

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5458
(filed December 7, 2016)

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S.C. SUPREME COURT

William Lee Turner, Employee, ... Petitioner,

v.

SAIIA Construction, Employer, and
Old Republic General Insurance Corporation
c/o Gallagher Bassett Services, Inc., Carrier, ... Respondents.

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS PROPERLY REFUSE TO EXTEND THE UNEXPLAINED DEATH PRESUMPTION TO THE FACTS OF THIS CASE?
2. DID THE COURT OF APPEALS PROPERLY RELY ON NORTH CAROLINA PRECEDENT IN THE ABSENCE OF CONTROLLING SOUTH CAROLINA CASE LAW?
3. DID THE COURT OF APPEALS PROPERLY DISTINGUISH BARNES AND NICHOLSON FROM THE FACTS OF THIS CASE?
4. DID THE COURT OF APPEALS PROPERLY APPLY THE SUBSTANTIAL EVIDENCE STANDARD?
5. IS THE COURT OF APPEALS' OPINION IN DEROGATION OF AND/OR CONTRARY TO THIS COURT'S PRECEDENT?

STATEMENT OF THE CASE

Appellant William Lee Turner (“Petitioner”) filed a Form 50 alleging that, on April 19, 2012, he suffered a compensable injury to his back, head and thoracic spine. (Appx. p. 130). His employer, SAIIA Construction and their insurer, Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc., Respondents herein, filed a Form 51 denying, among other things, that Petitioner’s alleged injuries were the result of an accident that arose out of and in the course and scope of Petitioner’s employment.¹ (Appx. 132).

The parties were heard by Single Commissioner Susan S. Barden, who found, among other things, that “Petitioner failed to carry his burden of proving that he sustained a compensable injury by accident within the course and scope of his employment with the [Respondents] on April 19, 2012.” (Decision and Order of the Single Commissioner, filed April 14, 2014, Appx. pp. 93-111 (“Single Commissioner Decision”)). The Single Commissioner found that Petitioner’s alleged accident was unwitnessed and that he did not remember anything that happened on April 19, 2012 or the day after. The Single Commissioner found that the dispute before her was whether Petitioner “fell from a standing position or from the steps of the cab,” with Petitioner alleging that the circumstantial evidence was sufficient to establish that he fell from the step of the cab.

¹ In his Statement of the Case, Petitioner presents argumentative and contested matters in violation of Rule 208(b)(1)(C), SCACR, which instructs that the “statement shall not contain contested matters ...” Petitioner misleadingly asserts in his Statement of the Case that it is admitted that his injury both arose out of and in the course of his employment. (Pet. Br. p. 2). The inquiry in this case centers precisely on the questions of whether his injuries were the result of an accident, as that term is employed in the Act, and whether they arose out of his employment. Petitioner’s contentions on both points have been consistently denied by Respondents. This Court should disregard such argumentative and contested statements in Petitioner’s Statement of the Case.

(Appx. pp. 102-105). The Single Commissioner also held that Petitioner was impeached at least twice. (Appx. pp. 106-107). Petitioner was impeached as follows: 1) at a 2012 deposition, he testified that co-workers told him that, just before he fell, they had seen Petitioner climbing up onto the truck and then, when they turned around, they saw him lying on the ground, (Appx. p. 454, lines 18-24) (Appx. p. 461, lines 7 – p. 462, line 3), whereas the referenced co-workers denied ever seeing Petitioner on the truck, (Appx. p. 397, lines 9-11) (Appx. p. 403, lines 22-24); and 2) at the hearing, he testified that a fall from a horse during his recuperation “didn’t hurt or anything like that,” which statement was contradicted by medical records showing he sought medical treatment for the fall. (Appx. p. 106) (Appx. p. 327, line 24 – p. 329, line 24) (Appx. pp. 189-191, 193, 195). The Single Commissioner noted that Petitioner had been prescribed narcotic pain medication three days prior to his fall and had sought treatment at the Emergency Room for vomiting and diarrhea two days prior to the alleged accident. (Appx. pp. 103, 106-107). She concluded that Petitioner had failed to meet his burden of proving a compensable injury and that the ruling in Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941) did not serve to make this claim compensable. (Single Commissioner Decision, Appx. pp. 107-111).

Petitioner filed a timely Form 30 raising 11 separate points of appeal. (Appx. pp. 223-227).² After briefing and oral argument, an Appellate Panel of the Full Commission issued its Decision on October 10, 2014, affirming the Single Commissioner Decision in its entirety. In particular, the Commission rejected Petitioner’s argument that

² One of the issues raised by Petitioner was whether the Single Commissioner “erred as a matter of law by failing to apply the concept of circumstantial evidence to the facts of this case.” (Cl. Form 30, Appx. p. 227).

circumstantial evidence supported his theory that he had fallen from the step of his truck. Furthermore, the Commission distinguished Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), from the facts of this case and held that Owens did not control. Consequently, the Commission found that Petitioner was not entitled to the unexplained death presumption and had not otherwise met his burden of proving his injuries were compensable. Even if the Commission presumed that Petitioner was “injured through his employment,” Respondents presented evidence that Petitioner was “taking prescription medication (including Neurontin and Ultram) for back pain in the few days preceding the date of the accident,” and that Petitioner had “sought treatment at the ER two days before the date of the accident for stomach/dehydration issues,” as well as the facts that no one saw Petitioner on the step of the truck prior to his fall and Petitioner had been impeached twice at the hearing. (Appellate Panel Decision and Order of the South Carolina Workers’ Compensation Commission, filed Oct. 10, 2014, Appx. pp. 112-129, 526 (“Commission Decision”)).

Petitioner timely appealed to the Court of Appeals which affirmed the Commission Decision, holding that Petitioner failed to present a single South Carolina case that extended the unexplained death presumption “to cases where the employee survives but has no memory of the injury,” and noting that other states, including North Carolina, have limited the presumption to cases where the claimant was deceased. Alternatively, the Court of Appeals held that, even if the presumption were to apply in this case, Respondents presented sufficient evidence to rebut the presumption. (Appx. pp. 531-540).

Petitioner petitioned this Court for review, which this Court granted on November 15, 2017.

FACTUAL BACKGROUND

Petitioner began working for SAIIA Construction in 2007, at age 21, as a heavy equipment operator, which involved “bulldozers, trackhoes and dump trucks and backhoes.” (Appx. p. 295, line 18 – p. 296, line 6) (Appx. p. 324, lines 12-25) (Appx. p. 438, lines 9-11). Petitioner testified that he is between 5’6” and 5’7” in height. (Appx. p. 527, lines 18-22).

On March 27, 2012, a few weeks before his alleged work-place injury, Petitioner sought medical care for his lower back, which he had injured lifting logs while working on a house he was building. (Appx. p. 441, lines 16-22). Dr. Meha Minhas prescribed Ultram 50MG two times daily and Flexeril, 5MG two times daily. (Appx. pp. 201-202). On April 16, 2012, three days before his alleged work-place injury, Petitioner saw Dr. Minhas again with complaints of both lower and upper back pain. Dr. Minhas changed Petitioner’s medicine to Ultram ER 100MG two times daily and Neurontin 300MG three times daily. (Appx. pp. 203-205). On April 17, 2012, two days before his alleged work-place injury, Petitioner was seen at the Palmetto Health Baptist Emergency Department with complaints of vomiting and diarrhea and suspicion of dehydration. (Appx. pp. 206-208) (Appx. p. 302, line 18 – p. 303, line 2) (Appx. p. 443, lines 5-13).

Petitioner testified repeatedly that he had no memory of the day he fell, April 19, 2012. (Appx. p. 309, lines 10-12) (Appx. p. 312, lines 14-16) (Appx. p. 319, lines 2-12). No one saw Petitioner fall. (Appx. p. 461, line 3 – p. 462, line 11) (Appx. p. 397, lines 9-11) (Appx. p. 403, lines 22-24) (Appx. p. 419, lines 21-22) (Appx. p. 425, lines 13-15).

Although Petitioner testified under oath at a deposition that his co-workers told him they saw him “up in the truck” before he fell, (Appx. p. 454, lines 18-24) (Appx. p. 461, line 7 – p. 462, line 5), those co-workers, Paul Barnette and David Bolden, testified that they did not see Petitioner in or on the truck prior to his fall. (Appx. p. 377, line 15 – p. 379, line 8) (Appx. p. 412, line 2 – p. 413, line 7).

Mr. Barnette testified that, at the end of the work day, Petitioner had washed his truck, which typically was done with a high pressure washer. (Appx. p. 383, lines 12-25). Petitioner then went to do some paperwork and retrieve his lunch backpack and Mr. Barnette’s 12-pack cooler. (Appx. p. 381, lines 9-12). Mr. Bolden testified that he saw Petitioner walking from the trailer toward his truck, carrying the backpack and the cooler. Petitioner acknowledged that, by the end of the day, his backpack “more than likely” would be emptier and lighter than it would have been at the beginning of the day, because he would have eaten and drunk most of the food and water or Gatorade he brought with him to work. (Appx. p. 321, line 4 – p. 322, line 17).

Mr. Bolden saw Petitioner put items in the truck. He specifically testified, “I never saw [Petitioner] on the steps of the truck,” but only “standing on the ground, placing [the cooler] in the truck. I did not see him on the steps.” (Appx. p. 412, line 2 – p. 413, line 13) (*see also* Appx. p. 178).

Mr. Barnette finished washing his truck and walked around to the tailgate and saw Petitioner lying on the ground, on his back with arms outstretched and his palms up. Mr. Barnette said Petitioner appeared to want to vomit. (Appx. p. 390, line 4 – p. 392, line 2) (*see also* (Appx. p. 426, lines 2-6). Mr. Bolden confirmed that Petitioner was lying on the ground. (Appx. p. 403, line 22 – p. 404, line 7). Although Mr. Barnette thought the

door to Petitioner's truck was open, (Appx. p. 397, lines 2-6), Mr. Bolden was not sure. (Appx. p. 404, lines 10-17). Petitioner had an abrasion on the back of his head that did not require stitches. (Appx. pp. 156-157) (Appx. p. 470, lines 11-15). Although Mr. Barnette could not say for certain how long Petitioner had been lying on the ground before he saw him, he estimated it would not have been more than three or four minutes. (Appx. p. 393, lines 21-25).

Mr. Barnette testified that, although the truck Petitioner had been driving had been washed, the truck step would not have been soapy because the cleaning was done by a high pressure hose. In addition, the truck steps were perforated with "little things sticking up like that ... for traction." (Appx. p. 383, lines 12-25). Mr. Barnette then engaged in what he termed "speculation" of what he believed might have happened, suggesting that Petitioner might have been on the truck step when he fell:

On the record now, I don't know. I know **speculation** is not really a thing, but my **speculation** is that he got on the first step, got on the second step, put the lunch box up there and my **speculation** is he was on the second – you make sure this is **speculation**, but my **speculation** is he was on the top step when he fell backwards because of the amount of injury on the back of his head and the way he fell on the ground.

(Appx. p. 384, lines 17-25) (emphasis added) (Appx. p. 394, lines 12-15). Mr. Barnette testified that he did not know of anyone falling off the steps of the trucks. (Appx. p. 386, line 24 – p. 387, line 2) (*see also* Appx. p. 409, line 12 – p. 410, line 3 (testifying that he never fell from the steps of the truck)).

Although Mr. Barnette indicated that he believed Petitioner would "freely discuss if he was having a problem," (Appx. p. 529, lines 16-17), when asked about Petitioner's two medical visits prior to his fall, Mr. Barnette only could say, "I knew he had went to the emergency room and got some medications or something like that. I don't know all

the details. You know, your records show that. But he worked a few days and he was off checking with the doctors in the two or three weeks before that.” (Appx. p. 375, lines 11-18). In fact, the only lower back problem Mr. Barnette was aware of was that Petitioner had “discussed he had a back problem when he was a teenager, younger, a teenager, you know, and I knew that.” (Appx. p. 375, lines 19-23).³

Mr. Barnette testified that Petitioner was only 5’3” or 5’4” in height, (Appx. p. 386, lines 22-23), whereas in reality, Petitioner is 3”- 4” taller than that.⁴ (Appx. p. 527, lines 18-22). Mr. Barnette also admitted that his memory of what transpired on April 19, 2012 was not as clear at the time of his deposition as it was when he wrote a statement for his supervisor a few days after Petitioner’s injury. (Appx. p. 395, line 4 – p. 396, line 23 (first testifying that the fall could not have been as late as 4:15 or 4:30, but then conceding that that might have been the case based on the statement he wrote a few days after April 19, 2012)).

Mr. James Speegle, Petitioner’s supervisor at the time of the injury, testified that just days before he fell, Petitioner “was complaining he wasn’t feeling well, I want to say like on a Monday and the Tuesday of that – I think it was Thursday that this accident took place.” He said Petitioner told him that he “just didn’t feel well, stomach messed up, couldn’t eat. He ... said he was wanting to drink all the time. I had recommended to him like on Tuesday or Monday or one of those days, I can’t remember which one exactly,

³ Thus, Petitioner’s assertion that Mr. Barnette “knew about Mr. Turner’s past back problems,” (Pet. Br. p. 5), is misleading at best. There is no evidence that Mr. Barnette knew that Petitioner had been to the doctor twice recently complaining of low back pain, or that he had been prescribed narcotic medications as a result. (Appx. pp. 201-204).

⁴ It is perplexing that Petitioner continues to rely on co-worker testimony that he is 5’3” to 5’4” tall, (Pet. Br. p. 6), in light of the fact that, at the hearing before the Single Commissioner, Petitioner himself testified that he is around 5’6½” tall. (Appx. p. 527, lines 18-22).

that, you know, he's probably dehydrated. He needed to drink plenty of fluids. He just ... looked like he was dry-mouthed and just seemed like to me signs of dehydration. I told him that I thought he was dehydrating He had had little sicknesses here and there prior to this incident, but the week of the incident is what I'm referring to, is that he was not feeling well, sick." (Appx. p. 520, line 17 – p. 421, line 11). Mr. Speegle said Petitioner seemed to be okay and that he was unaware of any particular signs that anything was wrong with Petitioner on the day he fell. (Appx. p. 422, lines 3-10). He described Petitioner as "a very agile individual." (Appx. p. 422, line 17).

After Petitioner fell, he was taken to Palmetto Health Richland, where he was provided emergency treatment and admitted. He was diagnosed with a "small subdural hemorrhage," "intraparenchymal contusion left lobe," and "endplate compression deformity of T3 and T4." (Appx. pp. 137-142).⁵ Petitioner was treated and released, not to a rehabilitation facility, but to home, given his rapid improvement. (Appx. pp. 143-145, 158-159). His discharge diagnosis included "small subdural hemorrhage, traumatic," and "T3 to T4 endplate fractures." Medical notes indicate that the April 19 CT of Petitioner's head "showed small hemorrhagic contusion left temporal lobe anteriorly in the middle cranial fossa with a tiny amount of acute appearing extra axial blood in this location Mild to moderate size subdural hematoma left occipital region. No mass effect. There is no midline shift or any herniation. No skull fracture." A CT of his thoracic region showed "minimal superior endplate compression deformities of T3 and T4 ..." (Appx. p. 159).

⁵ Although the medical notes from his initial medical care indicate variously that Petitioner fell from a ladder or from on top of a truck, Petitioner testified that those assumptions were inaccurate. (Appx. p. 319, line 17 – p. 320, line 5).

At a follow-up appointment, Dr. James Selph noted that Petitioner “has a history of back pain and in fact was taking Ultram prior to his fall.” (Appx. p. 161). All of Petitioner’s remaining follow-up treatment was with Dr. Peterson, his family doctor. (Appx. p. 467, lines 14-25) (Appx. pp. 179-182, 184-187).

Included in the exhibits Petitioner filed with the Commission is a statement by Dr. Peterson indicating that Petitioner’s head injuries were caused by the fall on April 19, 2012, and that the fall caused Petitioner to have seizures, not the other way around. (Appx. p. 173). The first page of the questionnaire presented by Petitioner’s counsel to Dr. Peterson (omitted from Petitioner’s exhibits filed with the Commission, but later submitted by Respondents) stated, as though it were an established fact, that Petitioner “fell from the cab of his employer’s truck on April 19, 2012.” (Appx. p. 183). The letter does not request and the questionnaire does not express any verification by Dr. Peterson that his opinions are to a reasonable degree of medical certainty.

During the time Petitioner was out of work as a result of his injuries, he engaged in farming activities, including bailing hay, driving his tractor, and “bush hogging.” He also worked on a house he was building with his father, went hunting, and drove a four-wheeler. (Appx. p. 333, line 23 – p. 337, line 12) (Appx. p. 514, line 10 – p. 515, line 19).

On December 27, 2012, Dr. Peterson released Petitioner to go back to work without any restrictions. On January 2, 2013, Petitioner resumed his same position with SALLA Construction, working the same number hours and at the same rate of pay. (Appx. p. 326, line 18 – p. 327, line 18) (Appx. p. 494, line 25 – p. 495, line 20). Petitioner testified that he is fully capable (both physically and mentally) of performing his job as a

heavy equipment operator and that he has missed no time from work due to the injuries he received in his April 19, 2012 fall. (Appx. p. 323, line 19 – p. 326, line 17). His current supervisor, Mr. Robert Bennett, confirmed. (Appx. p. 344, line 23 – p. 346, line 23).

On September 18, 2013, and again on October 17, 2013, Petitioner sought medical treatment from Dr. Gisele Girault for a fall from a horse. Her medical notes indicate Petitioner “was doing well until he fell off a horse a few weeks ago and he has pain in the same T3-4 area and has severe muscle spasm.” (Appx. pp. 188-196). Although Dr. Girault recommended injections and a back brace, Petitioner “declined the injections” and “didn’t accept the back brace.” (Appx. p. 528, lines 7-25) (Appx. p. 330, lines 1-3). His visit to Dr. Girault in October 2013 was the last time he sought any treatment for his alleged work-related injuries. (Appx. p. 338, lines 9-18) (Appx. p. 504, line 1 – p. 506, line 1).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The claimant has the burden of proving facts that will bring the injury within the workers’ compensation law, and such

award must not be based on surmise, conjecture or speculation. Packer v. Corbett Canning Co., 238 S.C. 431, 435, 120 S.E.2d 398, 400 (1961); Fowler v. Abbott Motor Co., 236 S.C. 226, 234, 113 S.E.2d 737, 742 (1960) (the claimant “is faced with the burden to show by competent testimony, not only the fact of the injury, but that it occurred in connection with his employment,” and an award cannot “be based upon mere possibilities, probabilities, surmises or conjectures”).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). It is axiomatic that where there is conflicting evidence or where “conflicting inferences may be reached from the evidence ... the findings of the Commission thereabout [are] binding on this Court ... on appeal.” Canady v. Charleston County Sch. Dist., 265 S.C. 21, 27, 216 S.E.2d 755, 758 (1975), *quoting* Black v. Barnwell County, 243 S.C. 531, 536, 134 S.E.2d 753, 756 (1964). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.” Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, where the facts and/or the reasonable inferences that can be drawn from the facts are in dispute, the Commission’s conclusions are final. See Singleton v. Young Lumber Co., 236 S.C. 454, 461, 114 S.E.2d 837, 840 (1960). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011).

ARGUMENTS

As an initial matter, Petitioner failed to raise a number of the Single Commissioner's rulings on his Form 30 Notice of Appeal to the Full Commission and, as a result, those findings of fact and conclusions of law are now the law of this case. Although Petitioner prefaced his Form 30 appeal to the Full Commission with a broad, sweeping request for review of the entire Single Commissioner Decision, he failed to challenge certain Findings of Fact and Conclusions of Law, which are now the law of the case. *E.g.*, Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (unappealed findings by the Single Commissioner are and become the law of the case), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). Section 42-17-60 requires that the "Notice of appeal must state the grounds of the appeal or the alleged errors of law." S.C. Code Ann. § 42-17-60. An issue not raised in the application for review to the Full Commission is not preserved for further appellate review. Clark v. Aiken County, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005). "General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue." *Id.*; *cf.* White v. Medical Univ. of South Carolina, 355 S.C. 560, 564-65, 586 S.E.2d 157, 160 (Ct. App. 2003) (general challenge to the only ruling in the case "was sufficient to direct the circuit court to the error complained of ..."). Here, the attempt at a catchall appeal of an entire order with multiple findings and conclusions is particularly objectionable where Petitioner raised 11 detailed and specifically-targeted appeal points.

In particular, Petitioner did not appeal Conclusion of Law Nos. 6 & 11, which held that, Petitioner "failed to carry his burden of proving that he sustained a compensable injury by accident within the course and scope of his employment with the

[Respondents],” No. 7, that Petitioner “is not entitled to any temporary total disability benefits for the period of time during which the [Petitioner’s] incapacity for work was total ...”, No. 8, that “[Respondents] are not responsible for the provision of treatment nor the payment of medical bills arising out of the [Petitioner’s] alleged work-related accident,” or Nos. 9 & 10 that Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941) does not render his claim compensable and is distinguishable from this case. (Single Commissioner Decision, Appx. pp. 109-110). Petitioner also failed to challenge Finding of Fact No. 22, which held that Petitioner “was impeached at the hearing testimony with his initial deposition testimony that he had sustained no accidents since the date of the alleged work accident.” (Single Commissioner Decision, Appx. p. 106). By failing to appeal these findings and conclusions, they are the law of this case and cannot be disputed now. *E.g.*, Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). This Court should hold that Petitioner’s failure to appeal Conclusion of Law Nos. 6, 7, 8, 9, 10 & 11, and Finding of Fact No. 22 means that they are the law of this case and cannot be challenged on appeal.

An appellate court may affirm on any ground appearing in the record. Wright v. Bi-Lo, Inc., 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same). This Court can and should dispose of this appeal by ruling that Petitioner failed to challenge the Single Commissioner’s ruling that Petitioner failed to meet his burden of proving he suffered a compensable injury and, as a result, that decision is the law of this case, and that Respondents are not responsible for paying him compensation benefits or for his medical care. Such a ruling would completely resolve this appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518

S.E.2d 591, 598 (1999) (an “appellate court need not address remaining issues when disposition of prior issue is dispositive”).

I. The Court of Appeals properly refused to extend the unexplained death presumption to the facts of this case.

By way of statutory framework for this case, Section 42-1-160 of the South Carolina Workers’ Compensation Act (“Act”) defines “injury” to “mean only injury by accident arising out of and in the course of employment ...” S.C. Code Ann. § 42-1-160; Doe v. South Carolina State Hosp., 285 S.C. 183, 187, 328 S.E.2d 652, 654 (Ct. App. 1985). Although various courts have stated the analysis in different terms, the two elements must exist simultaneously, *i.e.*, the injury must both: 1) arise out of, and 2) in the course of employment. Doe, 285 S.C. at 187-88, 328 S.E.2d at 654-55; Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007) (in order “to be compensable, an injury by accident must be one ‘arising out of and in the course of employment’”). “‘Arising out of’ refers to the injury’s origin and *cause*, whereas ‘in the course of’ refers to the injury’s time, place, and circumstances ... For an injury to ‘arise out of’ employment, the injury must be proximately *caused* by the employment.” Grant, 372 S.C. at 201, 641 S.E.2d at 871 (emphasis added). Whether there is any causal connection between employment and an injury is a question of fact for the Commission. Sharpe, 336 S.C. at 159, 519 S.E.2d at 105; Jennings v. Chambers Dev. Co., 335 S.C. 249, 258-59, 516 S.E.2d 453, 458 (Ct. App. 1999).

A. The Court of Appeals properly refused to apply the unexplained death presumption to the facts of this case.

Petitioner alleges that the Court of Appeals erred by not extending the unexplained death presumption to cases where the injured worker survives the accident

but alleges he does not remember what happened. Petitioner attempts to bolster his argument by raising the specter of hosts of employees suffering unwitnessed and unremembered falls or injuries and being denied workers' compensation benefits. (Pet. Br. pp. 9-10). The reality is that there have not been hosts, or even many "workers suffering very common unwitnessed injuries" since the inception of the Act, a fact that plainly demonstrates Petitioner's fears are unfounded. The converse, however, is true: if this Court holds that the unexplained death presumption applies to merely "unremembered" injuries, the floodgates will open and any claimant who plausibly can allege they do not "remember" how the accident occurred will make that the centerpiece of his or her claim.

Petitioner attempts to obfuscate the fact that he can point to no South Carolina precedent extending the unexplained death presumption to an unwitnessed and allegedly unremembered fall, by relying on verbiage in cases applying it in death cases. That verbiage is dicta because each and every South Carolina case that applied the presumption did so in a case involving a deceased employee. Petitioner has not and cannot point to a single South Carolina case where the presumption was applied where the claimant survived but alleged he could not remember the accident. Given Petitioner's vision of "many workers suffering very common unwitnessed injuries," one would think there would be an abundance of South Carolina cases applying the presumption to cases like the instant one. But there are not. Not one.

Heretofore, this Court has applied the unexplained death presumption only in cases where the employee was deceased. Owens, 196 S.C. 97, 12 S.E.2d 839 (claimant found in woods he was patrolling, deceased from a gunshot wound); Halpern v. De Jay

Stores, Inc., 236 S.C. 587, 592, 115 S.E.2d 297, 300 (1960) (presumption applied where the claimant was involved in a fatal car accident and it was determined the claimant had not deviated from his course of employment); Jake v. Jones, 240 S.C. 574, 126 S.E.2d 721 (1962) (employee found deceased where his job required him to be); Eagles v. Golden Cove, Inc., 260 S.C. 113, 194 S.E.2d 397 (1973) (claimant died from bee sting).⁶ This Court has not extended the presumption or signaled that it would extend the presumption to cases where claimant survives with all of his or her faculties intact but simply claims to have no memory of the accident.

Nonetheless, Petitioner asserts wrongly that this Court has “clearly and specifically ruled that it would apply the unexplained injury presumption to cases where the Claimant did not die from his injuries,” citing Fowler. He is incorrect. The language from Fowler quoted on page 11 of Petitioner’s Brief consisted of a brief summary of the *claimant’s* legal argument in that case. It was not a holding and it cannot fairly be construed to be an adoption or application of the unwitnessed death presumption in cases where the claimant survived.

Although the claimant in Fowler argued there was sufficient circumstantial evidence “to justify the inference and the presumption that [his] injury arose out of and in the course of his employment,” 236 S.C. at 232, 113 S.E.2d at 740, citing Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), this Court rejected that argument. While this Court agreed that, in general, circumstantial evidence can support a

⁶ The key issue in Eagles was not whether the claimant’s fatal injury was witnessed or not but, rather, whether the bee sting, which was clearly connected with his employment (as he was stung while cutting grass with a swing blade), was capable of causing death. Finding sufficient evidence supported the Commission’s decision, this Court upheld the award of benefits. 260 S.C. at 116, 194 S.E.2d at 398.

finding of fact or an award, the evidence in Fowler, failed “to disclose or to warrant a reasonable inference that there was any *causal connection* between the employment and the injury to the claimant. To hold that claimant’s injury, which occurred by accident, arose out of and in the course of his employment, or that there was a *causal connection* between the injury and the employment would be to engage in surmise, conjecture and speculation It was the duty of claimant to show that his injury by accident was connected with or incident to the performance of [his work] duties.” 236 S.C. at 231-232, 113 S.E.2d at 740 (emphasis added). The same is true in this case.

In Fowler, this Court also declined to apply the unexplained death presumption because the claimant failed to prove that his injury occurred at a place where his job required him to be, *i.e.*, that it occurred in the course of his employment. And, because that ruling disposed of the matter, there was no need for this Court to analyze the unexplained death presumption any further. See Futch, 335 S.C. at 613, 518 S.E.2d at 598 (an appellate court does not need to determine all issues when one is dispositive of the appeal). Petitioner’s attempt to contort that into a “holding” that the unexplained death presumption otherwise would have applied is pure speculation, not precedent. Furthermore, even if Fowler could reasonably be read to endorse the application of the unexplained death presumption where the claimant survived but did not remember the accident, which Respondents dispute, the facts of Fowler are strikingly different from those of the instant case. There, following his injury the claimant was “mentally and physically disabled and [was] a patient in a hospital.” 236 S.C. at 228, 113 S.E.2d at 738. Here, in contrast, Petitioner has returned to work full-time with no restrictions and is in

full possession of his mental faculties. (Appx. p. 323, line 19 – p. 326, line 17) (Appx. p. 344, line 23 – p. 346, line 23).

Petitioner also mistakenly argues that, in Fowler, this Court quoted Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944), in relation to the unexplained death presumption. However, the discussion of Eargle was in response to the claimant's argument in Fowler that a presumption should arise because he was injured in an automobile that the employer furnished for his use.⁷ This Court ultimately rejected the claimant's arguments, finding that the claimant failed to show he was "using the automobile of his employer at a place and a time where his duty as an employee required him to be." Fowler, 236 S.C. at 234, 113 S.E.2d at 741. There is no statement or even intimation in Fowler that this Court would have applied the unexplained death presumption if the claimant had been in the course of his employment. Petitioner goes so far as to baldly assert that this Court has not only suggested it *would* but "*has applied* the unexplained death and injury presumption" to facts of this case. (Pet. Br. p. 13) (emphasis added). Tellingly, he cites no case to back up this startling assertion because, as noted above, there is none. Thus, Petitioner's attempt to cobble together a prior statement or ruling by this Court that it would apply the unexplained death presumption to the facts of this case fails.

Even in cases involving the unexplained death presumption, this Court has explained: "[u]nwitnessed deaths have posed grave problems for many learned judges. The distinction between reasonable inferences (which are compensable) and speculation,

⁷ Eargle turned on the applicability of an exception to the going and coming rule and did not discuss the unexplained death presumption at all. 205 S.C. at 431-432, 32 S.E.2d at 243-244.

conjecture and surmise (non compensable) often baffle the wisest. The courts however, usually abide by the decision of the fact-finding body unless it can be said that taking all the factors into account it drew an inference that no reasonable man could draw.” Steed v. Mount Pleasant Seafood Co., 236 S.C. 253, 256, 113 S.E.2d 827, 828-29 (1960); *see also* Buff v. Columbia Baking Co., 215 S.C. 41, 51, 53 S.E.2d 879, 883-84 (1949) (upholding inferences drawn by Commission that were both reasonable and sufficient to affirm the Commission’s determination). In the instant case, as was the case in both Steed and Buff, the Commission’s resolution of the facts⁸ and the inferences it drew from those facts are entirely reasonable. That Petitioner, or even this Court might draw different inferences, is of no consequence given the applicable and controlling standard of review.

This Court should reject Petitioner’s attempts to create precedent out of thin air and hold that the unexplained death presumption does not apply to the facts of this case. As is discussed in more detail below, what Petitioner is proposing would drastically alter the balance struck by the Legislature in the Act.

B. Even if the unexplained death presumption applied to the facts of this case, Respondents presented sufficient and substantial evidence to rebut any such presumption.

Even if, solely for the sake of argument, the unexplained death presumption applied to unwitnessed and allegedly unremembered falls, there is sufficient evidence of

⁸ In Steed, there was some evidence that the claimant, who either fell or dove off of a dock and drowned, could not swim, was afraid of the water, did not intend to swim and was wearing swimming trunks on the day he drowned only because he was planning to wash the dock and packing shed. The Court noted “some testimony contrary to some of that referred to above,” and upheld the Commission’s resolution of the factual disputes. 236 S.C. at 255-56, 113 S.E.2d at 828. In Buff, there was conflicting testimony between experts as to whether the wire the claimant may have touched could have shorted out and electrocuted him. 215 S.C. at 46-47, 53 S.E.2d at 881.

a cause personal to Petitioner to rebut the presumption. Although Petitioner downplays the fact that he was taking narcotic pain medications on the day of his fall, the Commission found this fact significant, emphasizing it twice. (Commission Decision, Appx. pp. 120-123).

In an effort to circumvent this evidence, Petitioner attempts to limit the types of personal, non-work related causes to instances where the injury and/or death is caused by a medical condition such as heart attack, seizure, thrombosis or ruptured aneurysm. (Pet. Br. pp. 18, 23).⁹ Petitioner's statement of the law is unreasonably narrow and must be rejected. Instead, the rule that compensation is denied where the cause of injury was something personal to the claimant or unrelated to the employment is not limited to heart attacks, seizures, thrombosis or aneurisms. *See, e.g., Dukes v. Rural Metro Corp.*, 356 S.C. 107, 110, 587 S.E.2d 687, 689 (2003) (holding that the gun that caused the claimant's injuries during a smoking break was in no way related to his job and, therefore, the claimant's injuries did not arise out of his employment); *Bright v. Orr-Lyons Mill*, 285 S.C. 58, 62, 328 S.E.2d 68, 71 (1985) (employee's injuries, incurred when he was shot while walking to his car parked on the employer's parking lot after his shift, not compensable because assailant was a nonemployee looking for someone else for personal reasons unrelated to job); *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998) (claimant's injury not compensable where her knee just "gave out" on her). Patently, Petitioner's assertion that his fall "was not caused by a

⁹ Below, Petitioner attempted to limit personal causes to where the injury and/or death is caused by a medical condition such as a heart attack or thrombosis. (Appx. pp. 22, 243). On appeal to this Court, he now asserts the personal causes are limited to a heart attack, seizure or ruptured aneurysm. (Pet. Br. pp. 18, 23).

condition peculiar to him,” (Pet. Br. pp. 17, 18), presumes the precise outcome he has failed to prove.

Petitioner phrases the inquiry narrowly as whether he had a personal *medical* condition that might have caused dizziness, imbalance, fainting, etc. He studiously ignores the facts that he was taking strong pain medication – Ultram ER and Neurontin – at the time of his fall and that he sought treatment from the Emergency Room two days before the accident for listed side effects of those medications – vomiting and diarrhea – facts highlighted by the Commission. (Commission Decision, Appx. pp. 120, 123).

Specifically, on March 27, 2012, a few weeks before his fall, Petitioner had been prescribed Ultram (50MG) and Flexeril (5MG). (Appx. pp. 201-202). Ultram is a narcotic pain reliever. Side effects include, among other things: seizure (convulsions); weak or shallow breathing; high levels of serotonin in the body--agitation, hallucinations, fever, fast heart rate, overactive reflexes, nausea, vomiting, diarrhea, loss of coordination, fainting; headache, dizziness, drowsiness, tired feeling; and constipation, diarrhea, nausea, vomiting, stomach pain. According to Drugs.com, “Ultram can slow or stop your breathing ... Seizures (convulsions) have occurred in some people taking this medicine.” <http://www.drugs.com/ultram.html>.¹⁰ In fact, seizures “may be more likely” if a patient is also “taking certain medicines such as ... muscle relaxers ... or medicine for nausea and vomiting.” *Id.* Flexeril, which Petitioner also had been prescribed, (Appx. pp. 201-202), is a muscle relaxer. <http://www.drugs.com/flexeril.html>.

¹⁰ See also <http://www.janssenpharmaceuticalsinc.com/assets/ultram.pdf> from the manufacturer of Ultram, Janssen Pharmaceuticals, Inc., pp. 7-8.

On April 16, 2012, three days before his fall, Dr. Menhas changed Petitioner's prescription from Ultram 50MG to Ultram ER 100MG. (Appx. pp. 203-204). Possible side effects of Ultram ER, an opioid analgesic, include, among other things:

- change in walking and balance;
- abdominal pain;
- nausea;
- convulsions (seizures);
- lightheadedness; and
- loss of consciousness.

<http://www.drugs.com/cons/ultram-er.html>.¹¹ Dr. Menhas also dropped the Flexeril and added Neurontin (300MG). Neurontin is “is an anti-epileptic medication, also called an anticonvulsant. It affects chemicals and nerves in the body that are involved in the cause of seizures and some types of pain.” Side effects of Neurontin include “dizziness, drowsiness, and diarrhea.” <http://www.drugs.com/neurontin.html>.

On April 17, 2012, two days before his fall, Petitioner sought emergency medical treatment for vomiting and diarrhea and concerns about dehydration. (Appx. pp. 206-207) (Appx. p. 420, line 17 – p. 421, line 11). Thus, even if Petitioner had the benefit of the unexplained death presumption, there is substantial evidence in this case, highlighted by the Commission in its Decision, that Petitioner was taking medication that can cause dizziness, drowsiness, diarrhea, abdominal pain, nausea, seizures, loss of consciousness, change in walking and balance, etc., and that he sought emergency medical care two days before his fall for some of those side effects.

Furthermore, even if the presumption applied in cases where a claimant was injured but not deceased, which Respondents do not concede, the presumption still “may

¹¹ See also <http://www.janssenpharmaceuticalsinc.com/assets/ultram-er.pdf> from the manufacturer of Ultram ER, Janssen Pharmaceuticals, Inc., p. 9.

not be availed of to establish the incident of accident,” as opposed to some internal cause of the injury. Packer, 238 S.C. at 438, 120 S.E.2d at 401. In fact, in both Packer and Jennings, the decedents were found where their work required them to be. However, in both cases, the Court determined that the decedents were not entitled to benefits because, despite the presumption, there was no evidence that an accident (as opposed to something internal and personal to themselves) had caused the fatal injuries. Packer, 238 S.C. at 437, 120 S.E.2d at 401; Jennings, 335 S.C. at 256, 516 S.E.2d at 457.

In the case before the Court, there is no evidence (only speculation) that Petitioner suffered an accident, as opposed to something internal to himself. There is, on the other hand, undisputed evidence that Petitioner was taking medications that have multiple and serious side effects, including seizures, dizziness, fainting, loss of balance, diarrhea, nausea, vomiting, etc., as is discussed in more detail above.

Thus, even if the presumption applied in this case, which Respondents do not concede, Respondents presented evidence of a cause internal to Petitioner to explain his fall. (Appx. pp. 201-204). As a result, this Court should uphold the Commission’s denial of benefits.

II. The Court of Appeals properly relied on North Carolina precedent in the absence of controlling South Carolina case law.

Petitioner attacks the Court of Appeals’ reliance on Janney v. J.W. Jones Lumber Co., Inc., 145 N.C. App. 402, 550 S.E.2d 543 (N.C. Ct. App. 2001), and argues that the “inequality of information” reasoning put forth in Janney is “antithetical” and “totally contrary” to the Act. North Carolina, along with other states with similar Acts, has refused to expand the unexplained death presumption to cases where the worker survives but claims no memory of the events leading up to his or her injury. (See Appx. pp. 54-

56). The Court of Appeals correctly noted that the facts in Janney, which involved a claimant who had no memory of falling and hitting the floor, are “very similar to the instant case.” Petitioner’s attacks on the Court of Appeals’ reliance on Janney are misplaced, incorrect and should be rejected.

First, “[w]hen there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority.” Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005). As is noted above, there are no South Carolina cases that have applied the unexplained death presumption to facts even remotely similar to the case at hand.

Second, Petitioner either misunderstands or intentionally misconstrues North Carolina’s explanation of its adoption of the presumption in cases where a worker has died and its refusal to extend that presumption to cases where the worker survives his injury, based on an “*inequality* of information” in the former that does not exist in the latter.¹² In any event, North Carolina does not apply any such concept to “deny benefits to the injured worker who lives,” but, instead, simply leaves the burden of proof on the claimant in those cases.

Third, without explaining how or why, Petitioner simply states that there is no logical or legal difference between a deceased worker and one who simply cannot (or claims he cannot) remember how an injury occurred. Indeed, there is both a logical and a legal rationale for treating these two classes of claimants differently. As the Court of Appeals explained, in death cases, “the underlying purpose of the presumption is fairness because employers, rather than a decedent’s family, are in a better position to offer

¹² There is no such thing as a “concept of an, ‘*inequity* of information.’” (Pet. Br., Table of Contents and pp. iii, 13).

evidence surrounding the employee's death." (Appx. pp. 535-536). The same is not necessarily true where the claimant survives the injurious event.¹³ There is, in fact, a substantive and legal difference between the knowledge a deceased employee's family possesses vis-à-vis the employer, versus the knowledge an employee (who was at work when injured but simply does not remember or claims he does not remember the incident) possesses vis-à-vis the employer. In the first circumstance, the employer unquestioningly knows more about the daily schedule, responsibilities and work environment than does the family. In the latter, neither the employer nor the employee has any superior knowledge. Thus, there is both a logical and a public policy reason to apply the presumption in the first circumstance that is absent in the latter.

In addition, where the injured claimant survives, there is not only the opportunity but also a clear incentive to "not remember" the facts of an injury where doing so is advantageous to a claimant's case. The incentive is that the presumption "flips" the burden of proof long established in workers' compensation cases. *See, e.g., Packer*, 238 S.C. at 435, 120 S.E.2d at 400 (the claimant bears the burden of proving he is entitled to benefits under the Act); *Fowler*, 236 S.C. at 234, 113 S.E.2d at 742 (the claimant "carries the burden of establishing the necessary facts to entitle him to ... compensation").

Fourth, Petitioner's dispute with relying on *Janney* goes to the difference between South Carolina and North Carolina jurisprudence on what constitutes an injury by

¹³ Respondents say "necessarily" because there might be an argument for applying the unexplained death presumption in a case where a claimant survives an accident but does not remember the accident because he or she is in an extended coma or suffered severe brain damage rendering the claimant incapable of providing competent testimony. That, however, is not the case before this Court. Petitioner testified that he was both physically and mentally able to perform his job, which requires concentration and clear thinking. (Appx. p. 324, line 6 – p. 326, line 7).

“accident” and is nothing more than a red herring. (Pet. Br. pp. 13-14, 16-17, 18). The issue of what constitutes an accident was not addressed substantively in Janney, as the North Carolina court affirmed the commission’s finding “that plaintiff’s fall itself was the unusual and unforeseen occurrence that is the accident.” 145 N.C. App. at 404, 550 S.E.2d at 545. Furthermore, neither the Commission nor the Court of Appeals relied on Janney or any other North Carolina precedent for the definition of accident, which is where the two states’ jurisprudence concerning workers’ compensation law diverges.

Furthermore, this Court specifically relied on North Carolina precedent, (*i.e.*, Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (N.C. 1932)), in adopting the unexplained death presumption in Owen v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941), a case decided a year and a half after Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939), the case Petitioner insists is “one of the most precedential decisions” relevant to his position. Thus, it is more than simple “speculation” on the Court of Appeals’ part that this Court would look to North Carolina precedent and decline to extend the unexplained death presumption to the facts of this case.¹⁴ The Court of Appeals was following clear precedent and reasoning established by this Court.

North Carolina is not alone in declining to extend the unexplained death presumption to cases where the claimant survives. For example, in Pinkerton’s Inc. v. Helmes, 242 Va. 378, 410 S.E.2d 646 (Va. 1991), the Virginia Supreme Court pointedly refused to extend the application of the presumption to non-death cases. There, the

¹⁴ Petitioner mis-states the issue in this case as one “where the Claimant was injured in the course of and as a ‘consequence’ of employment ...” (Pet. Br. pp. 10-11). There is no evidence whatsoever that Petitioner’s injury was “as a ‘consequence’” of his employment, *i.e.*, that it arose out of or had any causal relationship to his employment.

claimant was injured in her vehicle which had run off the roadway. The claimant suffered permanent brain damage, was confined to a nursing home, and could recall no facts regarding the accident. The Commission found that, although her injuries occurred in the course of her employment, the claim was not compensable because she failed to prove that her injuries arose out her employment. In upholding the Commission, the Virginia Supreme Court rejected arguments that the claimant's situation was no different than an employee who dies as the result of an accident:

Every unexplained accident, by definition, means that no one can relate how the accident happened. The reason for the inability to recall may be based on a preexisting or resulting, temporary or permanent, physical condition of the claimant, as well as mere inattention at the moment of the accident. If mere inability to recall the events is the rationale for application of the presumption, then it would also be logical that the claimant should be entitled to the benefit of the presumption in any of these circumstances, or whenever there is an unexplained accident.

242 Va. at 381, 410 S.E.2d at 648. However, such an expansion of the presumption “significantly alters the jurisprudence of workers’ compensation law,” which the Virginia Supreme Court correctly recognized is the prerogative of the legislature, not the courts. Id.

In Husvar v. Engineered Prods, Inc., 2000 ME 132, 755 A.2d 498 (Me. 2000), the Maine Supreme Court refused to extend the presumption to cases where the claimant had no memory of the incident leading to his injuries, despite statutory language embodying the presumption that indicated it applied where “the employee has been killed or is *physically or mentally unable to testify ...*” 755 A.2d at 501. The Court noted that, although the claimant had no memory of the incident, he was both physically and mentally able to testify. The Maine Court also declined to usurp what is a legislative

prerogative, refusing to equate the inability to recall the circumstances of an injury with the physical or mental inability to testify. Id.

In the end, while South Carolina precedent establishes that provisions of the Act should be construed liberally in order to effect its purposes, it is equally true that the words of the Act “must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Stone v. Roadway Express, 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006); Wigfall v. Tideland Util., Inc., 354 S.C. 100, 580 S.E.2d 100 (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”). In fact, the Act, which represents a balancing of competing interests between workers and employers, Wigfall, 354 S.C. at 116-117, 580 S.E.2d at 108, must be construed “in justice to both parties and must not impose a burden on either.” Hill v. Skinner, 195 S.C. 330, 340, 11 S.E.2d 386, 390 (1940). The “inequality of information” represents just such a balance. If the Legislature believes a presumption should apply where injured claimants allege they cannot remember how the injury occurred, it is the Legislature, and not the courts, that should enact such a presumption, as it has in other areas of the Act.

As the Court of Appeals correctly noted, 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, 831-32 (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. Petitioner’s effort to impose a burden-shifting analysis on this case is just such an attempt.

This Court should hold that the Court of Appeals did not err in relying on North Carolina precedent for the proposition that the unexplained death presumption does not apply to unwitnessed incidents where the claimant survives but has or claims no memory of the event.

III. The Court of Appeals properly distinguished Barnes and Nicholson from the facts of this case.

In addition to finding that the unexplained death presumption does not apply to this case, the Court of Appeals also affirmed that Petitioner failed to meet his burden of proving his injuries arose out of and in the course of his employment. Petitioner incorrectly argues that Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015) and Nicholson v. South Carolina Dept. of Soc. Services, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) are controlling precedent for this case and that the Court of Appeals erred by not awarding benefits pursuant to this Court’s ruling in those cases. However, neither of those cases is controlling here because both are factually and meaningfully distinguishable.

Each of the claimants in Barnes and Nicholson established that she was performing some task for the employer when she fell. In Barnes, the claimant testified that she had been asked to check a realtor’s email, and “was hurrying to the realtor’s

office” which caused her to fall. This testimony “clearly established” a causal connection between the claimant’s work and her accidental injury. Barnes, 411 S.C. at 393-394, 398, 768 S.E.2d at 652, 654. In Nicholson, the claimant was walking down a hallway to a meeting when she scuffed her foot on the carpet and fell. Such evidence established a causal relationship between her work and her injury. Nicholson, 411 S.C. at 383, 390 & 769 S.E.2d at 2 & 5. Here, there simply is no evidence that Petitioner was performing any work-related function or activity when he fell. True, he was at work, but there is no evidence whatsoever that he was “performing a work task” when his injury occurred. There is no evidence that he was doing anything other than standing still beside his truck at the time he fell. In fact, the last person who saw Petitioner saw him standing beside his truck. (Appx. p. 412, line 2 – p. 413, line 13) (*see also* Appx. p. 178). Had Petitioner presented evidence that he tripped or scuffed his foot and fell while on his way to complete a work-related task or to attend a meeting, his injuries may well have been found compensable. But those are not the facts of this case.

Despite Petitioner’s assertion otherwise, the Court of Appeals did not base its decision on “the dissent and a concurring opinion” in Barnes and Nicholson. Nor did the Court of Appeals fail to follow or attempt to overrule controlling precedent from this Court. (Pet. Br. pp. 15-18). Although the Court of Appeals noted Justice Pleicones’ dissent in Barnes and his concurring opinion in Nicholson, it distinguished the instant case from both of those cases: “Here, unlike in Barnes and Nicholson, we cannot determine what Turner was doing at the time of his alleged accident ... no evidence indicates his employment contributed to the cause of his fall.” (Appx. pp. 538-539). In any event, it is not unheard of and there is nothing inherently wrong with appellate courts

citing to and relying on statements made in prior dissents. *E.g.*, Faulkenberry v. Norfolk S. Ry., 349 S.C. 318, 563 S.E.2d 644 (2002).

What Barnes and Nicholson establish is that a fall can still be work-related even where a claimant cannot prove a particular *workplace hazard* caused the injury. However, a claimant still has to prove a *causal relationship* between the injury and work. *E.g.*, Barnes, 411 S.C. at 398, 768 S.E.2d at 654. In Barnes, the causal link was hurrying to check a co-worker's email when she tripped; in Nicholson, it was scuffing her foot on the carpet on her way to a meeting that caused her to fall. Here, there is absolutely no evidence of any such causal relationship.

Furthermore, both Barnes and Nicholson are distinguishable from the case at hand with regard to another significant fact: in neither of those cases was the claimant taking medications that have side effects, such as seizures, dizziness, fainting, loss of balance, etc., that could cause a fall, whereas here, it is undisputed that Petitioner had been taking Ultram (50MG) and Flexeril (5MG) weeks prior to his fall and, was taking Ultram ER (100MG) and Neurontin (300MG), at the time of his fall, (Appx. pp. 201-204),¹⁵ which the Commission noted twice with emphasis. (Appx. pp. 120-123). It is also undisputed that Petitioner was seen at the emergency room just two days prior to his fall for side effects associated with these narcotics. (Appx. pp. 206-208) (Appx. p. 302, line 18 – p. 303, line 7).

Here, there is no direct evidence of what caused Petitioner's fall because it was unwitnessed and he claims no memory of the moments prior to his fall. However, as

¹⁵ As noted above, side effects associated with Ultram ER, an opioid analgesic, include, among other things, change in walking and balance; abdominal pain; nausea; convulsions (seizures); lightheadedness; and loss of consciousness. Neurontin is "is an anti-epileptic medication" with side effects that include "dizziness, drowsiness, and diarrhea."

noted above, Petitioner's credibility was impeached twice and there is competing circumstantial evidence as to what may have caused his fall. Petitioner argues that circumstantial evidence shows he was in "top notch shape" on the day of his alleged accident, and suggests, as he did below, that he might have fallen from the step of his truck. At the same time, however, there is other evidence, both direct and circumstantial, demonstrating that, on the day he fell, Petitioner was taking narcotic medications with serious side effects, some of which had sent him to the emergency room just days prior to his fall. (Appx. pp. 161, 201-207) (Appx. p. 302, line 18 – p. 303, line 7). The Commission's resolution of this conflicting evidence and the reasonable inferences that it drew from the evidence before it must be upheld on appeal. Canady, 265 S.C. at 27, 216 S.E.2d at 758; *see also* Jake, 240 S.C. at 581, 126 S.E.2d at 723-724 (upholding Commission's resolution of conflicting inferences drawn from circumstantial evidence).

Furthermore, contrary to Petitioner's assertion, (Pet. Br. pp. iii, 15), this Court did not overrule Crosby. Instead, this Court distinguished the facts in Crosby from the facts before it in Barnes. Barnes, 411 S.C. 15 396-398, 768 S.E.2d at 653-655 (noting that, in Crosby, there was evidence that the claimant's leg just "gave out" causing her fall, as opposed to the claimant in Barnes, who was hurrying to check an email, and was "performing a work task when she tripped and fell," which provided the requisite work connection). The majority opinion in Nicholson did not even discuss Crosby.

Petitioner appears to take issue with the Court of Appeals' reliance on Bagwell v. Burwell, 227 S.C. 444, 88 S.E.2d 611 (1955). However, Bagwell, which is still good law, is factually similar to the instant case. In Bagwell, this Court first found that the claimant had suffered a non-work related seizure and then looked to see whether any

aspect of his employment caused greater injury. In Nicholson, this Court dismissed Bagwell as irrelevant to the case before it because Bagwell did not consider whether there was a causal connection between the fall itself and the work but only whether a work hazard increased the severity of the consequences of the fall. Nicholson, 411 S.C. at 387-388, 769 S.E.2d at 4. Similarly, in Barnes, this Court held that Bagwell was inapplicable to the facts before it because, in Bagwell, “the circumstances of the fall were not simply unexplained, but indicated the cause was internal.” The same is true here: the circumstances of the fall indicate the cause was internal.

As noted above, Petitioner incorrectly suggests that personal or “natural” causes or conditions are limited to conditions or diseases, such as “a ruptured aneurysm, a heart attack or a seizure,” (Pet. Br. pp. 18, 23); however, taking prescription medications that have powerful side effects also constitutes a cause personal to Petitioner and unrelated to his employment. To clarify the distinction here, if Petitioner had been prescribed the Ultram ER and Neurontin for a work-related injury, and side effects of those medications caused him to black out or have a seizure or lose his balance and fall, then he may have demonstrated a causal link to his employment. However, those are not the facts of this case and he has failed to produce any probative, reliable and substantial evidence of any causal link between his accidental injury and his employment.

In fact, Bagwell bears significant similarities to the instant case. There, prior to his fall, the claimant was “apparently in good physical condition.” The only “witness” to the fall saw the claimant only out of the corner of his eye, and “did not see the fall until deceased was about eighteen inches from the floor.” 227 S.C. at 447-448, 88 S.E.2d at 612. The claimant made no sound, took no steps prior to his fall, and appeared to fall straight back. 227 S.C. at 448-449, 88 S.E.2d at 612-613. As was the case in Bagwell,

here, “the manner in which he fell and all the surrounding circumstances rather indicate that his fall was due to” something peculiar to the claimant. 227 S.C. at 450, 88 S.E.2d at 614. As was the case in Bagwell, here, “[i]t would be wholly conjectural under these circumstances to say that the cause of the fall had any relation to his work or the conditions under which it was performed.” 227 S.C. at 451, 88 S.E.2d at 614. One important difference between Bagwell and the instant case is that, in Bagwell, there was no evidence that the claimant had been suffering from any prior back pain or that he was taking prescription medications with serious side effects. Here there is such evidence. However, that factual difference supports the Commission and the Court of Appeals’ resolution of this case.

This Court should hold that the Court of Appeals properly distinguished Barnes and Nicholson from the facts of this case.

IV. The Court of Appeals properly applied the substantial evidence standard.

Contrary to Petitioner’s arguments otherwise, the Court of Appeals properly applied the substantial evidence standard in this case. Here, there is substantial evidence, some of which is circumstantial,¹⁶ in this record that his fall was “brought on by a purely personal condition unrelated to the employment.” (Pet. Br. p. 18). That is, as both the Commission and the Court of Appeals found that, at the time of his fall, Petitioner was taking narcotic pain medications for his non-work related preexisting back condition, and

¹⁶ Petitioner clearly agrees that circumstantial evidence is sufficient to uphold a Commission decision, as he argued to the Full Commission that the Single Commissioner had “erred as a matter of law by failing to apply the concept of circumstantial evidence to the facts of this case.” (Cl. Form 30, Appx. p. 227).

that he had sought emergency medical care for symptoms that are listed side effects of those narcotics just days prior to his fall.

In this case, the circumstantial evidence and the reasonable inferences¹⁷ that can be drawn from that evidence are in conflict. On one hand, the Commission could have inferred from statements made by Petitioner's co-workers (who are not medical professionals and could only testify to what they observed as laymen) that they believed he was in "top notch shape" on the day of the injury.¹⁸ Or the Commission might have inferred, as Petitioner argued below, that he fell from the step of his truck. On the other hand, the Commission could have inferred and did find, based on all of the evidence presented, including Petitioner's visits to doctors, the prescription medications he was taking, his seeking emergency medical care for side effects from those medications, and the lack of any evidence that his fall was causally related to his employment, that Petitioner failed to meet his burden of proving he suffered an injury by accident arising

¹⁷ As noted above, "[t]he distinction between reasonable inferences (which are compensable) and speculation, conjecture and surmise (non compensable) often baffle the wisest. The courts however, *usually abide by the decision of the fact-finding body* unless it can be said that taking all the factors into account it drew an inference that no reasonable man could draw." Steed, 236 S.C. at 256, 113 S.E.2d at 828-29 (emphasis added); *see also* Buff, 215 S.C. at 51, 53 S.E.2d at 883-884 (upholding inferences drawn by Commission that were both reasonable and sufficient to affirm the Commission's determination).

¹⁸ It is worth noting that there was testimony in Jennings that the claimant had been "laughing and talking with co-workers," immediately before his last trip of the day, after which he suffered a ruptured thoracic aneurysm. 335 S.C. at 257, 516 S.E.2d at 457. Thus, the fact that Petitioner's co-workers, who have no medical training and who had limited knowledge of Petitioner's medical history, (*compare* Barnette Dep., Appx. p. 375, lines 19-23 (the only lower back problem Mr. Barnette was aware of was when Claimant "discussed he had a back problem when he was a teenager, younger, a teenager, you know, and I knew that"); *with* Appx. pp. 201-204 (medical notes chronicling Claimant's lower back problems in the weeks leading to his fall), believed he was in "top notch" shape on the day of his fall does not establish anything concrete about his physical condition.

out of and in the course of his employment. The Commission found significant the fact that “three days prior to the date of the alleged accident, Petitioner was prescribed 90 capsules of Neurontin (to be taken three times daily) and 60 tablets of Ultram (to be taken two times daily).” (Appx. p. 120) (*see also* Appx. pp. 116, 123-124). There is sufficient evidence, both direct and circumstantial, to uphold the Commission Decision.

Petitioner argues that the Court of Appeals erred by requiring that he prove the “cause” of his fall or his injury. (Pet. Br. pp. 12 n.1, 15, 18, 23). However, it is indisputable that, in order “to be compensable, an injury by accident must be one ‘arising out of and in the course of employment,’” and that, “[a]rising out of” refers to the injury’s origin and *cause*, whereas ‘in the course of’ refers to the injury’s time, place, and circumstances ... For an injury to ‘arise out of’ employment, the injury must be *proximately caused* by the employment.” Grant, 372 S.C. at 201, 641 S.E.2d at 871 (emphasis added); *see also Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965) (an injury “arises ‘out of’ the 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 But it excludes an injury which cannot fairly be traced to the employment as a *contributing proximate cause* ...”) (emphasis added).

In other words, the concept of a causal link to work is embedded in the “arising out of” prong of the definition of a compensable injury. And, because a claimant bears the burden of proving facts that will “render the injury compensable” under the Act, Packer, 238 S.C. at 435, 120 S.E.2d at 400, one of the things he must prove is some causal link between his injury and his employment. Nicholson, 411 S.C. at 389, 769

S.E.2d at 5 (a claimant must “prove a causal connection between the conditions under which the work is required to be performed and the resulting injury”). Thus, Petitioner’s repeated assertion that “[a]n injured worker has never had to prove cause,” (Pet. Br. p. 18, *see also* pp. 12 n.1, 15, 23), is as perplexing as it is incorrect. While a claimant has never had to prove fault or negligence, claimants have always had to prove a causal relationship between their injury and their employment.¹⁹ Respondents have not argued and neither the Commission nor the Court of Appeals have ruled that Petitioner had to prove fault or negligence. This, again, is nothing more than another red herring.

Causation is relevant even where the unexplained death presumption applies. That is, even where the deceased employee is “found dead in a place where he may reasonably be expected to be, [and] the natural presumption arises that his death occurred out of and in the course of his employment,” the presumption alone may be insufficient to prove that the cause of death was a work-related accident, as opposed to some cause peculiar to the claimant. Packer, 238 S.C. at 436-437, 120 S.E.2d at 400-401. Without a causal link to the employment, the Act simply becomes an insurance plan for workers, which clearly was not the Legislature’s intent. Roper Hosp. v. Clemons, 326 S.C. 534, 537 n.1, 484 S.E.2d 598, 599 n.1 (Ct. App. 1997) (although the Act “should be liberally construed in order to accomplish [its] humane purpose ... liberal construction does not mean that the act should be converted into a form of insurance”); *see also* Sylvan v.

¹⁹ Similarly, Petitioner’s citation to Thompson v. J. A. Jones Const. Co., 199 S.C. 304, 19 S.E.2d 226 (1942) is puzzling. Thompson dealt with the issue of whether an assault by co-workers, including a foreman, fell within the definition of injury by accident under the Act. In holding that it did, this Court (relying on North Carolina precedent) explained that, “[t]he test of liability under the statute is not the master’s dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk.” 199 S.C. at 312, 19 S.E.2d at 229.

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”).

Petitioner also attempts to confuse the concepts of proving a causal relationship between his injury and his employment with the concept of whether he has to prove an unexpected “accident” occurred, *citing* Stokes v. First Nat. Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991) (nervous breakdown case, where the issue was whether the claimant had suffered an “injury by accident”), and Hiers v. Brunson Const. Co., 221 S.C. 212, 232, 70 S.E.2d 211, 220 (1952) (exposure case, where the issue was whether pneumonia was an “injury by accident” under the Act). However, Stokes and Hiers are inapplicable to this case because, unlike in those cases, here there is no issue regarding whether Petitioner’s job subjected him to extreme stressors or weather. In addition, neither the Court of Appeals nor the Commission held that Petitioner had to prove he experienced a sudden, unexpected external event. Instead, both the Court of Appeals and the Commission held that Petitioner was not entitled to a presumption that his injury was work-related and that he failed to show any causal relationship between his employment and his fall.

Jennings, on which Petitioner relies, does not hold differently. There, the claimant drove a garbage truck and, one morning was found slumped over the wheel, having suffered a heart attack. The claimant’s widow argued she should be entitled to the “‘unexplained death’ presumption.” The Court of Appeals clarified that the unexplained death “presumption is applied simply to establish that the injury occurred in the course or and as a consequence of employment. The presumption cannot be applied to establish

the incident of accident.” Jennings, 335 S.C. at 256, 516 S.E.2d at 457. In other words, the unexplained death presumption does not eliminate the test for whether a heart attack or fall has a causal relation to the work, or whether it was caused by some condition peculiar to the claimant, such as coronary artery disease or such as taking prescription medications with serious side effects. The Court of Appeals neither misunderstood nor overlooked long-standing precedent concerning the definition of “injury by accident” and/or “what constitutes arising out of,” as Petitioner suggests.

Petitioner argues that all he has to show is “an unexpected result from the work activity.” (Pet. Br. p. 18). However, this is precisely what he has not and cannot do. First, he has not shown that anything related to his work activity caused his “unexpected result.” Second, he cannot prove that he was engaged in any “work activity” at the time he fell. All he can prove is that he was at work at the time he fell. He has not proven that anything related to his work either caused or contributed to his fall, or to the effect of his fall.

This Court should hold that the Court of Appeals properly applied the substantial evidence standard and correctly upheld the Commission’s determination that Petitioner failed to meet his burden of proving a compensable injury by accident.

V. The Court of Appeals’ Opinion is not in derogation of and/or contrary to this Court’s precedent.

Petitioner’s final argument is based on his prior, erroneous arguments that Barnes, Nicholson, Owens and/or Fowler compel a finding of compensability in this case. Respondents address those arguments in Sections I, III & IV above. The Court of Appeals has not ignored or “change[d] the rulings of this Court.” While this Court adopted the phraseology “[w]here an employee is found injured or dead at a time and

place where his employment reasonably required him to be, there is a presumption of fact that the death arose out of and in the course of the employment,” Eagles, 260 S.C. at 116, 194 S.E.2d at 398, no South Carolina court has applied the presumption where the claimant survived the injury, recovered completely, but simply claimed he could not remember what happened. In addition, this Court has warned that, “[t]o say that an injury arises out of the employment in every case where an employee was required to be at the place where the injury occurred would effectively eliminate an essential requirement of the statute.” Bagwell, 227 S.C. at 454, 88 S.E.2d at 615; *see also* Roper Hosp., 326 S.C. at 537 n.1, 484 S.E.2d at 599 n.1 (the Act was not intended to serve as a form of insurance); *see also* Sylvan, 225 S.C. at 442, 82 S.E.2d at 800 (the “Act of course does not and is not intended to afford protection and coverage of general accident or life insurance policies”).

In fact, although this Court adopted the opinion of the circuit court in Owens, that case and every other South Carolina case applying the unexplained death presumption did so where the employee was deceased. Petitioner can point to no South Carolina case that has applied the presumption to facts even remotely similar to the facts of this case. Patently, this Court did not rely on and apply the presumption in Fowler or any other case where the employee survived but claimed he could not remember his accident. As a result, the Court of Appeals did not “change the rulings,” fail to follow the opinions of this Court or violate any principles or constitutional mandates. Petitioner’s arguments on this point are little more than grandiose posturing, are entirely without merit and should be dismissed summarily.

As noted above, should this Court extend the unexplained death presumption to merely “unremembered” injuries, the floodgates will open and any claimant who plausibly can allege they do not “remember” how the accident occurred will make that the centerpiece of his or her claim. Such a ruling would eliminate the requirement that a claimant prove that their injuries arose out of their employment and would convert the Act into an employee health insurance program. Clearly, such a result was not intended by the Legislature and should be rejected.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission and Court of Appeals and dismiss this appeal.

January 5, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5458
(filed December 7, 2016)

William Lee Turner, Employee, ... Petitioner,

v.

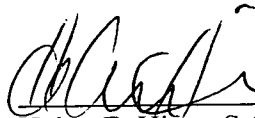
SAIIA Construction, Employer, and
Old Republic General Insurance Corporation
c/o Gallagher Bassett Services, Inc., Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of SAIIA Construction and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief 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.

January 5, 2018

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THE STATE OF SOUTH CAROLINA
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S.C. SUPREME COURT

William Lee Turner, Employee, ...Appellant,

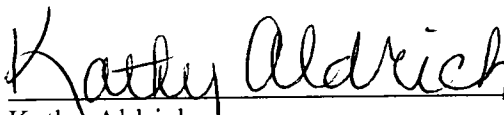
v.

SAIIA Construction, Employer, and
Old Republic General Insurance Corporation
c/o Gallagher Bassett Services, Inc., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that on the 10th day of January 2018, I served the **Respondents' Brief** on William Lee Turner by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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