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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No.: 5891 (S.C. Ct. App. filed January 19, 2022)
Appeal No.: 2022-000271

Dale Brooks, Employee, ...Respondent,

v.

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

AMICUS BRIEF OF THE SOUTH CAROLINA EMPLOYERS' ADVOCACY ASSOCIATION

McANGUS GOUDELOCK & COURIE LLC
Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Attorneys for the South Carolina Employers' Advocacy Association

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I. WHETHER 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?

The South Carolina Employer's Advocacy Association ("SCEAA") represents South Carolina employers of all types on workers' compensation issues across the state, providing education to members, and participating as an amicus in litigation affecting employers in workers' compensation cases. In the above-captioned case, the SCEAA has a keen interest in ensuring that appellate courts properly apply S.C. Code Ann. § 42-1-172, keeping in mind that the South Carolina Workers' Compensation Act ("Act") places the burden of proving all elements of a claimant's right to compensation on the claimant, *see Crisp v. SouthCo, Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013), *quoting Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 848 (1998), and recognizing that the Act itself embodies a compromise, or a balancing of interests between injured workers, employers and society at large. *Cook v. Mack's Transfer & Storage*, 291 S.C. 84, 87, 352 S.E.2d 296, 298 (Ct. App. 1986), *citing Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980); *see also Wigfall v. Tideland Utils.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) ("Worker's compensation laws are a classic example of this legislative balancing of the equities").

It is the position of Amicus SCEAA that the South Carolina 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. Specifically, the Court of Appeals erred in overruling the South Carolina Workers' Compensation Commission's finding that, in addition to providing medical evidence of causation, "there is an independent requirement that the Commissioner find by a preponderance of evidence that the claimant's specific job activities are repetitive. § 42-1-172(B)." (App. 423). The Court of Appeals further erred in finding that, "[t]he two-part test announced by the Full Commission is unfaithful to

Murphy[1] and misreads § 42-1-172," and that "[t]he plain language of § 42-1-172 does not support a two-part construct." The Court of Appeals erred in finding that "the Full Commission sees something in the statute that is not there. Setting such an extra hurdle violates fundamental rules of statutory construction." The Court of Appeals also incorrectly concluded that "[t]he effect of the Full Commission's two-part formula would be to force claimant to offer expert testimony that their job duties were repetitive," suggesting that such evidence would be insufficient, "for there is no question § 42-1-172 requires that the causal connection between the work and the injury must be established by 'medical evidence,'" as defined in that Section. (App. 423).

STANDARD OF REVIEW

While it is true that "[s]tatutory interpretation is a question of law," which an appellate court "is free to decide … with no particular deference to the fact finder," *Murphy*, 393 S.C. at 82, 710 S.E.2d at 456, it is equally true that, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). Patently, in deciding the legal question before it, this Court is not bound by the Court of Appeals' interpretation of S.C. Code Ann. Section 42-1-172.

"A statute as a whole must receive [a] practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Sparks*, 406 S.C. at 128, 750 S.E.2d at 63. Thus, a court "may not, in order to give effect to particular words, virtually destroy the meaning of the entire

[1] *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011).

context, that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Sparks*, 406 S.C. at 129, 750 S.E.2d at 73. Accordingly, a reviewing "court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and policy of the law." *Bass v. Isochem*, 365 S.C. 454, 472, 617 S.E.2d 369, 378 (Ct. App. 2005).

"This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192-193 (2014). Indeed, "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). "The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

ARGUMENT

I. 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.

The Court of Appeals misconstrued S.C. Code Ann. § 42-1-172 in a manner that relieves a claimant from proving all parts of his or her repetitive injury workers' compensation claim. That is, pursuant to the Court of Appeals' ruling in this case, all a claimant need do in order to prove they are entitled to workers' compensation benefits under the repetitive injury statute is to present medical evidence of causation, regardless of whether their job actually involves repetitive motion, movement or tasks. However, just as a claimant must prove under S.C. Code Ann. § 42-1-160 that an injury was incurred by an accident that occurred in the course of

employment, in addition to proving that it arose out of, *i.e.*, is causally related to his or her employment, a claimant must not only prove medical causation but also that their job involved repetitive movements or tasks in order to recover under S.C. Code Ann. § 42-1-172. To require less impermissibly shifts the burden of proof from the claimant to the employer who, under the Court of Appeals' interpretation of the statute, will be required to submit medical evidence *disproving* causation, regardless of whether a job even entails repetitive motion, movement or tasks in the first place. Pursuant to *Murphy*, on which the Court of Appeals relies heavily, even that evidence likely would be insufficient, however. 393 S.C. at 81, 710 S.E.2d at 456 (ruling in the claimant's favor despite expert medical evidence submitted by the employer that the claimant's injury "was not caused by her work," pointing out that the employer's physician "did not examine Murphy or view her at the job site").

By reducing the four subparts of Section 42-1-172 to a single requirement that a claimant provide medical evidence of causation, the Court of Appeals misinterpreted the statute, altered the balance struck by the Legislature in the Act, and produced a result that is both absurd and which renders parts of that section mere surplusage. Moreover, the Court of Appeals' interpretation of Section 42-1-172 to require only proof of causation runs counter to the general framework of the Act as a whole. *Sparks*, 406 S.C. at 129, 750 S.E.2d at 73 (a court "may not, in order to give effect to particular words, virtually destroy the meaning of the entire context, that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent"); *Bass*, 365 S.C. at 472, 617 S.E.2d at 378 (a reviewing "court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and policy of the law").

In abrogating the common law, the Act discarded common law concepts of tort liability and substituted "a duty of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of an in the course of his employment." *Cook*, 291 S.C. at 87, 352 S.E.2d at 298. In return, the employee bears the burden of proving all elements of his or her claim in order to recover benefits under the Act. *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842, *Clade*, 330 S.C. at 11, 496 S.E.2d at 848. The Court of Appeals' opinion in this case upends that balance in a manner that the Legislature could not have intended, and produces an absurd result that is in conflict with and repugnant to the Act as a whole.

A. Repetitive Trauma Claims in South Carolina Prior to July 2007.

Prior to July 2007, repetitive trauma claims were analyzed under S.C. Code Ann. § 42-1-160. In two cases handed down on November 25, 2002, this Court confirmed that repetitive trauma claims are compensable under Section 42-1-160 of the Act. *See Pee v. Avm, Inc.*, 352 S.C. 167, 573 S.E.2d 785 (2002), and *Schurlknight v. City of N. Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002). A later Court of Appeals opinion defined repetitive trauma injuries as having "a gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.'" *Bass*, 365 S.C. at 475, 617 S.E.2d at 380.

Comparing the onset of repetitive trauma injuries to the gradual onset of occupational disease, this Court held that the lack of a definite time of injury was not dispositive. *Pee*, 352 S.C. at 172, 573 S.E.2d at 788. However, in rejecting the suggestion that a repetitive trauma injury should be compensated as an occupational disease, this Court explained that, while "a repetitive trauma injury has some of the characteristics of both accidental injury and occupational disease—it is the cumulative effect of repeated and distinct events that ultimately

produces the disability." 352 S.C. at 173, 573 S.E.2d at 788. This Court pointed out that, requiring a repetitive injury claim to be proven as an occupational disease "would be a more onerous burden than proving it as an injury by accident." 352 S.C. at 174, 573 S.E.2d at 789. In other words, while eschewing the burdensome, multi-part test for proving a repetitive trauma claim under the occupational disease provision, this Court held that proof of such claims should be similar to—but certainly not easier than—proving an injury by accident.

B. General framework for proving an injury by accident under S.C. Code Ann. § 42-1-160.

Section 42-1-160 defines the terms "injury" and "personal injury" as "only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160. For decades, this Court has construed the definition of "injury" to include at least three separate elements that must be proven by the claimant. That is, in order to recover under the Act, a claimant bears the burden of proving that he or she suffered an injury, 1) "by accident," 2) that "arises out of" and, 3) that was incurred "in the course of" his or her employment. S.C. Code Ann. § 42-1-160. *E.g.*, *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842, *Clade*, 330 S.C. at 11, 496 S.E.2d at 848; *see also*, *e.g.*, *Green v. Bennettsville*, 197 S.C. 313, 318-319, 15 S.E.2d 334, 336-337 (1941) (in order to prove claim was compensable, the claimant had to show the decedent's death "was the result of injury from accidental means," and that the accident arose out of and in the course of the employment).

The term "accident" has been "construed to mean not only an injury the means or cause of which is an accident, but also an injury which is itself an accident; that is, an injury occurring unexpectedly from the operation of internal or subjective conditions, without the prior occurrence of any external event of an accidental character. As stated in some cases, an injury need not have been created by wound or external violence," and does not require a "slip, fall or

other fortuitous event or accident in the cause of the injury." *Stokes v. First Nat'l Bank*, 306 S.C. 46, 49, 410 S.E.2d 248, 250 (1991), *quoting Hiers v. Brunson Constr. Co.*, 221 S.C. 212, 70 S.E.2d 211 (1952); *see also Crisp*, 401 S.C. at 645, 738 S.E.2d at 844 ("it is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits"). Patently, before the Commission reaches the issue of causation, a claimant in a claim under Section 42-1-160 must prove an accidental injury as that term has been interpreted by our courts.

While the analyses are often interrelated and overlapping, the concepts of arising out of and in the course of employment are separate and distinct elements of a worker's compensation claim, each of which must be proven by a claimant, and each of which "must exist simultaneously before any court will allow recovery." *Osteen v. Greenville County Sch. Dist.*, 333 S.C. 43, 49-50, 508 S.E.2d 21, 24 (1998). "'Arising out of' refers to the injury's origin and cause, whereas 'in the course of' refers to the time, place, and circumstances under which the injury occurred." *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 758 (Ct. App. 2007). In other words, the "arising out of" prong addresses causation, requiring a claimant to establish a causal link between the employment and the injury. The "in the course of" prong requires the claimant to prove he or she was at work and doing something reasonably related to the employment. In medically complex cases, the arising out of prong requires medical evidence stated to a reasonable degree of medical certainty, S.C. Code Ann. § 42-1-160(E) & (G), whereas, even in medically complex cases, determining whether an "accident" occurred and whether it occurred "in the course of" employment do not.

C. Repetitive Injury Claims Arising after July 2007.

In 2007, the Legislature made substantive changes to the Act. One of those changes was the addition of a separate provision for repetitive trauma injury claims. That provision, as signed into law, provides the following:

> (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).

At the time it enacted Section 42-1-172, the Legislature is presumed to have been well-aware of this Court's long-standing interpretation of Section 42-1-160. *Thomerson v. DeVito*, 430 S.C. 246, 252, 844 S.E.2d 378, 381 (2020) ("[t]he Legislature is presumed to [have been] aware of this Court's interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation"). Thus, it is assumed that, at the time it enacted the definition of "repetitive

trauma injury" in subpart (A), the Legislature was familiar with this Court's interpretation of the definition of the terms "injury" and "personal injury" in Section 42-1-160 and the requirement for a claimant to prove all three prongs.

It is therefore both logical and consistent with prior case law that, in defining "repetitive trauma injury" in subpart (A), the Legislature intended for a claimant to prove all of the elements of that definition, just as a claimant is required to prove all parts of the definition of "injury" under Section 42-1-160. This includes, at a minimum, proof that, 1) the claimant suffered an injury, 2) the injury was "gradual in onset," and 3) it was "caused by the cumulative effects of repetitive traumatic events." Practically, this means a claimant must prove, among other things, that his or her job involved repetitive movements or tasks that constitute "traumatic events." Any other reading of Section 42-1-172 negates the definition in subpart (A), rendering it superfluous and meaningless. *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"); *TNS Mills*, 331 S.C. at 620, 503 S.E.2d at 476 ("The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something").

It stands to reason that, if an employee's job does not involve repetitive motions, movements or tasks, there can be no "repetitive traumatic events." Thus, while medical evidence is critical to prove causation under Section 42-1-172, it is not sufficient, in and of itself, to prove that an employee's job involves repetitive motion, movement or tasks. This requirement is analogous to requiring an employee to prove he or she was injured by an "accident" that occurred in the course of employment. Even in medically complex injury by accident cases, those elements typically are proven through credible lay testimony or other non-medical

evidence. The Court of Appeals opinion does not address subpart (A) and, in essence, writes it out of the statute.

Subparts (B) and (D) of Section 42-1-172 specifically address the "arising out of" or causal link between the injury and employment. And, while expert medical evidence is both competent and required to provide a causal link under Section 42-1-172, it is not sufficient, standing alone, to prove an accident occurred in the course of employment and certainly not to show that a claimant's job duties involve repetitive movements or tasks.

The Respondent in this case incorrectly suggests that a change made to subpart (D) during the legislative process proves that the Legislature intended for a repetitive trauma injury to be decided *solely* on the basis of medical evidence. (Resp. Br. pp. 17-18). As noted above, subparts (B) and (D), address causation, which is analogous to the "arising out of" prong in Section 42-1-160. There should be no surprise that, given the medically complex nature of repetitive trauma injuries, causation must be proven by medical evidence as defined in the statute. That does not, however, negate the requirement that a claimant prove that his or her job involves repetitive movements in the first place. The Respondent's, and indeed the Court of Appeals' reading of Section 42-1-172 focuses narrowly on the requirement for medical evidence set out in subparts (B) and (D) and impermissibly renders the definitional language in subpart (A) superfluous. *See Sweat*, 386 S.C. at 351, 688 S.E.2d at 575 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"). In other words, assuming, as the Court must, that the Legislature intended the language in all subparts of Section 42-1-172 to have meaning, the only rational reading that gives meaning to all parts is that subpart (A) sets out the elements of a repetitive trauma injury, each of which the claimant must prove, subpart (D) sets out the type of evidence—medical evidence—

necessary to prove a causal link between employment and the injury, and subpart (B) requires a commissioner to make a specific finding of fact regarding that medical evidence.

D. The two-part test applied by the Commission is not unfaithful to *Murphy* but, instead, properly interprets and applies Section 42-1-172.

The Commission properly interpreted and applied S.C. Code Ann. 42-1-172 in a way that is consistent with the rest of the Act and gives meaning to all subparts of that Section. As is indicated above, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Sparks*, 406 S.C. at 128, 750 S.E.2d at 63.

The Court of Appeals' focus on *Murphy* is misplaced because there is no indication that there was any dispute in that case over whether the claimant's job—which involved bending over, looking and reaching up approximately 4,000 times during an eight-hour shift—involved repetitive tasks. Instead, the claimant submitted medical evidence stating that her neck injury was caused by her job and the employer submitted medical evidence saying it was not. Thus, the only issue in contention in *Murphy* was causation, and whether the Commission had cited the incorrect statutory provisions in its order finding the injury compensable. *Murphy* does not address and certainly does not stand for the proposition that, in order to prove a repetitive injury claim, a claimant need not prove by competent and credible evidence that his or her job involves sufficiently repetitive motion, movement or tasks to support such a claim.

The same is true in other repetitive trauma injury cases—the issue of whether the job involved repetitive motions, movements or tasks either was conceded or simply was not at issue. *See Hieronymus v. Hamrick*, 385 S.C. 1, 6, 682 S.E.2d 512, 515 (Ct. App. 2009) (insurer admitted the claimant "suffered an injury by accident … due to 'constant repetitive motions performed by dental hygienist and assisting duties'"); *Hargrove v. Titan Textile Co.*, 360 S.C.

276, 283-284, 599 S.E.2d 604, 607-608 (Ct. App. 2004) (company nurse "professed the tasks assigned to an employee in the evisceration department involve repetitive work, 'to some degree,'" and supervisor at textile plant indicated the claimant's "job was repetitive"); *Pee*, 352 S.C. at 170, 573 S.E.2d at 787 (the employer contended repetitive trauma injury should be classified as occupational disease as opposed to an injury by accident, but apparently did not contest that the injury arose form a "repetitive event" that was "part of the worker's normal work activity").

The Court of Appeals discounted the need for a claimant to prove his or her job involves repetitive movements or tasks, erroneously suggesting the Commission was "adding" to the statute and that including such a requirement would "force claimants to offer expert testimony that their job duties were repetitive." (App 423). First, a claimant is required to prove all parts of his or her claim, whether injury by accident, occupational disease or repetitive trauma injury. This is part of the compromise struck by the Legislature decades ago, *i.e.*, that, while an injured employee no longer needs to prove fault on the part of the employer, *Cook*, 291 S.C. at 87, 352 S.E.2d at 298; *Parker*, 275 S.C. at 70, 267 S.E.2d at 526, he or she still bears the burden of proving all elements of a worker's compensation claim. *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842, *Clade*, 330 S.C. at 11, 496 S.E.2d at 848.

Second, the definitional subpart of Section 42-1-172, subpart (A), clearly requires proof of a "gradual onset" as well as that the job involves repetitive movements or tasks capable of producing "repetitive traumatic events." Notably, there is no requirement in subpart (A) that these elements be proven via medical evidence.

Third, there are a number of ways to prove a job involves repetitive motions, movements or tasks sufficient to support a claim under Section 42-1-172. While expert evidence, such as the

ergonomics report submitted by the Petitioners in the case below, is demonstrably unbiased and persuasive evidence, there are other ways to prove a job involves repetitive movements or tasks sufficient to give rise to a compensable injury. In some cases, testimony of a co-worker or an employee who previously performed the claimant's position could be offered. Alternatively, the claimant could submit a job description that describes the repetitive nature of the position. Even the claimant's own sworn testimony, where deemed unbiased as opposed to self-serving, could support this prong of the analysis.

Notably, in the case below, Respondent's counsel appeared to agree with the Commission's two-part test, arguing that the repetitive nature of the job could be proven through lay testimony. (*See* App 66 ("The evidence can come from lay people, of course, Claimant who did the job personally and it can also come from medical evidence …")). While evidence of the repetitive nature of a job *can* come from medical evidence, where, as is true in the case below, a medical opinion that is based on the claimant's unsworn and self-serving medical history alone, as opposed to an official job description, or credible sworn testimony by either the claimant or co-workers, it is inadequate to prove a job involves repetitive motion, movement or tasks sufficient to meet a claimant's burden of proof under Section 42-1-172. In the case below, the Commission did not find the Respondent's testimony to be credible but, instead, found it to be self-serving, assigning greater weight to the "unbiased" ergonomics report.

E. The Court of Appeals erred by conflating the need to prove causation by medical evidence with the need to prove a job involves repetitive emotion, movement or tasks.

The Court of Appeals erroneously relied on *Michau v. Georgetown County ex rel. S.C. Cntys. Workers Comp. Tr.*, 396 S.C. 589, 723 S.E.2d 805 (2012), in its rejection of the ergonomics report, suggesting it was submitted as "medical evidence" as opposed to evidence that the Respondent's job was not repetitive. There is no dispute that *Michau* sets out the legal

standard for medical evidence acceptable under Section 42-1-172 to prove causation. 396 S.C. at 594-595, 723 S.E.2d at 807-808.[2] What *Michau* does not address is how the Commission and Courts determine that a job entails repetitive motion, movement or tasks sufficient to support a repetitive trauma injury claim.

Misunderstanding the purpose for which an ergonomics report may be submitted, the Court of Appeals erroneously ruled that it was "obvious" that the "Full Commission substituted the opinion of the ergonomics report for the considered medical opinion, made to a reasonable degree of medical certainty, for Dr. Loudermilk." (App 424). In the instant case, it is clear that the ergonomics report was directed at whether the Respondent's job involved sufficiently repetitive movements to support a repetitive trauma injury claim, but did not address medical causation in any way whatsoever. Thus, the Court of Appeals' outright rejection of the ergonomics report, which does not even attempt to address medical causation, was error.

For this same reason, the Court of Appeals' reliance on 12 Lex K. Larson, *Larson's Workers' Compensation Law* § 128.03[4], is misplaced. While it is undisputed that medical evidence is necessary to prove causation in medically complex cases, Professor Larson also notes that there are instances where a decision in conflict with medical testimony is justified. "The first is that lay testimony, including that of the claimant, is of probative value in establishing such simple maters as the existence and location of pain, *and sequence of events leading to the compensable condition*, and the actual ability or inability of claimant to perform work; the second is that Industrial Commissions generally become expert in analyzing certain uncomplicated kinds of medical facts, *particularly those bearing on industrial causation*,

[2] However, this Court stressed in *Michau* that its opinion was "a narrow one limited to medical evidence given by expert opinion or testimony as provided for in section 42-1-172," specifically referencing subpart (D) of that section, 396 S.C. 589, 596, 723 S.E.2d at 808, not subpart (A).

disability, malingering, conversion reaction, and the like." 12 Lex K. Larson, *Larson's Workers' Compensation Law* § 128.04 (emphases added).

Moreover the cases relied upon by the Court of Appeals to conclude that Dr. Loudermilk's opinion trumped all the other evidence in the record all addressed either the issue of medical causation or degree of impairment, but not whether an injury by accident or a repetitive trauma injury had occurred in the first place. *See Clemmons v. Lowe's Home Ctrs., Inc.-Harbison,* 420 S.C. 282, 289, 803 S.E.2d 268, 271 (2017) (rejecting degree of impairment found by the Commission in light of judicial determination that all expert medical evidence supported a higher rating); *Michau*, 396 S.C. at 592, 723 S.E.2d at 806 (evaluating admissibility of medical evidence regarding causation); *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 207, 143 S.E.2d 376, 379-380(1965) (relying on expert medical evidence to determine whether the claimant's bone cancer was caused or accelerated by a workplace fall from a ladder); *Baker v. Graniteville Co.*, 197 S.C. 21, 30, 14 S.E.2d 367, 371 (1941) (evaluating expert testimony regarding whether blow to arm at work caused fatal infection); *Burdette v. City of Greenville*, 401 S.C. 417, 428-429, 737 S.E.2d 200, 206 (Ct. App. 2012) (overturning Commission decision that the claimant had not proven causation based on the medical evidence).

The error in the Court of Appeals' reliance on *Herndon* to reject non-medical evidence that is submitted to prove an element *other* than medical causation is highlighted in *Tobey v. L&P Constr. Co.*, 296 S.C. 122, 170 S.E.2d 897 (Ct. App. 1988). There, the Commission denied benefits based on its finding that lay testimony failed to establish a work accident occurred as the claimant had alleged. On appeal, the circuit court reversed, pointing to medical evidence and relying on *Herndon* for the proposition that, "where 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 the medical experts on a particular subject may be conclusive even if contradicted by lay witnesses." 296 S.C. at 125-126, 170 S.E.2d at 899. However, the Court of Appeals reversed, explaining that "*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 is a "fact to be determined by the commission." 296 S.C. at 126, 170 S.E.2d at 899-900. There, as is the case here, "[t]he reasoning of the appealed order is misplaced." 296 S.C. at 126, 170 S.E.2d at 899. That is because, in the case of a repetitive trauma injury, whether a job involves repetitive actions or tasks is a question of fact that is not reserved for medical experts but, instead, can be proven by competent, probative lay testimony, job descriptions, as well as expert opinion contained in an ergonomics report.

F. Implications of the Court of Appeals' ruling.

The danger of relieving a claimant from the burden proving the repetitive nature of his or her job is fairly evident. While the case below did not involve an issue with the timing of the Respondent's notice of injury,[3] numerous repetitive trauma injury cases do involve timely notice or statute of limitations issues. *See Rhame v. Charleston County Sch. Dist.*, 415 S.C. 162, 170, 781 S.E.2d 151, 155 (Ct. App. 2015) (whether the claimant's repetitive trauma back injury was

[3] At some point, a question arises as to why the Claimant below did not present this claim as an injury by accident, pursuant to S.C. Code Ann. § 42-1-160, as there was evidence he felt a sharp pain in his back in January 2017, (App 134-135, 137, 244, 260, 269), and reported it soon after. (App 320-324). It is entirely possible that he was concerned that he could not prove all of the elements of an accidental injury that both arose out of and in the course of his employment, mistakenly believing all he needed to present under S.C. Code Ann. § 42-1-172 was a medical opinion on causation, which in turn was based on his own self-serving history, making his claim easier to "prove." Under the Court of Appeals' reasoning, that would be the case; however, such a result runs counter to the scheme adopted by the Legislature, as well as to decades of judicial interpretation of our Act.

barred by the statute of limitations); *King v. Int'l Knife & Saw–Florence*, 395 S.C. 437, 443, 718 S.E.2d 227, 230 (Ct. App. 2011) (determining what triggers an injured employee's duty to provide notice to employer of repetitive trauma injury); *Bass*, 365 S.C. at 481, 617 S.E.2d at 383 (overturning Commission finding that claim was barred due to late notice since it was a repetitive injury case). If a claimant is not required to prove that his injury was the result of the repetitive nature of his or her job, he or she could delay providing timely notice of an injury by accident as is required by S.C. Code Ann. § 42-15-20, or fail to file within the statute of limitations and, because "repetitive trauma injuries have a gradual onset" making it "difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury," *Rhame*, 415 S.C. at, 168, 781 S.E.2d at 154, *citing Schurlknight*, 352 S.C. at 178, 574 S.E.2d at 195, simply claim the injury is a repetitive trauma injury without ever having to show that the job, in fact, involved repetitive trauma. In other words, under the Court of Appeals' interpretation, Section 42-1-172 would provide claimants a convenient by-pass or work around of the notice and statute of limitations requirements in cases where the claimant failed to notify the employer or file the claim in a timely fashion.

The Court of Appeals' decision in this case leads inevitably to the conclusion that a claimant can prove he or she is entitled to benefits under 42-1-172 without ever proving that his or her job duties were repetitive. Such a result is absurd and cannot have been what the Legislature intended, *see, e.g.*, *Ranucci*, 409 S.C. at 500, 763 S.E.2d at 192-193 ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless"), and must be reversed.

CONCLUSION

For the reasons stated herein, this Court should grant the SCEAA's Motion to file an amicus brief, and correct the Court of Appeals' errors in interpreting S.C. Code Ann. § 42-1-172, adopting the interpretation applied by the Commission.

Respectfully submitted,

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McANGUS GOUDELOCK & COURIE LLC

s/Helen F. Hiser

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Attorneys for the South Carolina Employers' Advocacy Association