full Commission stopped too soon as we learned from *Nicholson* and failed to determine or even consider whether a special danger or hazard of the Claimant's employment contributed to the resulting injury, or increased the severity of the injury. The Court has addressed a level surface fall on wet concrete in the case of *Pierre v. Seaside Farms Inc.*, 386 SC 538, 689 SE 2nd 617. In *Pierre* the Claimant, a migrant worker, was injured when he slipped and fell on a wet sidewalk at the Employer provided housing. The primary issue involved in Pierre was the application of the bunk house rule to the Claimant who lived at a labor camp, but was not expressly required to do so by the employer. *Id* 542-48, 689 S.E. 2d 619-22. After concluding Pierre was obligated to live at the camp due to the nature of his employment, the Court considered the Employer's assertion that Pierre's fall was not compensable because the sidewalk he fell on was no different in character from other sidewalks. *Id* 548-49, 689 SE 2d at

622. The Court rejected this argument and found Pierre was exposed to the wet sidewalk because of his employment and therefore the requisite connection between injury and employment was established.

1. **THE SCWCC ERRED IN WEIGHING THE OPINION OF THE EMPLOYER'S EXPERT, I.E., DR. PRITCHARD MORE HEAVILY THAN THE TREATING PHYSICIANS SUBMITTED BY THE CLAIMANT? THIS ERROR WAS EXACERBATED BY THE FACT THAT THE EMPLOYER'S PHYSICIAN NEVER TREATED, TOUCHED, PERSONALLY EXAMINED, OR EVEN SPOKE TO THE CLAIMANT. (SEE EMPLOYER'S APA EXHIBIT #12, REPORT OF DR. PAUL PRITCHARD), SAID EVIDENCE SHOULD HAVE BEEN EXCLUDED OR DISCOUNTED.**

6. **THE SCWCC ERRED IN WEIGHING MORE HEAVILY THE OPINION OF DR. PRITCHARD OVER THE OPINION OF PHYSICIANS WHO ACTUALLY TREATED, EVALUATED, COUNSELED AND SPOKE TO AND PERSONALLY EXAMINED THE CLAIMANT?**

It is also submitted that the Single Commissioner and the Panel relied too heavily on the opinion of Dr. Pritchard on the basis that Dr. Pritchard's testimony found that the cause of the fall was a syncope incident related to Dr. Pritchard's assumption that the Claimant was non-compliant with his medications and that he had complained of dizziness at the scene of the accident. Dr. Pritchard's report is flawed in the following particulars. The report that the Claimant testified that he felt dizzy the day of the accident occurred only after he suffered a traumatic brain injury and had been unconscious for a period of time prior to the first responder's arrival. This is corroborated by the blood around the Claimant, his unconscious state, the photographs showing the results of the fall and the fact that his memory was shattered, all corroborative of a significant closed head injury. See photographs of scene. Dr. Pritchard's report fails to take into consideration the Claimant's testimony in which he specifically addressed a prior dizzy episode which was

explained to have disappeared when the pain medication for a previous worker's compensation injury was changed. See Transcript of the Hearing, Page 27, Lines 11-25 and Page 28, Lines 1-14. The record is clear and without question that Mr. Williams, the Appellant never had a syncope event reported or experienced before, during or after his injury in this case. The Respondent places undue reliance on the cleaning brushes. The Appellant's testimony was that he fell while cleaning the windows of the truck twice. Once on the right side and once on the left. Therefore, the most likely conclusion derivative of a brain injured worker is that the brushes were on the right hand side of the truck where he had his first fall. No photographs or video were on the right hand side of the truck and no one knows what happened to the brushes, if any were present on the right hand side of the truck. It is interesting but without any evidentiary foundation that a physician who had never treated or even examined the Claimant, that the Appellant had a syncopal episode on the passenger's side of the truck on a dry, concrete surface. However, the Claimant was wet. No mention is made by Dr. Pritchard indicating that he hadn't considered same as to any investigation on the right hand side of the truck, the site of the first fall. Is it not believable that a brain injured worker does not remember the fall but remembers last standing on the tire of the truck washing the truck windshield and then finding himself on the ground wet and disoriented. See Transcript of the Record, Page 47, Lines 10-25, and Page 48 Lines 125.

In further reply to the Respondent's argument in the Respondent's Initial Brief, the Appellant must point out obvious inconsistencies. First the Single Commissioner never addressed the issue of the enhanced danger rule and made a specific finding that their existed no evidence as to what caused the fall. See Single Commissioner Decision and Order, Page 26, Item 21. Also, in the Single Commissioner's Conclusion of Law found on Page 27 of the Decision and Order, the

Single Commissioner erroneously concluded as a matter of law that from Claimant's own testimony that he did not recall the event and that he had a syncopal episode and that he was feeling hazy and lightheaded immediately preceding the incident that caused him to strike his head. This Conclusion of Law and mixed finding of fact is absent from the record of the case and indicates that the Trial Commissioner misapprehended the testimony. The Claimant specifically addressed the issue concerning dizziness on Page 48 and Page 29 of the Transcript of the Hearing, lines 4-45.

A: If you are asking me if I remember falling, specifically I can't say I specifically remember falling, I just know I did. The next thing I remember is I'm on the ground wet.

Q: But it's also possible that you could have gotten down and all of a sudden ended up sitting on the ground because you don't remember what happened between the time you were cleaning your windshield and all of a sudden you were on the ground, is that right?

A: Probably, yea. Yea I guess you could say it's possible but not likely. You don't sit on the concrete by a diesel pump.

Q: But you don't know why you sat on the ground by the diesel pump, is that right?

A: Well you would never sit down, down there.

Q: Okay.

A: It's just to nasty.

Q: And when you realized you were sitting on the ground on the passenger's side is that when everything was kind of hazy to you?

A: I guess hazy would be the right word.

Q: And I am taking this from your prior deposition. You said you were feeling lightheaded and hazy while you were sitting on the ground, is that how you were feeling?

A: Right.

In short, the Single Commissioner misapprehended the evidence and erroneously found as a matter of fact and law that the Appellant was feeling hazy and lightheaded immediately preceding the incident which caused him to strike his head, omitting and disregarding the fact that the Claimant testified uncontradicted that he fell twice. Once from the passenger's side of his vehicle and second from the driver's side. This report of lightheadedness appears several times in the medical records, but at no point in the record is their any report of lightheadedness on the day of the accident, which occurred before the initial fall.

5. THE SCWCC ERRED IN ACCEPTING THE OPINION OF DR. PAUL PRITCHARD ON THE BASIS THAT HIS TESTIMONY AS PRESENTED IN HIS THREE (3) PAGE OPINION WAS BASED UPON A REVIEW OF THE COMPLETE MEDICAL RECORDS OF THE CLAIMANT WITHOUT A CERTIFICATION OF EXACTLY WHAT RECORDS WERE REVIEWED, IN THE ABSENCE OF WHICH HIS OPINION LACKS APPROPRIATE FOUNDATION ON THE BASIS OF HIS OPINION BY SIMPLY INDICATING ALL OF THE MEDICAL RECORDS WITHOUT LISTING AND DESCRIBING EACH RECORD REVIEWED AND AS SUCH DR. PRITCHARD'S REPORT SHOULD HAVE BEEN EXCLUDED FROM THE RECORD OR GIVEN NO WEIGHT.

It is respectfully submitted that the Single Commissioner and Full Commission misapprehended the *juris prudence* set forth in Barnes v. Chapter 1 Realty, 411 SC 391. A finding that a fall is idiopathic is not warranted simply because the Claimant is unable to point to a specific cause of the fall. This is precisely the case before the Court today. It is respectfully submitted that this constitutes an error of law to the very foundation of the idiopathic exception. It is respectfully submitted that the Commissioner erred in relying on the window washing brushes and the opinion of Dr. Pritchard that the Claimant suffered two (2) syncopal events or unexplained

fainting. It is unreported and unsupported by any previous treating physician. It is respectfully submitted that Dr. Pritchard speculated on two (2) syncopal events causing the fall, and also speculated that the Claimant's fall was initiated by a condition peculiar to Mr. Williams, i.e., two (2) syncopal events. The entire medical record fails to show any syncopal events and a previous report of dizziness was clearly defined and explained by the Claimant going away when his pain medication for a previous compensable injury was changed. Therefore, Dr. Pritchard's opinions were based upon speculation and a misapprehension of the prior medical history. As to the cleaning brushes, the record is clear that Mr. Williams, the Appellant herein, fell first on the right hand side of the vehicle and felt wet. His dizziness and lightheadedness occurred only subsequent to the first fall and no photographs were available to show the right hand side of the truck. While the Claimant was unconscious a variety of circumstances could have occurred to show a movement of the brushes and there is no evidence of what happened on the right hand side of the vehicle, the location of the first fall. These two (2) falls are the basis of Dr. Pritchard's opinion of syncope. The Trial Commissioner never addressed the special or enhanced danger rule. The Appellant respectfully submits that the enhanced danger rule is applicable and should have been applied by the Commissioner based upon the severity of the injury and the fact that the fall was not from a level surface, corroborated by the only witness whose last memory was being on the right tire washing the window and his next memory being on the ground injured and wet. Dr. Pritchard omits the testimony of the Appellant that he was wet after the first fall and dizzy after the fall. The dizziness is well explained by the degree of brain damage suffered by the Appellant.

In reply to the Respondent's assessment of Dr. Pritchard's testimony, while Dr. Pritchard is able to point out previous history of hypertension and diabetes myelitis type II, he has taken

steps beyond the medical record and opines without appropriate basis or foundation that the Appellant suffered two (2) syncope episodes based almost exclusively on a January 29, 2012, visit with Dr. Brunson wherein the Appellant complained of lightheadedness while ignoring testimony of the Claimant indicating that that lightheadedness went away when his pain medicine for a previous worker's compensation injury had changed. See Transcript of the Record, Page 34, lines 5-23.

Q: Okay now, have you ever had an episode where you fainted?

A: No.

Q: In your whole life?

A: No.

Q: Okay, in the medical records that we have submitted to the Commissioner the emergency room report indicates that you felt dizzy. Do you recall telling the E.R. people that?

A: No. I don't.

Q: Would that have been after the fall? Is that correct? When do you remember telling them at all that you fell?

A: I was laying on the ground. I don't know but I don't remember telling them that at all. No.

Q: Okay. So you don't remember any of that?

A: No.

Q: Do you remember telling them that you became weak?

A: No.

Q: Do you remember when you became weak, if you became weak.

A: No.

The Appellant testified that there were usually brushes on both sides of the truck. Page 36, Lines 22-25. This was also ignored by Dr. Pritchard and the Commission.

Also as to the insinuation by Dr. Pritchard that the Claimant was non-compliant, see Transcript of the Record, Page 38, Lines 20 through Page 39, Line 21. This also is ignored by Dr. Pritchard and the Commission.

It further appears that the Trial Commissioner misunderstood and misapprehended at the time of the hearing that a previous incident in which the Appellant complained of lightheadedness related to a medication issue, which resolved when the medication was changed. See Transcript of the Record, Page 41, Lines 6-15.

C: He thought it was the medication, it was some type of pain medication and when he came off of it it he didn't have that?

A: Yes, and I didn't know I had a kidney stone.

The Respondent suggests that the Single Commissioner and the panel of the Full Commission justified in giving less weight to Dr. White's opinion with the implication that the fall that the Appellant suffered was from a distance of six (6) to eight (8) feet. The Employer's, Mr. Wimberly's, own testimony indicated that the tire of the truck was at least two (2) feet high. To suggest that the fall was from two (2) feet is disingenuous. These factors show that this assumption of the reliability, credibility and corroborative nature of the events of the fall and the height of the fall are misplaced. The uncontradicted testimony is that the Appellant fell twice while perched upon the top of the truck's tires, first on the right and then on the left. These factors are significant. The Appellant suffered a traumatic brain injury.

In particular the Appellant's deposition and hearing testimony from which the Commission and Dr. Pritchard apparently opined, the Appellant had a syncopal episode. That accounted for falling on the concrete. They did consider the added risk of standing on a truck tire. Where is the evidence of the prior syncopal episode? The photographs and witnesses testimony prove that the Appellant was engaged in cleaning the truck windows when he fell from an elevated position onto a flat concrete surface. What record supports the Full Commissioner's finding that the Appellant suffered an idiopathic fall which resulted in an injury which was not causally connected to employment? None of this is supported by the record and the Appellant craves notice of Appellant's testimony that the Appellant was engaged in cleaning the truck windows when he fell. To the contrary, the testimony and evidence reveals a fall from a distance of such magnitude to cause a significant, permanent brain injury, leaving the Appellant disabled, bleeding from the head and unconscious, with resulting loss of memory and permanent disability. This does not support a fall from a level surface, or any syncopal event that had never occurred in the past, did not occur on the date of the accident and has not occurred since.

CONCLUSION

In conclusion, the Court of Appeals should reverse the decision of the Single Commissioner affirmed by the panel of the Full Commission and find the Claimant's injuries compensable and remand for a determination of the degree of disability. The evidence presented and relied upon by the Single Commissioner and panel of the Full Commission fail the substantial evidence test. Dr. Pritchard's opinions concerning two (2) syncopal episodes as the cause of the Appellant's injuries is without evidentiary support and/or flawed by the misinterpretation of the testimony and other evidence. Assuming that the Court of Appeals believes there is substantial

evidence to support Dr. Pritchard's opinion of an idiopathic fall caused by personal conditions of the Appellant, the injury is still compensable based upon the enhanced risk doctrine, supported by the record, the testimony of the Claimant and the injuries sustained by the Appellant.

Respectfully Submitted,

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Dated: March 21, 2016

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CERTIFICATE OF SERVICE

I, Lewis C. Lanier, attorney for the Appellant, hereby certify that I have served the foregoing ***Reply Brief of the Appellant*** on the attorney for the Respondent, with proper postage affixed, by US First Class Mail, at the address indicated as follows:

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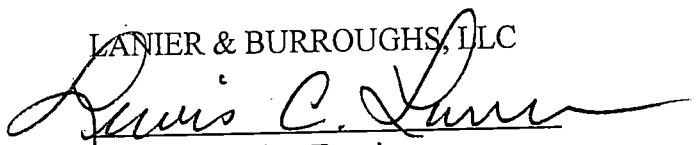

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