

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1605900

George C. Leggette, Jr., Employee Respondent,

v.

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

AMENDED
INITIAL BRIEF OF RESPONDENT

RECEIVED
NOV 17 2017
SC Court of Appeals

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QUESTIONS PRESENTED ON APPEAL

- A. THE COMMISSION'S FACTUAL FINDING THAT THE CLAIMANT SUFFERED A COMPENSABLE INJURY BY ACCIDENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.**

- B. THE COMMISSION'S FACTUAL FINDING THAT THE ACCIDENT AGGRAVATED THE PRE-EXISTING CONDITION OF THE CLAIMANT'S SPINE IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.**

I. STATEMENT OF THE CASE

This is a Workers' Compensation case which was tried before the Single Commissioner, resulting in an Order of February 16, 2017, denying the compensability of the claim. The matter was timely appealed to the Workers' Compensation Commission Appellate Panel which issued an Order on July 24, 2017 finding the claim compensable. This appeal followed.

II. FACTUAL BACKGROUND

Claimant is employed as a mechanic 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 very quickly to a sign-in level, and to descend the stairway very quickly. (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 the Claimant 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)(emphasis added).

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, lines1-2). 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 with his back against 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).

The Claimant appealed to the Commission Appellate Panel which reversed, finding as a matter of fact:

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.**
(App. Panel Ord. 07/24/17, p. 9).
4. **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.**
(App. Panel Ord. 07/24/17, p. 16).

Defendants appealed.

III. STANDARD OF REVIEW

Judicial review of the Workers' Compensation Commission Appellate Panel's factual findings is generally governed by the substantial evidence standard. See Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006). In particular, the Commission's factual findings must be affirmed if supported by substantial evidence in the record. See Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). That is, a reviewing court may not substitute its judgment for the

judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5)(d)-(e)(Supp. 2006).

It is not within the court's province to reverse the commission's factual findings if they are supported by substantial evidence. See, Etheredge v. Monsanto Co., 349 S.C. 451, 454 (Ct. App. 2002). 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. See Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622 (2004).

Thus, where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. See Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied).

IV. ARGUMENT

A. THE COMMISSION'S FACTUAL FINDING THAT THE CLAIMANT SUFFERED A COMPENSABLE INJURY BY ACCIDENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

The Commission found:

- 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.**
(App. Panel Ord. 07/24/17, p. 9).

In their Brief, the Appellants argue "The evidence the Commission relies on to find compensability simply either does not exist or is taken out of context." (App. Brf. pp. 17-18).

Appellants argue categorically “There is no competent evidence to support a finding that Claimant’s back or any other part of his back hit the conex stairs or the ground.” (App. Brf. p. 22).

In support of their factual finding, the Commission cited the testimony of Claimant’s co-worker, Leon Bone. The Commission found:

... 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. 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 body 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).
(App. Panel Ord. 07/24/17, pp. 12-13).

The Commission also cited a diagram drawn by Mr. Bone at his deposition and admitted as APA No. 4, p. 35 before the Single Commissioner. The Commission found:

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).

This alone is substantial evidence in support of the Commission's finding that the Claimant suffered an injury by accident when his back came into contact with the metal stairs of the conex. Therefore, the Court of Appeals should affirm the Commission's factual finding in that regard and decline the Appellant's invitation to substitute this Court's judgment for the judgment of the Commission as to the weight of the evidence on that question of fact.

In urging the Court of Appeals to weigh the evidence itself, the Appellants point to the testimony of the Employer's safety director, Shannon Oditt. The Commission considered the testimony of Ms. Oditt at length, (Order pp. 14-16). It concluded:

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 the 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. (Order, pp. 15-16).

The Commission's judgment as to the weight of the evidence and the factual findings here should be affirmed having been based, as they were, on the substantial evidence.

B. THE COMMISSION'S FACTUAL FINDING THAT THE ACCIDENT AGGRAVATED THE PRE-EXISTING CONDITION OF THE CLAIMANT'S SPINE IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

The Commission found:

4. 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.

(App. Panel Ord. 07/24/17, p. 16).

Appellants argue “there is no credible reliable evidence that the Claimant suffered a work-related accident on March 16 or anything associated with his job aggravated his pre-existing lumbar spine condition.” (App. Brf. pp. 34-35).

In support of their factual finding, the Commission cited the testimony of the Claimant's treating physician, Dr. Lizina Green. The Commission noted:

Claimant's counsel questioned Dr. Green with an extensive hypothetical; quoting directly from the testimony of Dr. 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[sic] spine. (See Depo. Dr. Green, p. 36 line 8-p. 38 line 22). (Order p. 18).

This is substantial evidence in support of the Commission's finding and should be affirmed.

The Defendants take issue with the hypothetical presented to Dr. Green by Claimant's counsel as “too long and unwieldy to produce a reliable opinion.” (App. Brf. p. 29).

Respectfully, the weight to be given Dr. Green's opinion is the province of the Workers' Compensation Commission. Moreover, the Appellants are correct that the Claimant's counsel went to great lengths in the hypothetical that he presented to Dr. Green to set out verbatim the testimony of Mr. Bone as well as the diagram that Mr. Bone created. (See Green Dep. pp. 23-38). This was done to insure that Dr. Green's opinions were based, not upon a summary of the

evidence, but, instead, on the actual verbatim testimony of witnesses at the scene. Moreover, Defendants' counsel was, of course, present at the deposition and had an opportunity to cross-examine Dr. Green. Her testimony on cross was also considered by the Commission in rendering their decision.

In the end, Dr. Green testified to a reasonable degree of medical certainty that the Claimant's sliding with his back against the stairs most probably aggravated the condition of his lumbar spine to a reasonable degree of medical certainty. (See Dep. Dr. Green p. 36, line 8 – p. 38, line 22).

Having reviewed the testimony, the Commission found that the Claimant's lumbar spine was injured as a result of contact between his back and the stairs of the conex, (See Order, p. 18); and, therefore, the accident aggravated the pre-existing condition of the Claimant's spine. (Order p. 16).

The Commission's finding was based on substantial evidence and should be affirmed.

The Appellants' urge this Court to weigh the evidence for itself and find that there was no injury by accident based upon the opinions of their experts, Dr. Joseph Healy and Dr. Marshall White. The Commission considered the reports of Dr. Healy and Dr. White and the testimony of Dr. Healy and discussed it in its Order at length. (See Order pp. 18-21). Having weighed all the evidence, the Commission found:

We the Appellate Panel have viewed this evidence and testimony and we place the greater weight on the testimony of Dr. Green based, as it was, to a significant extent of time on the deposition testimony of Mr. Bone and his diagram of the incident.
(Ord. p. 21).

In particular, the Commission noted that, when deposed, Dr. Healy testified that at the time he prepared his report the Defendants had withheld from him numerous pieces of evidence; including pertinent portions of Mr. Bone's deposition testimony and Mr. Bone's diagram. (Ord. pp. 18-21).

The Commission found:

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 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)(Order 07/24/17, pp. 20-21).

The Commission also noted:

... 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). (07/24/17 Order, p. 21).

Dr. White's report indicates that he, like Dr. Healy, was only given excerpts of Mr. Bone's deposition. (APA No. 16, p. 389). Dr. White's report does not list the diagram of Mr.

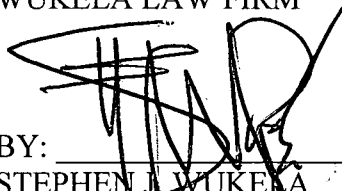
Bone as a document he reviewed in preparing his report for the Commission. (APA No. 16, p. 389). Obviously, these facts played a role in the weight given by the Commission to Dr. Healy's and Dr. White's opinions. Obviously, the Claimant contends that the Commission weighed this evidence correctly. However, once again, whether the Commission weighed the evidence correctly is not the issue before this Court. The weight given the evidence is the province of the Commission and the Commission's judgment must be affirmed based, as it was, on substantial evidence.

CONCLUSION

The Commission's finding below was based on substantial evidence; including the testimony of witness, Leon Bone; a diagram drawn by Mr. Bone depicting what he witnessed; and the opinion of the Claimant's treating physician given to a reasonable degree of medical certainty. The Court of Appeals should affirm the factual findings of the Commission.

Respectfully submitted,

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November 16th, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
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WCC FILE NO. 1605900

George C. Leggette, Jr., Employee Respondent,

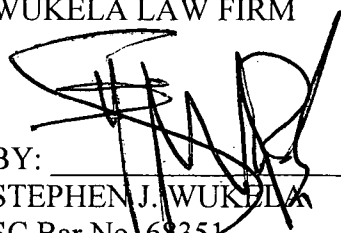
v.

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

**PROOF OF SERVICE OF AMENDED
INITIAL BRIEF OF RESPONDENT**

I certify that I have served the Respondent's Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on November 16, 2017, addressed to their attorney of record, Ms. Helen Hiser, PO Box 650007, Mt. Pleasant, SC 29465.

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November 16, 2017

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SC Court of Appeals

Re: George C. Leggette, Jr., Employee v. Three D Machinery
Installers, LLC, Employer, and Amerisure Mutual Insurance Co.
WCC File No. 1605900

Dear Ms. Kitchings:

Pursuant to two (2) letters I received from the Court of Appeals today, I enclose the following;

1. The original Amended Initial Brief of Respondent, along with Proof of Service;
2. The original Respondent's Amended Designation of Matter to be Included in the Record on Appeal, along with Proof of Service, which has the certificate of counsel added at the bottom.

By copy of this correspondence, I am serving opposing counsel with the Amended Initial Brief of Respondent and the Amended Designation of Matter to be Included in Record on Appeal.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

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Enclosures

cc: Ms. Helen F. Hiser
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