THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No.: 1118193
Appellate Case No.: 2012-213494

Patricia Johnson ..... Claimant, Appellant,

v.

Staffmark and New Hampshire Insurance Company..... Respondents.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **Did the Appellate Panel properly determine the Appellant/Claimant's fall was not an injury by accident arising out of the scope of her employment and is said determination supported by substantial evidence?**

2. **Did the Appellate Panel properly determine the Appellant/Claimant's fall was idiopathic in nature?**

3. **Did the Appellate Panel correctly determine the medical evidence supported the Appellant/Claimant's December 2011 fall was the result of an idiopathic failure of the left ankle?**

STATEMENT OF THE CASE

Patricia Johnson, the claimant, appeals the Decision and Order of the South Carolina Workers' Compensation Commission finding she was not entitled to benefits under the South Carolina Workers' Compensation Act, as the accident in question did not constitute a compensable injury by accident. The Respondents, Staffmark and New Hampshire Insurance Company, ("defendants") maintain the Commission properly denied the claimant benefits pursuant to the Act.

The claimant alleges she sustained a compensable injury to her left foot and left leg on December 21, 2011, when she slipped and fell while walking into the workplace. The defendants deny the claimant sustained an injury within the course and scope of her employment. The defendants further maintain the claimant failed to prove she sustained a compensable injury by accident and that any alleged injury she sustained was the result of an idiopathic fall or internal failure of her ankle due to a non-work related personal condition.

A hearing on the matter was held on March 27, 2012, before the Hearing Commissioner pursuant to the Forms 50 and 51 filed on behalf of the parties. By way of the Decision and Order dated May 16, 2012, the Hearing Commissioner determined the claimant failed to meet her burden of proving she sustained a compensable injury by accident arising out of and in the course of her employment. Rather, the Hearing Commissioner found her alleged injury was the result of an idiopathic failure of her left ankle and determined the claimant was not entitled to benefits under the Act. (R. p. 10).

On May 16, 2012, the claimant filed a Form 30 appeal to the Full Commission contending the Hearing Commissioner erred in concluding that the Appellant did not sustain a compensable injury by accident and was not entitled to benefits under the Act; that the fall was the result of an idiopathic failure of the left ankle; and that there was no evidence that the fall

arose out of her employment. By way of Decision and Order filed November 15, 2012, the Full Commission Appellate Panel affirmed the Hearing Commissioner's determination in its entirety. The claimant timely appealed to this Court. (R. pp. 12-17)

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. Code Ann. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law. S.C. Code Ann. § 1-23-380(A)(6)(d)(Supp. 2006). Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark, supra.*; S.C. Code Ann. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). A decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(f).

ARGUMENT

I. THE APPELLATE PANEL CORRECTLY APPLIED THE "ARISING OUT OF AND IN THE COURSE AND SCOPE OF EMPLOYMENT" STANDARD IN DETERMINING THE CLAIMANT'S ALLEGED FALL WAS NOT AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT AND SUCH DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Court should affirm the decision of the Appellate Panel of the Workers' Compensation Commission in this case because the Appellate Panel correctly applied the arising out of and in the course of employment standard and its determination is supported by substantial evidence.

In order to establish a compensable claim for benefits under the Act, a claimant must prove an injury by accident that "arose out of" and "in the course of" her employment with an employer. *See* S.C. Code Ann. § 42-1-160 (Supp. 2007). An injury 'arises out of employment' when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Owings v. Anderson County Sheriff's Department,* 315 S.C. 297, 433 S.E. 2d 869 (1993). In addition, "[a]n injury occurs 'in the course of' employment if it happens 'within a reasonable period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties.'" *Jennings v. Chambers Development Co.,* 335 S.C. 249, 254, 516 S.E.2d 453, 456 (Ct. App. 1999) (quoting *Baggott v. Southern Music, Inc.,* 330 S.C. 1, 5, 496, S.E.2d 852, 854 (1998)). Although the "arising out of" and "in the course of" employment requirements for compensability under the Act may overlap, they are not synonymous; both must exist simultaneously to allow the claimant to recover. *See Gray v. Club Group, Ltd.,* 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000).

a. The Appellate Panel properly concluded the claimant's fall was idiopathic in nature.

The claimant asks this Court to find the incident in question qualifies as a compensable injury by accident as opposed to an idiopathic injury purportedly based upon the following assertions: the floor was not level, several witnesses found her on the floor, her shoes were wet, and the employer put up a warning sign at the doorway sometime after the fall. However, to find the incident as compensable would require this Court to disregard the substantial evidence in the record, the South Carolina Workers' Compensation Act, and prior precedent relating to idiopathic injuries and unexplained falls.

This Court has previously determined that unexplained falls are not compensable as injuries by accident under existing South Carolina law as such incidents do not arise out of and within the course and scope of employment as required by § 42-1-160. *See Crosby v. Wal-Mart Inc.*, 330 S.C. 489, 495, 499 S.E.2d 253, 257 (Ct. App. 1998). This case, like *Crosby*, involves an unexplained fall.

Crosby was a "slip and fall" case like our present case. Crosby testified she was just walking and her feet went out from under her. *Id.* The store manager, who did not witness the fall, testified there was no liquid substance, debris, merchandise, or paper on the floor upon his inspection immediately following the claimant's fall. *Id.* This Court found that "[w]here an employee suffers an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, furniture, or other objects such as would contribute to the effect of the fall, the majority of jurisdictions deny compensation." *Id.* at 256 (citing 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law § 12.14(a) (1997)). The reasoning behind the adoption of this rule is that the basic cause of the harm is personal to the employee, and the employment does not significantly add to the risk. *Id.*

In *Crosby*, the Court determined the claimant failed to show a causal connection between her fall and her employment and, therefore, failed to show an injury by accident arising out of her employment. *Id.* at 257. In coming to its determination, this Court divided unexplained falls into two categories: (1) those in which the fall was unwitnessed or was purely unexplained; and (2) those in which the evidence established that the fall, while unexplained, had an apparent lack of work connection, the implication arising that the fall resulted from some pre-existing physical condition. *Id.* at 257. Importantly, this Court confirmed the burden is on the claimant to prove such facts as will render the injury compensable and such an award must not be based on surmise, conjecture, or speculation. *Id.*

In the case at hand, the claimant failed to establish a causal connection between her fall and her employment with the defendants. First, there were no witnesses to corroborate the mechanism of the claimant's alleged fall. (R. pp. 174-175, 201). Additionally, the claimant's testimony regarding the alleged incident is inconsistent at best. During her deposition, the claimant alleged she returned to the building and "just slipped and went down." (R. p. 121). Throughout the Hearing, however, the claimant testified she slipped and fell when she returned to the building. (R. p. 181). Furthermore, the fact that several employees found the claimant lying on the ground provides no evidence relating the nature of the injury to her employment. (R. pp. 175-181).

The claimant also alleged that the bottoms of her shoes were wet. There is no credible evidence, however, establishing there was any substance on the floor aside from the claimant's own self-serving testimony. On the other hand, Terrance Green, the claimant's supervisor, testified at the Hearing that he and others completed an investigation of the incident after the claimant's fall which confirmed that the area where the claimant fell inside the building was ***completely dry*** on the date of the alleged accident. (R. p. 199) (emphasis added). Mr. Green

also testified the only shoe marks he observed came from an EMS or paramedic who came from the ambulance after the accident. (R. p. 203). Moreover, it is important to note that Mr. Green was an employee for Lang Mekra and had no affiliation with claimant's actual employer, Staffmark, and thus was by all accounts an impartial and unbiased witness.[1] Mr. Green had nothing to gain for himself or his employer with his testimony offered. The Hearing Commissioner and the Full Commission Appellate Panel obviously afforded more weight to the testimony of Mr. Green in determining there was no causal connection between the fall and claimant's employment.

The claimant also argues that stepping over a raised threshold somehow caused her to slip and fall. The "raised threshold" is something that all employees walk over on a daily basis and does not create a hazard as alleged by the claimant. In fact, Mr. Green testified he was not aware of any other accidents where someone had tripped over this "raised threshold." Importantly, the "raised threshold" was described by the claimant and Mr. Green as being *approximately two inches tall* and was part of the door jamb. (R. pp. 194, 204-206). The claimant failed to provide any pictures of the "raised threshold" to support her contention that it created a hazard. Additionally, the threshold is not as high as a normal step one would even take while walking a normal stride. Notwithstanding the claimant's contention, the critical issue as set forth by *Crosby,* is *whether there exists a causal connection between the fall and employment.* No evidence exists to support such a causal connection between the fall and the claimant's allegations related to the threshold. The claimant failed to present *any* evidence that she actually *tripped over* the threshold, as she did not describe her fall as a "tripping" incident, but rather a "slipping" incident. Therefore, she failed to support a causal connection between the alleged fall and her employment.

[1] Lang Mekra contracted with Staffmark in order to hire temporary employees.

Two Supreme Court cases also support the decision reached in this case that the injury in question is not compensable. In *Bagwell v. Ernest Burwell, Inc.,* 227 S.C. 444, 88S.E.2d 611 (1955), the claimant died as a result of striking his head against his employer's concrete floor during the course of his employment after he suddenly, and for no explained reason, fell backwards. An examination following the incident revealed the floor was dry, and there was no evidence of grease or other foreign substance. *Id.* at 450. The Supreme Court held the claimant failed to show a causal connection between the claimant's fall and his employment as the claimant's fall was witnessed and revealed his employment did not contribute to his fall. *Id.* at 453.

The case of *Miller v. Springs Cotton Mills,* 225 S.C. 326, 82 S.E. 2d 458 (1954), is also instructive. In that case, the Supreme Court applied the same reasoning relating to idiopathic/unexplained falls to a case which did not involve a level floor fall. In *Miller*, the claimant alleged she sustained an injury by accident at work when she rose from the lunch table, felt her knee twist and a sharp pain in her knee. *Id.* There was no medical testimony regarding causation of the twisting in the claimant's knee. *Id.* at 459. Furthermore, the Supreme Court held given the testimony, the "failure of the claimant's knee to function normally was the cause of her near-fall and not the near-fall the cause of the injury to the knee." *Id.* The Supreme Court further determined it would be "wholly conjecture" based upon the evidence before them to find that claimant's employment was the contributing cause of her injury. *Id.* Likewise, given the evidence in this case regarding the claimant's "slip and fall," it would be entirely speculative for this Court to hold that the employment was a contributing cause of the claimant's injury.

Finally, the claimant argues that the fact that the employer subsequently put up a sign in the doorway is a remedial measure which constitutes compelling evidence that the employment contributed to the effect of the fall or that the doorway constituted a hazard that caused the fall.

This argument is wholly without merit. Though Green admitted that he placed a sign in the doorway following the incident, the investigation as testified to by Green revealed that the employment did not contribute to the fall in any respect whatsoever. The placing of the sign in the doorway following the accident does not constitute compelling evidence that the doorway caused her fall at all, but rather is again speculation by the claimant. Moreover, the Hearing Commissioner and Full Commission Appellate Panel obviously reviewed this evidence and chose to afford it little to no weight in their decisions. Because there is substantial evidence in the record to support the decision below, this Court must affirm.

b. The Appellate Panel correctly determined the medical history supported that her injury was the result of an idiopathic failure of her left ankle.

A review of the medical evidence in the record offers further support of the defendants' contention that claimant's fall was unexplained or idiopathic in nature. The medical narrative from Fairfield County EMS indicated the claimant "had fallen while entering the door of the facility where she works and had twisted her left ankle." (R, p. 25). The claimant then presented to Providence Hospital Northeast on the day of the alleged accident where she reported "she was walking through a doorway when she felt a twisting sensation and had a sharp pain in her left ankle." (R. p. 26). Not surprisingly, during the Hearing, the claimant testified she did not recall what she told her medical providers following her alleged accident. (R. pp. 178-181).

For the first time in this case, the claimant, in her Initial Brief to this Court, attempts to utilize medical literature to support her position that her injury was not caused by an internal breakdown. This literature does not in and of itself establish causation of the alleged fall. In fact, there is no evidence from a medical doctor that this literature serves any purpose in our case. Moreover, this argument was not raised below and this literature was never presented to the Hearing Commissioner or Full Commission Appellate Panel for consideration and should not be considered by this Court on appeal. *See* Jean Hoefer Toal, et al., Appellate Practice in South

Carolina, 56 (2d. ed. 2002) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995)). As such, it should not be allowed before this Court for the first time.

Regardless, the Appellate Panel relied upon substantial medical evidence supporting the existence of a pre-existing condition which attributed to the internal breakdown of the ankle. On June 28, 2010, the claimant presented to The Regional Medical Center with complaints of left foot/ankle pain and swelling giving no indication of a recent injury. (R. p. 79). The claimant was diagnosed with a foot sprain. (R. p. 84). An x-ray of the claimant's complete left foot revealed degenerative changes with a small plantar calcaneal bone spur and a small enthesophyte at the Achilles tendon. (R. p. 102). There was also soft tissue prominence, edema versus obesity. (R. p. 102). The medical evidence above constitutes substantial evidence to support that claimant's significant pre-existing left ankle condition, including arthritis, attributed to her internal breakdown or failure of her ankle. In none of the idiopathic cases discussed above was there any evidence of pre-existing conditions, yet benefits were denied in each case. In the case at bar, there is direct evidence of pre-existing medical problems which show a history of similar unexplained medical problems with the claimant's left ankle. This evidence supports the Appellate Panel's finding of an idiopathic injury.

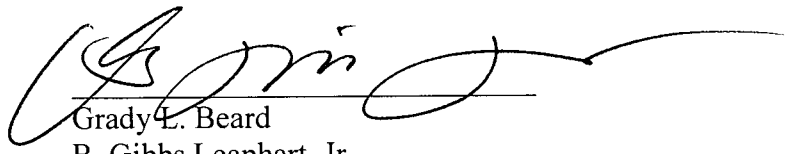
Accordingly, the defendants maintain the claimant has failed, through her own testimony or that of any witness, to provide an explanation for her slip and fall accident. Most importantly, she failed to provide any sort of causal connection between the fall and her employment. In fact, the medical reports of her initial treating physicians and the testimony of Terrence Green contradict her allegations. Taken together, the testimony of the claimant, Terrance Green, and the medical evidence in the record support an unexplained idiopathic fall, and are more than enough to support the Appellate Panel's findings. By considering the testimony of both the

claimant and Mr. Green, as well as the medical evidence, the Appellate Panel correctly applied the standard of whether the claimant met her burden of proving the alleged accident arose out of and in the course and scope of employment, and concluded that she did not. Therefore, the Appellate Panel's determination should be affirmed.

CONCLUSION

Based upon the foregoing, Staffmark and New Hampshire Insurance Company respectfully request the Court of Appeals to affirm the Order of the South Carolina Workers' Compensation Commission Appellate Panel in its entirety.

Respectfully submitted,



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May 9, 2013

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CERTIFICATE OF COUNSEL

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

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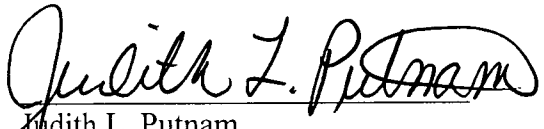
PROOF OF SERVICE

I certify that I have served three copies of the Respondents' Final Brief on Patricia Johnson, by depositing a copy of it in the United States Mail, postage prepaid, on May 13, 2013, addressed to her attorney of record, Paula Howker Amick, Esquire, George Sink, P.A., 1440 Broad River Road, Post Office Box 21567, Columbia SC 29221 on May 13, 2013.



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