

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1605900

RECEIVED

AUG 16 2017
SC Court of Appeals

George C. Leggette, Jr., Employee,

Claimant/Appellant,

vs.

Three D Machinery Installers, LLC., Employer,
and Amerisure Mutual Insurance Company,
Carrier,

Defendants/Respondents.

Appellate Panel Review held in Columbia,
South Carolina, on May 15, 2017 notices
timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed
7-24, 2017

APPEARANCES:

Claimant/Appellant represented by Stephen J. Wukela, Esquire
of Florence, South Carolina

Defendants/Respondents represented by Mary Margaret Hyatt,
Esquire, of Columbia, South Carolina

I. STATEMENT OF THE CASE

This is a denied case decided by the Commission on the Claimant's Form 50 and Defendants' Form 51.

The case was decided by the Single Commissioner on February 16, 2017 who found:

FINDINGS OF FACT

The following findings of fact are based on the stipulations of the parties, the testimony rendered at the Hearing, the written evidentiary submissions, and the information contained in the Workers' Compensation Commission file:

1. The South Carolina Workers' Compensation Commission has jurisdiction over this claim and venue is proper in Georgetown County, South Carolina.
2. The Claimant's average weekly wage was Eight Hundred Forty-Nine Dollars and 37/100 (\$849.37), with a corresponding compensation rate of Five Hundred Sixty-Six Dollars and 27/100 (\$566.27).
3. Claimant alleges he sustained an injury by accident arising out of and in the course of his employment to his pre-existing back condition by hitting his back on the stairs of the Employer's conex trailer during a seizure at work on March 28, 2016.
4. The Employer's conex is a trailer that has tools, water, and other items in it with fabricated metal stairs off of the back.
5. Defendants allege any injury to the Claimant's back was the result of the muscle contractures related to the seizure itself and not Claimant's work environment, or Claimant hitting his back on the stairs of the Employer's conex trailer, or anything else, during the seizure.
6. Claimant underwent various evaluations and treatment for his alleged work-related injury at Georgetown Memorial Hospital and Tideland's – Andrews Medical Center. (Claimant's APA Nos. 2 and 3).
7. Dr. R. Joseph Healy, a neurologist, reviewed medical records and deposition testimony, and in a letter report dated August 17, 2016, opined to a reasonable degree of medical certainty that it appeared that the most likely cause of Claimant's back problems was the seizure, which is not uncommon in view of the amount of muscle contraction particularly in the paraspinal musculature which occurs with a seizure. (Def. APA No. 15).
8. Claimant's attorney conducted the deposition of Dr. Healy on October 3, 2016, which provided the opportunity for Dr. Healy to have all of the evidence as it was known at that time. (Def. APA No. 17).
9. Dr. Healy testified that Claimant had pre-existing lumbar spine disease that was likely exacerbated by the seizure, but Dr. Healy could not conjecture as to what type of trauma Claimant experienced other than the seizure. When asked to assume that Claimant slid down the conex stairs, Dr. Healy testified that it could have aggravated the Claimant's pre-existing lumbar spine condition. Dr. Healy also testified that if he assumed Claimant sustained trauma to the lumbar spine from the conex stairs,

- Claimant could have aggravated the pre-existing condition of his lumbar spine. However, Dr. Healy testified that he would have to defer to anyone who saw the Claimant hit his back as to whether it resulted in a trauma to the lumbar spine. (Dep. Tr. R. Joseph Healy, Jr., M.D. p. 20, ll. 1-16).
10. All Dr. Healy could testify to with medical certainty is that the seizure could have contributed to Claimant's back complaints. (Dep. Tr. of R. Joseph Healy, Jr., M.D., p. 26, ll. 14-23). Dr. Healy could not render an opinion as to whether Claimant's surroundings, or work environment, contributed to his back issues. (Id., p. 26, l. 24 – p. 27, l. 3).
 11. According to Dr. Healy, the testimony of Shannon Oditt, the Employer's Safety Director, with regard to what happened would trump the Claimant's testimony because patients don't know what happened during a seizure and their recollection is not reliable when they are the one who has the seizure. (Id., p. 23, l. 11 – p. 25, l. 5; p. 28, l. 25 – p. 29, l. 6).
 12. In an October 3, 2016 report, Dr. White, a neurologist, opined to a reasonable degree of medical certainty that Claimant's seizure that occurred at work is unrelated to any work activity, and is directly related to Claimant's history of seizure disorder, alcoholism, and uncontrolled hypertension. Dr. White agreed with Dr. Healy that Claimant's back pain is related to musculoskeletal activity, which was provoked by Claimant's seizure. Accordingly, Dr. White also opined to a reasonable degree of medical certainty that Claimant's back pain is also unrelated to work activity. (Def. APA No. 16, pp. 389-392).
 13. According to Shannon Oditt's testimony and witness statement, as well as the Non-Injury Incident Report prepared by Oditt, Claimant was sitting on the bottom stair of the Employer's conex. (Hr'g Tr. p. 52; Def. Exh. A; Def. Exh. C). The conex stair Claimant was sitting on was approximately a foot to a foot and a half off of the ground. (Def. Exh. L).
 14. Shannon Oditt was standing in front of Claimant when the Claimant's seizure occurred. Shannon Oditt testified that Claimant became completely stiff like a board during the seizure and may have slid a couple of inches at most. (Hr'g Tr. p. 56, ll. 10-17). To Shannon Oditt's knowledge, Claimant did not hit his back on a step as a result of the seizure. Claimant also did not hit anything as a result of the seizure. (Hr'g Tr. p. 41, l. 6 – p. 42, l. 7; p. 56, ll. 18-24).
 15. Claimant's co-worker, Leon Bone, witnessed Claimant's seizure. When Leon Bone saw the Claimant having a seizure, Leon Bone went to Claimant, got behind Claimant and between Claimant and the conex stairs, put both arms under Claimant's arms, and assisted Claimant to the ground. (Hr'g Tr. p. 69, l. 10 – p. 71, l. 6). Leon Bone did not see Claimant's back strike the stairs of the conex trailer while in a stiff slide during the seizure. (Hr'g Tr. p. 72, ll. 20-24). According to Leon Bone, Claimant did not hit the ground. (Hr'g Tr. p. 71, l. 15 – p. 72, l. 7).
 16. Both Shannon Oditt and Leon Bone reached Claimant within seconds after Claimant's seizure and stiff slide began. (Hr'g Tr. p. 72, ll. 14-19).
 17. Claimant did not know if he had hit his back as a result of the seizure on March 28, 2016. (Hr'g Tr. p. 33, l. 25 – p. 34, l. 2).
 18. In deposition testimony on August 17, 2016, Dr. Lizina Green of Tideland's – Andrews Medical Center, who practices Family Medicine, testified that she could not

say with certainty that sliding down the conex stairs was the most probable cause of Claimant's back complaints. However, in further testimony, Dr. Green testified to a reasonable degree of medical certainty, that assuming Claimant did not have prior complaints of back pain and hit the ground, it is likely that the slide could have aggravated Claimant's pre-existing condition and caused the back pain. (Dep. Tr. of Lizina Green, M.D., p. 20, l. 16 – p. 21, l. 16; p. 36, l. 8 – p. 38, l. 22; p. 51, ll. 4-8).

19. Dr. Green would not defer to a neurologist as to the cause of any injury Claimant might have had to his back *per se*, but would defer to a pain specialist or spinal orthopedist. Dr. Green would defer to a neurologist as to whether or not a seizure could have caused any back injury like the Claimant alleged. (Id. at p. 51, l. 19 – p. 52, l. 7). Dr. Green would also defer the opinion of whether or not a seizure can cause a disc protrusion to a neurologist. (Id. at p. 53, l. 18 – p. 54, l. 11).
20. There are no eyewitnesses who observed Claimant hit his back on the stairs of the Employer's conex, or anything else, when the Claimant had a seizure on March 28, 2016. Absent an eyewitness who observed Claimant's back hit the stairs of the conex and based on a preponderance of the medical evidence and sworn testimony, I cannot make a determination as to whether Claimant's back issues are causally related to his seizure or alleged work related accident.
21. I find that the Claimant's employment did not contribute to the effect of the Claimant's seizure.
22. Therefore, I hereby find that Claimant did not meet his burden of proof that he sustained a compensable injury by accident arising out of and in the course of his employment.
23. Claimant is not entitled to any benefits under the South Carolina Workers' Compensation Act.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act, S.C. Code Ann. §§ 42-1-10 et seq. that:

1. S.C. Code Ann. § 42-17-40 governs the conduct of hearing and renderings of awards.
2. S.C. Code Ann. § 42-1-130 defines employer.
3. S.C. Code Ann. § 42-1-40 defines average weekly wage.
4. S.C. Code Ann. § 42-1-140 defines employment.
5. S.C. Code Ann. § 42-1-150 defines employment.
6. S.C. Code Ann. § 42-1-160 defines injury and personal injury.
7. S.C. Code Ann. § 42-15-20 governs notice of an accident by an employee to an employer.
8. The Claimant's employment did not contribute to the effect of the Claimant's seizure.
9. Claimant has not carried the burden of proof, required under the South Carolina Workers' Compensation Act, to establish that any injury arose out of and in the course and scope of his employment with the Defendants on March 28, 2016. See Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) (the workers' compensation claimant has the burden of proving facts that show that the injury arose

out of the employment, and an award of benefits must not be based on surmise, conjecture, or speculation); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951) (the burden is upon the claimant to prove the facts which render the injury compensable).

10. The evidence and testimony presented in this case do not support the Claimant's contention that he was injured in a work-related accident arising out of and in the course of his employment on March 28, 2016.
11. The Claimant is not entitled to any benefits under the South Carolina Workers'

Compensation Act.

This appeal followed.

The Claimant argued on appeal that the Single Commissioner erred in failing to find that the Claimant sustained a compensable injury by accident and to award benefits.

II. EVIDENCE

A. STIPULATIONS

The record on appeal reflects that Counsel for the parties stipulated at the Single Commission hearing to the following:

1. Notice of the hearing was timely and properly served upon all parties of interest.
2. The South Carolina Workers' Compensation Commission has jurisdiction over this claim.
3. Venue is proper.
4. The Claimant's average weekly wage was Eight Hundred Forty-Nine Dollars and 37/100 (\$849.37), with a corresponding compensation rate of Five Hundred Sixty-Six Dollars and 27/100 (\$566.27).

B. APA SUBMISSIONS

The record on appeal also contains the following documents which were submitted into evidence at the Single Commission hearing under the South Carolina Administrative Procedures Act:

The Claimant submitted the following medical records and exhibits:

1. Records of Georgetown County EMS dated 03/28/2016 consisting of 4 pages (Claimant's APA No. 1).
2. Records of Georgetown Memorial Hospital dated 03/28/2016 thru 05/18/2016 consisting of 14 pages (Claimant's APA No. 2).
3. Records of Tideland's Andrews Medical Center dated 03/30/2016 – 05/30/2016 consisting of 16 pages (Claimant's APA No. 3).
4. Diagram drawn by Leon Bone consisting of 2 pages (Claimant's APA No. 4).
5. Photographs of Rear of Conex consisting of 2 pages (Claimant's APA No. 5).
6. Turner v. Campbell Soup Co., 252 S.C. 446, 166 S.E. (2d) 217 (1969) consisting of 3 pages (Claimant's APA No. 6).
7. Deposition transcript of Leon Russell Bone, Jr. dated 07/07/2016 (Claimant's APA No. 7).
8. Deposition transcript of Ivan Rutledge dated 07/07/2016 (Claimant's APA No. 8).
9. Deposition transcript of Dr. Lizina Green dated 08/17/2016 (Claimant's APA No. 9).
10. Deposition transcript of Dr. R. Joseph Healy dated 10/03/2016 (Claimant's APA No. 10).

The Defendants submitted the following medical records and exhibits:

1. Records of Georgetown Memorial Hospital dated 11/15/2006 thru 05/18/2016 consisting of 138 pages (Defendants' APA No. 11).
2. Records of Gentle Dentistry dated 06/18/2012 thru 05/02/2016 consisting of 2 pages (Defendants' APA No. 12).
3. Records of St. James Santee Family Health Center, Inc. dated 01/09/2013 thru 1/21/2014 consisting of 22 pages (Defendants' APA No. 13).

4. Records of Georgetown Co. Fire & EMS dated 03/28/2016 consisting of 3 pages (Defendants' APA No. 14).
5. Records of R. Joseph Healy, M.D. dated 08/17/2016 consisting of 2 pages (Defendants' APA No. 15).
6. Records of Marshall Allyn White, M.D. dated 10/03/2016 consisting of 4 pages (Defendants' APA No. 16).
7. Deposition transcript of Dr. R. Joseph Healy dated 10/03/2016 consisting of 20 pages (Defendants' APA No. 17).
8. Incident Report from Three D Metal Works dated 03/28/2016 consisting of 1 page (Defendants' Exhibit A).
9. Russell Leon Bone, Jr.'s witness statement dated 03/28/2016 consisting of 1 page (Defendants' Exhibit B).
10. Shannon Ray Oditt's witness statement dated 03/28/2016 consisting of 1 page (Defendants' Exhibit C).
11. Three D Machinery's Notice of Separation dated 04/04/2016 consisting of 4 pages (Defendants' Exhibit D).
12. Deposition transcript of George Leggette dated 07/07/2016 consisting of 12 pages (Defendants' Exhibit E).
13. Deposition transcript of Shannon Ray Oditt dated 07/07/2016 consisting of 12 pages (Defendants' Exhibit F).
14. Deposition transcript of Leon Russell Bone, Jr. dated 07/07/2016 consisting of 11 pages (Defendants' Exhibit G).

15. Deposition transcript of Ivan Rutledge dated 07/07/2016 consisting of 8 pages (Defendants' Exhibit H).
16. Diagram drawn by Leon Russell Bone, Jr. consisting of 2 pages (Defendants' Exhibit I).
17. Diagram drawn by Shannon Ray Oditt consisting of 1 page (Defendants' Exhibit J).
18. South Carolina Law Enforcement Report dated 07/05/2016 consisting of 2 pages (Defendants' Exhibit K).
19. Photographs of the Conex consisting of 2 pages (Defendants' Exhibit L).
20. Claimant's complete employment file consisting of 120 pages (Defendants' Exhibit M).
21. Wage documentation consisting of 1 page (Defendants' Exhibit N).

C. TESTIMONY

In addition to the above set out APAs, Exhibits, and depositions, the Single Commissioner received into evidence the live testimony of the Claimant; (Tr. pp. 13-34); Ms. Shannon Oditt (Tr. pp. 35-63); and Mr. Russell Bone (Tr. pp. 64-77).

WE, THE APPELLATE PANEL, have reviewed the evidence of the record, the Single Commissioner's Order, and the briefs and oral arguments of the parties, and we hereby vacate the Single Commissioner's Findings of Fact, Conclusions of Law, and Order and substitute for them this Panel's findings and Order below:

III. APPELLATE PANEL FINDINGS OF FACT

Based upon the evidence submitted by the respective parties pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with George C. Leggette, Jr. being the Claimant, and Three D Machinery Installers, LLC. being the Employer, and the Amerisure Mutual Insurance Company being the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. We find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Eight Hundred Forty-Nine and 37/100 (\$849.37) Dollars per week resulting in a compensation rate of Five Hundred Sixty-Six and 27/100 (\$566.27) Dollars per week.

This finding is based on the parties' stipulation at the commencement of the hearing.

3. We find that pursuant to S.C. Code §42-1-160 the Claimant sustained a compensable injury by accident to his back with radiculopathy affecting his lower extremity as the result of an accident arising out of and in the course of his employment on March 28, 2016.

This finding is based on the preponderance of the above set out evidence of the record. In particular, Claimant has been employed as a mechanic for approximately 12 years (with about a year intervening layoff) with Three D Metal Works. On March 28, 2016, Three D directed Claimant to go to a work site at International Paper in Georgetown, S.C. There, Three D crews were welding on a tower approximately 300 feet in the air. Claimant and his co-employee, Mr. Leon Bone, who was normally an electrician, were charged with the job of being spotters at the bottom of the tower to prevent people approaching the area where the welding was being done on the tower.

Supervisor, Ivan Rutledge, directed Claimant, Mr. Bone, and several other members of the crew to climb up a 40 foot metal stairway on the tower to a sign-in level, and to descend the stairway.

(APA No. 8, Ivan Rutledge Dep., p. 16; APA No. 7, Leon Bone Dep., p. 11, line 14 - p. 14, line 23). The very rapid ascension and descension of approximately 40 feet of metal stairs left Mr. Bone and the Claimant exhausted.

Mr. Bone testified that when they came back down they were standing in the area of the conex "huffing and puffing" trying to catch their breath. (APA No. 7, Leon Bone Dep., p. 14). The "conex" is effectively a tool trailer, a 53 foot van/trailer that holds tools and equipment and is accessed by metal manufactured stairs off of the back. (APA No. 8, Ivan Rutledge Dep. p. 13-14; APA No. 5).

Mr. Bone testified that he was in the vicinity of the conex, approximately 20 feet from Claimant, (APA No. 7, Leon Bone Dep., p. 27, lines 4-8), when he heard him yell out. (APA No. 7, Leon Bone Dep., p. 14, line 3 - p. 16, line 18). He testified that Claimant was in the vicinity of the back stairs to the conex when he heard him yell out, he looked at him, and George had both hands over his head and was "Just as stiff as a 6x6." (APA No. 7, Leon Bone Dep., p.16, lines 1-3). Mr. Bone testified:

A. The way - - when I seen him stretched straight out and leaning back towards the Steps, that was the only thing I could figure that at one time he was leaning up against it and when he went straight out, he just went straight out and he went (mouth sounds) right straight - - he went, went - - feet and all went then out from up under him and was going down on, on the surface there. (APA No. 7, Leon Bone Dep., p.16, lines 11-18).

He testified "... he was probably half way down maybe to the ground and I grabbed him from behind..." (APA No. 7, Leon Bone Dep., p. 17, lines 1-2). He further testified "And when he went down, by the time I got to him, he had to be halfway down or maybe a little bit more, because I - - 'cause I, I was able to get up under his shoulders, but I had to almost go down on one knee to get underneath him." (APA No. 7, Leon Bone Dep., p. 19, lines 15-19). He also testified "...when I

heard the hollering and looked at him, I observed him slide down to hit the ground." (APA No. 7, Leon Bone Dep., p. 37, lines 6-8). (Emphasis added).

At deposition, Mr. Bone drew a diagram of the Claimant sliding down the conex stairs while seizing. (APA No. 4).

This case was tried on October 14, 2016 before Commissioner Campbell who found, among other things:

20. There are no eyewitnesses who observed Claimant hit his back on the stairs of the Employer's conex, or anything else, when the Claimant had a seizure on March 28, 2016. Absent an eyewitness who observed Claimant's back hit the stairs of the conex and based on a preponderance of the medical evidence and sworn testimony, I cannot make a determination as to whether Claimant's back issues are causally related to his seizure or alleged work related accident. (2/16/17 Order, pp. 22-23).

This appeal followed.

Pursuant to Turner v. Campbell Soup Co., 252 S.C. 446 (1969), Claimant's back injury is compensable regardless of whether or not the seizure was brought on by the job, given that the employment contributed to the effect of the seizure. (See Turner, 252 S.C. 446, 448-449 (finding " If, except for the employment, the fall, [or here, the seizure], though due to a cause not related to the employment, would not have carried the consequences it did, then causal connection is established between injury and employment, and the accidental injury arose out of the employment.")).

The Single Commissioner found that no eyewitnesses observed the Claimant's back hit the stairs and that, absent an eyewitness to that fact, the Commissioner could not make a determination as to whether the Claimant's injury was compensable. (02/16/17 Order, pp. 22-23).

First, it is well established that Workers' Compensation claims may be established by

circumstantial evidence. To the extent that the commissioner's ruling refuses to consider circumstantial evidence, such was an error as a matter of law. See Tiller v. Nat'l Health Ctr. Of Sumter, 334 S.C. 333, 341 (1999) (workers' compensation claim may be established by circumstantial evidence.); See also, Ham v. Mullis Lumber Co., 193 S.C. 66 (1940).

Second, the preponderance of evidence in the record establishes that the Claimant slid down the metal of the conex stairs on his back. In particular, Claimant's co-worker, Leon Bone, was standing to the side of the Claimant and he testified:

A. Like I said, when I heard him hollering, he was in the position of like he was – with his arms over his head straight out. He was like in a probably, maybe close to a 45 degree angle and – and his feet were – his feet were touching the ground. **And I guess his feet started sliding on – on the ground and he was basically going down like that. But the steps, probably – the tallest step would have been no --- probably no higher than the center of his back I guess. Because he was kind of what I call in a – in a straight out position against the – the steps.**

Q. Okay. And you were there within seconds?

A. Yes, ma'am.

Q. Okay.

MS. HYATT: That's all I have. Thank you.

COMMISSIONER: Okay. Thank you. Mr. Wukela?

MR. BONE – CROSS EXAMINATION BY MR. WUKELA:

Q. You used the term he was in a stiff slide?

A. Yes, sir.

Q. **And he was in a straight out position with his back against the steps?**

A. Pretty much. I wanna say his back was touch – he was – he was straight back. That if you look at the way the steps are on the picture of the conex, they go up. Basically, his both followed the outer points of the steps at that angle.

Q. Yeah. So his back was against the outer points of the steps?

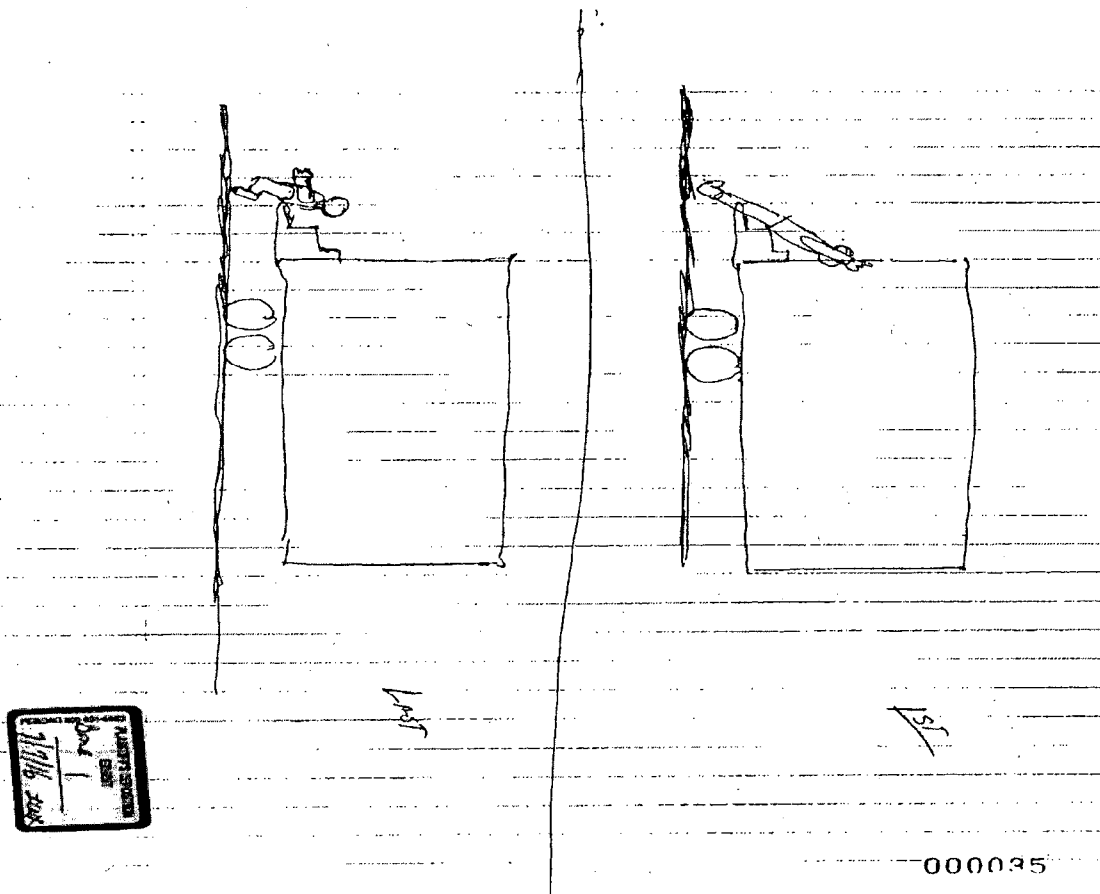
A. I'm not quite – I should not say points, it's rolled edges.

Q. I – rolled edges of the steps?

A. Yes.

(Tr. p. 76, line 5 – p. 77, line 14)(Emphasis added); (See also Tr. p. 70, lines 3 – 5; p. 72, lines 6-7).

At deposition, Leon Bone drew a diagram of what he saw which, we find, shows exactly what Bone described: Claimant in a stiff slide down metal stairs with his back against the metal stairs. (APA No. 4, p. 35):



Shannon Oditt, the Employer's safety director, was at the scene as well, although she was standing face to face with the Claimant and could not see his back. (APA No. 4, p. 36; Tr. p. 40, line 16 – p. 41, line 5; see also p. 49, lines 7-10). The Defense relied heavily on the testimony of Ms. Oditt. At trial, Ms. Oditt initially testified she did not see Claimant slide down the stairs on his back. (Tr. p. 42, lines 17-21). Upon further questioning, however, she admitted that she did see him slide down the stairs. (Tr. p. 43, lines 10-11; p. 49, lines 11-12; p. 63, lines 4-12).

The fact that Ms. Oditt admittedly could not see Claimant's back did not discourage her from testifying that the Claimant did not hit his back on the stairs. (Tr. p. 56, lines 18-24). In fact, the evidence of the record indicates that Ms. Oditt also told Claimant's family doctor, ex parte, that

the Claimant never hit his back on the steps. Dr. Lizina Green's records reflect that Ms. Oditt called Dr. Green's office on April 12, 2016 and "said that he never hit his back on the stairs, the trailer, the cart, or anything else." (APA No. 4, p. 30). On that same date, Dr. Green's records reflect that Ms. Oditt told Dr. Green's office that they "need to update our records to clarify that he did not fall." (APA No. 4, p. 30). Dr. Green declined to do so. (Dep. Dr. Green, p. 26, line 13-p. 36, line 7).

At trial, Ms. Oditt admitted that she told Dr. Green's office that the Claimant never hit his back on the stairs, the trailer, the cart, or anything else, but denied that she asked them to change or update their records to reflect that assertion. (Tr. p. 44, line 22 – p. 48, line 13). In any event, Dr. Green refused to "update" her records to comply with Ms. Oditt's recitation of how the accident happened. (See APA No. 4, p. 30; Dep. Green p. 35, line 20-p. 36, line 5). Ms. Oditt testified:

Q. Well did you hear back from Dr. Green's office as to whether they were going to update the records?

A. No, sir.

Q. You didn't see his back, right?

A. I'm sorry?

Q. You could not see Mr. Leggette's back?

A. No, sir.

Q. He did slide?

A. Yes.

Q. But you were determined to make sure that there wasn't a claim?

A. No, sir.

Q. To the point that you were willing to call the doctor's office and ask them to update their records?

A. No, sir.

(Tr. p. 49, lines 3-19).

In sum, the evidence reveals that Ms. Oditt, the safety director told Dr. Green's office, outside of the Claimant's presence, that the Claimant did not hit his back on the conex stairs, and

testified at trial that he never hit his back, in spite of the fact that she simply could not see the Claimant's back, as she admitted.

Mr. Bone, who could see the Claimant's back, testified that he saw the Claimant in a "stiff slide" with his back against the steps. (Tr. p. 76, line 5 – p. 77, line 14). Mr. Bone drew a diagram depicting what he saw. (APA No. 4, p. 35).

We find that greater weight should be given to the testimony and drawing of Mr. Bone.

Having considered and weighed all of the evidence of the record, we find by a preponderance of the evidence that Mr. Leggette suffered a compensable accident when, while having a seizure, he went into a stiff slide with his back against the metal steps of the conex, which contributed to the effect of the Claimant's seizure, causing injury to his back with radiculopathy affecting his lower extremity.

4. We find that pursuant S.C. Code §42-9-35, the injury by accident of March 28, 2016 aggravated the pre-existing condition of the Claimant's spine.

This finding is based on the preponderance of the above set out evidence of the record. In particular, Claimant testified at trial, without contradiction, that he had not suffered back pain before the accident of March 2016. (Tr. p. 20, lines 7-10). His testimony was corroborated by the testimony of the safety supervisor, Ms. Oditt, by his supervisor, Mr. Rutledge, (who had known the Claimant for 20 years) and by his co-worker, Mr. Bone, each of whom testified that the Claimant had never made complaints of back pain before the accident. (See Dep. Mr. Bone p. 34; Dep. Ms. Oditt p. 33; Dep. Mr. Rutledge p. 26).

After the accident, however, the Claimant complained of back pain. Claimant was transported by EMS to Georgetown Memorial Hospital where he was diagnosed with a seizure. He told the

doctors there that he had seizures in the past and had at one time taken Tegretol for seizures but had not taken medication or had seizures in many years.

At the Emergency department they directed him to follow up with his primary doctor. On March 30, 2016, he saw physician's assistant, Tom Fort, at Tideland's Andrews Medical Center seeking a release to return to work. Mr. Fort, indeed, released the Claimant to return to work. Claimant attempted to return to work but could not because of back pain.

On April 4, 2016 he returned to his family doctor, this time seeing Janis Harvey, N.P. She noted as chief complaint "When he had his seizure last week, he fell. He was seen last week for seizure followup, but not fall. He doesn't remember where he fell, but he knows he did. He is having severe back pain. Says it is much worse on the left side, it feels like he can't breathe." (APA No.3, p. 000023). Ms. Harvey diagnosed low back pain and took the Claimant out of work.

On April 27, 2016, at the direction of Nurse Harvey, Claimant saw Dr. Lizina Green at Tideland's Andrews Medical Center complaining of back pain. She noted "Patient here f/up on his back pain after recent fall from seizure landing on concrete floors while at work. He is not sure if he fell or not, he is assuming he fell as he is in pain..." (APA No. 3, p. 000023).

Dr. Green ordered an MRI of his lumbar spine after physical therapy did not improve his condition. The MRI revealed "at L4-5 and L5-S1 there is moderate bilateral foraminal stenosis by disc protrusions". (APA No. 2, p. 000017). On May 11, 2016, the Claimant saw Dr. Green with continued low back pain and numbness and tingling into his right leg. Dr. Green has referred him for epidural steroid injections in the lumbar spine which he has not been able to have because of lack of income.

Dr. Green testified having reviewed the MRI, that it was likely that the Claimant had pre-existing conditions in his spine that were asymptomatic. (Depo. Dr. Green, p. 19 lines 5-10).

Claimant's counsel questioned Dr. Green with an extensive hypothetical; quoting directly from the testimony of Mr. Bone as to what Mr. Bone witnessed on the date of the accident. (Depo. Dr. Green, p. 22, line 8-p. 38, line 22). Based on that hypothetical, Dr. Green testified to a reasonable degree of medical certainty that the Claimant's sliding down the stairs to hit the ground, as Mr. Bone had testified (and drawn) most probably aggravated the pre-existing condition of Mr. Leggette's lumber spine. (See Depo. Dr. Green, p. 36 line 8-p. 38 line 22).

Defendants point to the testimony of neurologist R. Joseph Healy. Dr. Healy prepared a report on August 17, 2016 after reviewing records provided by the Employer. (APA No. 15). The report notes, by way of history, that Mr. Leggette had a major motor seizure followed by back pain. Dr. Healy offered the opinion that "it also would appear that the most likely cause of his back problems were the seizure." (APA No. 15 p. 209).

Claimant took the deposition of Dr. Healy on October 3, 2016. In his deposition Dr. Healy testified that he had never examined Mr. Leggette or performed any test on him. (Dep. Dr. Healy, p. 6, lines 22-25). He testified that the opinions he offered in his August 17, 2016 note were based on the documents provided him by the Employer. (Dep. Dr. Healy, p. 7, lines 1-5). Dr. Healy went on to testify:

Q. Okay. Did you have any facts in those records sufficient to allow you to form any opinion as to whether the Plaintiff's surrounding at the time of the seizure contributed to the effect of the seizure, that is to say contributed to his back pain?

A. Probably not sufficient.

(Dep. Dr. Healy, p. 8, line 22-p. 9, line 2). (Emphasis added).

Dr. Healy testified he was not aware whether there were any objects in Mr. Leggette's vicinity at the time of his seizure. (Dep. Dr. Healy, p. 9, lines 10-14). Dr. Healy went on to testify that the documents that he was provided by the Employer did not include numerous pieces of evidence that shed light on the question of whether Mr. Leggette's surroundings contributed to the effect of the

seizure. In particular, the Employer did not provide Dr. Healy with portions of Mr. Bone's deposition that described the Claimant's "stiff slide". (See Dep. Dr. Healy, p. 13, line 22-p. 17, line 11). Dr. Healy testified:

Q. [Mr. Bone] goes on and I will turn to page 37 of the deposition, beginning at line 5, page 37 and [Mr. Bone] testifies, "From, from what I seen at the time that I observed him, when I turned – when I heard the hollering and looked at him, I observed him slide down to hit the ground." And, again, I gather this is the first time you've heard Mr. Bone's testimony about Mr. Leggette sliding down to the ground, is that correct?

A. Yes.

(Dep. Dr. Healy, p. 16, lines 1-9).

Dr. Healy also testified that the Employer did not provide him the diagram, (See APA No. 4), drawn by Mr. Bone and attached as Exhibit 1 to Mr. Bone's deposition which was later marked for trial as APA No. 4. Dr. Healy testified:

Q. Again, you were provided, I think in the packet here, some excerpts of Mr. Bone's deposition, but they only included pages 10 through 17 and didn't include these other pages that I've shared with you today. Also, the documents you were provided didn't include Exhibit 1 to Mr. Bone's deposition [APA No. 4]. Is this the first time you've seen this document, Doctor?

A. Yes.

(Dep. Dr. Healy p. 16, lines 10-17).

The Claimant's counsel presented Dr. Healy with Mr. Bone's deposition testimony and his diagram. (Dep. Dr. Healy, p. 15, line 2-p. 17, line 6). At deposition, Dr. Healy also reviewed the lumbar MRI performed on Mr. Leggette at the direction of Dr. Green and Dr. Healy identified its description of moderate bilateral foraminal stenosis by disc protrusions at L4-5 and L5/S1. (Dep. Dr. Healy p. 17; line 7-p. 18, line 5). Dr. Healy confirmed that those findings were consistent with low back and radicular pain. (Dep. Dr. Healy, p. 18, lines 6-8). He also testified that:

Q. In fact, going back to Mr. Bone's diagram, particularly this second section, the portion of Mr. Leggette's back that's proximate to that last stair there, what disc levels would that represent as far as you can tell?

A. Well, it would be the low back, roughly the lower lumbar spine.

Q. In the area of L4-5 and L5/S1?

A. Yes.
(Dep. Dr. Healy p. 18, lines 9-17).

Dr. Healy testified that he also was not provided with Dr. Green's deposition and was unaware of her testimony that most probably Mr. Leggette sliding down the stairs to hit the ground aggravated the pre-existing condition of his lumbar spine at L4-5 and L5/S1. (Dep. Dr. Healy, p. 18, line 18-p. 19, line 10). Given the benefit of all of that evidence which was not provided to him by the Employer, Dr. Healy testified:

Q. If you assume that Mr., as Mr. Bone has described that he slid down those stairs, would such a sliding have aggravated the pre-existing condition in his lumbar spine?

A. Well, it could: yes.
(Dep. Dr. Healy, p. 20, lines 5-9).

Dr. Healy went on to testify:

Q. Fair enough. If he did have trauma to his lumbar spine, if his lumbar spine did come into contact with those stairs on his way down, I ask you to assume that fact and I know you weren't there and didn't witness it, would that – if we assume – if we were asked to assume that fact, would that have aggravated the pre-existing condition of his lumbar spine?

A. Could; yes.

Q. Okay. And if, if that, in fact, occurred that would certainly have contributed to the effect of the seizure, would it not?

A. The effects of the seizure?

Q. Yes, sir. Yes, sir. Put differently, in the absence of those stairs, okay, would his – would the effect of his seizure have been less?

A. Could have, yeah.
(Dep. Dr. Healy, p. 20, line 17-p. 21, line 8).

Ultimately, Dr. Healy testified:

Q. Very well. And can you render an opinion or not as to whether his surroundings contributed or not?

A. To the seizure or to the back?

Q. To the back?

A. I can't.

(Dep. Dr. Healy, p. 26, line 14- p. 27, line 3).(Emphasis added).

It is evident from review of Dr. Healy's deposition testimony that the Employer provided Dr. Healy incomplete records; asking him to render an opinion as to causation in this case. The

Employer omitted particularly relevant testimony from Mr. Bone, including his diagram, as well as the testimony of Dr. Green, such that Dr. Healy did not have sufficient information, when he prepared his report, for him to form any opinion as to whether the Claimant's surroundings contributed to the effects of the seizure. (See Dep. Dr. Healy, p. 8, line 22-p. 9, line 2).

When provided that evidence by Claimant's counsel at deposition, Dr. Healy acknowledged that disc protrusions in the Claimant's low back were located at the same level that his back came in contact with the metal stairs. (Dep. Dr. Healy, p. 17, line 7-p. 18, line 17). Dr. Healy then acknowledged that sliding down the stairs could have aggravated the pre-existing condition of the Claimant's lumbar spine. (Dep. Dr. Healy, p. 20, lines 5-9 and line 17-p. 21, line 8). Ultimately, Dr. Healy testified that he could not render an opinion as to whether the Claimant's surroundings contributed to the effect of his seizure or not. (Dep. Dr. Healy, p. 26, line 24-p. 27, line 3).

The Defendants next offered the written opinion of neurologist Dr. Marshall White dated October 3, 2016. Like Dr. Healy, Dr. White did not have the opportunity to examine the Claimant; instead he was given records by the Employer to review. Like Dr. Healy, Dr. White was only given excerpts of Mr. Bone's deposition, (See APA No. 16, p. 389). Like Dr. Healy Dr. White prepared a report without knowledge of the evidence contained in Mr. Bone's deposition; concluding that the Claimant's back pain was a consequence of his seizure.

We the Appellant Panel have weighed this evidence and testimony and we place the greater weight on the testimony of Dr. Green based, as it was, to significant extent on the deposition testimony of Mr. Bone and his diagram of the incident.

Having thus weighed the evidence, we find that, pursuant to S.C. Code §42-9-35, the injury by accident of March 28, 2016 aggravated the pre-existing condition of the Claimant's spine.

5. We find that, pursuant to S.C. Code §42-15-20, the Employer received notice of the accident of March 28, 2016 within 90 days of the accident.

This finding is based on the above set out evidence of the record. In particular, it is evident that the Form 50 in this matter was filed on May 16, 2016 within 90 days of the accident of March 28, 2016. In addition, Ms. Oditt, the Employer Safety Supervisor, witnessed the incident.

6. We find that, pursuant to S.C. Code §42-15-60, the Defendants are responsible for all causally related medical treatment rendered to Claimant, including medical treatment rendered by Georgetown County EMS, Georgetown Memorial Hospital and Tideland's Andrews Medical Center, including by Dr. Lizina Green, to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.

This finding is based on the medical records and the above set out testimony.

7. We find that, pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning April 4, 2016 to the date of this Order and continuing in the weekly amount of \$566.27 until further Order of this Commission.

This finding is based on the above set out evidence of the record. In particular, the record reflects that on the date of the accident the Claimant was transported by EMS to Georgetown Memorial Hospital, (APA No. 2, p. 5), where he was evaluated and directed to follow-up with the primary care physician, and not to drive or operate heavy machinery. (APA No. 2, p. 10 and p. 12). Claimant followed up with his family doctor's office, Lizina Green, MD, on March 30, 2016 where he saw Physician's Assistant, Tom Ford; seeking a release to return to work. (APA No. 4, p. 25).

Mr. Ford released him to return to work and directed him to follow-up in about a week with Dr. Green. (APA No. 4, p. 26).

Claimant returned on April 4, 2016 to Dr. Green's office where he saw Nurse Practitioner, Janis Harvey, indicating "Severe back pain which began after a falling last week during a seizure and has progressed since then. Not taking any analgesics. Does not remember falling or if he fell on any objects. Returned to work for 3 days only." (APA No. 4, p. 24). Nurse Practitioner Harvey wrote the Claimant out of work on April 4, 2016, (APA No. 4, p. 31) prescribed medication, and directed him to follow-up with Dr. Green; which he did on April 7, 2016. (APA No. 4, p. 23).

On April 7, 2016 Dr. Green continued to keep the Claimant out of work. (APA No. 4, p. 32). On follow-up on April 27, 2016, she again continued him out of work, (APA No. 4, p. 34), and ordered an MRI of his lumbar spine. That test was performed on May 2, 2016 and revealed at L4/5 and L5/S1 moderate bilateral forminal stenosis by disc protrusion. (APA No. 2, p. 17).

On May 11, 2016, Dr. Green recommended pain management, continued medication, and diagnosed intervertebral lumbar disc disorder with radiculopathy. (APA No. 4, p. 21). That treatment has not occurred because those visits have not been approved. (See Dep. Dr. Green, p. 47, lines 16-17).

Dr. Green testified that she did not recommend that the Claimant to return to work unless he saw pain management. (See Dep. Dr. Green, p. 46, line 25-p. 49, line 13). In particular, Dr. Green on cross-examination testified that she would limit the Claimant from no lifting, no twisting motion, or stooping. (Dep. Dr. Green, p. 55, line 17-p. 56, line 2).

8. We find that the Claimant has not reached Maximum Medical Improvement.

This finding is based on the above set out evidence of the record.

IV. RULINGS OF LAW

In view of the above set out Findings of Fact and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS A MATTER OF LAW:

1. We find that, pursuant to S.C. Code §42-1-130; 42-1-140, the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with George C. Leggette, Jr. being the Claimant, and Three D Machinery Installers, LLC. being the Employer, and the Amerisure Mutual Insurance Company being the Carrier.

2. We find that, pursuant to S.C. Code §42-1-40, the Claimant's average weekly wage is Eight Hundred Forty-Nine and 37/100 (\$849.37) Dollars per week resulting in a compensation rate of Five Hundred Sixty-Six and 27/100 (\$566.27) Dollars per week.

3. We find that, pursuant to S.C. Code §42-1-160, and Turner v. Campbell Soup Co. 252 S.C. 446 (1969), the Claimant sustained a compensable injury by accident to his back with radiculopathy affecting his lower extremity as the result of an accident arising out of and in the course of his employment on March 28, 2016.

4. We find that, pursuant S.C. Code §42-9-35, the injury by accident of March 28, 2016 aggravated the pre-existing condition of the Claimant's spine.

5. We find that, pursuant to S.C. Code §42-15-20, the Employer received notice of the accident of March 28, 2016 within 90 days of the accident.

6. We find that, pursuant to S.C. Code §42-15-60, the Defendants are responsible for all causally related medical treatment rendered to Claimant, including medical treatment rendered by Georgetown County EMS, Georgetown Memorial Hospital and Tideland

Andrews Medical Center, including by Dr. Lizina Green to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.

7. We find that, pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning April 4, 2016 to the date of this Order and continuing in the weekly amount of \$566.27 until further Order of this Commission.

8. We find that the Claimant has not reached Maximum Medical Improvement.

ORDER

IT IS THEREFORE ORDERED that the Form 50 regarding the injury of March 28, 2016 under Workers' Compensation File No. 1605900 is found to be a compensable accident.

IT IS FURTHER ORDERED that the Employer Three D Machinery Installers, LLC. and the Carrier, Amerisure Mutual Insurance Co. shall pay all medical treatment rendered to the Claimant including medical treatment rendered by Georgetown County EMS, Georgetown Memorial Hospital and Tideland's Andrews Medical Center, including by Dr. Lizina Green, to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay to the Claimant benefits at the weekly compensation rate of \$566.27 from April 4, 2016 to the date of this Order and continuing thereafter in the weekly amount of \$566.27 until further Order of this Commission.

The Single Commissioner's Order of February 16, 2017 is, therefore,
REVERSED BY VOTE OF THE MAJORITY.
AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION



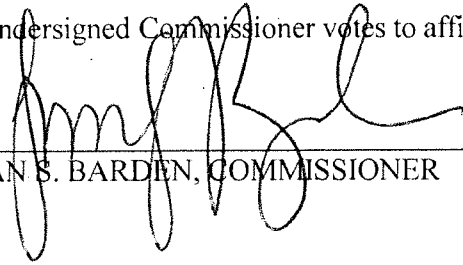
AISHA TAYLOR, COMMISSIONER



T. SCOTT BECK, COMMISSIONER

DISSENTING:

The undersigned Commissioner votes to affirm the Order of the Single Commissioner.



SUSAN S. BARDEN, COMMISSIONER

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on July 24, 2017