

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. SUPREME COURT

Opinion No. 5477 (S.C. Ct. App. filed August 23, 2017)

Otis Nero, Claimant,.....Respondent,

v.

South Carolina Department of Transportation, Employer, and
State Accident Fund, Carrier.....Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) (1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on April 13, 2017 and granted by the Court of Appeals on August 22, 2017, with an attached opinion dated August 23, 2017 that substituted the previous March 29, 2017 opinion. (Appendix, p.50). Out of an abundance of caution, a Successive Petition for Rehearing was filed on September 6, 2017, since a new opinion was issued and the previous opinion was withdrawn. (Appendix, p.39). The Successive Petition for Rehearing has not been addressed by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the Commission's denial of benefits based on Respondent's failure to provide timely notice in accordance with S.C. Code Ann. §42-15-20 and accompanying case law?
2. Whether the Court of Appeals erred in their application of either the "substantial evidence" or "preponderance of the evidence" standard of review, exceeding their role as an appellate court by substituting their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case.

STATEMENT OF THE CASE

This appeal involves a workers' compensation matter. On January 6, 2014, Respondent filed a Form 50 Request for Hearing, wherein he alleged injuries to his neck and bilateral shoulders as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012. (Appendix, p.107). Petitioners timely filed a Form 51 Answer to Respondent's Request for Hearing, denying Respondent sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged, and arguing that Respondent failed to provide the Employer with timely notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law.

A hearing was held before the Single Commissioner on March 28, 2014. At the hearing, Respondent took the position that while working with a road crew on June 20, 2014, he was using a squeegee to pull cement when he felt an immediate onset of pain in his back and shoulders that he described as a “snap.” (Appendix, pp.183, lines 9-13). Respondent testified that he did not report the squeegee accident to his supervisors, and he continued to work the rest of the day. (Appendix, p.183, lines 18-24). Respondent further testified that at the end of his shift, he and his co-workers were standing around, talking, and joking with his supervisors at the work shed, and Respondent passed out and fell to the ground. (Appendix, p. 185, lines 3-18). Respondent testified was able to get back up, and he told his supervisors “I feel okay” and “I don’t know what happened, you know.” (Appendix, p.185, lines 20-23). Respondent testified that his supervisors asked again if he was okay, and he replied “well, I feel like I’m all right” and “I’m hot.” (Appendix, p.186, lines 8-15). Respondent testified that he cooled off in his truck and drove home, and as he pulled into his yard and started to get out of his truck, he fainted a second time. (Appendix, p. 186, lines 14-18).

Respondent testified that his wife took him to the hospital, where he filled out a “History and Physical Report” stating that he was being seen because “I passed out talking to my boss.” (Appendix, p.422). Respondent’s medical records made no mention of an accident that took place pulling a squeegee board. At the emergency room, Respondent was seen by his primary care physician, Dr. Robert Richey, who ordered a series of diagnostic tests to determine the cause of his syncope episode, including Head CT, x-ray of the right foot, chest x-ray, cardiac work up, gastrointestinal work up, and a cervical MRI, which revealed cervical stenosis. (Appendix, pp. 423-430). Based on the cervical MRI findings, Dr. Richey referred Respondent to a neurosurgeon, Dr. William Naso, who performed a fusion surgery on August 28, 2012. (Appendix, p.434-435).

In his "patient health history questionnaire" prepared on June 28, 2012 for Dr. Naso, Respondent stated that his complaints were not related to an injury or Worker's Compensation. (Appendix, p.438). In addition, Respondent submitted a certification of health care provider for employee's serious health condition to his employer on July 9, 2012, wherein he stated that he had a neck condition that commenced several years ago with syncope episodes. (Appendix, pp. 417-420).

At the hearing before the Single Commissioner, Respondent took the position that as a result of his accident pulling the squeegee board, Respondent aggravated his pre-existing cervical stenosis. (Appendix, p.171, lines 21-25). Petitioners argued Respondent lacked sufficient evidence to satisfy his burden of proving a compensable injury by accident while pulling the squeegee board as alleged in his pleadings, or that the alleged accident pulling the squeegee board caused either of his two (2) syncope episodes or aggravated his pre-existing cervical condition. (Appendix, pp. 174, lines 20-25). Petitioners further argued Respondent failed to provide his employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and therefore his claim for benefits should be denied. (Appendix, p.172, lines 11-23).

On August 5, 2014, the Single Commissioner issued a decision and order, wherein she found Respondent sustained a compensable injury by accident while pulling a squeegee board leveling concrete, aggravating a pre-existing disease in the Respondent's cervical spine that was asymptomatic prior to the accident. (Appendix, p. 124-125). The Single Commissioner further found that Respondent's accident affected both arms and shoulders in the form of radiculopathy, and Respondent was not currently at a point of maximum medical improvement ("MMI"). (Appendix, pp. 127-128). The Single Commissioner ruled that Respondent had a reasonable excuse for not reporting his work injury due to the facts that (1) his lead man and supervisor were present when he passed out and had knowledge of pertinent facts surrounding the accident

sufficient to indicate the possibility of a compensable injury, (2) the Employer was aware that Respondent had not returned to work after June 20, 2012, and (3) Petitioners were notified Respondent had been hospitalized and ultimately underwent neck surgery. (Appendix, pp.128-129). The Single Commissioner found that Petitioners were not prejudiced by the late formal reporting of the injury and ordered Respondent was entitled to TTD benefits from June 20, 2012 and continuing, and Petitioners were responsible for all causally related medical treatment, including past, present, and future treatment. (Appendix, p. 133).

On August 28, 2014, Petitioners filed a Form 30 Request for Review to the Full Commission Appellate Panel ("Full Commission"). Petitioners argued the Single Commissioner erred in finding that Respondent sustained a compensable injury by accident to his neck arising out of and in the course of his employment while pulling a squeegee as alleged in his pleadings, nor did he meet his burden in proving an aggravation of his pre-existing cervical condition as a result of his accident pulling the squeegee board. Petitioners further argued the Single Commissioner erred in finding that Respondent had reasonable excuse for not providing notice of his alleged work accident pursuant to S.C. Code Ann. §42-15-20, and that Petitioners were not prejudiced by the late formal reporting of the accident.

Following the submission of briefs by both parties, oral arguments were held on February 23, 2015. On May 29, 2015, the Full Commission issued a Decision and Order, reversing the August 5, 2014 decision of the Single Commissioner. (Appendix, pp.155-160). The Full Commission ruled that although the Respondent's supervisors witnessed his syncope episode, Respondent never reported the alleged accident pulling the squeegee board alleged in his pleadings and awarded by the Single Commissioner's finding of compensability. (Appendix, p.155). The Full Commission ruled that Petitioners were prejudiced by Respondent's failure to provide timely

notice in accordance with S.C. Code Ann. §42-15-20, and Petitioners were deprived of the opportunity to investigate the causation of the Respondent's injury, and whether it was caused by the accident Respondent alleged pulling the squeegee board, or whether his injury was a result of Respondent's first syncope episode at work or his second syncope that took place at home in his driveway. (Appendix, p.157). The Full Commission concluded that based on Respondent's failure to provide notice as required by S.C. Code Ann. §42-15-20, Respondent's failure to provide a reasonable excuse made to the satisfaction of the Commission for not giving timely notice, and the resulting prejudice suffered by Petitioners, Respondent's request for benefits as a result of his alleged June 20, 2012 accident were denied. (Appendix, p. 159).

On June 10, 2015, Petitioner filed their Notice of Intent to Appeal with the South Carolina Court of Appeals. Following submission of briefs by both parties, oral arguments were held on November 17, 2016. On March 29, 2017, the Court of Appeals issued an opinion reversing the decision of the Full Commission on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Respondent failed to put Petitioners on notice of a potential injury. (Appendix, p.7). The Court of Appeals further stated that the substantial evidence in the record did not support the Full Commission's finding that Respondent failed to provide a "reasonable excuse" for failure to provide timely notice, and Petitioners were not prejudiced by the lack of timely notice. (Appendix, p.10).

On April 13, 2017, Petitioners filed a Petition for Rehearing, arguing the Court of Appeals March 29, 2017 opinion cited no error of law on the part of the Full Commission, and the Court of Appeals may have misapprehended, or overlooked the law involving the "substantial evidence" standard of review, exceeding their role as an appellate court by substituting its judgment for that of the Commission, who are the appropriate fact finders.

(Appendix, pp22-32). On August 22, 2017, the Court of Appeals issued an Order granting the Petition for Rehearing, and withdrawing the March 29, 2017 opinion and substituting it with a new refiled August 23, 2017 opinion. (Appendix, p.50)

In the substituted August 23, 2017 opinion, this Court added an additional paragraph to the “Standard of Review” section of the opinion, stating:

“Statutory interpretation is a question of law subject to de novo review.” *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. “The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; “only exceptions and restrictions on coverage are to be strictly construed.” *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, “the [c]ourt may take its own view of the preponderance of the evidence.” *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951) (reversing award of compensation and noting hearing commissioner awarded compensation without discussion of “the jurisdictional defense of timely notice.”).

(Appendix, pp.13-14).

Essentially, the Court of Appeals made no substantive changes to its previous opinion, but instead recognized that they incorrectly applied the “substantial evidence” standard of review and simply replaced it with the “preponderance of the evidence” standard of review to support their own view of the evidence on the issue of notice and reverse the Commission’s decision.

Since the Court of Appeals replaced the March 29, 2017 opinion with a new August 23, 2017 opinion, Petitioners, in an abundance of caution, filed a Successive Petition for Rehearing

on September 6, 2017 in addition to the current Petition for Writ of Certiorari. (Appendix, pp.39-47).

ARGUMENT

- I. The Petition for Writ should be granted because the Court of Appeals erred in substituting the “substantial evidence” standard of review with the “preponderance of the evidence” standard of review, and continued to exceed their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinder in the case**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court's review is limited to deciding whether the Full Commission's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

The requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

- (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such

giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

- (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Since Respondent admittedly failed to tell his employer about his alleged work accident during the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had “adequate notice” of a possible work related injury. In *Etheridge v. Monsanto Co.*, the Court of Appeals stated, ” [f]or adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim.” 349 S.C. 451, 457 (S.C.Ct.App. 2002).

In this case, the Court of Appeals recited the conflicting factual evidence presented to the Full Commission in order for them to render a decision on whether Respondent provided timely notice in accordance with the law. The Court of Appeals cited several facts raised by Respondent in support of the position that although Respondent stipulated to never reporting his alleged accident to his supervisor, Petitioners still had adequate notice of his injury in accordance with the *Etheridge* case, including the following facts:

1. That on the day of the alleged accident, Respondent’s supervisor briefly pulled him from the squeegee board for a to rest as a result of his age and the heat;
2. That after finishing their work for the day, though still on the clock, Respondent lost consciousness and fell to the ground, and his supervisors, Mr. Durant and Mr. Bostick, both witnessed the fall;

3. That Respondent regained consciousness and drove home, where he passed out for a second time in his driveway, and was taken by his wife to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis;
4. That Respondent underwent neck surgery approximately two months later, and both Mr. Durant and Mr. Bostick were aware of Respondent's hospitalization and surgery, and in fact, both supervisors spoke with appellant while he was in the hospital;
5. That Respondent never returned to work for Petitioner.

(Appendix, pp. 5-6)

The Court then then went on to recite facts argued by Petitioners that contraindicated a finding that sufficient accompanying facts existed to put the Employer, as a reasonably conscientious supervisor, on notice that the case might involve a potential claim. Specifically, this Court referenced the following facts:

1. On July 9, 2012, only one (1) month after his alleged accident, Appellant submitted to Human Resources a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor. The document submitted by Appellant to Respondent's HR department made no mention of his alleged work accident, and instead stated that the date Appellant's condition commenced was "several years -- neck and syncope";
2. Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he stated his problems were not related to his job and this was not a workers compensation injury.
3. Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his accident, and during their visits to him at the hospital, and Appellant chose to never report any work accident involving the pulling of a squeegee board as alleged in his pleadings and the Hearing Commissioner's finding of compensability.
4. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology.," but, Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

(appendix, p.6).

Without further explanation, the Court of Appeals went on to state that after weighing the same arguments and evidence presented to the Full Commission, the Court of Appeals did not agree that the substantial evidence supported the conclusions reached by the Full Commission,

and instead the Court of Appeals substituted its own judgment on the weight on the conflicting evidence and facts.(Appendix, p.7) As stated above, these were conflicting factual determinations to be made by the Commission as the fact finder in the case. Instead the Court of Appeals weighed the same facts, evidence, and supporting law, and came to their own conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Full Commission did exactly that, stating " We find that the only actual or in formal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday." (Appendix, p.17). With respect to this finding, this Court previously held in *Sanders v. Richardson*, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325 (1968).

In addition, the Appellate Panel went on to state several additional pertinent Findings of Fact, including, "We find that pursuant to S.C. Code Ann. §42-15-20, Respondent failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice is required by the statute. Although Respondent's supervisors witness

Respondent's syncope episode, Respondent never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Respondent was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years instead of requesting workers compensation. (Appendix, pp.156-157).

The Full Commission further held that S.C. code Ann. §42-15-20, Petitioners suffered a prejudice as a result of Respondent's failure to provide timely notice. Petitioners were unable to fully investigate whether Respondent's alleged squeegee accident caused the syncope episode, or whether the alleged squeegee accident or syncope fall cause the aggravation of his cervical condition. As a result of the prejudice against Petitioners caused by Respondent's failure to provide timely notice, claimant's request for benefits is denied. (Appendix, p.159).

The Full Commission's findings were sufficiently detailed to enable the Court of Appeals to determine whether the evidence supported their findings and whether the law was properly applied to those findings. Instead, the Court of Appeals reversed the factual conclusions of the Commission and substituted its own judgment that Petitioners had adequate notice. In addition to exceeding their role as the appellate court, the Court of Appeals decision would result in an almost impossible and impractical application of the law to future workers compensation claims.

When Respondent failed to tell his employer about his alleged accident, told his doctor it was not related to any work injury, and submitted formal paperwork to Petitioner/Employer denying his condition was related to a recent work injury and instead has existed for years, it is illogical to find that the injured worker has satisfied his burden or that an employer should disregard his statements and investigate a potential injury they know nothing about.

Finally, the Court of Appeals held that Petitioners were not prejudiced by Respondent's failure to provide notice in accordance with the statute. As discussed above, there were disputed facts and competing medical opinions regarding whether Respondent's aggravated cervical stenosis or his syncope episodes were causally related to the accident he alleged operating the squeegee board, and Petitioners were deprived of the right to timely investigate the causation of Respondent's injuries, the extent of Respondent's pre-existing conditions, and whether Respondent sustained his burden in proving a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-15-35.

The substituted opinion of this Court filed August 23, 2017 continues to exceed the Court of Appeals role as an appellate court and inserts itself as the fact finder which established case law states should be reserved to the Commission. The Court of Appeals substituted opinion still fails to address any specific basis for the reversal of Full Commission's finding that Respondent failed to provide adequate notice in accordance with §42-15-20 and the accompanying case law, and instead simply recites the statement that the notice provision is to be liberally construed in favor of the injured worker.

In the August 24, 2017 opinion, this Court cites the *Transportation Co. & Flagstar* case in support of its statements the "statutory interpretation is a question of law subject to de novo review" and "the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration will not be overruled absent compelling reasons." 389 S.C. 422, 699 S.E.2nd 687 (2010).

In *Transportation Co. & Flagstar*, this Court goes into more detail on the issue of an appellate court's review of workers compensation statutes, stating:

When reading a workers' compensation statute, this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. See *id.* **“If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning.”** *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted). “The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation.” *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citation omitted).

This case is not a case of statutory interpretation. The language of §42-15-20 is plain, unambiguous, and conveys a clear meaning. Further, the Court of Appeals has already interpreted §42-15-20 in the 2002 *Etheridge vs. Monsanto* case, wherein the Court of Appeals stated, “for adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” 349 S.C. 451, 562 S.E.2nd 679 (S.C.App. 2002). This Court previously stated that although the notice statute is to be liberally construed in favor of the claimant, “there are limitations upon that rule and the statutory requirement cannot be disregarded altogether.” *Mintz v. Fiske Carter Construction Co.* 218 S.C. 409, 63 S.E.2nd 50 (1951).

In the August 23, 2017 opinion, this Court again recited the conflicting factual evidence presented to the Full Commission on the issue of whether there was some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential workers compensation claim. Despite the conflicting evidence presented by both parties, and the Commission's

interpretation and findings based on that conflicting evidence, the Court of Appeals simply states that the Full Commission erred in reversing the Single Commissioner's decision on notice, but does not provide any evidence based support for its reversal. The Court of Appeals cites no additional facts or case law in support of their decision, but instead simply disagrees with the Full Commission's view of the facts. As soon as our appellate courts are allowed to begin reversing the fact-finding decisions of the Worker's Compensation Commission, the role of the commission and the appellate courts overlap, and the appellate courts inappropriately become the second line factfinder, ignoring the authority of the commission to make factual determinations in accordance with the law.

Petitioners argue the Court of Appeals reliance on the fact that Respondent's supervisors witnessed him pass out at the end of a work day does not support a finding of compensability. The evidence is clear after Respondent passed out at this work place, he drove himself home, and he passed out again in his own driveway before being taken to the emergency room. Respondent even admits to suffering from dizzy spells in the past. In order for the Court of Appeals to reverse the Full Commission's decision based on the fact that the Respondent's supervisors witnessed him fall at the end of the day, it would require them to find that the syncope episode at the worksite, and not the alleged squeegee incident or the subsequent syncope episode in his own driveway, was the mechanism of injury that aggravated his pre-existing cervical condition, even though it was the raking, and not the syncope episode that was pled by Respondent and awarded by the Single Commissioner. Such a finding would be speculative, and this Court has been clear that, "an award cannot be based on surmise, conjecture, or speculation." *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999);

As this Court has previously stated, “In the review of a finding of the Worker’s Compensation Commission, the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence. *Fox v. Newberry Co. Memorial Hospital*, 319 S.C. 278, 461 S.E.2nd 393 (1995).

Although the Court of Appeals previously applied the substantial evidence standard of review used in the *Etheredge* case, which also interpreted §42-15-20, the new application of the preponderance of the evidence still does not support a reversal of the Full Commission. A reversal of the Full Commission’s decision in this case would result in an almost impossible and impractical application of the notice statute to future workers compensation claims. If an injured worker refuses to tell his employer he was hurt at work, he submits formal paperwork to his employer stating he did not suffer a work accident and his condition pre-dated his alleged date of injury, and he denies any work injury in his medical reports to his doctors, it is unreasonable to expect a “reasonably conscientious” manager to disregard those facts and continue to investigate a potential work accident anyway. This heightened requirement on the employer does not exist in the Worker’s Compensation Act.

CONCLUSION

For the reasons set forth above, Petitioner argue that the Court of Appeals decision in this case conflicts with prior Supreme Court holdings involving the role of the Commission as fact finders in workers compensation claims, and Petitioners respectfully requests that this Court grant the Petition for Writ of Certiorari and allow further briefing on the issues.

Respectfully submitted,



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September 21, 2017

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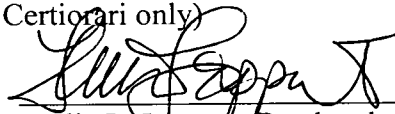
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PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Writ of Certiorari** and **Appendix** by mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

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September 21, 2017
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