**THE STATE OF SOUTH CAROLINA**
In the Supreme Court



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**APPEAL FROM THE APPELLATE PANEL**
**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

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Opinion No. 5458
(SC Ct. App. heard June 9, 2016;
Filed December 7, 2016)

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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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# FINAL REPLY BRIEF OF PETITIONER

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## STANDARD OF REVIEW

By way of Reply to the Standard of Review set out by the Defendants as part of their Respondents' Brief, this appeal involves an appeal from the SC Workers' Compensation Commission and therefore is not only an appeal filed under the SC Administrative Procedures Act, SC Code §1-23-380, but is also an appeal filed under the Workers' Compensation Act under SC Code §42-17-60. The Workers' Compensation Act is a statutorily created scheme of benefits in derogation of the common law which takes away the right to trial by jury and replaces it with an appointed Commissioner system for which our Appellate Courts have set out specific fundamental review principles that apply to appeals from the Commission. In that regard, the Respondents do not set out the entire Standard of Review applicable in a workers' compensation case, which principles must be added to any recitation of the Standard of Review recited by any party or by the Court. Those fundamental principles of law that apply specifically in workers' compensation cases as part of the Standard of Review are:

First, it is the established law of this State that the Act must be liberally construed and that any reasonable doubts as to the construction of the Workers' Compensation Act must be resolved in favor of the injured worker and,

> "its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage . . ."

> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws **shall be liberally construed in favor of the employees and their dependents,** in furtherance of the beneficent purposes for which they were enacted and to avoid any incongruous or harsh results." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emphasis added).

Second, since the workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the reviewing Court must strictly construe such statutes, leaving it to the Legislature to amend and define any ambiguities. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). Cox v. BellSouth Communications, 356 S.C. 468, 589 S.E.2d 766 (SC App. 2003, reh. den., cert. den.).

## ARGUMENT

### REPLY TO THE GENERAL NON-RESPONSIVE ARGUMENT RAISED BY THE RESPONDENTS:

#### PETITIONER DID NOT FAIL TO APPEAL AND/OR PRESERVE CERTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE SINGLE COMMISSIONER WHICH ARE NOT NOW THE LAW OF THE CASE.

This argument and the arguments made are not responsive

to the issues upon which certiorari was granted and should be stricken from the Brief. Further, the Respondents did not appeal those issues and thus abandoned those issues. Finally, the arguments are in error in that the Appellant preserved for argument all of the issues presented to the Court of Appeals for consideration.

The Respondents did not file an appeal pursuant to SCACR, Rule 203(b) nor did they file a cross appeal under subsection (c). The Respondents in making this argument allege that the Petitioner did not specifically challenge certain findings and conclusions in his Request for Review to the Full Commission. However, the Petitioner would submit that this Court will find from a review of the Record absolutely no argument made on that basis to the Full Commission, either in brief or in oral argument, by the Defendants/Respondents. Therefore, in the first instance this issue having not been appealed from the Full Commission Decision to the Court of Appeals for review, this argument should be stricken as not being an issue properly preserved and submitted to the Court of Appeals for review.

Next, the case cited by Respondents in argument, Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d, 685 (SC App. 1993), actually supports Petitioner's Reply argument that the issues were preserved. In Green the Full Commission went outside of the issues raised for review and the Findings of Fact and Conclusions of Law that had been made by the Hearing

Commissioner, and made a decision based on an issue that had not been appealed and remanded to the Hearing Commissioner. In Green, the Respondents before the Full Commission appealed that decision and were the Appellants before the Court of Appeals alleging in part that the Full Commission had gone outside of the Record and outside of the issues that had been presented to them for review. In other words, those issues were specifically presented to the Court of Appeals by an appeal by the Respondents in Green as Appellants whereas in this case, there was no such appeal by Respondents in this case.

Next, not only did the Respondents not raise this as an issue for decision before the Full Commission nor did they appeal, but also, they misstate and comingle the law as to appeals from the Hearing Commissioner to the Full Commission versus Appeals from the Commission to our Appellate Courts.

SC Code §42-17-50 applies to appeals to the Full Commission and simply requires that a request for review of the Decision be made. While it is true that the parties must be given notice of the issues to be addressed by the Full Commission, Green, supra, there is simply no requirement that each individual Finding of Fact or Conclusion of Law be appealed to the Full Commission but only that the issue that the party wants addressed can readily be determined and is clear from the exceptions and arguments of the party; and that the issue was ruled upon by the Hearing Commissioner.

Goodman v. City of Columbia, 318 SC 488, 458 S.E.2d 53 (1995); Holston v. Allied Corp, 300 S.C. 174, 386 S.E.2d 793 (SC App. 1989). In this case not only did Petitioner file a request for review, but specifically listed in his request a request for review of all of the Findings of Fact and Conclusions of Law and decisions made by the Hearing Commissioner. He then addressed the issues of law and fact and the Decision of the Hearing Commissioner in his Brief and at oral argument before the Full Commission to which a responsive Brief was filed by the Respondents concerning the specific legal and factual issues that Petitioner wanted to have reviewed in reference to which all of the Findings of Fact and Conclusions of Law were made. (App. p. 223-227).

Also, the Respondents in reality mix apples and oranges as there is a distinct difference between a request for review by the Full Commission and its requirements versus an appeal on specific issues to our Appellate Courts. It is completely sufficient, (there is no case law to the contrary), in requesting a review by the Full Commission to allege, a specific general exception asking the Commission to review all Findings of Fact and Conclusions of Law and decisions made by the Hearing Commissioner. In addition to the statute only requiring a Request for Review (see Goodman, supra) in the case of Clark v. Aiken County Gov., 366 S.C. 102, 620 S.E.2d 99 (SC App. 2005), also cited by the Respondents, the Court of Appeals in its decision refers to

several cases including White v. Medical Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003) holding that even very general, vague exceptions, not specific general exceptions as is in this case (App. p. 223-227), are sufficient to provide for review before an Appellate Court, much less before the Full Commission. Those cases also cite back to the Green decision and chastise parties for not raising that type of issue (issue preservation) at the Full Commission and then raising it at the Appellate Court noting that, "all parties should raise all necessary issues and arguments to the lower Court and attempt to obtain a ruling." The Court also noted that the Appellate Court Rules of Procedure should not be, "interpreted to create a trap for the unwary." The Respondents chose not to raise this issue before the Full Commission; did not appeal this issue; attempted to raise it as a separate argument to the Court of Appeals and now raise it again to this Court.

## ARGUMENTS

### I. THE COURT OF APPEALS ERRED BY NOT EXTENDING THE UNEXPLAINED INJURY PRESUMTION TO THE FACTS OF THIS CASE.

In Respondents Brief as to this issue, the argument is broken out into a general argument and then to sub-arguments. In Reply to the general argument, the Respondents are again trying to infuse cause into the definition of "injury by

accident". That has never been part of the definition throughout the entire history of the Act and specifically since 1939 where cause was specifically rejected by this Court in Layton v. Hammond-Brown-Jennings, 190 S.C. 425, 3 S.E.2d 492 (1939). That definition has been repeatedly restated and was specifically reviewed as to the historical precedence of that definition in this Court's decision in Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785(2002). In Pee this Court referred to all of that line of cases and recited and quoted from the line of cases concerning the definition of injury by accident and reaffirmed there is no necessity of proof of a cause of the event but only that there be an unexpected result from the work activity(ies). The Court in Pee quoted from the Heirs v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211 (1952):

> "If the injury results from the conditions under which the work is being carried on, there is no reason why it should not be held compensable. In such cases, it is one of the casualties of business; and it is the purpose of the compensation statutes to place the burden of casualties upon the business and not upon the unfortunate employee."

As cited by Petitioner in his Final Brief at p. 12 and 13 and as this Court has held since 1939, cause is not an issue and the Respondents are clearly trying to infuse cause of the injury into the definition of injury by accident which this Court has rejected. If the Claimant is involved at the time of the accident in work activities, or in other words a

connection to the conditions under which the work is required to be performed and the resulting injury, the arising out of part of the definition is met. Here again, it is not the cause, it is the unexpected result stemming from the work activities that constitutes injury by accident. Just like Mr. Ellis and unlike Ms. Miller, Mr. Turner was involved in work activities (arising out of) at the time (in the course of) that the injury occurred and from which he had an unexpected result. To rebut that, there has to be substantial evidence for one of the strictly limited exceptions to apply to prevent benefits being awarded; e.g. at the time and place of injury a result such as, an internal breakdown or natural condition (heart attack/aneurysm), unconnected to the conditions under which work is being performed occurred.

A. **THE COURT OF APPEALS ERRED BY REFUSING TO APPLY THE UNEXPLAINED INJURY PRESUMPTION TO THE FACTS OF THIS CASE.**

In brief reply, the Respondents continually try to rephrase the presumption definition that this Court has applied and that this Court has established. This Court, since it established the unexplained injury presumption in Owens v. Ocean Forest Club, Inc., 196 S.C. 97, 12 S.E.2d 839 (1941) has stated, referred to, recited and defined the presumption as follows:

> "One charged with the performance of a duty and injured while performing such duty, or found injured at a place where his duty may have required him to be, is injured in the course of,

and as a consequence of, the employment."

The use of the word "injured" and the lack of any limitation to only a death situation have always been and are the words of this Court not the Petitioner.

Applying the presumption and the principle that the Commission's decision cannot be based on surmise, speculation or innuendo whether it is an award of benefits versus a denial of benefits, where is there any evidence medical, testimonial or circumstantial on the day and at the time that this accident occurred that the injury did not result from the exposure occasioned by the nature of the employment or more importantly, that there was evidence that the injury did not result from the work activities but resulted from an unrelated cause. There is none. For a study in the difference, compare this Court's decision in Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981) with Miller v. Springs Cotton Mills, 225 S.C. 326, 82 S.E.2d 458 (1954). In Ellis, Mr. Ellis was arising from working on a machine and this Court found injury by accident arising out of and in the course of his employment. Ms. Miller was at lunch and arose from the lunch table and was not performing activities associated with her work and this Court found that she did not sustain injury by accident arising out of her employment activities. Just like Mr. Ellis, Mr. Turner had to prove nothing more to meet his burden in this fall situation.

B. **THE RESPONDENTS DID NOT PRESENT SUFFICIENT AND/OR SUBSTANTIAL EVIDENCE TO REBUT THE PRESUMPTION.**

As noted and without citation, the Commission's decisions cannot be based upon surmise, speculation or innuendo. The Respondents argue that there is, "sufficient evidence of a cause personal to Petitioner to rebut the presumption. The Respondents go on to argue and cite to side effects of various medications, one or more of which the Claimant may have been taking on the day of the accident. The Respondents instead of applying the substantial evidence standard state in reference to those side effects that Petitioner, "was taking medication that **can cause** dizziness, drowsiness, diarrhea, abdominal pain, nausea, seizures, loss of consciousness, change in walking and balance, etc. ..." There is simply no evidence, not that that "could" be the case or that those medicines, "can" cause something but that Mr. Turner "did" have or he was on that day and at that time of accident suffering from/exhibiting any of those. In fact, the Court will find no evidence in the Record or referred to in Respondents Statement of Facts of any of these conditions or side effects actually being present or Mr. Turner having any of those even on any of the days before the accident. The Respondents want this Court to ignore that there is simply no evidence of any of those on the day and time of the accident. It is surmise, speculation and innuendo to cite to all those possible causes when there is no evidence that they were

present at that time or that he was suffering from any of those side effects. There is no evidence of an, "internal" cause peculiar to the Petitioner at the time that this occurred. He was last seen going about his work activities required him to be. He was found at a place that those work activities required him to be. All the evidence is that he was feeling great and in wonderful shape that day. The Respondents may dream otherwise but that is simply not the facts and there are no facts to support the Commission's decision to the contrary; medical, testimonial or circumstantial at the time and place that this accident occurred.

## II. THE COURT OF APPEALS SHOULD NOT HAVE APPLIED A NORTH CAROLINA PRECEDENT WHERE THERE IS NO ABSENCE OF CONTROLLING SOUTH CAROLINA CASE LAW.

By way of reply, the Petitioner would first point out in reference to the argument of a lack of controlling case law in South Carolina that is simply not true. There is absolutely controlling Case Law as cited in the Petitioner's Brief in reference to our Court's commitment to a liberal interpretation of the Act and applying any presumptions to achieve an absolute maximum expansion of benefits to the injured worker. There is also specific Case Law under the s of this Court since time in memorium and specifically repeated throughout such as in Nicholson v. South Carolina Department of Social Services, 411 S.C. 381, 761 S.E.2d 1

(2015) that exceptions and limitations such as the idiopathic fall exception are to be strictly limited in their application. It should not be lost on the Court by way of reply that the Court of Appeals relied on the dissent in cases decided by this Court not on its precedents to justify its opinion. Finally, there is the specific decision by this Court holding it would apply the presumption in an injury situation. Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 237 (1960).

In further reply, the North Carolina Supreme Court has never had occasion to deal with or issued its opinion in a situation where the presumption is applied to an unwitnessed injury where the Claimant lived but does not remember or for other reasons does not know what happened in the accident. In Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988) the North Carolina Supreme Court, not Court of Appeals, established their presumption and stated the presumption very similarly to ours and stated that, "in the absence of evidence to the contrary, the presumption or inference will be indulged in that **injury** or death arose out of employment where the employee is found injured at the place where his duty may have required him to be ..." The N.C. Court of Appeals' decision in Janney v. J.W. Jones Lumber Co., Inc. 145 N.C. App. 402, 550 S.E.2d 543 (NC App. 2001) relied on by Respondents and cited by the Court of

Appeals panel was a 2:1 decision and the appeal of that decision to the North Carolina Supreme Court was withdrawn and therefore the Supreme Court did not have an opportunity to review it, the dissenting opinion cited the Pickrell presumption language referring to both injury or death stating:

> "By using this language, the Supreme Court clearly indicates that there are situations other than death cases where a presumption would be appropriate. I believe that the facts here present this type of occasion. Accordingly, I would apply the Pickrell presumption to Plaintiff's claim."

The Respondents also fail to note that in the facts in Janney, there was specific medical evidence that the fall was due to a seizure.

Finally, this Court has spoken in its decision in Fowler in a situation where Mr. Fowler lived and was totally disabled, which decision speaks for itself in that this Court clearly stated that it would apply the presumption in the appropriate case where the Claimant was injured, the accident was unwitnessed and the Claimant, due to his injuries, could not testify as to what happened. The Petitioner will leave to the Court it's reading of its decision.

One final note by way of reply, the Respondents allege that this Court in establishing the unexplained injury presumption, again not death presumption, in Owens relied on Goodwin v. Bright, 202 N.C. 481, 163 S.E.2d 576 (N.C. 1932) but that is not the case. This Court relied on that case for

another proposition. The North Carolina presumption was established until later in the Pickrell decision, supra, in which the North Carolina Supreme Court cited to 100 CJS Workers' Compensation §513 (1958) which is actually the successor section in Corpus Juris Secondum to the section relied on by our Court in Owens which at the time Owens was decided was set out in 71 CJ §1060.

## III. THE COURT OF APPEALS ERRED BY NOT APPLYING BARNES AND NICHOLSON TO THE FACTS OF THIS CASE.

By way of reply, the Petitioner would simply submit to the Court if Barnes v. Charter One Realty, 411 S.C. 391, 768 S.E.2d 651 (2015) and Nicholson v. South Carolina Department of Social Services, 411 S.C. 381, 769 S.E.2d 1 (2015) are not controlling precedents in this case, why did the Court of Appeals find it necessary to cite to the dissent in those cases to support its decision. Those cases are controlling precedent; the Respondents know it; and the Court of Appeals should have applied those precedents.

Also, as in Barnes and Nicholson, all the evidence establishes that Mr. Turner was performing his duties of employment at the time that he fell. The undisputed evidence is that Mr. Turner had just washed his truck which was obviously wet. He was last seen putting his lunch pail and that of a fellow employee's into the truck and it is undisputed that he would have had to have stepped up onto the truck step to place those neatly on the seat. There is no

difference in this evidence than there is in reference to the evidence in Barnes and Nicholson that they were performing work activities at the time that they fell. Contrary to the statement by the Respondents, there is absolutely no evidence that he was standing still at the time that he fell.

## IV. THE COURT OF APPEALS DID NOT PROPERLY APPLY THE SUBSTANTIAL EVIDENCE STANDARD.

The Commission's decision cannot be based on surmise, speculation or innuendo. There must be substantial evidence surrounding the facts and circumstances as of the date, time and place that the accident occurred. There is absolutely not one shred of evidence medical, testimonial or circumstantial that the Claimant was not in tip-top condition on the date of the accident. All of the evidence is he was talking, laughing, cutting up and was in a great condition and had just spoken with and was seen walking normally to his truck and putting his lunch pail into the seat of the truck when the accident happened. He was involved in his work activities. There is absolutely not one shred of evidence of any natural condition, seizure, medication side effect or whatever contrary to that evidence. There is no evidence of any pre-existing condition such as a seizure disorder. Again, there is simply nothing in this Record from an evidentiary standpoint that would establish his fall came about as a result of a natural condition. This Court should apply its prior decisions; a liberal construction in

reference to the application of the presumption; and the Barnes/Nicholson standard; the fact there is absolutely no contradictory evidence and award benefits as a matter of law.

Finally, the Petitioner would point out again by way of reply as set forth in the Brief that there are two (2) distinct lines of cases in reference to the unexplained injury presumption in reference to: 1) injuries which stem from accidental means such as a fall and head injury versus 2) results from natural conditions. This Court has recognized not only in that line of cases but also in its opinions such as in Nicholson and Barnes, that any exceptions and/or limitations on the application on a liberal construction are to be extremely limited and there has to be evidence of, for example an internal breakdown or there has to be clear evidence that the result is unrelated to the work activities. Compare Ellis v. Miller, supra. To be intentionally redundant, this Court as the Petitioner wrote has held for over eighty (80) years that the Act is to be liberally construed and that, "its provisions are to be reconciled, if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage." The Act is to be liberally construed in favor of the injured worker and their dependents.

## V. THE COURT OF APPEALS' OPINION IS IN DEROGATION OF THE PAST PRECEDENTS OF THIS COURT WHICH IT IS CONSTITUTIONALLY BOUND TO APPLY.

Again, if the Court of Appeals opinion is not in derogation of the past precedents of this Court which it is Constitutionally bound to apply, why did the Court of Appeals cite to the dissent in both Nicholson and Barnes to support its opinion?

Also, this Court has not changed or varied the language of the presumption as it established which is to be applied to situations where, an employee is "found injured at the place where his duty may have required him to be." Owens supra.

This Court, not the Petitioner, cited the unexplained injury presumption in Fowler from Eargle v. South Carolina Electric & Gas, 205 S.C. 423, 32 S.E.2d 240 (1944) and stated that it would have applied that presumption but for the fact that the evidence established that the wreck did not occur, "in the course of" the employment. No matter how hard the Respondents try, they cannot change the law and they cannot change the facts in Fowler or this Court's words.

Finally, by way of reply, when has this Court ever instructed or told the Bar and the Court of Appeals and all other inferior Courts and the Commission that the presumption it created which it has recited repeatedly as the unexplained injury presumption applies only to death situations. It has

not and under the fundamental principles applied by this Court ever since the inception of the Act and in accordance with all of its prior decisions including Nicholson and Barnes, it will not abandon its fundamental principles and not apply that presumption in this case.

## CONCLUSION

Having fully replied to the Arguments, the Decision should be reversed and this worker provided benefits.

Respectfully submitted,

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January 29, 2018

THE STATE OF SOUTH CAROLINA
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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January 29th, 2018

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**PROOF OF SERVICE**

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I certify that I have had Respondents served with the **FINAL REPLY BRIEF** by depositing a copy of it in the United States Mail, postage prepaid, on January 29th, 2018, addressed to its attorney of Record:

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Dated: January 29th, 2018

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