

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1113790

Kevin S. Stokes, Appellant,

v.

Techno Loading Arms, a division of Aluminum
Ladder Company, and Bridgefield Casualty Insurance
Company c/o Summit Holdings, Inc., Respondents.

INITIAL BRIEF OF RESPONDENTS

Nicolas L. Haigler
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Respondents

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STATEMENT OF THE CASE

This is a workers' compensation appeal involving an alleged injury by accident pursuant to Section 42-1-160 and/or an aggravation of a pre-existing condition pursuant to Section 42-9-35 of the Act. The Claimant has appealed the Decision and Order of the Full Commission Appellate Panel ("Full Commission), which unanimously affirmed the Decision and Order of the Hearing Commissioner. This brief is submitted on behalf of Techno Loading Arms, a division of Aluminum Ladder Company, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. ("Respondents" or "Defendants") in response to the Claimant's appeal.

By way of background, this claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 50 filed by the Claimant on January 4, 2012. It is the position of the Claimant that he sustained an injury by accident to his back with bilateral radicular leg symptoms or an aggravation of a pre-existing condition arising out of and in the course of his employment with the Defendants on August 26, 2011. Accordingly, the Claimant now seeks the authorization of past and continued causally-related medical treatment for his back and temporary total disability benefits from September 26, 2011, and continuing until such time as maximum medical improvement is reached.

It is the position of the Defendants that the Claimant did not sustain a compensable injury by accident or aggravation of a pre-existing condition, as alleged. Specifically, the Defendants assert the Claimant has failed to meet his burden of proof under Section 42-1-160 and/or Section 42-9-35 of the Act. As such, the Defendants deny the Claimant is entitled to any benefits under the Act. In addition, even if the claim were found compensable, the Defendants deny liability for the unauthorized medical treatment received by the Claimant in violation of Section 42-15-60.

Finally, the Defendants requested the Full Commission make a determination as to the credibility of the Claimant.

The Hearing in this matter was held on April 24, 2012, in Florence, South Carolina, before Commissioner Andrea C. Roche ("Hearing Commissioner"). By way of Decision and Order filed on August 9, 2012, the Hearing Commissioner determined the Claimant did not sustain a compensable injury by accident or aggravation of a pre-existing condition on August 26, 2011. Specifically, the Hearing Commissioner determined the Claimant failed to meet his burden of proof under Section 42-1-160 and/or Section 42-9-35 of the Act and, therefore, denied the Claimant's claim for benefits.

The Claimant timely appealed the Decision and Order to the Full Commission. By way of Decision and Order filed April 3, 2013, the Full Commission unanimously affirmed the Decision and Order of the Hearing Commissioner. The Claimant has now timely appealed to the Court of Appeals.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. CODE ANN. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by error of law. S.C. CODE ANN. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative, or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark*, supra.; S.C. CODE ANN. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). As the South Carolina Supreme Court observed,

a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(A)(6)(f).

ARGUMENT

I. CLAIMANT'S ARGUMENTS ARE CONCLUSORY AND SHOULD BE DEEMED ABANDONED ON APPEAL.

The Claimant has failed to cite any legal authority to this Court to support his arguments for compensability and, therefore, has abandoned his appeal as a matter of law.

It is well-established by our appellate courts that conclusory arguments, or arguments which fail to cite any supporting legal authority, are deemed abandoned on appeal. *Pack v. Department of Transportation*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009)(citing *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005); see also *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994)). In the matter at bar, the claimant argues for the compensability of his claim as an injury by accident or aggravation of a pre-existing condition, but fails to cite to the Court either the specific statutes applicable to the claim or any legal authority to support his appeal for a reversal of the Decision and Order of the Full Commission. As such, the appeal should be abandoned as a matter of law.

II. DENIAL OF CLAIM OF AN INJURY BY ACCIDENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The determination by the Full Commission that the Claimant failed to prove an injury by accident on August 26, 2011, pursuant to Section 42-1-160, is supported by substantial evidence.

It is well-established in South Carolina that the Claimant has the burden of proving by a preponderance of the evidence that his alleged injuries are causally-related to his employment and that he is entitled to any compensation or medical care as a result. S.C. CODE ANN. § 42-1-160 (Supp. 2007); *Mims v. Nehi Bottling Co.*, 218 S.C. 513, 63 S.E.2d 305 (1991). Importantly,

however, an award under the Act cannot be based upon surmise, conjecture, or speculation, but must be founded upon sufficient substance to afford it a reasonable basis. *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985).

In the case at bar, the Claimant contends the Full Commission, in denying the claim of an injury by accident, “simply overlooked the deposition testimony of Dr. Chokshi and the eyewitness testimony of William Belin and George Ray, coworkers of the Claimant.” See Initial Brief of Appellant, pp. 7-8. The Claimant then proceeds to argue that the Full Commission placed too much weight upon the inconsistency between the medical records and the testimony of the Claimant with regard to the alleged date of accident, arguing that the Claimant’s relative lack of an education and inability to accurately identify the date of accident should not preclude an award of compensability. See Initial Brief of Appellant, p. 9. In short, the Claimant contends the Full Commission simply “cherry picked” the evidence to support its decision instead of relying upon the preponderance of the evidence.

To the contrary, the Defendants assert the Claimant’s contentions are simply not supported by the evidence in the record. In fact, the Claimant’s Brief is fraught with *cherry-picked* testimony from the aforementioned witnesses and Dr. Chokshi and, as such, does not provide this Court with an accurate and complete analysis of the evidence in the record. Moreover, the Defendants contend the absence of any medical records evidencing an accident on or about August 26, 2011, cannot be reasonably or justifiably explained by error or ignorance on the part of the Claimant and/or treating physicians, but instead constitutes probative evidence to support the decision of the Full Commission.

A. **Medical Evidence Does Not Support An Injury By Accident.**

The Defendants contend the medical evidence in the record is absent any reference to a work-related accident on or about August 26, 2011, a fact not disputed by the Claimant in his Brief to the Court. Interestingly, the Claimant fails to identify or rely upon a single medical record in his Brief to support or establish a causal relationship between his back problems and the alleged accident on August 26, 2011. The Defendants assert it is disingenuous and seemingly impossible to make an argument in support of causation without being able to reference any of the numerous medical reports submitted as evidence in the record. In support of this assertion, the Defendants direct the this Court to the medical records from Carolina Pines Regional Medical Center, Dr. Lisa Mancuso, Dr. Robert Elder, Dr. Rakesh Chokshi, and Dr. Anthony Alexander, **none** of which reference a work-related accident on August 26, 2011. In fact, none of the records even reference any accident or causal relationship to the Claimant's employment.

On August 27, 2011, **only one day after the alleged accident**, the Claimant presented to Carolina Pines Regional Medical Center ("Carolina Pines") with complaints of "left flank pain **since Monday (August 22, 2011)** . . . sts had some blood and passed some "pebbles" . . . sts still hurting and pain is going down into left leg." See Claimant's APA #2, p. 6 (emphasis added). Importantly, the report provided a date of onset inconsistent with the alleged date of accident, August 26, 2011, and does not mention the mechanism of injury or any relationship to the Claimant's employment. The Defendants assert this report is the most probative evidence given its proximity to the alleged date of accident.

On August 31, 2011, **only five days after the alleged accident**, the Claimant presented to Dr. Elder with low back and left leg pain, which the Claimant described as **suddenly occurring**

and continuous for two weeks. See Defendants' APA #2, p. 25. This report, like that of Carolina Pines from August 27, 2011, details the onset of symptoms but fails to reference a date of onset or specific causative event or accident, and provides no correlation to an accident on the date alleged.

On September 19, 2011, the Claimant presented to Dr. Lisa Mancuso of the Pee Dee Pain Center, at the referral of Dr. Elder, with complaints of "**chronic low back pain for years, worse in the last 3-4 months.**" See Defendants' APA #2, p. 27 (emphasis added). The Defendants assert this report like that of Dr. Elder and the attending physician at Carolina Pines supports an ongoing chronic back problem and not an acute injury on August 26, 2011. Importantly, Dr. Mancuso reported the Claimant had not had a lumbar spine MRI in the last year (despite the recommendation of Dr. Elder in April of 2011). See Defendants' APA #2, pp. 17, 27. On September 21, 2011, the Claimant presented to Carolina Pines for an MRI of the lumbar spine. The history portion of the corresponding report indicates the Claimant complained of low back pain with bilateral leg pain and numbness for a "few months." See Defendants' APA #3, p. 41. Again, a "few months" is inconsistent with an accident which is alleged to have occurred less than a month prior.

Finally, the Claimant presented to Dr. Anthony Alexander, of Pee Dee Orthopaedics, on September 27, 2011. The corresponding report of Dr. Alexander notes the date of onset as **August 1, 2011, with the symptoms getting "worse over the past two weeks."** See Claimant's APA #6, p. 29 (emphasis added). The Defendants submit neither of these dates is consistent with an accident on August 26, 2011. On September 28, 2011, the Claimant presented to Dr. Chokshi for a surgical consultation at the request of Dr. Alexander. Dr. Chokshi reported the

“patient has been having this pain for the **last two to three months progressively getting worse.**” See Claimant’s APA #6, p. 33 (emphasis added). In sum, the Defendants contend it is simply untenable to find as a fact that, based upon the aforementioned records, the Claimant sustained an injury by accident on August 26, 2011. In fact, all of the medical evidence is to the contrary.

Additionally, the Claimant, in an attempt to avoid the reality of the medical records, presents piece-meal testimony of Dr. Chokshi in support of the Claimant’s position that the medical records do not accurately reflect the reported date of accident. See Initial Brief of Claimant, pp. 8-9. Specifically, the Claimant directs this Court to Dr. Chokshi’s testimony that “[i]f I didn’t write [a work-related accident], it doesn’t mean that we didn’t talk about it.” See Deposition of Rakesh P. Chokshi, M.D., p. 16. The Claimant now asks this Court to take a quantum leap to compensability based upon the possibility that the Claimant’s mention of a work-related injury to Dr. Chokshi was mistakenly not recorded in his initial report. Importantly, the Claimant fails to provide to this Court Dr. Chokshi’s subsequent testimony that he did not have “any independent recollection [of a conversation with the Claimant regarding an accident on August 26, 2011].” See Deposition of Dr. Chokshi, p. 40. This testimony is not surprising considering the deposition occurred almost 8 months after the appointment.

In short, this clearly speculative testimony on the part of Dr. Chokshi cannot provide the basis for an award under the Act and, therefore, was properly disregarded as determinative by the Full Commission. It is the responsibility of the Full Commission, as the finder of fact, to consider the credibility and weight afforded an expert’s opinion during the process of rendering a decision. *Chapman v. Foremost Dairies, Inc.*, 249 S.C. 438, 154 S.E.2d 845 (1967); see also *Tiller v. Nat’l Health Care Ctr. Of Sumter*, 334 S.C. 333, 334, 513 S.E.2d 843, 846 (1999) (“once admitted,

expert testimony is to be considered just like any other testimony”). Importantly, “although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.” *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006)(citing *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004)).

Moreover, the Defendants maintain that a critical review of the testimony of Dr. Chokshi confirms he could not provide an opinion stated to a reasonable degree of medical certainty regarding an injury by accident on August 26, 2011. With regard to his reported date of onset, Dr. Chokshi testified his “notes” did not reflect an acute injury at work, but problems which had **progressively worsened over the prior two to three months**. See Deposition of Dr. Chokshi, pp. 6, 17-18. In fact, Dr. Chokshi admitted his report, as well as those of Dr. Mancuso, Dr. Elder and Carolina Pines referencing the Claimant’s progressive back problems, is inconsistent with an alleged acute work-related accident on August 26, 2011. See Deposition of Dr. Chokshi, pp. 22, 24, 35-36. Dr. Chokshi ultimately testified **he had no evidence** to support the Claimant sustained a work-related accident on August 26, 2011. See Deposition of Dr. Chokshi, p. 44.

B. **Testimony Of Claimant and Lay Witnesses Is Inconsistent and Does Not Outweigh The Overwhelming Medical Evidence.**

The Claimant directs this Court to the deposition testimony of William Belin and George Ray, who the Claimant asserts were “eyewitnesses” to the alleged accident on August 26, 2011, when the Claimant was injured flipping a counterweight. Importantly, neither Mr. Belin nor Mr. Ray testified regarding any such event. In addition, neither witness could confirm the date on which the alleged accident occurred. See Deposition of George Ray, p. 8; Deposition of William Belin, p. 6. In fact, neither witness could even confirm whether the alleged accident occurred in

August or September of 2011. See Deposition of George Ray, p. 8; Deposition of William Belin, p. 6. Accordingly, the Defendants submit this alleged “eyewitness” testimony is not reliable to establish causation as it relates to an accident on August 26, 2011.

Additionally, the Defendants direct this Court to the wholly inconsistent Hearing testimony of the Claimant regarding the date of accident. The Claimant initially testified he told his supervisor about his accident before leaving the plant on August 26, 2011. See H.T., p. 12. The claimant, however, never deposed his supervisor or called him as a witness before the Hearing Commissioner to confirm this alleged conversation. The Claimant then testified he presented to Carolina Pines on August 27, 2011, and informed the attending physician that he injured his back at work on the day before. See H.T., pp. 25-26. He disputed the corresponding report of the physician indicating his problems began six days earlier. See H.T., p. 26. The Claimant then testified he informed Dr. Elder on August 31, 2011, of the alleged work accident on August 26, 2011. See H.T., p. 27. Considering this testimony independent of the corresponding medical reports it certainly appears as though the Claimant recalled the date of his accident as August 26, 2011. However, his subsequent testimony before the Hearing Commissioner confirms the Claimant did not independently know the day or month of his accident, as his testimony under direct examination attempts to assert.

Specifically, the Claimant testified that after receiving the recommendation for surgery on September 28, 2011, more than one month after the alleged accident, he immediately presented to Cindy Smith at Aluminum Ladder to inform her that his back injury was caused by a work accident on August 26, 2011. See H.T., p. 15. Importantly, the Form 12-A First Report of Injury, completed following this conversation with Ms. Smith, indicates the accident occurred on

September 9, 2011. See Deposition of Cindy Smith, Ex. 1. When questioned how September 9, 2011, was identified as the date of accident, the Claimant testified “[m]e and Cindy was trying to figure out when the accident date was and I think she backed it up to when I had missed a day or something.” See H.T., p. 16. However, when Ms. Smith was questioned regarding the identification of the date of accident as September 9, 2011, she testified that “Scott gave me that date.” See Deposition of Cindy Smith, p. 17. Moreover, Ms. Smith testified neither she nor anyone else at Aluminum Ladder was aware of an alleged accident on August 26, 2011, **until April of 2012**. See Deposition of Cindy Smith, p. 19.

Moreover, and contrary to his prior testimony, the Claimant testified he did not discover the date of accident was actually August 26, 2011, until a conversation with his wife which occurred after he reported an alleged accident to Ms. Smith on September 28, 2011. See H.T., p. 16. The Defendants find it difficult to understand how the Claimant could recall the date of accident on August 31, 2011, when he allegedly told Dr. Elder, but subsequently forget it less than one month later.

In sum, the lay witnesses identified by the Claimant as the “eyewitnesses” could not even identify the month (much less the date) of the accident and described an incident different from the accident alleged by the Claimant. In addition, the Claimant’s testimony that he specifically told Dr. Elder and Carolina Pines about his accident on August 26, 2011, is not consistent with his Hearing testimony that he did not discover the date of the accident until a conversation with his wife on or after September 28, 2011. Moreover, the Claimant’s testimony that he notified his employer of his injury on August 26, 2011, is not supported by his Hearing testimony, the Form 12-A, or the testimony of Ms. Smith. Accordingly, the Defendants contend the Full Commission’s

determination that the testimony of the Claimant and lay witnesses is not consistent with an alleged accident on August 26, 2011, is supported by substantial evidence in the record.

III. DENIAL OF CLAIM OF AN AGGRAVATION OF A PRE-EXISTING CONDITION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The determination by the Full Commission that, pursuant to Section 42-9-35, the Claimant failed to prove an aggravation of a pre-existing condition on August 26, 2011, is supported substantial evidence.

As referenced in Part I, the Claimant has the burden of proving by a preponderance of the evidence a casual relationship between his employment and his alleged back injury in order to be entitled to any compensation or medical care as a result. S.C. CODE ANN. § 42-1-160 (Supp. 2007); *Mims v. Nehi Bottling Co.*, 218 S.C. 513, 63 S.E.2d 305 (1991). Importantly, the Act has carved out an additional burden of proof for those Claimants alleging a compensable aggravation of a pre-existing condition. Under Section 42-9-35, “[t]he employee **shall** establish by a preponderance of the evidence, including **medical evidence**, that: (1) the subsequent injury aggravated the pre-existing condition or permanent physical impairment” S.C. CODE ANN. § 42-9-35 (Supp. 2007)(emphasis added). “Medical evidence” is statutorily defined as “expert opinion or testimony stated to a reasonable degree of medical certainty . . . offered by a licensed health care provider.” S.C. CODE ANN. § 42-9-35.

Interpreting Section 42-9-35, our appellate courts have consistently held that “[t]he Claimant’s right to compensation for aggravation of a pre-existing condition arises when the Claimant has a **dormant condition** that becomes disabling because of the aggravating injury.” *Murphy v. Owens Corning*, 393 S.C. 77, 86, 710 S.E.2d 454, 459 (Ct. App. 2011)(citing

Anderson v. Baptist Med. Ctr., 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001)(emphasis added)).

In this case the Claimant contends the Full Commission erred by failing to consider the deposition testimony of Dr. Chokshi, which the Claimant asserts provides the required medical evidence to support a compensable aggravation of a pre-existing condition. See Initial Brief of Claimant, p. 9. To the contrary, the Defendants submit the speculative testimony of Dr. Chokshi upon which the Claimant relies was predicated upon an incomplete understanding of the Claimant's significant recent prior back problems. In fact, the overwhelming medical evidence in the record, which is relied upon by the Full Commission, **but initially not disclosed to Dr. Chokshi**, reveals the Claimant was actually having significant back problems continually from April of 2011 through at least July 28, 2011, less than one month prior to the alleged accident.

Specifically, the Claimant presented to Carolina Pines on April 25, 2011, with lower back pain; the Claimant reported the "**onset of acute symptoms was 6 days ago**." See Defendants' APA #3, p. 35 (emphasis added). On April 27, 2011, Dr. Elder diagnosed the Claimant with low back pain and lumbar radiculitis, prescribed him Flexeril and 800 milligram Motrin, and referred him for an "**MRI ASAP**." See Defendants' APA #2, p. 17. The Claimant did not recall following through with the recommendation for an MRI. See H.T., p. 41. On July 11, 2011, **only 46 days prior to the alleged accident**, the Claimant presented to Dr. Elder with bilateral leg and back pain ongoing **intermittently for six weeks**. See Defendants' APA #2, p. 19. On July 28, 2011, less than one month before the alleged accident, the Claimant again complained of lower back and leg pain, which the Claimant described as **continuous for two months**. See Defendants' APA #2, p. 22. Importantly, Dr. Chokshi testified he had no knowledge of this medical treatment at the time

of his initial causation testimony referenced by the Claimant. See Deposition of Dr. Chokshi, p. 25-26. Moreover, once Dr. Chokshi was apprised of the Claimant's history, he was unable to provide a causation opinion stated to a reasonable degree of medical certainty, thereby supporting the Full Commission's determination to deny the claim under Section 42-9-35. See Deposition of Dr. Chokshi, pp. 31-32.

Interestingly, even before being presented with this critical medical evidence, Dr. Chokshi actually admitted the Claimant reported to him on September 28, 2011, that the Claimant's lower back pain had progressively worsened during the prior two or three months, which would have included the period from July 28, 2011, through August 26, 2011. See Deposition of Dr. Chokshi, p. 18. While this testimony alone establishes the Claimant's condition was not dormant as required by *Murphy*, the Defendants contend Dr. Chokshi's subsequent testimony is equally compelling and confirms Dr. Chokshi could not provide the requisite medical evidence to prove an aggravation of a pre-existing condition under Section 42-9-35. The testimony proceeded as follows:

Q: Okay. Doctor, based on the information I've shown you, all the records I've shown you from April, from June, from July, from August, from September, the doctor's - - Dr. Mancuso's notes, based on all that, are you able to give an opinion to a reasonable degree of medical certainty that Mr. Stokes sustained a work-related accident on August 26, 2011, injuring his back and causing the problems you treated him for?

A: Yeah, well the problem that he had could - - it sounded from his history of many months prior to - - you showed me all different notes, that he was having exacerbations and improvements, obviously, as he was being treated. Now, clearly, something along the way could have triggered another of those episodes.

Q: Are you able to state within a reasonable degree of medical certainty that that occurred?

A: But I didn't see him immediately after that, so **I couldn't tell you exactly.**

See Deposition of Dr. Chokshi, pp. 40-41 (emphasis added). Dr. Chokshi restated his opinion as follows:

Q: Doctor, let me ask you this question, do you have any documentation to show that he had a work-related accident?

A: I have to look at my intake sheet. I don't it on my notes of 9-28-11, and if my intake sheet indicates something like that, I would look at it.

Q: Okay. Other - - of what you've seen today and what's present at the table, do you have any documentation?

A: **Not at this time.**

Q: Okay. Do you - - so I assume you can't state to a reasonable degree of medical certainty then that he either had an acute injury or aggravation of a pre-existing condition or any other type of accident on August 26, 2011?

A: Based on my recalling of the events when we made the decision for his surgical treatment, that's the conversation we had, which is that he specifically told me that he was concerned that this problem that he's dealing with for which we are talking about doing a surgical intervention, you know, he believed that it was related and aggravated by his work problem and he wanted workers' comp to step in and help him with this process. And I said, well, that's fine if that's what you want to do. But because of the pain that he was having and the concern we had, impending cauda equine type problem, we didn't want him to wait too, too long, and that's when he did, on his own, decide that he'll deal with that issue on the other end of the spectrum, but then he wanted us to go and take care of his medical issues right then.

Q: Doctor, when Mr. Bledsoe was asking you questions, the very second question he asked you was whether you thought this was related to a work-related accident, and you said, I can't say one way or the other. So how are you now giving an opinion that you thought that was related to his work?

A: No. I'm saying based on my conversation with him. **I'm not giving you -**
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Q: My question - -

A: - - an opinion.

Q: Okay. I want a medical opinion stated to a reasonable degree of medial certainty. Can you give one as to whether - - given all the evidence you've seen, the pre-existing problems, the continuation of problems - -

A: I - -

Q: - - can you give an opinion to a reasonable degree of medical certainty?

A: I cannot because I didn't - - I wasn't the treating doctor immediately after his injury occurred.

See Deposition of Dr. Chokshi, pp. 44-46 (emphasis added).

In sum, substantial evidence supports the Claimant's pre-existing back condition was not dormant but actually required active and continuous treatment from April through July of 2011. The claimant is therefore not entitled to benefits under *Murphy*. Moreover, the record is devoid of the requisite medical evidence establishing the aggravation of a pre-existing condition under Section 42-9-35. Accordingly, the denial by the Full Commission of an aggravation of a pre-existing condition on August 26, 2011, is supported by substantial evidence and, therefore, should be affirmed by this Court.

CONCLUSION

Based upon the foregoing, the Defendants respectfully request the Court of Appeals to affirm the Decision and Order of the South Carolina Workers' Compensation Commission denying the claim for benefits under Sections 42-1-160 and 42-9-35 of the Act.

Respectfully submitted,



Nicolas L. Haigler
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Respondents

July 17, 2013