THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2017-002124

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

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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OBJECTION TO RESPONDENT'S STATEMENT OF ISSUES ON APPEAL AND BRIEF FOR NON-COMPLIANCE WITH SCACR RULE 208(B)(1)(A)-(E) AND (B)(2)

The Court will first note from a review of the Respondents' Brief that their Statement Of Issues On Appeal is not the same as their Arguments. The Court will further note that the Arguments Respondents make which are to be responsive to the Arguments made by the Appellant are in a completely different format as to the Issues Presented by the Appellant on appeal.

While SCACR Rule 208(b)(2) allows for the Respondents, (and the Appellant does not dispute the right of the Respondents), to state a contradictory Statement Of The Issues presented to those of the Appellant, that same subsection of the Rule in reference to the Brief of the Respondent requires that the Brief "shall conform to the requirements of Rule 208(b)(1)(A-E)." Neither the Court nor the Appellant should be left to have to try to discern or interpret which Arguments being made by way of response by the Respondents are being made in response to which Issues that are being presented by the Appellant to this Court for decision. This non-compliance is something that is occurring on a not infrequent basis in Appellate practice.

What Rule 208 contemplates is that the Respondents may rephrase the Issues Presented on appeal as to each issue that is presented for review. Any objection to an issue presented by Appellant should be made within the context of the Argument and

not by reformatting or by violating the Appellate Court Rules or making it difficult for the Court and the Appellant(s) to obtain an Appellate review of the Issues Presented. This is made clear by Rule 208(b)(1)(B) which states that the, "statement shall be concise and direct as to each issue, and may be stated in question form. Broad, general statements may be disregarded by the Appellate Court."

As noted, the contrary Statement of Issues Presented by the Respondents contains broad, sweeping statements of law and fact but yet the Arguments are broken into six (6) different Arguments. Thus, any objection as to the Issues as Presented should have been made within the context to the Arguments made in response to the Issues Presented by the Appellant and since the Issues Presented and the reformatted Brief are in a violation of the Appellate Court Rules, the Brief should be disregarded.

STANDARD OF REVIEW

By way of amendment to the Standard of Review set out by the Respondents 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 more specifically an appeal filed under the Workers' Compensation Act under SC Code §42-17-60. The Workers' Compensation Act is a

statutorily created scheme of "swift and sure" benefits payable in derogation of the common law and which takes away the fundamental right to trial by jury and replaces it with an appointed Commissioner (factfinder) system for which our Appellate Courts have established specific fundamental review principles that apply to appeals from a Commission decision to insure the purposes of the basically no-fault system are being met. In that regard, the Respondents do not set out the entire Standard of Review applicable in a workers' compensation case. Those principles must be addressed and are part of any recitation of the Standard of Review recited by any party or by the Court. Those fundamental principles of law that specifically apply to workers' compensation cases as part of the Standard of Review on appeal are:

First, it is the established law of this State that the Act and its provisions 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.).

While this Court or an Appellate Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, this Court may and shall reverse or modify the decision if the Commission's decision is affected by an **error of law** or is clearly erroneous in view of the substantial evidence in the Record as a whole. Clemmons v. Lowe's Home Centers, Inc.-Harbison, 420 S.C. 282, 803 S.E.2d 268 (2017). (Emphasis added).

ARGUMENTS

I.A. THE FULL COMMISSION DID NOT PROPERLY APPLY APPLICABLE LAW EITHER AS A MATTER OF FACT OR LAW AND APPELLANT DID MEET HIS BURDEN OF PROOF PROVING COMPENSABLE INJURY BY ACCIDENT.

By way of reply, this is not an idiopathic fall case but more importantly that concept, being an exception from the general rule that a work-related injury is compensable, is to be applied as narrowly as possible as being contrary to the basic principle of interpreting the workers' compensation laws in favor of benefits to the injured worker. The Supreme Court and this Court have specifically held that the idiopathic fall concept being an exception is to be extremely and narrowly applied. Foran v. Murphy USA, 420 S.C. 377, 803 S.E.2d 311 (S.C. App. 2017) and Nicholson v. S.C. Department of Social Services, 411 S.C. 381, 769 S.E.2d 1 (2015); Barnes v. Charter One Realty, 411 S.C. 391, 768 S.E.2d 651 (2015). The uncontested facts in the decision in Bagwell v. Ernest Burwell, Inc., 377 S.C. 444, 88 S.E.2d 611 (1955) which differentiate that case from this case, (but which decision contrary to these later limiting decisions is relied on by Respondents in this case as it is in every case to allege an idiopathic fall), are specifically set out in Appellant's Brief. In that case, Mr. Bagwell died without speaking and there was direct evidence from a witness who, unlike here, could see Mr. Bagwell completely and totally and who specifically testified Mr. Bagwell did not slip

or trip. (emp. added). In this case, Mr. Dillon lived and there was direct evidence from Mr. Dillon that he slipped and fell and also direct evidence from an unknown witness recorded within three (3) days of the date of the accident that Mr. Dillon tripped and fell. Mr. Fludd's deposition evidence upon which the Respondents and Commission relied is specifically quoted at p. 9 of Appellant's Brief and will not be quoted again here. However, Mr. Fludd could not and did not see Mr. Dillon from the waist down and he specifically testified: 1) he could not say whether or not Mr. Dillon slipped; and 2) that he had absolutely no idea as to why Mr. Dillon fell.

Again, looking at the evidence in this case as is set forth in Appellant's Brief, the Respondents try and want this Court to apply the narrow idiopathic exception and ignore the specific difference in the testimony and evidence available in Bagwell versus the evidence available in this case.

Finally, at some point, this Court is going to have to address the Commission's failure to apply the Claimant's burden of proof by a preponderance of the evidence and the fundamental principle of a liberal construction in favor of benefits to the worker as being an error of law versus substantial evidence in the Record. There have been more reversals by our Appellate Courts based on a lack of substantial evidence in the Record to sustain the decision of Commission denying benefits in the last

seven (7) years than in the entire history of the Act.

I.B. THE COMMISSION DID NOT PROPERLY DISTINGUISH BAGWELL FROM NICHOLSON AND BARNES AND DID NOT PROPERLY APPLY THE LAW TO THE FACTS OF THIS CASE.

In Barnes v. Charter One Realty, supra, there was no explanation as to the, "cause" of the fall. The Supreme Court again made it clear under the definition of injury by accident that it is the unexpected result from the work activity that is compensable. The worker has never since the inception of the Act; was not in Barnes; and is not today required to prove the "cause" of the injury. Under S.C. Law, the unexpected result stemming from the work activity is compensable[1] with the only very limited "exception" being that where there is specific/ direct evidence that the "cause" of the fall, an accidental-type injury and result, was an internal breakdown or other internal cause peculiar to the Claimant, the injury is not compensable. Again, as the Court noted in Barnes, in Bagwell "the circumstances of the fall were not simply unexplained, but indicated the cause was internal." (Emphasis added). Again, in this case, there was direct evidence that the Claimant slipped

[1] Layton v. Hammond, Brown, Jennings, 190 S.C. 425, 3 S.E.2d 492 (1939); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952); Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981); Barnes v. Charter One Realty, supra. Quoting from Hiers v. Brunson Const. Co.: "Such an injury is accidental in that it is unforeseen and unexpected. If it 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 a case, it is one of the casualties of the business; and it is the purpose of the compensation statutes to place the burden of such casualties upon the business and not upon the unfortunate employee."

and fell both from the Claimant and an unknown witness; that the Claimant was involved of his work activities, walking/standing, and no evidence on the date/time that the accident occurred that the cause was internal.

Finally, in reply, the Appellant would ask the Court to note that the undisputed medical evidence is that the injuries to the Claimant's head were to the "right frontal hematoma" and "right frontotemporal parietal subdural hematoma.", (Cl. APA, p. 22) of the Claimant's head not the back of his head as one would find if the Claimant fell, "rigidly", backwards as in Bagwell; there is no testimony he fell "rigidly".

II.A. THE COMMISSION ERRED BY EXCLUDING THE EVIDENCE FROM APPELLANT'S RETAINED LEGAL NURSE.

The argument as to why this expert testimony was improperly excluded as a matter of law is set forth fully under Argument III of Appellant's Brief. By way of reply, to Respondents' Argument concerning the arguments made by the parties as to the purpose of the admission of the evidence from Nurse Crider, the arguments of the parties are not within the Record.

Next, in reference to the argument this issue was not presented, the hearing Commissioner and the Commission are required by law to make detailed findings of fact and conclusions of law on all essential issues presented to them for decision. In this case, the Court will find in the hearing

Commissioner's Order, first, in the Statement of the Case absolutely no reference in the recitation of the APA Submissions and Exhibits noting the exclusion of this evidence and/or setting out a reason for that exclusion. In the Findings of Fact and Conclusions of Law, the Court will not find any reference to the exclusion of this evidence either on a factual and/or a legal conclusion of law basis. Thus, the order sets forth no basis for the exclusion as a matter of fact or as a matter of law to specifically challenge. In fact, the Court will find the only specific reference by the Commissioner in the Record concerning the Commissioner's exclusion is found at p. 5 of the Transcript wherein the blanket statement is made that, "I think a correct characterization would be a report from Donna Crider who is an R.N. and I rule that I was going to exclude that from the APAs".

In two separate Grounds for Review, the Claimant requested review of the hearing Commissioner's exclusion and/or failure to consider the expert medical evidence submitted by the Claimant. In the first exception, the Appellant asked the Full Commission to address rulings of the hearing Commissioner concerning the evidence and other issues involved. In Exception 14, the Claimant specifically asked for review of the hearing Commissioner's failure to give weight to the expert evidence presented concerning the essential issues before the

Commissioner for decision.

Then, in Appellant's Brief to the Full Commission, the Appellant under Argument III specifically raised the decision to exclude this evidence as an error of law to the Full Commission. Clearly this issue was properly presented and properly preserved for argument.

Finally, by way of reply, the interpretation of and an analysis of the hospital records following the accident in reference to the Claimant's condition and statements and tests results and actions taken by the doctors and nurses involved was critical to the Claimant's case, particularly in reference to the Commissioner weighing and considering the meaning of that evidence. Clearly, expert evidence interpreting the notes, the timing and the procedures followed by the nurses and doctors involved would aid the Commissioner in determining the weight and value to be given to that evidence. This was a critical/ prejudicial evidentiary error for Appellant's case, as to Mr. Dillon's condition at the time of his statements.

II.B. THERE IS NOTHING TO ESTABLISH THAT THE FULL COMMISSION WEIGHED THE EVIDENCE AND TESTIMONY OF APPELLANT'S MEDICAL EXPERT.

The Commission is required to make detailed Findings of Fact and Conclusions of Law on all essential issues presented for decision. Drake v. Raybestos Manufacturing Company, 241 S.C. 116, 127 S.E.2d 288, (1962).

One of the essential issues for decision was what was the evidence of the Claimant's condition on the date of and at the time of the accidental injury, the fall, which would specifically call for even the consideration of the very limited exception the Defendants wanted applied to deny benefits in this workers' compensation case. As is set forth in Appellant's Brief, the Appellant's expert addressed this issue based on his specific review of the records at the hospital that day and the absence of any significant symptoms or findings in the medical workup at the hospital that would lead to the conclusion that any condition peculiar to him had caused the fall at work. That evidence is nowhere reviewed in the Commissioner's Findings of Fact or Conclusions of Law nor as to why it was not given great weight.

The Nurse Practitioner's review/opinion was excluded.

The Respondents own expert specifically testified that, "**there was no objective medical evidence to establish the cause of the Claimant's fall**". Quoting from his deposition:

> "Question: Ok. 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?
>
> Answer: That's correct." (Depo. p. 24, ll. 17-21).

Repeatedly, beginning at p. 24, l. 22 and proceeding through p. 28, l. 19, Dr. Vandersteenhoven, M.D. stated that on the date

and time of the accident and based on a review of all the medical records from the EMS and ER that day, that there was "no objective evidence" to establish the cause of the Claimant's fall as being anything other than accidental.

II.C. THE FULL COMMISSION ERRED BY CONSIDERING THE DEPOSITION OF JOSIAH FLUDD.

This argument is specifically addressed and reviewed in Argument V of Appellant's Brief.

However, in reply as to argument that this issue was not raised, it was specifically raised as an issue for review in the Claimant's Brief to the Full Commission under Argument V (Cl. FC Brief, p. 16).

The Respondent's appropriately note that the Full Commission is the final arbiter of the facts but fail to note this Court is the final arbiter of the law.

There is no question that Appellant's Counsel objected to leading and that Mr. Fludd, whose deposition served as the basis for the Commissioner's decision, was lead through that Affidavit at the deposition through the use of leading questions.

There is no question Appellant's Counsel served Respondents with a Subpoena prior to that deposition and that documentation surrounding and the Affidavit served exclusively as the basis for Mr. Fludd's testimony at deposition had not been provided pursuant to the Subpoena. (Ex. No name of who took the

Affidavit? Duh.)

All this evidence should have been excluded due to the use of leading questions but more importantly, as set forth in Appellant's Brief, due to the use of this Affidavit when Respondents failed to comply with discovery of it; i.e., the right to meaningful cross-examination in a meaningful way. This Affidavit and the leading testimony based on that Affidavit is the sole basis for the Commissioner's decision from a factual standpoint. Appellant would submit there is no evidence that could have been wrongfully admitted that would have been more prejudicial to Appellant in reference to the facts and circumstances of what happened to him that day the day of the accident.

II.D. ASSUMING ARGUENDO THAT THE OBJECTION TO LEADING WAS NOT PROPERLY PRESERVED NOR WAS THE USE OF THE AFFIDAVIT AND NATURE OF THE QUESTIONS IMPROPER, THE FULL COMMISSION IMPROPERLY CONSIDERED THE TESTIMONY OF THE JOSIAH FLUDD.

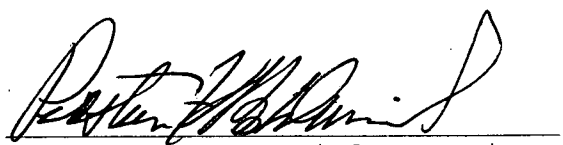
By way of reply, assuming that the objection to leading was not preserved and the use of the Affidavit and nature of the questions (leading) was not improper, the Commission failed to properly consider that evidence. While it is black letter law that the Commission is the factfinder and has the right to resolve conflicts between the testimony of various witnesses or conflicts within the testimony of the same witness in this case, there is simply no contradiction in and, the testimony of Mr.

Fludd is uncontested. The only testimony given by Mr. Fludd was that he could not see Mr. Dillon from the waist down and he could not say whether or not Mr. Dillon slipped or tripped as specifically set out in the Appellant's Statement of Facts in Appellant's Initial Brief. There being no conflict and the uncontradicted evidence being that Mr. Dillon tripped or fell, (the evidence from him was that he did trip or slip and the statement from the unidentified witness was he slipped or tripped), there is simply no evidence in Mr. Fludd's testimony that Mr. Dillon did not slip or trip; an unexpected result.

CONCLUSION

For all of the foregoing reasons, the decision of the South Carolina Workers Compensation Commission should be reversed or at a minimum should be reversed and remanded for a de novo hearing with instructions to apply the law.

Respectfully submitted,



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May 14, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
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Edmund Dillon, (Deceased) Employee, ... Appellant,

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

PROOF OF SERVICE

I certify that I have served the **INITIAL REPLY BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on May 14, 2018, addressed to:

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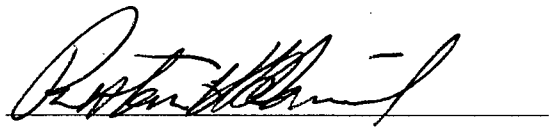

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RE: Edmund Dillon (Deceased) Employee, Appellant v. FleetPride, Employer and Gallagher Bassett as TPA for American Zurich Insurance Co., Carrier, Respondents. Appellate Case No.: 2017-002124

Dear Ms. Kitchings:

Please find attached the original and one (1) copy along with Proof of Service pursuant to SCACR Rule 208(a)(3) of the **INITIAL REPLY BRIEF OF APPELLANT** 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
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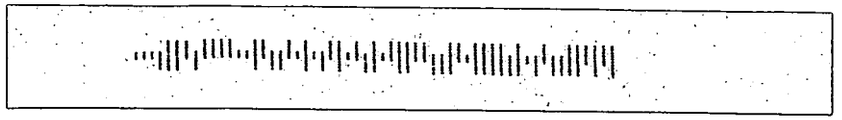

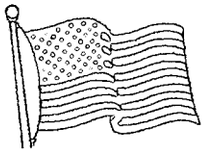

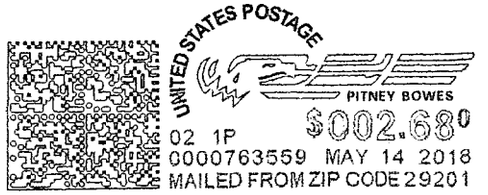

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