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.

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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.

Despite Claimants' arguments otherwise, the Commission erred in finding that Decedent's death arose out of her employment. Claimants rely on Fox v. Newberry County Mem. Hosp., 316 S.C. 537, 451 S.E.2d 28 (Ct. App. 1994), *rev'd* by Fox v. Newberry County Mem. Hosp., 319 S.C. 278, 461 S.E.2d 392 (1995), and Davis v. South Carolina Dep't of Corr., 289 S.C. 123, 345 S.E.2d 245 (1986), for the proposition that the Act is subject to a liberal construction in favor of coverage rather than exclusion. While this is true in certain respects, Claimants' position appears to be that, where there is a question of whether a claimant has met his or her burden of proving compensability, the Commission and Courts should err on the side of awarding benefits. However, what they fail to note is that Fox involved the question of whether a particular condition (heptic whitlow) constituted an occupational disease as defined in the Act, and Davis involved the question of whether a correctional facility inmate is entitled to workers' compensation benefits. Neither case involved the question of whether a claimant had met his or her burden of proving an injury was causally related to the employment. As a result, neither case supports Claimants' contention that they should prevail by the resolution of doubts in their favor.

Instead, "although 'compensation *law* will be construed liberally in order to effect its beneficent purpose .... the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission

in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are." Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 831-832 (1960). In other words, "our rule which is applicable to the finding of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts." 236 S.C. at 446, 114 S.E.2d at 832. The burden of proving compensability rests with the claimant and the "difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 209, 143 S.E.2d 376, 380-381 (1965); Cross, 236 S.C. at 445-446, 114 S.E.2d at 831-832 (the facts necessary to support a workers' compensation award "must be proved with the same certainty as in other civil cases" and a claimant cannot "prevail by the resolution of doubts").

A number of Claimants' arguments are contradictory and/or irrelevant. For example, while they argue that this case is not novel, they can point to no South Carolina case with even remotely similar facts. The South Carolina case that is closest to this case factually is Jolly v. South Carolina Indus. Sch. for Boys, 219 S.C. 155, 64 S.E.2d 252 (1951), which Claimants do not even discuss. Jolly involved a claimant who lived on the employer's premises rent-free, was on call outside his normal working hours, and, like Decedent, was required to perform "whatever work was necessary" in his off-duty hours. 219 S.C. at 157-58, 64 S.E.2d at 253. The claimant was injured when he was off-duty but on call, while painting a part of his employer's premises where the claimant and his family lived on-site. In affirming the award of benefits to the claimant, the Supreme

Court analyzed separately whether his injuries arose out of and in the course of his employment. The fact that the claimant was on call 24-hours a day established that his injuries occurred in the course of employment. However, the fact that the painting benefited the employer, 219 S.C. at 158, 64 S.E.2d at 253, was necessary to provide a causal link to his employment in order to support the finding that his injuries also arose out of his employment. That is the prong Claimants have failed to prove in this case.

In addition, Claimants' suggestion that the bunkhouse 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," (Resp. Br. p. 7, *citing* Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)), is an overly-broad statement of the law in South Carolina.[1] In fact, Claimants later quote the portion of Pierre that confirms that the fact that Decedent was required to live on the premises and was on call merely establishes that her injuries were incurred in the course of her employment. (Resp. Br. p. 8, "when an employee is required to live on the premises ... 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**," 386 S.C. at 542, 689 S.E.2d at 619 (emphasis added)). In contrast, the claimant in Pierre, who had fixed hours outside of which he was not on duty, also had to show that his injury occurred

[1] The full quote lifted from Pierre was the Court's observation that, "[o]ther jurisdictions have applied the bunkhouse rule under similar circumstances and found the injuries arose out of and in the course of employment where the employee was required, either by contract or by the nature of the work, to reside on the employer's premises, such as migrant workers, logging employees, and others who live at remote work sites." Pierre, 386 S.C. at 545, 689 S.E.2d at 620. This is not a blanket statement that all injuries incurred by workers who live on the employer's premises are compensable but, instead, the result reached in other cases with facts similar to those in Pierre.

during his "reasonable use of the premises" in order to be deemed in the course of his employment. 386 S.C. at 545, 549, 689 S.E.2d at 620, 622-623.

Being in the course of employment, however, does not automatically establish that an injury arose out of employment. *See, e.g.*, Ardis v. Combined Ins. Co., 380 S.C. 313, 320, 669 S.E.2d 628, 632 (Ct. App. 2008) ("[t]he two parts of the phrase 'arising out of and in the course of employment' are not synonymous"); Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007) (arising out of and in the course of employment are two separate requirements, both of which must exist simultaneously before compensation is allowed). Far from abolishing the need to show some causal connection between an injury and employment, the Supreme Court explained in Pierre that, "[a]n accident arises out of the employment when the accident happens because of the employment, as when the employment is a contributing proximate cause." 386 S.C. at 541, 689 S.E.2d at 618.

Claimants assert that Appellants are attempting to insert fault into the analysis under the Act. This is a red herring: Appellants' consistent argument has been that there is no causal connection between Decedent's employment and her fatal injuries – not that either party must be found at fault. Causation is different from fault. Indeed, the requirement of a causal link between employment and an injury has not been completely erased by our Courts. Nicholson v. South Carolina Dep't of Soc. Servs., 411 S.C. 381, 386, 769 S.E.2d 1, 3 (2015) ("an injury is not compensable absent some causal connection to the workplace"); Pierre, 386 S.C. at 549, 689 S.E.2d at 622 ("the source of the injury was a risk associated with the conditions under which the employees were required to live"). In fact, in both Nicholson and Pierre, the Supreme Court found a

causal connection between the work and the injury: in Nicholson, the employee scuffed her shoe on the carpet as she was walking to a meeting; in Pierre, the employee was injured when he slipped on water from an overflowing sink that employer had installed next to the bunkhouse sidewalk. Here, there is no similar causal link. Instead, here Decedent was in her room/home and, although she was dressed for work, had not yet reported for duty and was not actively working at the time of the assault.[2] She was fatally injured by an unconnected third party for reasons completely unrelated to her employment in the course of an armed robbery. There is no reliable, probative and substantial evidence that Decedent's employment caused or contributed to the risk of an armed robbery or to her injuries in any way.[3]

Although Claimants argue that Pierre addresses the issues arising in this case, it is factually and significantly distinguishable in that there, the claimant's injuries, which were incurred as a result of a condition created by the employer on the premises, were causally linked to his employment. As noted above and in their Brief of Appellants, here, there is no evidence of any such condition or causal link. And, as the Supreme Court explained in Pierre, "[i]n determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances." 386 S.C. at 541, 689 S.E.2d at 618.

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[2] Claimants attempt to equate being on call with being on duty at all times. (Resp. Br. p. 15). While Decedent was on call at the time she was shot, the only evidence of record confirms that she was not yet on duty. (R. p. 59, line 23 – p. 60, line 9).

[3] For example, although Decedent was required to live on the premises, there is no evidence whatsoever that she was required to live specifically in room 265. Further, there is no evidence that living in room 265 made the assault on Decedent any more likely than had she lived in a different room, a house or an apartment. In addition, contrary to Claimants' suggestion, here is no evidence that Decedent was "required to be present on the motel's premises at all times," nor is there any evidence that the fact that she was on call "expose[] her to the danger of the assault." (Resp. Br. p. 18).

As noted above, on one hand, Claimants argue that this case is not novel and is covered by South Carolina precedent. On the other hand, they urge this Court to rely on North Carolina precedent, citing the dissent in Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945), for the proposition that, where there is no South Carolina precedent, our courts often look to North Carolina case law.[4]

In any event, Claimants' focus on Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 278 (N.C. Ct. App. 1993), Chandler v. Nello L. Teer Col, 53 N.C. App. 766, 281 S.E.2d 718 (N.C. Ct. App. 1981), and Hernandez v. Leo Polehn Orchards, 122 Ore. App. 241, 857 P.2d 213 (Or. Ct. App. 1993), is somewhat perplexing as Appellants did not rely on any of those cases or argue that the bunkhouse rule does not apply in South Carolina. Furthermore, like Pierre, those cases are factually distinguishable from the instant case. Chandler involved a traveling employee, and not an employee who lived year-round on his employer's premises. Although the compound where the claimant's deceased husband was staying while out of town was owned by the employer, the North Carolina Court of Appeals clearly applied the traveling employee rule. 53 N.C. App. at 768-769, 281 S.E.2d at 719-720 (the traveling employee "rule's rationale is that an employee on a business trip for his employer must 'eat and sleep in various places in order to further the business of his employer ...'"). The best that can be said of the North Carolina Court of Appeals' decision in Chandler is that it is an unusual mix of traveling employee/bunkhouse rule: "It is clear from the evidence that Teer sent [the decedent] on a business trip to an isolated part of Africa, and provided [the decedent] and other Teer employees with sleeping, eating and recreational facilities within the various Teer project

[4] Because there is no binding precedent that applies to the facts of this case, Claimants' citation to Rule 217, SCACR, (Resp. Br. p. 17 n.3), is inapplicable here.

areas. While within the project areas, employees of Teer are continuously in an employment situation and are protected by the provisions of the Workers' Compensation Act." This established the claimant's injuries were incurred in the course of employment. The "arising out of" prong was satisfied by the traveling employee concept that finds compensability where a traveling employee is "in the process of returning to his place of employment and the sleeping accommodations provided for him by his employer at the time of the accident," 53 N.C. App. at 770, 281 S.E.2d at 721, because, for a traveling employee, these activities are acts incidental to employment. 53 N.C. App. at 769, 281 S.E.2d at 720.

In the two remaining cases, the employee was not on call but, instead, was off duty and making reasonable use of the employer's premises. In each of those cases, as was the case in Pierre, the causal link was supplied by the fact that the injury arose out of the living conditions at each bunkhouse location: in Jauregui the claimant slipped on the steps of an outdoor shower; in Hernandez the claimant slipped and fell in a mud puddle on the employer's premises. As Appellants pointed out in their Brief, had Decedent injured herself by tripping on the stairs of the hotel or over furniture in the room in which she lived, her injuries likely would have been compensable. In other words, the stairs or the furniture would have provided the causal link between Decedent's work and her injury. Here, however, there simply is no such causal link.

In fact, the Supreme Court explained that, under the bunkhouse rule, "the premises are considered an extension of the employer's primary work site." In cases where an employee is not on call, as was the case in Pierre, in order "[f]or the rule to apply, the injuries must have occurred during the employee's reasonable use of the

premises ..." Pierre, 386 S.C. at 545, 549, 689 S.E.2d at 620, 622. However, in addition, the Court held that "the **source** of the injury was a **risk** associated with the conditions under which the employees were required to live. [the wet sidewalk caused by the overflowing sink] But for the fact that Pierre's work essentially required him to live on his employer's premises near the farm, he would not have been exposed to the **risk** that **caused** his injury." 386 S.C. at 549, 689 S.E.2d at 622. In short, because he was not on call or actively working, the claimant had to prove that he was making reasonable use of his employer's premises, and also that "the injury arose from a hazard existing on the employer's premises." Pierre, 386 S.C. at 549, 689 S.E.2d at 623.

Nicholson merely establishes that the causal "hazard" does not need to be something unique to the work place or particularly hazardous (in the ordinary sense of that term), but a causal link between the injury and a claimant's employment still must be established in order for an injury to be compensable. 411 S.C. at 385, 769 S.E.2d at 3 ("[f]or an accidental injury to be compensable, it must 'aris[e] out of and in the course of employment.' S.C. Code Ann. § 42-1-160(A). An injury arises out of employment if it is proximately caused by the employment"). Appellants are not arguing that the cause of Decedent's injuries had to be peculiar to her workplace; however, they are arguing that there has to be some causal link between her employment and her injury. The examples provided in Nicholson – a chef who cuts himself with a knife and a carpenter who falls off a ladder – both involve some connection to the workplace besides just being on the premises (the knife and the ladder, as well as the carpet Nicholson tripped on, are incidental to the employment). Here, in contrast, there is no evidence whatsoever that the

assailant (or armed robbers, or assailants in general) are incidental to Decedent's employment.

Unless this Court is prepared to break with precedent and find that any injury, regardless of cause, incurred by an employee who is required to live on an employer's premises and is on call is compensable – which necessarily would include purely idiopathic conditions – then it must reverse the Commission in this case, where there is absolutely no evidence of any causal link between Decedent's employment and her injuries. If this Court upholds the Commission Decision, then it also must make clear that it is expanding the coverage of the Act to no longer require than an injury both occur in the course of and **arise out of** employment. Frankly, however, should that be the result this Court believes is appropriate, such an expansion of coverage under the Act is for the Legislature, and not the courts. *See, e.g.*, Wigfall v. Tidelands Utils, Inc., 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) (courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's [sic] Compensation Act* in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt").

Just because Decedent's injuries were incurred on her employer's property does not make them automatically compensable, as Claimants suggest. Claimants urge this Court to adopt a "but for" analysis, taking language from Nicholson out of context. (Resp. Br. pp. 8, 11, 12). If the test for "arising out of" was simple "but for" causation, then the injury in Dukes v. Rural Metro Corp., 356 S.C. 107, 587 S.E.2d 687 (2003) would have been compensable, as it was incurred on the employer's premises during a smoke break (which is considered to be in the course of employment under the personal

comfort doctrine). Under Claimants' reasoning, "but for" the fact that the injured employee was at work when a co-worker brought a gun into the break room during their break, the employee would not have been injured. However, the claimant in Dukes "was injured by a gun, which was not naturally found on his employer's premises, and was in no way connected to his employer's business." 356 S.C. at 110, 587 S.E.2d at 689. The same is true in this case: the Decedent was fatally injured by an armed robber who was not an employee or guest of her Employer, there is no evidence that such should have been expected by her employer or that there is any other connection between her injuries and her employment.[5] In both cases, the injuries are not compensable.

Nicholson holds that "Pierre's work brought about his exposure to the situation which led to his fall ..." 411 S.C. at 389, 769 S.E.2d at 5. Here, there is no evidence that Decedent's work brought about her exposure to the situation which led to her injuries any more than the workplace in Dukes brought about the claimant's exposure to the gun that injured him. This is not infusing "fault" into the analysis; it is requiring that both parts of the statutory phrase, "arising out of and in the course of employment," S.C. Code Ann. § 42-1-160, be satisfied in order for an injury to be compensable.

Frankly, the Supreme Court rejected "but for" causation analysis in Bright v. Orr-Lyons Mill, 285 S.C. 58, 328 S.E.2d 68 (1985), where it observed 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." 285 S.C. at 60, 328 S.E.2d at 70

[5] Claimants suggest for the first time on appeal that the armed robber may have been "the invitee of a registered 'guest.'" (Resp. Br. p. 14). There is absolutely no evidence that would support such speculation and, in any event, this theory is not preserved because it was not raised below. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (an argument raised on appeal that is based on different grounds from the argument presented to the trial court is not preserved for appeal).

(emphasis added). However, the Supreme Court denied compensation, 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. There is no evidence of either in the present case.

Claimants' attempts to distinguish State Compensation Ins. Fund v. Workers' Comp. Appeals Bd., 133 Cal App.3d 643, 184 Cal. Rptr. 111 (Cal. Ct. App. 1982) are ineffectual. First, Appellants are not relying on dicta but on the holding of the case that found no compensability where the assailants' motives had no connection to the decedents' employment. Second, it is the motive of the assailant that determines whether an attack is work-related or not. There, the motives behind decedents' murders included negotiations for the sale of an automobile that went sour and racial animus, 133 Cal App.3d at 648, 655, 184 Cal. Rptr. at 113-14, 118; here it was armed robbery. (Commission Decision, p. 12). Third, it did not matter whether the decedents in State Compensation Ins. Fund were on call or not, as they were making reasonable use of the premises (visiting with friends and sleeping) at the time they were murdered. Thus, in both cases, the decedents were in the course of employment but still had to show their injuries arose from their employment.

Similarly, Claimants' characterization of Grenon v. City of Palm Harbor Fire Dist., 634 So.2d 697, 1994 Fla. App. LEXIS 2559 (Fla. Ct. App. 1994) as involving an idiopathic injury is misleading. There, the claimant previously had incurred a work-related back injury after carrying a 150 lb. dummy over his shoulder during a drill. 634 So.2d at 698, 1994 Fla. App. LEXIS 2559 at **2. He also had some congenital abnormalities in his lower back. The Florida Court of Appeals' discussion regarding

idiopathic conditions was in response to the claimant's argument, similar to Claimants' argument here, that "*any* injury sustained by a worker while on-call [should be] compensable regardless of whether the injury originated from a condition personal to the claimant." The Court held such a position would allow for coverage of purely idiopathic injuries, so long as they occurred while an on call employee was on the employer's premises. The Florida court ruled 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," and clarified that the claimant's "on-call status in no way posed an increased risk of the back injury which occurred." 634 So.2d at 699, 1994 Fla. App. LEXIS 2559 at **6. The point of the discussion regarding idiopathic conditions was that, where there is no causal link between a claimant's injury and his or her employment, as happens to be the case with purely idiopathic conditions unless something from the employment contributes to the effect of the idiopathic incident, compensation should be denied, even where the claimant is living on the employer's premises and is continuously on call. The same is true here with respect to the lack of a causal link. Claimants have presented absolutely no evidence of any causal link between Decedent's employment and her fatal injuries. They argue that, simply because she was required to live on site and was on call her injuries should be compensable.

In fact, that was the point of the quote in Grenon regarding "increased risk" that Claimants take out of context. (Resp. Br. p. 16). The Florida Court was discussing idiopathic falls which, absent some contribution such as a work-related increased risk of

injury, or increased effect of a fall, are not compensable. This is also the law in South Carolina. Bagwell v Ernest Burwell, Inc., 227 S.C. 444, 453, 88 S.E.2d 611, 615 (1955) (if the cause of a fall is purely personal, an injury is not compensable unless the claimant can show that the "employment has subjected the workman to a special danger which in fact resulted in injury"); *see also* Pierre, 386 S.C. at 545-546, 689 S.E.2d at 621, *quoting* Hernandez ("[i]t is the obligation of employment to reside on the premises that subjects the employee to the risk that resulted in injury").

In Grenon, the Florida Court rejected the claimant's suggestion that the bunkhouse rule, particularly where the employee was on call, should result automatically in compensation regardless of whether there was any causal link to the workplace – a suggestion the Court rejected for the same reason it held purely idiopathic injuries are not compensable. 634 So.2d at 699, 1994 Fla. App. LEXIS 2559 at **5-6. As a result, Claimants' suggestion that Florida might not apply the bunkhouse rule "in even a remotely similar fashion to" the rule as articulated South Carolina courts is both misleading and incorrect. Likewise, Claimants' proposition that Appellants seek to require claimants to prove a particular risk of employment or fault of the employer is an inaccurate and ineffective attempt to divert this Court's attention from the fact that they have produced no evidence of any causal link between Decedent's employment and her fatal injuries.

In addition, Claimants failed to distinguish Gomez v. State (In re Gomez), 2010 WY 67, 231 P.3d 902 (Wy. 2010), and Loyola Univ. v. Industrial Comm'n, 408 Ill. 139, 96 N.E.2d 509 (Ill. 1951), both of which hold that injuries incurred by employees who live on their employer's premises and who are on call still must establish that their

injuries arose out of their employment. Indeed, the result sought by Claimants would render the employer an insurer of its employees' safety and well-being, which the Act was never intended to do. Loyola, 408 Ill. at 146-47, 96 N.E.2d at 513; *see also* 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").

Claimants suggest that the facts of this case are most analogous to those in DeBow v. First Inv. Prop., Inc., 623 S.W.2d 276, 1981 Tenn. LEXIS 500 (Tenn. 1981). (Resp. Br. pp. 17-18). However, what Claimants fail to acknowledge is that, in DeBow, there was a specific causal relationship between her employment and her assailant's motive – he knew she kept rent money on her person during weekends when she was on call. The Tennessee Supreme Court held that, "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 (emphasis added). Here, there is no such link. The fact that Claimants go so far as to suggest that, "it is entirely possible that Mrs. Patel's assailant could have believed that she had custody of motel funds or property," (Resp. Br. p. 18), reveals the lack of any credible or reliable evidence of a causal link in this case. Their suggestion, which is not supported by a single shred of evidence, is admittedly speculation and cannot serve as the basis for a workers' compensation award in South Carolina, *E.g.*, Clade v. Champion Labs, 330 S.C. 8, 11,

496 S.E.2d 856, 858 (1998) (an award under the Act "must not be based on surmise, conjecture or speculation).

Finally, Claimants attempt to construe Commissioner Barden's Finding of Fact No. 5 that "Employer's motel is in close proximity to Interstate 95," as common knowledge among Commissioners and/or a fact of which they took "judicial notice," asserting that the location is "universally known to the members of the Commission." (Resp. Br. p. 13). However, Commissioner Barden explained that she based her "finding on the address of the motel," (Single Commissioner Decision, p. 5), and not on the basis of common knowledge among Commissioners. Her Finding of Fact No. 5, as well as the Commission's Finding of Fact No. 7, indicate the adjudicating Commissioners researched "the address of the motel," and provided evidence intended to assist Claimants' claim, which raises due process concerns. *See* Garris v. Governing Bd. of the State Reins. Fac., 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (cautioning against administrative adjudicators who have developed a "will to win" in a case); 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). The attempt to provide evidence on Claimants' behalf is particularly egregious in this case where Claimants failed to prove that anything related to Decedent's workplace had any causal relation to her fatal injuries. Claimants could have researched crime statistics in the area – but they did not. Claimants could have researched whether the Best Western had experienced criminal behavior in the past – but they did not. In this vacuum of evidence, Commission Barden's Finding of Fact No. 5 and the Commission's Finding of Fact No. 7, which were intended to bolster

Claimants' claim, take on added import and demonstrate a "will to win." This is not only troubling, but serves as an independent ground for reversing the Commission Decision.

In any event, to the extent the Commission relied on this Finding of Fact in order to reach its decision, it is nothing more than speculation that the proximity of the Best Western to Interstate 95 made an attack on Decedent any more likely. As such, it is insufficient to support the Commission's award. *E.g.*, Clade, 330 S.C. at 11, 496 S.E.2d at 858 (awards cannot be based on surmise, conjecture or speculation). There simply is no evidence in this record that anything about Decedent's employment contributed to her injuries.

This Court should reverse the Commission and hold that Claimants failed to meet their burden of proving that Decedent's death arose out of her employment.

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

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

Claimants' newly-minted position on appeal regarding the "unexplained death presumption," centers on a theory that the motive behind the assault on Decedent may have been something other than armed robbery. However, both the Single Commissioner and the Commission found, as a factual matter, that "Decedent-Employee died of gunshot wounds on August 16, 2015, at approximately 8:01 a.m. **during an armed robbery** on Employer's premises." (Single Commission Decision, Finding of Fact No. 1, R. p. 21) (Commission Decision, Finding of Fact No. 3, R. p. 13) (emphasis added). Claimants did not challenge these findings which are now the law of the case. Ham v. Mullins Lumber

Co., 193 S.C. 66, 7 S.E.2d 712 (1940); Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) ("[t]he findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission"). And, contrary to Claimants' suggestion, there is substantial evidence in the record to support the Commission's finding that Decedent's injuries were incurred in the course of and as a result of an armed robbery. (R. pp. 31-32, 35, 65, 85, 94, 95).

Claimants' attempt to separate the intent to commit armed robbery from the intent to commit a homicide in the course of such robbery is facetious at best. Contrary to the result reached in Suburban Propane Gas Co. v. Deschamps, 298 S.C. 230, 233, 379 S.E.2d 301, 302 (Ct. App. 1989), here the Commission did not rule out robbery as a motive but specifically found that Decedent suffered fatal wounds during the commission of an armed robbery. (Single Commission Decision, R. p. 21) (Commission Decision, R. p. 13). As a result, there is no unexplained death in this case – the fatal assault was committed in the course of an armed robbery. If Claimants wanted to contest this finding, they were compelled to file their own Form 30 challenging the Single Commissioner's Finding of Fact No.1, but they did not. That finding is the law of the case and Claimants cannot challenge it on appeal.

The unexplained death presumption does not apply in this case because the cause Decedent's death is not unknown and the motive of her assailant is both known and established by the Commission as the law of this case.

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

Claimants argue that the Commission's determination of Decedent's average weekly wage is supported by substantial evidence and, therefore, should not be overturned. The probative evidence Claimants point to consists of Decedent's wage statements, with which Appellants have no issue, and the testimony of Mr. Vyas. By relying on an isolated portion of Mr. Vyas' testimony, however, the Commission reached an average weekly wage calculation that is not fair to both parties. *See, e.g.*, Bennett v. Gary Smith Builders, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978) (explaining that "the ultimate objective of" the average weekly wage calculation is to reach a result that is fair to both the employee and to the employer); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 110-113, 542 S.E.2d 732, 733-735 (Ct. App. 2001) (substantial evidence is viewed in the context of "the record as a whole" in order to reach an average weekly wage calculation that is fair and just to both the employee and the employer).

To say that the room provided to Decedent was valued at $80.00 per night for overnight guests is one thing. To apply that commercial nightly rate without any consideration whatsoever of the other employee living on the employer's premises is an error of law. *E.g.*, Sellers v. Pinedale Res. Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 699 (Ct. App. 2008) (explaining the Commission's first determination of the claimant's average weekly wage was overturned due to an error of law); Booth v. Midland Trane Hearing Air Cond., 298 S.C. 251, 254, 379 S.E.2d 730, 732 (Ct. App. 1989) (upholding reversal of Commission's determination of average weekly wage because it ignored the financial realities of the case).

As Claimants acknowledge, Mr. Vyas testified that the arrangement between Decedent and the bartender was just "a little bit different tha[n] what we had with Hansaben ..." (R. p. 56, lines 4-6). As Mr. Vyas testified, 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. So, this was kind of a different arrangement, but, I mean, you can compare that, you know." (R. p. 56, lines 6-11). Given that bartenders were hard to find living in the area and housekeepers were not, it makes no sense that the Best Western would provide a more valuable living space to a housekeeper than it would to the bartender. At a minimum, the value of the suite provided to the bartender should have been taken into consideration by the Commission and not dismissed outright since Claimant and the bartender's situations were only "a little bit different." Instead, without any analysis, the Commission held that the arrangement with the bartender was "irrelevant." Given that the bartender was the only employee who paid for his room, reflecting a negotiated value between the Employer and the employee, his weekly rent was highly probative with regard to the actual value of the room provided to Decedent for average weekly wage purposes. The Commission erred in dismissing this information as irrelevant.

The Commission's statement that "[t]he financial arrangement between another housekeeper and Employer would, however, be relevant," is perplexing in light of Mr. Vayas' testimony that he could find housekeepers in the area. There simply was no reason for him to provide housing to housekeepers other than Decedent. As a result, the Commission's emphasis on the lack of evidence of the value of a room provided to another housekeeper is, frankly, misplaced under the facts of this case.

The Commission's finding also ignores the commercial reality that short-term lodging, the "going rate" for a hotel room, is inherently more expensive than are long-term rentals. It also ignores the fact that the $80.00/night rate computes to $2,433.33 per month, three times the median rental rate in Jasper County, or $29,200.00 per year. It strains credulity to believe that a single room, not even a suite, is fairly valued at that rate over the period of a year. Claimants take issue with Appellants' reference to U.S. Census data.[6] However, that data is produced by the United States government and is publicly available as a reference source. Claimants do not contest the accuracy of the Census data, nor do they disagree that it weighs heavily in favor of reducing Decedent's average weekly wage to an amount that fairly reflects the value of the room provided to Decedent as part of her wages.

In short, Claimants fail to address the serious flaw in the Commission's determination of Decedent's average weekly wage. The Commission committed legal error in computing the value of the room provided to Decedent as part of her wages, which resulted in an average weekly wage that was grossly excessive and not fair to both parties.

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

CONCLUSION

For all the reasons stated in the Brief of Appellants and 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 at least 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 Reply 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 Reply 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

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