

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APR 17 2017

S.C. SUPREME COURT

Court of Appeals Opinion No. 5458
(filed December 7, 2016)

William Lee Turner, Employee, ^{Petitioner,}
~~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 WRIT OF CERTIORARI**

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Pursuant to Rule 242, SCACR, Respondents SAIIA Construction and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc. hereby oppose Petitioner William Lee Turner's Petition for Writ of Certiorari ("Petition") for review of the Court of Appeal's Opinion No. 5458, filed December 7, 2016. Petitioner has presented no issues that warrant this Court's review, which request should be denied.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly refuse to extend the unexplained death presumption to the facts of this case?
2. Did the Court of Appeals properly rely on North Carolina precedent in the absence of any South Carolina cases addressing this issue?
3. Did the Court of Appeals properly decline to extend the holdings in Barnes and Nicholson to the facts of this case?
4. Did the Court of Appeals properly apply the substantial evidence standard because there were disputed facts as to the cause of Petitioner's fall?

STATEMENT OF THE CASE

Appellant William Lee Turner ("Petitioner") filed a Form 50 alleging that, on April 19, 2012, he suffered a compensable injury to his back head and thoracic spine. (R. 38). His employer, SAIIA Construction and their insurer, Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc., Respondents herein, filed a Form 51 denying, among other things, that Petitioner's alleged injuries were the result of an accident that arose out of and in the course and scope of Petitioner's employment.¹ (R. 40).

The parties were heard by Single Commissioner Susan S. Barden, who found, among other things, that "Petitioner failed to carry his burden of proving that he sustained

¹ Petitioner misleadingly asserts that it is admitted that his injury both arose out of and in the course of his employment. (Pet. p. 4). The inquiry in this case centers precisely on the questions of whether his injuries were the result of an accident, as that term is used in the Act, and whether they arose out of his employment. Petitioner's contentions on both points have been consistently denied by Respondents.

a compensable injury by accident within the course and scope of his employment with the [Respondents] on April 19, 2012.” (Decision and Order of the Single Commissioner, filed April 14, 2014, R. 1-19 (“Single Commissioner Decision”). The Single Commissioner found that Petitioner’s alleged accident was unwitnessed and that he did not remember anything that happened on April 19, 2012 or the day after. (R. 10-13). The Single Commissioner also held that Petitioner was impeached at least twice.² The Single Commissioner concluded that Petitioner had failed to meet his burden of proving a compensable injury. (Single Commissioner Decision, R. 16-19).

Petitioner filed a timely Form 30 raising 11 separate points of appeal. (R. 131-135). After briefing and oral argument, an Appellate Panel of the Full Commission issued its Decision on October 10, 2014, affirming the Single Commissioner Decision in its entirety. In particular, the Commission noted that prescription medications had been prescribed to Petitioner three days prior to his alleged accident, and that he had sought emergency treatment for vomiting and diarrhea two days before. The Commission rejected Petitioner’s argument that circumstantial evidence supported his theory that he had fallen from the step of his truck. Furthermore, the Commission distinguished Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), from the facts of this case and held that Owens did not control. Consequently, Petitioner was not entitled to the unexplained death presumption and had not otherwise met his burden of proving his

² Petitioner was impeached as follows: 1) at a 2012 deposition, he testified that co-workers told him that, just before he fell, they had seen Petitioner climbing up onto the truck and then, when they turned around, they saw him lying on the ground, (R. 362, lines 18-24) (R. 369, lines 7 – 370, line 3), whereas the referenced co-workers denied ever seeing Petitioner on the truck, (R. 305, lines 9-11) (R. 311, lines 22-24); and 2) at the hearing, he testified that a fall from a horse during his recuperation “didn’t hurt or anything like that,” which statement was contradicted by medical records showing he sought medical treatment for the fall. (R. 235, line 24 – 237, line 24) (R. 97-99, 101, 103).

injuries were compensable. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Oct. 10, 2014, R. 20-37 ("Commission Decision")).

Petitioner timely appealed to the Court of Appeals which affirmed the Commission Decision, holding that Petitioner failed to present a single South Carolina case that extended the unexplained death presumption "to cases where the employee survives but has no memory of the injury," and noting that other states, including North Carolina, have limited the presumption to cases where the claimant was deceased. Alternatively, the Court of Appeals held that, even if the presumption were to apply in this case, Respondents presented sufficient evidence to rebut the presumption.

Petitioner has petitioned this Court for review.

FACTUAL BACKGROUND

Petitioner began working for SAIIA Construction in 2007, at age 21, as a heavy equipment operator, which involved "bulldozers, trackhoes and dump trucks and backhoes." (R. 203, line 18 – 204, line 6) (R. 232, lines 12-25) (R. 346, lines 9-11). Petitioner testified that he is between 5'6" and 5'7" in height. (R. 433, lines 18-22).

On March 27, 2012, a few weeks before his alleged work-place injury, Petitioner sought medical care for his lower back, which he had injured lifting logs while working on a house he was building. (R. 349, lines 16-22). Dr. Meha Minhas prescribed Ultram 50MG two times daily and Flexeril, 5MG two times daily. (R. 109-110). On April 16, 2012, three days before his alleged work-place injury, Petitioner saw Dr. Minhas again with complaints of both lower and upper back pain. Dr. Minhas changed Petitioner's medicine to Ultram ER 100MG two times daily and Neurontin 300MG three times daily.

(R. 111-113).³ On April 17, 2012, two days before his alleged work-place injury, Petitioner was seen at the Palmetto Health Baptist Emergency Department with complaints of vomiting and diarrhea and suspicion of dehydration. (R. 114-116) (R. 210, line 18 – 211, line 2) (R. 351, lines 5-13).

Petitioner testified repeatedly that he had no memory of the day he fell, April 19, 2012. (R. 217, lines 10-12) (R. 220, lines 14-16) (R. 227, lines 2-12). It is undisputed that no one saw Petitioner fall. (R. 369, line 3 – 370, line 11) (R. 305, lines 9-11) (R. 311, lines 22-24) (R. 327, lines 21-22) (R. 333, lines 13-15). Although Petitioner testified under oath at a deposition that his co-workers told him they saw him “up in the truck” before he fell, (R. 362, lines 18-24) (R. 369, line 7 – 370, line 3), those co-workers, Paul Barnette and David Bolden, testified that they did not see Petitioner in or on the truck prior to his fall. (R. 285, line 15 – 287, line 8) (R. 320, line 2 – 321, line 7).

Mr. Barnette testified that, at the end of the work day, Petitioner had washed his truck, which typically was done with a high pressure washer. (R. 291, lines 12-25). Petitioner then went to do some paperwork and retrieve his lunch backpack and Mr. Barnette’s 12-pack cooler. (R. 289, lines 9-12). Mr. Bolden testified that he saw

³ Ultram is a narcotic pain reliever. Side effects include, among other things, seizure (convulsions); weak or shallow breathing; high levels of serotonin in the body--agitation, hallucinations, fever, fast heart rate, overactive reflexes, nausea, vomiting, diarrhea, loss of coordination, fainting; headache, dizziness, drowsiness, tired feeling; and constipation, diarrhea, nausea, vomiting, stomach pain. <http://www.drugs.com/ultram.html>; *see also* <http://www.janssenpharmaceuticalsinc.com/assets/ultram.pdf> from the manufacturer of Ultram, Janssen Pharmaceuticals, Inc., pp. 7-8. Possible side effects of Ultram ER, an opioid analgesic, include, among other things, change in walking and balance; abdominal pain; nausea; convulsions (seizures); lightheadedness; and loss of consciousness. <http://www.drugs.com/cons/ultram-er.html>; *see also* <http://www.janssenpharmaceuticalsinc.com/assets/ultram-er.pdf> from the manufacturer of Ultram ER, Janssen Pharmaceuticals, Inc., p. 9. Neurontin is “is an anti-epileptic medication” with side effects that include “dizziness, drowsiness, and diarrhea.” <http://www.drugs.com/neurontin.html>.

Petitioner walking from the trailer toward his truck, carrying the backpack and the cooler. Petitioner acknowledged that, by the end of the day, his backpack “more than likely” would be emptier and lighter than it would have been at the beginning of the day, because he would have eaten and drunk most of the food and water or Gatorade he brought with him to work. (R. 229, line 4 – 230, line 17).

Mr. Bolden saw Petitioner put items in the truck. He specifically testified, “I never saw [Petitioner] on the steps of the truck,” but only “standing on the ground, placing [the cooler] in the truck. I did not see him on the steps.” (R. 320, line 2 – 321, line 13) (*see also* R. 86).

Mr. Barnette finished washing his truck and walked around to the tailgate and saw Petitioner lying on the ground, on his back with arms outstretched and his palms up. Mr. Barnette said Petitioner appeared to want to vomit. (R. 298, line 4 – 300, line 2) (*see also* (R. 334, lines 2-6). Mr. Bolden confirmed that Petitioner was lying on the ground. (R. 311, line 22 – 312, line 7). Although Mr. Barnette thought the door to Petitioner’s truck was open, (R. 305, lines 2-6), Mr. Bolden was not sure. (R. 312, lines 10-17). Petitioner had an abrasion on the back of his head that did not require stitches. (R. 64-65) (R. 378, lines 11-15). Although Mr. Barnette could not say for certain how long Petitioner had been lying on the ground before he saw him, he estimated it would not have been more than three or four minutes. (R. 301, lines 21-25).

Mr. Barnette testified that, although the truck Petitioner had been driving had been washed, the truck step would not have been soapy because the cleaning was done by a high pressure hose. In addition, the truck steps were perforated with “little things sticking up like that ... for traction.” (R. 291, lines 12-25). Mr. Barnette then engaged in

what he termed “speculation,” using that term no fewer than eight times in his explanation of what he believed might have happened, suggesting that Petitioner might have been on the truck step when he fell. (R. 292, line 17 – 293, line 23) (R. 302, lines 12-15). Mr. Barnette testified that he did not know of anyone falling off the steps of the trucks. (R. 294, line 24 – 295, line 2) (*see also* R. 317, line 12 – 318, line 3 (testifying that he never fell from the steps of the truck)).

Although Mr. Barnette indicated that he believed Petitioner would “freely discuss if he was having a problem,” (R. 435, lines 16-17), when asked about Petitioner’s two medical visits prior to his fall, Mr. Barnette only could say, “I knew he had went to the emergency room and got some medications or something like that. I don’t know all the details. You know, your records show that. But he worked a few days and he was off checking with the doctors in the two or three weeks before that.” (R. 283, lines 11-18). In fact, the only lower back problem Mr. Barnette was aware of was that Petitioner had “discussed he had a back problem when he was a teenager, younger, a teenager, you know, and I knew that.” (R. 283, lines 19-23).⁴

Mr. Barnette testified that Petitioner was only 5’3” or 5’4” in height, (R. 294, lines 22-23), whereas in reality, Petitioner is 3”- 4” taller than that.⁵ (R. 433, lines 18-22). Mr. Barnette also admitted that his memory of what transpired on April 19, 2012 was not as clear at the time of his deposition as it was when he wrote a statement for his supervisor a few days after Petitioner’s injury. (R. 303, line 4 – 304, line 23 (first

⁴ Thus, Petitioner’s assertion that Mr. Barnette “knew about Mr. Turner’s past back problems,” (Pet. p. 7), is misleading at best. There is no evidence that Mr. Barnette knew that Petitioner had been to the doctor twice recently complaining of low back pain, or that he had been prescribed narcotic medications as a result. (R. 109-112).

⁵ It is perplexing that Petitioner continues to rely on co-worker testimony that he is 5’3” to 5’4” tall, (Pet. p. 8), in light of the fact that, at the hearing before the Single Commissioner, he testified that he is around 5’6½” tall. (R. 433, lines 18-22).

testifying that the fall could not have been as late as 4:15 or 4:30, but then conceding that that might have been the case based on the statement he wrote a few days after April 19, 2012)).

Mr. James Speegle, Petitioner's supervisor at the time of the injury, testified that just days before Petitioner fell, "[h]e was complaining he wasn't feeling well, I want to say like on a Monday and the Tuesday of that – I think it was Thursday that this accident took place." He said Petitioner told him that he "just didn't feel well, stomach messed up, couldn't eat. He ... said he was wanting to drink all the time. I had recommended to him like on Tuesday or Monday or one of those days, I can't remember which one exactly, that, you know, he's probably dehydrated. He needed to drink plenty of fluids. He just ... looked like he was dry-mouthed and just seemed like to me signs of dehydration. I told him that I thought he was dehydrating He had had little sicknesses here and there prior to this incident, but the week of the incident is what I'm referring to, is that he was not feeling well, sick." (R. 328, line 17 – 329, line 11). Mr. Speegle said Petitioner seemed to be okay and that he was unaware of any particular signs that anything was wrong with Petitioner on the day he fell. (R. 330, lines 3-10). He described Petitioner as "a very agile individual." (R. 330, line 17).

After Petitioner fell, he was taken to Palmetto Health Richland, where he was provided emergency treatment and admitted. He was diagnosed with a "small subdural hemorrhage," "intraparenchymal contusion left lobe," and "endplate compression deformity of T3 and T4." (R. 45-50).⁶ Petitioner was treated and released, not to a rehabilitation facility, but to home, given his rapid improvement. (R. 51-53, 66-67). His

⁶ Although the medical notes from his initial care indicate variously that Petitioner fell from a ladder or from on top of a truck, Petitioner testified that those assumptions were inaccurate. (R. 227, line 17 – 228, line 5).

discharge diagnosis included “small subdural hemorrhage, traumatic,” and “T3 to T4 endplate fractures.” Medical notes indicate that the April 19 CT of Petitioner’s head “showed small hemorrhagic contusion left temporal lobe anteriorly in the middle cranial fossa with a tiny amount of acute appearing extra axial blood in this location Mild to moderate size subdural hematoma left occipital region. No mass effect. There is no midline shift or any herniation. No skull fracture.” A CT of his thoracic region showed “minimal superior endplate compression deformities of T3 and T4 ...” (R. 67).

At a follow-up appointment, Dr. James Selph noted that Petitioner “has a history of back pain and in fact was taking Ultram prior to his fall.” (R. 69). All of Petitioner’s remaining follow-up treatment was with Dr. Peterson, his family doctor. (R. 375, lines 14-25) (R. 87-90, 92-95).⁷

During the time Petitioner was out of work as a result of his injuries, he engaged in farming activities, including bailing hay, driving his tractor, and “bush hogging.” He also worked on a house he was building with his father, went hunting, and drove a four-wheeler. (R. 241, line 23 – 245, line 12) (R. 422, line 10 – 423, line 19).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should

⁷ Included in the exhibits Petitioner filed with the Commission is a statement by Dr. Peterson indicating that Petitioner’s head injuries were caused by the fall on April 19, 2012, and that the fall caused Petitioner to have seizures, not the other way around. (R. 81). The first page of the questionnaire presented by Petitioner’s counsel to Dr. Peterson (omitted from Petitioner’s exhibits filed with the Commission, but later submitted by Respondents) stated, as though it were an established fact, that Petitioner “fell from the cab of his employer’s truck on April 19, 2012.” (R. 91). The letter does not request and the questionnaire does not express any verification by Dr. Peterson that his opinions are to a reasonable degree of medical certainty.

affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. Packer v. Corbett Canning Co., 238 S.C. 431, 435, 120 S.E.2d 398, 400 (1961); Fowler v. Abbott Motor Co., 236 S.C. 226, 234, 113 S.E.2d 737, 742 (1960) (the claimant "is faced with the burden to show by competent testimony, not only the fact of the injury, but that it occurred in connection with his employment," and an award cannot "be based upon mere possibilities, probabilities, surmises or conjectures").

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). It is axiomatic that where there is conflicting evidence or where "conflicting inferences may be reached from the evidence ... the findings of the Commission thereabout [are] binding on this Court ... on appeal." Canady v. Charleston County Sch. Dist., 265 S.C. 21, 27, 216 S.E.2d 755, 758 (1975), quoting Black v. Barnwell County, 243 S.C. 531, 536, 134 S.E.2d 753, 756 (1964).

ARGUMENTS

1. The Court of Appeals properly refused to extend the unexplained death presumption to the facts of this case.

First, Petitioner takes issue with the Court of Appeals' holding that the unexplained death presumption does not apply where the injured worker survives the accident but does not remember what happened. Petitioner attempts to bolster his argument by raising the specter of hosts of employees suffering unwitnessed and unremembered falls or injuries and being denied workers' compensation benefits. (Pet. pp. 11-12). The reality is that there have not been hosts, or even many "workers suffering very common unwitnessed injuries" since the inception of the South Carolina Workers' Compensation Act ("Act"), a fact that plainly demonstrates Petitioner's fears are unfounded. The converse, however, is true: if this Court accepts the Petition and holds that the unexplained death presumption applies to "unremembered" injuries, the flood gates will open and any claimant who plausibly can allege they do not "remember" how the accident occurred will make that the centerpiece of his or her claim.

Petitioner 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 death cases. That verbiage is dicta. Petitioner has not and cannot point to a single South Carolina case where the presumption was applied where the claimant survived but could not remember the accident. Given Petitioner's vision of "many 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.

Next, Petitioner asserts wrongly that this Court has “clearly and specifically ruled that it would apply the unexplained injury presumption to cases where the Claimant did not die from his injuries,” citing Fowler. He is incorrect. The language from Fowler quoted on page 13 of the Petition consisted of a brief summary of the claimant’s legal argument in that case. It was not a holding and it cannot fairly be construed to be an adoption or application of the unwitnessed death presumption in cases where the claimant survived.

Although the claimant in Fowler argued there was sufficient circumstantial evidence “to justify the inference and the presumption that [his] injury arose out of and in the course of his employment,” 236 S.C. at 232, 113 S.E.2d at 740, citing Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), this Court rejected that argument.⁸ While this Court agreed that, in general, circumstantial evidence can support a finding of fact or an award, the evidence in Fowler, “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). The same is true in this case.

In Fowler, this Court also declined to apply the unexplained death presumption because the claimant failed to prove that his injury occurred at a place where his job required him to be, *i.e.*, that it occurred in the course of his employment. And, because that ruling disposed of the case, there was no need for this Court to analyze the unexplained death presumption any further. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an

⁸ This Court already had held that it had “no difficulty in concluding that the [claimant] suffered an injury by accident,” but that the issue before it was “whether the accident arose out of and in the course of employment.” 236 S.C. at 230, 113 S.E.2d at 739.

appellate court does not need to determine all issues when one is dispositive of the appeal). Petitioner's attempt to contort that into a "holding" that the unexplained death presumption otherwise would have applied is pure speculation, not precedent.

Petitioner also mistakenly argues that, in Fowler, this Court quoted Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944), in relation to the unexplained death presumption. However, the discussion of Eargle in Fowler was in response to the Fowler claimant's argument that a presumption should arise because he was injured in an automobile that the employer furnished for his use.⁹ This Court ultimately rejected the claimant's arguments, finding that the claimant failed to show he was "using the automobile of his employer at a place and a time where his duty as an employee required him to be." Fowler, 236 S.C. at 234, 113 S.E.2d at 741. There is no statement or even intimation in Fowler that this Court would have applied the unexplained death presumption, if that claimant had been in the course of his employment. Thus, Petitioner's attempt to cobble together a prior statement or ruling by this Court that it would apply the unexplained death presumption to the facts of this case fails.¹⁰

Petitioner's arguments do not warrant this Court's review and his Petition should be denied.

⁹ Eargle turned on the applicability of an exception to the going and coming rule and did not discuss the unexplained death presumption at all. 205 S.C. at 431-432, 32 S.E.2d at 243-244.

¹⁰ Petitioner goes so far as to baldly assert that this Court has not only suggested it *would* but "*has applied* the unexplained death and injury presumption" to facts of this case. (Pet. p. 15) (emphasis added). Tellingly, he cites no case to back up this startling assertion because, as noted above, there is none.

2. The Court of Appeals properly relied on North Carolina precedent in the absence of any South Carolina cases addressing this issue.¹¹

Petitioner attacks the Court of Appeals' reliance on Janney v. J.W. Jones Lumber Co., Inc., 145 N.C. App. 402, 550 S.E.2d 543 (N.C. Ct. App. 2001), and argues that the "inequality of information" reasoning put forth in Janney is "antithetical" and "totally contrary" to the Act. North Carolina, along with other states with similar Acts, has refused to expand the unexplained death presumption to cases where the worker survives but claims no memory of the events leading up to his or her injury. (See Appx. pp. 54-56). The Court of Appeals correctly noted that the facts in Janney, which involved a claimant who had no memory of falling and hitting the floor, are "very similar to the instant case." Petitioner's attacks on the Court of Appeals' reliance on Janney are misplaced, incorrect and should be rejected.

First, Petitioner either misunderstands or misconstrues North Carolina's explanation of its adoption of the presumption in cases where a worker has died and its refusal to extend that presumption in cases where the worker survives his injury, based on an "*inequality of information*" in the former that does not exist in the latter.¹² In any event, North Carolina does not apply any such concept to "deny benefits to the injured worker who lives," but, instead, simply leaves the burden of proof on the claimant in those cases.

Second, without explaining how or why, Petitioner simply states that there is no logical or legal difference between a deceased worker and one who simply cannot (or

¹¹ "When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority." Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005).

¹² There is no such thing as a "concept of an, '*inequity of information*.'" (Pet. pp. i, 1, 15).

claims he cannot) remember how an injury occurred.¹³ There is both a logical and a legal rationale for treating these two classes of claimants differently. As the Court of Appeals explained, in death cases, “the underlying purpose of the presumption is fairness because employers, rather than a decedent’s family, are in a better position to offer evidence surrounding the employee’s death.” (Appx. p. 535-536). The same is not necessarily true where the claimant survives the injurious event. There is, in fact, a substantive and legal difference between the knowledge a deceased employee’s family possesses vis-à-vis the employer, versus the knowledge an employee (who was at work when injured but simply does not remember the incident) possesses vis-à-vis the employer. In the first circumstance, the employer unquestioningly knows more about the daily schedule, responsibilities and work environment than does the family. In the latter, neither the employer nor the employee has any superior knowledge. In addition, where the injured claimant survives, there is not only the ability but also a clear incentive to “not remember” the facts of an injury where doing so is advantageous to a claimant’s case. The incentive is that the presumption “flips” the burden of proof long established in workers’ compensation cases. *See, e.g., Packer*, 238 S.C. at 435, 120 S.E.2d at 400 (the claimant bears the burden of proving he is entitled to benefits under the Act); *Fowler*, 236 S.C. at 234, 113 S.E.2d at 742 (the claimant “carries the burden of establishing the necessary facts to entitle him to ... compensation”).

Third, Petitioner’s dispute with relying on North Carolina precedent goes to the difference between South Carolina and North Carolina jurisprudence on what constitutes an injury by “accident” and is nothing more than a red herring. The issue of what

¹³ Note, in this case, we are not dealing with a claimant who is either brain-dead or in a coma. Therefore, the question of whether the unexplained death presumption should apply in those types of cases, which Respondents do not believe it should, is not before this Court.

constitutes an accident was not addressed substantively in Janney, as the North Carolina court affirmed the commission's finding "that plaintiff's fall itself was the unusual and unforeseen occurrence that is the accident." 145 N.C. App. at 404, 550 S.E.2d at 545. Furthermore, the Court of Appeals did not rely on Janney or any other North Carolina precedent for the definition of accident.

Fourth, this 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 Petitioner insists is "one of the most precedential decisions" relevant to his position. Thus, it is more than simple "speculation" on the Court of Appeals' part that this Court would decline to extend the unexplained death presumption to the facts of this case.¹⁴ The Court of Appeals was following clear precedent and reasoning established by this Court.

Finally, while South Carolina precedent establishes that 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

¹⁴ Petitioner mis-states the issue in this case as one "where the Claimant was injured in the course of and as a 'consequence' of employment ..." (Pet. p. 12). There is no evidence whatsoever that Petitioner's injury was "as a 'consequence'" of his employment, *i.e.*, that it arose out of or had any causal relationship to his employment whatsoever.

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” represents just such a balance. If the Legislature believes a presumption should apply where injured claimants allege they cannot remember how the injury occurred, it is the Legislature, and not the courts, that should enact such a presumption, as it has in other areas of the Act.

As the Court of Appeals 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. Petitioner’s effort to impose a burden-shifting analysis on this case is just such an attempt.

Petitioner’s arguments do not warrant this Court’s review and his Petition should be denied.

3. The Court of Appeals properly declined to apply the holdings in Barnes and Nicholson to the facts of this case.

In addition to finding that the unexplained death presumption does not apply to this case, the Court of Appeals also affirmed that Petitioner failed to meet his burden of proving his injuries arose out of and in the course of his employment. Petitioner incorrectly argues that the Court of Appeals erred by not following this Court's ruling in Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015) and Nicholson v. South Carolina Dept. of Soc. Services, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015). However, neither of those cases is controlling here because both are factually distinguishable.

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" a causal connection between the claimant's work and her accidental injury. Barnes, 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. Such evidence established a causal relationship between her work and her injury. Nicholson, 411 S.C. at 383, 390 & 769 S.E.2d at 2 & 5. Here, there simply is no evidence that Petitioner 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 beside his truck at the time he fell.

Despite Petitioner's assertion otherwise, the Court of Appeals did not base its decision on "the dissent and a concurring opinion" in Barnes and Nicholson.¹⁵ Nor did the Court of Appeals fail to follow or attempt to overrule controlling precedent from this Court. (Pet. pp. 21-23). Although the Court of Appeals noted Justice Pleicones' dissent in Barnes and his concurring opinion in Nicholson, it distinguished the instant 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." (Appx. pp. 538-539). In any event, 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).

What Barnes and Nicholson establish is that a fall can still be work-related even where a claimant cannot prove a particular *workplace hazard* caused the injury. However, a claimant still has to prove *some causal relationship* between the injury and work. *E.g.*, Barnes, 411 S.C. at 398, 768 S.E.2d at 654. In Barnes, the causal link was hurrying to check a co-worker's email when she tripped; in Nicholson, it was scuffing her foot on the carpet on her way to a meeting that caused her to fall. Here, there is no evidence of any such causal relationship.

Furthermore, both Barnes and Nicholson are distinguishable from the case at hand with regard to another significant fact: in neither of those cases was the claimant taking

¹⁵ Furthermore, contrary to Petitioner's assertion, this Court did not overrule Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998). Instead, this Court distinguished the facts in Crosby from the facts before it 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" causing 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," which provided the requisite work connection). The majority opinion in Nicholson did not even discuss Crosby.

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 Petitioner was 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),¹⁶ which the Commission noted twice with emphasis. (R. 27-32). It is also undisputed that Petitioner was seen at the emergency room just two days prior to his fall for symptoms associated with these narcotics. (R. 114-116) (R. 210, line 18 – 211, line 7).

Here, there is no direct evidence of what caused Petitioner's fall because it was unwitnessed and he claims no memory of the moments prior to his fall. However, as noted above, Petitioner's credibility was impeached twice and there is competing circumstantial evidence as to what may have caused his fall. Petitioner argues that circumstantial evidence shows he was in "top notch shape" on the day of his alleged accident, and suggests, as he did below, that he might have fallen from the step of his truck. At the same time, however, there is other evidence, both direct and circumstantial, demonstrating that, on the day he fell, Petitioner was taking narcotic medications with serious side effects, some of which had sent him to the emergency room just days prior to his fall. (R. 69, 109-115; R. 210, line 18 – 211, line 7). The Commission's resolution of this conflicting evidence and the reasonable inferences that it drew from the evidence must be upheld on appeal. Canady, 265 S.C. at 27, 216 S.E.2d at 758.

Petitioner appears to take issue with the Court of Appeals' reliance on Bagwell v. Burwell, 227 S.C. 444, 88 S.E.2d 611 (1955). However, Bagwell, which is still good

¹⁶ As noted above, side effects associated with Ultram ER, an opioid analgesic, include, among other things, change in walking and balance; abdominal pain; nausea; convulsions (seizures); lightheadedness; and loss of consciousness. Neurontin is "is an anti-epileptic medication" with side effects that include "dizziness, drowsiness, and diarrhea."

law, is factually similar to the instant case. In Bagwell, this Court first found that the claimant had suffered a non-work-related seizure and then looked to see whether any aspect of his employment caused greater injury. In Nicholson, this Court dismissed Bagwell as irrelevant to the case before it, because Bagwell did not consider whether there was a causal connection between the fall itself and the work but only whether a work hazard increased the severity of the consequences of the fall. Nicholson, 411 S.C. at 387-388, 769 S.E.2d at 4. Similarly, in Barnes, this 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.” The same is true here: the circumstances of the fall indicate the cause was internal.¹⁷

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 the claimant 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 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

¹⁷ Petitioner incorrectly argues that internal or personal causes are limited to naturally-occurring conditions or diseases, such as “high blood pressure, diabetes, or heart problems”; however, taking prescription medications that have powerful side effects also can be a cause personal to the claimant.

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 such evidence. However, that factual difference supports the Commission and the Court of Appeals' resolution of this case.

Petitioner's arguments do not warrant this Court's review and his Petition should be denied.

4. The Court of Appeals properly applied the substantial evidence standard because there were disputed facts as to the cause of Petitioner's fall.

Contrary to Petitioner's suggestion otherwise, there is substantial evidence in this record that his fall was "brought on by a purely personal condition unrelated to the employment." (Pet. p. 20). That is, as both the Commission and the Court of Appeals found, at the time of his fall, Petitioner was taking narcotic pain medications for his non-work-related preexisting back condition, and that he had sought emergency medical care for symptoms that are listed side effects of those narcotics just days prior to his fall.

In this case, the circumstantial evidence and the reasonable the inferences that can be drawn from that evidence are in conflict.¹⁸ On one hand, the Commission could have inferred from statements made by Petitioner'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, and that he fell

¹⁸ As this Court stated in Steed v. Mount Pleasant Seafood Co., "[t]he 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).

from the steps of his truck.¹⁹ Or the Commission could have inferred (and did) based on all of the evidence presented, including Petitioner's visits to doctors, the prescription medications he was taking, his seeking emergency medical care for side effects from those medications, and the lack of any evidence that his fall was causally related to his employment, that Petitioner failed to meet his burden of proving he suffered an accidental injury arising out of and in the course of his employment. The Commission found significant the fact that "three days prior to the date of the alleged accident, Petitioner was prescribed 90 capsules of Neurontin (to be taken three times daily) and 60 tablets of Ultram (to be taken two times daily)." (R. 28; *see also* R. 24, 31-32). There is sufficient evidence, both direct and circumstantial, to uphold the Commission Decision.

Petitioner argues that the Court of Appeals erred by requiring that he prove the "cause" of his fall or his injury. (Pet. pp. 14, 17). 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

¹⁹ Although Petitioner argued to the Commission that the evidence supported a finding that he fell from the step of his truck, (R. 38, 127, 129), the Commission found otherwise.

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, 238 S.C. at 435, 120 S.E.2d at 400, one of the things he must prove is some causal link between his injury and his employment. Nicholson, 411 S.C. at 389, 769 S.E.2d at 5 (a claimant must “prove a causal connection between the conditions under which the work is required to be performed and the resulting injury”).²⁰ 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 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.

Petitioner 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”), and 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). However, Stokes and Hiers are

²⁰ 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”).

inapplicable to this case because there is no issue regarding whether Petitioner's job subjected him to extreme stressors or weather. In addition, neither the Court of Appeals nor the Commission held that Petitioner had to prove he experienced a sudden, unexpected external event. Instead, both the Court of Appeals and the Commission held that Petitioner 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.

Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999), on which Petitioner 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." The Court of Appeals 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 fall has a causal relation to the work, or whether it was caused by some condition peculiar to the claimant, such as coronary artery disease or such as taking prescription medications with serious side effects. The Court of Appeals neither misunderstood nor overlooked long-standing precedent concerning the definition of "injury by accident" and/or "what constitutes arising out of."

Petitioner argues that all he has to show is "an unexpected result from the work activity." (Pet. p. 20). 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.” Second, he cannot prove that he was engaged in any “work activity” at the time he fell. 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 legally and factually from Nicholson and Barnes.

Petitioner’s arguments do not warrant this Court’s review and his Petition should be denied.

CONCLUSION

For all the reasons stated herein, this Court should deny Petitioner’s Petition.

Respectfully submitted,

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April 13, 2017



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5458
(filed December 7, 2016)

William Lee Turner, Employee, *Petitioner*
~~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 13th day of April 2017, I served the Respondents' **Return in Opposition to Petition for Writ of Certiorari** 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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