THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Opinion No. 5458
(SC Ct. App. heard June 9, 2016;
filed December 7, 2016)

Appellate Case No.: 2017-000699

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MAY 01 2017

S.C. SUPREME COURT

William Lee Turner, Employee, ...Petitioner,

v.

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

**REPLY TO RETURN IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

By way of Reply to the Return filed in opposition to the Petition for Writ of Certiorari, the Petitioner would respectfully submit:

I. **The Court of Appeals erred by not applying the unexplained injury presumption.**

While Counsel for the Petitioner will not apologize for being an advocate for this injured worker and every injured

worker that he has sat across from over the last forty years, both sides do engage in arguments that one could argue call for speculation. On the one hand, the Petitioner argues the Court of Appeal's new precedent that the unexplained injury presumption does not apply where the worker does not die will be applied to numerous injured workers that are not killed but have no memory (contrary to Respondents due to their injuries, not just because they allege no memory). On the other hand, Respondents argue that to overturn it will open a flood-gate of fained memory-loss and non-meritorious claims. What the Court should do and will do, is to apply its tenfold and unbiased experience to the review of this new precedent and apply the law and the principles applicable to workers' compensation.

It is a fundamental principle that the Act is to be liberally construed in favor of benefits to the injured worker and his dependents with its provisions reconciled if possible, its purposes effectuated, and its presumptions and penalties directed towards the end of providing coverage. Clemmons v. Lowe's Home Centers, Inc., Op. #27708, filed March 8, 2017; Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889, 894 (1941). In the same year that Cokely was decided, this Court also first established and applied the unexplained injury presumption. That guiding principle has been restated by this Court in numerous cases ever since and has remained exactly the

same, which is that it is the unexplained, "injury" presumption. The word "death" is nowhere included in the presumption and quoting this Court's time honored presumption from Owens v. Ocean Forest, Inc., 296 S.C. 97, 12 S.E.2d 839 (1941)

> ". . . that one charged with the performance of a duty and **injured** while performing such duty, or found **injured** at a place where his duty may have required him to be, is **injured** 'in the course' and as a consequence of employment." (Emp. add.) Owens, supra, 12 S.E.2d 839 at 8.

The Bench and the Bar have a right and should be able to rely on the law as established **by this Court**. This Court has always recited the presumption as the unexplained injury presumption and has never said or added the criteria that the worker must die from the injuries. If the presumption is to change, it is for this Court to say so, not the Court of Appeals.

In reference to the Respondents' attempts to limit or interpret Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d. 737 (1960), this Court knows what it said and the Petitioner will rely on the Court's application of its decision in Fowler as the law in this case. Unfortunately for the Respondents and their argument, Mr. Fowler lived.

This Court should grant the Petition because it is this Court that is supposed to speak on this issue; again not the Court of Appeals, under our case law, under our statutes, and under our Constitution.

II. The Court of Appeals did err in violation of the principles established by this Court and by applying a North Carolina concept that this Court has never established nor applied.

Again, this Court has never established nor applied the principle applied by the Court of Appeals in establishing this new precedent. The Court of Appeals is required to apply the principles and presumptions as established by this Court; not the North Carolina Supreme Court. With great respect for all Courts, the Supreme Court of each state at the time of any given decision will look at the status of the entire body of law, that being statutory and case law in reviewing and establishing the precedents applicable in its State.

In that regard, while the Workers' Compensation Acts of North Carolina and South Carolina were very similar when they were first established, South Carolina in 1936, today they have morphed into totally different statutes in many respects and as substantively interpreted by the two Supreme Courts. This Court, even before 1939 but specifically in 1939, began to break with the North Carolina Supreme Court over the very fundamental principles and definitions of the Act and specifically, for example, in the case of Layton v. Hammond-Brown-Jennings, 190 S.C. 425, 3 S.E.2d 492 (1939) as previously cited in the Brief. When the Court analyzes the Opinion of the Court of Appeals, the Court will readily see where the Court of Appeals' decision invades, morphs and warps numerous fundamental principles in the

area of workers' compensation as established by this Court. (Petitioner has to believe that the Court of Appeals did not realize the fundamental principles it was toying with or altering or affecting in its opinion.)

Next, after a thorough reading of Janney v. J.W. Jones Lumber Co., Inc., 550 S.E.2d 543 (NC App. 2001) obviously somebody either just read a portion of it or did not thoroughly read the whole decision. First, in Janney there was specific testimony by a neurologist who examined and treated Mr. Janney right after the accident who stated his opinion that Mr. Janney had had a seizure. Second, in Janney the North Carolina Court of Appeals quotes North Carolina law which is that if an employee's **"idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment."** Third, in Janney the North Carolina Court notes that the North Carolina presumption as established by their Supreme Court specifically includes a reference to death that where, "an unexplained injury resulting in death is compensable . . .". They also note that under their injury presumption that the presumption shifts the burden of proving compensability from the plaintiff to the defendant but that the Commission is still duty bound to weigh all the evidence. Based on this, in Janney two members of the Court of Appeals held that because of the neurologist testimony, there was sufficient evidence even if

they were to apply the presumption to rebut the presumption.

Finally, Janney was a divided North Carolina Court of Appeals Opinion in which the dissent mirrors our jurisprudence. Quoting from the dissent:

> "Our Courts have not previously applied the Pickrell presumption to a non-death case. However, consistent with the historically liberal interpretation of the Workers' Compensation Act, I believe that the rational supporting the Pickrell presumption is also applicable here . . . .
>
> Though my research has not disclosed a case where our Courts have determined whether or not this presumption may be applied in a non-death context, I would hold that the plain language in Pickrell allows for application in non-death cases." 550 S.E.2d, 543 at 547-548.

The dissent also notes that the North Carolina presumption applies to both death and injury cases and highlighted the use of the word, "injury" in the presumption and quoted the whole presumption by the North Carolina Supreme Court in Pickrell:

> "Where the employee is **found injured at the place where his duty may have required him to be, or** where the employee is found dead under circumstances indicating that the death took place within the time and space limits of the employment . . ." (Emp. add).

Would the North Carolina Supreme Court agree based on these precedents?

> "Motion by plaintiff and defendants to withdraw appeal has been filed and the following Order entered: 'Motion allowed . . .'" Supreme Court of North Carolina, Op. No. N0492A01, 354 N.C. 573, 558 S.E.2d 870 (2001).

We do not know. Therefore, a clear reading of Janney both factually and legally and in every aspect, distinguishes it from the precedents of this Court as applied to the facts in this case which would be applied to Janney.

The Petitioner will make no further reply because the Court will readily see this in its analysis of the Petition and the Return and of the Court of Appeals' Opinion, which is based upon the application of a Court of Appeals of North Carolina Opinion not their Supreme Court in setting precedent for this State that it is this Court's responsibility to set. However, the Petitioner cannot help but highlight one further point made in the Return to the Petition as to Petitioners' position that it is simply illogical to treat a dead worker and that worker's dependents differently than a severely injured worker and that worker's dependents; for example, a dead worker versus a brain dead injured worker. Words are important and the Petitioner would ask the Court in reviewing this argument, that it is illogical to treat these workers differently, that in reference to the worker that lives, the Respondents add one very important word when referring to the application of Janney to the injured worker that lives verses to a dead worker. When referring to the worker that lives and applying Janney, they make the statement that "the same is not **necessarily** true where the worker survives the injurious event." (Emp. add.) (Return, p.

14). Are Respondents recognizing in making this argument that there should be no difference in the treatment of a dead worker and a dead worker's family as compared to an injured worker who is in a coma or who is brain dead and that worker's family? Should there be a degree?

III. The Court of Appeals did err by failing to apply the holding in Barnes and Nicholson to the facts in this case.

The Petitioner will make no further argument here other than simply to say that the Court of Appeals ignored this Court's Opinions in Barnes and Nicholson and relied on the dissent. The Court of Appeals is duty bound to apply the precedents and the law as this Court dictates what it is under case law, statutory law and our Constitution.

It is also ironic that Janney, the North Carolina Court of Appeals decision upon which the Court of Appeal's decision is based and upon which the Respondents so heavily rely, is also specifically based on a factual situation and applied their law in that factual situation which the Petitioner would submit is exactly in correlation with this Court's Opinions in Nicholson and Barnes which is that, "when the employee's **idiopathic condition is the sole cause** of the injury" it is not compensable. There is simply no evidence in this case that an idiopathic condition was the sole cause of Mr. Turner's fall, just like Barnes and Nicholson; and just like Barnes, Nicholson,

and Janney if an idiopathic condition was the cause it is not compensable.

IV. The Court of Appeals did not properly apply the substantial evidence rule.

The question was and the central issue for decision was whether or not there was any evidence in the Record on the date and at the time of the claimant's fall, circumstantial or direct, that his fall was caused by an idiopathic condition. Respondents point to no such evidence because there is none. There is no medical evidence; there is no lay testimony evidence, nor any circumstantial evidence that Mr. Turner on the date and time of his fall was suffering from any natural condition or any idiopathic condition that caused the fall. All the evidence is to the contrary. Mr. Turner had worked the entire full day. All employees, including his supervisor, testified he was in tip-top shape. The Respondents simply cannot avoid this evidence. Yes, Respondents may have a point if there was this evidence of treatment for various conditions and/or medications, two, three or four days beforehand and his condition at that time **if** there was no specific testimony and evidence about his condition that day. However, there was specific evidence and it was he was in great shape. In light of this evidence that day, the Petitioners are simply trying to get this Court, as they did in the Court of Appeals and before the

Commission, to chase a red herring as to the real and pertinent facts and the only facts that were relevant, that being either lay testimonial evidence, circumstantial evidence and/or medical evidence that would lead, "a reasonable" person based on the facts on the date and at the time of the injury to the conclusion they want reached.

Traditional law school example: if the ground is dry when you enter the theater and it is wet when you come out, there is circumstantial evidence that it rained. It doesn't matter whether or not it rained two or three days beforehand; if there is no evidence that it rained that day.

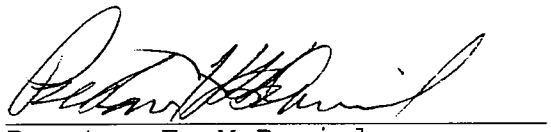
Also, this argument tries to get the Court to ignore the legal issue that the Hearing Commissioner misapplied the law that has been laid down by this Court. When that law is properly applied, there is simply no substantial evidence in the Record to sustain a denial of benefits to this injured worker.

CONCLUSION

For all the foregoing reasons, by way of Reply the Petitioner would respectfully request that the Court grant the Petition and allow Counsel to argue on behalf of Mr. Turner for the application of the law as has been set down by this Court for over seventy (70) years and to apply this Court's decisions and this Court's logic and this Court's precedents and this Court's Opinions to the facts and the law applicable to this

case. This Court should speak on this issue in fairness to all of the parties and particularly in fairness to all of the injured workers of our State who rely on its Opinions to obtain the benefits guaranteed to these workers under the Workers' Compensation Act and to achieve its beneficial purposes.

Respectfully submitted,



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May 1, 2017

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PROOF OF SERVICE

I certify that I have served the **REPLY TO RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on the following persons by depositing a copy of it in the United States Mail, postage prepaid, on May 1, 2017, addressed as follows:

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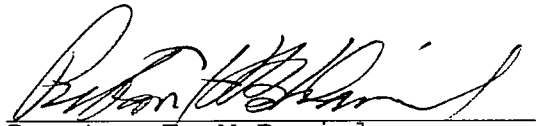

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