THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners Gene McCaskill, Melody L. James, and Cynthia C. Dooley

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Appellate Case No. 2026-000329
WCC File No. 1613880

Ivan Moore, Claimant .....Appellant,

v.

Spartanburg Steel, Employer, and Hartford Accident & Indemnity Company, Carrier, c/o Sedgwick Claims Management Services, Inc., ... Respondents.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondents' Statement of the Case concedes the violation. "Before the hearing, the carrier had sent Dr. Hoenig a medical questionnaire on September 29, 2023, without notice to Claimant; Dr. Hoenig completed it on October 3, 2023." (RIB p. 6.) The Commission found the same thing: the questionnaire was excluded "because Defendants improperly contacted the physician in violation of S.C. Code Ann. § 42-15-95." (Appellate Panel Order, Finding of Fact 2.)

What follows in Respondents' brief is three pages establishing that the October 31 deposition was not a communication the employer or carrier requested. (RIB pp. 13–15.) That is largely true, and it is beside the point. Subsection (C) does not exclude depositions. It excludes "discussions, communications, medical reports, or opinions obtained in violation of this section." S.C. Code Ann. § 42-15-95(C). The question the statute asks is whether one of those four things was obtained in violation. What subsection (C) removes is the *opinion* the carrier obtained through its violation — the answer Dr. Hoenig marked on a form the carrier wrote, and read back into the record a month later.

That leaves an order which denies Claimant the only treatment any physician has recommended and, in the next paragraph, finds that he has not reached maximum medical improvement. Respondents say the claim "can and will proceed to a final decision." (RIB p. 11.) They do not say what that final decision could be.

1. THE APPELLATE PANEL'S ORDER IS IMMEDIATELY REVIEWABLE UNDER S.C. CODE ANN. § 1-23-380.

A. Respondents' finality cases describe a posture this case does not present.

Claimant has assumed for the purposes of this issue that the order is interlocutory. (AIB p. 7.) The question is the exception, and Respondents' finality authorities do not reach it.

In Rose the appellants were an upstream employer and its carrier, contesting which entity would bear liability for benefits the claimant was *already receiving*: the commission had ordered them to pay Rose's medical treatment and temporary total disability benefits while they sought to shift that cost to the Uninsured Employers' Fund. The Court dismissed because the appellants "[made] no specific argument as to how the commission's refusal to address transfer at this time affect[ed] [them] in any way other than to delay the payment of money," and because the Fund "appear[ed] to acknowledge that it would be required to reimburse Appellants." Rose v. JJS Trucking, LLC, 411 S.C. 366, 369, 768 S.E.2d 412, 413–14 (Ct. App. 2015). Respondents say this case is in the same posture because both orders found the claimant not at maximum medical improvement. (RIB p. 9.) In Rose, that finding meant the claimant was still being treated toward maximum medical improvement, at the appellants' expense, while the payors argued over cost. In Claimant's case the finding sits beside an order denying the only treatment that could help Claimant achieve maximum medical improvement. Rose's "delay the payment of money" presupposes money moving. Nothing is moving in this case.

Bone draws the same line. The parties seeking immediate review there were the employer and its carrier, and the order they challenged had held the claimant's injury compensable and returned the case so the Commission could reach what it had not yet addressed — "the severity of Bone's injury, whether or not she had reached MMI, or if she should be provided medical

treatment. No award of any kind was made." Bone v. U.S. Food Serv., 404 S.C. 67, 74, 744 S.E.2d 552, 556 (2013). The Court's adequacy holding followed from that: "Petitioners have an adequate remedy in that they may raise the issue of compensability on appeal of a final award." Id. A final award was coming in Bone, and the party asking to appeal early was the party who would have to pay it. Here the appellant is the claimant, the ruling is the denial of his treatment, and no step remains that would produce an award for him to appeal from.

The sentence Respondents draw from Davis is incomplete. They quote the holding that a "final decision" excludes one "on a procedural or other intermediate point that does not resolve the merits of the claim." (RIB p. 9.) The next sentence explains why the Court said it: "Otherwise, there would be no need for the explicit exception in section 1-23-380 allowing immediate review . . . when the claimant would be left with an inadequate remedy on appeal." Davis v. S.C. Dep't of Corr., 444 S.C. 138, 153, 906 S.E.2d 569, 577 (2024). The passage is the setup for the exception, not a bar to it, and Davis held the order reviewable.

B. Hilton and Davis supply the test, and Respondents supply the premise.

Respondents' "hens' teeth" quotation comes from a case in which the Court granted immediate review. The sentence describes the circumstances that *do* permit an interlocutory appeal under § 1-23-380, and Hilton found them present, vacating the dismissal. Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016). What drove Hilton was the consequences of the order: if the order stood, "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." Id. at 252, 791 S.E.2d at 723. And Davis rested on two grounds together, not delay alone — the length of the stall *and* "the fundamental flaw in the decision by the Appellate Panel," because "these errors could continue

to impact the Commission's view of the status of Davis's claim upon remand." Davis, 444 S.C. at 156.

That second ground governs here. Respondents describe the Panel as having "affirmed that order and adopted its findings verbatim." (RIB p. 10.) The ruling that a statutorily excluded opinion may be received, and the causation finding built upon it, now stand at both levels of the Commission. Any further proceeding begins from those flawed findings.

Russell does not narrow the exception; it explains what the exception protects. The Court granted immediate review there because the Commission's handling had defeated the Act's purpose of "quick recovery, relatively ascertainable awards, and limited litigation." Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 285 (2019). Claimant was injured on March 1, 2016. The order Respondents defend denies the only treatment identified in the record and finds him not at maximum medical improvement, and their answer is that he should wait for a final decision. Russell is also not the last word. Davis followed it in 2024 and rested on the fundamental flaw in the Appellate Panel's decision as well as on delay.

C. The remedy Respondents describe is not one this claimant has.

Respondents' answer is that Claimant can fund the surgery himself, citing testimony that his personal health insurance "could be used for the surgery." (RIB p. 12.) That is half the answer. Asked whether he could get the surgery paid for by his health insurance, Claimant said: "I could, but . . . if I do it through my health insurance, I have to pay a lot of money, and I -- that I -- that I can't afford . . . ." (Hr'g Tr. p. 15, lines 16–25 (Dec. 19, 2024).) The Single Commissioner's summary of the evidence, which Respondents also cite, records both halves: Claimant "stated he cannot afford the surgery." (Single Comm'r Order, Evidence of the Case.)

The answer would not change on Respondents' version of the testimony. Section 42-15-60 places the obligation to furnish treatment on the employer. A remedy that requires an injured worker to purchase a compensable surgery out of pocket and litigate for years toward reimbursement is not the delayed provision of a benefit; it is the denial of one. And the delay has no end. Permanency cannot be adjudicated until Claimant reaches maximum medical improvement; the treatment that would get him there has been denied; and no other treatment recommendation appears in this record. See infra Part 3.D. The final decision Respondents say Claimant should wait for may never come.

D. The merits inquiry Respondents concede resolves the question.

Respondents acknowledge that a court may examine the underlying merits in assessing the adequacy of a later remedy, and argue that the examination "only confirms dismissal" because the order is correct. (RIB p. 12.) That concedes the framework and stakes appealability on the merits — which is exactly how Hilton proceeded: "Determining whether review of the final agency decision would give Hilton an adequate remedy requires us to reach the underlying merits of the Commission's order, and since we conclude that the order cannot stand, we vacate the Court of Appeals' order and remand the matter to the Commission." Hilton, 418 S.C. at 247, 791 S.E.2d at 720; accord Davis, 444 S.C. at 155. For the reasons set out in Parts 2 and 3, the order cannot stand. Under Hilton and Davis, that is not merely a reason to reverse. It is the reason review is available now.

2. SECTION 42-15-95(C) REQUIRED EXCLUSION OF THE OPINION THE CARRIER OBTAINED IN VIOLATION OF THE STATUTE, AND NO HARMLESS-ERROR PRINCIPLE PRESERVES IT.

A. Respondents answer a question subsection (C) does not ask.

Subsection (C) operates on four things — "discussions, communications, medical reports, or opinions" — and asks of each whether it was "obtained in violation of this section." S.C. Code Ann. § 42-15-95(C). Respondents' three pages on who noticed the deposition (RIB pp. 13–15) never reach that question. What the September 29 questionnaire produced was an opinion. The Commission excluded the two pages bearing the questionnaire and admitted the opinion those pages contained. (Appellate Panel Order, Findings of Fact 1–2.) That is not an application of subsection (C); it is a reading in which the word "opinions" has no independent operation at all.

Claimant does not ask this Court to strike the deposition. Claimant's objection is to the opinion. His pre-hearing brief, marked as Claimant's Exhibit 1 at the December 19, 2024 hearing, argued that "Dr. Hoenig's opinion must be excluded because it was obtained in violation of S.C. Code Ann. § 42-15-95" and that Claimant "has not waived his right to seek exclusion of Dr. Hoenig's opinion by deposing Dr. Hoenig." (Clt. Supp. Pre-Hr'g Br., Attach. pp. 1–2 (Nov. 22, 2024); Hr'g Tr. p. 4, lines 1–3.) Claimant asks the Court to hold that "the opinion of Dr. Michael Hoenig contained in his October 31, 2023 deposition must be excluded," and alternatively to remand on a record "from which the excluded opinion has been removed." (AIB p. 30.) What gets excluded is the natural-progression opinion the questionnaire produced: Dr. Hoenig's answer to Question 1, which he read aloud, and his testimony restating and explaining it. (Hoenig Dep. p. 32, lines 11–25; p. 33, line 9 – p. 34, line 1; p. 36, line 20 – p. 37, line 24; p. 39, lines 5–24; p. 41, lines 18–25.) His treatment history, his records, his referral of Claimant to

Dr. Gerscovich for the total knee replacement, and his testimony that the work injury "aggravated it, exacerbated it" all remain. (*Id.* pp. 29–30, 33.) That is how an exclusionary rule ordinarily operates. Evidence is excluded where it "would not have come to light but for the illegal actions" and "has been obtained by the exploitation of that illegality," while evidence "obtained from a lawful source independent of the illegal conduct" remains admissible. State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

The narrower remedy is also the only one that leaves the statute workable. On the Commission's construction, a claimant who learns the carrier has obtained an ex parte opinion must either depose the treating physician — on causation, treatment history, work restrictions, future care — and thereby validate the very opinion the statute excluded, or leave the physician unexamined to preserve the objection. Respondents protest that exclusion "would penalize Defendants for doing nothing more than participating in a deposition the Claimant chose to take." (RIB p. 14.) It would not. Their reading penalizes claimants, for doing what competent representation requires. Claimant pressed this point in the initial brief. (AIB pp. 19–20.) Respondents do not engage it.

Respondents' textual argument also overstates what subsection (B) says. They assert that "[e]ach of those conditions is expressly directed at 'the employer, carrier, or its representative requesting the discussion or communication.'" (RIB p. 13.) That is accurate as to (B)(1) and (B)(2). It is not accurate as to (B)(3), which names no actor at all: the employee must be "provided with a copy of the written questions at the same time the questions are submitted to the health care provider," and "also must be provided with a copy of the response." S.C. Code Ann. § 42-15-95(B)(3). Subsection (B)(3) is the provision violated here — and on any reading of subsection (B), the September 29 questionnaire was a written communication the carrier initiated

and submitted without the copy the statute requires. The section was violated. Subsection (C) attaches to the *opinion* that violation produced.

Brown confirms the point rather than answering it. Respondents quote the Supreme Court's observation that carriers "may obtain additional information through approved methods of discovery," including depositions. (RIB p. 14, quoting Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).) The sentence immediately before it holds that the statute "does not authorize other 'ex parte' methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider," and the Court then adds that representatives may speak with the provider "provided they obtain the claimant's permission." Id. Those are the two routes Brown recognized. Subsection (B), added after Brown, supplies a third route: written questions, with a copy to the employee at the same time. The carrier used that route's form without its required condition.

The Commission's stated reason — that a contrary ruling "would be to conclude that Defendants acted improperly in participating in the deposition" (Appellate Panel Order, Finding of Fact 2) — does not follow from anything in the statute. Exclusion under subsection (C) is not a finding of misconduct at the proceeding where the evidence surfaces; it is a consequence the General Assembly attached to how the material was obtained, and the impropriety the Commission itself found occurred on September 29, by the carrier.

B. Respondents' own canon of construction defeats their reading.

Respondents open Issue II with a principle Claimant accepts without qualification: "Because workers' compensation is a creature of statute, its terms are strictly construed, and it is for the General Assembly — not the tribunal — to expand them." (RIB pp. 12–13.) The principle has a settled source. Workers' compensation statutes provide an exclusive compensatory system

in derogation of common law rights, courts are "bound by precedent to strictly construe statutes in derogation of the common law," and so "when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 110 (2003) (citing Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001), and Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948)). The canon is neutral — Wigfall applied it against the claimant, confining him to scheduled benefits, Id. at 111, 580 S.E.2d at 111 — and it enforces mandatory language as mandatory: "The term 'shall' in a statute means that the action is mandatory." Id. (citing Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981)). Subsection (C) is written in that register: opinions obtained in violation "must be excluded."

A canon that forbids the tribunal to expand a statute also forbids it to contract one. The Commission narrowed subsection (C) in two steps. It supplied an initiator element — its sole stated ground for admitting the deposition was "the fact that Claimant noticed and conducted Dr. Hoenig's deposition in an attempt to change his medical opinion" (Appellate Panel Order, Conclusion of Law 2) — and, through Respondents' fallback position, a prejudice element. (RIB pp. 15–16.) Subsection (C) contains neither. Nor does it contain the additional limitation Respondents' reading requires: it does not exclude tainted opinions unless and until they are repeated in a permitted proceeding. It excludes them "from any proceedings under the provisions of this title."

Respondents would have the Court read "opinions" out of the statute. If an opinion obtained in violation may be restored whenever the physician repeats it later in a different form, the word does no work. "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language." Hodges

v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 581 (2000). Respondents quote that sentence. (RIB p. 12.) It describes exactly what the Commission did.

C. Harmless-error review has no application to a statutory command — and Respondents' own chain of authority proves it.

Respondents' fallback is that any error in admitting the deposition was harmless. (RIB pp. 15–16.) The argument borrows a rule built for a different problem. Every authority in Respondents' chain concerns a trial judge's *discretionary* ruling admitting or excluding evidence. Conner v. City of Forest Acres was a wrongful-discharge jury trial, and the reasonable-probability test Respondents quote rests in part on Timmons v. South Carolina Tricentennial Commission. "The admission or exclusion of evidence is within the sound discretion of the trial court." Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Timmons states the same premise: "The admission of evidence is largely a matter of discretion of the trial judge." 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970). Neither case involves a statute mandating a tribunal to exclude evidence.

The distinction is not formal. Harmless-error review asks whether a decisionmaker who was free to rule either way probably ruled wrongly. It presupposes discretion. Section 42-15-95(C) removes discretion: opinions obtained in violation of the section "must be excluded." A tribunal that was never free to admit the opinion did not exercise discretion badly. It disobeyed a command.

Ross v. Medical University of South Carolina does not fill the gap. Ross rests on Burgess v. Stern, a Code of Judicial Conduct case about a trial judge's ex parte contacts with counsel concerning a proposed order, whose holding is that while the Court "explicitly condemns ex parte communications," it does "not adopt, per se, the view that all orders consequentially

emanating therefrom in part or in whole are rendered invalid." 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993). That was a decision about whether *the Court* should create a categorical rule where no statute supplied one. Section 42-15-95(C) is precisely the statute Burgess did not have. And Ross applied Burgess to § 1-23-360 of the Administrative Procedures Act — another provision that prohibits ex parte contact without prescribing exclusion. 328 S.C. 51, 71–74, 492 S.E.2d 62, 73-74 (1997).

The question presented is not whether South Carolina courts ordinarily require a showing of prejudice before reversing an evidentiary ruling. They do, and Claimant does not suggest otherwise. The question is whether the General Assembly may prescribe exclusion without one. Nothing in Conner, Ross, or Burgess suggests it may not; each decided only what a court should do in the absence of such a statute. No published decision of a South Carolina appellate court has applied harmless-error analysis to § 42-15-95(C). Should the Court nonetheless reach prejudice, Respondents have conceded it.

D. Even if prejudice were required, it appears on the face of the order — and Respondents' counsel conceded it to the Panel.

Respondents contend that the causation finding rests on evidence "independent of any question about the deposition's admission," identifying "Dr. Hoenig's contemporaneous treatment records and testimony describing the natural progression of Claimant's arthritis." (RIB pp. 15–16.) The order says otherwise. Its causation holding occupies three findings. Two weigh Dr. Hoenig against the other physicians: he "has treated Claimant exclusively…", and "[m]ore weight is afforded" to his opinions. The third states the result: the surgery is unrelated. (Appellate Panel Order, Findings of Fact 3–5; *see* Conclusion of Law 4.) That rationale

presupposes an existing Dr. Hoenig opinion. Nothing in it identifies a treatment note, a diagnostic study, or any source of a causation opinion other than Dr. Hoenig himself.

Dr. Hoenig's only opinion against causation is the one obtained through the September 29 questionnaire and repeated at the October 31 deposition. The "contemporaneous treatment records" Respondents invoke contain treatment notes, assign a work-related impairment rating, and prescribe causally related future care. (RIB p. 5.) The phrase "natural progression" is the carrier's, not his. *See infra* Part 3.B. The "testimony" Respondents invoke *is* that opinion. Respondents' argument is that admitting the opinion was harmless because the opinion supports the finding.

Respondents' counsel told the Panel the same thing, in plainer language:

> If Mr. Moore had not taken the deposition in an attempt to change Dr. Hoenig's opinion, then the only opinion would be the opinion that was excluded. In other words, there would be no opinion and the commissioner would have been bound by the only other opinions in the case….There was new evidence obtained, new and different evidence, and it was the basis for the commissioner's conclusion that this was not causally related.

Panel Hr'g Tr. p. 14, lines 3–14 (Aug. 25, 2025). The "only other opinions in the case" belong to Dr. O'Leary and Dr. Gerscovich, and both support compensability. *See infra* Part 3.C. The concession establishes more than mere influence. It establishes the outcome.

In their appealability argument Respondents write that the statement "does not concede that the deposition was inadmissible or that the causation finding lacks support." (RIB p. 12.) Claimant does not contend that counsel conceded inadmissibility. The concession goes to materiality — the precise question Respondents' harmless-error argument raises. Respondents assert that Claimant "cannot show the prejudice that reversal requires" (RIB p. 16) without mentioning their counsel's statement at all. Under the test Respondents themselves supply, a reasonable probability that the fact-finder was influenced by the wrongly admitted evidence, this

record forecloses the question. Counsel did not tell the Panel that the deposition may have influenced the result. He told the Panel it *was the basis for* it.

3. THE FINDING THAT THE KNEE REPLACEMENT IS UNRELATED TO THE ADMITTED INJURY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The deference cases Respondents invoke presuppose a properly constituted record, and Corbin does not hold what they need.

Every authority in Respondents' Part III — Corbin, Hargrove, Tiller, and the Commission's own reliance on Sharpe — governs how the Commission weighs evidence that is properly before it. None addresses what may be received in the first place. Section 42-15-95(C) operates a step earlier, and deference to the Commission's weighing of an opinion the General Assembly forbade it to receive is the error. Corbin itself says as much. Substantial evidence "is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering *the record as a whole*, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002) (emphasis added). The record as a whole, correctly constituted, does not contain Dr. Hoenig's natural-progression opinion.

Nor does Corbin hold what Respondents extract from it. Corbin affirmed a Commission award *in favor of* a claimant, holding that substantial evidence supported the decision to credit a treating physician; it did not hold that the length of treatment alone carries the weight. 351 S.C. at 624. Corbin held that substantial evidence supported crediting a treating specialist over physicians who never examined the claimant, were not pulmonologists, or saw him once. The differential was specialty as much as duration. Here, Dr. Gerscovich is Dr. Hoenig's partner at the same orthopaedic practice, working from the same records. (AIB pp. 28–29; Clt. APA pp.

235–42.) Dr. Hoenig referred Claimant to Dr. Gerscovich, the practice's total joint specialist, *for the knee replacement*, on a signed order identifying the left knee and the "work comp date of March 1, 2016." (Hoenig Dep. p. 29, lines 17–25, p. 30, line 1, p. 35, line 25 – p. 36, line 1.) The physician whose superior vantage Respondents celebrate sent Claimant to his partner for the surgery, on a workers' compensation referral, before the carrier sent its questionnaire.

B. The rule Respondents state requires that the condition be due solely to natural progression — and Carter, read past its first half, is distinguishable on the testimony.

Respondents quote Hargrove for the governing rule and stop mid-passage. A condition "is compensable unless it is due *solely* to the natural progression of a pre-existing condition." Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (Ct. App. 2004) (citing Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995)). The sentences that follow, which Respondents omit, supply the rest: "It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her," and aggravation "is compensable where disability is continued for a longer time, even though no disability would normally have resulted from the injury alone…." Id.; *see also* Sturkie v. Ballenger Corp., 268 S.C. 536, 541, 235 S.E.2d 120, 122 (1977) (exacerbation of a pre-existing condition arising out of employment is compensable).

"Solely" is not satisfied on this record. Dr. Hoenig testified that the cartilage "was already damaged" and that "the work injury aggravated it, exacerbated it…pain was worse" (Hoenig Dep. p. 33, lines 1–8), and, asked directly whether the injury "made his knee worse to begin with," answered "Correct" (Id. p. 34, lines 2–5). Asked at what point aggravation gave way to natural progression, he answered: "Again, I think this is very much a gray area. There's

no exact answer….My typical thought is that, after two or three years, then roughly, that's when his arthritis would have naturally progressed to this point." (Id. p. 37, lines 19–24.) An admitted aggravation is the opposite of a condition due solely to natural progression, and a "typical thought" about a "gray area" with "no exact answer" is not testimony that the result "most probably" came from the cause alleged — the standard the Commission itself invoked, quoting Ashley v. South Carolina Highway Department. (Appellate Panel Order, Conclusion of Law 3.)

That is what distinguishes Carter, which Respondents call "materially identical." (RIB p. 17.) Dr. Grady testified "within a reasonable degree of medical certainty" that the claimant had experienced natural progression, and that "we are going to arrive at the same end result whether it would have been six months later, eight months later, or [twelve] months later." Carter v. Verizon Wireless, 407 S.C. 641, 649, 757 S.E.2d 528, 532 (Ct. App. 2014). Dr. Hoenig's testimony is not of that kind. He conceded the aggravation twice. (Hoenig Dep. p. 33, lines 1–8; p. 34, lines 2–5). He placed the end of the aggravation in "a gray area" with "no exact answer" (Id. p. 37, lines 19–24). He dated it only "about two or three years" out, by reference to a pattern he applies to patients generally (Id. p. 39, lines 9–24). And asked whether Claimant would need the replacement now regardless of the injury, he said "Roughly, yes" (Id. p. 41, lines 22–25). An admitted aggravation plus a "roughly" is not a condition due solely to natural progression. The closing question confirming a reasonable degree of medical certainty (Id. p. 42, lines 15–21) certifies that testimony; it does not change what the testimony says. Dr. Grady volunteered an opinion in his own words. Dr. Hoenig checked a line on a form sent to him without notice to Claimant, having, by his own testimony, no recollection of reading the letter that accompanied it. (Id. p. 31, lines 11–13.)

Finally, the "contemporaneous treatment records" Respondents invoke (RIB pp. 15–16) do not describe a "natural progression." The phrase "natural progression" does not originate with Dr. Hoenig. It is the carrier's language, supplied to him on September 29, 2023, in a questionnaire the Commission excluded. (Hoenig Dep. p. 32, lines 11–19 (Def. APA p. 279)).

C. The exception Respondents describe has two branches, and this record satisfies both.

Respondents state the rule as a single, narrow exception applying "only where 'all the evidence points to one conclusion.'" (RIB p. 18.) That is half the sentence they quote. Clemmons holds that "if all the evidence points to one conclusion *or* the Commission's findings 'are based on surmise, speculation or conjecture, then the issue becomes one of law for the court.'" Clemmons v. Lowe's Home Ctrs., Inc.-Harbison, 420 S.C. 282, 288, 803 S.E.2d 268, 271 (2017) (quoting Polk v. E.I. duPont de Nemours Co., 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968), which in turn cites Hines v. Pacific Mills, 214 S.C. 125, 131, 51 S.E.2d 383, 385 (1949)). Two triggers, joined by "or," each sufficient on its own. Respondents answer one of them.

The evidence "conflicts" (RIB p. 18) only because the tainted opinion is in it. Remove the opinion § 42-15-95(C) required the Commission to exclude, and what remains is unanimous. Dr. O'Leary found Claimant's symptoms related to the work injury, found that he had never reached a plateau and was not at maximum medical improvement, and recommended the replacement. (Clt. APA pp. 231–34.) Dr. Gerscovich found end-stage arthritis aggravated by the March 1, 2016 injury and concluded Claimant would not be a candidate for the replacement had the injury not occurred. (Clt. APA pp. 235–42.) And Dr. Hoenig, stripped of the questionnaire answer, testified that the work injury aggravated the pre-existing damage and referred Claimant

for the surgery on a workers' compensation order. *Supra* Parts 3.A–B. Every competent medical source in this record points the same direction.

The second branch is independently satisfied. The finding turns entirely on an interval — the point at which aggravation supposedly gave way to natural progression — that is documented nowhere in eight years of treatment and that its author could describe only as a "gray area" and a "typical thought." A general practice heuristic untethered to this claimant's records is the conjecture and surmise Polk and Hines describe. The Commission applied that very standard to Claimant, quoting Jeffers v. Manetta Mills for the proposition that an award "must be based upon something more than surmise or conjecture." (Appellate Panel Order, Conclusion of Law 3.) A standard that governs the claimant's proof governs the Commission's findings as well.

D. The order's two holdings cannot both stand.

Respondents answer the inconsistency by separating the questions: maximum medical improvement "addresses whether Claimant's compensable condition has stabilized," while causation "addresses whether this particular surgery was made necessary by the 2016 accident…." (RIB p. 18.) In the abstract that is correct. It resolves nothing here, because the separation works only if some other treatment exists to carry Claimant from where he is to stability, and none appears in this record. Respondents' counsel told the Panel as much, first arguing "it's our position that that finding is inconsistent with the commissioner's determination that the need for knee replacement is not related" before arguing that the surgery "is the only treatment at this time that has been identified by anyone moving forward" and that "the only treatment in the record is a surgery that has already been ruled out by a commissioner." (Panel Hr'g Tr. p. 21, lines 21–25; p. 22, lines 6–18.) The order denies the total knee replacement — the

only treatment any physician has recommended (AIB pp. 5, 7, 27) — and in the next paragraph finds Claimant not at maximum medical improvement. (Appellate Panel Order, Order.)

The law supplies what the order withholds. Section 42-15-60(A) requires the employer to provide treatment that "will tend to lessen the period of disability." So the two findings are not answers to different questions. They are a finding that the compensable condition has not stabilized and a finding that the only identified means of stabilizing it is not compensable. That pairing is not a resolution supported by substantial evidence, and its remedial consequence is addressed in Part 1, *supra*.

CONCLUSION

Respondents ask this Court to dismiss the appeal without reaching the statute. The order they defend denies an injured worker the only treatment any physician has recommended for an admitted injury, finds in the same breath that he has not reached maximum medical improvement, and rests on an opinion the General Assembly commanded be excluded. Under Hilton and Davis, that is not a reason to wait. It is the reason the appeal is properly before this Court now.

For the foregoing reasons, and for those set out in his initial brief, Appellant Ivan Moore respectfully requests that this Court:

(1) Hold that the Appellate Panel's January 29, 2026 order is immediately reviewable under S.C. Code Ann. § 1-23-380;

(2) Reverse the Appellate Panel's Decision and Order of January 29, 2026;

(3) Hold that the opinion of Dr. Michael Hoenig contained in his October 31, 2023 deposition must be excluded under S.C. Code Ann. § 42-15-95(C);

(4) Hold on the remaining record that the Claimant's left total knee arthroplasty is causally related to his admitted March 1, 2016 injury, and remand to the Commission for entry of an order awarding that treatment and attendant benefits; and

(5) In the alternative, reverse and remand for a new determination on a record from which the excluded opinion has been removed.

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