THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 0920040

John R. Bowen, ... Respondent/Appellant,

vs.

Vinyl Services, Inc., South Carolina Home Builders SIF and Bridgefield Casualty Ins. Co., ... Defendants,

of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are ..... Appellants/Respondents.

and South Carolina Builders is the

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE COMMISSION PROPERLY DETERMINED BOWEN PERMANENTLY AGGRAVATED HIS PRE-EXISTING CONDITION AS A RESULT OF REPETITIVE TRAUMA ON OR ABOUT NOVEMBER 11, 2009.

II. THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FINDING THAT HE AGGRAVATED HIS PRE-EXISTING CONDITION, CUTTING OFF ANY CAUSAL CONNECTION TO BOWEN'S CURRENT LOWER BACK SYMPTOMS AND THE DODGE MEDICALS PERTAINING TO THE MARCH 22, 2004 ACCIDENT.

III. THE APPELLANT/RESPONDENT AND THE RESPONDENT/APPELLANT ARE BARRED FROM ARGUING THE CLAIMANT IS ENTITLED TO ANY ADDITIONAL BENEFITS ON APPEAL IN REGARD TO THE MARCH 22, 2004 ACCIDENT, BECAUSE NEITHER PARTY APPEALED THE SINGLE COMMISSIONER'S FINDING OF FACT OR CONCLUSIONS OF LAW.

STATEMENT OF THE CASE

By prior Order of the South Carolina Workers' Compensation Commission, dated August 9, 2006, the Commission determined the Claimant had sustained compensable injuries to his neck, back and right lower extremity as a result of his on-the-job injury of March 22, 2004. (R. p. 6) At the hearing, held on March 7, 2006, Bowen complained of cervical, lumbar and right lower extremity pain, although he had returned to work. On August 9, 2007, Commissioner George F. Funderburke issued a Decision and Order finding that Bowen had sustained (35%) thirty-five percent permanent disability to his back and (10%) ten percent permanent partial disability to his right lower extremity as a result of the March 22, 2004 accident. (R. p. 47) Bowen was also found to be entitled to continuing medical treatment to his neck, back and right lower extremity. (R. p. 47). Dodge v. Bruccoli, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999) (Maximum medical improvement is a plateau at which no further medical care or treatment will lessen the degree of impairment.) (R. p. 47)

In April of 2007, Bowen requested that the South Carolina Home Builders SIF (hereafter, "Home Builders") refer him back to Dr. McCallum, his authorized treating physician, for his right ankle. On April 23, 2007, Bowen was re-evaluated by Dr. McCallum. (R. p. 280) On July 10, 2007, Bowen underwent arthroscopic surgery. (R. pp. 282-284) On July 18, 2007, Dr. McCallum indicated Bowen could return to work the following week. (R. p. 286) After the Claimant returned to work, his ankle was feeling

better, and he was able to perform the essential functions of his position. (R. p. 31, lines 14-18) On October 22, 2007, Dr. McCallum opined Bowen had reached maximum medical improvement with no additional impairment. (R. pp. 282-284; R. p. 430)

On February 19, 2010, Bowen filed a South Carolina Workers' Compensation Commission Form 50, request for a hearing, in regard to his March 22, 2004 claim, alleging he had sustained a change of condition. (R. p. 50) Bowen alleged a change of condition to his back, right lower extremity, right foot, neck, left upper extremity, left lower extremity and psychological overlay. (R. p. 50) On February 19, 2010, Bowen also filed a Form 50, request for a hearing, alleging the same injuries to his back, right lower extremity, right foot, neck, left upper extremity, left lower extremity and psychological overlay as a result of repetitive trauma with a date of injury of November 11, 2009. The Home Builders' Motion to Consolidate Bowen's alleged change of condition for the worse and repetitive trauma injury was granted by Commissioner Wilkerson. (R. p. 36) Therefore, the purpose of the underlying hearing was for the Single Commissioner to address both South Carolina Workers' Compensation Claim Number 0402800, which concerns Bowen's argument for a change of condition for the worse in regard to the March 22, 2004 injury, as well as South Carolina Workers' Compensation Claim Number 092004, which concerns Bowen's November 11, 2009 repetitive trauma injury.

At the time of the hearing, held on June 24, 2010, it was the position of Home Builders that despite Bowen filing a South Carolina Workers' Compensation Commission Form 50 alleging injuries to Bowen's back, right lower extremity, right foot, neck, left upper extremity and psychological overlay, that the only body part that would be subject to an indemnity award for a change of condition for the worse would be the

right ankle injury. Bowen only received treatment for his right ankle following the hearing on August 9, 2006 until his one year change of condition had expired. On October 22, 2007, Dr. McCallum opined the Claimant had reached maximum medical improvement with no additional impairment. (R. p. 430) There was absolutely no medical evidence entered into the record indicating Bowen sought any treatment for any other body part within the (1) one year change of condition for the worse. (R. p. 69)

Currently, Bowen states his pains are "definitely" more severe than they were at the time of the prior hearing held on March 7, 2006. (R. p. 132, lines 11-15) Bowen believes that continuing to work, after his release from Dr. McCallum, performing climbing scaffolding, building scaffolding, carrying walk-boards, building decks, remodeling, walking up and down inclines permanently aggravated, accelerated or exacerbated his pre-existing condition in his cervical spine, lumbar spine and right lower extremity. (R. pp. 132-133, lines 16-5) Also, due to the repetitive nature of Bowen's job, he experienced a significant change in his knees and back in 2008. (R. pp. 131-132, lines 19-3) (R. p. 133, lines 12-24) The Home Builders did not provide coverage during this time period.

Per the Decision and Order of Commissioner Avery B. Wilkerson, dated November 18, 2010, the Single Commissioner determined Bowen sustained an injury by repetitive trauma on November 11, 2009, and Bridgefield is responsible for all causally related medical evaluations and treatment expense for the injuries to his cervical spine, lower back and bilateral lower extremities. (R. pp. 15-35) This finding was based not only on Bowen's testimony but the medical records and the medical opinions of Dr.

McCallum and Dr. Lucas. (R. pp. 25-27) The Commissioner also determined Bowen's average weekly wage for the 2009 injury is $645.75 resulting in a corresponding compensation rate of $430.52. (R. pp. 15-35)

The Single Commissioner further found the Claimant did sustain a change of condition to his right lower extremity only. (R. p. 25) The issue as to whether Bowen sustained any permanent disability in regard to his right lower extremity was held in abeyance pending a future hearing before the Commission or an agreement by the parties. (R. p. 25) Obviously, per the Decision and Order, dated November 18, 2010, of the Single Commissioner, the Defendant Home Builders is only responsible for any additional permanent disability to the Claimant's right ankle, as a result of a compensable change of condition for the worse to the right ankle.

From Commissioner Wilkerson's Decision and Order, Defendant Bridgefield filed a South Carolina Workers' Compensation Commission Form 30 dated December 1, 2010. (R. pp. 53-55) Bowen also filed a South Carolina Workers' Compensation Commission Form 30 dated December 6, 2010. (R. p. 56) Significantly, neither Party appealed Commissioner Wilkerson's Findings of Fact Number Eight, Number Nine, Number Ten, Number Eleven, Number Thirteen or Number Fourteen. (R. pp. 24-25) Nor did either Bridgefield or Bowen appeal Commissioner Wilkerson's Rulings of Law Number Three and Number Four. (R. pp. 32-33) Both Bridgefield and Bowen's Form 30s never mention the March 22, 2004 injury or the Findings of Fact or Conclusions of Law that Bowen only sustained a change of condition to his right lower extremity.

Per the Decision and Order of the Appellant panel of the South Carolina Workers' Compensation Commission, dated July 21, 2011, it affirmed the Single Commissioner's Decision and Order in its entirety. (R. p. 3) Before the Full Commission, Home Builders argued despite Bridgefield's argument that Bowen's symptoms could be related to a change of condition for the worse as a result of the March 22, 2004 injury, neither party appealed any issue having to do with the change of condition being limited to the right lower extremity on their respective South Carolina Workers' Compensation Commission Form 30s. (R. pp. 258-259, lines 16-2) Therefore, since neither party appealed the Findings of Fact and Conclusions of Law relative to the change of condition for the worse in regard to the right lower extremity or the March 22, 2004 injury, it precluded jurisdiction in front of the Full Commission. (R. pp. 258-259)

Bridgefield argued that they did not have any "standing" to appeal the 2004 claim in regard to their South Carolina Workers' Compensation Form 30, as they were only parties to the 2009 claim. (R. p. 261, line 23) Of note, as stated previously, the Single Commissioner consolidated the 2004 claim number 0402800 concerning the March 22, 2004 claim and the 2009 claim number 0920040 concerning the injury on November 11, 2009 per Order dated May 17, 2010. (R. p. 36)

It was Bowen's contention on appeal that the Single Commissioner was correct in finding the Claimant sustained a repetitive trauma injury on November 11, 2009 and disputed Bridgefield's argument that the claim is barred by Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2^{d} 329 (Ct App.1992). Bowen also contended the South Carolina Workers' Compensation Commission's Form 20, submitted by Bridgefield, was

incorrectly completed, due to his payroll records not being provided to Bowen, he argued his average weekly wage should be based on the 2008 W-2 form. Thus, his average weekly wage according to Bowen should be $811.18 Dollars with a corresponding compensation rate of $540.81 Dollars. It was also argued Bridgefield was responsible for temporary total disability benefits from December 20, 2009 to present and continuing. (R. pp. 15-35)

The Single Commissioner's Decision and Order was affirmed in its entirety, per Order of the Commission dated July 21, 2011. (R. p. 3) This appeal rises from the Workers' Compensation Commission. Now both Bowen and Bridgefield appeal to this Court.

STATEMENT OF FACTS

Bowen has worked for the same Employer-Defendant for approximately twenty years. He is required to load trucks, unload trucks, build scaffolding, unbuild scaffolding, install windows, carry materials, install vinyl siding and Hardie board siding, which requires frequent bending, stooping, lifting, walking and working overhead. (R. p. 78-79, lines 11-9) Bowen estimates he has to bend and stoop approximately 50 to 100 times per day. (R. p.79, lines 1-9). Bowen further testified that all of the tasks he performed were the same.

A. March 22, 2004 injury

On March 22, 2004, Bowen did sustain an accident when a walk board collapsed. This caused him to fall, injuring his neck, back and right lower extremity. (R. p. 44) He was seen the same day at Oconee Memorial Hospital. (R. p. 265) Bowen was instructed to follow up with Blue Ridge Orthopedics. (R. pp. 266-267) Dr. P. Sean McCallum, at Blue Ridge Orthopedics, provided treatment for Bowen's right ankle injury. (R. pp. 274-279) On May 28, 2004, Dr. McCallum opined, that Bowen had reached maximum medical improvement for his right ankle injury and sustained a (5%) five percent permanent impairment to his right lower extremity. (R. p. 279)

In regard to the Claimant's cervical injury following the March 2, 2004 injury, he received treatment from Dr. S. Emmett Lucas. (R. pp. 298-307) On January 24, 2005, Dr. Lucas performed a C5-C6 anterior cervical discectomy and interior body fusion. (R. pp. 317-319) Dr. Lucas opined on April 24, 2005 Bowen reached maximum medical

improvement and sustained (15%) fifteen percent permanent impairment to the cervical spine. (R. p. 43)

Following the March 22, 2004 claim, Bowen admitted he continued to experience some lower back pain at the time of the hearing on August 9, 2006. However, it is important to note that Bowen had returned to work in May of 2005, before the hearing in 2006, per his physicians' opinions. (R. p. 41) He had returned to work full-duty until on or about November 11, 2009. Bowen testified he was required to lift Hardie board, which is heavier than the vinyl siding, more so after the March 22, 2004 accident, with trim pieces weighing up to 100 pounds. Bowen was required to lift and carry Hardie board, climb up and down ladders and then after installation, perform the same process over and over again with other pieces. (R. pp. 83-88, lines 18-2) Out of the eight hour workday, he performed this task continuously. (R. p. 79)

B. Change of condition for March 22, 2004 injury

As stated previously, following the March 22, 2004 injury, Bowen had returned to work in May of 2005. (R. p. 128) Approximately one year following the hearing on March 7, 2006 he called the Home Builders to say that he was having some problems with his right ankle. (R. p. 129) On April 23, 2007, Bowen was evaluated by Dr. McCallum, who recommended an MRI of his right ankle. (R. p. 280) Following the MRI of the right ankle, Dr. McCallum recommended surgery. (R. p. 281) On July 10, 2007, Dr. McCallum performed arthroscopic surgery on Bowen's right ankle. (R. pp. 282-285)

He was released and returned to work following his surgery on July 10, 2007. Not only did Dr. McCallum release the Claimant to maximum medical improvement, he indicated Bowen did not have any additional impairment to his right lower extremity. (R. p. 430) During Bowen's entire course of treatment, he did not complain of any back problems. He did not contact the Home Builders or request any additional treatment until January of 2010. (R. p. 129) Between 2007 and 2010 Bowen testified the Home Builders did not pay any kind of medical bills. (R. p. 129) Nor did he request any additional treatment for his back, lower back or right lower extremity during this time period.

C. November 11, 2009 repetitive trauma

Bowen testified following his release for his ankle surgery in July 2007 that he was physically able to perform the functions of his position. (R. p. 131) His pains are "definitely" more severe now than at the time of the hearing in 2006. (R. p. 132, lines 11-15) Bowen adamantly testified that due to the repetitive nature and strenuous nature of his position, after returning back to work following his surgery in July of 2007, that continuing to climb scaffolding, build scaffolding, carrying walk boards, building decks, remodeling and walk up and down inclines permanently aggravated, exacerbated and/or accelerated his pre-existing condition in his neck, lumbar spine and right knee. (R. pp. 132-133, lines 16-1) Bowen believes that due to the permanent aggravation, caused by his repetitive work duties, that it has caused his symptoms to worsen.

His symptoms have worsened to such an extent that he "cannot do anything physical at all." (R. p. 133, lines 6-11). Bowen testified his symptoms began to worsen in 2008 when he really started to "[push]" himself. (R. p. 133, lines 21-24) Bowen testified

he felt like he was "carrying [his] own weight . . . . Up to about two years ago. . ." (R. p. 138, lines 16-18). Following the March 22, 2004 accident, Home Builders stopped providing coverage to the Employer-Defendant.

Bowen went out of work on or about November 11, 2009. Bowen did not return to Dr. Lucas's office, following his initial release, on April 24, 2005, until January 20, 2010. (R. p. 43) Bowen's testimony is clear he had continued to experience some amount of pain in his lower back following the 2004 incident, but due to the strenuous and repetitive nature of his position, his job duties aggravated, accelerated and/or permanently exacerbated his pre-existing condition. Also, his back pain began to extend down his legs to his knees. Due to that amount of pain, Bowen has been out-of-work since November 11, 2009. (R. pp. 308-310)

Dr. Lucas recommended a cervical and lumbar MRI scan. In addition, on February 3, 2010, he recommended a lumbar epidural steroid injection and for the Claimant to remain out of work. (R. pp. 311-312) In April of 2010, Dr. Lucas opined to a reasonable degree of medical certainty that Bowen's work activities including but not limited to the carrying of walk boards, while working for the Employer-Defendant, was sufficiently repetitive to cause injury to the lower back and his work aggravated his pre-existing condition, which required medical treatment as a result of the aggravation. (R. pp. 314-316) Dr. Lucas also stated that when Bowen was seen on January 20, 2010 with complaints of lower back pain and neck pain, that the lower back pain was worse, and Bowen was also having leg pain. (R. p. 208, lines 6-25) **Dr. Lucas opined that Bowen's current back problems are <u>not</u> related to the fall on March 22, 2004. (R. p. 209, lines**

15-24; p. 211 line 212) (*Emphasis Added*) **Dr. Lucas was clearly of the opinion that the Claimant's repetitive work activities aggravated his pre-existing condition. (R. p. 232, lines 12-17)** (*Emphasis Added*)

STANDARD OF REVIEW

The standard of review in workers' compensation cases is clear, in that a court may overturn a conclusion of the South Carolina Workers' Compensation Commission if that conclusion is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C. Code Ann. §1-23-380 (2009).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify the action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999).

ARGUMENTS

I. THE COMMISSION PROPERLY DETERMINED BOWEN PERMANENTLY AGGRAVATED HIS PRE-EXISTING CONDITION AS A RESULT OF REPETITIVE TRAUMA ON OR ABOUT NOVEMBER 11, 2009.

In the present case, the Commission found that Bowen's job duties with the Employer-Defendant was an aggravation of his pre-existing condition and sufficient to cause repetitive trauma within the meaning of S.C. Code Ann. §42-1-172. This is supported by substantial evidence in the record and is not effected by any error of law.

The South Carolina Court of Appeals recently upheld a decision of the Commission awarding benefits of an aggravation of a pre-existing condition as a result of injury by repetitive trauma in Murphy v. Owens Corning, 393 S.C. 77, 80, 710 S.E.2d 454, 455 (Ct. App. 2011). The Claimant worked as a silver handler, and her job required her to reach for hot pieces of glass above her head and pull them down into strands. She did this on numerous occasions during her eight hour shift. The Claimant then began experiencing cervical pain, severe headaches and tingling in her fingertips.

She was subsequently seen by Dr. McDonald, a neurosurgeon, who diagnosed her with cervical spondylosis with a disc bulge at C5-6 and C6-7, causing possible nerve root impingement. It was the neurosurgeon's opinion that the disc bulges, more likely than not, within a reasonable degree of medical certainty, were a result of the Claimant irritating the nerve roots due to the continual extension that made the Claimant's symptoms worse. He clearly indicted the Claimant's symptoms were made worse by her job duties.

The Commission found the Claimant aggravated her underlying pre-existing condition by repetitive trauma, due to performing overhead work at her employ. The finding was based on the record as a whole, including the medical records that established there was a direct causal connection between the repetitive activities of the job and the aggravation of her condition. This Court agreed that the Commission's findings were supported by the substantial evidence in the record.

The case at bar is substantially similar to Murphy. Bowen has maintained his employment with the Employer-Defendant for approximately 20 years. He was frequently required (50 – 100 times per day) to bend, stoop, lift, walk, climb, work overhead, walk up inclines, walk down inclines in order to perform his position of loading and unloading equipment and materials to build scaffolding, disassemble scaffolding and in essence continuing to perform these same repetitive job movements 50 to 100 times per day. (R. pp. 77-79, lines 12-9)

As stated previously, the Claimant did sustain injuries to his back and right lower extremity on March 22, 2004. Bowen underwent an anterior cervical discectomy at C5-C6 on January 24, 2005 as well as an arthroscopic surgery on July 10, 2007 to his right ankle that was performed by Dr. McCallum. The Claimant did return back to Dr. McCallum in April of 2007 and was subsequently released on October 22, 2007 to maximum medical improvement in which Dr. McCallum opined the Claimant had no additional impairment. (R. pp. 282-284) Bowen testified he was able to return to work and carry his own weight up until 2008. (R. p. 138).

Bowen is of his own opinion that following his return to work in July of 2007, that continuing to perform the building of scaffolding, walking up and down inclines, building decks, and performing his regular job duties on a repetitive basis permanently aggravated, accelerated and/or exacerbated his pre-existing condition in his neck, lumbar spine and right lower extremity. (R. pp. 132-133, lines 16-1) Bowen is clearly of the position that he only sustained a change of condition to his right ankle as a result of the March 22, 2004, accident and his current lower back and lower extremity symptoms were aggravated and caused by repetitive work activities.

Dr. Lucas is also of the same opinion, based upon his review of the medical records, deposition testimony and other information related to Mr. Bowen's history,

> John Bowen's low back condition was directly caused or aggravated by repetitive trauma he sustained to his low back as a result of his regular work duties including but not limited to lifting and carrying walk boards and other materials, climbing ladders and scaffolding, carrying walk boards and other materials while climbing scaffolding, and walking on roofs, other inclines and uneven ground.

(R. p. 315) He further stated Bowen's current lower back condition, for which he is now receiving medical attention, is not causally related back to the March 22, 2004 injury within a reasonable degree of medical certainty. (R. p. 226, line 19-25) It is his opinion the type of repetitive activity Mr. Bowen performed upon returning to work following Dr. McCallum's release he would expect to cause an aggravation of Bowen's lower back condition. (R. p. 232, line 7-17) As a result of his present condition, due to the aggravation of his pre-existing condition as a result of repetitive trauma, it is Dr. Lucas's opinion Bowen is not able to return to work. (R. p. 235, line 4-10)

II. THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FINDING THAT HE AGGRAVATED HIS PRE-EXISTING CONDITION, CUTTING OFF ANY CAUSAL CONNECTION TO BOWEN'S CURRENT LOWER BACK SYMPTOMS AND THE DODGE MEDICALS PERTAINING TO THE MARCH 22, 2004 ACCIDENT.

In accordance with S.C. Code Ann. §42-9-35, the preponderance of the evidence clearly establishes Bowen aggravated his pre-existing condition, due to his continual employment with the Employer-Defendant, and there is medical evidence by Dr. Lucas by written opinion and by testimony stating to a reasonable degree of medical certainty that Bowen has sustained an aggravation of his pre-existing condition related to repetitive trauma which is related to his return to work following Dr. McCallum's release on October 22, 2007.

Bridgefield argues that Bowen did not sustain a repetitive trauma injury on November 11, 2009, and that Bowen's current back condition is causally related to the March 22, 2004 work accident. Bridgefield also argues that Bowen is merely pursuing the November 11, 2009 claim as a way of obtaining additional indemnity that he would not be able to obtain under the March 22, 2004 claim. Bridgefield argues Bowen would be limited to the additional treatment Dr. Lucas is recommending based upon the Dodge medicals previously ordered by Commissioner Funderburke in 2006.

There is however substantial evidence in the record that demonstrates the repetitive trauma Bowen sustained to his back, as a result of the repetitive lifting at his employment, aggravated his pre-existing lumbar spine condition leading to his inability to work and a need for additional medical treatment. This finding is based on all the evidence on the record including but not limited to the Claimant's testimony, the medical

records and opinions of Dr. Lucas. (R. p. 28) This cuts off any causal connection to Bowen's current need for treatment to the March 22, 2004 injury.

The Single Commissioner's Finding of Fact Number Twenty-Five, finds based on the medical records and Dr. Lucas' opinion that Bowen's back condition was aggravated by his repetitive work, and the medical treatment Dr. Lucas is recommending is a result of the aggravation. (R. p. 27) In April of 2010, Dr. Lucas opined, to a reasonable degree of medical certainty, that Bowen's current lower back condition was directly caused by an aggravation, following the March 22, 2004 injury, due to repetitive trauma he sustained, during his employ with the employer-defendant. (R. p. 315) He unquestionably testified, within a reasonable degree of medical certainty, during the course of his deposition that the Claimant's current pain is not causally related to the March 22, 2004 injury. (R. p. 226, line 19-25)

Bridgefield has failed to provide any medical evidence that the repetitive trauma did not aggravate Bowen's pre-existing back, lower back and right lower extremity condition. Bridgefield's main contention is that the job was not repetitive as required by S.C. Code Ann. §42-1-172. Bridgefield has conceded the Claimant's job is a physical job requiring him to build scaffolds, install vinyl siding, install windows, install Hardie boards, set columns, install doors and load and unload materials that are used on the job site. (R. p. 78, lines 11-16; p. 114, lines 1-6) Bridgefield has yet to deny that Bowen did not permanently aggravate his pre-existing condition. It is only Bridgefield's contention that Bowen did not perform the same task each day. In fact, Bridgefield argues,

> **Hard work in itself is not compensable.** There is no dispute that Bowen's job with Vinyl Services was a physical job; however, the substantial evidence in the record, specifically Bowen's own testimony, clearly establishes his job with Vinyl Services was not a repetitive job. (Appellant/Respondent Brief p. 17) *(Emphasis Original)*

Based on Bowen's testimony, the medical records and Dr. Lucas' opinion, Bowen did clearly aggravate, accelerate or exacerbate his pre-existing condition that is obviously an intervening accident, cutting off causal-relationship between the previously ordered Dodge medical treatment and Dr. Lucas' current recommended treatment. (R. p. 27)

Obviously, in accordance with S.C. Code Ann. §42-9-35, Bowen could have filed a claim for an injury by accident in 2008, which is the date he asserts as aggravating his pre-existing condition. (R. pp. 132-133, lines 16-1; R. p. 138, lines 16-18) This would be considered a new accident, and the causal connection between the previously ordered Dodge medical and the Claimant's current condition is broken. Despite the fact that Bowen did not file a claim under S.C. Code Ann. §42-9-35, the Findings of Fact Number 25 is sufficient to cut off any causal connection to Bowen's lower back symptoms and the Dodge medicals pertaining to the March 22, 2004 accident.

Home Builders is not only of the position the Claimant sustained an aggravation of his pre-existing condition to his cervical spine, lumbar spine and right lower extremity due to repetitive nature of his work following the March 22, 2004 accident, but also Mr. Bowen is clearly not entitled to additional treatment under Dodge.

III. THE APPELLANT/RESPONDENT AND THE RESPONDENT/APPELLANT ARE BARRED FROM ARGUING BOWEN IS ENTITLED TO ANY ADDITIONAL BENEFITS IN REGARD TO THE MARCH 22, 2004 ACCIDENT, OTHER THAN THE EXTENT OF PERMANENT LOSS OF USE TO THE RIGHT LOWER EXTREMITY, BECAUSE NEITHER PARTY APPEALED THE SINGLE COMMISSIONER'S FINDING OF FACT OR CONCLUSIONS OF LAW

Bridgefield cannot raise an argument before this Court pertaining to the March 22, 2004 accident, including the scope of the change of condition, medical treatment or indemnity, as both Bridgefield and Bowen failed to properly appeal the Commission's Finding of Fact and Conclusions of Law. At no point did Bridgefield or Bowen raise any issue on their Form 30 that single Commissioner Wilkerson erred in the failing to find Bowen did sustain a change of condition to the worse to his spine as well as his right lower extremity. (R. p. 25)

The March 22, 2004 injury and the change of condition for the worse is not mentioned in Bridgefield's Form 30, although twenty-three issues on appeal were raised. (R. pp. 53-55) Also, Bowen filed a Form 30, and Bowen's Form 30 also failed to make any mention of the March 22, 2004 accident or a change of condition. None of the issues pertaining to the Commissioner's Findings of Fact or Conclusions of Law in regard to the change of condition or the March 22, 2004 injury were raised and cannot now be raised on appeal.

At the Full Commission, Home Builders argued that the 2004 claim had been talked about during oral arguments and also briefed extensively by both parties, although neither party appealed any issue in regard to the March 22, 2004 claim or the change of condition. This Home Builders argued necessitates the Commission finding it does not

have jurisdiction over the issue as it was not properly preserved for appeal. (R. pp. 258-259) Bridgefield and Bowen failed to comply with Regulation 67-701 A(3), requiring the grounds for appeal to be set forth in detail and question any Finding of Fact or Conclusion of Law it believes is an error.

The Court is well aware that it is a fundamental rule of law that an appellant court will affirm a ruling by a lower court if the offending party does not challenge that ruling. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993) Failure to challenge the ruling is abandonment of the issue and precludes consideration on appeal. *Id.* The issues that are not appealed become the law of the case. Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 443, 427 S.E.2d. 646 (1993) The law of the case applies to both issues explicitly decided and to those issues necessarily decided in the former case. Therefore, it is the law of the case that Home Builders is not liable for any additional permanency to any other body member or medical treatment, as the issues were not raised in Bridgefield's or Bowen's Form 30.

Before the Full Commission, it was Bridgefield's argument that it could raise the issues regarding Bowen's possible claim for Dodge medical in regard to the March 22, 2004 claim. (R. p. 259) Further, Bridgefield argued,

> And with respect to Mr. Smith's argument that the Form 30, were only parties to the 2009 case, so we appealed the award of the compensability on the 2009 claim. I don't have any standing to appeal Mr. Smith's 2004 case, but it does not effect our position that we can say that the proper remedy for Mr. Bowen would have been to seek Dodge medical under his 2004 claim or for this Commission to deny his claim based on Notice and the other compensability grounds that we set forth. (R. pp. 261-262, line 19-4)

Bridgefield is in error in that they were only parties to the 2009 case, as the Single Commissioner, per Order dated May 17, 2010, at the request of Home Builders, granted the Motion to Consolidate. (R. p. 36) Therefore, both Workers' Compensation File Number 0920040 as well as South Carolina Workers' Compensation File Number 0402800 were consolidated, and the issue should have been properly preserved for appeal. The very caption of the Single Commissioner's Decision and Order dated November 18, 2010 includes both file numbers. (R. p. 15)

CONCLUSION

It is respectfully submitted that the Full Commission's Decision and Order, dated July 21, 2011, is correct in its entirety and is supported by the substantial evidence and is not effected by any errors of law. Bowen established every element of a claim required for repetitive trauma under S.C. Code Ann. §42-1-172. Bowen's testimony, the medical records and Dr. Lucas's expert opinion regarding the same does support a compensable repetitive trauma claim. In addition, the Court's recent decision in Murphy reaffirms the Commission's Order. This is irrespective of the substantial evidence supporting a finding that Bowen clearly aggravated a pre-existing condition and the medical treatment currently recommended by Dr. Lucas is unequivocally not related to the March 22, 2004 injury.

It is also respectfully submitted that the parties are precluded from arguing any additional medical treatment in regard to the March 22, 2004 claim. The parties have abandoned any arguments. The issues were not appealed on the parties Form 30s. Therefore, the finding that Bowen only sustained a change of condition for the worse, in

regard to the right ankle, precludes the parties from arguing the Claimant is entitled medical treatment for any other body part or indemnity to any other body part. Thus, the Commission's Order should be affirmed in its entirety.

RESPECTFULLY SUBMITTED

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This 25th day of March 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0920040

John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders SIF and Bridgefield Casualty Ins. Co. Defendants,

Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that The Respondent's Appendix to the Record on Appeal complies with the August 13, 2007 order of the South Carolina Supreme Court.

This 25th day of March, 2013

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THE STATE OF SOUTH CAROLINA
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Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Appellants/Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Appendix to the Record on Appeal complies with Rule 209(c) and does not contain matter which is irrelevant to the appeal.

This 26th day of March, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
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SCWCC No. 0920040

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CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Final Brief to Be Included In the Record On Appeal, by depositing a copy of it in the United States Mail, postage prepaid, addressed to J. South Lewis, II, Esquire, at 872 S. Pleasantburg Drive, Greenville, South Carolina 29607 and Kathryn Williams, P.O. Box 10693 Greenville, South Carolina 29601.

This 28th day of March, 2013

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