

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

JUN 26 2018

SC Court of Appeals

Appellate Case No. 2017-002124
W.C.C. File No. 1501382

Edmund Dillon, Employee,.....Appellant,

v.

FleetPride, Employer, and Gallagher Bassett as TPA for
American Zurich Insurance Company, Carrier,..... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. DOES THE SUBSTANTIAL EVIDENCE SUPPORT THE CONCLUSION OF THE UNANIMOUS FULL COMMISSION THAT APPELLANT SUSTAINED AN IDIOPATHIC FALL AND NOT A COMPENSABLE INJURY?

- II. DID THE FULL COMMISSION PROPERLY RULE ON EVIDENTIARY ISSUES REGARDING THE ADMISSION OF EVIDENCE?

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the “substantial evidence” rule as the standard of review for decisions of the Workers’ Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the court reviewing an award or denial of benefits may only reverse or modify the agency’s decision if the findings, rulings, and conclusions of the administrative agency are “clearly erroneous in view of the reliable and substantive evidence of the whole record.” *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, the court’s “role is appellate only, and is limited to deciding whether the Commission’s decision is not supported by substantial evidence or is controlled by some error of law.” *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers’ Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry’s, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial

evidence.” *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers’ compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). It is not the task of this Court to weigh the evidence as found by the Full Commission. *Shealy*, at 455, 535 S.E.2d at 442.

STATEMENT OF THE CASE

April Dillon, as Personal Representative of Edmond Dillon (“Appellant”), filed a Form 52, Request for Hearing, alleging FleetPride (“Employer”) and Gallagher Bassett as TPA for American Zurich Insurance Company (“Insurer,” collectively “Respondents”), owe benefits resulting from Appellant’s collapse at work. (R. p. 47) Respondents filed a Form 53, Employer’s Answer, denying Appellant was entitled to benefits pursuant to the Act as the fall did not arise out of and in the course of his employment. (R. p. 48)

Following a hearing before the single commissioner on August 30, 2016, the single commissioner determined Appellant failed to meet his burden of establishing a compensable claim by a preponderance of the evidence, determining instead that Appellant simply collapsed for reasons not related to his employment. (R. pp. 33-46) Appellant sought review of the single commissioner’s Decision and Order via Form 30, Request for Commission Review, filed February 15, 2017. (R. pp. 1171-1174) Following oral argument on May 15, 2017, a unanimous panel of the Full Commission upheld the single commissioner’s denial of benefits. (R. pp. 1-30) Appellant filed her Notice of Appeal in this Court on October 12, 2017.

FACTS

Appellant was an employee for FleetPride at the time of his injury. He worked behind the counter as a parts salesman. Appellant was at work on the morning of February 23, 2015, when the sole eyewitness, Josiah Fludd, observed Appellant collapse outside the front of Employer's building. (R. p. 156, line 19 – p. 157, line 18) Fludd observed Appellant fall while Appellant was standing idle and without any attempt to stop himself or break his fall. (*Id.*) Appellant hit his head on the concrete and lost consciousness. Fred Mogridge, Employer's first staff member to come outside after Appellant's fall, got a fellow employee to call EMS to come to the scene. (R. pp. 1238-1240)

EMS arrived and took Appellant to the hospital. (R. p. 1240) While at the hospital, Appellant's condition deteriorated rapidly. (R. p. 366) Records reflect Appellant suffered from many underlying prior conditions, including Anemia, Thrombocytopenia (low platelet count), Hypkalemia (low potassium), Hyponatremia, Liver Disease, and severe dehydration. (R. p. 946) Appellant's medical history, provided by himself and his family members, demonstrates Appellant had a known history of alcohol abuse. (R. p. 614) In addition, he had been suffering from bouts of diarrhea, nausea, and vomiting in the weeks leading up to the fall. (R. p. 323) In addition, Appellant was jaundiced, frail, and weak leading up to his collapse at work. (*Id.*)

At the hearing before the single commissioner, Employer's shop supervisor, Fred Mogridge, testified Appellant had health issues in the months prior to the fall. (R. p. 1237, lines 18-24) He also testified he noticed Appellant's color had changed and that he had lost a substantial amount of weight. (*Id.*) In addition, Mogridge testified that leading up to the collapse at work, Appellant was slow moving and had some problems with his body control,

particularly his bowel control. (R. p. 1238, lines 3-15, 21-25) Gene Lane, Appellant's supervisor, also testified he noticed Appellant's health rapidly deteriorating over the months leading up to the accident. (R. p. 1249, line 25 – p. 1250, line 25) He also testified that Appellant had lost a significant amount of weight and became slow moving. (*Id.*)

Decedent died as a result of his injuries on February 27, 2016. (R. p. 127)

ARGUMENTS

It is well-established that “[t]he burden is upon a claimant to prove such facts as will render his injury compensable within the provisions of the Workers’ Compensation Law.” *Lee v. Harborside Café*, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002) (citing *Kennedy v. Williamsburg County*, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963)). “Such an award must not be based on surmise, conjecture, or speculation.” *Id.* In workers’ compensation cases, the Full Commission is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). As a result of these principles, the Full Commission was correct in affirming the denial of benefits, and this Court should affirm.

I. The Full Commission Properly Applied The Applicable Law To The Facts And Correctly Determined Benefits Should Be Denied Inasmuch As Appellant Failed To Meet His Burden To Prove A Compensable Injury.

While Appellant maintains that the evidence and facts submitted into the record are uncontroverted, Respondents contend Appellant did not merely sustain a trip and fall but that his injuries resulted from an idiopathic fall. The proper case law when dealing with idiopathic falls is *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955) and related cases. Therefore, the Full Commission correctly reviewed the substantial record evidence, applied the correct law to the facts of this case, and unanimously affirmed the single commissioner’s denial of benefits as Appellant was unable to establish a causal connection between Appellant’s fall and subsequent death and his employment. The judgment below should be affirmed because the findings are supported by the substantial evidence in the record and because Appellant cannot establish that an error of law has been committed.

A. The Full Commission properly applied controlling law and correctly determined that benefits should be denied inasmuch as Appellant failed to meet the burden of proving a compensable death by accident.

Contrary to Appellant's contention that the facts are not disputed, the critical facts giving rise to Appellant's fall were hotly disputed below and are the crux of the issues presented in this appeal. In light of the substantial evidence considered by the Commission and addressed below, Respondents assert the Commission correctly applied *Bagwell* and its progeny and that the denial of benefits should be affirmed.

Appellant relies heavily upon his statement to EMS and emergency room personnel that he slipped and fell. However, implicit in the Commission's analysis of this evidence is that Appellant's recollection of fact was inherently unreliable due to the traumatic brain injury he suffered. Appellant's own expert, Dr. Sribnick, admitted Appellant suffered a traumatic brain injury. (R. p. 1005, lines 5-14) Respondents' expert, Dr. Vandersteenhoven, also noted that individuals who sustain traumatic brain injury often exhibit some attendant short-term memory loss regarding the events surrounding the injury. (R. p. 1110, lines 13-23) Therefore, while Appellant stated he slipped and fell, Respondents' medical expert explained that potential retrograde or anterograde amnesia could have caused confusion regarding the facts of the fall. This possibility was confirmed by uncontradicted fact witness testimony presented to the Commission. For example, Appellant's supervisor testified Appellant was unconscious immediately after the fall and that it took up to a minute to revive him. (R. p. 1239, lines 7-13) Further, non-employee Josiah Fludd also testified Appellant was unconscious after the fall. (R. p. 164, lines 5-10)

Based on the uncontroverted testimony from Respondents' expert and two fact witnesses, it was entirely reasonable for the Full Commission to determine Appellant's post-fall statements

are unreliable, especially when the sole independent eyewitness testified to facts in direct contrast to the those statements. As noted, Josiah Fludd testified he witnessed the fall. (R. p. 156, line 19 – p. 157, line 14) He testified he saw the sequence of events, that Appellant collapsed, and that Appellant made no attempt to break his fall. (*Id.*) The unreliable nature of Appellant's account of the facts, contrasted by testimony from two witnesses, places this case squarely within the parameters of the court's analysis in *Bagwell*. In *Bagwell*, there was only one eye witness, who testified the claimant in the case collapsed at work, which led to a head injury and subsequent death. The eyewitness stated he did not see the entire incident but noticed the claimant as he was falling ridged towards the ground. He noted the claimant did not attempt to break his fall.

Bagwell is very similar to the case at hand. Although the decedent in that case died prior to giving a statement, the eye witness was able to testify as to events surrounding the fall. Based on the witness and the rest of the record, the court determined the decedent suffered an idiopathic fall that bore no causal connection to the employment. Here, Josiah Fludd was able to provide testimony to the facts surrounding the fall. While Appellant takes issue with the fact that Mr. Fludd's view was not uninterrupted, that distinction is irrelevant as the witness in *Bagwell* did not witness all the facts surrounding the fall in that case. Here, Josiah Fludd testified he saw Appellant standing still from the thighs down, saw him begin to collapse, and that Appellant collapsed to the ground without attempting to break his fall. (R. p. 156, line 19 – p. 157, line 14)

In this case, it stands to reason that the Full Commission would determine Appellant sustained an idiopathic fall given the inherently unreliable nature of his testimony immediately following the injury, the testimony of both parties' expert witnesses, and Mr. Fludd's testimony that Appellant simply collapsed. Further, Appellant had extensive medical issues prior to his

idiopathic fall. For all of these reasons, the Full Commission properly weighed the evidence and concluded Appellant's fall was idiopathic and had no relation to his work.

B. The Full Commission properly distinguished *Bagwell v. Ernest Burwell, Inc.* from *Nicholson and Barnes* and properly applied *Bagwell* to the facts of this case.

In spite of Appellant's arguments to the contrary, the holding of *Bagwell* still stands as binding precedent with regard to idiopathic falls in South Carolina. The Full Commission properly relied on *Bagwell* and correctly distinguished it from the holdings in *Nicholson* and *Barnes*. Those two cases are distinguishable from the facts presented here, particularly where they did not address idiopathic falls. In *Nicholson*, "the question [was] whether a woman who sustains a non-idiopathic fall at her place of employment while performing a job function" has sustained a compensable injury. *Nicholson v. South Carolina Dep't of Social Serv.*, 411 S.C. 381, 383, 769 S.E.2d 1, 2 (2015). In that case, the claimant merely tripped and fell on the carpet on her way to a meeting. *Id.* The Court held *Nicholson* had a compensable claim since she was performing a job function. *Id.* at 390, 769 S.E.2d at 5. The Court disagreed with the argument that the fall could have occurred anywhere, and therefore found the claim compensable. *Id.* There was no indication in *Nicholson* that the claimant had an idiopathic fall, which entirely distinguishes it from the case at hand.

Similarly, the claimant in *Barnes* simply tripped, leading the Court to distinguish that claim from an idiopathic fall claim. *Barnes v. Charter One Realty*, 411 S.C. 391, 768 S.E.2d 651 (2015). The Court found there was no internal breakdown and, therefore, the claim was compensable as the fall arose out of the claimant's work. *Id.* at 393, 768 S.E.2D at 652. The Court reiterated that "the idiopathic fall doctrine is based on the notion that an idiopathic injury does not stem from an accident, but is brought on by a condition peculiar to the employee that

could have manifested itself anywhere.” *Id.* at 396, 768 S.E.2d at 653. Since there was no evidence of an internal breakdown, other than the rejected argument claimant was clumsy, the Court distinguished the claim from earlier idiopathic falls cases.

In contrast to *Nicholson* and *Barnes*, the Full Commission received and considered substantial record evidence supporting its conclusion that Appellant sustained an idiopathic fall. Numerous witnesses testified regarding Appellant’s poor health leading up to the date of the fall, the medical records corroborate Appellant’s serious medical conditions, and the sole eye witness testified Appellant was standing still, collapsed, and failed to break his fall. Further, Respondents’ medical expert stated to a reasonable degree of medical certainty that the fall was idiopathic in nature. (R. p. 947) As a result, the Full Commission’s decision is supported by more than substantial evidence and should be affirmed.

II. The Full Commission Properly Excluded Certain Evidence And Correctly Weighed The Admissible Evidence.

Appellant challenges numerous evidentiary rulings that were not timely objected to or raised in Appellant’s Form 30, Request for Commission Review, including failing to respond to a subpoena and Josiah Fludd’s deposition. As such, this Court should deem those issues abandoned on appeal. Further, the Full Commission properly weighed all of the medical evidence and correctly determined that Nurse Crider’s report was properly excluded. Even assuming Appellant properly preserved these issues for review, which he did not, his arguments do nothing to change the ultimate conclusion that he failed to meet his burden of proving a compensable injury.

A. The Full Commission properly excluded Appellant's retained legal nurse due to her admission that she is not an expert in the area of causation.

Pursuant to S.C. Regulation § 67-701, Appellant was required to state the grounds for appeal in his Form 30, Request for Commission Review, specifically and concisely. Further, it is axiomatic that "[a]n issue not raised in the application for review is not preserved for the full commission's consideration." *Clark v. Aiken County Government*, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) (citing *Creech v Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct.App.1995)). Appellant's Form 30 failed to properly raise this issue or otherwise challenge the single commissioner's decision to reject Nurse Crider's report and causation opinion. While this issue was briefly raised by Appellant at the Full Commission hearing during his rebuttal argument, it was not properly before the Full Commission and should not be considered as part of this appeal. (R. p. 1277, line 17)

Even assuming the issue is preserved for review, the Full Commission was correct in excluding the "expert" report. Appellant included two reports regarding causation in his APA submissions. The first was from Appellant's retained physician expert, Dr. Michael Sribnick, and Respondents did not object to that report becoming part of the record. The second was a report from Appellant's retained registered nurse expert, Donna Crider. Respondents did object to the admission of Nurse Crider's report and, particularly, her admittedly unqualified causation opinion from becoming part of the record.

In the course of discovery, Respondents noticed the deposition of Donna Crider. In response, she sent a letter to Appellant's counsel in which she forthrightly stated:

My role in the Edmond Dillon [case] was that of a legal nurse consultant and not that of a testifying expert. My position is and has been to defer to treating physicians or medical doctors to make the determination of issues concerning causation.

(Supp. R. p. 991A)

That letter was admitted into evidence in Respondents' APA submissions without objection from Appellant. Further, Respondents argued to the single commissioner that Nurse Crider was not qualified to serve as an expert on causation and relied on her own letter admitting her lack of qualifications to prove that point. After hearing both sides, the single commissioner permitted Appellant to make a proffer of Nurse Crider's report but ultimately excluded the evidence from the record. The report was properly excluded, and the Court should affirm the exclusion of Nurse Crider's admittedly unqualified causation opinion.

B. The Full Commission correctly weighed evidence and testimony from Appellant's medical expert and nevertheless determined Appellant failed to meet the burden of proving a compensable claim.

The Commission properly reviewed the whole record and determined that a preponderance of the evidence established Appellant did not sustain a compensable fall. Both medical experts' reports and depositions were submitted and properly included in the record, and it was solely within the purview of the Full Commission to give such weight as to each expert's report and testimony it deemed appropriate.

Pursuant to Finding of Fact No. 24, the Full Commission reviewed the entire record. Therefore, it stands to reason that it reviewed both experts' opinions and depositions. In reviewing Appellant's medical expert's deposition, Dr. Sribnick agreed Appellant suffered from liver disease, jaundice, Hyperbilirubinemia, Hypokalemia, Hypotraneia, severe dehydration, and anemia. (R. p. 1013, line 4 – p. 1015, line 5) Further, throughout the deposition, Appellant's medical expert agreed these conditions could result in confusion, vomiting, diarrhea, jaundice, dizziness, lightheadedness, and possibly syncope. In fact, both experts agreed Appellant suffered from these conditions. (R. pp. 945-947) Indeed, the only disagreement between the two experts

has to do with their ultimate opinion. Respondent's expert stated to a reasonable degree of medical certainty that Appellant suffered from these issues and that those issues could lead to a syncopal episode like the one that actually occurred. (*Id.*) Appellant's expert stated in his report and reiterated in his deposition that Appellant's underlying conditions would not lead to a syncopal episode, despite admitting to all the noted conditions. (R. p. 120)

Appellant's expert also relied heavily on Appellant's statements to the medical providers regarding his fall even though Appellant sustained a traumatic brain injury. (R. p. 1004) Dr. Sribnick relied on the Glasgow Coma Scale to reiterate that Appellant was in a state of mind to accurately relay what had occurred. (R. pp. 1009-1011) As noted by Respondents' expert, however, the Glasgow Coma Scale is not a test of memory but rather a test that measures a patient's level of consciousness. (R. p. 1112) Respondent's expert also noted that individuals who sustain traumatic brain injuries often exhibit anterograde or retrograde amnesia and may not be able to recall events correctly or with diminished accuracy. (R. pp. 1110-1111)

Unfortunately, Appellant simply was not in a position to give reliable information after suffering from a traumatic brain injury, and the Full Commission likely gave little or no weight to Appellant's expert's statements to the contrary. The Full Commission considered all medical evidence, including the expert reports and depositions, and properly determined by a preponderance of the evidence that Appellant merely collapsed.

C. The Full Commission properly considered the deposition testimony of Josiah Fludd.

Once again, Appellant argues for the first time on appeal, and in contravention of the requirements established by S.C. Regulation § 67-701, that the Full Commission erred in relying

on the deposition testimony of Josiah Fludd. The Appellant's Form 30 failed to properly raise this issue. This issue was not properly preserved and should not be heard as part of this appeal. In any event, the Full Commission properly considered Josiah Fludd's deposition.

Respondents never received any correspondence from Appellant regarding the alleged omission of the investigative report in response to his subpoena. Further, Appellant failed to raise this issue in a timely manner to the single commissioner. Thus, not only did Appellant fail to timely address any of these alleged issues, but he also elected not to ask a single question of Josiah Fludd to address any questions surrounding his identity or the investigation into the facts and circumstances giving rise to Appellant's claims. In addition, Appellant not only failed to object to the inclusion of Josiah Fludd's deposition into the record, but also, in fact, included the deposition transcript as part of his evidentiary submissions, effectively waiving any right to appellate review of this now-challenged evidence. (R. pp. 149-178)

For the forgoing reasons, the Full Commission properly considered and weighed the evidence, including the appropriately admitted testimony of Josiah Fludd, in determining Appellant merely collapsed.

D. The Full Commission correctly considered the testimony of Josiah Fludd based on the proper nature of the questions, as well as the lack of a timely objection.

Like his other evidentiary issues, Appellant's challenge to the admission of Mr. Fludd's testimony on the basis that it was elicited through improper leading questions was not properly preserved and should not be heard as part of this appeal.

Following proper notice, Respondents deposed Josiah Fludd on October 15, 2016. Mr. Fludd initially was questioned by Respondents, who asked the witness questions regarding Appellant's collapse at work. This line of questioning was exhausted prior to any examination

based upon Mr. Fludd's Affidavit being shown to the witness. While Appellant objected to one leading question, counsel for Respondents rephrased his question, and there were no further objections raised by Appellant during Mr. Fludd's deposition. Indeed, Mr. Fludd testified, without objection, that Appellant was merely standing still prior to his collapse and that he did not attempt to break his fall. He denied seeing Appellant slip or trip, and he also testified that his Affidavit properly reflected his observations as the events unfolded.

Appellant did not raise a single objection to this line of questioning and had ample opportunity to question the witness on these issues:

Q. Was he standing motionless before he collapsed? Standing Idle?

A. He was standing –

Appellant's counsel: Objection as to leading.

Respondents' counsel: Okay. I'll rephrase.

Q: What was Mr. Dillon's physical movements at the time you saw him.

A. He was standing, just standing.

(Deposition continues without objection)

(R. p. 156, line 22 – p. 157, line 6)

There were no other objections, and this issue was never raised to the single commissioner. The single commissioner and the Full Commission properly considered the testimony of the only eye witness to the collapse of the Decedent as he made the determination to deny benefits, and Appellant has waived his right to argue otherwise.

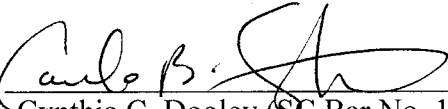
CONCLUSION

For the reasons stated herein, Respondents urge the Court to affirm the Decision and Order of the Full Commission in its entirety.

(Signature page to follow.)

Respectfully submitted,

June 26, 2018

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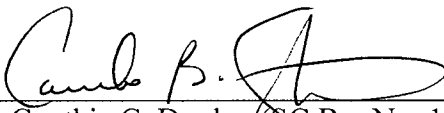
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FleetPride, Employer, and Gallagher Bassett as TPA for
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CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENTS complies with Rule
211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

June 26, 2018

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