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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Opinion No. 5891 (S.C. Ct. App. filed January 19, 2022)

Dale Brooks, Employee, Respondent,

v.

Benore Logistics System, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Petitioners.

BRIEF OF PETITIONERS

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II. WHETHER THE COURT OF APPEALS' INTERPRETATION OF S.C. CODE ANN. § 42-1-172 (2007) RELIEVED THE CLAIMANT OF HIS BURDEN OF PROOF FOR ESTABLISHING A COMPENSABLE REPETITIVE TRAUMA INJURY UNDER SOUTH CAROLINA LAW WHEN IT DETERMINED THAT THE FULL COMMISSION NEED NOT "MAKE A SEPARATE FACTUAL FINDING THAT THE EMPLOYEE'S JOB DUTIES WERE REPETITIVE"?

STATEMENT OF THE CASE

This appeal concerns whether the South Carolina Workers' Compensation Commission is required to accept the opinion of an independent medical examiner in response to a self-serving questionnaire from a claimant's attorney, without actual testimony from that medical provider, as determinative of the existence of a "repetitive trauma injury," despite conflicting evidence in the record. The Court of Appeals answered this question in the affirmative. Petitioners respectfully disagree that this is the law in South Carolina.

This appeal arises from the South Carolina Workers' Compensation Commission. Dale Brooks (Respondent) alleged a repetitive trauma injury to his low back and right leg on January

17, 2017, from "repeatedly getting in and out of his truck." (App. p. 33). His employer, Benore Logistics System, Incorporated through its workers' compensation insurance carrier, Great American Alliance Insurance Company (collectively, Petitioners) denied the claim in its entirety. (App. p. 4). A hearing was held on September 7, 2017, before Commissioner Gene McCaskill (the single commissioner). (App. p. 73). On December 27, 2017, the single commissioner issued an order finding Respondent met his burden of establishing a compensable repetitive trauma injury to his low back affecting his right leg. (App. pp. 30-31). The single commissioner relied on the opinion of Respondent's independent medical examiner, Dr. Eric Loudermilk, who answered "yes" to the following questions in response to a questionnaire from Respondent's attorney:

> Did the repetitive activities of [Respondent]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping, and climbing ladders, most probably cause low back pain with right leg radiculopathy?
>
> Did the repeated work activities above cause an L4-L5 disc protrusion shown on [Respondent]'s MRI of 6.27.17?

(App. pp. 29, 317). The single commissioner awarded Respondent temporary total disability benefits for the period January 19, 2017 through June 28, 2017, as well as prior and future causally-related medical treatment. (App. pp. 31-32).

Petitioners appealed the single commissioner's order to the Appellate Panel of the South Carolina Workers' Compensation Commission (Full Commission). (App. p. 3). The Full Commission reversed the single commissioner by order dated October 26, 2018. (App. pp. 9-15). Specifically, the Full Commission found, among other things, that Respondent failed to meet his burden of proving a compensable repetitive trauma injury. (App. p. 14). The Full Commission interpreted section 42-1-172 of the South Carolina Code (2007) (i.e., the "repetitive trauma statute") as requiring a claimant to prove his job is repetitive to recover benefits. (App. pp. 11-

14). It chose to assign more weight to an ergonomics report that disputed Respondent's claim that his job was repetitive when compared to Respondent's own testimony as well as an opinion from Respondent's independent medical examiner in response to a self-serving questionnaire from Respondent's attorney. (App. pp. 11-13). The Full Commission held that neither the medical nor the ergonomics evidence supported Respondent's claim for a repetitive trauma injury; therefore, it denied Respondent's claim. (App. pp. 9-15).

Respondent appealed the Full Commission's Order to the Court of Appeals. (App. p. 349). The Court of Appeals reversed the Full Commission by published opinion without oral argument. *Brooks v. Benore Logistics Sys., Inc.*, Op. No. 5891 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 40) (App. pp. 418-25). The Court of Appeals initially held that the Full Commission erred in finding section 42-1-172 required a claimant to prove that his job is repetitive to recover benefits for a repetitive trauma claim, noting such an interpretation would add an "improper, redundant condition to [section] 42-1-172." (App. pp. 423-24). Next, the Court held the Full Commission committed a "clear error" in finding an ergonomics report concluded Respondent's job duties were not repetitive because, according to the Court, the report only opined that his job duties did not expose him to an enhanced risk of injury to his back or legs. *Id.* at 424. Additionally, the Court held it was reversible error for the Full Commission to accept the opinion of the ergonomics report over the opinions of Dr. Loudermilk in response to a questionnaire from Respondent's attorney. *Id.* Relying on *Herndon v. Morgan Mills, Incorporated,* 246 S.C. 201, 143 S.E.2d 376 (1965), the Court of Appeals held that whether Respondent suffered a repetitive trauma injury was a matter in which a layman can have no knowledge, and Dr. Loudermilk's opinion on the issue was conclusive. *Id.* Moreover, the Court disagreed with the Full Commission's logic in choosing to assign Dr. Loudermilk's opinion less weight for several fact-specific reasons that will

be discussed herein. *Id.* at 424-25. The Court concluded that the ergonomics report was not competent evidence of causation under section 42-1-172 and held that all the competent evidence supported Respondent's claim for benefits. *Id.* Consequently, it reversed the Full Commission and held Respondent was entitled to benefits for a repetitive trauma injury as a matter of law. *Id.* at 425.

On February 3, 2022, Petitioners filed a petition for rehearing, which the Court of Appeals denied two business days later. (App. pp. 426-46). Petitioners timely filed a petition for writ of certiorari on March 8, 2022, which this Court granted on September 8, 2022. This appeal follows.

STATEMENT OF THE FACTS

A. Respondent's Testimony

Respondent was a 56-year-old male at the time of the hearing before the single commissioner. (App. p. 341). He was hired by Benore on August 29, 2016 as a switcher operator (hereinafter, "Switcher"). (App. pp. 89, 219, 226-27). As a "Switcher," Respondent would "move trailers from one point of the yard [at the BMW manufacturing plant in Greer, South Carolina] to another point of the yard." (App. p. 89). He described his job duties as follows:

> [Y]ou have to back up to the trailer, raise it up hydraulically from inside the cab. You have to walk onto the platform, bend over, hook up the lines, pull the trailer forward, get off the truck, walk to the back of the truck, close the doors, walk back into the truck, go to wherever it's going to go, and reverse the entire process.
>
> What you're going to do is you're going to get off the truck, you're going to open the doors, get back in the truck, back the trailer back up, and then you're going to climb -- unhook the airlines, and then you're going to pull the trailer out.

(App. pp. 225-26).

Respondent stated this process takes approximately 15 minutes to complete. (App. p. 226). Respondent last worked for Benore on January 17, 2017. (App. p. 233). Thus, he only worked for Benore for approximately 6 months before the alleged repetitive trauma injury in this case. (App. pp. 234-35). During that time, Respondent alleged he was involved in two other work-related accidents. (App. p. 235).

Regarding the incident in question, Respondent testified he began noticing pain about two weeks prior to actually reporting an accident. (App. p. 243). Respondent testified at the hearing that his repetitive trauma injury occurred from "getting in and out of the truck so much . . . ." (App. p. 113). He also stated his job duties required him to climb steps, stoop, bend over, and twist his body. (App. pp. 95-97, 113). Respondent testified that every aspect of his job was repetitive. (App. pp. 156-57). Respondent testified he initially did not think his condition was work-related. (App. p. 247). He explained that he first noticed the injury was work-related on January 17, 2017, when he stepped onto a platform and felt a burning sensation in his right leg and lower back. (App. pp. 248-49).

As relevant here, Respondent also testified at the hearing regarding the description of onset of symptoms he gave his medical providers. He testified that he told every medical provider that his back injury occurred from him "getting in and out of the truck so much . . . ." (App. p. 113). He also testified records from Greenville Health System dated January 20, 2017 that indicated his back had been hurting for one week were "wrong." (App. p. 140 (*citing* App. p. 331)). Moreover, Respondent testified he did not give his doctor, Dr. Eric Loudermilk, a specific date of onset of his symptoms, yet the record from his initial visit notes the date of onset as "around January 3, 2017." (App. p. 137 (*citing* App. p. 308)).

B. Ergonomics Expert Glen Adams

Petitioners hired ergonomics expert Glen Adams to review Respondent's job and to issue

an ergonomics report. (App. p. 341). The purpose of his report was to "determine the ergonomic risk factors to which [Respondent] may have been exposed while performing his job duties at Benore Logistics Systems." *Id.* In preparing his report, Adams reviewed Respondent's deposition transcript and his medical records and visited the job site where Respondent worked as a "Switcher" to observe the job duties. (App. pp. 341-347). Adams found that, contrary to Respondent's testimony, Respondent would be able to enter and exit the cab of the truck without having to bend over. (App. pp. 149-51, 346). He further found that the job duties of a "Switcher" do not require lifting that exceeds any recommended safe lifting limit. (App. p. 347). Finally, Adams concluded the job involved two activities with forward bending (connecting the harness and entering / exiting the cab); however, neither of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. (App. pp. 346-47).

C. Respondent's Independent Medical Examiner Dr. Eric Loudermilk

Respondent was referred to Dr. Eric Loudermilk of Piedmont Comprehensive Pain Management Group, LLC by his attorney. (App. p. 308). Dr. Loudermilk evaluated Respondent on May 1, 2017. (App. p. 308). At that time, Respondent reported pain in his back and leg that began around January 3, 2017. *Id.* Dr. Loudermilk diagnosed low back pain with right lower extremity radiculopathy most likely due to a lumbar disk bulge, disk protrusion, or disk herniation at the L5-S1 level. (App. p. 309).

Later, in response to a questionnaire from Respondent's attorney dated August 11, 2017, Dr. Loudermilk checked the box "yes" to the following questions:

> Did the repetitive activities of [Respondent]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping, and

> climbing ladders, most probably cause low back pain with right leg radiculopathy?
>
> Did the repeated work activities above cause an L4-L5 disc protrusion shown on [Respondent]'s MRI of 6.27.17?

(App. p. 317).

Dr. Loudermilk opined "no" to the question: "Does the attached ergonomics report change your opinion in anyway?" (App. p. 318). However, it is unclear whether the ergonomics report from Glen Adams was included as an attachment to the questionnaire because the Adams report was not included in Respondent's attorney's Administrative Procedure Act (APA) submissions to the single commissioner. (App. pp. 286-327). Moreover, neither the questionnaire from Respondent's attorney nor any other evidence indicate Dr. Loudermilk reviewed an actual job description of Respondent's job activities as a "Switcher." (App. pp. 317-18). Dr. Loudermilk did not testify in this case.

STANDARD OF REVIEW

The Full Commission is the ultimate factfinder in a workers' compensation appeal. *Geathers v. 3V, Inc.*, 317 S.C. 570, 576, 641 S.E.2d 29, 32 (2007). Questions of the weight assigned to the evidence and credibility are reserved for the Full Commission. *Shealy v. Aiken City.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the [Full] Commission as triers of fact are conclusive." *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 465, 405 S.E.2d 407, 409 (1991). Whether there is any causal connection between employment and an injury is a question of fact for the Full Commission. *Pee v. AVM, Inc.*, 352 S.C. 167, 172 n. 4, 573 S.E.2d 785, 788 n. 4 (2002). Moreover, "whether the facts of a case were correctly applied to a statute is a question of fact subject to the substantial evidence standard." *Murphy v. Owens Corning*, 393

S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011) (*quoting Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479-80, 646 S.E.2d 162, 165 (Ct. App. 2007)).

"This Court must affirm the findings of fact made by the [F]ull [C]ommission if they are supported by substantial evidence." *Tenant v. Beaufort Cty. Sch. Dist.*, 381 S.C. 617, 620, 674 S.E.2d 488, 490 (2009). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *McGraw v. Mary Black Hosp.*, 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002). This Court has also described "substantial evidence" as follows:

> [S]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were (sic) to a jury, a 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.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 135–36, 276 S.E.2d 304, 307 (1981) (citations omitted).

"In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 294, 599 S.E.2d 604, 613 (Ct. App. 2004). However, this Court must refrain from "judicial fact-finding or a substitution of judicial judgment." *Tobey v. L & P Constr. Co.*, 296 S.C. 122, 125, 370 S.E.2d 897, 899 (Ct. App. 1988).

ARGUMENT

I. The Court of Appeals disregarded its standard of review by substituting its opinion on questions of fact and the weight assigned to evidence, which are questions reserved for the Full Commission.

Petitioners respectfully assert that the issue on appeal—whether the Full Commission erred in finding Respondent did not meet his burden of proving a repetitive trauma injury—was a

question of fact subject to the substantial evidence standard of review. Petitioners further assert that the Court of Appeals disregarded this standard of review and the substantial evidence that supported the Full Commission's Decision and Order.

A. The Court of Appeals reweighed the evidence as found by the Full Commission

The Full Commission made the following finding of fact:

> Although [Respondent] testified that his job duties as a "Switcher" were repetitive in that they required him to bend over, and twist his body; we find the unbiased opinion of Glen Adams that [Respondent]'s job duties were not sufficiently repetitive *is entitled to greater weight than [Respondent]'s testimony* on that issue.
>
> We likewise find that *Dr. Loudermilk's opinion is entitled to less weight* because he appears to have relied on [Respondent]'s own self-serving statements as to the alleged repetitive job activities of a "Switcher" as well as a description of those job activities from [Respondent]'s attorney included in questionnaires.

(App. p. 12 (*citing* App. pp. 95-97, 113, 317-18) (emphasis added)).

Thus, the Full Commission found Adams' opinion was entitled to more weight than Respondent's testimony and Dr. Loudermilk's opinion. (App. p. 12). This Court has repeatedly stated that questions of witness credibility and the weight assigned to evidence are determinations left to the Full Commission as the factfinder. *See Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Full Commission]. It is not the task of this Court to weigh the evidence as found by the [Full Commission].").

The Court of Appeals disagreed with the Full Commission's determinations and found that Dr. Loudermilk's opinion was entitled to more weight than the ergonomics report. (App. pp. 424-25). By doing so, it reweighed the evidence as found by the Full Commission.

B. The Full Commission can accept or reject lay and medical evidence when deciding an award of benefits under the Act

The appellate courts of this State have held on numerous occasions that the Full Commission is not required to accept the opinions of medical providers in deciding whether an injury is compensable. *See Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23-24, 716 S.E.2d 123, 126-27 (Ct. App. 2011) (explaining the Full Commission may consider lay and medical evidence and disregard medical evidence if the record contains other competent evidence, and reiterating the appellate court does not balance objective against subjective findings of medical witnesses, or weigh the testimony of one witness against that of another, in reviewing the Commission's findings); *Hargrove v. Carolina Orthopaedic Surgery Assocs., PA*, 389 S.C. 119, 125, 697 S.E.2d 641, 643 (Ct. App. 2010) ("Regardless of what the medical evidence indicated, we cannot disregard the lay evidence on which the [Full C]ommission relied in finding Hargrove did not prove her problems resulted from her fall."); *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999) (explaining the Full Commission has discretion to weigh and consider all evidence, both lay and expert, when determining causation); *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946) (finding despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly into the claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award); *Poston v. Southeastern Constr. Co.*, 208 S.C. 35, 38-39, 36 S.E.2d 858, 860 (1946) (finding lay testimony that the claimant's eyes became runny and inflamed after construction material blew into them and that he lost vision in

his eyes after the accident was sufficient to support an award even though the doctor testified the vision loss was not related to the work injury). More recently, the Court of Appeals has held that it is error for the Full Commission to rely solely on "objective evidence" in deciding whether a claimant has suffered a change of condition. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016).

Although medical evidence is entitled to great respect, the Full Commission is allowed to disregard it "*even when it is unanimous, uncontroverted, or uncontradicted.*" Thus, even sharply contradicted evidence of injury can constitute substantial evidence for purposes of review." *Pack v. State Dep't of Transp.*, 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (emphasis in original). The principle that the Full Commission can accept or reject even unanimous medical evidence is particularly applicable in a case such as this one where the medical opinions came from Respondent's independent medical examiner, in response to a questionnaire from Respondent's attorney, and without testimony from the doctor. (App. pp. 311-12, 317-18). The reason for this rule is simple—just because an expert offers an opinion does not mean that opinion is not subject to scrutiny. Rather, the purpose of medical evidence is to "aid the [Full Commission] in coming to the correct conclusion." *Potter*, 395 S.C. at 23, 716 S.E.2d at 126; *see also Windham v. City of Florence*, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952) (stating—in a workers' compensation case—"[n]o factfinding body is compelled to blindly accept an expert's opinion"); *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946) ("Medical testimony should not be held to be conclusive, irrespective of other evidence; and it is not, under the decisions of this Court.").

This Court has explained the role of medical evidence and the Full Commission's role in deciding the weight to be applied to same:

> [M]edical testimony should not be held conclusive irrespective of other evidence. Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Once admitted, expert testimony is to be considered just like any other testimony. Accordingly, in deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Moreover, **in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact.**

Sharpe v. Case Produce, Inc., 336 S.C. 154, 160-61, 519 S.E.2d 102, 106 (1999) (emphasis removed and added, citations omitted).

In *Sharpe*, this Court explained that in the absence of actual testimony from a physician in the record, it is impossible to determine whether his opinion was based strictly upon medical symptoms reported by the claimant or on other medical factors. *Id.* at 162 n.2, 519 S.E.2d at 106 n.2. This Court held that the burden is on the claimant to prove his injury arises out of employment, and it was within the Full Commission's discretion, as the ultimate factfinder, to weigh the doctor's opinion that the alleged injury was work-related. *Id.* at 161, 519 S.E.2d at 106. This Court ultimately held that although the record contained evidence from which the Full Commission could have found the injury compensable, there was evidence which would allow reasonable minds to reach the conclusion the Full Commission reached. *Id.* Therefore, this Court affirmed the Full Commission's denial of benefits—and consequently reversed the Court of Appeals—holding that the Court of Appeals "erred in substituting its view of the evidence for that of the [Full] Commission." *Id.*

The Court of Appeal's opinion in this case essentially holds that the Full Commission must accept the opinion of the medical provider to the exclusion of all other evidence. Petitioners respectfully assert that this is not the law in South Carolina. *Sharpe* illustrates why the Full

Commission is not required to accept even seemingly unanimous, uncontroverted medical opinions—because without actual testimony on the record, it is impossible to know whether the doctor's opinion was based strictly on the claimant's reported symptoms or on other medical factors. Realizing that was the case with Dr. Loudermilk's opinion, the Full Commission considered the opinion of Dr. Loudermilk and chose to assign it less weight. (App. p. 12). The Court of Appeals should have affirmed that decision because it was a determination for the Full Commission as the factfinder.

C. The Court of Appeals exercised judicial fact-finding in attempting to discredit the ergonomics report in favor of Dr. Loudermilk's opinions

Although the Court of Appeals held that the ergonomics report was not competent evidence to support the Full Commission's denial of benefits, it then proceeded to object to the reasons given by the Full Commission when it decided to rely on the ergonomics report over Dr. Loudermilk's opinion. (App. pp. 423-25). Specifically, the Court states the Full Commission illogically "tried to discredit Dr. Loudermilk by claiming 'his opinions assume the job is sufficiently repetitive,' and 'there is no evidence Dr. Loudermilk ever reviewed a job description for a 'switcher.'" (App. p. 424). However, it is undisputed there is no evidence in the record that Dr. Loudermilk reviewed a job description for a "Switcher." (App. pp. 308-318). It is also undisputed that Dr. Loudermilk was never asked whether Respondent's job duties were repetitive. (App. pp. 311-12, 317-18). To the extent that the Court of Appeals found Respondent's reports of his job duties to Dr. Loudermilk were "competent evidence" on this issue, the Full Commission identified several reasons why those reports were entitled to less weight. (App. pp. 9-13). Namely, Respondent's testimony at the hearing regarding the date of onset of symptoms differed from some of the initial medical records with Dr. Loudermilk. (App. p. 12). Next, the Full Commission found the descriptions of Respondent's job duties would have been self-serving statements from Respondent and/or his

attorney. (App. p. 12). Although the Court of Appeals chastised the Full Commission for using "fuzzy logic," its finding—Dr. Loudermilk was aware of Respondent's job duties because Respondent told him—rested entirely on an assumption that Respondent provided Dr. Loudermilk an honest and accurate description of both his job duties and his onset of symptoms. (App. p. 424). The Full Commission decided Respondent did not and cited several reasons to support its conclusion. (App. pp. 9-13).

The Court of Appeals went on to state that "[n]othing in [section] 42-1-172 prevents a medical doctor from using his expert evaluation of patient history in forming his professional opinion, and we expect the medical community would be surprised to learn that the Full Commission believes this time-honored practice always entails an unwarranted assumption." (App. p. 424). However, the Full Commission did not hold that a claimant's reports to a medical doctor always require an assumption of inaccuracy. Rather, the Full Commission simply found in this case to afford Respondent's reports to Dr. Loudermilk less weight. (App. pp. 11-13). Respectfully, Petitioners doubt that the medical community would be surprised to learn that the Full Commission occasionally finds that patients may not always give doctors an honest and accurate description of their medical history and onset of symptoms.

Moreover, the Full Commission noted Glen Adams personally observed Respondent's job duties, determined the job involved two activities with forward bending, but neither of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. (App. p. 13). Although the Court of Appeals took issue with the Full Commission's interpretation of the findings of the ergonomics report, it is undisputed that the report does not support Respondent's claim that he suffered a repetitive trauma injury to his back resulting from his activities as a "Switcher." (App. pp. 341-47). The fact that the ergonomics report does not conclusively rule out the

possibility that Respondent suffered a compensable repetitive trauma injury is irrelevant and improperly shifted the burden of proof to Petitioners to disprove the alleged work-related injury. *See Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation." (*quoting Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998))); *Crisp*, 401 S.C. at 645, 738 S.E.2d at 844 ("[I]t is *always* incumbent on the employee-claimant to prove that he or she sustained an injury by accident, and demonstrate that he or she is entitled to benefits." (emphasis added)).

The Court of Appeals then proceeded to make a factual finding that Dr. Loudermilk avowed that the ergonomics report did not change his opinion. (App. pp. 424-25). However, as Petitioners have argued in this case, there is no factual finding from the Full Commission that Dr. Loudermilk reviewed the ergonomics report. (App. pp. 3-15). Presumably, the Full Commission did not make this factual finding because there is no evidence in the record that the Adams ergonomics report was included as part of Respondent's questionnaires to Dr. Loudermilk. (App. pp. 311-12, 317-18). Regardless, it was improper for the Court of Appeals to make that factual finding on appeal. *See Tobey*, 296 S.C. at 125, 370 S.E.2d at 899 (stating an appellate court reviewing a decision of the Full Commission must not engage in "judicial fact-finding or a substitution of judicial judgment").

D. The Court of Appeals erred in ruling the issue before it was a matter of expertise reserved solely for Dr. Loudermilk

The Court of Appeals held that it was reversible error for the Full Commission to accept the opinion of the ergonomics report over Dr. Loudermilk's opinion because, relying on *Herndon v. Morgan Mills, Incorporated*, 246 S.C. 201, 216, 143 S.E.2d 376, 384 (1965), whether Respondent suffered a repetitive trauma injury was a matter in which a layman can have no

knowledge, and Dr. Loudermilk's opinion on the issue was conclusive. (App. p. 424). A close review of *Herndon* and the authority in which it is based shows that this holding was an error of law.

In *Herndon*, the claimant suffered a compensable injury by accident when he fell from a ladder. *Id.* at 203-04, 143 S.E.2d at 377. He later developed multiple myeloma and then died five months after the accident. *Id.* The opinion notes there was no medical testimony of any causal connection between the claimant's work accident and his death from multiple myeloma. *Id.* at 207, 143 S.E.2d at 377-78. The issue on appeal was whether his death from multiple myeloma five months after the accident was causally related to the admitted work accident. *Id.* The Full Commission found that it was, despite the absence of medical evidence. *Id.* at 208, 143 S.E.2d at 380. The circuit court "vacat[ed] and set[] aside the award of the [Full] Commission." *Id.* at 209, 143 S.E.2d at 380. The Supreme Court stated the following:

> [W]here the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects *may* be conclusive, even if contradicted by lay witnesses.

Id. at 216, 143 S.E.2d at 384 (*citing Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104, 107 (1943) (emphasis added))).

Based on this rule, the Supreme Court affirmed the decision of the circuit court finding there was "no evidence of substance to make issue with the unanimous professional opinion of the medical witnesses that, in effect, the death could not have been caused or accelerated by the aforesaid accident." *Id.* at 217, 143 S.E.2d at 385.

Interestingly, if one reads the full quote from *Anderson*, you find the following statement of the rule applied in *Herndon* and subsequently applied here by the Court of Appeals:

> [W]here the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses, although where uncontroverted medical opinions are merely deductions drawn from certain symptoms the final conclusion remains with the jury.

Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104, 107-08 (1943) (*quoting* 32 C.J.S. *Evidence* § 569 (unknown ed.) (*revised and now available at* 32 C.J.S. *Evidence* §§ 967, 969 (2022) (emphasis added))).

Therefore, *Anderson* makes clear that this "expert's word is final" rule is not applicable where the medical opinions are merely deductions drawn from certain symptoms. Moreover, in *Anderson*, the Supreme Court further elaborated regarding medical evidence and the role of the factfinder:

> [I]t is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, the fact that he is a paid witness, the relative opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements. **In other words, the same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony.** The opinion of the expert may not be arbitrarily rejected; it is to be considered by the jury in view of all the facts and circumstances in the case and of the common knowledge and experience of mankind; and when such common knowledge utterly fails, the expert opinion may be given controlling effect.

Id. at 54, 24 S.E.2d at 108 (*quoting* 20 Am Jur. § 1206 (*revised and now available at* 31A Am. Jur. 2d *Expert and Opinion Evidence* §§ 90, 94 (2012) (emphasis added))); *see also Hiers v. Brunson Const. Co.*, 221 S.C. 212, 229, 70 S.E.2d 211, 219 (1952) ("After such expert testimony is admitted, it is to be considered by the fact-finding body just as other evidence and given such

weight as in the opinion of such body it should receive. The probative value of expert testimony passing upon hypothetical facts stands or falls with the existence of the facts upon which it is predicated, and the Circuit Court fell into error when it attempted to weigh the testimony.").

Moreover, the Supreme Court has also held that

> While there may be circumstances where medical testimony is conclusive, ordinarily such opinions, although uncontradicted, are not conclusive in the sense that they must be accepted as true. They may be rejected if found inconsistent with the facts or otherwise unreasonable.

Windham v. City of Florence, 221 S.C. 350, 359, 70 S.E.2d 553, 556–57 (1952)

Therefore, a complete reading of the *Herndon* rule applied by the Court of Appeals in this case reveals that it is not the "end all be all" that the Court of Appeals understood it to be. The factfinder draws the final conclusion from the medical opinion when that opinion consists merely of deductions drawn from certain symptoms. Likewise, the factfinder—in this case the Full Commission—is allowed to consider such factors as whether the expert is paid, the reasoning for his opinion, and the background of his knowledge among other things. Moreover, the opinions of the medical expert may be rejected if found inconsistent with the facts or otherwise unreasonable. Simply stated, the factfinder is permitted to analyze medical evidence like other evidence and retains the final say in the conclusion to be drawn from the medical evidence. *Hiers*, 221 S.C. at 229, 70 S.E.2d at 219; *Sharpe*, 336 S.C. at 160-61, 519 S.E.2d at 106.

Here, the Full Commission did exactly as instructed by *Herndon*. They evaluated Dr. Loudermilk's opinion, Respondent's testimony, and the ergonomics report, in deciding whether Respondent met his burden of proving a compensable repetitive trauma injury. In finding Respondent did not meet this burden, the Full Commission recognized Dr. Loudermilk's opinion

was merely a deduction based on Respondent's subjective reports of his symptoms, and it drew the final conclusion from this evidence.

Still, there are even other applicable exceptions to the *Herndon* rule applied by the Court of Appeals in this case. Specifically, the Court of Appeals has previously rejected the "expert's word is final" rule in cases such as this one where the existence of a compensable work-related event was an issue of fact in dispute in the case.

For example, in *Tobey v. L & P Construction Company*, the Court of Appeals held:

> *Herndon* does not apply to the present situation. In the case before us, whether the "accident" occurred as alleged is not a matter for experts or skilled witnesses *alone;* it can be addressed by lay testimony and we hold that it is not a situation in which "a layman can have no knowledge." Finally, whether the alleged accident did or did not happen at the time and place alleged by the claimant was a matter of fact to be determined by the commission, and lay testimony was pertinent to this issue. And we so hold.

296 S.C. 122, 126, 370 S.E.2d 897, 899-900 (Ct. App. 1988) (emphasis in original).

As in *Tobey*, whether Respondent suffered a repetitive trauma injury at the time, place, and manner alleged was an issue of fact before the Full Commission. There was obviously a question of fact as to whether Respondent suffered the alleged repetitive trauma injury because Petitioners denied the claim. (App. p. 9). Moreover, when the alleged incident occurred was certainly disputed because Petitioners argued *ad nauseum* that the medical records were inconsistent regarding Respondent's date of onset of symptoms and the alleged mechanism of injury. (App. pp. 55-56). Based on *Tobey*, it logically follows that whether the repetitive trauma injury occurred as alleged is a matter in which lay testimony is permissible. Indeed, Respondent's testimony was undoubtedly considered by the Full Commission; however, they chose to afford it less weight than the Court of Appeals would have preferred. (App. pp. 9-13). Therefore, Petitioners respectfully assert that the Court of Appeals misconstrued *Herndon* in holding that the determinative issue on

appeal—whether Respondent suffered a compensable repetitive trauma injury—was a matter of expertise reserved *solely* for Dr. Loudermilk.

E. *Murphy v. Owens Corning* is distinguishable from the case at bar

The Court of Appeals relied on *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011) in reversing the Full Commission and awarding benefits in this case. (App. pp. 422-23). Petitioners respectfully assert that *Murphy* is easily distinguishable from the case at bar.

In *Murphy*, the claimant worked as a sliver handler—a job that required her to "reach for hot glass pieces above her head and pull them down into strands." 393 S.C. at 79, 710 S.E.2d at 455. She filed a workers' compensation claim for a repetitive trauma injury to her back, shoulders, hands, and arms. *Id.* Notably, the claimant's doctor offered medical testimony that her job duties aggravated her symptoms and that there was a direct causal relationship between the claimant's job duties and the injury. *Id.* at 80, 710 S.E.2d at 455. Defendants presented evidence that the job duties did not cause the alleged repetitive trauma injury. *Id.* at 81, 710 S.E.2d at 456. Most notably, both the single commissioner and Full Commission found the alleged repetitive trauma injury was compensable as an injury by accident under section 42-1-160. *Id.* The defendant employer then appealed to the court of appeals arguing "because Murphy's alleged injuries arise from repetitive trauma, the [Full] Commission erred in finding Murphy suffered an injury by accident arising out of and in the course of her employment under South Carolina Code section 42-1-160." *Id.* at 83, 710 S.E.2d at 457.

The Court of Appeals held that although the Full Commission technically erred in relying on section 42-1-160 to find the claim compensable, it affirmed the Full Commission's decision, as modified, because, despite erroneously relying on section 42-1-160, the Full Commission made the required findings under section 42-1-172. *Id.* at 84, 710 S.E.2d at 458. Specifically, it held:

> Compensability under section 42-1-172 requires a specific finding of fact, by the preponderance of the evidence, of a direct causal relationship, established by medical evidence, between the repetitive act and the employment. The single commissioner found in part that "the preponderance of the evidence is that there is a direct causal connection between the repetitive activities of [Murphy's] job and the aggravation of her . . . condition. This finding is based on the medical records . . . ." The Commission sustained the [single] commissioner's order in its entirety, and found in part: (1) Murphy suffered an aggravation of her underlying condition by the repetitive trauma of performing overhead work on her job; (2) the finding was based on the record as a whole, including the medical record; and (3) there was a direct causal connection between the repetitive activities of Murphy's job and the aggravation of her condition. We find the Commission made the findings necessary under section 42-1-172 and, accordingly, affirm as modified.

Id. at 85, 710 S.E.2d at 458.

Thus, *Murphy* simply stands for the proposition that compensability of a repetitive trauma injury is only determined under the provisions of section 42-1-172, which Petitioners do not dispute. However, there is a significant procedural difference that make *Murphy* distinguishable from this case. Unlike *Murphy*, here the Full Commission found Respondent did *not* suffer a compensable repetitive trauma injury. (App. p. 14). The Full Commission then cited to the evidence that negated such a finding of compensability including the ergonomics report, Respondent's testimony, and Respondent's medical records. (App. pp. 9-14). Because Respondent lost at the Full Commission, it then became his burden at the Court of Appeals to demonstrate that the Full Commission's decision was not supported by substantial evidence. *See Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince this Court that the lower court was in error."); *Tenant*, 381 S.C. at 620, 674 S.E.2d at 490 (stating this Court "must affirm the findings of fact made by the [F]ull [C]ommission if they are supported by substantial evidence"). However, the Court of Appeals in this case chose to substitute its own view of the evidence for that of the Full Commission.

Candidly, Petitioners concede that had the Full Commission found this claim compensable (as in *Murphy*), we would have had the difficult burden on appeal of establishing that decision was not supported by substantial evidence. However, the Full Commission did not make such a finding. It ruled the claim was not compensable. There was substantial evidence to support that decision, and the Court of Appeals committed reversible error in substituting its own view of the evidence for that of the Full Commission. *See Sharpe*, 336 S.C. at 161, 519 S.E.2d at 106 ("Although there was evidence from which the Commissioner could have gone the other way, there is also clearly evidence which would allow reasonable minds to reach the conclusion he reached.").

In essence, the Court of Appeals held that an ergonomics report is not competent evidence under section 42-1-172 while simultaneously holding that Respondent's reports to the doctor about his job duties are competent evidence in which to base a reversal in this case. This is especially odd when the Full Commission—the ultimate factfinder—specifically stated it was assigning the ergonomics report more weight than Respondent's testimony on the issue. (App. p. 12). The Court of Appeals' ruling leaves Respondents perplexed as to why Respondent's reports to Dr. Loudermilk are competent evidence; however, the ergonomics report is not. Moreover, the Court of Appeal's opinion effectively accepted everything Respondent reported to Dr. Loudermilk as true, even when the medical records themselves were inconsistent with Respondent's testimony, and, again, even when the Full Commission decided to assign Respondent's testimony less weight than other evidence. The proper weight to be assigned to <u>all</u> the evidence was an issue left to the sound discretion of the Full Commission as the factfinder. *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442. Respectfully, the Court of Appeals disregarded its standard of review by deciding to reweigh the evidence.

II. The Court of Appeals misconstrued S.C. Code Ann. § 42-1-172 (2007) by relieving the claimant of the burden of proving all elements of his claim for a repetitive trauma injury.

A. The Court of Appeals' interpretation of § 42-1-172 ignored statutory language

The South Carolina Workers' Compensation Act essentially provides three theories of compensability to establish a prima facie case: (1) an injury by accident (S.C. Code Ann. § 42-1-160 (2007)), (2) an occupational disease (S.C. Code Ann. § 42-11-10 (2007)), or (3) a repetitive trauma injury (S.C. Code Ann. § 42-1-172 (2007)). Regardless of the theory of compensability, the claimant bears the ultimate burden of proving all elements of his claim. *See Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation." (quoting *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998))).

Causation is one element that a claimant must prove as part of his claim for benefits. *See, e.g., Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015) (explaining the circumstances where an "accidental injury" is causally related to the employment); *Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 263, 851 S.E.2d 714, 722 (Ct. App. 2020) (holding that "even if [the claimant] had met his burden pursuant to § 42-9-35, he did not show his neck injury was proximately caused by the dove-field accident pursuant to § 42-1-160(A)"). However, there are other elements he must prove in addition to causation. For an "injury by accident," a claimant must prove (1) an injury, (2) by accident, (3) arising out of, and (4) in the course and scope of his employment. *See e.g., Osteen v. Greenville Cty. Sch. Dist.*, 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998) (noting the terms "arising out of" and "in the course of employment" are not synonymous and "[b]oth parts must exist simultaneously before any court will allow recovery"). For an occupational disease, he must prove six distinct elements to recover benefits. *See Muir v. C.R.*

Bard, Inc., 336 S.C. 266, 283, 519 S.E.2d 583, 591-92 (Ct. App. 1999). Both of these theories of compensability have multiple elements.

Repetitive trauma injuries are no exception to this rule. The South Carolina Workers' Compensation Act provides the following provisions regarding a "repetitive trauma injury."

Section 42-1-160 provides in relevant part:

> (A) "Injury" and "personal injury" mean only injury by accident arising out of and in the course of employment....
>
> ....
>
> (F) The word "accident" as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. *Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 ....*

S.C. Code Ann. § 42-1-160 (2007) (emphasis added).

Section 42-1-172 provides:

> (A) "Repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. Compensability of a repetitive trauma injury must be determined only under the provisions of this statute.
>
> (B) An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a

> preponderance of the evidence of a causal connection that is established by medical evidence between the **repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury**.
>
> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.
>
> (D) A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.

S.C. Code Ann. § 42-1-172 (2007) (emphasis added)

Examining subsection 42-1-172(A), it appears that a "repetitive trauma injury" is defined as the following: (1) an injury, (2) which is gradual in onset, (3) and caused by the cumulative effects, (4) of repetitive traumatic events. Moreover, subsection 42-1-172(B) provides certain qualifiers as to what types of injuries constitute a "repetitive trauma injury." Specifically, an injury is not considered a "compensable repetitive trauma injury" unless a commissioner makes a specific finding of fact by a preponderance of the evidence of "a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." *Id.* (emphasis added). Finally, subsection 42-1-172 (D) further provides that "[a] 'repetitive trauma injury' is considered to arise out of

employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury."

The Court of Appeals' opinion focuses on the medical causation aspect of the "repetitive trauma injury" in this case. According to the Court of Appeals, this element is addressed in subsection (B). (App. pp. 422-23). Interestingly, section 42-1-172 appears to have two causation subsections: (B) and (D). Subsection (B) requires the Commissioner to make a specific finding of fact by a preponderance of evidence that is established by medical evidence of a causal connection (i.e., causation) between the "repetitive activities that occurred while the employee was engaged in his regular duties of employment" and "the injury."

It seems logical to assume that for a Commissioner to make the requisite finding of fact required under subsection (B) of a "causal connection" between the "repetitive activities that occurred while the employee was engaged in the regular duties of his employment," that there must actually be (1) repetitive activities, (2) that occurred, (3) while the employee was engaged in the regular duties of his employment. Any interpretation that would remove these requirements would render that language used in subsection (B) meaningless. *See Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192-93 (2014) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."). If the Full Commission is not required to analyze the basis of the physician's opinion in determining whether an alleged injury meets the definition of a compensable "repetitive trauma injury" under section 42-1-172, then the Court of Appeals' opinion in this case is correct. However, Petitioners believe the Legislature included that language in subsection (B) to require the Full Commission to analyze whether there were indeed (1) repetitive activities, (2) that occurred, (3) while the employee was engaged in the regular duties of his employment.

This language is important because it distinguishes "repetitive trauma injuries" from other theories of compensability. Prior to July 1, 2007, repetitive trauma injuries were compensable under section 42-1-160. *See Murphy v. Owens Corning*, 393 S.C. 77, 83, 710 S.E.2d 454, 457 (Ct. App. 2011) ("[R]epetitive trauma injuries were compensable under section 42-1-160 prior to July 1, 2007."). Effective July 1, 2007, the repetitive trauma statute, section 42-1-172, was added and section 42-1-160 was amended to specifically exclude repetitive trauma injuries. *See* S.C. Code Ann. § 42-1-160(F). Petitioners assert that by specifically excluding "repetitive trauma injuries" from the definition of an "injury by accident," the Legislature intended "repetitive trauma injuries" to require proof of something more than an injury by accident.

An issue in this case is how does one prove "repetitive activities that occurred while the employee was engaged in the regular duties of employment"? The Court of Appeals' opinion holds that requiring a claimant to prove his job is repetitive (i.e., "repetitive activities that occurred while the employee was engaged in the regular duties of his employment") reads an "improper, redundant condition" into section 42-1-172 and "sees something in the statute that is not there." (App. pp. 422-23). However, Petitioners respectfully assert that the language in the statute is, in fact, there. Because the General Assembly felt obliged to include that language in the statute, Petitioners can only assume that they had a reason for doing so. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating courts must interpret statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" because "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law").

The Court of Appeals' opinion further holds that requiring a claimant to prove his job is repetitive would require him to present an ergonomics report to the Full Commission, but that

would not be sufficient because section 42-1-172 requires causation to be established by medical evidence stated to a reasonable degree of medical certainty, which an ergonomics report cannot do. (App. p. 423). However, the Full Commission did not hold that a claimant must present an ergonomics report to prove a prima facie case under section 42-1-172. Rather, it held that "neither the medical nor the ergonomics evidence" (which, aside from Respondent's testimony, was the only evidence presented) supported a finding that Respondent's job activities as a Switcher were repetitive (i.e., Respondent did not prove the Switcher position consisted of "repetitive activities that occurred while [he] was engaged in the regular duties of his employment"). (App. pp. 11-14).

B. Dr. Loudermilk's opinion is legally insufficient to establish a compensable repetitive trauma injury because it does not address all subsections of § 42-1-172.

Even assuming the Court of Appeals did not reweigh the evidence as discussed herein in Argument I of Petitioner's brief, Dr. Loudermilk's purported causation opinion is legally insufficient to establish a compensable repetitive trauma injury under section 42-1-172. The Court of Appeals appears to hold that Dr. Loudermilk's opinion meets all the criteria for establishing a compensable repetitive trauma injury under section 42-1-172. However, a close examination of Dr. Loudermilk's opinion reveals that it is legally insufficient because it does not address all the elements of a compensable repetitive trauma injury under section 42-1-172. Because it is legally insufficient, the Court of Appeals erred in finding Respondent established a compensable repetitive trauma injury under section 42-1-172.

As noted above, a repetitive trauma injury is defined by statute as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A). Petitioners again refer this Court to the opinion of Dr. Loudermilk. (App. pp. 317-18).

Here, Dr. Loudermilk was presented with the following questions:

> Did the repetitive activities of [Respondent]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping, and climbing ladders, most probably cause low back pain with right leg radiculopathy?
>
> Did the repeated work activities above cause an L4-L5 disc protrusion shown on [Respondent]'s MRI of 6.27.17?

(App. p. 317).

Notably, Dr. Loudermilk was never asked whether Respondent's job activities were "repetitive traumatic events." Nor was he asked whether the cumulative effects of said repetitive traumatic events caused an injury. Rather, the questionnaire simply assumes Respondent's reported job duties were repetitive traumatic events that caused an injury. This is an important deficiency in his opinion that the Court of Appeals simply overlooked or chose to ignore. For an "injury" to be a "repetitive trauma injury" it must actually be (1) an injury, (2) which is gradual in onset, and (3) caused by the (4) cumulative effects of repetitive traumatic events. § 42-1-172(A). Simply stated, Dr. Loudermilk never addressed any of these elements.

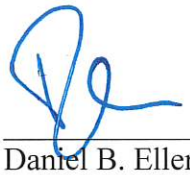
Furthermore, as noted above, a repetitive trauma injury "is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the conditions under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D) (emphasis added). Here, Dr. Loudermilk's opinion likewise fails to address any of the elements of subsection (D)—he is simply never asked whether there is a direct causal relationship between the conditions under which the work is performed and the injury. (App. pp. 317-18). Because the General Assembly felt obliged to include that language in the statute, Petitioners can only assume that they had a reason for doing so. *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881. Therefore, Dr. Loudermilk's opinion fails to satisfy S.C. Code Ann. § 42-1-172. In short,

Petitioners respectfully assert that the Court of Appeals erred in both its statutory interpretation of section 42-1-172 and its application of the facts to same.

CONCLUSION

Petitioners respectfully assert that the Court of Appeals disregarded its standard of review by substituting its opinion for the Full Commission on questions of fact. The Court of Appeals also misconstrued section 42-1-172 by relieving the claimant of the burden of proving all elements of his claim for a repetitive trauma injury. For the foregoing reasons, we respectfully request that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Full Commission.

Respectfully Submitted,



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