THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

W.C.C. No. 1514060

Jayeshkumar K. Patel and Mehulbhai Patel, Dependents Claimants for Hansaben Patel, Deceased Employee..... Respondents,

v.

BVM Motel, LLC d/b/a Best Western Point South, Employer, and Auto-Owners Insurance Company, Carrier, ... Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an undeniably tragic case. Decedent Hansaben Patel worked as a housekeeper for BVM Motel, LLC d/b/a Best Western Point South ("Employer" or "Best Western") in Yemasse, Jasper County, South Carolina. As part of her employment, she was provided a room at no charge. On the morning of August 16, 2015 at approximately 8:01 a.m., she and her husband, Kantibhai Ambala Patel, were fatally shot by an unknown intruder. (R. pp. 85-86). An individual was later apprehended and charged with armed robbery. (R. pp. 65, 94-95).

Decedent's son, Jayeshkumar K. Patel,[1] filed a Form 52 seeking death benefits. (R. p. 26). Best Western and its insurance carrier, Auto-Owners Insurance Company (Appellants herein), denied the claim, raising, among other issues, whether Decedent's death arose out of and in the course of Decedent's employment. The average weekly wage was "to be determined." (R. p. 27).

The parties submitted Pre-Hearing Briefs and APA submissions, and were heard by the Single Commissioner on September 26, 2016. There were no witnesses at the hearing; instead, counsel stated their positions on the record. (R. pp. 145-154).[2]

The Single Commissioner issued a Decision on December 28, 2016, finding Decedent's death compensable. Finding of Fact No. 5 held that, "Employer's motel is in close proximity to Interstate 95. I base this finding on the address of the motel." The Single Commissioner awarded Decedent's beneficiaries, the identity of whom would be

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[1] Decedent's other son, Mehulbhai Patel, was later added to the caption. Jointly, Jayeshkumar and Mehulbhai are referred to herein as Claimants.

[2] A parallel proceeding addressed whether Decedent's husband, Kantibhai, also was an employee of Best Western at the time of his death. (R. p. 153, line 25 – p. 154, line 15).

determined at a future hearing, the statutory funeral benefit amount of $2,500, as well as 500 weeks of compensation based on an average weekly wage of $408.38 with a corresponding compensation rate of $272.25. The average weekly wage was computed by taking Decedent's actual payroll earnings and half the value of the room provided to Decedent, determined to be $80.00 per night. The Single Commissioner discounted the arrangement made with another employee, a bartender who also resided at the hotel, as irrelevant, indicating that, "[t]he financial arrangement between another housekeeper and Employer would be relevant; however, no such evidence is in existence." (Decision and Order of the South Carolina Workers' Compensation Commission, filed Dec. 28, 2016, R. pp. 18-25 ("Single Commissioner Decision").

Appellants filed a timely Form 30 raising 16 separate issues, challenging the following findings made by the Single Commissioner: that Decedent's death arose out of and in the course of her employment; that "the fact that the perpetrator of the homicide was not a guest does not serve to defeat this claim"; the amount of Decedent's average weekly wage; that the value of the room provided to Decedent and her husband was $80.00 per night; and, Finding of Fact No. 5, which assumed facts not in evidence and was based on independent research performed by the Single Commissioner as opposed to any facts presented by the parties. (R. pp. 96-97).

The parties filed briefs,[3] and were heard by an Appellate Panel of the Workers' Compensation Commission on March 20, 2017. At oral argument, defense counsel noted

[3] Defendants'/Appellants' Brief to the Appellate Panel of the Full Commission, dated Feb. 17, 2017 (R. pp. 99-120); Claimants'/Respondents' Brief to the Appellate Panel of the Full Commission, dated March 8, 201[7] (R. pp. 121-134); and Defendants'/Appellants' Reply Brief to the Appellate Panel of the Full Commission., dated March 13, 2017 (R. pp. 135-144).

that the Best Western is located right in front of the Lowcountry Council Government building, and pointed out that Decedent's fatal injuries were the result of an armed robbery. (R. p. 157, line 20 – p. 158, line 12; p. 162, lines 10-18). As a result, this is not an "unexplained death" but, instead, an armed robbery/murder. (R. p. 179, lines 6-10). Counsel pointed out that there was no evidence that the hotel was located in a dangerous location, (R. p. 180, lines 19-20), and that, although Decedent's and the bartender's situation were not precisely equivalent, the amount the bartender paid for the long-term rental of a suite ($120.00 bi-weekly) was relevant to the true value of the single room provided to Decedent and her husband for free. (R. p. 181, line 10 – p. 182, line 24).

The Full Commission affirmed the Single Commissioner in part and reversed in part. The Commission found Decedent's death was compensable but adjusted the average weekly wage by attributing the full amount of the value of the room provided to Decedent, found to be $80.00 per day, resulting in an average weekly wage of $688.38 with a corresponding compensation rate of $458.92. The Commission repeated the Single Commissioner's "finding" that the Best Western "is in close proximity to Interstate 95" based on the address of the motel. (Decision and Order of the South Carolina Workers' Compensation Commission, filed Aug. 4, 2017, ("Commission Decision"), R. p. 13, Finding of Fact No. 7).

Appellants timely appealed to this Court.

BACKGROUND FACTS

At the time of her death, Decedent was 67 years of age. Raj Vyas, the General Manager and owner of the Best Western where Decedent worked, (R. p. 50, lines 17-23), gave a telephonic deposition. (R. pp. 44-60). Mr. Vyas testified that he employed

Decedent as a housekeeper, (R. p. 56, lines 23-24), and that she and her husband Kantibhai, who "was helping her out," lived in Room 265 of the hotel. (R. p. 51, lines 12-15). Decedent had worked for Mr. Vyas for about 10 years. (R. p. 54, lines 4-12). Mr. Vyas also testified that Decedent was required to live at the hotel as a condition of her employment because she was on call to provide housekeeping services if needed at any time that she was on the premises. Her husband helped her out, even though he was not on the payroll. (R. p. 52, line 12 – p. 53, line 20; p. 54, line 20 – p. 55, line 1; p. 56, line 25 – p. 57, line 19).

Mr. Vyas explained that part of Decedent's compensation was the room where she lived at no charge. The "going rate" for the room, if rented to a customer, was $80.00 a night. (R. p. 52, lines 5-11). He also explained that another employee, a bartender, lived at the hotel and paid $120.00 bi-weekly for a suite. (R. p. 55, line 6 – p. 56, line 17).

Decedent typically started her work day at 8:30 a.m., although she was not required to clock in and out. (R. p. 57, lines 20-21; p. 58, lines 1-6). Mr. Vyas testified that, at around 9 a.m. on the morning she was murdered, the person at the front desk indicated that Decedent had not shown up for work yet. When they went to find out what had happened, they found the Patels shot in their room. (R. p. 58, lines 10-16; p. 59, lines 20-22). Although he could not be sure whether Decedent had been called out during the night before her murder to perform any housekeeping tasks, Mr. Vyas confirmed that Decedent was not working at the time she was murdered. (R. p. 59, line 23 – p. 60, line 9).

Both of the Patels died from their wounds and Decedent's death was classified as a homicide. The Death Certificate lists the place of injury as "Decedent's home." (R. pp. 85-86). According to the Jasper County Coroner, the Patels "were shot to death during an armed robbery at their residence in Yemassee, SC which is located in Jasper County." (R. pp. 94-95). Mr. Vyas testified that the intruder was not a guest of the hotel. (R. p. 53, line 24 – p. 54, line 1). There also is no evidence that he was an employee of the hotel. An arrest was made in the case and the individual was charged with "Robbery/Armed Robbery, robbery while armed or allegedly armed with a deadly weapon." (R. p. 65).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence standard under the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2015); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should 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); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law).

In addition, "[a] reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in

view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting* Bursey v. South Carolina Dep't of Health & Envt'l Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004). "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 conclusion the administrative agency reached in order to justify its action." Frame v. Resort Services Inc., 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). Workers' Compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

ARGUMENT

The Commission committed two principal errors. First, the Commission erred in finding that the Decedent's fatal injuries arose out of her employment. Second, the Commission erred in calculating Decedent's average weekly wage to be $688.38 with a corresponding compensation rate of $458.92. Appellants address each error below.

I. The Commission erred in finding that Decedent's death was compensable.

A. The Commission erred in finding that Decedent's fatal injuries arose out of her employment.

This case presents a novel issue, as the particular fact pattern of this case (where an employee who is required to live on site and who is on call[4] is murdered during time

[4] Although Appellants concede that Decedent was on call at the time of her murder, the Commission erred in finding that Decedent was on call "twenty-four hours a day, seven days per week." (Commission Decision, R. p. 14). The only testimony on this point came from Mr. Vyas, whose clear and uncontroverted testimony shows that "as long as she was on the premises, [Decedent] was charged with doing whatever was necessary." (R. p. 52, line 25 – p. 53, line 3). Thus, there is no evidence demonstrating that, even

she was not actively at work, by a third-party assailant with no connection to her employment and whose motive was robbery) has not been before South Carolina appellate courts previously. However, in order to be compensable under the South Carolina Workers' Compensation Act ("Act"), an injury must both arise out of and in the course of employment. "The two parts of the phrase 'arising out of and in the course of employment' are not synonymous." Ardis v. Combined Ins. Co., 380 S.C. 313, 320, 669 S.E.2d 628, 632 (Ct. App. 2008). "'Arising out of' refers to the origin of the cause of the accident; 'in the course of' refers to the time, place, and circumstances under which the accident occurred." Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). Although the two concepts are "so entwined that they are usually considered together," id., they are two separate requirements, both of which must exist simultaneously before compensation is allowed. *See* Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). In this case, it is crucial to consider both lines of inquiry and to refrain from mixing unrelated concepts, such as the principles applied to traveling employees or the unexplained death presumption, neither which are particularly relevant to the instant case.

Although the question of whether an injury arises out of and in the course of employment is largely a factual determination to be made by the Commission, where the facts are not in dispute, the question of whether an accident is compensable becomes a question of law. *See, e.g.*, Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007); Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d

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when Decedent was away from the Best Western, she was still on call. Concomitantly, there is no evidence that Decedent was not allowed to leave the premises of the Best Western when she was not scheduled for duty.

333, 335 (2008) (where the relevant facts are not disputed, the question of whether a claimant's injuries are compensable become a question of law). The claimant bears the burden of proving sufficient facts in order to recover under the Act. Hall, 376 S.C. at 349, 656 S.E.2d at 759.

An injury arises out of employment when the employment is a contributing proximate cause of the accident. It has long been the rule in South Carolina that, "if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen [sic] would have been equally exposed apart from the employment." *E.g.*, Bridges v. Elite, Inc., 212 S.C. 514, 519, 48 S.E.2d 497, 498-99 (1948). In other words, there must be some causal nexus connecting an employee's job to the injury in order for it to be compensable. Dukes v. Rural Metro Corp., 356 S.C. 107, 110, 587 S.E.2d 687, 689 (2003). "An accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises. To so hold, would be to abandon the requirement that an accident bear some logical causal relation to the employment." Bright v. Orr-Lyons Mill, 285 S.C. 58, 60, 328 S.E.2d 68, 70 (1985).

Respondents concede that Decedent was required to live at the Best Western and that, when she was on the premises, she was on call. (R. p. 52, line 12 – p. 53, line 20; p. 54, line 20 – p. 55, line 1; p. 56, line 25 – p. 57, line 19). Her room at the Best Western

was considered part of her compensation.[5] (R. p. 51, line 12 – p. 52, line 11). However, under the so-called bunkhouse rule, this only establishes that her fatal injuries occurred in the course of employment. *See* Bright, 285 S.C. at 60, 328 S.E.2d at 70 (the fact that an injury occurs on an employer's premises establishes course of employment prong but not arising out of prong); Pierre v. Seaside Farms, Inc., 386 S.C. 534, 549, 689 S.E.2d 615, 623 (2010) ("merely being on an employer's premises, without more, does not automatically confer compensability for an injury," but, instead, a claimant must also show that the injury arose from his/her employment, such as that "the injury arose from a hazard existing on the employer's premises, and [the claimant] was making reasonable use of the premises"). Claimants still must establish that Decedent's death arose out of her employment. This they cannot do and the Commission erred in finding otherwise.

Claimants rely heavily on Pierre. However, Pierre is distinguishable from the instant case because, there, the claimant demonstrated that his injury both arose out of and in the course of employment. In Pierre, the claimant was required by the nature of his employment to live on the employer's premises. The claimant was injured during a time he was not actively on duty, when he fell on a wet sidewalk that was the result of an overflowing outside sink. At the time of his injury, he was making reasonable use of the employer's premises. Key to the finding of compensability in Pierre is that the cause of his accident was "[t]he employer's placement of the sink and the apparent lack of drainage [which] created the wet conditions that caused Pierre to fall. Thus, the source of the injury was a risk associated with the conditions under which the employees were

[5] As is explained in more detail below, there is a significant disconnect between the findings that Decedent was required to live at the hotel to perform her housekeeping duties and the Commission's finding that that accommodation was reasonably valued at $80.00/night, an expensive long-term living accommodation by any standard.

required to live." 386 S.C. at 548-59, 689 S.E.2d at 622. In other words, the claimant's injury was in the course of his employment because he was required to live on the employer's premises, even though he was not actively on duty, and was making reasonable use of the premises. His injury arose out of his employment because the injury was caused by a hazard created by and existing on the employer's premises. 386 S.C. at 549, 689 S.E.2d at 623.

Here, there is no evidence whatsoever that Decedent's employer did anything or that her employment created any condition that led to her injuries. It was Claimants' burden to show a causal connection, *e.g.*, Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998) (the claimants normally bears the burden of proving all the facts that will entitle them to compensation under the Act), which they failed to do.

The only difference that the fact that Decedent was on call at the time of her injury makes is that her on call status satisfies the "in the course" prong of the analysis all of the time she was on the hotel premises. It does not, however, satisfy or eliminate the "arising out of" prong of the analysis. This is a crucial distinction. For example, had the claimant in Pierre been doing something unreasonable, such as drinking heavily or intending to injure himself or others, his injuries would not have been found to have been incurred in the course of his employment since he was not actively on duty and would not have been making reasonable use of the premises. Here, in contrast, Decedent was in the course of her employment all the time she was at the hotel because she was on call. However, there is no evidence, and the Commission erred in concluding, that her injuries arose out of her employment.

In this respect, Pierre is substantively different from the instant case because there, the evidence showed the employer created the hazardous condition to which the claimant was exposed and which caused the injury. Here, there is no evidence whatsoever that there was a hazardous condition, or that the Employer was in any way responsible for or connected to the injuries Decedent sustained. In short, while in both cases the "in the course of" prong was satisfied, albeit in two different ways (in Pierre, he was required to live on the employer's premises and was making reasonable use of those premises; in the instant case, Decedent was required to live on the employer's premises and was on call even beyond her normal working hours), the present case fails to satisfy the "arising out of" prong.

Pierre would be applicable to the case at hand had Decedent tripped on the stairs of the hotel, or over furniture in the room in which she lived. Those are risks or dangers associated with the workplace where she was required to live. Her death might be compensable had the hotel caught on fire while she was sleeping and she died as a result. That is the fact pattern in Ardis, 380 S.C. 323, 669 S.E.2d at 634 (*citing* Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (N.C. Ct App. 1969), for the proposition that, "traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel fire cases are the best illustration of this"),[6] and the

[6] Some jurisdictions refer to causal forces such as fire or unknown motives as neutral causes (*i.e.*, they are neither work related nor purely personal). Armed robbery is not considered a neutral cause, as the intent of the assailant is quite clear and, unless something about the employment situation (or in this case living situation) contributed to or made the assault more likely, the resulting injuries are not compensable. *Compare* State Compensation Ins. Fund v. Workers' Comp. Appeals Bd., 133 Cal App.3d 643, 184 Cal. Rptr. 111 (Cal. Ct. App. 1982) (murders not compensable because they were

key was that the fire occurred while the claimant was sleeping at the hotel where his employment required him to stay while out of town, away from his home. However, Decedent's fatal injuries occurred in her home, (R. pp. 85-86), where she had lived for 10 years, (R. p. 54, lines 6-12), and resulted from an armed robbery committed by a non-guest intruder whose motive was robbery and who had no connection whatsoever with her workplace or employment. (R. p. 53, line 24 – p. 54, line 1) (R. p. 65).[7] The assailant was not a guest of or visitor to the hotel, and there is no evidence that he was known to the Employer or had any connection whatsoever to Decedent's employment. Even Claimants' counsel acknowledged that the perpetrator was "a non-guest intruder." (Claimants' Brief to the Commission, R. pp. 124-125).

The need to establish both prongs of the analysis for live-in, on call employees is demonstrated in Jolly v. South Carolina Indus. Sch. for Boys, 219 S.C. 155, 64 S.E.2d 252 (1951). There, the claimant lived on the employer's premises rent-free and was on call outside his normal working hours. His job as foreman of the hogs and general utility man included doing "whatever work was necessary in connection with maintaining the buildings and grounds, such as carpentry, fencing, etc." 219 S.C. at 157-58, 64 S.E.2d at 253. The claimant was injured while painting the entrance hall and apartment that was provided to him and his family as part of his employment. Although the employer

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motivated by intent to rob and due to racially motivated animus), *with* Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (N.C. 1932) (employment made robbery more likely), and DeBow v. First Inv. Prop., Inc., 623 S.W.2d 276, 1981 Tenn. LEXIS 500 (Tenn. 1981) (employment connection due to the fact that the assailant knew the claimant was required to be on site on weekends when she was on call and had to keep rent payments on her person), discussed in more detail below.

[7] Before the Commission, Claimants also suggested that the motive for the assault was completely unknown. This is factually untrue. Jasper County officials made an arrest and charged the culprit with armed robbery. The motive clearly was a personal desire on the part of the perpetrator to commit a robbery. (R. pp. 65, 94-95).

advised the claimant that he would have to do the painting "in his spare time away from his regular duties," the employer provided the paint and brushes, as well as "two young men of the institution to assist in the work." 219 S.C. at 157-58, 64 S.E.2d at 253. The Supreme Court held that the claimant's injuries both arose out of and in the course of his employment. The Court first pointed to the evidence that showed the claimant was on call 24-hours a day. That established that his injuries occurred in the course of employment. In addition, the Court emphasized that the painting work benefited the employer, 219 S.C. at 158, 64 S.E.2d at 253, which provided the necessary causal link to the claimant's employment to support the finding that his injuries also arose out of his employment.

Although she was dressed for work at the time she was shot, Decedent had not yet reported for work. (R. p. 58, lines 10-16; p. 59, line 20 – p. 60, line 9). There is no evidence that, at the time of the attack, Decedent was doing anything work-related or that benefitted her employer. She was found shot inside her apartment, so the evidence demonstrates she was not even on her way to report for duty at the time of her death.

Here, there simply is no connection between Decedent's employment and her fatal injuries at the hands of an armed robber. As noted above, the uncontroverted evidence confirms that the assailant was not a guest of the hotel or connected to Best Western or Decedent's employment in any way. (R. pp. 85-86, 94-95) (R. p. 53, line 24 – p. 54, line 1). Although Claimants presented no evidence whatsoever regarding the environs of the Best Western, the Commission engaged in its own investigation in order to reach Finding of Fact No. 7, that the Best Western "is in close proximity to Interstate 95." (Commission Decision, R. p. 13). First, engaging in such investigation by the

decision maker was impermissible. *See, generally,* Ross v. Medical Univ. of S.C., 328 S.C. 51, 69, 492 S.E.2d 62, 72 (1997) (adjudication by same person(s) who prosecute/investigate a matter is impermissible). Second, even that finding, without more, does not support a finding that Decedent's injuries arose out of her work. As is explained in more detail below, there is no indication in this case, let alone substantial evidence, that the hotel or its location had any causal relation to the assault on Decedent.

There is no evidence in this case that the Employer was forewarned of the armed robbery or had any reason to suspect such might occur. The record in this case is absolutely devoid of any evidence that the Best Western, or the area in which it is located, is plagued with crime or that its location made the assault on Decedent any more likely than had she lived elsewhere. The proximity to I-95, a fact that the Commission researched on its own, does not indicate one way or the other whether the Best Western was in a dangerous location. As was pointed out to the Commission at oral argument, the Best Western is situated right in front of the Lowcountry Council Government building. (R. p. 157, line 20 – p. 158, line 12). There is no evidence that the Best Western had experienced any other armed robberies or crime of any other nature, or that the Employer had any reason to suspect that someone would attempt to rob a tenant or employee of the hotel.

Claimants argued below that any injury incurred by a claimant who is required to live on an employer's premises is compensable. However, that overstates the bunkhouse rule as adopted in South Carolina and elsewhere. "Although merely being on an employer's premises, without more, does not automatically confer compensability for an injury, we believe the circumstances of Pierre's accident – including the facts that he was

required by the nature of his work to live on the employer's premises and such residence furthered the interests of the employer, **the injury arose from a hazard existing on the employer's premises,** and he was making reasonable use of the premises – establish the requisite work connection and compel a finding that Pierre's injury **arose out of** and in the course of his employment at Seaside Farms." 386 S.C. at 549, 689 S.E.2d at 623 (emphasis added). Key to this result was the Court's conclusion that "the source of the injury was a risk associated with the conditions under which the employees were required to live," 386 S.C. at 549, 689 S.E.2d at 622, which provided the causal connection to the claimant's employment. Here, the source of the injury was completely unrelated to the conditions under which Decedent was required to live – there is no evidence whatsoever that the hotel or its location increased the risk of injury to Decedent and her husband. As a result, her injuries did not arise out of her employment and are not compensable.

Cases from other jurisdictions with similar fact patterns are in accord.[8] Even where an employee lives on the employer's premises and is injured while on the premises, there still has to be some causal connection to the workplace. In State Compensation Ins. Fund, two employees, Vargas and Castellanos, were robbed and shot to death in the bunkhouse where they lived "rent free as additional compensation for services arising from their employment, and as a convenience to the employer." 133 Cal App.3d at 647, 184 Cal. Rptr. at 113. Although the Commission awarded compensation, finding that the motive for Vargas' shooting was unknown and that "[t]he bunkhouse, and thus the work environment, did contribute to the shootings," 133 Cal App.3d at 651, 184

[8] "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, 365 S.C. at 477, 617 S.E.2d at 381.

Cal. Rptr. at 116, the California Court of Appeals reversed. The robbery and assault were associated with prior negotiations between one of the assailants and Castellanos concerning the sale of a vehicle, wherein the assailant had given Castellanos a forged/fraudulent check for the purchase. Part of the assailant's intent in going to the bunkhouse was to retrieve the check before Castellanos could cash it. With respect to Vargas, who had not been involved in the car deal and who was upstairs sleeping when the assailants arrived, the Court pointed out that the assailants were racially motivated to kill some "Mexicans." 133 Cal App.3d at 648, 655, 184 Cal. Rptr. at 113-14, 118.

Note that it is the motive of the assailant that is the focus of inquiry and not necessarily whether the assailant and employee knew each other previously or had any prior relationship. State Compensation Ins. Fund, 133 Cal App.3d at 655, 184 Cal. Rptr. at 118 ("[i]njuries to employees in [a] bunkhouse are not per se compensable; if a third party assaults and injures the employee while in the course of employment (including being in a bunkhouse) and the third party acted out of purely personal motives there is no compensability").[9] Focusing on the intent of the perpetrator, where "the assault is personally motivated, it could conceivably occur anywhere ... the connection between the employment and the injury is so remote that the injury is not an incident of the employment." 133 Cal App.3d at 654, 184 Cal. Rptr. at 117. The Court distinguished between a non-personal motive, as in the case of young boys who started a bulldozer that injured two 24-hour managers of rental property as they were sleeping, which was compensable, and a personal motive, such as robbery or racial animus, as in the murders

[9] This is true in South Carolina also. *See* Bright, 285 S.C. at 59, 328 S.E.2d at 69 ("[t]he assailant's motive for the shooting was purely personal and unrelated to any employment activities").

of Vargas and Castellanos, which were not. 133 Cal App.3d at 655, 184 Cal. Rptr. at 118.

Furthermore, the California Court of Appeals explained that "the bunkhouse rule does not dispense with the requirements of Labor Code section 3600", which requires that, "in order to be compensable the injury must *arise out of* and be *in the course of* employment." State Compensation Ins. Fund, 133 Cal App.3d at 652-53, 184 Cal. Rptr. at 116. "Our review of these cases reveals that invocation of the bunkhouse rule establishes that the injury occurred in the course of the employment but there also must be some connection between the employment and the injury, or an injury arising out of the reasonable use of the premises, or the bunkhouse must place the employee in a peculiar danger." 133 Cal App.3d at 653, 184 Cal. Rptr. at 116-17.[10] The Court also clarified that, "[w]here the nature of the employee's duties places her in no particularly dangerous or isolated position, or where the risk of harm is not limited to the place of employment and where the attack occurs on the premises not because the victim was performing the duties of employment at the time of assault but because she merely was there, and where the nature of employment was not part of an assailant's plan to isolate or trap the victim, the injury does not arise out of the employment." 133 Cal App.3d at 654, 184 Cal. Rptr. at 118.

[10] As is also the case here, in State Compensation Ins. Fund, the lower tribunal "improperly took notice of a fact which was unsupported by the Record," which was that the bunkhouse's remote location supposedly left the two employees more susceptible to attack. 133 Cal App.3d at 656-57, 184 Cal. Rptr. at 119. The Court concluded that it was an "unreasonable inference that the victims were vulnerable because of the bunkhouse," because there was no evidence to support such a conclusion, despite the fact that a foreman directed the assailants to the bunkhouse. Id.

In this case, the fact that Decedent was on call does not change the outcome. To grant on call employees greater coverage than their counter-parts who are injured on their employer's premises and during normal work hours would be patently unfair and run counter to the Act, as the latter still must show that their injuries arose out of their employment. For example, in Grenon v. City of Palm Harbor Fire Dist., 634 So.2d 697, 1994 Fla. App. LEXIS 2559 (Fla. Ct. App. 1994), a firefighter who was required to live on his employer's premises during his 24-hour shifts, injured his back while putting on underwear after a shower. The Florida court rejected the claimant's suggestion that any injury sustained by a worker on the employer's premises and on call should be compensable, explaining that, "[t]o apply the bunkhouse rule in the manner suggested by appellant would give the on-call employee greater coverage than a similarly situated claimant injured during his or her regular hours of employment but whose injury was not caused by his or her employment." 634 So.2d at 699, 1994 Fla. App. LEXIS 2559 at **6. Instead, an on call employee living on the employer's premises still must show that the injury arose out of the employment.

In Gomez v. State (In re Gomez), 2010 WY 67, 231 P.3d 902 (Wy. 2010), the claimant was required to live on his employer's premises and was "on call 24-hours a day, 7 days a week, Sundays and holidays included." 2010 WY at __, 231 P.3d at 904. On the day he was fatally shot, he and a fellow employee had begun drinking and arguing about the amount of money the co-employee was sending back to his family in Peru, with the argument eventually escalating into a physical fight. At some point, the co-employee shot the claimant, killing him instantly. Id. The Wyoming Supreme Court applied a statutory formulation of the rule that injuries incurred during non-work related

recreational activities are not compensable.[11] In addition, however, the Court emphasized and affirmed the administrative finding that the altercation "had nothing to do with [the cliamant's] work ... but was obviously due to a personal animosity between the parties." 2010 WY at __, 231 P.3d at 905. The Court explained, "[t]his is not a close case. To find Gomez's death compensable under these circumstances would require adoption of what would resemble a strict liability standard for cases where an employee is on call and on the employer's premises. That is not the law in Wyoming, where compensability requires some 'nexus' between the work and the injury ..." 2010 WY at __, 231 P.3d at 906.

Patently, simply because an employee is required to live on the employer's premises or is provided housing free of charge, and is on call, and is injured on the employer's premises does not and should not create "strict liability" for the employer, regardless of the lack of any causal connection to employment. Such a result – the result reached by the Commission – nullifies the statutory requirement that an injury arise out of employment. In Loyola Univ. v. Industrial Comm'n, 408 Ill. 139, 96 N.E.2d 509 (Ill. 1951), the claimant was employed as a kitchen and dining-room helper in the school cafeteria. He was paid a salary and provided room and board and, in addition, was expected to be on call whenever he was needed. He was injured on the employer's premises while he was off-duty but on call, when he "was just walking around, killing time before [he] went to work." In doing so, the claimant fell off a ramp and injured his

[11] A similar rule is applied in South Carolina. *See, e.g.*, Leopard v. Blackman-Uhler, 318 S.C. 369, 458 S.E.2d 41 (1995) (injury incurred while playing on a work softball team not compensable because it was not incurred on the employer's premises or during work hours; participation was not required (expressly or implicitly); and the employer did not derive a "substantial direct benefit" from the activity other than general health and morale).

leg. 408 Ill. at 142, 96 N.E.2d at 511. While acknowledging that the claimant's injury occurred in the course of his employment, 408 Ill. at 144, 96 N.E.2d at 511-12, the Court held that he still had to prove it arose out of his employment. The Court rejected the claimant's argument that "the mere fact he was on the premises of his employer subject to its call and ready to do any task which might be required of him renders the injury sustained compensable even though, at the immediate time of the accident, he was not doing any work directly for the benefit of his employer." Loyola, 408 Ill. at 146, 96 N.E.2d at 512. The Court explained that the Illinois "Workmen's Compensation Act has never been construed by this court as applicable to every accident or injury which may happen to the employee during the period of employment," which impermissibly would have rendered the employer "an insurer of the safety of its employee at all times." 408 Ill. at 146-47, 96 N.E.2d at 513.[12] The Court overturned the finding of compensability because, "[t]he act which resulted in the injury was not reasonably incidental to the employment." 408 Ill. at 1450, 96 N.E.2d at 514.

Conversely, in United States Fidelity & Guar. Co. v. Whiting, 597 S.W.2d 504, 1980 Tex. App. LEXIS 34242 (Tex. Ct. App. 1980), the decedent was employed as a ranch foreman. He and his family lived on the ranch as part of his employment, and he was on call 24-hours a day. His employer testified that the decedent "took care of the ranch," and had unlimited authority to do what needed to be done on the ranch. On the evening he was shot, the decedent was more or less off duty and had had a few drinks. He had taken his own pistol into the yard and fired several shots. When his employer

[12] A similar restriction on the coverage of the Act is recognized in South Carolina. *See, e.g.*, Sylvan v. Sylvan Bros. Inc., 225 S.C. 429, 442, 82 S.E.2d 794, 800 (1954) (dissent acknowledging that the "Act of course does not and is not intended to afford protection and coverage of general accident or life insurance policies").

called the sheriff's office to report the gunshots, two officers arrived in unmarked cars to investigate. As the decedent walked toward them, he was ordered to drop his gun and, when he did not, he was fatally shot. Quoting Professor Larson, the Court explained that, due to the combination of the bunkhouse rule and an employee who is "continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment." Whiting, 597 S.W.2d at 506, 1980 Tex. App. LEXIS 34242 at **5. The decedent's injuries arose out his employment because the officers who shot him had no personal motive to injure him but, instead, "were present only because of a call from his employer." 597 S.W.2d at 506, 1980 Tex. App. LEXIS 34242 at **7. The employer's call to the sheriff's office and the decedent's responsibility to "determin[e] who had entered upon the employer's premises" in unmarked cars supplied the required causal link to his employment.

Similarly, in DeBow v. First Inv. Prop., Inc., 623 S.W.2d 276, 1981 Tenn. LEXIS 500 (Tenn. 1981), the claimant was the assistant manager of an apartment complex who was on call on alternate weekends. On weekends, her employer required her to keep rent monies in her possession to be deposited on Mondays. After she broke up with her live-in boyfriend, she began seeing another resident of the apartment complex. On a weekend when she was on call, she was having dinner with her friend at his apartment. When her friend left the apartment to investigate a disturbance outside, the claimant's former boyfriend entered the apartment, assaulted the claimant and stole the cash in her possession. The Tennessee Supreme Court upheld the compensation award. Even though robbery was the purpose underlying the assault on the claimant, "there was a causal connection between the conditions under which [the claimant] was required to

perform her work and the resulting injury ... The basis of this latter finding evidently was the fact that [the claimant] was required to remain constantly in the apartment complex over the weekend and to retain in her personal possession rents paid by tenants, a fact known to her assailant." 623 S.W.2d at 275, 1981 Tenn. LEXIS 500 at **6.

Here, there is no such evidence that causally links the attack on Decedent to her employment. Her employer did nothing to encourage or allow the assailant. Her employment did not require her to maintain any hotel monies on her person. Decedent was not targeted in any way because she lived or worked at the hotel. There is no evidence in this record that an armed robbery is more likely at the Best Western where Decedent lived, or at any hotel for that matter, than at any other form of abode. Instead, Decedent and her husband were chosen at random as victims of a vicious armed robbery that could have taken place anywhere and had nothing to do with her employment. Tragic as this case is, it is not compensable under the Act

In every workers' compensation assault case decided thus far by South Carolina courts, the employee's injuries were found to arise out of employment only where there was a connection between the work and the assault. For example, in Baggott, the claimant, who was on call after normal working hours, had completed his work and was playing a game of pool when a fellow employee, McDowell, angrily accused him of leaving an alarm triggered which endangered McDowell's son. The Supreme Court explained that, "[i]t cannot be disputed claimant's injury 'arose out of' his employment with SMI. The assault was the result of McDowell's anger toward claimant in failing to

disengage the security alarm at SMI. The dispute had its origin in McDowell's and claimant's employment with SMI." 330 S.C. at 5-6, 496 S.E.2d at 854.[13]

In Lanford v. Clinton Cotton Mills, 204 S.C. 423, 30 S.E.2d 36 (1944), there was conflicting evidence as to the cause of the assault. However, the Supreme Court held that there was sufficient evidence that "the controversy arose out of the repair of crankshafts" and the claimant's work to find that the resulting injuries arose out of his employment. 204 S.C. at 431, 30 S.E.2d at 40.

The employer in Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973), was advised that a third-party assailant had threatened the claimant, but told the claimant to return to work on the roof, where the assailant later shot him. In Carter, although there was no work-related dispute underlying the assault, it was the employer's knowledge of the threat and his subsequent instruction to claimant to return to work (without providing any protection) that provided the requisite causal link. 261 S.C. at 348, 200 S.E.2d at 67.

In contrast are cases where the genesis of the assault had no relation whatsoever to work. For example, in Bridges, the decedent was shot to death by an estranged lover while on duty. Even though her position as a hostess at the entrance of the restaurant left her vulnerable to the attack, the Court held that the accident, "arose out of a purely personal transaction between [claimant] and [her assailant], having no connection with

[13] The Court also held that the claimant's injuries were incurred in the course of his employment because he was at a place ("Tiny's Tub") where he routinely performed duties and "when McDowell entered Tiny's Tub and confronted claimant about a work-related matter, claimant was compelled to resume his work duties for SMI." 330 S.C. at 6, 496 S.E.2d at 854. Here, there is no evidence that Decedent, although on call, was performing any work duties for her employer at the time she was shot.

the employment. The fact that she met her violent death on the employer's premises was purely coincidental." 212 S.C. at 520-21, 48 S.E.2d at 499.[14]

Similarly, in Bright, the claimant was mistaken for another employee with whom the assailant had a personal dispute. The motive for the shooting, which occurred in the employer's parking lot, had nothing to do with work. While the assault occurred during the claimant's employment, it did not arise out of his work. Again, although there were facts suggesting some work connection (*i.e.*, that the intended victim worked the same shift as claimant and that the claimant "probably would not have been in the parking lot but for his employment," in other words, "but for" causation), the Supreme Court found the injury noncompensable, explaining that "an assault arises out of employment if the risk of assault is increased by the nature or setting of the work, or if the reason was a quarrel which originated in the work." 285 S.C. at 60-61, 328 S.E.2d at 70.

In reaching its conclusion in Bright, the Supreme Court relied on a North Carolina case, Williams v. Salem Yarns, 23 N.C. App. 346, 208 S.E.2d 855 (N.C. Ct. App. 1974). In Williams, the claimant was shot in his employer's parking lot by an individual who lived across the street from the mill. The assailant, who had no connection to the mill, was intoxicated and had been yelling at other employees prior to the time he fired the shot. The North Carolina Court of Appeals reversed the Industrial Commission's finding of compensability, explaining that, while the assault occurred in the course of the claimant's employment, the record lacked evidence of any "connection with the

[14] It is axiomatic that "[a]ccidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises. The claimant must show also that the accident was connected with or incident to the performance of the duties of employment." Evans v. Jones-Wilson, Inc., 235 S.C. 219, 221, 110 S.E.2d 851, 852 (1959).

employment that it can be logically found that the nature of the employment created the risk of the attack." 23 N.C. App. at 348, 208 S.E.2d at 856. The same is true here. There is no evidence in this case that anything related to Decedent's employment created or contributed to the risk of the attack.

Even though the assault in Elrod v. Union Bleachery, 204 S.C. 481, 30 S.E.2d 73 (1944), occurred on the employer's premises and during work hours, and thus in the course of employment, it did not arise out of the employment. Instead, the assault was motivated by personal reasons involving an alleged insult the claimant made concerning the assailant's wife. 204 S.C. 485-86, 30 S.E.2d at 75. The Supreme Court found significant the fact that there was no evidence that the employer knew the assailant harbored animosity toward the claimant. 204 S.C. at 485, 30 S.E.2d at 74.

Finally, in Gory v. Monarch Mills, 208 S.C. 86, 37 S.E.2d 291 (1946), the claimant was injured when a fellow employee, whom he had asked for a cigarette during a break, knocked into the claimant and caused him to fall. Although the injury clearly occurred on the employer's premises and in the course of employment, the Court held that, with respect to "'the origin and cause of his injury,' it appears to us that the respondent is met with insurmountable difficulties." 208 S.C. at 91, 37 S.E.2d at 293. The request for a cigarette and the ensuing physical "horseplay" that occurred between the two employees had no connection whatsoever to the employment. 208 S.C. at 91, 93, 37 S.E.2d at 293-94 ("the proximate cause of [the claimant's] injuries was the unexpected and unforeseen act of a passerby or a fellow employee in hitting him or shoving him. Therefore, by no stretch of the imagination can it be said that the respondent's injuries arose out of his employment"). As is the case in the above assault cases, where there is

no causal connection between a claimant's injuries and the employment, compensation is denied. Here, where there is no causal connection between the attack on Decedent and her employment, compensation should be denied.

Just as there was "no nexus connecting [the claimant's] job as a paramedic to his colleague's handgun that they were examining during a smoke break," in Dukes, 356 S.C. at 110, 587 S.E.2d at 689, here there is no nexus connecting the unknown armed intruder to Decedent's job or the hotel premises where she lived. It is conceded that the assailant was not a guest. There is no evidence that he was known to anyone at the Best Western or that his presence on the morning of August 16, 2015 could or should have been anticipated. There is no evidence that living at the Best Western put Decedent at greater risk of or contributed to the assault.

This Court should reverse the Commission and hold that Decedent's death is not compensable because it did not arise out of her employment.

B. The unexplained death presumption does not apply to this case.

Claimants argued to the Commission that, assuming Decedent's death was not compensable pursuant to the bunkhouse rule, it should be found compensable under the "explained death presumption." Under this policy, "where an employee is found injured or dead at a time and place where his employment reasonably required him to be, there is a presumption of fact that death arose out of and in the course of employment." Suburban Propane Gas Co. v. Deschamps, 298 S.C. 230, 233, 379 S.E.2d 301, 302 (Ct. App. 1989). In Suburban Propane, the claimant was found shot in a driveway within the operating radius of his sales territory, with his "tools of trade" near his body. "The department ruled out the motive of robbery since a watch and approximately $85 were

found on the body." 298 S.C. at 232, 379 S.E.2d at 302. It was precisely because the case remained unsolved that this Court upheld the Commission's determination of compensability under the unexplained death presumption: "Because the case has remained unsolved, it is unknown whether the attack on Mr. Deschamps was motivated by personal or work-related reasons." 298 S.C. at 234, 379 S.E.2d at 303. Here, in contrast, there is no question that the motive was robbery. *See* (R. p. 157, line 20 – p. 158, line 12; p. 162, lines 10-18; p. 179, lines 6-10) (R. pp. 65, 94-95).

Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), relied on heavily by Claimants, is distinguishable on several key points. First, in Owens, the question was whether the claimant, who was found dead from a gunshot wound in the woods, had been shot by poachers or had committed suicide. Here, there is no question that Decedent was shot during the commission of an armed robbery by an unknown, non-guest intruder.[15]

In addition, in Owens, there was conflicting testimony as to whether the decedent's death was by suicide (the deceased had made statements to the effect that he

[15] In Owens, the Supreme Court cited Goodwin, a North Carolina case that involved a fire-man at a planing mill, who was shot and killed during an armed robbery on the mill premises. Goodwin is factually and significantly distinguishable from the case at hand because there, the claimant was required to report to the mill in the early hours of the morning, leaving his house at 5 a.m., to start the fires under the boiler. At the time he was assaulted, he was the only employee on the mill premises, which was located between railroad tracks and a highway and where the evidence showed that "it was well known to the employer that many tramps, hitch-hikers and hoboes passed ... traveling over the railroad tracks and the high way, both during the day and during the night." In addition, there was evidence that the employer had no night watchman on duty. From these facts, the North Carolina Supreme Court held that the claimant "was exposed by the terms of his employment to a hazard which might have been contemplated by a reasonable person as incidental to the service required of him by his employer," and, as a result, the death was compensable. Goodwin, 202 N.C. at 484, 163 S.E. at 578. No such evidence of a known risk has been presented in this case and to assume such a risk without any evidence would be pure speculation.

had contemplated suicide as well as regarding some motive for the same, but his wife testified that he was happy and had never suggested suicide to her), or at the hands of poachers, whom he was searching out. Here, there is no such conflicting testimony or evidence. There is no evidence in the record that this was anything other than an armed robbery and that Decedent was chosen at random for reasons completely unrelated to her job.

Finally, in Owens, because the employer was claiming that the death arose out of the claimant's willful intent to injure himself, the employer bore the burden of proving the fact of suicide. Although a claimant normally bears the burden of proving all the facts that will entitle him or her to compensation under the Act, *e.g.*, Clade, 330 S.C. at 11, 496 S.E.2d at 858 (an award under the Act "must not be based on surmise, conjecture or speculation"), under what is now Section 42-9-60, the person asserting that a claimant was injured or killed "by the wilful intention of the employee to injure or kill himself or another" bears the burden of proof. S.C. Code Ann. § 42-9-60. In this case, because Appellants are not asserting a Section 42-9-60 defense, the burden of proof remains on Claimants to prove Decedent's death arose out of her employment. They have not met their burden of proof and, as a result, this Court should reverse the Commission's award.

The unexplained death presumption does not apply in this case because Decedent's death is not unexplained. The motive and cause were a random armed robbery that had nothing whatsoever to do with her work.

II. The Commission erred in calculating Decedent's average weekly wage.

The Commission erred by valuing the room provided to Decedent as part of her wages at the nightly rate a similar room would be rented to paying customers of the Best

Western. The goal of determining a claimant's average weekly wage is to fairly approximate the claimant's probable future earnings. *See*, Forrest v. A.S. Price Mech., 373 S.C. 303, 309-310, 644 S.E. 2d 784, 787 (Ct. App. 2007). "An elasticity or flexibility is permitted with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). In other words, the result reached by the Commission must be fair to both the employer and the employee. *See* Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 113, 542 S.E.2d 732, 735 (Ct. App. 2001).

There is no indication in either the Single Commissioner Decision or the Commission Decision as to what method they employed to derive Decedent's average weekly wage. (Single Commissioner Decision, R. p. 23) (Commission Decision, R. pp. 12-15). However, it appears that the Commission utilized the primary method under Section 42-1-40 with respect to Decedent's "actual payroll earnings," (Single Commissioner Decision, R. p. 23) (Commission Decision, R. p. 13 n.1), as Decedent had reported wages for the 12 months prior to her murder. Appellants take no issue with that part of the calculation.

However, calculation of the value of the room as part of Decedent's average weekly wage is an entirely different matter. The Commission simply added what it deemed the "full value" or the "the 'going rate' on regular rate/value of the room" provided to Decedent and her husband to Decedent's wages to arrive at an average weekly wage of $688.38. (Commission Decision, R. pp. 12-14). The Commission simply did a straight calculation of the "going [commercial] rate" for a nightly rental of a Best Western room without considering or analyzing whether this resulted in an average

weekly wage that was reasonable or fair to both employee and employer. As was the case in Bennett, 271 S.C. at 98, 245 S.E.2d at 131, and Brunson, 344 S.C. at 112, 542 S.E.2d at 734-35, the result reached by the Commission in this case is grossly unfair to the employer.

To begin with, simple math shows that this number is grossly inflated. At $80.00/night, the room is valued at $29,200.00 per year, or $2,433.33 per month ($80.00 x 365 days = $29,200.00 ÷ 12 months = $2,433.33). This is not a reasonable rental value for a single room in Jasper County, South Carolina. Instead, according to United States Census Data, median gross rent in Jasper County from 2011-2015 was $784.00/month.[16] It strains credulity to believe that a single room, as opposed to a full apartment or house with multiple rooms and a full kitchen, would be valued at three times the median rental rate in Jasper County.

In addition, to the extent the bartender and Decedent were not similarly situated employees, any such argument only serves to bolster Appellants' point that the room occupied by Decedent and her husband should not be valued at $80.00 per night for the purposes of calculating her average weekly wage. The Commission pointed to Mr. Vyas' testimony that the bartender's "arrangement was a little bit different tha[n] what we had with Hansaben," because bartending was "such a big job and I couldn't find employees in that area, but the housekeepers I could find, you know, in the area." (R. p. 56, lines 2-11). In short, Mr. Vyas explained that he gave a better deal to the bartender than he would have had to give to a housekeeper in order to have him on site for work. Given this testimony, it makes no sense that Mr. Vyas would give more valuable/expensive

[16] https://www.census.gov/quickfacts/fact/table/jaspercountysouthcarolina/HSG860215#viewtop

housing to Decedent than to the bartender. The Commission's logic is completely backward on this point – the value of the room provided to Decedent would have been less than or at a minimum equal to the value of the suite provided to the bartender – since there was less incentive to provide a room to a housekeeper, who could be found in the area, than to a bartender, a position that was more difficult to fill. Thus, the most the room provided to Decedent should be valued at is $120.00 biweekly, or $60.00 per week.

Although a single room like the one Decedent lived in may have been rented to short-term paying customers for $80.00 a night, there is no evidence in this record that the hotel was frequently or even ever at full capacity, meaning Best Western was not losing $80.00 per night by providing that room to Decedent. Furthermore, it is common knowledge that long-term rentals are typically let at a lower rate than shorter stays, single nights or weekends.

Because the average weekly wage calculated by the Commission is excessive and grossly unfair to the employer, this Court should reverse the Commission Decision and, in the event this Court finds Decedent's injuries compensable, find that the value of the room for average weekly wage purposes is $60.00 per week or, in the alternative, remand for a proper calculation of the average weekly wage based on the reasonable value of the room.

CONCLUSION

For all the reasons stated herein, this Court should reverse the Commission's finding that Decedent's fatal injuries arose out of her employment. However, in the event this Court upholds the Commission's compensability finding, the value of the room provided to Decedent as part of her employment should be reduced to $60.00 per week for purposes of calculating her average weekly wage.

November 28, 2017

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

W.C.C. No. 1514060

Jayeshkumar K. Patel and Mehulbhai Patel, Dependents Claimants
for Hansaben Patel, Deceased Employee..... Respondents,

v.

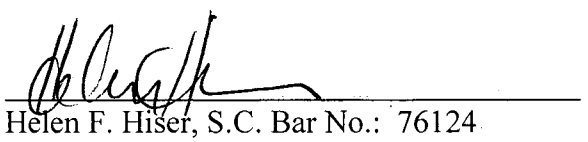
BVM Motel, LLC d/b/a Best Western Point South, Employer,
and Auto-Owners Insurance Company, Carrier, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellants BVM Motel, LLC d/b/a Best Western Point South and Auto-Owners Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Appellants complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

November 28, 2017

McAngus Goudelock & Courie, LLC



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