APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1518978

Pamela Grady — EMPLOYEE, CLAIMANT/RESPONDENT

VS.

Magnolia Manor of Inman — EMPLOYER,

AND

Zurich American Insurance Company of Illinois c/o Gallagher Bassett Services, Inc. — CARRIER, DEFENDANTS/APPELLANTS,

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Appellate Panel Review held in Columbia, South Carolina, on December 12, 2016 per notices timely And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

April 7, 2017

APPEARANCES: Claimant/Appellant represented by Mitchell K. Byrd, Jr.

Defendants/Respondents represented by Landon Hughey and Brett H. Bayne

STATEMENT OF THE CASE

This matter comes before the Full Commission on Defendant's appeal of the Single Commissioner Decision and Order. Defendant's appeal was timely filed. Defendants asserted the Single Commissioner erred in finding Claimant's claim compensable. In Defendants' Notice of Appeal, Defendants raised nine (9) exceptions to the Single Commissioner Decision and Order. However, prior to the Full Commission Hearing, Defendants abandoned Exception 5 and noted that Exceptions 2-4, 6, and 8-10 were proper findings of the Single Commissioner should the Full Commission affirm the Single Commissioner. Therefore, Defendants only proceeded on Exceptions 1 and 7 which addressed whether the Single Commissioner erred in finding Claimant sustained a compensable injury by accident within the course and scope of her employment. All parties were properly notified of the hearing and counsel for both parties appeared at the hearing. The hearing in this matter was conducted on December 12, 2016. Proposed Order instructions were sent to the parties on January 6, 2017.

SINGLE COMMISSIONER FINDINGS OF FACTS

1. Claimant sustained a compensable injury to her right shoulder arising out of and within the course and scope of her employment. I find that Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965) controls based on the following:
    a. The sidewalk/walkway on which Claimant fell and broke her right shoulder was owned and maintained by the employer, Magnolia Manor. There is no evidence to the contrary. I find this is evidence of the employer's "control" over the sidewalk/walkway.
    b. As noted in Williams (quoting Eargle v. South Carolina Electric & Gas Co, 205 S.C. 423, 32 S.E.2d 240 (1944)), "[i]f the employee be injured while passing, with

the express or implied consent of the employer by a way . . . over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment... ." I find if the Williams' Court extended coverage to a parking lot that was not owned by the Employer, the same would hold true when the Employer owns the area in which the Claimant fell. In this case, I find the sidewalk adjacent to the Employer's building is in practical effect a part of the building, based on the holding in Williams.

c. The fact that Claimant may have already clocked out for the day is a "red herring." Claimant was a salaried employee and was carrying files and her purse in her arms while she was walking to her car. However, even if she had clocked out, Claimant's fall still took place on employer controlled property very shortly after she exited the building for the day, within the scope of Williams.

d. I find that the cause of Claimant's fall was not idiopathic, as there was no evidence of any "internal breakdown." See Nicholson v. S.C. Dept of Social Services, 411 S.C. 381, 769 S.E.2d 1 (2015) and Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015). The fact Claimant could not exactly identify what caused her foot to stop as she was walking ("I don't know") does not mean it was idiopathic. The specific facts in this case are not very distinguishable from those of Nicholson.

2. Claimant is entitled to a lump-sum payment of past-due TTD from September 24, 2015 through December 21, 2015. This finding of fact is based on the testimony of the Claimant, the medical records, and the evidence in the record as a whole.

3. Defendants are liable for all causally-related medical treatment received as a result of this work injury, to be paid pursuant to the South Carolina Fee Schedule. This finding of fact is based on the testimony of the Claimant, the medical records, and the evidence in the record as a whole.
4. Claimant is entitled to reimbursement for all out-of pocket expenses, including mileage reimbursement, if any. This finding of fact is based on the testimony of the Claimant, the medical records, and the evidence in the record as a whole.
5. Claimant is not at maximum medical improvement for her work-related injury to her right shoulder. This finding of fact is based on the testimony of the Claimant, the medical records, and the evidence in the record as a whole.
6. Although Defendants are generally entitled to direct medical treatment pursuant to the South Carolina Workers' Compensation Act, in this case, I find Claimant is entitled to continue treatment with Dr. Alan Posta, who performed Claimant's complex shoulder replacement surgery, and who has been monitoring her recovery. I find this will aid in coordination of Claimant's medical care and will lessen Claimant's period of disability. This finding of fact is based on the testimony of the Claimant, the medical records, and the evidence in the record as a whole.
7. No hearing costs are assessed.

SINGLE COMMISSIONER CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965), Nicholson v. S.C. Dept of Social Services, 411 S.C. 381, 769 S.E.2d 1 (2015) and Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015) Claimant sustained an injury by accident, arising out of and within the course of her employment, to her right shoulder.

3. Under § 42-15-60, Claimant is entitled to the provision of and payment for all causally related medical treatment for her right shoulder injury, to include out of pocket expenses and mileage, if any.

4. Under § 42-9-10, Claimant is entitled to payment of temporary total disability benefits from September 24, 2015, through December 21, 2015.

FACTUAL BACKGROUND

Claimant works full time for Magnolia Manor of Inman. Claimant testified that she finished her work duties on September 23, 2015 and began walking to her car with a co-worker. After she exited the building, but still while she was on the sidewalk adjacent to the building and leading to the employer's parking lot, she fell. She was not "on the clock" at the time of her fall (although she is a salaried employee). Claimant testified she was had some work files and her purse at the time of her fall. Claimant admitted that she did not know why she fell on the sidewalk, and specifically noted she did not slip or trip on or over anything. Claimant landed on her right side, injuring her right shoulder. She was able to drive herself home and later went to the emergency room at Spartanburg Regional. She testified that she suffered a broken shoulder as a result of the fall and ultimately came under the treatment of Dr. Alan Posta at Carolina Orthopaedic Center. She underwent a total reverse right shoulder arthroplasty on October 16, 2015. She testified that she was out of work from September 24, 2015, through December 21,

2015, the date she returned to work at Magnolia Manor. The parties stipulated Claimant's average weekly wage is $1192.35 with a corresponding compensation rate of $766.05. She continues to work at Magnolia Manor of Inman. Claimant acknowledged that the area where she stumbled and fell was flat and that she did not know why she fell.

FULL COMMISSION FINDINGS OF FACT

1. Claimant testified to the following in her deposition:

Q: Is the parking lot flat...

A: It's flat

Cl. Depo. Tr. 29:4-7

Q: Was it raining that day?

A: No.

Q: Was there any water in the parking lot that you could tell?

A: No

Q: ...I take it there was no ice or anything like that.

A: No.

Cl. Depo. Tr. 29:8-16

Q: What caused you to fall?

A: I stumbled and fell. My feet stopped. My body kept going.

Cl. Depo. Tr. 30:10-12

Q: Did you catch your foot on the part where it changes from old

cement to new cement?

A: I—I don't—I don't know that—that I did, no. I just know that my—I stumbled, and my feet stopped, and I fell.

Q: What caused you to stumble?

A: I don't know that.

Cl. Depo. Tr. 31:8-14

Q: Did your shoe catch on anything at the time of the fall?...But you don't remember anything specific that—

A: No.

Q: --caught them?

A: I don't.

Cl. Depo. Tr. 34:4-13

2. Claimant admits that there was no rain, water, or other substance that led to her fall. Claimant's testimony is clear that the unexplained fall occurred on a flat, level, dry surface during daylight hours.
3. Claimant did not trip over a ridge in the concrete, slip off a curb, slip on a wet surface, trip over a stick, scuff her foot, or any other event typically associated with falls.
4. Claimant has failed to provide any explanation, evidence, testimony, or witnesses as to why she "stumbled and fell." She does not recall slipping, scuffing her foot, tripping, or otherwise doing anything except falling. Quite simply, the fall is without explanation beyond "I fell."

FULL COMMISSION CONCLUSIONS OF LAW

1. The Single Commissioner cited to—and relied on—three cases in reaching her conclusions: Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965), Nicholson v. S.C. Dept of Social Services, 411 S.C. 381, 769 S.E.2d 1 (2015) and Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015). For the reasons set forth below, the Single Commissioner erred in relying on applying these cases to the present case as each is distinguishable both on their face and as set out in the concurring and dissenting opinions of Chief Justice Pleicones' in Nicholson and Barnes.

    a. The facts surrounding the injury in Williams are distinguishable from the facts of the instant case. In Williams, the claimant slipped and fell while stepping off a curb due to rain and the resulting mud accumulation. Further, in Williams, the claimant could point to a direct cause—the mud. Here, Claimant admits she has no idea why she fell on a flat, dry surface. Therefore, Williams—to the extent it addresses the nature of the fall—is inapplicable.

    b. Williams does not provide a blanket, universal holding that *any* injury on an employer owned premises is compensable as either "arising out of" or "in the course and scope" of employment. In fact, Nicholson and Barnes, also relied upon by the Single Commissioner set out this point—that location/proximity alone does not compensability make. Therefore, the Single Commissioner's finding that the claim is compensable based on Williams on the sole basis that the fall occurred on an employer-owned property is in error.

    c. In Nicholson, the claimant was determined to have suffered a compensable injury because her foot caught on a piece of carpet causing her to fall to the ground. The

Supreme Court took great care to delineate that the claimant's foot "caught on the hall carpet and she fell." This specific piece of information was the nexus of the Nicholson decision. In the present case, there are numerous distinguishing factors from Nicholson. First, the claimant could directly trace her injury to tripping on carpet in the office. In other words, the claimant had at least some reason for why she fell. In the present case however, Claimant cannot point to a reason why she fell on a flat, dry surface other than her foot "stopped."

d. In Barnes, the claimant was "hurrying" down a hallway to check email when she fell. However, the key to Barnes was not whether the claimant had an explanation for the fall—as required by Crosby and Bagwell—but rather a legal error by the Commission that the claimant's fall in Barnes was "idiopathic." As this claim is not an idiopathic fall, reliance on Barnes was improper.

2. "An injury "arises out" of employment when there is a causal connection between the conditions under which the work is required to be performed and the injury." See, e.g., Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008).

3. The fall claimed by Claimant in this case is an unexplained fall rather than an idiopathic fall. *See* Turner, Barnes, Crosby, Nicholson, Williams.

4. South Carolina is in the minority of jurisdictions denying compensation for unexplained falls. *See* Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (1998).

5. "It is not enough that a claimant show that she fell while at work but rather, when the fall occurs on a level surface, that she present evidence to explain her fall." *See* Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (1998); Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1995).

6. In Crosby, the court stated "[t]he burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture or speculation." Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998). "

7. A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other." Cross v. Concrete Materials, 236 S.C. 440, 446-47, 114 S.E.2d 828, 832 (1960).

8. "Where the claimant presents no evidence as to what caused the fall, it is wholly conjectural to say that "employment was a contributing cause of [petitioner's] injury." Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1995).

9. Turner v. SAIIA Construction—was issued by the South Carolina Court of Appeals on December 7, 2016. Turner directly addresses the arguments set out by Defendant in its Initial Brief. Turner also embraces and validates the opinions of Chief Justice Pleicones in Nicholson and Barnes.

    a. In Turner, an employee was found lying on the ground and had no memory of the fall or injury. While Claimant has a memory of the fall, the cases are similar in that both the claimant in Turner and Claimant in the present case could provide no explanation for their fall. The Turner court cited to Bagwell which stated that an unexplained fall is generally not compensable unless the employment contributed to either the cause or the effect of the fall. Here, Respondent cannot testify as to whether her employment contributed to the cause or the effect of the fall because

Respondent does not know how the fall actually happened.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decision and Order of the Single Commissioner is **REVERSED.**

IT IS FURTHER ORDERED that in accordance with Turner, Claimant's fall is an unexplained fall and, therefore, is not a compensable accident arising out of the course and scope of her employment.

IT IS FURTHER ORDERED that as this claim is not compensable, Defendants are entitled to terminate all benefits to Claimant.

IT IS SO ORDERED.

Susan S. Barden, Commissioner
For the Appellate Panel

WE CONCUR:

Avery B. Wilkerson, Jr. Commissioner

Mike Campbell, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on April 7, 2017