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
Appellate Tracking No.: 2017-001727

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 RESPONDENT

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December 4, 2017

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STATEMENT OF THE CASE

This case arose out of a tragic incident which ended in the shooting death of Hansaben (hereinafter "Mrs. Patel") and Kantibhai Patel (hereinafter, "Mr. Patel"). Mrs. Patel was employed by BVM Motel, LLC d/b/a Best Western Point South (hereinafter, "Employer" or "Best Western"), as a housekeeper, and as a condition of her employment, she was required to live in one of the rooms of the motel. Mrs. Patel lived in room 265 of the motel with her husband, who, while not on the employer's payroll, helped with various tasks around the motel as directed by the hotel's management. On August 16, 2015, at approximately 8:01 a.m., the Patels were fatally shot by an intruder, who was not registered as a customer.

The Patels' children filed a Form 52 claim for benefits, dated September 29, 2015, and their claims were denied by Defendants. The parties submitted Pre-hearing Briefs and APA submissions, and the Single Commissioner heard the case on September 26, 2016. The issues before the commissioner were whether Mrs. Patel's death arose out of and in the course of her employment with Defendants, whether her death was the result of a compensable accident under the South Carolina Workers' Compensation Act (hereinafter, "the Act"), and a determination of her appropriate average weekly wage and compensation rate. The Single Commissioner issued a Decision on December 28, 2016, finding that Mrs. Patel's death was compensable. In a parallel proceeding, the Commissioner also found Mr. Patel's death compensable, but the Commissioner's

Decision in that claim was reversed by the Full Commission, which held that the Single Commissioner erred in finding that Mr. Patel was an employee of Best Western.

In her Order, the Single Commissioner found that Mrs. Patel was a 10-year employee of Best Western that sustained a fatal injury that arose out of and in the course of her employment. (Decision and Order of the South Carolina Workers' Compensation Commission, filed Dec. 28, 2016, R. pp. 18 – 25 ("Single Commissioner Decision")). The Commissioner found that the employer's motel was in close proximity to Interstate 95 and that Mrs. Patel was "required to live in the room provided by the employer on the Employer's premises." (R. p. 6, ¶¶ 5, 9). The Commissioner further found that Mrs. Patel's regular day began at 8:30 a.m., but that she was required to provide services "at any time of the day or night" (even in "the middle of the night"), and that she was on call 24/7. (R. p. 6, ¶¶ 11 – 12). The Commissioner found that Mrs. Patel was deceased at 8:01 a.m., and that she was found dressed for work, with a name badge affixed to the shirt she was wearing. (R. p. 7, ¶ 15).

The Commissioner found that Mrs. Patel's beneficiaries were entitled to the statutory death benefit in the amount of $2500, along with 500 weeks of compensation based on an average weekly wage of $408.39. The Commissioner calculated her average weekly wage and corresponding compensation rate by assigning half of the value of the motel room to her compensation, as she shared the room with her husband. Thereafter, Defendants filed a Form 30, challenging the findings and conclusions of the Single Commissioner. In their Form 30, Defendants contended that the Commissioner erred in finding that Mrs. Patel was required to live in the room provided by the employer, that her death arose out of and in the course of her employment, that she was on call 24/7 with her employer, and that the value of the room was $80.00 per night. Also among Defendants' contentions were that the Commissioner erred in finding and concluding the

following: that the Commission had jurisdiction over this matter; that Mrs. Patel died at approximately 8:01 a.m. during an armed robbery on the Employer's premises; that the Employer's motel is in close proximity to Interstate 95; and that Mrs. Patel was dressed for work at the time of her death. (R. pp. 96 – 98).

The parties submitted briefs prior to the hearing before the Appellate Panel of the Full Commission in March 2017. At the hearing, counsel for Defendants argued that the Single Commissioner erred in holding that the injuries that resulted in Mrs. Patel's death arose out of her employment, and that there was no link between the employment and the assault because it involved an armed robbery. (R. pp. 158 – 159). Defendants' counsel further noted at the hearing that Mrs. Patel's murder took place on the premises of the Best Western, in front of the Lowcountry Council of Governments building, which is where the claim was heard by the Single Commissioner, and which is frequented by the South Carolina Workers' Compensation Commissioners. (R. p. 157, ln. 20 – 25). Counsel for Mrs. Patel's dependent beneficiaries maintained that Mrs. Patel's death arose out of and occurred in the course and scope of her employment, consistent with the Court's holdings on the "bunkhouse rule," because she and her husband were required to be on the premises at all times of the day and night, and were essentially on duty all the time. (R. pp. 171 – 172). Counsel for the claimants noted that Mr. and Mrs. Patel were dressed for work, wearing company uniforms when they were found deceased in their motel room. (R. p. 172, ln. 1 – 19). Counsel for claimants further noted that the only probative evidence of record as to the value of the motel room which was added to Mrs. Patel's payroll records to comprise her average weekly wage, was the testimony of Mr. Raj Vyas, the manager and Rule 30(b)(6) designee for the employer, that the value of the room was $80.00 per night. (R. pp. 174 – 175).

The Full Commission affirmed the Single Commissioner in part and reversed in part. The Full Commission affirmed the findings and conclusions of the Single Commissioner that Mrs. Patel's death arose out of and in the course of her employment and that her death was compensable under the Act. However, after finding that Mrs. Patel's husband was not an employee, and therefore not covered under the Act, the Full Commission found that the full value of the motel room should be attributed to Mrs. Patel's compensation from the employer, resulting in an average weekly wage of $688.38 with a corresponding compensation rate of $458.92. This appeal followed.

STATEMENT OF FACTS

Mrs. Patel was an employee of the Best Western at Point South for more than 10 years at the time of the incident leading to her death. Mrs. Patel lived with her husband at the motel in room 265, where she was required to live as a condition of her employment. (R. p. 51, ln. 17; R. p. 52, ln 12 – 15). Mr. Raj Vyas, the manager and owner of the Best Western, testified during his deposition that Mr. Patel was also an employee and that the Patels lived on the premises "so that [he could] utilize their services at any time of the day or night." (R. p. 51, ln. 12 – 15; p. 52, ln. 18 – 20). Mrs. Patel was, in fact, required to be on call or was on duty 24/7 at the motel, and if some service needed to be performed even in the middle of the night, it was Mrs. Patel's responsibility. (Decision and Order of the South Carolina Workers' Compensation Commission, filed Aug. 4, 2017, R. pp. 2 – 17 ("Order of Full Commission"); R. pp. 54 – 55). In addition to her pay demonstrated by her payroll records, Mrs. Patel was not charged for her obligatory living arrangement with her employer. The Single Commissioner found that the value of the room was $80.00 per night and her evaluation was based on the only probative evidence in the record, which

was the testimony of Mr. Vyas of the fair market value for the Patel's room. (R. pp. 14, ¶ 12; 52, ln 9-11).

Although Mrs. Patel was on duty or on call at all hours of the day and night, her regular working hours began at 8:30 a.m. (R. p. 58, ln. 1 – 6). Around 9:00 a.m. on August 16, 2015, the staff at the motel noticed that Mrs. Patel had not yet shown up for work, and shortly thereafter, Mr. and Mrs. Patel were found slain in room 265 of the Best Western. (R. p. 58, ln. 12 – 16). The autopsy report performed revealed that the Patels died as a result of gunshot wounds at approximately 8:00 a.m. in their room. (R. p. 32). The autopsy report further noted that she was shot "at work" and that at the time of her death she was wearing what appeared to be work clothes and with her name badge affixed to her shirt. (R. pp. 32 – 33). Besides an armed robbery charge pending at the time of the hearing, no other evidence was submitted as to the alleged perpetrator's motive in the killing of the Patels (R. p. 65).

STANDARD OF REVIEW

The standard for judicial review of decisions rendered by the South Carolina Workers' Compensation Commission is provided by the Administrative Procedures Act ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, an appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable probative, and substantial evidence within the entire record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e)). 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. Moreover, the general policy is to construe the Workers'

Compensation Act in favor of coverage rather than exclusion. *Fox v. Newberry County Memorial Hospital*, 316 S.C. 537, 451 S.E.2d 28 (Ct. App. 1994) (citing *Davis v. South Carolina Dept. of Corrections*, 289 S.C. 123, 345 S.E.2d 245 (1986)).

"'Substantial evidence' is not a mere scintilla of evidence nor the evidence reviewed 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 that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) (Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached."). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E. 2d 497, 501 (Ct. App. 2008). Applying the correct scope of review, this Court should affirm the decision of the Appellate Panel of the Full Commission.

ARGUMENTS

I. THE APPELLATE PANEL OF THE FULL COMMISSION PROPERLY FOUND AND CONCLUDED THAT MRS. PATEL'S INJURY AND RESULTING DEATH IS COMPENSABLE UNDER THE ACT.

The substantial evidence of record supports the Full Commission's findings and conclusions that Mrs. Patel's injuries and subsequent death arose out of, and in the course of, her employment with Best Western. While Defendants attempt to characterize this case as presenting completely novel issues of law, prior rulings of the Supreme Court of South Carolina regarding the "bunkhouse rule," and unexplained or ambiguous deaths affirmatively support the findings of

the Single Commissioner and the Full Commission that Mrs. Patel's death was compensable under the Act.

A. The Full Commission correctly found that Mrs. Patel's death is compensable, pursuant to the "bunkhouse rule," as articulated by South Carolina courts.

It is axiomatic that to be compensable under the South Carolina Workers' Compensation Act (hereinafter, "the Act"), an injury by accident must "arise out of" and "in the course of" employment. S.C. Code Ann. § 42-1-160. An injury arises out of employment when "there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 268, 140 S.E.2d 173, 174 (1965). An accident is said to occur in the course of employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto. *Hicks v. Piedmont Cold Storage, Inc.*, 324 S.C. 628, 470 S.E.2d 831 (Ct. App. 1996). However, an employee need not be in the actual performance of the duties for which he was expressly employed in order for his injury to be in the course of employment for purposes of compensability under the Act. Rather, the Court has held that it is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007).

Recognizing the realities of employment arrangements in which the employee is required to live on employer's premises, the Supreme Court adopted the "bunkhouse rule," which has also been implemented by several other jurisdictions. This rule provides that "injuries [arise] out of and in the course of employment where the employee [is] required, either by contract or by the nature of the work, to reside on the employer's premises." *Pierre v. Seaside Farms, Inc.*, 386 S.C.

534, 545, 689 S.E.2d 615, 619 (2010). In adopting the rule, the Court in *Pierre* examined Larson's *Law of Workmen's Compensation*, which describes that "[w]hen an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, and is continuously on call (whether or not actually on duty), the entire period of his presence is deemed included in the course of employment." *Id* at 542, 689 S.E.2d at 619 (quoting 1A Arthur Larson, *The Law of Workmen's Compensation*, § 24.00, at 5-234 (1993)). Larson's *Law of Workmen's Compensation* differentiates the situation in which an employee was continuously on call from an employee that "has fixed hours outside of which he is not on call," and in that circumstance, "compensation is awarded usually only if the course of the injury was a risk associated with the conditions under which the claimant lived because of the requirement of remaining on the premises." *Id.*

In Pierre, the claimant was a migrant worker at a tomato farm that slipped on a wet sidewalk outside the housing provided by his employer. In that case, the Court held that although there was nothing in the claimant's employment contract requiring him to live in the housing provided, his employer derived a benefit from the claimant living in that housing. The employer benefited from Pierre's living in the employer-provided housing because he and the other workers could be transported to the job site at the same time, and the work could not be commenced until the entire crew was there. The Court found that the injury was a risk associated with the conditions under which the employee was required to live, because he would not have been exposed to the injury "[b]ut for the fact that that Pierre's work essentially required him to live on the employer's premises near the farm." *Id* at 548-549, 386 S.E.2d at 622.

In adopting the "bunkhouse rule" the Court declined to rely on North Carolina courts' holding in a factually similar case. See *Juaregui v. Carolina Vegetables*, 112 N.C. App. 593, 436

S.E.2d 268 (1998). The court in that case held that because the claimant was not continuously on call at the time of his injury and he was not engaged in a duty that was calculated to further his employer's business directly or indirectly, his injury was not compensable. *Id* at 271. In rejecting the reasoning found in *Juaregui*, the Court in *Pierre* articulated the "bunkhouse rule" to apply in circumstances when the employer is benefited directly or indirectly by an employee who is required to live on the employer's premises or employer-provided housing, regardless of whether the employee was on call, on duty, or engaged in activity directly benefiting the employer at the time of the injury. The Court further noted that "North Carolina lacks a consistent rule in resident-employee cases." *Pierre*, 386 S.C. at 544. (citing *Chandler v. Nello L. Teer Co.,* 53 N.C. App. 766, 281 S.E.2d 718 (N.C. Ct. App. 1981) (finding compensability where the employee was stationed at a remote work cap for a road building project in Africa and the accident occurred as he was traveling back to his employer's camp after an off-duty excursion with friends; the court found that the accident arose out of and in the course of his employment even though he was returning after a personal frolic, because he was still within the confines of the employer's road project)). The Court found the holding in *Chandler* to be more persuasive, and notably, the claimant in *Pierre* had finished work for the afternoon, was not on call or on duty at the time of his injury, and was walking out of an employer-provided residence, presumably on a purely personal mission when he was injured. Furthermore, in discussing adoption and application of the "bunkhouse rule," the Court noted that "Larson observes that . . . the 'better view' upholds compensability when living on the premises is practically required." *Juaregui*, 112 N.C. App. At 217 (citing 1A Larson, *Workmen's Compensation Law* 5-271, § 24.40 (1993)).

The only evidence of record in the present case establishes that Mrs. Patel was required to live on the premises of the motel, as a condition of her employment or by the nature of her work,

like the claimant in *Pierre*. Unlike the claimant in that case, Mrs. Patel was also on call or on duty 24/7 as a condition of her employment. As previously discussed, Mr. Vyas affirmed that Mrs. Patel and her husband were required to live at the motel so that he could "utilize their services at any time of the day or night." (R. p. 52, ln. 18 – 20). Mr. Vyas further stated that Mrs. Patel was always on call, that she was charged with doing whatever necessary on the premises, and that Mr. Patel was responsible for helping whenever necessary. (R. p. 52-53). Mr. Vyas went so far in his testimony to illustrate the fact that Mrs. Patel was on call 24/7 by providing examples, such as "if a bathroom overflowed at 11:30 in the night . . . they would call the front desk and the front desk would call [room 265] and tell Hansaben" to clean, and if a bed "had a dirty sheet and it had to be changed," she would be called to change it, even if it was in the middle of the night. (R. p. 57, ln. 6 – 19). Thus, there is no question of fact that Mrs. Patel was required to live on the premises as a condition of her employment, that she was on call or on duty at all times, including at the time of her death, and that her employer derived a benefit from her living arrangement. Accordingly, there is no legal issue as to whether her death occurred in the course of her employment, and Defendants readily concede the same.

However, Defendants challenge the finding and conclusion of the Full Commission that Mrs. Patel's death arose out of her employment, asserting that the decision was clearly erroneous and not supported by substantial evidence. In support of this assertion, Defendants argue that the present case is distinguishable from *Pierre* because in that case "the evidence showed the employer created the hazardous condition to which the claimant was exposed and which caused the injury." (Brief of Appellant, p. 11, ln. 2-3). Respectfully, Defendants' interpretation of the language in *Pierre* to require that the Employer create the hazard to which the employee was exposed and cause the injury, or to require some fault on the part of the employer for the injury to arise out of

the employment, is disingenuous at worst, and misguided at best. In finding *Chandler* to be the more persuasive of the North Carolina cases, the Court in *Pierre* endorsed the view that when employees are required to live on the employer's premises or job site that the employees are "continuously in an employment situation and are protected by the provisions of the Workers' Compensation Act while they are within the confines of the employer's premises." *Pierre*, 386 S.C. at 544 (quoting *Chandler*, 281 S.E.2d at 721 (internal quotations omitted)). As discussed above, the Court articulated a "but for" causation standard, in situations where the employee is required to live on the premises, especially in the case where the employee is constantly on call or on duty. *Id* at 549 (citing *Hernandez v. Leo Polehn Orchards*, 122 Ore. App. 241, 857 P. 2d 213 (Or. Ct. App. 1993) (stating the basic underpinning of cases finding compensability is that it is the obligation to reside on the employer's premises that subjects the employee to the risk that resulted in injury and creates the employment connection that does not exist when the employee is free to leave).[1]

In support of their position that the risk must somehow be created by the employer, Defendants point to language at the end of *Pierre*, stating that "[t]he employer's placement of the sink and the apparent lack of drainage 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 required to live." *Pierre*, 386 S.C. at 548 – 549. However, as recently as 2015, the Court revisited and further clarified its holding in *Pierre*. See *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 769 S.E.2d 1 (2015). The claimant in *Nicholson* sustained a non-idiopathic fall at her place of employment while performing her job, and while walking down the hallway to a meeting at her

[1] See also *Ardis v. Combined Ins. Co.*, 380 S.C. 313, 669 S.E.2d 628 (2008) (holding that an employee who died as a result of a fire in a hotel during a business trip is within the coverage of the Act, even though the employee was not engaged in any work-related activity when he died and though his death may not have been foreseeable).

workplace. In that case, this Court previously held that although the fall was not unexplained or idiopathic, the carpet was not a hazard or special condition peculiar to the claimant's employment that contributed to or caused Nicholson's injuries. *Nicholson v.* S.C. Dep't of Soc. Servs., 405 S.C. 537, 546-48, 748 S.E.2d 256, 261-62 (Ct. App. 2013). This Court relied upon the holding in *Pierre* and the language quoted above to reach the conclusion that "Nicholson could not recover because no condition or hazard existed on the carpet." *Nicholson*, 411 S.C. at 388. However, the Supreme Court of South Carolina reversed, holding that the non-idiopathic fall was compensable. Concerning this Court's reliance upon *Pierre* in that case, the Supreme Court provided as follows:

> This reasoning misses the import of our holding in that case. There, the reference to the hazard or risk of the sidewalk was in response to the argument that because it could have happened anywhere, the fall was noncompensable. The Court's analysis did not hinge on whether the cause of the fall was something that could be characterized as hazardous or dangerous. Instead, it noted Pierre's work brought about his exposure to the situation which led to his fall, and the fact that this circumstance was not unique to his employment did not preclude recovery. Thus, the court of appeals erred in misapplying this isolated language in *Pierre*, which was employed to respond to the employer's argument that this fall could have occurred anywhere. ***This Court has never stated an injury must stem from a particular hazard or risk of the employment.*** (emphasis added).

Id at 388-89.

The Court further explained that this Court erred "in requiring a claimant to prove the existence of a hazard or danger because it erroneously injected fault into workers' compensation law" and that doing so was "unfaithful to principles underlying the creation of workers' compensation and turns the entire system on its head." *Id* at 389-90.[2] Thus, Defendants' position that the Full Commission

[2] Some jurisdictions employ a "positional-risk" test, whereby an injury arises out of the employment if it would not have occurred but for the fact that conditions and obligations of the employment placed the claimant in the position where he or she was injured. This test is usually applied in particular circumstances. The theory supports compensation "for example in cases of roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." 1-3 Larson's Workers' Compensation Law § 3.05 (2017). Citing *Nicholson*, Larson's Workers' Compensation Law noted "the Supreme Court of South Carolina, moving ever so

erred in finding that Mrs. Patel's death was compensable because there was "no evidence whatsoever that [Mrs. Patel's] employer did anything or that her employment created any condition that led to her injuries" misses the point of the Court's holding in *Pierre* and is nothing short of an attempt to inject fault into the question of whether there was substantial evidence to support the determination of the Full Commission that Mrs. Patel's death arose out of her employment. (Brief of Appellants, p. 10, ln. 7 – 8).

Defendants further argue that the present case is differentiated from the situations in *Pierre* and *Ardis* because Mrs. Patel was fatally shot by an assailant that was not a "guest" (i.e. paying customer) of the hotel and "there is no evidence that he was known to the Employer or had any connection to Decedent's employment." (Brief of Appellants, p. 12, ln. 7 – 8). Defendants also assert that there is no evidence regarding the environs of the Best Western, but that the Commission impermissibly engaged in its own investigation in reaching its finding that the Best Western is in close proximity to Interstate 95. (Brief of Appellants, p. 12). However, Defendants readily admitted in their brief and suggested at the hearing before the Full Commission that the employer's premises was familiar to the Commissioners because it is located in front of the Lowcountry Council of Governments, where Commissioners regularly hold hearings. To suggest that it is improper for the Commission to take judicial notice of a location universally known to the members of the Commission, and when the Defendants described the location of the employer's premises at the hearing, strains credulity. Moreover, Defendants' assertions also appear to be an attempt to improperly inject fault into the Act and these assertions are misplaced, for reasons discussed above. The evidence of record is that Mrs. Patel was found deceased in the motel room in which she was obligated to live as a condition of her employment, that she was found dressed

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close to the positional risk standard without using those words . . . indicated that the employee need not prove the existence of a special hazard." *Id.*

for work, and that she was on call or on duty at all times, including at the time of her death. There was also no evidence submitted suggesting a motive for her or her husband's killing, or whether the assailant was the invitee of a registered "guest."

In support of their position that the Commission's holding that Mrs. Patel's death was compensable was clearly erroneous, Defendants cite dicta from various jurisdictions that are either inconsistent with the law and policies of this State, or incongruous to the facts in the present case. Only when there is no South Carolina case on point, "our courts may look to other states to determine if the issue has been decided if the decision is persuasive authority." *Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005). Though there is no requirement that South Carolina Court's abide by North Carolina's determination of the law, in cases where South Carolina courts have not addressed the issue, our courts frequently look to North Carolina's rulings since our worker's compensation code is similar. *Parrott v. Barfield Used Parts*, 206 S.C. 381, 396, 34 S.E.2d 802, 810 (1945). While the *Pierre* case appears to be the first time that this Court and the Supreme Court had the opportunity to examine the "bunkhouse rule" under the Act, the Supreme Court thoroughly examined case law from other jurisdictions. In doing so, it first looked to North Carolina cases, specifically rejecting the Court's holding in *Juaregui*, and adopting a more equitable and inclusive standard in applying the bunkhouse rule as detailed in *Chandler*. The Court also discussed and relied upon persuasive authority from the state of Oregon. See *Hernandez v. Leo Polehn Orchards*, 122 Ore. App. 241, 857 P.2d 213 (Or. Ct. App. 1993) (where a migrant worker at a cherry orchard sustained injuries at the employer's labor camp when she slipped and fell in a mud puddle outside the bunkhouse while engaged in purely personal activities). Discussed at length in *Pierre*, the court in that case remarked that there are a variety of specialized situations where the activities have been categorized to determine if there is a sufficient work connection to

make them compensable. Quoting *Hernandez*, the Court noted that the personal comfort doctrine is one such categorization and that the "basic underpinning of those cases is that it is the obligation of employment to be on the premises that creates the risk of injury to the employee; when the employee is free to leave when he or she pleases, that employment connection does not exist." *Pierre*, 386 S.C. at 545 (internal quotations omitted). The Court concluded that the application of the bunkhouse rule represented "an incremental extension" of the personal comfort doctrine. *Id.* Because the Court in *Pierre* addresses the issues arising in the present case and weighed policy from jurisdictions that had implemented the "bunkhouse rule," it is improper to consult cases, much less dicta, on the issue from other jurisdictions.

However, assuming *arguendo* the Court did not intend its holding in *Pierre* to extend to an employee that was the victim of an assault or homicide, the cases cited by Defendants are neither instructive nor persuasive in addressing the questions involved in this case. Defendants principally rely upon dicta from the California Court of Appeals. See *State Compensation Ins. Fund v. Workers' Compensation App. Bd.*, 133 Cal.App.3d 643, 184 Cal.Rptr. 111 (1982). As noted by Defendants, the decedent-employees subject to the claims in *State Compensation Ins. Fund* lived rent-free on their employer's premises, where they were shot to death and robbed. However, the robbery and assault were associated with negotiations between one of the assailants and one of the employees concerning the purchase of an automobile, wherein the assailant had given the employee a fraudulent check for the automobile. Part of the assailant's motive was to retrieve the check before it could be cashed. There was also racial animus involved in the shooting death of both employees. Unlike the decedent-employees in that case, there is no evidence of motive or of the intent of Mrs. Patel's assailant, and there is no indication that the employees in *State Compensation Ins. Fund* were on call or on duty at all times, like Mrs. Patel.

Defendants also seem to conflate idiopathic injury cases, and perhaps the horseplay line of cases, with the "bunkhouse rule." Defendants point to case law from Florida which they claim also supports their assertion that the fact of Mrs. Patel's being on call or on duty at all times while on the premises should not render her death compensable. See *Grenon v. City of Palm Harbor Fire Dist.*, 634 So.2d 697, 19 Fl. L. Weekly D581 (1994). In *Grenon*, a firefighter was required to live on the employer's premises while on duty for each twenty four hour shift, and during his shift he strained his back while putting on his underwear after taking a shower. This is an example of an idiopathic injury which is not compensable under Florida law or our Act, and is completely incongruous to the facts in the present case. Mrs. Patel did not suffer an idiopathic injury; rather, she was shot to death while on call, on the employer's premises, where she was required to be at all times as a condition of her employment, and but for her required presence, she would not have been exposed to the risk which caused her death. Moreover, the case cited indicates that Florida takes the position that "[t]he employment must in some way, contribute an 'increased risk' of injury peculiar to that employment; otherwise, the statutory requirement that the injury 'arise out of employment' would be eliminated." *Id* at 699 (citing *Foxworth v. Florida Industrial Commission*, 86 So.2d 147, 151, 151 (Fla. 1955)). Similarly, the Court in *State Compensation Ins. Fund* remarked 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 . . . the injury does not arise out of the employment." *State Compensation Ins. Fund*, 133 Cal.App.2d at 654. This is in stark contrast to our courts' jurisprudence as discussed by the Supreme Court in *Nicholson*, explaining that the Court "has never stated an injury must stem from a particular hazard or risk of the employment." *Nicholson*, 411 S.C. at 389. Thus, it is not clear that Florida courts would apply the "bunkhouse rule" in even a remotely similar fashion to that

articulated by our Supreme Court in *Pierre*. Furthermore, in suggesting that South Carolina Courts alter the burden of proof to require that claimants provide evidence of a particular risk or hazard of employment or to show fault of the employer runs contrary to the grand bargain enshrined in our Workers' Compensation Act and is an argument against long-standing precedent in this State.[3]

Among the numerous cases from other jurisdictions discussed by Defendants, the facts and circumstances of the claimant in *Debow v. Investment Property, Inc.* 623 S.W.2d 273 (1981), were most similar to the facts of the present case. In *Debow*, the claimant was an assistant manager of an apartment complex who was on call on alternate weekends, and was on call at the time of her injury. As a condition of her employment, she lived on the employer's premises, and when on call, she "could move freely about the apartment complex and do whatever she normally would do in her off-duty hours" but she could not leave the apartment complex for an extended period. *Id* at 274. She was required to keep the company beeper with her at all times so that she could be reached by the apartment answering service so that she could respond to calls or complaints. The claimant in that case was also required to keep rent money paid by apartment residents in her possession until banks opened on Mondays. After a break-up with a live-in boyfriend at the apartment complex, she began dating another resident. While on call on a Sunday evening, she was having dinner with her new boyfriend. When her boyfriend left to investigate a disturbance outside the apartment, her former boyfriend quickly entered the apartment, and stabbed her several times. After the incident, the claimant's supervisor found the rent money missing from her apartment. In that case, even though there was substantial evidence of record for a reasonable person to conclude that the assault was personally motivated, the fact-finder concluded that the

[3] "Permission of the appellate court shall not be required to argue against precedent in the brief. Oral argument against precedent shall not be permitted except upon leave of the appellate court in which the case is the pending, pursuant to motion accordance with Rule 240 filed at least fifteen (15) days prior to oral argument." SCACR Rule 217.

purpose of the assault was the robbery and that her injuries arose out of her employment due to the requirement that she remain on her employer's premises while on call and because she was charged with retaining the money. Much like the claimant in that case, Mrs. Patel lived on her employer's premises as a condition of her employment, was required to be on the premises where she was brutally attacked, was on call or on duty at the time of the attack, and there was some evidence that robbery may have been a motivating factor. Additionally, it is entirely possible that Mrs. Patel's assailant could have believed that she had custody of motel funds or property. However, *Debow* is distinguishable factually from the present case in that Mrs. Patel had no connection to her assailant, and it is unclear from the text of *Debow* that the courts of Tennessee recognized or applied any form of the "bunkhouse rule" like South Carolina courts.

While it is Claimants' position that Mrs. Patel's death arose out of her employment for reasons discussed extensively above, claimants would further assert that the present case is distinct from other assault cases and novel in the fact that it was an unexplained death that occurred during the operation of the "bunkhouse rule." Claimants concede that the assault in the present case was not personally motivated or resulting from a horseplay incident, and there is no evidence the assailant was directly associated with the employer. When an employee is not required to live on the employer's premises and the reason or cause of death is not ambiguous, the Supreme Court has held that the danger associated with the assault "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *Bright v. Orr-Lyons Mill*, 285 S.C. 58, 61, 328 S.E.2d 68, 71 (1985). As discussed, in the context of the "bunkhouse rule," the fact that Mrs. Patel was required to be present on the motel's premises at all times and that she was on call at all times exposed her to the danger of the assault. The employers had control over where Mrs.

Patel lived and required her to live in a specific place, room 265 of the Best Western Motel, which was where the risk associated with the condition that caused her death existed. Thus, because the cause of death could be said to be neutral (not personal) there exists a rational connection between her employment and the assault, based on the holding in *Pierre*. However, assuming this Court were to find this claim to be legally novel, the Court should rely upon the findings of fact supported by substantial evidence and all reasonable inferences derived therefrom. Rather than engage in weighing the evidence as the Defendants suggest, the Court should give deference to the findings of four of South Carolina's Workers' Compensation Commissioners, and reverse only if their findings are affected by error of law. Additionally, any novel legal question as to compensability should be decided in favor of inclusion under the Act.

B. As an additional sustaining ground, Mrs. Patel's death is compensable under the Act, pursuant to the unexplained or ambiguous death line of cases.

In the case of an unexplained or ambiguous death, the Commission or Court should apply "a natural presumption of fact, that one charged with the performance of a duty and injured while performing such duty, or found injured at a place where his duty may have required [her] to be is injured in the course of, and as a consequence of the employment." *Owens v. Ocean Forest Club, Inc.*, 196 S.C. 97, 102, 12 S.E.2d 839, 841 (1941) (finding that an employee who was found dead of a bullet wound at a place where his duties required him to be suffered a compensable injury; although suicide was a possible cause of death it was not the only reasonable inference based upon substantial evidence). This presumption has been applied by the Court in various other circumstances in which the cause of death is uncertain, including cases involving assaults. See *Suburban Propane Gas Co. v. Deschamps*, 298 S.C. 230, 379 S.E.2d 301 (1989). In *Deschamps*, the claimant was an outdoor propane salesman, who was found dead in the driveway of a home within the operating radius of the company. Although there was some evidence that the decedent-

employee's murder may have arisen from a personal dispute with a third-party, which was unrelated to his work (Deschamps' office drawer contained a list names of various women and their telephone numbers), the Court held that the presumption applied and the death was compensable, because, although a possibility, a personal dispute was not the only reasonable inference drawn from the substantial evidence of record as to the reason for Deschamps' death.

Defendants contend that because evidence in the record exists that someone involved in the killing of Mrs. Patel was charged with armed robbery, the Commission's finding and conclusion that Mrs. Patel's shooting death arose out of her employment is clearly erroneous. Defendants claim that the evidence of this charge demonstrates that this was personally motivated, which makes the assault by a third party non-compensable. However, to conclude that the shooting deaths of Mrs. Patel and her husband were motivated by a personal desire on the part of the perpetrator to commit a robbery would be purely speculative. The motive and intent involved in committing robbery is clearly not the same involved in committing a homicidal act, and no evidence of motive was ever before the Commission. Unfortunately, no one is likely to know the motive, intent, or thinking of the assailant in committing the terrible act of violence against the Patels that prematurely ended their lives, and Defendants presented no evidence that would indicate a motive. The Patels' lips are sealed by death and their assailant's lips are sealed by the Fifth Amendment. Even if the motive could have been robbery, in and of itself, the Defendants presented no evidence of what the Patels' assailant stole or attempted to steal. Notably, like Deschamps, Mrs. Patel was found deceased with jewelry on her person (a beaded necklace, earrings with clear stones, a bracelet, and two anklets). Mrs. Patel was also found in a place where her employment reasonably required her to be, as she was constantly on duty or on call and her body was found dressed for work. Therefore, as discussed in claimants' brief before the

Commission, there was substantial evidence that Mrs. Patel's death is essentially unexplained and ambiguous, and the robbery itself is not the only reasonable inference to be drawn as the reason for Mrs. Patel's death.

II. THE APPELLATE PANEL OF THE FULL COMMISSION DID NOT ERR IN CALCULATING MRS. PATEL'S AVERAGE WEEKLY WAGE.

The Commission's calculation of Mrs. Patel's average weekly wage and corresponding compensation rate was based in and supported by substantial evidence of record and is, accordingly, a factual finding that should not be disturbed or reversed. Indeed, the Commission's factual finding is based on the only probative evidence of record. The Commission considered evidence as to her earnings, including her payroll earnings for 52 weeks prior to her death. Defendants also submitted her wage records from the South Carolina Department of Employment and Workforce. The wages reported by the employer resulted in an average weekly rate of $123.26. However, the wages reported did not reflect her actual earnings, given that her employer provided housing as a condition of her employment. Mr. Vyas testified that the value or going rate of the motel room was $80 per night. Mr. Vyas also stated that he rented a room to a to a bartender working at the motel at a bi-weekly rate of 120 dollars. However, Mr. Vyas stated that the employment "arrangement was a little bit different than what [he] had with Hansaben." (R. p. 56, ln. 5-6). Defendants submitted no other evidence concerning Hansaben's pay or the value of the motel room. Thus, based on the only probative evidence as to the value of the room provided, the Commission found that the room was valued at $80 per night. This was added to her payroll earnings, resulting in an average weekly wage of $688.38.

Defendants argue that this is clearly erroneous because the value of the motel room to Mrs. Patel was less than the value of the "going rate" of the room. In doing so, Defendants allude to U.S. Census data to support the proposition that the evaluation of Mrs. Patel's room was not fair

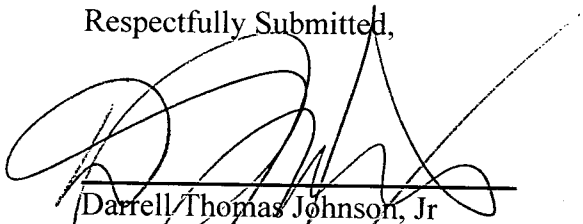
to the employer. However, this evidence was not presented by Defendants or in any way before the Single Commission or the Full Commission. Respectfully, it would be improper for this Court to look to evidence not considered by the Commission, and not properly preserved by Defendants, in making its determination as to whether the Commission's findings are supported by substantial evidence.

Furthermore, Defendants contend that the Commission's finding was clearly erroneous in discounting the testimony of Mr. Vyas as to what he charged the bartender for his room. However, in affirming the findings of the Single Commissioner, the Commission weighed the evidence presented by Defendants, finding that the greater weight of the evidence supported that the "going rate" of the room was the better approximation of the room's value to be included in calculating Mrs. Patel's earnings. (R. p. 13, ¶ 12). The Commission reasoned that evidence of the financial arrangement between another housekeeper and the employer would have had probative value, but Defendants submitted no such evidence and the arrangement Mr. Vyas and the employer had with another employee was irrelevant because they were not similarly situated. This is exactly the kind of factual finding for which there is substantial evidence, or evidence for which, considering the record as a whole would allow reasonable minds to reach the conclusion that the Commission reached. The possibility that the Single Commissioner and the Full Commission may have reached another conclusion is not, is not sufficient to hold that this finding was clearly erroneous. Accordingly, this Court should not disturb the factual findings of the Full Commission as to Mrs. Patel's average weekly wage.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment, findings of fact and conclusions of law of the Appellate Panel of the Full Commission.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Tracking No.: 2017-001727

W.C.C. FILE NO.: 1514060

Jayeshkumar K. Patel and Mehulbhai Patel, Dependants
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 certified that this Final Brief complies with Rule 211 (b), SCACR.

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