THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE
South Carolina Workers' Compensation Commission

Appellate Panel

SCWCC Case No. 1518978
Appellate Case No. 2017-001096

Pamela Grady, Employee, Claimant, ... Appellant,

v.

Magnolia Manor of Inman, ... Employer,

and

Zurich American Insurance Company of Illinois c/o
Gallagher Bassett Services, Inc., Carrier, ... Respondents.

FINAL BRIEF OF RESPONDENT

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II. **DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR AS A MATTER OF LAW IN FINDING THAT GRADY'S CLAIM WAS NOT COMPENSABLE BECAUSE SHE SUFFERED AN UNEXPLAINED FALL?**

STATEMENT OF THE CASE

Appellant works full time for Magnolia Manor of Inman. Appellant 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). Appellant testified she was had some work files and her purse at the time of her fall. Appellant 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. Appellant 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 Appellant's average weekly wage is $1192.35 with a corresponding compensation rate of $766.05.

She continues to work at Magnolia Manor of Inman. Appellant acknowledged that the area where she stumbled and fell was flat and that she did not know why she fell.

STATEMENT OF THE FACTS

Appellant was seen at Spartanburg Regional Emergency Department on September 23, 2015. The note indicates an accidental fall with right shoulder injury after tripping while on a sidewalk leaving work. X-rays and CT scan were performed and Appellant was diagnosed with a right humeral head fracture. She was referred for orthopedic consultation and released. (R. p. 84-96)

Appellant was first seen by Dr. Alan Posta at Carolina Orthopaedic Center on October 7, 2015. Dr. Posta indicates Appellant saw Dr. Tony Sanchez, who referred Appellant to Dr. Posta for treatment. Dr. Posta noted bruising down Appellant's right arm and exam was limited due to discomfort. The impression was a three part right proximal humerus head fracture and Dr. Posta recommended a reverse total right shoulder replacement/arthroscopy. Appellant underwent the surgery on October 16, 2015 at St. Francis Eastside. (R. p. 101-125)

Appellant followed up with Dr. Posta on October 28, 2015, doing well. At her follow up on November 11, 2015, Appellant was getting better and participating in physical therapy rehab for the right shoulder. On November 24, 2016, Appellant was again continued in physical therapy rehab and was improving. She was continued out of work. At her December 14, 2015 appointment with Dr. Posta, Appellant was allowed to return to work as of Monday, December 21, 2015. Her physical therapy was continued. Appellant's next appointment with Dr. Posta was on January 12, 2016. Appellant noted that she had returned to work. Dr. Posta continued Appellant in physical therapy. (Id.).

Records indicate that Appellant participated in physical therapy at Advanced Therapy Solutions from November 10, 2015 at least through February 1, 2016, for her right shoulder upon referral by Dr. Posta. (R. p. 127-166).

ARGUMENT

I. APPELLANT DID NOT SUSTAIN A COMPENSABLE INJURY IN THE COURSE OF OR WITHIN THE SCOPE OF EMPLOYMENT BECAUSE APPELLANT'S FALL WAS AN "UNEXPLAINED FALL"

As Appellant relies on the Single Commission Decision and Order for argument, we will address this appeal within that context. 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 (and the Full Commission properly held) in relying on applying these cases to the present case as each is clearly distinguishable both on their face and as set out in Justice Pleicones' replies in Nicholson and Barnes.

We first must address Williams as the basis of the finding of compensability by the Single Commissioner. The facts surrounding the injury in Williams are far removed from the facts of the instant case. In Williams, the Appellant slipped and fell while stepping off a curb due to rain and the resulting mud accumulation. In the present case, Appellant testified as follows:

> Q: Is the parking lot flat…
>
> A: It's flat
>
> R. p. 201 (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.

R. p. 201 (Cl. Depo. Tr. 29:8-16)

Q: What caused you to fall?

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

R. p. 202 (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.

R. p. 203 (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.

R. p. 206 (Cl. Depo. Tr. 34:4-13)

Appellant readily admits that there was no rain, water, or other substance that led to her fall. Further, in Williams, the Appellant could point to a direct cause—the mud. Here, Appellant readily admits she has no idea why she fell on a flat, dry surface other than her "feet stopped." She does not recall slipping, scuffing her foot, tripping, or otherwise doing anything except falling. Therefore, Williams—to the extent it addresses the nature of the fall—is inapplicable.

Williams also contains discussion about the location of a fall in relation to "arising out of" and/or "course and scope" language. However, 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.

Next we turn to Nicholson and Barnes. These two cases are the most recent jurisprudence on unexplained and/or idiopathic falls in South Carolina. These opinions

provide illumination on prior decisions (like Williams) but also serve as guideposts for what is—and is not—a compensable unexplainable fall.

In Nicholson, the Appellant was eventually 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 Appellant's foot "caught on the hall carpet and she fell." This specific piece of information was the nexus of the Nicholson decision. In his concurring opinion, Justice Pleicones agrees with the majority in holding the injury is compensable because "her foot caught on the carpet." However, Justice Pleicones correctly notes errors of law by the majority relating to unexplained falls and "arising out of" and "in the course and scope of" employment. First, Justice Pleicones notes that "arising out of" requires "a causative connection between employment and the cause of the accident." (*referring to* Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993)). Absent an actual causal connection between employment and the cause of the accident, there is no compensable injury. Justice Pleicones then goes on to correctly note the majority erred in interpreting Bagwell by absolving "[the Appellant] of her obligation to present evidence that her unexplained fall on a level surface was the result of special conditions or circumstance." *See* Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1995). Finally, Justice Pleicones notes that 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)[1]. He states "**it is not enough that an Appellant show that she**

[1] The fall in Crosby was idiopathic in nature. The testimony dealt with the internal failing of a knee. However, the case as a whole stands for the proposition, as addressed by Justice Pleicones, that unexplained falls are not compensable.

fell while at work[2] but rather, when the fall occurs on a level surface, that she present evidence to explain her fall." Id.; Bagwell, supra.

In the present case, there are numerous distinguishing factors from Nicholson. First, as noted above, in Nicholson the Appellant could directly trace her injury to tripping on carpet in the office. In other words, the Appellant had at least some reason for why she fell. In the present case however, Appellant cannot point to a reason why she fell on a flat, dry surface other than her foot "stopped." Appellant testified about her fall, again, as follows:

> Q: Is the parking lot flat…
>
> A: It's flat
>
> R. p. 201 (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.
>
> R. p. 201 (Cl. Depo. Tr. 29:8-16)

[2] This comment is also a rebuke of wholesale reliance on Williams as noted above. Again, the Single Commissioner erred by relying on Williams to support the position that mere presence on employer's premises is sufficient for compensability.

Q: What caused you to fall?

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

R. p. 202 (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.

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A: No.

Q: --caught them?

A: I don't.

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Nicholson, as it relates to the mechanism of fall, is clearly inapplicable. Therefore, we must turn to the supporting case law cited in Nicholson and clearly and cohesively set out by Justice Pleicones. First, unlike in Owings, Appellant has failed to show an actual "causal connection" between her employment and the fall. Second, as in Bagwell,

Appellant has failed in her obligation to present evidence that her unexplained fall on a level surface was the result of special conditions or circumstance. Appellant's testimony is clear on the surface conditions, weather, etc—the unexplained fall occurred on a flat, level, dry surface during daylight hours. Finally, pursuant to Crosby, unexplained[3] falls are not typically compensable in South Carolina. Appellant's testimony is clear that she lacks any explanation for her fall other than her foot "stopped." She 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.

Justice Pleicones also gave a dissenting opinion in Barnes—a case which was relied upon by the Single Commissioner in the Decision and Order. In Barnes, the Appellant was "hurrying" down a hallway to check email when she fell. However, the key to Barnes was not whether the Appellant had an explanation for the fall—as required by Crosby and Bagwell—but rather a legal error by the Commission that the Appellant's fall in Barnes was "idiopathic." It is clear from the Supreme Court's opinion that the analysis would have been different had Barnes dealt with an "unexplained" fall as opposed to an "idiopathic" fall. The conflation of the two in the lower courts led to an opinion by the Supreme Court attacking the legal errors of "idiopathic" v. "unexplained" falls rather than whether the Appellant's fall constituted an "unexplained" fall (after determining it was not an "idiopathic" fall—e.g. the Supreme Court never touched on whether Appellant's fall was actually an "unexplained" fall as in the present case).

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[3] As compared to idiopathic. While Defendants believe this fall to be both unexplained and idiopathic in nature, the evidence need only support the fall as being "unexplained" to operate to deny compensability. Here, the evidence and Appellant's own testimony is clear that the subject fall is "unexplained."

However, despite the majority's failure to address the "unexplained" component of the claim, Justice Pleicones again addressed this aspect in his dissent. Justice Pleicones notes "[a]n 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). Justice Pleicones again cites to Crosby and Bagwell. However, in Barnes, Justice Pleicones goes a step further and points out that Bagwell held "**[w]here the Appellant 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.**" Id. Because the Appellant in Barnes "presented no evidence that her employment was a proximate cause of her fall," Justice Pleicones correctly conclude the Appellant "did not meet the 'arises out of employment' component required to prove a compensable injury."

Turning to the present case in comparison to Barnes, Justice Pleicones' commentary against hits the nail on the head in the circumstances of the facts of this case compared to Barnes. The case before this court is not an "idiopathic" fall. Rather is it an "unexplained" fall as contemplated by Bagwell, Crosby, and Justice Pleicones' opinions in Nicholson and Barnes. Appellant can provide no explanation for why she fell. And, as noted above, "**[w]here the Appellant 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.**" *See* Bagwell, supra. Specifically, again, Appellant testified as follows:

> Q: Is the parking lot flat…
>
> A: It's flat

R. p. 201 (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?

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Barnes, as it relates to the mechanism of fall, is clearly inapplicable. Therefore, we must turn to the case law cited in Barnes set out by Justice Pleicones. First, unlike in Owings, Appellant has failed to show an actual "causal connection" between her employment and the fall. Second, as in Bagwell, Appellant has failed in her obligation to present evidence that her unexplained fall on a level surface was the result of special conditions or circumstance. Appellant's testimony is clear on the surface conditions, weather, etc—the unexplained fall occurred on a flat, level, dry surface during daylight hours. Third, inapposite with Barnes, this is an "unexplained" fall case rather than an "idiopathic" fall case addressed by the Barnes court. Finally, pursuant to Crosby, unexplained[4] falls are not typically compensable in South Carolina. Appellant's testimony is clear that she lacks any explanation for her fall other than her foot "stopped."

[4] As compared to idiopathic. While Defendants believe this fall to be both unexplained and idiopathic in nature, the evidence need only support the fall as being "unexplained" to operate to deny compensability. Here, the evidence and Appellant's own testimony is clear that the subject fall is "unexplained."

She 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.

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). "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).

In Crosby, a Wal-Mart employee sought benefits for injuries she sustained when she fell at work. 330 S.C. at 490, 499 S.E.2d at 254. The claimant testified she fell while walking through the store on the way to a meeting. Id. She stated, "I was just walking on the floor and my feet went from under me." Id. This court determined the claimant's fall was an unexplained fall. The court of appeals stated, "there was no evidence offered in the case at hand as to what caused [the claimant] to fall. It would be wholly conjectural to say under the evidence presented that [the claimant's] employment was a contributing cause of her injury." Id. at 495, 499 S.E.2d at 256. This court concluded there was substantial evidence to support the Commission's finding that claimant failed to show a causal connection between her fall and her employment. Id.

Finally, the newest case on the unexplained fall issues is Turner v. SAIIA Construction. This case was published by this court on December 7, 2016. As noted above, this case embraces and validates Justice Pleicones' concurring opinion in

Nicholson[5] and his dissenting opinion in Barnes[6]. In Turner, an employee was found lying on the ground and had no memory of the fall or injury. While Appellant has a memory of the fall, the cases are similar in that both the claimant in Turner and Appellant could provide no explanation for their fall. The court cited to Bagwell which, again, stated that an unexplained fall is generally not compensable **unless the employment contributed to either the cause or the effect of the fall**. Here, Appellant cannot testify as to whether her employment contributed to the cause or the effect of the fall because Appellant does not know how the fall actually happened.

For all the foregoing reasons, the Full Commission should be affirmed. The fall sustained by Appellant was clearly "unexplained." Under existing South Carolina case law, the fall is clearly non-compensable. The Single Commissioner's reliance on Williams, Nicholson, and Barnes was misplaced as the current case is clearly distinguishable from all three opinions and is more in line with the legal analysis carried out by Justice Pleicones in Nicholson and Barnes. Further, the newest case on this issue Turner, sets out that Justice Pleicones opinions in Nicholson and Barnes are now the law in South Carolina.

CONCLUSION

As stated throughout, Appellant has failed to meet the compensability requirements for an "unexplained" fall. The case law in South Carolina is clear that an "unexplained" fall requires more than locality—it requires an explanation or a cause.

---

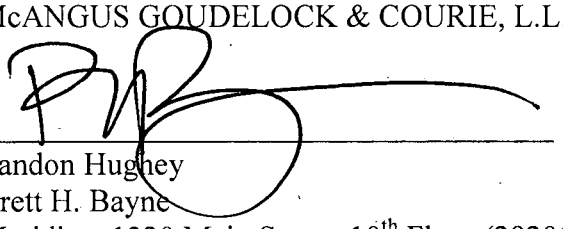
[5] "...it is not enough that a claimant show that she fell while at work but rather, when the fall occurs on a level surface, that she present evidence to explain her fall."

[6] "...because claimant failed to present evidence that her employment caused her fall, she failed to meet the 'arises out of employment' component required to prove a compensable injury."

"Where the Appellant presents no evidence as to what caused the fall, it is wholly conjectural to say that 'employment was a contributing cause of [Appellant's] injury.'" For that reason, because Appellant has failed to present a valid cause consistent with established South Carolina case law as to why she fell on a flat, level, dry surface, with no imperfections or special hazards, the Full Commission must be AFFIRMED.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, L.L.C.



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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