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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

Appellate Case No. 2024-000734
Commission File No. 2218722

Marcelina Santibanez, Claimant.....Respondent,

v.

Operational Resources, Inc., Employer, and Old Republic Insurance Company, Carrier.....Appellants.

AMENDED INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. In a workers' compensation claim involving a complex medical issue, the statute and South Carolina case law require medical testimony to support a finding that an injury is causally related to an accident.

2. Claimant is not credible where surveillance shows her walking without limp, difficulty, or assistive device.

3. The Commission's order is inconsistent in finding no aggravation but ordering Defendants to pay causally related medical care.

STATEMENT OF THE CASE

The First Report of Injury states that Claimant slipped and fell on her left knee on water on the floor at 2:40 p.m. FROI 1. Claimant's Form 50 alleges that Claimant fell on both knees. F. 50. At the hearing before the single Commissioner, Claimant went forward on the issue of compensability of the left leg but asserted the right leg as an affected body part. Tr.3. Defendants provided initial medical care to Occupational Health and an Xray and an MRI but did not pay Temporary Total Disability (TTD). Tr.5-6. The claim was denied after investigation. Defendants asserted that Claimant was unable to meet her burden of proof that it was a causally related and thus compensable claim. Tr.6-7. Defendants also asserted that this was a medically complex case due to the pre-existing, chronic findings and lack of acute finding on the MRI. Thus, a medical opinion from a qualified physician would be required linking the medically complex issues to a compensable work injury. Tr.7. Defendants requested that the Commission rule on all body parts. Tr.7. Defendants take the position that a family doctor providing unauthorized treatment cannot be a qualified physician to opine to causation, as they do not practice within workers' compensation. Tr.7. Defendants also asserted credibility as a major issue in this case, as Claimant's case for compensability rested entirely on her subjectively reported complaints. Tr.7-8. Defendants

advised that Employer continued to pay Claimant's salary through the end of December 2022. Tr.8.

STATEMENT OF THE FACTS

This fall was unwitnessed. In her deposition, Claimant says there were several witnesses. But at the hearing, no one except Claimant was present to testify to the fall. On her first report of injury, under witnesses, she put "None." FROI, Tr.35, 47, APA 82. At the site visit, no one came forward as a witness. Tr.49.

On December 5, 2022, Claimant saw Occupational Health at 5:52 p.m. and stated that she slipped on a wet floor and slid forward with her left knee, striking an open door, and fell to the ground. APA 7-8. She claimed left knee joint and muscle pain with weightbearing and bending, swelling, and weakness, but denied underlying knee problems. On exam, Occupational Health noted pain increased with weightbearing, as would be expected from a knee bruise. However, she was able to bear weight after an Ace wrap and knee brace with a cane for support. She was very hesitant with the exam initially due to pain, but had better range of motion by the end of visit. All objective tests were negative, and Occupational Health deemed no additional work-up was required. They diagnosed a left knee contusion. APA 7-10. They imposed restrictions of sedentary work only with minimal walking. They said she needed to wear a left knee brace and use a cane when walking, both at work and home. APA 10.

Claimant's left knee Xray showed "no acute abnormality." Zero. It showed only chronic arthrosis, a precursor to arthritis that is known to cause knee pain.

> No acute fracture or dislocation identified. Alignment is normal. Minimal medial femorotibial compartmental osteoarthrosis with subchondral sclerosis. No osseous erosion or focal periosteal reaction. No focal soft tissue abnormality. No radiopaque foreign bodies are seen.

APA 13. On December 6, 2022, she went to the ER for "worsening pain" and said she landed directly on the front of her left knee. The hinged knee brace was positioned over her lower leg mostly, not her knee as intended. She was placed in a knee immobilizer, and put on Ibuprofen 800 mg. They could not examine her due to subjective pain complaints. They gave her no restrictions. The ER referred her to orthopedics. APA 55, 58, 61. A week later, on December 12, 2022, Claimant returned to Occupational Health. She had stopped wearing the knee immobilizer a few days ago due to inability to walk on it and discomfort and had gone back to the hinged knee brace and ace wrap. Her knee pain was improved but still significant, up to a 8 or 9 out of 10 with walking and flexing along the front and back of the knee. She claimed she noticed buckling and "snapping" of the knee and was using the cane when walking. APA 14. Occupational Health observed that Claimant was using a cane while walking but only minimally every few steps. She walked slowly with a limp, which is very easy to fake. APA 16. Occupational Health continued restrictions of using a cane while walking and a left knee brace, both at work and home. APA 17. They recommended an MRI of the left knee. APA 17.

On December 27, 2022, almost a month after the slip and fall, the MRI showed:

> Medial Compartment: Mild mucoid degeneration of the medial meniscus which is normal in size and configuration. Thinning of the weightbearing cartilage of the medial femoral condyle. Intact MCL.
>
> Lateral Compartment: Normal size, signal, and configuration of the lateral meniscus. Normal cartilage of the lateral joint. Intact lateral joint line support structures.
>
> Intercondylar Notch: No ACL or PCL transection. Mild thickening and T2 hyperintensity of the proximal half of the PCL may indicate sequelae of strain- age indeterminate. Moderate T2 hyperintensity within the intercondylar notch.
>
> Anterior Compartment: Prepatellar soft tissue contusion. No patellar fracture. Mild distal quadriceps tendinosis. Cartilage loss of the patellar apex almost to the basal plate. Patella projects normally over the trochlear groove.

> Other: Small knee joint effusion.
>
> Impression: Probable acute findings which are superimposed on chronic findings. Prepatellar dermal fat contusion. Grade 3 patellar apex chondromalacia. Thinning of the cartilage of the weightbearing medial femoral condyle. No meniscal tear.

(Emphasis added.) APA 22-23. To translate, she had a knee strain along her PCL and a soft tissue bruise. She does have cartilage loss (which causes arthritis), cartilage thinning, and degeneration of the meniscus, all chronic conditions, which almost surely cause daily pain and which she almost surely wants fixed. However, those are not caused by a fall. Those are minor issues at best.

On January 5, 2023, Claimant returned to Occupational Health and stated she was still having the same pain. Her exam was within normal limits objectively. Doctors noted that the only acute finding on the left knee MRI was an anterior prepatellar contusion, which was reassuring. They recommended that she discontinue her walking cane, as her gait was within normal limits without it. She was told to maintain her work modifications and take 10-minute breaks every 2 hours. They recommended physical therapy. APA 27, 29, 30, 32. Tr.5. Thereafter, Claimant contained to treat with her primary care physician (PCP), who was not an authorized treating physician. On January 19, 2023, she continued to complain of left knee pain. She said she was told not to come back to work and believed she had been fired. She stated it was now hard for her to go up and down stairs. APA 36. They advised that she continue her knee brace and referred her to physical therapy. APA 37. On February 7, 2023, Claimant returned

> to discuss her left knee pain. States this was a work injury and she has been evaluated by her employers physician. States she was told that there is nothing wrong with her knee and that she should be able to get back to work. She has a lawyer and was told that she should get a separate opinion.

APA 45. Even though it was just a few weeks earlier, she was unsure if she had ever had an MRI. "She was found to have mild patellofemoral thickening and bruising of the patellar fat pad. MRI was personally reviewed by myself. Patient explains that she landed directly on her left knee during

a fall." APA 45. At the hearing, Claimant testified that she fell right on the bone of the left knee. Tr.13. Yet during her deposition and on her Form 50, Claimant alleges injury to both knees and says she landed on both knees. F.50, Depo. 22. Jarrell NeSmith, DO, opined, "You have mild arthritis in the knee. I believe that your pain from the fall exacerbated the arthritis." APA 46. On March 21, 2023, over three months later, Claimant now wanted her PCP to write her completely out of work and say she was disabled. He refused.

> She feels like now she has bone against bone in her knees. The patient says, "I fell down in my job. I slipped and I hit my knees. I have been having a lot of pain when I walk and I hear a noise." She has swelling of her feet with walking and at times feels like the knee is going to give way. Her pain is 10/10. Tylenol is not helping. She asked me above [sic] letter saying that she is disabled and cannot work. I informed her that she would need to do that through her job through Workmen's Comp. saying that she was injured on the job and also that we do not do disability here.

APA 50. This doctor, by his own admission, is not familiar with ratings and the workers' compensation system. He prescribed Gabapentin and referred her to orthopedic surgery. APA 51.

On January 27, 2023, Claimant presented to physical therapy (PT). She told PT that "she fell onto both knees, but her left knee is the only one that got injured." She told PT "she has not had any imaging as of yet." For the first time, she complained of "frequent clicking, crunching, and grinding," as well as constant pain and swelling, worse with walking. APA 63. She had observable swelling with significant tenderness. APA 64. By January 31, 2023, she was doing her exercises at home, reported 7/10 pain, and her knee was feeling a little better. APA 71. On February 13, 2023, she had had an injection the week before, and her knee had been more painful. She had intermittent pain and frequent muscle soreness (because that's how physical therapy works). APA 74. On May 2, 2023, Claimant's PCP injected her knee. Tr.16. At hearing on May 16, 2023, Claimant testified that her knee pops when she walks a lot. Tr.19. She stated that she wears support on it so that it does not pop so much. She stated her left knee was still swollen, but she was icing it. Tr. 17,23. She

testified that she was totally compliant with everything the doctors told her to do and never had any prior left knee problems. Tr. 18. She stated that when she walks too much, it gets swollen and hurts and started to pop a lot. Tr. 19. She testified at hearing that during her deposition, she put her left leg up in a chair during the deposition because it was very swollen and she had not been given medicine for it. Tr.19.

Rachel Beckwith, Employer's representative, testified that Claimant brought paperwork on December 12th, just one week after the alleged accident.

> I can see her walk out to the vehicle. She walks down the sidewalk. As she gets to the sidewalk, I am getting ready to go into the back. I pause because I see her step down off of the sidewalk. As she does, she takes the cane and puts it under her arm, walks down around the vehicle that she is getting into, does not use the cane again, and gets into her vehicle.
> ...
> So she stepped down on the driver's side of the vehicle, cane under her arm, walked. She didn't put her hand along the side for assistance of her car. She walked all the way around it unassisted, no limp.... She walked unassisted with no cane around, opened up her door, and got into her vehicle.... She was using a cane until she got to the end of the sidewalk, put it under her arm, stepped down without the cane, walked around it and got in her vehicle.
> ...
> Her medical records that day that she brought me stated that she's to use the cane doing all walking....

Tr.45, 53-55. Rachel Beckwith testified that Claimant's witnessed behavior was consistent with the surveillance of walking normally with no cane or support. Tr.46.

Based on what Rachel Beckwith witnessed, Defendants conducted surveillance on December 16, 2022, just eleven days after Claimant's fall. Claimant walked down an embankment, up a hill, walked back up the drive, and back to the car—all with no issues. She went to the Spartanburg County Tax Office and walked across a parking lot and then up two flights of steps in the center, not using the handrails. She went back home, and up and down the front steps with a small dog and then to take out trash. Recall that she had been placed in a knee immobilizer at the

ER and then was using a hinged knee brace and Ace wrap reporting 8-9/10 pain. She did not have any assistive device, nor did she walk with a limp or in a guarded manner. She was wearing leggings, and any brace or Ace wrap would have been obvious. Video showed she walked seemingly without any problems. APA 134-136. Claimant stated she did so because the elevator wasn't working. Tr.21-22. That wasn't the point. Claimant does what she wants to do when she wants to do it with no apparent injury, and then goes to her doctor and asks to be written out of work because she's disabled, which her doctor declined to do. That is what this case is about: medical causation and Claimant's credibility.

STANDARD OF REVIEW

Because this appeal presents a question of law and a question of fact, this Court has a bifurcated standard of review. The Court's interpretation of a statute to determine exactly what a claimant is required to prove is a pure question of law. The appellate courts may interpret statutes without any deference to the court below. *Brooks v. Benore Logistics System, Inc.*, Op. No. 28198 (S.C. Sup. Ct. filed April 10, 2024) (Howard Adv. Sh. No. 14 at 12, 19-20). Indeed, that is the express job of the appellate courts. Whether the Full Commission correctly determined the facts is subject to the substantial evidence standard of review. Under that standard, this Court may not substitute its judgment for the Commission's as to the weight of the evidence on questions of fact, but may reverse a decision affected by an error of law or where it is clearly erroneous in view of substantial evidence on the record as a whole. *Id.* "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 or must have reached in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

ARGUMENT

I. Complex causation requires medical testimony to support a finding that an injury is causally related to an accident.

Claimant bears the burden of proof to bring her injury within the Act.

> We have held in numerous cases and it is now well established that a claimant, who asserts the right to compensation, must establish by the preponderance of the evidence the facts which will entitle her to an award under the Workmen's Compensation Act, and such award must not be based on surmise, conjecture or speculation.

Lorick v. S.C. Elec. & Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965) (citations omitted). *See also Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 851 S.E.2d 714 (Ct. App. 2020). Moreover, although the Act is construed liberally in accord with its purpose, "a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts." *Cross v. Concrete Materials*, 236 S.C. 440, 446, 114 S.E.2d 828, 831 (1960). Quoting 100 C.J.S., *Workmen's Compensation*, § 547(7), p.602-03, the court held that the better rule is:

> Under other authority, the rule of liberal construction of the compensation acts in favor of the employee, ...does not dispense with the necessity of evidence to support the award, or of making proof prerequisite to recovery, does not permit a court to award compensation where the requisite proof is lacking, and does not make the rule as to the measure of proof or the sufficiency of evidence different from the rule in ordinary cases or in other civil suits, so that, despite such liberality, the facts relied on must be proved with the same certainty as in other civil cases. So, the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are. A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other.

Cross v. Concrete Materials, 236 S.C. 440, 446-47, 114 S.E.2d 828, 831-32 (1960).

"An injury arises out of employment if it is proximately caused by the employment." *Turner v. SAIIA Constr.*, 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016). Causation must be proven for an injury to arise out of employment and bring it within the Act. A doctor's opinion as to causation is required. "In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment." S.C. Code Ann. § 42-1-160(E). This is a medically complex case.

> In *Anderson v. Campbell Tire Co.*, 202 S.C. 54, 24 S.E.2d 104, we said:
>
> "...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 medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses...." ...
>
> Larson in his treatise on Workmen's Compensation Law, Vol. II, Section 79.54, page 304, asserts that reliance on lay testimony is not justified when the medical question is a complicated one and likely to carry the fact finding body into realms which are more properly within the province of medical experts. We quote therefrom the following:
>
> "The increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but simple and routine cases—and even in these cases such evidence is highly desirable and is a part of any well prepared presentation." *Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 118 S.E.2d 812, and *Dennis v. Williams Furniture Corp.*, 243 S.C. 53, 132 S.E.2d 1.

The court held in *Lorick* that the Commission "could not make a determination of causal connection ... independent of supporting medical testimony where the assessment of the precipitating cause requires expert knowledge...." *Id.* at 527, 141 S.E.2d at 669. S.C. Code Ann. § 42-1-160(E) clearly states: "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 health care provider." (Emphasis added.) S.C. Code Ann. § 42-15-60 similarly provides:

> The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty.

(Emphasis added.) Where the Commission's decision to order medical treatment beyond the ten weeks is unsupported by expert medical evidence, it is an error of law and must be reversed. *See Hartzell v. Palmetto Collision, LLC*, 419 S.C. 87, 97, 796 S.E.2d 145, 150 (Ct. App. 2016).

> Where one relies upon medical testimony alone to show a causal connection between an injury and a subsequent condition, the testimony must meet the "most probably" rule, and it is not sufficient that the malady in question "possibly" or "could have" or "might have" resulted from the injury.
>
> *Gambrell v. Burleson*, 252 S.C. 98, 165 S.E.2d 622 (1969).
>
> The rule has been established in this State that "when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury."

Lorick v. S.C. Elec. & Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965).

> "[W]hen in cases of this class expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question must probably come from the cause alleged."

Radcliffe v. Southern Aviation School, 209 S.C. 411, 40 S.E.2d 626 (1946) (quoting with approval *Fink v. Sheldon Axle & Spring Co.*, 270 Pa. 476, 113 A. 666 (1921)). *See also Brady v. Sacony of St. Matthews*, 232 S.C. 84, 94, 101 S.E.2d 50, 55 (1957).

> "If a medical expert is unwilling to state with certainty a connection between an accident and an injury, the 'expression of a cautious opinion' may support an award if there are facts outside the medical testimony that also support an award." *Tiller*, 334 S.C. at 340, 513 S.E.2d at 846. Thus, if medical expert testimony is not solely

> relied upon to establish causation, the fact finder must look to the facts and circumstances of the case. *Id.* at 341, 513 S.E.2d at 846.

Hargrove v. Titan Textile Co., 360 S.C. 276, 294, 599 S.E.2d 604, 613 (Ct. App. 2004). Here, Claimant doesn't have any medical opinion, much less a cautious one, of aggravation.

S.C. Code Ann. § 42-9-35 provides:

> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
>
> > (1) The subsequent injury aggravated the preexisting condition or permanent physical impairment; or
> > (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
>
> (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

See also Burnette v. City of Greenville, 401 S.C. 417, 427, 737 S.E.2d 200, 205-06 (Ct. App. 2012) ("An injured employee 'who has a permanent physical impairment or preexisting condition' may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that "the subsequent injury aggravated the preexisting condition or permanent physical impairment.'").

Frampton is the leading case on this section. In *Frampton*, the "single commissioner further found there was no medical evidence the dove field incident aggravated or exacerbated his preexisting neck condition for which he was already receiving treatment by Dr. Bailey, and she specifically concluded Frampton did not meet his burden of proof under § 42-9-35." *Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 851 S.E.2d 714 (Ct. App. 2020). The court rejected Frampton's argument that because DNR admitted the injury and paid for some of his treatment, it could not assert § 42-9-35 as a defense. The court noted that employer was not on notice of the

pre-existing injury until it received medical records shortly before the hearing. The court held that initially providing treatment does not estop it from contesting liability, as finding waiver would discourage employes from providing treatment. The court therefore held that the injury was not causally related to the work incident but was part of a long-term ongoing course of treatment for his progressive degenerative disc disease, which had begun years prior and was consistent with claimant's testimony that he told the doctor his symptoms began gradually over a number of years.

Similarly in *Cross v. Concrete Materials*, 236 S.C. 440, 114 S.E.2d 828 (1960), which had a remarkably similar fact pattern to this case, the court held that the "evidence was insufficient to sustain the finding of causal connection...." *Cross* had left hip osteoarthritis which predated the accident and argued that the fall aggravated the arthritic condition of his hip and disabled him. The doctor testified that it was possible that the quiescent osteoarthritis was aggravated by the injury but was unwilling to opine that it was "most probable", thus lacking the requisite causal connection.

Likewise, in *Dennis v. Williams Furniture Corp.*, the court held that the evidence failed to show aggravation of a prior injury where the only evidence of injury was employee's own testimony and a doctor's testimony that the condition may have been caused by trauma at some point in time. 243 S.C. 53, 132 S.E.2d 1 (1963). In *Dennis*, claimant suffered a ruptured vertebral disc. The court noted "somewhat complicated facts" and that "[t]he award of the Commission lacks a great deal in clarity as to the basis of the award." Dennis's doctor "expressed no opinion as to what part, if any, of such disability resulted from any accident." *Id.* at 57, 132 S.E.2d at 3. The doctor indicated that this was not an acute injury but had been present for some time. The court noted that *Dennis* was like *Cross*, where claimant contended that his pre-existing osteoarthritis

was aggravated, but that claim was unsupported by medical evidence. Here, Claimant's MRI was "very reassuring" with only chronic degenerative arthritic changes.

While it is unpublished, this case has the exact same fact pattern as *Davis v. Southlake Transp., Inc.*, Op. No. 2015-UP-026 (S.C. Ct. App. Jan. 14, 2015) (Shearouse Adv. Sheet No. 2 at 4). That was an arthritic knee replacement for a condition that pre-existed the accident. The Commission held "that the evidence 'could not be more clear' regarding the lack of a causal connection between Davis's work accident and his preexisting knee condition." His doctor "clearly stated—and reiterated—that Davis's left knee condition was preexisting and unrelated to the accident."

Contrast that with *Daley*, where the court held that the medical evidence was ample to sustain the Commission's factual conclusions that claimant had osteoarthritis in both knees that probably existed prior to the fall, which aggravated the formerly dormant disease. *Daley v. Public Sav. Life Ins. Co.*, 236 S.C. 236, 238, 113 S.E.2d 758, 759 (1960). An employee may recover for the aggravation of a pre-existing condition only "where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 295, 599 S.E.2d 604, 614 (Ct. App. 2004). However, a condition is not compensable when "it is due solely to the natural progression of a pre-existing condition." *Id.*

This case is also sharply distinguishable from *Arnold v. Benjamin Booth Co.* There, claimant had back trouble, lifted a desk, and pulled his back. The sole testimony was his own, and he presented no medical testimony, including no medical opinion of causation.

> Circumstantial evidence and lay testimony can be sufficient to support a finding of causal connection in a Workmen's Compensation case....It is sufficient if the facts and circumstances proved give rise to a reasonable inference that there was a causal connection between the disability and the injury. Whether the absence of medical

> testimony is conclusive on the question of causation depends upon the particular facts and circumstances of the case.... This is not a case where there was medical evidence presented but it failed to meet the "most probably" test...; nor is the involved injury one for experts or skilled witnesses alone and concerning a matter of science or specialized art or other matters of which a layman can have no knowledge.... The question here is simply whether the lay testimony of the respondent himself unsupported by any medical evidence is sufficient to support the finding of causal connection between the accident... and the disability....

Arnold v. Benjamin Booth Co., 257 S.C. 337, 342, 185 S.E.2d 830, 832 (1971). That made sense—he picked up a desk and pulled his already injured back. Here, Claimant slipped and fell on her left knee, bruising it. That did not cause bone on bone degenerative changes that Claimant is currently experiencing from her pre-existing arthritis. Moreover, every other South Carolina case has required medical evidence of causation, including a spate of cases just preceding *Arnold* in the mid-1960s. So *Arnold* may best be viewed as an anomaly. This case is like *Cross* and *Dennis* and *Davis*.

Claimant may attempt to argue *Gorodon*.

> The rule is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable.

Gorodon v. E.I. du Pont de Nemours & Co., 228 S.C. 67, 76, 88 S.E.2d 844, 848 (1955) (citations omitted). But in *Gorodon*, Claimant had medical evidence of aggravation. The issue in *Gorodon* and later in *Geathers* was the responsibility of successive carriers, not the burden of proof regarding aggravation necessary to bring claimant within the Act.

> The right of a claimant to compensation for aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. A determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Appellate Panel.

Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (Ct. App. 2004) (citations omitted). Notably, in *Hargrove*, Justice Kittredge dissented, finding that claimant's nine-day tenure at Perdue comprised entirely of orientation, training, and light work could not have exacerbated her condition caused by her long-time employment at Dillon Yarn. He recognized "that in workers' compensation cases, compensation may be awarded although a medical expert is unwilling to state with certainty a connection between an accident and an injury… 'if there are facts outside the medical testimony that also support an award.'" *Id.* at 299, 599 S.E.2d at 616. However, the Commission relied solely on the doctor's testimony, who testified it could "possibly" have exacerbated her injury.

In *Geathers*, the South Carolina Supreme Court adopted the "last injurious injury rule" to successive carriers. *Geathers v. 3V, Inc.*, 371 S.C. 570, 578, 641 S.E.2d 29, 33 (2007). The court reaffirmed the *Gorodon* rule as to aggravation of a pre-existing condition that results in disability and held that it "also reflects the essence of the last injurious exposure rule." *Geathers* and *Gorodon* are distinguishable. In both of those cases, claimants had medical proof of aggravation. They had injuries which were disabling, rendering them unable to work. Here, Claimant asked to be written out of work as disabled. Her doctor declined to do so.

Claimant had no statement from a doctor opining as to causation, as is required to prove her case under the Act. The only mention of causation in the entire medical records comes nowhere close to meeting the required "most probably" standard. On February 7, 2023, two months after the accident, her family doctor's record says, "You have mild arthritis in the knee. I believe that your pain from the fall exacerbated the arthritis." She was given an injection, and it was noted that it was due to chronic pain, as noted by Commissioner Dooley. APA 46. First, it's her family doctor that she went to on her own, not an authorized treating physician, not a specialist, not an

orthopedist. Second, in personal injury law, exacerbation is a temporary worsening of symptoms, while aggravation is a permanent escalation of an existing condition. Claimant has pre-existing osteoarthritis, and all of her current symptoms could just as easily be the result of this as her work accident. Claimant has not met her burden of proof as to aggravation. Third, Claimant's attorney did not even mention this statement before the single Commissioner or argue that this statement met Claimant's causation burden. The only mention in the single Commissioner's order was in Finding of Fact 14. Order 17. Only in her brief to the Full Commission did Claimant for the first time argue that that doctor's statement met the required causation burden. Thus, it is not preserved on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Moreover, doctors rely on symptoms as reported to them by claimants. In *Curiel*, the court held that claimant failed to cooperate with his physicians, resulting in his uncorrected vision and ability to work. The doctor suspected claimant was exaggerating his vision loss. *Curiel v. Envtl. Mgmt. Servs.*, 376 S.C. 23, 30, 655 S.E.2d 482, 486 (2007). The doctors' records here say that Claimant reported a work injury, but provide no medical opinion as to causation. So many claims are based solely on claimants' subjective reports of pain without objective findings. Under workers' compensation, employers are required to treat only causally related issues.

Notably, Claimant told her PCP on February 7, 2023, two months after her fall that she was evaluated by the employer's doctor and told that there was nothing wrong with her knee and she should get back to work. "She has a lawyer and was told that she should get a separate opinion." APA 45. That's really what this case is about. Doctor shopping. Until Claimant gets an answer she likes. Every time the employer's doctors find nothing wrong and claimants get an

attorney, what is that attorney going to say? Go find another doctor and get a second opinion. Because plaintiffs' attorneys want to get paid, and to do that, they need a compensable injury. She was appropriately evaluated, and the doctors determined that nothing was wrong. And what did her own general practitioner doctor say? That her fall MAY have exacerbated chronic conditions. That's not enough. To hold otherwise would support that claimants can treat with their regular doctor or a doctor of their choosing, shop until they get an answer they like that they can remain out of work with a knee bruise, and then have employer pick up the bill. To allow this solely on subjective reporting without any supporting objective medical evidence opens the door to fraud and abuse. That brings us to the matter of Claimant's credibility.

II. Claimant is not credible where surveillance shows her walking without limp, difficulty, or assistive device.

The Full Commission is the finder of fact and final arbiter of the credibility of Claimant.

> The determination of witness credibility and the weight to be accorded evidence is reserved to the commission.... This court cannot substitute its judgment for that of the commission as to the weight of the evidence on questions of fact.... The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence.

O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 29, 459 S.E.2d 324, 327-28 (Ct. App. 1995) (citations omitted). *See also Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 851 S.E.2d 714 (Ct. App. 2020).

> The commission often makes findings of fact based on credibility determinations. In numerous cases, our courts have upheld factual findings the commission made based on its credibility determinations.... The reason we consistently affirm these findings derives from a principle that applies beyond credibility to all factual determinations of the commission: "an award must be founded on evidence of sufficient substance to afford a reasonable basis for it."... This point is illustrated in the hundreds of cases in which our appellate courts have affirmed factual determinations by the commission.

Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 642-43, 842 S.E.2d 349, 352 (2020). "In cases in which we affirmed factual findings of the commission based on its credibility determination, we did so because it made sense for the commission to use credibility as the dispositive factor in deciding the particular issue." *Id.* at 646, 842 S.E.2d at 354.

> In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact.... [T]he court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision. In most cases, this is obvious from context...[where] the credibility determination...resolved the disputed factual question....

Id. at 646-47, 842 S.E.2d at 354. In *Gosnell*, claimant fractured a rib and later complained of low back pain and testified that he could not do the work he had previously done. Co-workers and employer testified that they could tell no difference in claimant's heavy duty work, and a town businessman and policeman observed him walking normally without limp or difficulty. Yet, he showed up at hearing on crutches. Thus, the court held that claimant had no medical testimony to support that his disability was causally related and that the non-medical evidence did not convincingly support claimant's contentions. *Gosnell v. Bryant*, 240 S.C. 215, 125 S.E.2d 405 (1962).

Interestingly, Respondent's brief before the Commission does not address the problems with her credibility at all, but turn back to the MRI and medical evidence. Here, Claimant does not have medical evidence of aggravation. So the entirety of her case turns on her testimony. No one except Claimant testified as to how the accident happened, which changed over time. At hearing, Claimant testified she was coming back from the restroom, and the door threw her to the floor. Tr.12. She put her hands out, or she would have hurt or broken both knees. Tr.13. She hit her left knee on the concrete floor. Tr.13. At other times, Claimant has variously claimed that she hit her

knee on the open door, that she hit her right knee, that she hit both knees, and later claimed back problems. APA 7, 55, 63. Depo. 19-20, 22.

Credibility is key, and Claimant's credibility is problematic. For example, at the single Commissioner hearing, Claimant testified that she had no prior workers' compensation claims. Tr. 12, 26. However, on cross examination, she admitted she had an admitted August 2021 for her right arm for which she received treatment. Tr. 26-27. She said she had three children at hearing but five children at deposition. Tr.10,28. Depo.15. That was also brought out on cross examination at hearing. Tr.28. Claimant stated that she was a single mom, and no one helped her. Tr.10,25. On cross examination, she stated that her boyfriend helped with the children. Tr.28. She testified that she had never been prescribed a cane. Tr.17-18. On cross examination, she admitted she had been prescribed a cane. Tr.28,30. On cross examination, Claimant said both that the doctors had helped her and that they mistreated her. Tr.29-30. At hearing, it was brought out that Claimant prevaricated about what she told the doctors and when she used a cane. Tr.28-31. Claimant also lied either as her deposition or at the hearing under oath regarding when she had driven. Tr.32. When confronted, Claimant then said she drove with an expired license, citing as an excuse: "I did drive it because I had to move around. Who's going to take me around?" Tr.33. Although her attorney objected to Claimant being called a liar on civility grounds, Claimant can be impeached in her testimony, as noted by Commissioner Dooley. Tr.33. This illustrates that Claimant changes the facts when it suits her. In explaining the surveillance, Claimant testified only that she went to the courthouse to take care of things with her car. She made no attempt to explain her walking normally and without support. She has stuff to get done so she does as she pleases, with or without a driver's license, with or without a cane. She only kept repeating, "Why would I lie?" Claimant

keeps changing details of her story when it suits her. That's a very big problem when we are relying on subjective reporting of complaints.

The entire question of compensability turns on the mechanism of injury—how the accident happened, and what body part was injured and to what extent. The objective medical evidence shows only that Claimant had a bruise on her left knee that resolved over time. The objective medical evidence also showed that Claimant had chronic arthritis, consistent with the bone-on-bone pain that she describes. That was not caused by the bruise to her knee. Claimant has zero medical evidence causally linking her complaints and need for medical treatment to her work slip and fall. Claimant testified at the single Commissioner hearing that she used a cane for about a month after the accident, until the doctor told her not to use it anymore. Tr.18,29-30. However, at eleven days after the accident, surveillance when she did not realize she was being observed clearly showed Claimant going about her business. It shows her climbing and descending an embankment, climbing two sets of stairs without hand rails, walking around—all with no limp, guarding, cane, brace, or assistive devices. Her employer saw her put her cane under her arm once out of the building at the end of the sidewalk and walk around the car. Tr.45-46. In *O'Banner*, the Commission relied on surveillance showing the claimant hitting softballs and in five days, never "exhibit[ing] any physically disabling conditions." *O'Banner*, 319 S.C. at 29, 459 S.E.2d at 327. Early on, doctors told her to stop using a cane because her gait was normal. APA 29. Credibility is absolutely critical to determining this central fact question.

To hold otherwise renders credibility meaningless. All claimants would have to do in an unwitnessed fall is say it hurts and it's worse. This Claimant lied about driving, was seen on surveillance walking fine, and was seen by Employer walking fine. Defendants do not have a burden of proof in this case. However, Defendants proved that eleven days after the injury, when

she did not realize she was being observed but was just going about her normal business, Claimant walked with no limp, no guarding, no cane. For months thereafter, she went to the doctor's office and physical therapy with a limp, using a cane, and with substantial guarding. To reject all this holds Appellants to an untenably high burden, and it's not even their burden. Worker's compensation turns on medical evidence. The medical evidence does not support aggravation. With Claimant's credibility problems, her testimony is not enough to support causation.

III. The Commission's order is inconsistent in finding no aggravation but ordering Defendants to pay causally related medical care.

The single Commissioner found that Claimant had not reached MMI and ordered Defendants to pay TTD from the date of the accident on an ongoing basis, despite Employer having paid wages for four weeks following the accident. The single Commissioner specifically found as a fact and included in her order instructions that "the Claimant did have a compensable injury to her left knee as evidenced by the bruising and swelling" and ordered Defendants "to provide additional treatment with an ortho of their choice." Notes 3, Order 18. Yet, just two sentences later (also in the order instructions), she stated, "I find that there is insufficient evidence to determine whether the aggravation of the Claimant's underlying osteoarthritis is compensable or not." Notes 3-4, Order 18-19. The Commission repeated the single Commissioner's order almost verbatim, without any commentary or analysis.

Respondent argued at the Commission that "[w]hether or not there is an aggravation of a pre-existing condition is for another day." Resp. Br.3. Her brief states that no law puts the burden of proof on a claimant with an acute injury. The argument is essentially, if she falls, it's compensable. Respondent argues that the appeal should end with a fall and a bruised knee. But that is not the end but only the beginning of the analysis.

It is tempting to say that employers should be required to send claimants to an orthopedist for evaluation any time a treating physician refers them, which is relatively easily and frequently. But this Court must take note that there are very real costs to the workers' compensation system from fraudulent claims. We should not have to do full imaging and MRI and refer to an orthopedic specialist every single time someone falls. Defendant is a staffing company. Fraudulent claims where there is no injury are a known problem. The costs of providing specialists and advanced imaging for every fall are substantial and significantly raise the costs of using staffing companies. Yes, Appellants provided initial treatment pending investigation. We do not want to discourage them from doing so by holding that if they provide treatment, every reported injury is going to be compensable.

Any bruising or swelling from the fall has long since resolved; orthopedic care is not required for that. That insufficient evidence to determine whether the aggravation of osteoarthritis is compensable or not is precisely the medical causation absent from Claimant's case and necessary to render this claim compensable. This inconsistency renders the order fatally flawed and thus requires this Court to reverse the Conclusion of Law ordering Defendants to provide care and pay TTD based on that Finding of Fact. The Commission cannot find insufficient evidence of aggravation, which is required under the Act to render an injury compensable, and simultaneously require Employer to provide further medical care and pay TTD. To do so constituted an error of law.

For example, in *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011), the Commission found that the repetitive trauma of overhead reaching aggravated claimant's neck condition based on the medical records and doctor's deposition testimony that the job aggravated the underlying physical condition. As the Court noted, "The 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." *Id.* at 86, 710 S.E.2d at 458. Here, that causal link is missing, and the order is inconsistent. The Commissioner cannot both find insufficient evidence of aggravation and order it compensable.

CONCLUSION

Every fall does not result in a compensable injury. Claimant specifically asked the doctor to write her out of work, and he declined to do so. Appellants have no doubt that Claimant's chronic and pre-existing arthritis makes being on her feet and working painful as she got older. But this does not bring her within the ambit of the Act absent causation.

> We have deep sympathy for all persons who after years of work find it difficult or impossible to continue their accustomed level of physical activity at their jobs because of progressive health problems. Sadly, many people have little choice but to work in pain and fatigue or else to bring their working lives to a close. Continuing to work often worsens their health. Havird's situation is unfortunate, but it is not uncommon. The Workers' Compensation Law was not intended to remedy this problem. Indeed, law in general is incapable of relieving us from many of the ills common to our human condition.

Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992). This is the classic case of bodies wearing out over time. People have manufacturing jobs that require substantial lifting and bending and constant standing. Jobs where they are in daily pain in their joints. Jobs that they cannot do as they get older. So they fall and want the employer to pay to fix chronic conditions unrelated to the accident.

To allow Claimant to treat with an orthopedist after the hearing to get causation based on a knee bruise would give her two bites at the apple. She only gets one. Causation is the lynchpin. It is Claimant's burden. Causation is required to bring her within the Act. And she doesn't have it. Appellants provided treatment pending investigation, and they're not asking for that money back. They paid most medical bills immediately following the injury and continued to pay Claimant's

salary through the end of December. Tr.7-8. They have treated her bruised knee. The only logical explanation for her bone on bone knee pain worsening months after the fall that caused only a fat pad bruise is that her current problems are caused by her chronic osteoarthritis. Her arthritis, chronic thinning of the knee lining, is not causally related. The Commissioner found insufficient evidence of aggravation. Treatment cannot be ordered without it.

Critically, Claimant has no medical evidence that her fall most probably caused her current problems, as she is required to have to carry her burden of proof under the Act. Moreover, Claimant is not credible when surveillance showed her to be uninjured. Finally, the order below is fatally inconsistent in finding no evidence of aggravation but yet ordering treatment. Thus, Appellants should not be required to provide any further medical care.

We are now a year and a half post-accident—a fall that caused only a knee bruise and mild PCL strain, according to both the treating doctors and the MRI. Employer provided initial medical treatment under workers' compensation. No additional treatment is warranted for a knee bruise and ligament strain a year and a half later. Neither is there any permanent impairment. This is common sense. We all bruise body parts all the time. They heal with time. Surveillance clearly showed Claimant walking normally, without a limp or assistive devices and going about her business. She is not credible. Her subjective complaints are unsupported by objective medical evidence. Admittedly, claimants are sometimes unsure exactly how a fall happened or what body parts were injured. But whether she fell on one knee or both knees does not change over time. And bruises heal with time, without impairment. The Commission erred in holding that Employer was required to provide additional treatment.

Moreover, Claimant has failed to meet her burden of proof to bring her alleged injury within the Act. She has failed to provide medical testimony that her knee problems were more

probably than not and to a reasonable degree of medical certainty caused by her fall. Causation is contested, and injury to the knee where there are underlying chronic problems is medically complex. That testimony is necessary in this case. Without it, the Commission's decision is unsupported by substantial evidence and must be reversed.

Respectfully submitted,

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June 27, 2024

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

Appellate Case No. 2024-000734
Commission File No. 2218722

Marcelina Santibanez, Claimant.....Respondent,

v.

Operational Resources, Inc., Employer, and Old Republic Insurance Company, Carrier.....Appellants.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants propose that the following to be included in the Record on Appeal:

Form 12-A: First Report of Injury
Form 20: Statement of Earnings of Injured Employee
Form 50: Request for Hearing dated January 17, 2023
Form 58: Claimant's Pre-Hearing Brief dated April 28, 2023
Form 58: Defendants' Pre-Hearing Brief dated May 4, 2023
Transcript of Hearing before Commissioner Cynthia Dooley dated May 16, 2023
Deposition of Claimant dated March 6, 2023
Request for Proposed Order from Commissioner Cynthia Dooley dated May 25, 2023
Decision and Order of Commissioner Cynthia Dooley dated July 7, 2023
Form 30: Request for Commission Review by Defendants dated July 14, 2023
Appellate Brief of Defendants to the Full Commission dated October 19, 2023
Respondent's Brief to the Full Commission dated November 3, 2023
Transcript of Full Commission Hearing dated November 21, 2023
Request for Proposed Order from Commission dated December 6, 2023
Appellate Panel Decision and Order dated March 25, 2024
Notice of Appeal to the Court of Appeals dated April 24, 2024

Pursuant to Rule 209(c), SCACR, I certify that this designation contains no matter which is irrelevant to the appeal.

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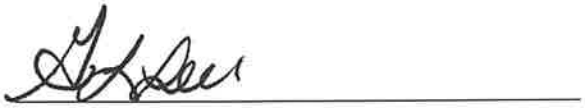
PROOF OF SERVICE

I certify that I have served a copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on counsel for Respondent, W. Grady Jordan, Smith Jordan, P.A. via email to jordan@smithjordan.com and on Julian Cabra Law Firm, LLC via email to julian@cabralaw.com on June 28, 2024.

WILLSON JONES CARTER & BAXLEY



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