THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. No. 1605900

George C. Leggette, Jr., Employee, ... Respondent,

v.

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

INITIAL REPLY BRIEF OF APPELLANTS

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Respondent George C. Leggette, Jr., Claimant below, does nothing to cure the fact that the Commission Decision is not supported by reliable, probative, and substantial evidence based on the whole record, S.C. Code Ann. § 1-23-380(5), and must be overturned. Contrary to Claimant's assertions, Appellants are not asking this Court to weigh the evidence differently than the Commission. Appellants' position is, however, that because the Commission Decision is based on speculation, conjecture and surmise, it must be overturned. Regardless of how persuasive Claimant's mischaracterization of the facts may have been to some of the Commissioners on the Appellate Panel, which rendered a split decision, the actual record demonstrates that there is not a conflict in the evidence but, instead, a complete lack of probative evidence to support the Commission Decision. Here, when the record is considered as a whole, and not simply in isolated excerpts "viewed blindly from one side of the case," Frame v. Resort Services Inc., 357 S.C. 520, 527-528, 593 S.E.2d 491, 495 (Ct. App. 2004), the only reasonable conclusion that can be reached is that Claimant failed to meet his burden of proving a compensable injury to his back.

I. The Commission erred in finding that Claimant suffered an injury by accident, as defined by Section 42-1-160 of the Act, to his back.

As he did at the Commission, Claimant again relies heavily on the drawing Leon Bone made at his deposition as proof that Bone witnessed him "sliding down the stairs." However, Claimant fails to effectively counter or even to acknowledge the fact that the Bone drawing submitted as an APA submission was never intended to depict "Claimant sliding with his back against the conex stairs while seizing." (Resp. Br. pp. 3, 7-8). Instead, at Bone's deposition, Claimant's counsel instructed Bone, "[n]ow, I want you to

give me the side view, all right? .... I want you to – I'm going to draw **when you first saw him** and then here I'm going to draw **when you got to him** .... First of all, draw the steps for me so I understand how the steps look .... Now, I'm going to write 'first' up here and 'last' down here, so I understand this .... Now, draw me a stickman and show me how he looked from that side **when you first saw him**, and then I want to see how he was when you got to him?" (Bone Dep. p. 20, lines 5-24) (emphasis added). Bone confirmed at the hearing that the first drawing is how he saw Claimant when he first looked at him and the second drawing depicts Claimant's position when Bone reached him, at which point Bone would have been behind him. (Hr'g Tr. p. 70, lines 6-24). There is no evidence whatsoever to the contrary. Claimant presented absolutely no evidence that the diagram was intended to show anything other than Claimant in a "still" position, as opposed to Claimant in the process of sliding. That overlay is pure speculation added by Claimant's counsel and, as such, does not constitute evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (argument of counsel is not evidence). The Commission erred by relying on Claimant's counsel's characterization of the drawing, (Commission Decision, p. 13, 16, 18), which is not supported by substantial evidence. (Bone Dep. p. 20, lines 5-24)

As he did below, Claimant relies on a select excerpt of Bone's deposition testimony to the effect that, "[t]he 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." (Bone Dep. p. 16, lines 11-18)

(Resp. Br. p. 3). However, what Claimant fails to acknowledge is that Bone clearly stated he was speculating as to what had occurred: "[t]he way he was – the way he went straight out, I was thinking that he could have been just propped up against it maybe. I don't know. **I can't speculate to that ... that was the only thing I could figure ...**" (Bone Dep. p. 16, lines 6-13) (emphasis added). He did not see Claimant before the onset of the seizure and only assumed/speculated that he had been standing. (Bone Dep. p. 14, lines 12-15; p. 15, lines 6-18; p. 35, lines 9-16). Thus, his assumptions that Claimant's "feet and all went then out from up under him" and that he was "going down" are nothing more than surmise, conjecture and speculation, which are insufficient to support a compensation award. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (Commission awards "must not be based on surmise, conjecture or speculation"); Glover v. Rhett Jackson Co. of Bush River Rd., 274 S.C. 644, 649, 267 S.E.2d 77, 80 (1980) (Commission's findings "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it").

On this point (and others), the Commission erred by completely disregarding the testimony of the sole witness who saw Claimant immediately prior to the seizure and throughout the entire seizure, Shannon Oditt. Oditt's testimony that she was in front of Claimant and observed him sitting on the bottom step of the conex with his back leaned against the stairs and his legs crossed and out in front of him before the seizure started is uncontroverted. (Oditt Dep. p. 13, lines 3-7) (Bone Dep. p. 17, lines 16-20, p. 35, lines 9-16 (Bone was not looking at Claimant prior to the seizure)) (Hr'g Tr. p. 68, lines 20-25 (same)). Also uncontroverted is her statement that she, "immediately grabbed [Claimant]

under his arms in the front and Leon came around behind him and held him and helped George to the ground holding his upper body, so that he didn't hit his head on anything." (APA p. 210-212; *see also* Hr'g Tr. p. 73, lines 9-25 (Bone testifying that Oditt was holding Claimant from the front and Bone was cradling him from behind).

Furthermore, although Bone was at a slight angle to Claimant, the evidence is uncontroverted that Oditt was closer to Claimant than was Bone. (APA pp. 210-212) (Oditt Dep. p. 16, line 3 – p. 17, line 15) (Hr'g Tr. p. 67, line 6 – p. 68, line 8). At best, Bone's testimony is that Claimant, who was already leaning his back against the steps prior to the seizure, slid only a few inches. (Hr'g Tr. p. 55, lines 6-8; p. 72, lines 14-17). Moreover, based on **both** of Bone's drawings (the first when Bone first saw Claimant and the second when Bone got to him, Bone Dep. p. 20, lines 7-24), the only logical inference is that the sliding caused Claimant's back to come off of the stairs, at which point Bone had wrapped himself around Claimant's back. (APA p. 35) (Hr'g Tr. p. 70, line 11 – p. 71, line 16) (Bone Dep. p. 19, lines 15-19). As has been pointed out previously, by the time Bone reached Claimant, Oditt was already holding Claimant from the front. (Hr'g Tr. p. 73, lines 6-18 (Bone testifying that, when he got to Claimant, "Shannon was holding him – his arms and hands from the front ...")) (APA pp. 210, 212) (Oditt Dep. p. 18, lines 2 – p. 19, line 1; p. 22, lines 14-25). The fact that Oditt immediately was holding Claimant up from the front is uncontested.

In addition, Bone's deposition testimony that he saw Claimant "slide down to hit the ground," (Bone Dep. p. 37, lines 6-8) (Resp. Br. p. 3), is taken out of context. Bone testified that he did not know whether any part of Claimant's body "hit those stairs .... I can't say that the coming down it would hurt him or not hurt him. To me from what I can

recollect it was more – it was in a – it was a stiff slide. Now, whether, whether he hit or, bumped I didn't see. I did not see that." (Bone Dep. p. 35, line 22 – p. 36, line 5). Furthermore, at the hearing, Bone explained that Claimant never "hit" the ground. Instead, Claimant's feet were already on the ground and he was doing what Bone "call[ed] a stiff slide, is what he was doing." (Hr'g. Tr. p. 71, line 15 – p. 72, line 24). Both the Commission and Claimant take Bone's testimony and diagram completely out of context in order to support their conclusion that Claimant suffered a compensable injury by accident. Here, as was the case in Doe v. South Carolina Dep't of Disabilities & Spec. Needs, 377 S.C. 346, 350, 660 S.E.2d 260, 262 (2008), testimony "taken completely out of context" is insufficient to support a decision.

While it is undisputed that Claimant sustained a seizure while he was at work on March 28, 2016, there is no evidence, but only speculation, that Claimant's back hit the stairs or that the stairs contributed to the effect of his seizure. There is no reliable, credible and substantial evidence to support the Commission's determination that Claimant suffered a compensable injury to his back as the result of a workplace accident and, as a result, the Commission Decision should be reversed.

II. The Commission erred in finding that anything connected to Claimant's job aggravated his pre-existing spine condition.

As did the Commission, Claimant relies entirely on Dr. Green's deposition testimony to provide a causal link between his employment and his lumbar spine condition. He does not contest that the back is a medically complex area of the body, *see* McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984), and that, as a result, "the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses." Herndon v. Morgan

Mills, Inc., 246 S.C. 201, 216, 143 S.E.2d 376, 384 (1965). He also appears to agree that, "when the testimony of medical experts is relied upon to establish causal connection between an accident an subsequent disability ... in order to establish such, the opinion of the experts must be at least that the disability ... 'most probably' resulted from the accidental injury." Cross v. Concrete Materials, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960).

Here, a careful and accurate reading of Dr. Green's testimony does not support the Commission's conclusion that any slide down the stairs aggravated Claimant's lumbar condition. Claimant fails entirely to address the fact that Dr. Green did not opine that a **slide** down the conex stairs most probably caused Claimant's lower back problems. In fact, Dr. Green's sole opinion to a reasonable degree of medical certainty is based on her mistaken assumption that Claimant's back hit the stairs in a **fall**. First, she testified, "[f]rom the diagram, I would state there is a possibility that from the – **the angle in which he fell** and the way that that step – especially since it's steel – could've caused an aggravation of his pre-existing condition and led to pain." (Green Dep. p. 37, lines 3-7) (emphasis added). When pressed, she again reverted to opining about a fall, not a slide:

> Q: Fair enough. Well, let me ask you, then, given that and given those assumptions I've given you, is that incident, **the sliding down the stairs**, the most probable cause of his complaints today?
>
> A: **I cannot say with certainty**.
>
> Q: Sure. And I'm not asking you to. What I'm asking –
>
> A: So –
>
> Q: – for is the most probable.
>
> A: The only reason why I'm having difficulty answering that question is because for – for us – for our office, **he was a new patient on that**

fall. So I don't know what activities he did prior to that. So I don't know, but **it is likely that the fall could've caused his pain**.

Q: Okay. And – and I know you don't know about his prior –

A: If –

Q: – activities, but let's assume that they didn't involve any complaints of back pain –

A: Uh-huh.

Q: – in his past. And believe me, if they did, Counsel will show them to you. But let's assume that they did not. Is **it**, then, the most probable cause –

A: Yes.

Q: – of the symptoms?

A: Yes.

Q: And that's to a reasonable degree of medical certainty?

A: Yes.

(Green Dep. p. 37, line 17 – p. 38, line 22) (emphasis added). Thus, Dr. Green testified, to a reasonable degree of medical certainty, that a **fall** on or down the stairs most likely caused Claimant's back pain but never testified to a reasonable degree of medical certainty that any **sliding** on the stairs was the most likely cause. Claimant's counsel failed to clarify what the "it" was that he was referring to and Dr. Green clearly was opining about a fall. There simply is no credible or reliable evidence that Claimant fell on the stairs but only that, at most, he slid a couple of inches while Oditt was grabbing him from the front and Bone was coming in and placing his body between Claimant and the steps. (APA pp. 210, 212) (Oditt Dep. p. 18, lines 2 – p. 19, line 1; p. 22, lines 14-25) (Hr'g Tr. p. 73, lines 6-18). Thus, there is no expert testimony that any slide on the stairs most probably caused Claimant's back pain.

Apparently recognizing that Dr. Green's actual testimony does not support any causal link between Claimant's lumbar spine condition and his alleged "sliding down the stairs to hit the ground," Claimant cites to the Commission Decision's summary of Dr. Green's testimony and avers that that summary constitutes substantial evidence supporting the Commission Decision. (Resp. Br. p. 10). Citing the Commission Decision as substantial evidence for its own findings of fact is circular, illogical and just plain wrong.

Given that Dr. Green never testified that any sliding most likely or to a reasonable degree of medical certainty aggravated Claimant's lumbar spine, but only that it might or could, Cross, 236 S.C. at 442, 114 S.E.2d at 829 ("when the testimony of medical experts is relied upon to establish causal connection between an accident an subsequent disability ... the opinion of the experts must be at least that the disability ... 'most probably' resulted from the accidental injury"), the only probative expert evidence with regard to whether a causal connection exists is that of Drs. Healy and White. Both Dr. Healy and Dr. White opined that the most likely cause of Claimant's back problems was the seizure itself, which was not causally related to his job. (APA pp. 208-209, 389-392). Dr. Healy largely confirmed his opinion at his later deposition, even after Claimant's counsel presented him with all of the evidence he felt was relevant. (*See* Healy Dep. p. 19, line 11 – p. 21, line 8).

Claimant again takes issue with the fact that Dr. Healy had not read Dr. Green's deposition transcript at the time he rendered his written opinion. However, as Appellants have pointed out before, his opinion was written the exact same date, August 17, 2016, as Dr. Green's deposition, *compare* Dr. Green Dep. *with* APA p. 208-209, making it

impossible for Dr. Healy to have been presented with Dr. Green's testimony. This attempted slight-of-hand reveals the irrational lengths to which Claimant will go in order to discredit Dr. Healy's opinion. Appellants did not "withhold" evidence from Dr. Healy but, instead, provided him with portions of the record that were available and that they believed were relevant, just as Claimant's counsel provided Dr. Green with select, but incomplete, portions of the evidence. (*See* App. Br. pp. 13-14).

Claimant joins the Commission in relying on the Bone diagram as a diagnostic tool, pointing to Dr. Healy's agreement that the diagram depicted "roughly the lower lumbar spine," including "the area of L4-5 and L5/S1." (Healy Dep. p. 17, line 17 – p. 18, line 17). However, as previously stated, Bone, who is not a medical or anatomical artist, actually admitted he could not draw people well and acknowledged his drawing was an approximation. (Bone Dep. p. 21, line 5 – p. 22, line 22). This is hardly reliable, probative and substantial evidence.

As to the evidence presented to Dr. White, Claimant suggests, without any evidence whatsoever, that Dr. White was not provided a copy of Bone's diagram. However, Dr. White's written opinion indicates he not only reviewed Dr. Green's deposition transcript, but also Claimant's Pre-Hearing Brief. (APA pp. 389-390). That Pre-Hearing Brief includes references to and a copy of Bone's diagram. (Cl. Pre-Hearing Brief and APA Submissions).

Claimant then argues that the hypothetical posed to Dr. Green was lengthy because he was citing verbatim testimony from Bone, as opposed to "a summary of the evidence," in order to elicit a reliable opinion. However, as noted in Appellants' opening Brief, Claimant's hypothetical to Dr. Green included factual allegations that are not

supported by the evidence. These include the assertion, repeated in his Brief to this Court, that Claimant and Bone were required to ascend and descend about 40 feet of stairs "very quickly" or "very rapidly," that when they got back down "they were ... huffing and puffing, trying to catch their breath." (Green Dep. p. 23, lines 3-10) (Resp. Br. p. 2). Bone denied that anyone ordered them to ascend or descend the stairs rapidly. (Hr'g Tr. p. 66, lines 19-25). He also stated that, although he was having difficulty catching his breath, he was not looking at Claimant and did not know what he was doing. (Bone Dep. p. 14, lines 8-19).

The hypothetical posed to Dr. Green also includes the misleading allegation that Claimant was just "in the vicinity" or "in the area" of the back of the conex when Bone heard him yell. (Green Dep. p. 23, line 24 – p. 24, line 2) (Resp. Br. pp. 2, 3). It is misleading because it intentionally omits testimony from the only witness who saw Claimant immediately prior to his seizure that he was sitting on the bottom step immediately prior to his fall. (APA pp. 210, 212) (Oditt Dep. p. 22, lines 2-7) (Hr'g Tr. p. 39, lines 19-23; p. 52, lines 4-13; p. 54, lines 21-22). This testimony is uncontroverted by any other reliable evidence.

It also fails to account for Claimant's counsel's lengthy "interruption" of the "facts" in the middle of his hypothetical to discuss telephone calls Oditt made to Dr. Green's office advising that the Employer would not be paying Claimant's medical bills. (APA pp. 29-30). The only ostensible purpose of this digression was to disparage Oditt, a fact Claimant has not even attempted to challenge on appeal. (Green Dep. p. 26, line 13 – p. 36, line 5). As noted on footnote 9 of their Appellants' Brief, Oditt denied asking Dr. Green's office to change their treatment records and explained that there likely was a

misunderstanding on this point, just as there was a misunderstanding about whether Leon Willis, as opposed to Leon Bone, had been on the worksite with Claimant on March 28, 2016.

In the end, there is no expert evidence that any **sliding** on the conex stairs caused or contributed to Claimant's lumbar spine disease. As a result, the Commission Decision is not supported by any, let alone substantial evidence. Instead, it is based on speculation, surmise and conjecture, which are insufficient to support a compensation award. Tiller, 334 S.C. at 339, 513 S.E.2d at 845 (Commission awards "must not be based on surmise, conjecture or speculation"); Glover, 274 S.C. at 649, 267 S.E.2d at 80 (Commission's findings "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it").

Because neither Dr. Green nor any other expert in this case testified "to a reasonable degree of medical certainty that the Claimant's sliding down the stairs to hit the ground ... most probably aggravated the pre-existing condition of Mr. Leggette's lumber [sic] spine," (Commission Decision, p. 18), that "opinion" appears to have been rendered by the Commission itself. The Commission, however, is not competent to make medical diagnoses or provide medical opinions of its own. *See* Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012).

In the end, because all of the credible evidence is susceptible of only one reasonable inference, Glover, 274 S.C. at 649, 267 S.E.2d at 80, this Court should conclude as a matter of fact and law that Claimant failed to prove either a compensable injury by accident or that there is any causal connection between his work and his back pain. In addition and as a result, this Court should reverse the Commission's finding that

Appellants are responsible for Claimant's past and future medical treatment and that he is entitled to temporary total disability payments.

CONCLUSION

For all the reasons stated herein and in the Brief of Appellants, this Court should reverse the Commission and find, as a matter of fact and law, that Claimant failed to prove that he suffered a compensable injury by accident on March 28, 2016 and/or that his employment caused or contributed to his low back pain.

McAngus Goudelock & Courie, LLC

November 20, 2017

By: _____

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George C. Leggette, Jr., Employee, ... Respondent,

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PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellants** on Respondent George C. Leggette, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on the 20th day of November, 2017, addressed as follows:

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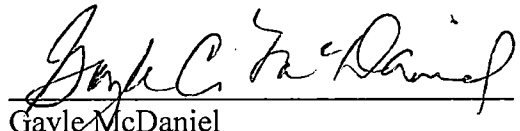

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November 20, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
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RE: George Leggette v. Three D Machinery Installers, LLC and Amerisure Mutual Insurance Company c/o Amerisure Insurance
Date of Accident: March 28, 2016
WCC File No.: 1605900
Our File No.: 20493.16096
Claim No.: 2042150
Appeal No.: 2017-001730

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Initial Reply Brief of Appellants, and the original and one copy of Appellants' Proof of Service. Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

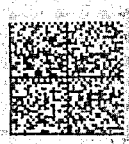
If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Stephen J. Wukela, Esquire



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