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.

RETURN IN OPPOSITION TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240(e), Respondents SAIIA Construction and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc. hereby oppose Appellant William Lee Turner's ("Claimant") Petition for Rehearing ("Petition") of this Court's Opinion No. 5458, filed December 7, 2016. Claimant has presented no issues that warrant this Court granting his Petition, hearing it *en banc*, or certifying any question to the South Carolina Supreme Court, all of which requests should be denied.

1. **This Court properly refused to extend the unexplained death presumption to the facts of this case.**

First, Claimant takes issue with this Court's holding that the unexplained death presumption does not apply where the injured worker survives the accident but does not remember what happened. This issue was fully briefed and argued, and Claimant presents no legitimate point that this Court misunderstood or overlooked other than to

raise the specter of hosts of employees suffering unwitnessed and unremembered falls or injuries and being denied workers' compensation benefits. (Pet. pp. 2, 17). The fact that there have not been "hundreds of workers suffering very common unwitnessed injuries" since the inception of the South Carolina Workers' Compensation Act ("Act") demonstrates that his fears are unfounded. The reality is that there have been very few cases involving unwitnessed, unremembered work accidents during the 80+ years since the Act was passed.

Claimant attempts to obfuscate the fact that he can point to no South Carolina precedent extending the unexplained death presumption to the facts of this case, by relying on verbiage in cases applying it in to death cases. That verbiage is dicta. Claimant has not and cannot point to a single South Carolina case where the presumption was applied where the claimant survived. Given Claimant's vision of "hundreds of workers suffering very common unwitnessed injuries," one would think there would be an abundance of South Carolina cases applying the presumption to cases like the instant one. But there are not. Not one.

Instead, this Court properly looked to other states, and to North Carolina in particular. North Carolina, in addition to other states with similar Acts, has limited the presumption to cases where the worker is deceased, and has specifically refused to apply it where the worker is alive but claims no memory of the events leading up to the injury. This Court correctly noted that the facts in Janney v. J.W. Jones Lumber Co., Inc., 145 N.C. App. 402, 550 S.E.2d 543 (N.C. Ct. App. 2001), which involved a claimant who had no memory of falling and hitting the floor, are "very similar to the instant case."

Claimant argues repeatedly that the South Carolina Supreme Court has held that it "does not follow and specifically rejects North Carolina law" in the "area of injury by accident." (Pet. pp. 3, 7, 11, 12, 14-15). Respondents presume he is referring to the fact that North Carolina requires that "some unusual or unlooked-for mishap" occur whereas, in South Carolina, a compensable injury can occur through normal work activities where an unexpected injurious result ensues. *See* Pee v. AVM, Inc., 352 S.C. 167, 170-171, 573 S.E.2d 785, 787 (2002). While this is true, that does not answer the question at issue in this case and our Supreme Court's rejection of the requirement that an unexpected mishap occur does not preclude South Carolina courts from following North Carolina's well-reasoned precedent concerning unwitnessed and unremembered injuries. In fact, our Supreme Court specifically approved of reliance on North Carolina precedent (*i.e.*, Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576) in adopting the unexplained death presumption in Owen v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), a case decided a year and a half after Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939), the case Claimant insists precludes South Carolina courts from relying on North Carolina precedent for any issues dealing with "arising out of." (Pet. p. 7). Thus, it is more than simple "speculation" on this Court's part that the Supreme Court would decline to extend the unexplained death presumption to the facts of this case.[1]

[1] In his Conclusion, Petitioner makes the perplexing statement that, since how the Supreme Court might resolve this issue "was not specifically raised, challenging the application of the unexplained death or injury presumption, under the principle of judicial restraint from deciding issues that need not be decided to reach a conclusion, the Appellant would ask that the opinion be withdrawn or redrawn in light of that Decision." (Pet. p. 21). His request should be denied. It is both common sense and the nature of an intermediate appellate court to resolve the cases before it in accordance with any precedent set by a higher court and, where an issue may be novel, to reach a resolution that it believes the higher court would reach.

Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999), on which Claimant relies heavily, does not hold differently. In Jennings, the claimant drove a garbage truck and, one morning was found slumped over the wheel, having suffered a heart attack. The claimant's widow argued she should be entitled to the "'unexplained death' presumption." This Court clarified that the unexplained death "presumption is applied simply to establish that the injury occurred in the course or and as a consequence of employment. The presumption cannot be applied to establish the incident of accident." 335 S.C. at 256, 516 S.E.2d at 457. In other words, the unexplained death presumption does not eliminate the test for whether a heart attack or brain aneurism – or some other condition peculiar to the claimant, such as taking prescription medications with serious side effects – is work-related. This Court neither misunderstood nor overlooked long-standing precedent concerning the definition of "injury by accident" and/or "what constitutes arising out of."

Claimant incorrectly argues that this Court is bound to "liberally apply" *precedent* interpreting the Act in order to extend the presumption to cover the facts of this case and award him relief. There is no such rule. He also argues incorrectly that the "inequality of information" reasoning put forth in Janney is "totally contrary" to the Act. While provisions of the Act should be construed liberally in order to effect its purposes, it is equally true that the words of the Act "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Stone v. Roadway Express, 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006); Wigfall v. Tideland Util., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) (courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's*

[sic] Compensation Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt"). In fact, the Act, which represents a balancing of competing interests between workers and employers, Wigfall, 354 S.C. at 116-117, 580 S.E.2d at 108, 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). The "inequality of information" is just such a balance.[2]

Furthermore, as this Court correctly noted, 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. Claimant's effort to impose a burden-shifting analysis on this case is just such an attempt.

Claimant asserts wrongly that our "Supreme Court has specifically ruled that it would apply the death and injury presumption to cases where the Claimant did not die from his injuries," citing Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737

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[2] Furthermore, Claimant's assertion that there is no logical or legal difference between an employee who has died and one who is in a coma or claims to not remember the events leading up to his or her injury, (Pet. pp. 8, 17), is incorrect. The former is a permanent condition and issues of credibility do not arise where the claimant is deceased – the same cannot be said in the case of a coma (which is not always permanent) or an employee who claims he or she has no memory of an event.

(1960). (Pet. p. 3). However, the language quoted by Claimant was the Court's summation of the claimant's legal argument. It was not a holding and it cannot fairly be construed to be an adoption of the unwitnessed death presumption in cases where the claimant survived. The Court was responding to the claimant's argument that circumstantial evidence was sufficient to support an award in his favor. While the Court agreed that circumstantial evidence can support a finding of fact or an award, the evidence in that case "fail[ed] to disclose or to warrant a reasonable inference that there was any *causal connection* between the employment and the injury to the claimant." 236 S.C. at 231-232, 113 S.E.2d at 740 (emphasis added). Although the claimant also argued he should be entitled to the unexplained death presumption, the Court rejected that argument because the claimant could not show his injury occurred in the course of his employment. And, because that ruling disposed of the case, there was no need for the Court to rule whether it would apply the unexplained death presumption in a case where the claimant survived but could not recall the accident. *See* Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court does not need to determine all issues when one is dispositive of the appeal).

Claimant incorrectly states that the Fowler Court referred to Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), "in regards to the presumption." (Pet. p. 4). The reference to Owens was to the fact that "circumstantial evidence need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached" by the Commission. Fowler, 236 S.C. at 232, 113 S.E.2d at 740.

The second reference to a "presumption" in Fowler that Claimant cites also is not to the unexplained death presumption but, rather, in response to the claimant's argument that an "injury may be compensable if received at some distance from employer's place of business, where, at the time and place of injury, employee was doing some work in connection with, or incidental to his employment." Fowler, 236 S.C. at 234, 113 S.E.2d at 741. That certainly does not apply to the facts of this case. Finally, in Fowler the Supreme Court cited to Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944) in reference to the going and coming rule, Fowler, 236 S.C. at 2343, 113 S.E.2d at 741, and not, as Claimant suggests, to the application of the "unexplained, unwitnessed death or injury presumption ..." (Pet. pp. 5, 6). Thus, Claimant's attempts to cobble together a prior statement or even intimation by the Supreme Court that it would apply the unexplained death presumption to the facts of this case fails.

Contrary to Claimant's suggestion otherwise, this Court did not fail to apprehend the distinction between cases applying the unexplained death presumption that involved accidental injury versus those where the death was the result of a claimant's pre-existing health condition. This Court first held that the presumption does not apply where the claimant survives but has no memory of the accident. Then, alternatively, this Court correctly held that, even if the presumption applied in such cases, Claimant still would not be entitled to compensation, where Claimant had recent medical conditions and Respondents rebutted any presumption to which he theoretically might have been entitled. The Commission emphasized the narcotic pain medications Claimant was

taking for his non-work-related preexisting back conditions, and that he had sought emergency medical care just prior to his accident.[3]

As the Supreme Court stated in Steed v. Mount Pleasant Seafood Co., "[u]nwitnessed 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 the factors into account it drew an inference that no reasonable man could draw." 236 S.C. 253, 256, 113 S.E.2d 827, 828-29 (1960) (emphasis added); *see also* Buff v. Columbia Baking Co., 215 S.C. 41, 51, 53 S.E.2d 879, 883-884 (1949) (upholding inferences drawn by Commission that were both reasonable and sufficient to affirm the Commission's determination). Here, even if the presumption applied, which it does not, it cannot be said that the Commission drew an inference that no reasonable man could draw.

In this case, the inferences from the circumstantial evidence are in conflict. On one hand, the Commission could have inferred from statements made by Claimant's co-workers (who, as was noted previously, are not medical professionals and could only testify to what they observed as laymen) that they believed he was in "top notch shape" on the day of the injury, or the Commission could have inferred from Claimant's visits to doctors, the prescriptions medications he was taking, and his seeking emergency medical

[3] Thus, Claimant's assertion that there is no contrary specific evidence regarding "the time and place of the accident," (Pet. p. 8), is incorrect. There is evidence that, on the day and at the time of the accident, Claimant was taking the same narcotic medications for a non-work-related back injury that sent him to the emergency room just two days before.

care for side effects from those medications, that the cause of his fall was peculiar to himself. The Commission found significant the fact that "three days prior to the date of the alleged accident, Claimant was prescribed 90 capsules of Neurontin (to be taken three times daily) and 60 tablets of Ultram (to be taken two times daily)." (R. p. 28) (emphasis in original) (R. p. 24). Two days before the fall, Claimant was seen in the ER for vomiting and diarrhea. (R. p. 28). The Commission also clearly held that, even if a presumption applied, it was "confronted with the following: (a) there is no known cause of the fall in the instant case, (b) Claimant had been taking prescription medication (including Neurontin and Ultram) for back pain in the few days preceding the date of the accident, (c) Claimant sought treatment at the ER two days before the date of the accident for stomach/dehydration issues, and while there Claimant's family questioned the side effects of the medications he had been taking; (d) no one saw Claimant on the steps of the truck, and in fact one witness saw Claimant place a cooler into the truck from a standing position on the ground–not the steps; ... and (f) very importantly, **Claimant gave sworn testimony at his deposition that two witnesses observed Claimant on the steps just before he fell, which is refuted (or at least inconsistent with) the testimony of Barnette and Bolden.** Claimant's sworn testimony in this regard ... greatly damages his credibility." (R. pp. 31-32) (all emphasis in the original). There is sufficient evidence, circumstantial and otherwise, to uphold the Commission Decision.

Claimant focuses narrowly on testimony by his supervisor and two co-workers that he seemed to be in good shape on the day of his injury. (Pet. pp. 8-9, 14, 16). However, he is incorrect that "all" of the circumstantial evidence shows he was involved in work activities when he sustained his injury. Instead, circumstantial evidence, which

Claimant agrees is sufficient to prove a case or support a finding, exists that Claimant had preexisting back problems for which he sought medical care and for which he was taking powerful narcotics at the time of his fall. "It is well settled that circumstantial evidence may be relied upon to settle questions of fact in workmen's compensation cases ..." Buff, 215 S.C. at 45, 53 S.E.2d at 881. That is, circumstantial evidence may support the claimant's claim but also may support the Commission's denial of that claim. "Circumstantial evidence may be sufficient to support a finding of fact or an award, and a finding or award may be based on inferences drawn from circumstantial evidence ..." Id., 215 S.C. at 46, 53 S.E.2d at 881.

In this case, there was sufficient circumstantial evidence that Claimant had sought medical care for lower back pain, had been prescribed and was taking at the time of his fall powerful narcotics that have numerous serious side effects, and had sought medical care just days before his fall for some of those side effects. Thus, Claimant is incorrect that "there is absolutely no evidence of any ... medication ... that could have caused ... the injury by accident." (Pet. p. 10, *see also* pp. 17). There is evidence, both direct and circumstantial that Claimant was taking narcotic medications at the time of his injury and had sought emergency medical attention for some side effects associated with those medications. Contrary to Claimant's repeated assertions, it is not only "a natural condition" that can constitute a cause of injury peculiar to the employee. Taking narcotic medications for a non-work-related injury also can constitute an independent cause.

Claimant argues that he does not have to prove the "cause" of his fall or his injury. (Pet. pp. 10, 11-14). However, it is indisputable that, in order "to be compensable, an injury by accident must be one 'arising out of and in the course of

employment,'" and that, "'[a]rising 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." Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007) (emphasis added); *see also* Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965) (an injury "arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a *causal connection* between the conditions under which the work is required to be performed and the resulting injury .... But it excludes an injury which cannot fairly be traced to the employment as a *contributing proximate cause* ...) (emphasis added). In other words, the concept of a causal link to work is embedded in the "arising out of" prong of the definition of a compensable injury.

And, because a claimant bears the burden of proving facts that will "render the injury compensable" under the Act, Packer v. Corbett Canning Co., 238 S.C. 431, 435, 120 S.E.2d 398, 400 (1961), one of the things he must prove is some causal link between his injury and his employment. Nicholson v. South Carolina Dept. of Soc. Services, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) (a claimant must "prove a causal connection between the conditions under which the work is required to be performed and the resulting injury").[4] This is true even where the unexplained death presumption applies. That is, even where the deceased employee is "found dead in a place where he may

[4] Otherwise, the Act simply becomes an insurance plan for workers which clearly was not the Legislature's intent. Roper Hosp. v. Clemons, 326 S.C. 534, 537 n.1, 484 S.E.2d 598, 599 n.1 (Ct. App. 1997) (although the Act "should be liberally construed in order to accomplish [its] humane purpose, ... liberal construction does not mean that the act should be converted into a form of insurance").

reasonably be expected to be, [and] the natural presumption arises that his death occurred out of and in the course of his employment," the presumption alone may be insufficient to prove that the cause of death was a work-related accident, as opposed to some cause peculiar to the claimant. Packer, 238 S.C. at 436-437, 120 S.E.2d at 400-401.

Claimant also attempts to confuse the concepts of proving a causal relationship between an injury and his employment with the concept of whether he has to prove an unexpected "accident" occurred, *citing* Stokes v. First Nat. Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991) (nervous breakdown case, where the issue was whether the claimant had suffered an "injury by accident"); Hiers v. Brunson Const. Co., 221 S.C. 212, 232, 70 S.E.2d 211, 220 (1952) (exposure case, where the issue was whether pneumonia was an "injury by accident" under the Act). (Pet. pp. 11-14, 15). Stokes and Hiers are inapplicable to this case because there is no issue regarding whether Claimant's job subjected him to extreme stressors or weather. Neither this Court nor the Commission held that Claimant had to prove he experienced a sudden, unexpected external event. Instead, both this Court and the Commission held that Claimant was not entitled to a presumption that his injury was work-related and that, even if such presumption applied under these circumstances, Respondents produced sufficient evidence to overcome the presumption.

Claimant argues that all he has to show is "an unexpected result from the work activity." (Pet. p. 14). However, this is precisely what he has not and cannot do. First, he has not shown that anything related to his work activity caused his "unexpected result." All he can prove is that he was at work at the time he fell back and hit his head. He cannot prove that anything related to his work either caused or contributed to his fall,

or to the effect of his fall. In this respect, the instant case is distinguishable factually from Nicholson and Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015), as is discussed below in Section 3.

Claimant's arguments do not warrant rehearing and his Petition should be denied.

2. This Court did not misapprehend Claimant's argument regarding Findings of Fact no. 4, 5, 6, 9, 10 and 11, and Conclusions of Law 9 and 10.

First, this Court dealt with Claimant's second argument in his Brief precisely as Claimant framed it: "The Commission erred as a matter of law by specifically affirming the Hearing Commissioner's Findings of Fact #4, #5, #6, #9, #10 and #11, and by failing to apply under Conclusions of Law #9 and #10 the unexplained injury or death presumption and by trying to 'factually' distinguish that legal presumption under Conclusion of Law #10." (App. Br. p. 16). Second, Claimant's short "argument" in this section of his Brief did not raise any of the issues in the heading for Argument No. 2 or that are raised in his Petition; instead, he simply re-argued that he was entitled to the unexplained death presumption. Nowhere in this section of his Brief did he state that the six Findings of Fact are correct.

Claimant's arguments do not warrant rehearing and his Petition should be denied.

3. This Court properly held that Claimant failed to prove his injuries arose out of his employment.

Claimant incorrectly argues that this Court failed to follow the Supreme Court's ruling in Barnes and Nicholson. Both of those cases are factually distinguishable from the case at hand. Each of the claimants in Barnes and Nicholson testified that she was performing some task for the employer when she fell. In Barnes, the claimant testified that she had been asked to check a realtor's email, and "was hurrying to the realtor's

office" which caused her to fall. This testimony "clearly established that she was performing her job when she sustained an accidental injury." 411 S.C. at 393-394, 398, 768 S.E.2d at 652, 654. In Nicholson, the claimant was walking down a hallway to a meeting when she scuffed her foot on the carpet and fell. 411 S.C. at 383, 390, 769 S.E.2d at 2, 5. Here, there simply is no evidence that Claimant was performing any work-related function or activity when he fell. True, he was at work, but there is no evidence whatsoever that he was "performing a work task" when his injury occurred. There is no evidence that he was doing anything other than standing still at the time he fell.

Despite Claimant's assertion otherwise, this Court did not base its decision "on the dissent in the Supreme Court as opposed to following the decisions of the Supreme Court." (Pet. p. 21). Although this Court noted Justice Pleicones' dissent in Barnes and his concurring opinion in Nicholson, it distinguished this case from both of those cases: "Here, unlike in Barnes and Nicholson, we cannot determine what Turner was doing at the time of his alleged accident ... no evidence indicates his employment contributed to the cause of his fall." (Op. No. 5458, pp. 8-9). Further, it is not unheard of and there is nothing inherently wrong with appellate courts citing to and relying on statements made in prior dissents. *E.g.*, Faulkenberry v. Norfolk S. Ry., 349 S.C. 318, 563 S.E.2d 644 (2002).

Contrary to Claimant's suggestion, (Pet. pp. 16-17), neither Barnes nor Nicholson applied the "unexplained death or injury presumption" in order to find the claimants' injuries were compensable. What Barnes and Nicholson establish is that a fall can still be work-related even where a claimant cannot prove a *workplace hazard* caused the injury.

However, a claimant still has to prove *some* causal relationship between the injury and work. In Barnes, the causal link was hurrying to check a co-worker's email; in Nicholson, it was scuffing her foot on the carpet which caused her to fall. Furthermore, both Barnes and Nicholson are distinguishable factually from the case at hand: in neither of those cases was the claimant taking medications that have 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. (R. 109-112).

Furthermore, the Supreme Court did not overrule this Court's ruling in Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998), but, rather, distinguished that case from the facts in Barnes, 411 S.C. 15 396-398, 768 S.E.2d at 653-655 (noting that, in Crosby, there was evidence that the claimant's leg just "gave out" which caused her fall, as opposed to the claimant in Barnes, who was hurrying to check an email, and was "performing a work task when she tripped and fell"). In rejecting application of the idiopathic fall rule to the facts in Barnes, the Supreme Court emphasized that there was evidence of a work connection between the claimant's injury and her employment. 411 S.C. 15 396-397, 768 S.E.2d at 653.[5] The majority opinion in Nicholson does not even discuss Crosby.

[5] Here, there is no direct evidence of what caused Claimant's fall because it was unwitnessed and he claims no memory of the moments prior to his fall. However, as noted above, there is competing circumstantial evidence as to what may have caused his fall. Claimant argues that circumstantial evidence shows he was in "top notch shape" on the day of his accident. (Pet. pp. 8, 10). At the same time, there is other evidence, both direct and circumstantial, that indicates Claimant was taking narcotic medications with serious side effects, some of which had sent him to the emergency room just days prior to

Furthermore, the Supreme Court did not overrule Bagwell v. Burwell, 227 S.C. 444, 88 S.E.2d 611 (1955) in either Nicholson or Barnes. Instead, in both cases, the Supreme Court simply distinguished the facts before it from those in Bagwell. In Nicholson, the Supreme Court noted that the Bagwell Court first found that the claimant suffered a non-work-related seizure and then looked to see whether any aspect of his employment caused greater injury; *i.e.*, it did not look to see whether there was a causal connection between the fall itself and the work but only whether a work hazard increased the severity of the injury. Nicholson, 411 S.C. at 387-388, 769 S.E.2d at 4. The Court concluded that, as a result, "Bagwell is thus not relevant to this case." 411 S.C. at 388, 769 S.E.2d at 4. Similarly, in Barnes, the Supreme Court held that Bagwell was inapplicable to the facts before it because, in Bagwell, "the circumstances of the fall were not simply unexplained, but indicated the cause was internal."

In fact, Bagwell bears significant similarities to the instant case. There, prior to his fall, the claimant was "apparently in good physical condition." The only "witness" to the fall saw him only out of the corner of his eye, and "did not see the fall until deceased was about eighteen inches from the floor." 227 S.C. at 447-448, 88 S.E.2d at 612. The claimant made no sound, took no steps prior to his fall, and appeared to fall straight back. 227 S.C. at 448-449, 88 S.E.2d at 612-613. As was the case in Bagwell, here, "the manner in which he fell and all the surrounding circumstances rather indicate that his fall was due to" something peculiar to the claimant. 227 S.C. at 450, 88 S.E.2d at 614. As was the case in Bagwell, here, "[i]t would be wholly conjectural under these

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his fall. (R. 69, 109-115; R. 210, line 18 – 211, line 7). The Commission's resolution of this conflicting evidence, as well as its credibility findings, are supported by substantial evidence and must be upheld on appeal. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001).

circumstances to say that the cause of the fall had any relation to his work or the conditions under which it was performed." 227 S.C. at 451, 88 S.E.2d at 614. One important difference between Bagwell and the instant case is that, in Bagwell, there was no evidence that the claimant had been suffering from any prior back pain or that he was taking prescription medications with serious side effects. Here there is. However, that factual difference supports the Commission and this Court's resolution of this case.

Finally, this Court did not misapprehend or misapply its ruling in Crosby. The key ruling from Crosby applied to this case is that, "while the fall was unexplained, there was an apparent lack of work connection and an implication of a pre-existing physical condition." (Op. No. 5458, p. 7). Here, as was the case in Crosby, there is some evidence, albeit circumstantial evidence, that the cause of Claimant's fall was peculiar to himself. In other words, this case does not fall within the category of "unwitnessed or *purely unexplained*" falls but, rather, falls within the category of falls that have "an *apparent lack of work connection.*" Crosby, 330 S.C. at 495, 499 S.E.2d at 257 (emphasis added).[6]

Claimant's arguments do not warrant rehearing and his Petition should be denied.

[6] Claimant is simply incorrect in his assertion that this Court, "clearly indicated that if Ms. Crosby had died and since her death would have been occasioned by an unwitnessed unexplained injury accidental in nature, i.e., fall, and not the result of some established internal condition such as a seizure disorder, aneurysm or heart attack that it would have been compensable." (Pet. p. 16). Claimant cites no reference for this startling assertion because it does not appear in Crosby. Instead, this Court indicated that there, as was the case in Bagwell, the "circumstances of the fall ... tended to show the employment was not a contributing cause." Crosby, 330 S.C. at 496, 499 S.E.2d at 257. The same is true in this case.

4. This Court did not misapprehend any facts or arguments in holding that the Commission did not err in the manner in which its Decision was drafted.

Claimant appears to suggest that this Court misapprehended some distinction between the posture of this case and the posture in Brown v. Peoplease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013), that warrants a different outcome here. He is incorrect. In both cases, the Commission upheld the findings and conclusions of the Single Commissioner. In both cases, the decision was a "consensus decision." In both cases, the Appellate Panel sent one of the parties a request to draft a proposed order that provided, "[t]he Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order." Brown, 402 S.C. at 486, 741 S.E.2d at 766. (R. p. 430).

Claimant's argument does lack merit, and he can find no case law or statutory support for his position. On rehearing, he raises the novel argument that, because "the Commissioner Panel ... meets once a month," and has to review "massive records on multiple cases," they cannot be expected to "find the time to go over [a proposed order] with a fine tooth comb" to make sure the decision is what they intend. (Pet. pp. 18, 20). First, this argument was not raised previously and cannot be raised for the first time on rehearing. Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (a party cannot raise an issue or argument for the first time on rehearing). Second, Claimant has presented no evidence whatsoever that the Commission is overwhelmed to the point that it is unable to carefully and properly review the proposed orders that it requests from one party or the other. Further, there is absolutely no evidence that the Commission did not fully review and approve the proposed Decision in this case before it issued it.

Finally, Claimant's assertion that "without direction numerous Findings of Fact were added," (Pet. p. 20), is plainly incorrect. *Compare* R. pp. 9-15, *with* R. pp. 26-32. To the extent Claimant intended to repeat his argument that some additional Conclusions of Law were added to the Commission Decision, that issue was addressed in Respondents' Brief. In short, the additional Conclusions of Law that Claimant appeared 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, R. 33), Conclusions of Law Nos. 9 and 10, which responded to Claimant's reliance on Packer v. Corbett Canning Co., 238 S.C. 431, 120 S.E.2d 398 (1961), (Commission Decision, R. 34-35), and Conclusion of Law No. 16, which simply affirmed the Commissioner's Decision.

Because there is no merit to Claimant's argument regarding how the Commission Decision was drafted, it provides no reason for this Court to grant his Petition, which should be denied.

CONCLUSION

For all the reasons stated herein, this Court should deny Claimant's Petition for Rehearing and/or for rehearing *en banc*. Certainly there is no need for this Court to "certify" any question to the Supreme Court, which is little more than an attempt to side-step the petition process under Rule 242, SCACR. Finally, Claimant has presented no reason why this Court should rewrite its Opinion to remove its conclusion of how the Supreme Court would rule on the issues before it.

Respectfully submitted,

McAngus Goudelock & Courie

January 3, 2017

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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 3rd day of January 2017, I served the Respondents' **Return in Opposition to Petition for Rehearing** 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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Reply To
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January 3, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: William Lee Turner v. SAIIA Construction and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc.
Date of Accident: April 19, 2012
WCC File No.: 1204039
Our File No.: 2098.12265
Claim No.: 002979-030511-WC-01
Appeal No.: 2014-002416

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return in Opposition to Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Preston F. McDaniel, Esq.