

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals.

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APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission  
Appellate Panel

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**RECEIVED**  
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SC Court of Appeals

Appellate Case No. 2017-002124

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Edmund Dillon, (Deceased) Employee, ..... Appellant,

v.

FleetPride, Employer  
And Gallagher Bassett as TPA for  
American Zurich Insurance Co, Carrier, ..... Respondents.

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF THE CASE**

This case was commenced with the filing of a Form 52 (death claim) dated March 19, 2015 and filed with the South Carolina Workers' Compensation Commission alleging that Mr. Dillon sustained a work-related injury by accident on February 23, 2015, and passed away as a result of his injuries from the accident on February 27, 2015 (WCC Form 52 3/19/15). A responsive Form 53 denying that Mr. Dillon sustained compensable injury by accident on February 23, 2015 was filed with the Commission (WCC Form 53 4/9/15). After discovery and an impasse at mediation pursuant to the Commission Regulations, fifteen (15) months after filing, this matter was set for hearing originally on June 10, 2016 and was then reset for hearing and heard on August 30, 2016. (Hearing Note 4/26/16 and Reset 6/8/16). The Claimant and the Defendants filed their Pre-Hearing Briefs and APA Submissions prior to the June hearing date with the Defendants filing an original Pre-Hearing Brief and APA Submissions on May 31, 2016, an Amended Pre-Hearing Brief filed on June 6, 2016 (untimely) with additional APA Submissions and a Second Amended Pre-Hearing Brief and APA Submissions (untimely) filed prior to the initial hearing on June 7, 2016. (Claimant's PHB/APAs 5/25/16; Defendant's PBH/APA 5/31/16, Amended PHB/APAs 6/6/16, and Second Amended PHB/APAs 6/7/16). Discovery had included a Subpoena for all records

including all investigative records issued on August 24, 2015.  
(Subpoena 8/24/15).

At the reset hearing on August 30, 2016, in addition to the APA Submissions placed into evidence and testimony that was taken that day, the depositions of Dr. Michael Scribnick, MD and of Dr. Jacob Vandersteenhoven, MD were made a part of the Record. (Depo. Dr. Scribnick, MD, JD 6/9/16; Dr. Vandersteenhoven, MD, 8/16/16; Hearing Tr. p. 4, l. 25 - p. 5, l. 15). Memorandums of Law from both Claimant's counsel and Defense counsel were also submitted and made a part of the Record. (Memos, Claimant and Defendant 8/30/16). The Commission file was also made a part of the Record with the exception of self-serving declarations and unstipulated medical reports. (Tr. 8/30/16, p. 5, ll. 12-15). Finally, at the hearing, the Defendants objected to pp. 48-57 of the Claimant's APA Submissions which consisted of an expert report from Donna A. Crider, Registered Nurse and Legal Nurse Consultant, which was excluded from evidence but which was proffered for the Record by Claimant's counsel, (Tr. 8/30/16, p. 5, l. 1-8).

On September 20<sup>th</sup>, the Hearing Commissioner issued his Notes for Decision and requested a Proposed Order denying the claim. (Request for Proposed Order 9/20/16). The Hearing Commissioner then filed his Decision on February 2, 2017 which was noticed to the parties only by electronic mail with Certificate that same

day. (Decision 2/7/17). (Note: there is no statutory authority for electronic service: see SC Code §42-17-40 and §1-23-350). A Form 30 Request for Commission Review was timely filed on February 15, 2017 (Form 30 2/15/17) and the matter was set for Commission review. Briefs were filed by both the Claimant as Appellant and the Defendants as Respondents, (Claimant's FC Brief 4/17/17; Defendants FC Brief 5/2/17), and a Full Commission Review hearing was held on May 16, 2017. A request for a Proposed Decision and Order from the Commission Panel affirming the Decision of the Hearing Commissioner with amendments was forwarded to counsel for the Defendants on June 13, 2017 (FC Transcript 5/15/17; Request for Order 6/13/17). A Proposed Order, drafted by the Defendants, was issued as the Final Decision and Order of the Workers' Compensation Full Commission Hearing Panel on September 18, 2017. (Full Commission Decision 9/18/17). (Note, SC Code §1-23-340 requires the Commission to prepare the Decision). From the Decision of the Full Commission affirming the Hearing Commissioner, a timely Notice of Appeal with the grounds for Appeal to this Court was timely filed/served on October 12, 2017.

## STATEMENT OF FACTS

The uncontradicted evidence/facts, in the Record as to what happened in the fall came from only one witness, that being the Claimant, who lived to tell his story which makes this case compensable as a matter of law and fact. This fact, that the Claimant lived long enough to tell what happened, also makes it distinguishable from all other factually alleged "idiopathic fall" death cases where there was only circumstantial evidence to rely on as to what happened. The direct evidence from the EMS drivers, the nurses and the attending physician from Mr. Dillon immediately after and the 12A issued four days after the accident all establish the undisputed evidence as to what happened and the only objective evidence of his condition:

### EMS Report:

EMS arrives at 11:11 a.m. and at 11:16 a.m. records:

### Neurological Report:

Level of Consciousness: Alert.

Neurological Present: Normal.

Mental Present: Normal.

Pupils: Size - left and right normal;  
Reactive - left and right reactive.

Motor and Sensory: Normal.

Glasgow Coma Scale: 4/5/6 15 (totally normal).

(Claimant APA, p. 10 and 11; Defendant p. 63-64).

### EMS Report:

(All of this information was taken from the Claimant).

Injury Details:

Reason for Encounter: Injury/Trauma.  
Fall Height: 6.  
Fall Surface: Hard.  
Landed on: Head.  
Work-Related: Yes.  
Mechanism: Fall.  
(Claimant APA, p. 11; Defendant p. 64).

EMS Report:

Activity:

"He (Claimant) did not wish to go to hospital but supervisor convinced him he needed to go."

EMS Report:

Times:

Left scene at 11:19 a.m. and arrived at hospital at 11:30 a.m. (Claimant APA, p. 10; Defendant APA p. 63), (emp. added).

Mr. Dillon arrived via ambulance at the hospital at 11:30 a.m. EST and at 11:35 a.m. EST, Nurse Jennifer Watson recorded the following:

Per EMS, "patient tripped and fell ... MD at bedside ..." (Claimant APA, p. 30,31).

Dr. David T. Ford, MD at 16:07 (4:07 p.m. EST) dictated the history Dr. Ford had taken from Mr. Dillon at 11:35 a.m. EST., as to what Mr. Dillon's condition was and what he said happened. That history is as follows:

"HISTORY OF PRESENT ILLNESS: This is a 56-year-old male presenting after he fell. States he slipped and fell, hit the back of his head. Says he wanted to go back to work, but his firm would not let him. Patient states that he has non-tender felt well over the last

several days, has not been eating well and did notice that his skin has changed colors, but attributed this to that. States that he had had vomiting and diarrhea and just not felt well but that today he had a mechanical fall, did not have syncopal symptoms. Denies any headache, chest pain or any shortness of breath. He has an abrasion to his back. Patient denies any weakness, any abdominal pain or other complaints. ...

The doctor further recorded:

**EMERGENCY DEPARTMENT COURSE:** Patient was seen upon arrival, full history and physical exam performed. Work-up was obtained as stated above and throughout his stay in the ER he continued to have progressive decline in his mental status ..."  
(Claimant APA, p. 35,36; Defendant p. 117).\*

\*[The Claimant would also specifically ask the Court to note that at the time this history was taken and recorded, Claimant's GCS (Glasgow Coma Scale) remained totally normal at 15. (APA as referenced above). Whereas, two hours later, it was noted to have deteriorated to less than 8, (Defendant APA, p. 123).]

Also, not only was Dr. Ford in attendance but also a Resident by the name of Dr. Emily Mackey with whom Dr. Ford concurred and recorded that he and M.D./Resident Mackey spent over 32 minutes with Mr. Dillon. (Defendant APA, p. 119).

In addition to the EMS personnel's reports: (1) of what Mr. Dillon told them; (2) and the emergency room nurse; and (3) the Resident and the emergency room doctor(s), as to what Mr. Dillon told them that: "he slipped and fell.", the 12A Filed Four Days After Accident on February 27, 2015, which was admitted without objection stated:

He was leaving his car headed toward the building when he tripped and fell hitting his head, knocking him

unconscious as witnessed by customer John at (803)272-7497 (APA p. 93 and Tr. p. 45).<sup>1</sup>

There were also pictures of the scene of the fall introduced a belated witness, Mr. Josiah Fludd, first known to have been contacted five (5) months after the accident on July 15, 2015, who that day, July 5<sup>th</sup>, signed a typed written statement for Defendants created by Defendant's agent. (CL's APA p. 42; l. 2-10). Mr. Fludd partially and as a sideshow/ indirectly witnessed part of Mr. Dillon; and part of his fall.

Two of the pictures found in Defendant's APA Submissions, p. 840 and p. 842 show the approximate location where the Claimant was seen to fall and show an unmarked curb cut directly adjacent to the fall site and to where Mr. Fludd's truck was parked and his view through his truck.

As to the conditions; as to what part of the Claimant Mr. Fludd observed; and as to the fall and his ability to observe what occurred; and as to what he was doing when he observed this fall, Mr. Fludd testified in deposition as follows:

Q. I called you after I saw this Affidavit.

A. Yes.

Q. Correct? And you and I spoke for a few moments on the phone. Is that correct?

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<sup>1</sup> This constitutes both an admission against interests and creates an inference that if this witness (company employee who recorded this) is under the control of the company were called as a witness to testify that the witness would confirm this statement. Ducksworth v. First National Bank 254 SC 263, 176 SC2d 297 (1970).

A. Yes, sir.

Q. And I believe you told me then, and you just told us now, that you were loading and unloading your truck?

A. Yes, sir.

Q. I believe you were at the front of the FleetPride entrance.

A. Yes, sir.

Q. It had been raining that day.

A. Yes, sir.

Q. The ground was wet.

A. Yes, sir. (Dep. Fludd, p. 13 l. 11-p. 14, l. 1).

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Q. And tell me what you actually saw, in your own words.

A. Well, I was loading my truck. I was putting the paperwork in my truck to keep from getting wet.

Q. Sure.

A. And turned to walk back towards the building. And that's when I saw Mr. Ed just stood there and just basically fell over.

Q. Okay.

A. That's what I saw.

Q. And in our discussion, you told me -- and you stop me if I'm wrong.

A. Okay.

Q. That all you saw was him from just below the waist up.

Is that correct?

A. Yes, sir.

Q. And that you couldn't say if he slipped or if he didn't.

A. Right.

Q. You just didn't know. Right?

A. No, sir.

Q. Okay. Is that correct?

A. Yes.

Q. Okay. So you don't know if he did slip. Right?

A. I didn't see any of his bottom movement.

Q. Okay. So you don't know whether he slipped or not.

Correct?

A. Correct.

Q. Okay. You -- to your knowledge, you have no idea why he fell. Do you?

A. No, sir.

Q. And you don't know if he passed out or what happened.

Right?

A. No, sir.

Q. Okay. So I am correct in that?

A. Yes, sir. (Deposition p. 14 l. 7 - p. 15 l. 13).

Q. Okay. But you were obviously busy with what you were doing. Correct?

A. Yes. (Deposition p. 20 ll. 17-19)

Q. Okay. Were you actually watching him for that full minute?

A. No. How I was putting paperwork inside my truck had me looking that direction.

Q. Okay. So you were just kind of looking in that general direction?

A. Yes, sir.

Q. Oh, okay. And I assume the motion is what caught your eye?

A. Yes.

Q. The motion of the fall?

A. Yes. (Deposition p. 21 l., 4, 10; l. 17-21).

Four days after the accident, the witness, John, told the employer Mr. Dillon "tripped and fell" (Claimant's APA p. 93). (note: John is either a separate witness or is Josiah Fludd). Mr. Dillon was not found on his back as if he had fallen backwards without trying to break his fall as the Defendants wanted to lead the Commission to believe but was found by Mr. Mogridge lying on his right side with bleeding above his right ear and in his opinion, "I figured that's the side that hit." (Tr. p. 33 l. 15 - p. 34 l. 10).

The Defendants submitted a Records Review Opinion Report from Dr. Jacob Vandersteehoven, MD, a pathologist and medical examiner (autopsies) who stated:

"In my view and to a reasonable degree of medical certainty, his underlying medical conditions either singly or in combination, indicated the syncopal episode that Mr. Dillon experienced on 2/23/15 which led to his demise. (Emp. Added). (Def. APA, p. 798)."

However, in his deposition after testifying he graduated from medical school thirty (30) years ago and was a pathologist and medical examiner testified:

Q. And my question to you is this, when is the last time you treated a live patient?

A. Oh, I'd say as a senior medical student.

Q. So, that was how many years ago?

A. That was 30-something years ago.

Q. Okay. And what's the importance of the patient's input in terms of diagnosing the problem or the etiology of their current problems?

A. It's very important. (Emp. Added) (Dep. Dr. Vandersteehoven, p. 10, 11. 12-21).

He further testified factually contrary to his opinion:

Q. Well, didn't Mr. Dillon deny any loss of consciousness according to his history as taken by both the EMS and the emergency room?

A. He denied a loss of consciousness but Mr. Fludd and other people recognized he had been unconscious. Or at least Mr. Fludd had recognized he was unconscious at the time.

Q. Okay. But there is nothing in the Record of ...so your testimony is that it's Mr. Fludd who said he went ...that he was unconscious. Now, was that before the fall or after the fall?

A. After the fall. (Dep. p. 23, ll. 8-19). (Emp. Added).

Q. ...is it true, isn't it, that there is no objective evidence in the medical records you have reviewed other than the 1994 Kershaw County medical records of the existence of a syncopal episode that preceded the fall?

A. No, there is objective medical evidence to say that he had a syncopal episode.

Q. Okay. Prior to the fall. Within the, within the short time span of the fall?

A. I'm not sure I understand the question, rephrase that, please.

Q. Okay. Isn't it true that there's no objective medical evidence in the Record to suggest that Mr. Dillon had a syncopal episode that - within one hour of his preceding his fall?

A. That's correct. (Dep. p. 24, ll. 6-21). (Emp. Added).

#### ARGUMENTS

#### I. THE COURT SHOULD REVERSE THE COMMISSION DENIAL OF BENEFITS BASED ON THE UNDISPUTED EVIDENCE AS TO WHAT OCCURRED AND BASED ON THE MISAPPLICATION OF THE LAW AS ESTABLISHED BY OUR APPELLATE COURTS.

Counsel for both parties presented Memorandums of Law to the Hearing Commissioner. Defense Counsel's Memorandum, while a basically accurate review of the idiopathic fall line of cases, cited that line of case law as the defense to this claim as it is in every case like this one where the Claimant dies, does not remember or cannot state exactly the, "cause", of the fall. This worn out idiopathic fall defense has been specifically discredited and rejected by the Supreme Court. Further, as part of the defense, the Defendants point to the facts in those cases that are similar to Mr. Dillon's case but point away from or

ignore the facts in those cases that are totally different from those in this case; and specifically ignore the facts in this case that are on all-fours with the facts in Nicholson v. South Carolina Department of Social Services, 411 SC 381, 769 S.E.2d 1. (2015) and Barnes v. Charter One Realty, 411 SC 391, 768 S.E.2d 651 (2015) where the Supreme Court debunked this defense. Facts versus surmise are the difference. As this writer is painfully aware, even in an unexplained death situation, evidence of accidental means versus a natural condition. See Jennings v. Chambers Development Co. 335 SC 249, 516 S.E.2d 453 (SC App. 1999); and Buff v. Columbia Baking Co. 215 SC 41, 53 S.E.2d 879 (1949) versus Packer v. Corbett Canning Co. 238 SC 431, 120 S.E.2d 398 (1961), i.e., evidence of electrical shock versus no evidence of electrical shock (accidental means).

As in all cases before the Commission where the Defendants assert the idiopathic defense, they harkin back to and rely on a case decided in 1955, Bagwell v. Ernest Burwell, Inc., 377 SC 444, 88 S.E.2d 611 (1955). In Bagwell, two witnesses saw Mr. Bagwell standing at a counter when he fell backwards without attempting to catch himself or break his fall; and specifically and particularly as compared to this case:

Q. Could you see his entire body?

A. Yes, sir.

Q. Did you see whether or not he slipped in any way or hit anything?

A. He did not slip - .

Then quoting the Court:

There is no evidence that the deceased while standing at the desk slipped or lost his balance, nor any showing that his fall was caused by any hazards of his employment. An examination of the floor shortly after the occurrence, disclosed no evidence of grease or other foreign substance. The floor was dry." 227 SC at 449-450.

In addition to the factual difference to this case, in using that case as a basis to apply the idiopathic fall concept, the Defendants always overlook one very important fact; Mr. Bagwell died without saying a word about what happened.

In Bagwell, after reminding the Bench and Bar that the Commission is required to consider "**the evidence most favorably from the Claimant's standpoint**", the Court distinguished the facts in Bagwell from the case where there is direct evidence from the Claimant, as to what happened but there are casual indirect witnesses of the accident and circumstantial evidence, citing Cagle v. Judson Mills 195 SC 346, 115 2d 376 (1940). In Cagle, it was agreed that the weave room was excessively hot and that he fainted and the basis for the claim was whether he had sustained a heat stroke. Mr. Cagle lived long enough to say and tell his story, that "I felt a little weak" and "I wonder how come I did that." He made no statement related to being overheated and based on his statements, there was no basis for finding an accident related to being overheated. Mr. Cagle related no problems associated with heat stroke to and the

doctor who treated him found none. The doctor who performed the autopsy testified there, "would," be objective evidence of heat stroke and testified that he found none. In reversing the Commission's Award, the Court stated:

"We have carefully studied the Record in this case in the hope that we could find some evidence which would sustain the award made ..."

but the Court found none. However, in this case, the direct evidence is I "tripped and fell" (remember the curb) and the objective medical evidence is that Mr. Dillon was totally normal per EMS and when he arrived at the hospital and no evidence of syncope before falling.

The Defendants also refer to Miller v. Springs Cotton Mills, 225 SC 326, 82 S.E.2d 458 (1954) which was also specifically distinguished by Barnes v. Charter One Realty, supra. In Miller, the Supreme Court specifically noted that the internal breakdown caused the near fall and not that the near fall caused the breakdown based on Ms. Miller's testimony and specifically noted that Ms. Miller, based on her testimony, was not doing any of her job functions but was in the cafeteria eating lunch and was not involved in any work activities at the time that her knee gave out on her. In other words, the Supreme Court's decision in Miller is based on her testimony as it was in this Court's decision in Crosby v. Walmart, 330 SC 489, 499 S.E.2d 253 (SC App. 1998).

In, Barnes v. Charter One Realty, supra, the Supreme Court specifically debunked this line of argument in reference to the identical type of facts that we have in this case i.e., where there was evidence from the Claimant about what happened. After stating in Barnes that idiopathic falls are an exception and that, "as an exception to workers' compensation coverage, the idiopathic doctrine should be strictly construed ..." the Court went through the distinguishing facts that are the same distinguishing facts that exist in this case. Quoting from Barnes in reference to the Crosby decision, the Court held:

"In finding the unexplained nature of Barnes fall rendered it idiopathic, the Appellate Panel relied on the Court of Appeals Opinion in Crosby v. Walmart Store, Inc. (citation omitted). In Crosby, the Court affirmed the finding that the Claimant's fall was idiopathic, basing its conclusion on the fact that the fall was a result of an internal failure or breakdown in the knee. (Citation omitted). The Court specifically referenced testimony of another employee that Crosby had indicated her leg gave out to support this finding (Citation omitted). Thus, in Crosby, the Court did not find the cause of the fall was unknown, but found it was in fact occasioned by an internal and personal condition specific to Crosby and was therefore idiopathic in nature.

Even in Crosby, and while that decision was overturned by the Supreme Court in Barnes, the Commission's decision was based on the "Claimant's own testimony" which established that the Claimant did not know the reason for the fall.

The idiopathic fall concept/doctrine is an exception to the injury by accident definition and as an exception it is to be narrowly applied and strictly limited in its application as

being abhorrent to the fundamental principles of workers compensation. The Supreme court has held specifically that it is not to be applied where there is any causal connection to a work activity. Therefore, the distinguishing characteristic between this case and all of the cases the Defendants cited to the Commission was that the decision to either grant benefits to a Claimant or to deny benefits to a Claimant was based upon the testimony that was presented and where the Claimant presented evidence in the form of statements and/or testimony from other witnesses, as to what the Claimant said, the Commission relied on that specific direct evidence concerning the injury. Ms.

Miller testified to an internal breakdown; Mr. Cagle stated he just got weak; Ms. Crosby stated that she knew of nothing that caused her fall; Mr. Bagwell was dead and did not state what happened before he died. Whereas, in both Barnes and Nicholson, Ms. Barnes and Ms. Nicholson testified that they tripped and fell and the Court found their injuries were not idiopathic.

The undisputed testimony and evidence in this case is that Mr. Dillon told both the EMS workers ("tripped and fell") and his treating doctor upon arrival at the emergency room in the presence of the treating nurse and a Resident that he had, "slipped and fell, and hit the back of his head." As in all other cases decided by our appellate courts, where the Claimant has testified, or stated to witnesses what happened, in every one of those, the Claimant would submit that this Court has

awarded benefits or has denied benefits based on the testimony and statements of the Claimant where those were available.

Those were available in this case and Mr. Dillon, who was totally coherent at the time that he made those statements, stated that he tripped or slipped and fell. The circumstantial evidence was that he was near a curb cut and it was raining and the ground was wet when he fell. Mr. Fludd was quite honest and said he could not see Mr. Dillon from the waist down, that the ground was wet and that he was putting his paperwork into his truck when Mr. Dillon's "fall", "drew" his attention and he could not say whether or not he slipped or tripped or what caused his fall. This Court should review this undisputed direct evidence and apply the law as established by the Supreme Court and reverse and remand for an award benefits on this basis alone as a matter of law.

**II. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT APPLYING THE LAW AS ESTABLISHED BY THE SOUTH CAROLINA SUPREME COURT IN NICHOLSON AND BARNES.**

As set forth above, the uncontested direct evidence is that Mr. Dillon tripped or slipped and fell. In his Conclusions of Law, the hearing Commissioner did not properly apply the decisions of the Supreme Court in reference to Nicholson and Barnes specifically in that after those decisions, the idiopathic fall exception should be applied only where there is no evidence of a causal relationship or only evidence of an unrelated cause.

The Defendants submitted and misstated the law to the hearing Commissioner causing him to misunderstand this case to be an idiopathic fall type case wherein it is not an idiopathic fall because the cause of the fall is known in that Mr. Dillon's uncontested statements were that he tripped or slipped and fell. As in Nicholson and Barnes, he is not required to further prove the reason that the trip or slip and fall occurred.

Further unlike cases involving the unexplained, unwitnessed injury or death presumption and an allegation of an idiopathic fall either causing death or injury and where the Commission and this Court must rely on circumstantial evidence to substantiate that the injury arose out of the work activities and was accidental in nature, in this case, there is direct testimony from the Claimant presented through the testimony and evidence from other witnesses as to what occurred.

In this case, there is specific evidence as to what occurred and as Mr. Dillon stated repeatedly to numerous people and as one other witness within four days of the day of the accident recorded, he "tripped and fell" and the Commission was wrong and committed an error of law by applying the Bagwell standard versus the standard of Barnes and Nicholson. This case should be awarded based on the uncontradicted direct testimony and evidence from the Claimant alone, but without question based on, as the Supreme Court has stated, "considering the evidence most favorably from the Claimant's standpoint".

**III. THE COMMISSION ERRED AS A MATTER OF LAW BY EXCLUDING THE EVIDENCE PRESENTED FROM THE LEGAL NURSE.**

The Claimant submitted evidence from a registered nurse certified in the areas of pathology and legal analysis. She expressed the opinion with a reasonable degree of certainty as a registered nurse, legal nurse and pathologist, that there was nothing, based on her Record's review, that Mr. Dillon had any definitive medical condition that caused him to faint and/or fall but instead he died as a direct result of the fall sustained while at his place of employment.

While admitting a records review from the Defendants' expert and from the Claimant's expert, the Commissioner excluded this expert evidence. There is simply no basis in law or fact for excluding this expert evidence rendered by, as uncontested, a registered nurse who has a background and experience and is credentialed and trained and who is a board certified in the areas of pathology, nursing and legal nursing analysis. The Commission cited no basis for its exclusion. The admission of expert opinion is within the sound discretion of the Commission but it is an abuse of discretion where the exclusion has no evidentiary support or where there is an error of law. Gooding v. St. Francis Xavier Hosp. 317 SC 320, 454 S.E.2d 328 (SC App. 1994) affirmed in part, reversed in part 326 SC 248, 487 S.E.2d 596 (1997). There is no basis set out in either the Record or the Commissioner's decision for the decision to exclude the

opinion evidence which is thus both an error of fact and of law. If there were any defects in the nurse's qualifications or background, training or experience as an expert, those go to the weight not the admissibility of the nurse expert's opinion. A nurse and other non-medical doctor experts in their area of expertise are qualified to express even in malpractice action. Gooding v. St. Francis Xavier Hosp., supra. Once admitted, the purpose of expert opinion evidence is designed to aid the Commission in coming to the correct conclusion, and as the fact finder, the Commission is to determine the weight and credit to be given such expert evidence. Tiller v. National Healthcare Center of Sumter, 334 SC 333, 513 S.E.2d 843 (1999).

Again, there is simply no basis in law or fact to exclude this evidence and based on the Commission's findings in reference to the medical records and medical records review, this evidence could very well have been significant in the Commission's decision had it been submitted. This exclusion was legal error and requires reversal.

**IV. THE COMMISSION ERRED A MATTER OF LAW BY FAILING TO RECITE IN ITS FINDINGS OF FACT ANY REVIEW OF THE MEDICAL EXPERT TESTIMONY SUBMITTED BY THE CLAIMANT.**

There was expert testimony and evidence presented by a board-certified physician on behalf of the Claimant (and expert medical evidence proffered from a registered nurse) based on a review of the medical records from the Claimant's hospitalization following his accident as to whether or not

there was any causal relationship established between his pre-existing medical conditions and the cause of his fall at the time of the fall. While there is evidence in the Record to establish that the Claimant had several pre-existing conditions, it is the subject of surmise, speculation and innuendo based on the objective medical records in evidence specifically including all of the blood work and other diagnostic testing that was performed that day, the day of the accident, that would establish any condition was present and caused or which most probably caused the Claimant to fall. In fact, the Defendants own medical expert testified there was no objective medical evidence to establish the cause of the Claimant's fall. Whereas based on the expert medical evidence, there was a specific review of that evidence from (a registered nurse, which was excluded,) a board certified medical doctor, that there was nothing indicating or from which one could conclude based upon the objective test results performed that day, that any of the pre-existing conditions caused the fall that day:

"I do not find to a reasonable degree that Edmund Dillon's fall at work was caused by a condition peculiar to him. I have particularly noted in my review of the records ... the absence of any significant symptoms that would lead to any conclusion that a condition peculiar to him caused the fall at work ..." (CL APA p. 58).

Evidence of a condition causing the fall is surmise and speculation.

V. WHERE THE CLAIMANT SPECIFICALLY SUBPOENAED "ANY AND ALL INVESTIGATIVE REPORTS, FILES, STATEMENTS OR OTHER MATERIALS CONCERNING THIS CLAIM, INCLUDING BUT NOT LIMITED TO, ANY INSURANCE INVESTIGATION" AND WHERE NONE WAS PRODUCED, THE COMMISSION ERRED BY GIVING WEIGHT TO THE DEPOSITION TESTIMONY OF JOSHIA FLUDD.

A Form 12A was placed in the Record, wherein the employer and its insurance carrier represented to the Commission that the Claimant was walking back to his truck when he tripped and fell, causing him to hit his head and being unconscious. That statement gave the name of a witness, John, who made this report and gave his telephone number. A witness for the employer at the hearing, testified that he "thought" John was Josiah Fludd.

Mr. Fludd at his deposition, which was put into evidence, was presented with a copy of a typed Affidavit; with which he had been presented five (5) months after the accident. Over objection as to leading, he was then lead through that Affidavit, which had been signed by Mr. Fludd, again over five (5) months after the accident. In addition, at the deposition, an inquiry was made by the Claimant's counsel as to who took the Affidavit, to which Mr. Fludd could not give an answer. He made no statement in reference to being contacted within four day after the day of the accident, by anyone, or to giving any statement to the employer and/or its insurance carrier or any of its agents or representatives prior to the typed statement presented to him five (5) months after the accident. In addition, contrary to the prepared Affidavit, which used the

word, "collapsed," in his deposition as quoted in the Statement of Facts, Mr. Fludd said that he had told the person that Mr. Dillon, "fell". He reiterated under oath, that he saw Mr. Dillon, "fall".

There is no question that Claimant's counsel had forwarded a subpoena requiring the production of:

"Any and all investigative reports, files, statements, or other materials concerning this claim, including but not limited to, any insurance investigation. Please provide a witness list with contact information for each witness."

There is nothing in the Record that any investigative report was ever provided to the Claimant, nor was one available or referred to, nor was the name given at the deposition to Mr. Fludd as to who the investigator was or how the person obtained the information or what the source of the information was that was set forth in the Affidavit which Mr. Fludd signed.

Mr. Fludd made it very clear in his deposition that the deposition was disruptive to his work and that he was only at the deposition because he was subpoenaed, or in other words, was forced to be there, and did not want to be there. There is no evidence in the Record, other than Claimant counsel's cross-examination, as to whether or not the witness, "John" whose telephone number appeared on the Form 12A, was ever contacted or sought to be contacted by the employer and its insurance carrier.

Based on the subpoena and the failure of the Defendants' to produce any investigative information, the Claimant was effectively denied due process based on his inability to obtain discovery which prevented him from being able to cross-examine witnesses in a meaningful manner. The decision should be reversed and at a minimum remanded for a De Novo hearing.

**VI. THE COMMISSION ERRED AS A MATTER OF LAW BY CONSIDERING THE TESTIMONIAL EVIDENCE OF MR. JOSHIA FLUDD FROM HIS DEPOSITION WHERE HIS TESTIMONY AND HIS ANSWERS, AS REFLECTED IN THE FINDINGS OF FACT OF THE COMMISSIONER WERE ELICITED BASED ON LEADING QUESTIONS.**

In the deposition, Mr. Fludd was shown the prepared Affidavit, which was prepared and submitted to him for signature, and instead of asking, (as Claimant's counsel did), for Mr. Fludd's recollection of what occurred, defense counsel after handing the Affidavit to Mr. Fludd, elicited answers based specifically from that Affidavit through the use of leading questions. Claimant's counsel had objected to leading during the deposition and those questions were clearly leading in nature and should have been excluded by the Hearing Commissioner. (Dep. p. 8, l. 25).

If, those questions and answers are excluded as they should have been, there is no basis in evidence lawfully admitted, to support the commissioner's findings. Based on this error of law and submission of this evidence, which was highly prejudicial to the Claimant, this matter should be reversed.

CONCLUSION

For all of the foregoing reasons, this matter should be reversed based on the uncontradicted testimony and evidence from the Claimant as to the fact that he tripped and fell and benefits should be awarded to his widow. At the bare minimum, based on the errors of law; errors of the application of the law; and errors of fact and law, this matter should be remanded for a De Novo hearing and the Defendants' should be instructed to produce all investigative reports and records in reference to the investigation of this claim, which were not produced in reference to the subpoena that was issued.

Respectfully Submitted By:



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And

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ATTORNEYS FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-002124

RECEIVED  
JAN 19 2018  
SC Court of Appeals

EDMUND DILLON (Deceased), Employee, ..... Appellant,

v.

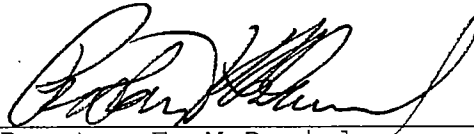
FLEET PRIDE, Employer, and  
Gallagher Bassett as TPA for  
American Zurich Insurance Co., Carrier, ..... Respondents

PROOF OF SERVICE

I certify that I have served the **INITIAL BRIEF OF APPELLANT**  
and Appellant's **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD**  
**ON APPEAL** by depositing a copy of it in the United States Mail,  
postage prepaid, on January 17, 2018, addressed to:

Cindy Dooley  
Carmelo Sammataro  
Turner Padgett  
1901 Main St, 17<sup>th</sup> Floor  
Columbia, SC 29201

Dated: January 17<sup>th</sup>, 2018



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for over 30 years.

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January 17, 2018

Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
JAN 19 2018  
SC Court of Appeals

**RE: Edmund Dillon (Deceased), Appellant, v. Fleet Pride,  
Employer, and Gallagher Bassett as American Zurich  
Insurance Co., Carrier, Respondents.  
Appellate Case No. 2017-002124  
Trial Court Case No. 1501382**

Dear Ms. Kitchings:

Please find attached the original and one (1) copy of the **INITIAL BRIEF OF APPELLANT** and Appellant's **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** in the above-referenced matter. I would appreciate you returning a clocked-in copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter I am hereby serving Counsel of Record with a copy of this document.

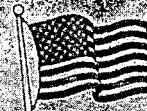
Sincerely yours,



Preston F. McDaniel

PFM/abh/smk/abh  
Enclosures

cc: Cindy Dooley & Carmelo Sammataro, Attorneys at Law  
Brian Dumas, Esq.



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1315 Elmwood Avenue  
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**RECEIVED**  
JAN 19 2018  
SC Court of Appeals

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