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.

BRIEF OF APPELLANTS

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II. WHETHER THE COMMISSION ERRED IN FINDING THAT ANYTHING CONNECTED TO CLAIMANT'S JOB AGGRAVATED HIS PRE-EXISTING SPINE CONDITION?

STATEMENT OF THE CASE

Claimant George C. Leggette, Jr. filed a Form 50 seeking medical treatment and temporary total disability payments as the result of an alleged March 28, 2016 work-place accident. Claimant alleged work-related injuries to his back, left leg and teeth. (R. p. 62). His employer, Three D Machinery Installers, Inc. ("Employer") and its workers' compensation carrier, Amerisure Mutual Insurance Company, Appellants herein, denied the claim on the basis that Claimant's injury did not arise out of and in the course of his employment. (R. p. 63).

The parties filed Pre-Hearing Briefs and APA submissions. (R pp. 74-123) (R. pp. 64-73) (R. pp. 124-501). The parties were heard on October 14, 2016 by Single Commissioner R. Michael Campbell, II, who issued a Decision and Order on February 16, 2017. (Single Commissioner Decision and Order, filed Feb. 16, 2017, R. pp. 28-61) ("Single Commissioner Decision").

The Single Commissioner summarized the extensive evidence and testimony in this case and concluded that, "[t]here 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." As a result, the Single Commissioner held that Claimant had not met his burden of proving he is entitled to compensation benefits. (Single Commissioner Decision, R. pp. 58-59).

Claimant filed a Form 30, arguing, among other things, that the Single Commissioner erred in failing to find that Claimant sustained a work-related injury by accident. (R. pp. 502-503).

The parties filed appellate briefs with the Full Commission and were heard by an Appellate Panel of the Full Commission on May 15, 2017. The Appellate Panel issued a split decision on July 24, 2017, with two Commissioners voting to reverse and one Commissioner voting to affirm the Single Commissioner. The majority found, "by a preponderance of the evidence," that Claimant had sustained a compensable injury to his back and lower extremity on March 28, 2016, and was entitled to past and future medical care, as well as temporary total disability compensation. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed July 24, 2017, R. pp. 2-27) ("Commission Decision").

Appellants timely appealed to this Court.

BACKGROUND FACTS

Claimant was 53 years old at the time of the Single Commissioner hearing. He has a 12th-grade education and had worked for Employer for a total of 12 years prior to his March 28, 2016 seizure. (R. p. 525, line 19 – p. 526, line 4).

Claimant has a history of seizures, hypertension, alcohol abuse and complaints of numbness and neck/back pain. Although at the hearing Claimant denied having had a seizure in 2006 when he worked for L&L Construction, (R. p. 536, line 19 – p. 537, line 9),[1] medical records show that he was seen at the Georgetown Memorial Hospital

[1] Claimant testified that he worked for L&L prior to working for Employer. (R. p. 625, lines 5-24). Claimant applied to work for Employer in May 2007, listing his employment with L&L as having extended from 2005 to 2007. (R. p. 382).

emergency room on November 15, 2006. The ER notes indicate that he had had a seizure at work, had been "combative in route; however, he is now awake and alert stating he is not sure what happened." He complained of pain in his chest, his head and the back of his neck. (R. pp. 135-137).

Claimant returned to the ER two days later, on November 17, 2006, complaining that his neck and shoulder hurt, telling the doctors that "his neck hurts from hitting it when he fell." He was diagnosed with "some very minimal degenerative changes at C5-6." (R. pp. 160-162, 180). At the hearing, Claimant denied these reports of pain in his neck and chest following the 2006 seizure, claiming "[t]hat medical record's wrong." (R. p. 539, lines 12-19).

He returned to Georgetown Memorial on March 6, 2007 with complaints of numbness and tingling in both hands. He was diagnosed with carpal tunnel syndrome in both wrists. (R. pp. 184-185).

In July 2008, he was again seen at the Georgetown ER due to staggering and "acting funny" and confused at work. Claimant, who did not remember the event, was told this might be due to blood pressure. (R. p. 202, 210).

In December 2008, he returned to the Georgetown ER for multiple stab wounds in his back. (R. pp. 220-227).

Throughout 2013, he was seen at St. James Santee Family Health Center on numerous occasions for various complaints, including hypertension. He was diagnosed with elevated blood pressure, hangover, current smoker, among other things. On May 10, 2013, he admitted "to drinking a 24pk Bud Light every day." (R. pp. 277-286).

On February 28, 2014, he was seen for high blood pressure. His medical report notes "SBIRT for alcohol and tobacco."[2] (R. pp. 287-288).

On May 23, 2014, he was seen again for hypertension, epilepsy and numbness in his left foot. Claimant reported "no seizure activity for more than a year." (R. pp. 289-290). He returned on May 29 for a follow-up, and was diagnosed with "benign essential hypertension, bronchitis, hangover and epilepsy and current smoker." (R. pp. 291-292).

He returned in August and November 2014 with the same diagnoses: "benign essential hypertension, bronchitis, hangover and epilepsy and current smoker." (R. pp. 293-294, 297-298).

Claimant testified at his deposition that he had been arrested only two times for criminal domestic violence. (R. p. 703, lines 8-22). However, at the hearing he reluctantly admitted to additional arrests for DUI and involuntary manslaughter, although he attempted to suggest that the latter arrests might have been his father, and averring, "Miss, that's in the past." (R. p. 543, line 19 – p. 544, line 25) (R. pp. 370-371).

On March 28, 2016, Claimant was sent by Employer to International Paper to serve as a watchman, keeping people away from welding that was being performed overhead. (R. p. 525, line 19 – p. 526, line 22). Claimant and a co-worker, Leon Russell Bone, Jr., initially were instructed to go to the third floor of the tower that was being repaired but were sent back down to ground level. (R. p. 578, lines 6-18). After coming

[2] SBIRT stands for "Screening, Brief Intervention, and Referral to Treatment" which "is a comprehensive, integrated, public health approach to the delivery of early intervention and treatment services for persons with substance use disorders." https://www.samhsa.gov/sbirt/about.

back from the tower, Claimant testified that he went to the bathroom and then "came back and sit down on the conex."[3] (R. p. 527, lines 16-24).

According to the Incident Report, prior to the seizure, Claimant was "sitting on the bottom step of the connex [sic] which is approximately 16" of[f] the ground. He had his legs stretched out in front of him crossed and his arms folded across his chest. He appeared to be stretching and his body had stiffened that's when it was realized he was having a seizure. Shannon Oditt grabbed him in the front by his arms holding him up as he was starting to slide. Shannon got Leon's attention who was standing to her right and he came up behind George and held him up assisting him to the ground so he didn't hit his head." (R. p. 307). Bone provided a statement at the scene: "I looked over and George appeared at first to be stretching his legs. They were straight out and arms were up in the air and he was starting to slide, that's when I realized he was having a seizure. I was standing on the right side of Shannon. I came around behind him and held him and helped George to the ground holding his upper body ..." (R. p. 309).

Shannon Oditt, the Employer's Safety Director, (R. p. 701, lines 22-24), also wrote a statement. "George Leggette was sitting on the bottom step of our Connex [sic] which is two foot or less. I was standing about three feet in front of him and Leon Bone was just off to my right and we were all talking. George reached up as though he was stretching, but then I realized he was going into a seizure. I immediately grabbed him 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."

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[3] The conex is the Employer's tool trailer. It has two steps leading up to it, the bottom of which is approximately 15-16 inches from the ground. (R. p. 751, line 16 – p. 752, line 5) (R. p. 712, lines 18-20).

(R. p. 311). Oditt testified that, prior to the seizure, Claimant was sitting on the bottom step and "kind of like had his butt on the edge of it and was like kind of leaned back against the other edge with his arms and legs crossed." (R. p. 707, lines 3-7).

Oditt was in front and "maybe a little bit off to [Claimant's] left" approximately between three and six feet away. (R. p. 311) (R. p. 711, lines 8-11) (R. p. 584, lines 7-14). Bone was off to Claimant's left at an angle. He was between 10 and 20 feet away from Claimant. (R. p. 710, line 3 – p. 711, line 15) (R. p. 579, line 6 – p. 580, line 8).

Although Oditt "was directly in front of" Claimant, as opposed to Bone who was at an angle, Oditt "saw it [the seizure] from the beginning. As he started into the seizure. Leon was just a couple seconds behind before he realized what was going on." (R. p. 551, lines 19-23). Oditt testified she thought Claimant was stretching "but then I realized he was kind of like letting out a scream, and then I seen that he was going into a seizure, and so as soon as I seen that, 'cause he was starting to kind of like – 'cause he was really low to the ground anyhow. He was kind of starting to slip, so I grabbed a hold to the front of him, and then Leon, in the meantime, it clicks with him what's going on that George was having a seizure, so he came around and got behind him and when you meet Leon, he's a rather large man, he basically, cradled George's head up against him to make sure that ... he didn't hit his head on anything ... George was on the very bottom of the Conex and like I said, it's maybe a foot, foot-and-a-half off the ground at the most, and there was no climbing. Like he was kind of starting to slip. Like his bottom was starting to slide and I grabbed him as soon as I realized that, and then we kind of maneuvered him around a little bit where he was up against Leon, and then Leon just

kind of cradled him to hold his head up so he didn't hit the ground." (R. p. 711, line 20 – p. 713, line 1).[4]

Oditt confirmed that, prior to his seizure, Claimant "was sitting at the very – he had like his butt on the edge. His back was leaned back against this top step ... like as a support, and his legs were crossed directly out in front of him." (R. p. 716, lines 2-7) (R. p. 566, lines 21-22). As Claimant started to slide, Oditt grabbed him by the front "so that he couldn't go anywhere. Leon came around behind me and was right here ... and like, basically took George from me, you know what I mean, 'cause like I had George, the front of him, under his arms, and then he kind of slid him around, and then laid him like to where his head would be here and his body would be here." (R. p. 716, lines 15-25); *see also* (R. p. 563, line 17 – p. 565, line 10). Oditt, who had worked as an EMT as well as in safety testified, "it was probably one of the worst seizures I'd seen as far as longevity of it, and then he, he was rigid for the whole" time. (R. p. 717, line 21 – p. 718, line 13) (R. p. 572, lines 5-18).

Oditt testified consistently that, although her perspective was from the front, Claimant's back did not hit the steps during his seizure. (R. p. 552, line 19 – p. 554, line 7). At the point that Bone saw Claimant and noticed that he had begun to slide, Oditt already "was there at that point to grab a hold of George." (R. p. 554, lines 13-16).[5]

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[4] Bone confirmed 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." (R. p. 584, line 15 – p. 585, line 24).

[5] At one point at the hearing, Oditt and Claimant's counsel became embroiled in a discussion regarding whether she saw Claimant "slide" or not, with Oditt conceding that she saw Claimant slide, (R. p. 554, line 17 – p. 555, line 11); however, that testimony is qualified by her immediately prior statement that she was grabbing Claimant under the arms at that point, (R. p. 554, lines 14-16), and her later testimony that Claimant slid only

Bone, the other witness to Claimant's seizure testified that, after going up to the third floor and back down, he "was still huffing and puffing," standing with his arms up on a fuel tank, and did not observe what Claimant was doing. (R. p. 671, lines 8-19) (R. p. 580, lines 9-25 ("I was not paying any attention to [Claimant], I had both arms resting on the fuel tank and I was just looking down at the fuel tank and I was just trying to catch my breath")).

Although Claimant testified that Bone was on his left side and not in front of him, Bone's drawing, on which the Commission relies, shows Bone to the left and in front of Claimant, at an angle. (R. p. 118). Both Bone and Oditt testified that he was at an angle, and not directly to Claimant's left. (R. p. 550, lines 1-14; p. 579, line 22 – p. 580, line 8).

Bone did not know whether Claimant was standing or sitting prior to the seizure. When he heard "hollering," he turned and, for the first time, "look[ed] over at George, and he's got both hands throwed over his head like this and ... he looks like a 6 X 6 actually. Just as stiff as a 6 X 6 .... And the steps of the Conex, the metal steps, go up like this. The 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 ... 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 there." (R. p. 672, line 2 – p. 673, line 18).

Q: When you saw him, you said he was straight like a board?

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a few inches, that she "grabbed a hold of the front of him to brace him," that he did not hit anything, and that Bone was there within seconds. (R. p. 567, line 3 – p. 568, line 21).

A: He was straight out.

Q: And he was up against the stairs:

A: Yes. He was just, just like that. If you could figure the staircase like that ... he was just like that and, and everything, propped out like that.

Q: Uh-huh. And do you know whether he had been sitting on the stairs or whether he had been standing or what he had been doing before you saw him?

A: I cannot say that. As I said at the time that I was trying to catch my breath.

(R. p. 674, lines 8-20; p. 692, lines 9-16).

At the hearing, Bone again testified that he was not looking at Claimant prior to his seizure but, once he heard the yell, he looked around and "noticed it was George," who was straight as a post and kind of "against the steps with his arms over his head." (R. p. 582, line 1 – p. 583, line 5). Although Bone testified that "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," he acknowledged that he did not know whether Claimant was "sitting or standing and fell." (R. p. 694, lines 5-11). When asked by Claimant's counsel:

Q: Do you know whether as he was coming down he hit anything on the way down? Do you know whether his back hit those stairs?

A: No, 'cause, I mean, the way – I don't know what – 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 in a stiff slide. Now, whether, whether he hit or, or bumped I didn't see. I did not see that.

(R. p. 692, line 22 – p. 693, line 5). At the hearing, Bone confirmed that he did not see Claimant hit his back on anything, and did not see any part of Claimant's body hit the floor. (R. p. 585, lines 20-24).

Bone was positioned between Claimant and the steps and held Claimant with both arms. "And Shannon was holding him – his arms and hands from the front and I had him bearhugged from the back. And we just went straight down."

Q: What part of him were you protecting?

A: Pretty much most of his back, torso and everything .... If I would have been sitting, he could have basically been sitting in my lap.

(R. p. 586, lines 9-25).

At the hearing, Bone also clarified the drawings that he had made at his deposition, explaining that the bottom drawing, labeled "later," "that was about the time that I draw that, I was between him. And that's when I had run around and caught him from behind." (R. p. 583, line 15 – p. 584, line 6). In other words, the bottom drawing showed Claimant's position but did not show that Bone was behind/underneath Claimant, cradling him.[6]

Claimant testified alternately that, immediately prior to his seizure, he "was not sitting down," (R. p. 540, lines 15-16), that he was "sitting there .... But that's all I remember," (R. p. 634 lines 15-20), and that he "stood up because I started to not feel too good sitting down." (R. p. 529, lines 22-23).[7] Dr. R. Joseph Healy, a neurologist, explained that Claimant's recollection of the events surrounding his seizure were unreliable: "patients don't know what happened during a seizure," (R. p. 789, lines 22-

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[6] Bone, who explained, "I can't draw people," had to draw Claimant's position twice, and finally admitted his drawing was only a close approximation of Claimant's position on the steps: "That's one. And I guess this, it's a little bit further out but anyway, there. I think that's a little bit better on the elevation." (R. p. 678, line 5 – p. 679, line 22).

[7] Claimant testified that he remembered standing up "because I took the bowl I had in my hand and put it in the trash can," which he testified was next to the steps to the conex. (R. p. 542, line 17 – p. 543, line 11). However, Oditt explained that the trash receptacles were next to where Bone was standing and that there were no trash containers at the sides of the conex stairs. (R. p. 568, line 25 – p. 569, line 1; p. 571, lines 9-25).

24), and, "it'd be hard to know if somebody knows what was actually happening if it's in the beginning of a seizure or during a seizure. I would have to question that." (R. p. 793, lines 3-11). In fact, Dr. Healy said he would believe Oditt's testimony "but the patient's, I wouldn't, I wouldn't think he might know or if it would be reliable. Not that he was lying, but I don't think your recollection when you're the one who has the seizure is reliable." (R. p. 793, line 25 – p. 794, line 6). When asked about Dr. Healy's statement, Claimant agreed that "I can't dispute nobody answers right now because I didn't know nothing." (R. p. 540, lines 17-23).

Following his seizure on March 28, 2016, Claimant was taken by ambulance to Georgetown Memorial Hospital. The EMS report indicates Claimant's "seizure lasted several minutes." (R. pp. 300-302). At the Georgetown ER, Claimant was treated and released. The ER medical notes indicate that, "[t]his is a 53 y/o male with a hix of htn, sz, and alcohol abuse who presents to the ED via EMS s/p sz episode at work PTA. Pt reports he thought he just passed out, states he has not had a sz for the last couple of years." The ER notes indicate that Claimant "was previously on Tegretol which he discontinued himself." Claimant denied neck pain back pain, numbness or any other complaints other than nausea. (R. pp. 87A-94).

Claimant testified that his back pain did not start until a few days after his seizure. (R. p. 642, lines 11-16) (R. p. 532, lines 7-22). Claimant went to Tidelands Andrews Medical Center, where he was seen from March 30, 2016 to May 30, 2016. (R. pp. 101-108). On March 30, his chief complaint was the seizure and he wanted a release to return to work. (R. pp. 107-108). He returned on April 4, 2016, advising the medical provider that, "[w]hen he had his seizure last week, he fell .... He doesn't remember where he fell,

but he knows he did. He is having severe back pain .... Does not remember falling or if he fell on any objects. Returned to work for 3 days only." (R. pp. 105-106). He returned a few days later complaining that his back "continue[d] to hurt." The medical notes indicate, "[p]atient 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." (R. p. 105). On April 27, 2016, he saw Dr. Lizina Green.[8] Her notes indicate, "[s]ource of patient information was patient. Low back pain secondary to fall (per patient) at work after having a seizure." (R. p. 104). He continued to see Dr. Green for his back pain in May 2016. (R. pp. 102-104).

Defendants presented the medical opinion of a well-qualified neurologist, Dr. Healy. (R. p. 770, lines 13-16). Dr. Healy opined on August 17, 2016 that it did not appear that Claimant's seizure was related to his job and that, "[i]t also would appear that the most likely cause of his back problems were the seizure. This is not uncommon in view of the amount of muscle contraction particularly in the paraspinal musculature which occurs with a seizure. These opinions are stated to a reasonable degree of medical certainty." (R. pp. 304-305).

Dr. Green, who is Board Certified in Family Medicine but not in orthopedics or neurology, (R. p. 847, lines 4-15), was deposed on August 17, 2016, the same day that Dr. Healy issued his initial opinion. Dr. Green acknowledged that, prior to her deposition, she had neither read any of the deposition transcripts nor seen any of Claimant's prior medical records. (R. p. 846, lines 17-23). Dr. Green testified that the

[8] Claimant testified that Dr. Green was his daughter's doctor and that is why he went to Tidelands Andrews Medical Center where Dr. Green sees patients. (R. p. 533, line 25 – p. 534, line 11) (R. p. 639, line 22 – p. 640, line 4).

medical notes from Tidelands Andrews Medical Center that indicate Claimant's injuries were from a fall were based on the history given to them by Claimant. (R. p. 803, line 19 – p. 811, line 23). She testified that her findings were consistent with Claimant's reported history of a fall. (R. p. 812, lines 3-6).

Claimant's counsel asked Dr. Green a hypothetical question that included isolated bits of testimony and several allegations that are not supported by the evidence, including that Claimant and Bone were required to ascend and descend about 40 feet of stairs "very rapidly," that when they got back down "they were standing in the area of what they call the conex ... huffing and puffing, trying to catch their breath," (R. p. 819, lines 3-10), or simply misleading, such as that Claimant was just "in the vicinity of the back of the stairs to the conex" when Bone heard him yell, (R. p. 819, line 24 – p. 820, line 2), omitting testimony by Oditt that Claimant was sitting on the bottom step immediately prior to his fall that is uncontroverted by any other reliable evidence. (R. p. 307) (R. p. 716, lines 2-7) (R. p. 564, lines 4-13; p. 566, lines 21-22). Claimant's counsel "interrupted" the "facts" 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, (R. pp. 111-112), ostensibly in order to disparage Oditt. (R. p. 822, line 13 – p. 832, line 5).[9]

[9] When asked if she had asked Dr. Green's practice to "change the records," Oditt unequivocally stated, "[n]o sir. I advised them that it wasn't a work-related injury and that we weren't going to authorize any kind of treatment." (R. p. 732, line 18 – p. 734, line 4). Oditt explained that she did not ask Dr. Green to alter Claimant's statements that he fell at work, but to change the records with regard to billing, since Employer had denied the claim and would not be paying for Claimant's treatment. Oditt testified that Dr. Green's office must have misunderstood her statements regarding billing. (R. p. 557, line 24 – p. 560, line 1). Oditt pointed out that Dr. Green's office also made an incorrect assumption regarding who had been present during Claimant's seizure, mistaking Leon Willis, who also lives in the community but who was not on the worksite on March 28,

After Dr. Green was shown selective deposition testimony and the diagram Bone had drawn, she testified, "Okay. From 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." (R. p. 833, lines 3-7). When pressed about a "slid[e] down the stairs," she 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?

2016, for Leon Bone, who actually was present when Claimant seized. (R. p. 562, line 2 – p. 563, line 4).

A: Yes.

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

A: Yes.

(R. p. 833, line 17 – p. 834, line 22).

On cross-examination, Dr. Green agreed that she would defer to a neurologist both as to the cause of Claimant's seizures, (R. p. 847, lines 16-18), as well as to whether or not a seizure could have caused Claimant's back pain. (R. p. 848, lines 3-7). Rather than holding herself out as a specialist regarding the actual cause of any injury to Claimant's back, Dr. Green stated she would defer to "a pain specialist, or ... to a spinal orthopedist." (R. p. 847, line 19 – p. 848, line 2).

At his later deposition, Dr. Healy largely confirmed his prior opinions. He stated that Claimant had a pre-existing lumbar spine issue that "likely [was] exacerbated by seizure," and refused to speculate as to any other alleged trauma to the back "other than the seizure." (R. p. 784, line 11 – p. 785, line 16). Dr. Healy only agreed that, if he assumed Claimant's "lumbar spine did come into contact with those stairs on his way down," that could have aggravated his pre-existing lumbar condition. He pointed out that he had seen no credible evidence that Claimant's back hit the stairs. (R. p. 785, line 1 – p. 786, line 8; p. 790, lines 1-5).

Dr. Marshall A. White, a board-certified neurologist, provided an opinion dated October 3, 2016, concluding that Claimant's seizure was not work related but, instead, was "directly related to his history of seizure disorder, alcoholism, and uncontrolled hypertension." After reviewing Claimant's medical records, excerpts from the depositions of Claimant, Bone and Oditt, as well as Dr. Green's full deposition

transcript,[10] Dr. White agreed "with Dr. Healy, that Mr. Leggette's back pain is related to musculoskeletal activity, which was provoked by his seizure," and opined, "to a reasonable degree of medical certainty, that [Claimant's] back pain is also unrelated to work activity." (R. pp. 498-499). Dr. White was never deposed.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is unsupported by substantial evidence or affected by an error of law. S.C. Code Ann. § 1-23-380(5); Lark, 276 S.C. at 136, 276 S.E.2d at 307.

"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." Frame v. Resort Services Inc., 357 S.C. 520, 527-528, 593 S.E.2d 491, 495 (Ct. App. 2004). In particular, Workers' Compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). In other words, "[w]hile a finding of fact of the commission will normally be upheld, such a finding may not be based upon

[10] Although Claimant alleged before the Commission that Dr. White only saw the same excerpts of the Bone deposition as had Dr. Healy, (R. p. 601, lines 15-21), Claimant did not depose Dr. White and there is no evidence that he was not presented with the same documentation that was presented to Dr. Healy at Healy's deposition. As noted above, Dr. White was provided Dr. Green's full deposition transcript. (R. p. 498).

surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Glover v. Rhett Jackson Co. of Bush River Rd., 274 S.C. 644, 649, 267 S.E.2d 77, 80 (1980).

In addition, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

ARGUMENT

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.

The Act defines "injury" to "mean only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160. The Commission's finding that 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," (Commission Decision, R. pp. 10-17), is legally and factually incorrect, and is not supported by reliable, probative and substantial evidence. Instead, the evidence the Commission relies on to find compensability simply either does not exist or is taken out of context. For example, the Commission states that Claimant and Bone were directed to ascend and then descend a 40 feet of stairs very rapidly. (Commission Decision, R. p. 11). However, there is no evidence that anyone required either Claimant or Bone to ascend and descend the stairs rapidly. (R. p. 578, lines 19-25 (Bone denying that anyone instructed them to ascend and descend rapidly)).

The Commission erroneously found that, "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." (Commission Decision, R. p. 11) (emphasis added). Although Bone

testified that he was "huffing and puffing" when he reached the ground, he was not paying attention to Claimant. Moreover, Bone could not say whether Claimant was standing or sitting immediately prior to his seizure. (R. p. 671, lines 9-13 (A: Like I say, I was still huffing and puffing, you know. Q: George, too? A: I really – I really wasn't observing him that much ..."); *see also* R. p. 580, line 13 – p. 582, line 9 (Bone testifying that he was not paying attention to Claimant once they reached the conex)). When asked directly whether Claimant had been sitting or standing prior to the seizure, Bone testified that he could not say, as he was not looking at Claimant. (R. p. 674, lines 16-20

The Commission's statement that Claimant was "in the vicinity of the conex when [Bone] heard him yell out," (Commission Decision, R. p. 11), also misleadingly suggests that Claimant was standing near the conex when his seizure occurred. In fact, the only witness who was looking at Claimant immediately prior to his seizure was Oditt, whose testimony that Claimant was sitting on the bottom step of the conex, leaning back against the trailer steps and his legs stretched out and crossed in front of him, (R. p. 307) (R. p. 716, lines 2-7) (R. p. 564, lines 4-13; p. 566, lines 21-22), is uncontroverted by any reliable evidence.

Bone's testimony regarding Claimant's position prior to the seizure ("that at one time he was leaning up against it [the conex] 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 there") (Commission Decision, R. p. 11), is admittedly speculation. Bone repeatedly testified that he had not been looking at Claimant prior to the seizure and did not know whether he was standing next to or sitting on the conex stairs when the seizure began. It was only Bone's

speculation or conjecture that Claimant may have been standing prior to the seizure, which is why he testified, "[t]he way [Claimant] 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** ... 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 there." (R. p. 672, line 2 – p. 673 line 18) (emphasis added).

Q: When you saw him, you said he was straight like a board?

A: He was straight out.

Q: And he was up against the stairs:

A: Yes. He was just, just like that. If you could figure the staircase like that ... he was just like that and, and everything, propped out like that.

Q: Uh-huh. And **do you know whether he had been sitting on the stairs or whether he had been standing** or what he had been doing before you saw him?

A: **I cannot say that**. As I said at the time that I was trying to catch my breath."

(R. p. 674, lines 8-20 (emphasis added); p. 692, lines 9-16).

Q: And you say you **think** he fell about half the – half of his height?

A: Yes.

(R. p. 682, lines 4-6) (emphasis added). Thus, the Bone testimony relied on by the Commission is nothing more than pure speculation.

Nonetheless, by focusing on select, isolated portions of Bone's testimony, the Commission implies that Claimant was standing and leaning up against the conex and fell onto and slid down the steps when he went into his seizure. (Commission Decision, R.

pp. 11-12). For example, the Commission underscores Bone's statement that, when Bone looked over at Claimant after he yelled out, he "observed him slide down to hit the ground." (Commission Decision, R. p. 12).[11] The testimony simply does not support this speculative scenario. The Commission fails to note that Bone clarified this statement at the hearing, stating unequivocally that Claimant "didn't actually hit the ground, what I meant to say was that ... when I first observed him, his feet were already on the ground and he was stiff, straight out stiff. And it's what I call a stiff slide, is what he was doing." Bone confirmed that he reached Claimant "within seconds," and that he did not see Claimant hit his back on anything or hit the floor. (R. p. 584, line 15 – p. 585, line 24). This statement is consistent with his deposition testimony. (R. p. 692, line 22 – p. 693, line 5 (Bone testifying that he did not see whether Claimant's back hit or bumped the stairs)). The fact that Claimant's back may have been touching the stairs (because he was sitting with his back against them prior to his seizure)[12] is an entirely different fact pattern than speculating that his lower back hit or bumped the stairs. In fact, the Single Commissioner correctly held that no eyewitness saw Claimant hit his back on the stairs or anything else.

The Commission erroneously characterizes the diagram Bone drew as "of the Claimant sliding down the conex stairs while seizing." (Commission Decision, R. p. 12). Instead, what Bone was asked to draw was, "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 .... Now, draw me a

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[11] The Commission incorrectly states that Oditt admitted "that she did see him **slide down the stairs**." (Commission Decision, R. p. 15). All she agreed to was that she saw Claimant "slide" a little, not "down the stairs." (*See* R. p. 554, line 14 – p. 555, line 11; p. 561, lines 9-12; p. 567, line 3 – p. 568, line 21).

[12] *See* (R. p. 307) (R. p. 716, lines 2-7) (R. p. 564, lines 4-13; p. 566, lines 21-22).

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?" (R. p. 677, lines 7-24). In other words, the diagram shows Claimant in a "still" position, and was never intended to show any action.

The Commission also takes issue with the Single Commissioner's finding that no eyewitness testified that they saw Claimant hit his back on the stairs or anything else during his seizure, asserting that the Single Commissioner committed an error of law by not considering circumstantial evidence. (Commission Decision, R. p. 12). However, there is a difference between circumstantial evidence and speculative evidence, the latter of which is insufficient to prove Claimant's case. "It is a well recognized rule that an issue may be proved by circumstantial evidence. But for circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty, and must have sufficient probative value to constitute the basis for a legal inference, and not mere speculation." Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 204, 51 S.E.2d 744, 749 (1949); *see also* Gastineau v. Murphy, 331 S.C. 565, 569-570, 503 S.E.2d 712, 714 (1998) (circumstantial evidence based on speculation is insufficient to support a finding of fact); Shealy v. Doe, 370 S.C. 194, 204-205, 634 S.E.2d 45, 50-51 (Ct. App. 2006) (rejecting unwitnessed account of accident as incompetent circumstantial evidence). It is incontrovertible that an award cannot be based on speculation, surmise and conjecture. Hutson v. South Carolina State Ports Auth., 399 S.C. 381, 389-390, 732 S.E.2d 500, 504 (2012) (discounting the claimant's speculation as insufficient to uphold commission decision). As explained above, there is

no competent evidence to support a finding that Claimant's back, or any other body part, hit the conex stairs or the ground.

Furthermore, although the evidence supports a finding that Claimant slid, it only supports a finding that he slid at most a couple of inches. The Commission's finding that Claimant "slid down the metal of the conex stairs on his back," (Commission Decision, R. p. 13), implies that he slid all the way down the stairs with all of his weight on his back, from which one might be able to infer some injury could have occurred to his back. However, the evidence is uncontroverted that he slid, at most, only a couple of inches. (R. p. 567, lines 6-8; p. 585, lines 14-17). Moreover, based on Bone's drawings, the most logical inference is that the sliding caused Claimant's back to come off of the stairs, at which point Bone wrapped himself around Claimant's back. (R. p. 117) (R. p. 583, line 11 – p. 584, line 16) (R. p. 676, lines 15-19). It is important to remember that, by the time Bone reached Claimant, Oditt was already holding Claimant from the front. (R. p. 586, lines 6-18 (Bone testifying that, when he got to Claimant, "Shannon was holding him – his arms and hands from the front ...")) (R. pp. 307, 311) (R. p. 712, lines 2 – p. 713, line 1; p. 716, lines 14-25). It is also key that Bone was positioned at an angle, and not directly to Claimant's left as the drawing labeled "1st" implies. (R. p. 117) (R. p. 710, line 3 – p. 711, line 15) (R. p. 579, line 6 – p. 580, line 8).

The Commission then joins Claimant in attempting to disparage Oditt, going off on an irrelevant tangent about the phone records from Dr. Green's office. (Commission Decision, R. pp. 15-17) (*see also* Brief of Claimant/Appellant, R. pp. 510-511). Oditt's testimony that she did not ask Dr. Green's office to change their treatment notes, and that Dr. Green's office must have misunderstood what she was asking, is uncontroverted.

Oditt explained that there must have been some misunderstanding regarding what she told Dr. Green's office, just as there was a mistake in the phone notes reference to a Leon Willis, who was not at the worksite on March 28, 2016, confusing him with Leon Bone, who was. (R. p. 557, line 24 – p. 560, line 1; p. 562, line 2 – p. 563, line 4). Nonetheless, and without any finding that Oditt lacks credibility, the Commission then assigns greater weight to Bone's testimony and drawing. However, Bone's testimony, viewed properly under the substantial evidence standard, does not support the Commission's award.

Patently, "[s]ubstantial 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." Frame, 357 S.C. at 527-528, 593 S.E.2d at 495 (emphasis added). As is discussed in detail herein, the Commission Decision relies on isolated pieces of testimony, taken out of context and often misconstrued. As such, it is insufficient to support the award. *See* 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" did not support the court's conclusion). For instance, the Commission Decision takes issue with Oditt's testimony that Claimant's back did not hit the conex stairs. (Commission Decision, R. pp. 15-17). However, Bone also testified both at his deposition and at the hearing that he never saw Claimant's back hit the stairs or anything else, or any other body part hit the ground. "Now, whether, **whether he hit or, or bumped I didn't see. I did not see that**." (R. p. 692, line 22 – p. 693, line 5) (emphasis added) (R. p. 585, lines 20-24 (Bone testifying that he did not see

Claimant hit his back on anything, and did not see anything hit the floor)). Thus, there is no evidence in the record that Claimant's back (or any other body part) hit the conex stairs during his seizure.

Ultimately, the Commission concludes that Claimant's injury is compensable "given that the employment contributed to the effect of the seizure," citing Turner v. Campbell Soup Co., 252 S.C. 446, 166 S.E.2d 817 (1969). (Commission Decision, R. p. 12). While it is true that Turner stands for the proposition that an injury can be compensable where the workplace contributes to the effects of a fall even where the fall itself is not work-related,[13] the Commission's conclusion assumes a fact that, as is discussed in more detail in Section II below, Claimant was unable to prove, *i.e.*, that his "employment contributed to the effect of the seizure." Likewise, the Commission's finding that Claimant "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," (Commission Decision, R. p. 17), assumes a result that Claimant failed to prove, *i.e.*, that any contact between Claimant's back and the conex stairs caused injury to his back. While it may be true that an injury may be found to be work-related if the work environment contributes to the effect of a fall, regardless of whether the fall itself is work-related, a claimant still must prove a causal relation between his work and his injuries. *See, e.g.*, Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 831-832 (1960) (the burden of proving a pre-existing condition was aggravated by a workplace injury falls on the claimant).

[13] In Turner, the Supreme Court remanded to the Commission for a determination of whether the claimant's workplace contributed to the effect of the fall, because the Commission had failed to make any findings in this regard. 252 S.C. at 450-451, 166 S.E.2d at 819.

Here, as is discussed in detail below, a causal relation between Claimant's work environment and his back pain has not been proven in this case, and there is not substantial evidence, let alone a preponderance of the evidence, that Claimant's employment contributed to the effect of his seizure.

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

The Commission's finding that the effects of Claimant's admittedly non-work related seizure, (R. p. 518, lines 3-4), are compensable is, by definition, dependent on its corollary finding that something connected to Claimant's job "aggravated the pre-existing condition of Claimant's spine." (Commission Decision, R. pp. 17-22). However, that finding of fact is, like the finding that Claimant suffered a work-related accident, dependent on speculation and isolated pieces of testimony taken out of context. While the determination of whether a causal link exists between a claimant's work and his injury is typically a finding of fact for the Commission, *see, generally,* Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 434, 315 S.E.2d 123, 125 (1984), "if the evidence is all one way, or if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

First, the fact that Claimant did not suffer from lower back pain prior to his seizure and did following his seizure, (Commission Decision, R. p. 17), does not prove that the conex steps, as opposed to the seizure itself, caused his back pain. All that that sequence of events proves is that Claimant's lower back condition was aggravated on March 28, 2016. It does not speak to the cause of the aggravation. *See* Glover, 274 S.C.

at 647, 267 S.E.2d at 79 (circumstantial evidence that cancer reoccurred following a blow to the arm insufficient to prove a causal link between the claimant's job and his cancer); *see also* Smith v. Michelin Tire Corp., 320 S.C. 296, 298-299, 465 S.E.2d 96, 97 (Ct. App. 1995) (mere increase in symptoms following a work-related accident does not provide causal link in medically complex cases).

The back is considered a medically complex part of the body. *See* McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984); Brown v. Peoplease Corp., 402 S.C. 476, 482-484, 741 S.E.2d 761, 764-765 (Ct. App. 2013) (citing McLeod and holding the claimant failed to prove a causal link between his lower back and work-related accident because the claimant "presented no medical evidence that related his lumbar problems to the accident"). Where, as is the case here, "the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses." Herndon, 246 S.C. at 216, 143 S.E.2d at 384.[14] "[W]hen 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, 236 S.C. at 442, 114 S.E.2d at 829.

[14] Here, there is no reliable and credible lay testimony linking Claimant's back pain to his workplace. Although Claimant reported to Dr. Green's office that he had fallen at work, that testimony is not corroborated by any other witness and, in any event, Dr. Healy explained that a seizure patient's recollection of the events surrounding a seizure is inherently unreliable. (R. p. 789, lines 22-24; p. 793, line 3 – p. 794, line 6).

Here, there is competent medical evidence in the record that the seizure – and not Claimant's work – is the most probable cause of Claimant's back pain. After reviewing Claimant's medical records and various deposition testimony, including Dr. Green's full deposition, Dr. White opined, to a reasonable degree of medical certainty, that Claimant's "back pain is related to musculoskeletal activity, which was provoked by his seizure." He was equally certain that Claimant's lower back problems were "unrelated to work activity." (R. pp. 498-501; *see also* R. pp. 304-305; R. p. 784, line 19 – p. 785, line 4 (Dr. Healy indicating that the seizure likely exacerbated Claimant's pre-existing back problems, and that he could not state that any slide on the stairs "resulted in a trauma to the lumbar spine. You know, I would have to defer to if anybody saw him hit and that's not clear to me")).

The Commission relies on Dr. Green's opinion, but either misconstrues or misunderstands her opinion. 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**. At no point did Dr. Green testify that "Claimant's **sliding down the stairs** to hit the ground," (Commission Decision, R. p. 19), most probably aggravated Claimant's pre-existing lumbar condition. Instead, she testified, "Okay. From 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." (R. p. 833, 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.

(R. p. 833, line 17 – p. 834, line 22) (emphasis added). Thus, Dr. Green testified, to a reasonable degree of medical certainty, that a **fall** on or down the stairs likely caused Claimant's back pain but not that any **sliding** down the stairs was most likely the cause. The fact that Claimant's counsel failed to make his hypothetical clear at the end of 16

pages,[15] where it was crucial for him to do so,[16] does not change the fact that there is uncontroverted medical evidence that the seizure most probably caused Claimant's back pain, and no expert stated to a reasonable degree of medical certainty that the minimal sliding on the stairs caused his back problems. *See* Herndon, 246 S.C. at 209, 143 S.E.2d at 380-381 (the burden of proving compensability rests with the claimant and, the "difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it"); Cross, 236 S.C. at 445-446, 114 S.E.2d at 831-832 (the facts necessary to support a workers' compensation award "must be proved with the same certainty as in other civil cases" and a claimant cannot "prevail by the resolution of doubts").

The Commission recites statements from Dr. Green's practice indicating that Claimant told her office that he fell at work. (Commission Decision, R. pp. 18-19). However, as explained in detail above, there is no credible, reliable evidence that Claimant fell. Although Bone testified that he thought Claimant might have fallen, (R. p. 682, lines 3-6), he consistently acknowledged that that was speculation because he did not see Claimant prior to the seizure and did not know whether he was standing or sitting when the seizure started. (R. p. 673, lines 7-9; p. 674, lines 8-20; p. 692, lines 9-16; p.

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[15] The hypothetical question posed by Claimant's counsel, ranging over 16 pages of testimony, (R. pp. 818-834), including a lengthy diversion clearly intended to discredit Oditt, (R. pp. 822-832), is too long and unwieldy to produce a reliable opinion. As noted above, the hypothetical also contained facts that were never proven. *See* above at pp. 13-14. Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 449, 154 S.E.2d 845, 851 (1967) (probative value of expert testimony based on a hypothetical stands or falls on the quality of the facts on which it is predicated); *cf.* Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 424, 40 S.E.2d 626, 632 (1946) (rejecting medical testimony based on unreliable facts).

[16] In particular, Claimant's counsel failed to define what "it" referred to in his final posturing of the question, as highlighted in bold above. Dr. Green had been discussing a fall and clearly answered the question in reference to her own framing of the events.

694, lines 5-11). Claimant testified that he did not remember the seizure. (R. p. 630, line 9 – p. 631, line 9; p. 634, lines 13-22).[17] He also admitted that he did not know if he hit his back during his seizure. (R. p. 545, line 25 – p. 546, line 2). The only witness to have observed Claimant immediately before and throughout the seizure was Oditt, whose consistent and uncontroverted testimony established that Claimant was sitting on the bottom step of the conex, with his back against the steps and his legs stretched out and crossed in front of him; that he slid, at most, a couple of inches and that, as he started to slide, she was holding him from the front. (R. pp. 307, 311) (R. p. 711, line 24 – p. 712, line 3; p. 716, lines 2-25) (R. p. 564, lines 4-13; p. 566, lines 21-22; p. 586, lines 9-18).

The Commission discounts Dr. Healy's opinion, (R. pp. 304-305 (stating to a reasonable degree of medical certainty that "the most likely cause of [Claimant's] back problems were the seizure"), based on his acknowledgement at his deposition that he probably did not have sufficient evidence at the time he wrote his August 17, 2006 opinion. (Commission Decision, R. pp. 19, 22). However, after Claimant's counsel presented Dr. Healy with his own selected deposition excerpts, including again a lengthy attempt to discredit Oditt, Dr. Healy maintained, "[w]ell, I think what I can say for sure, in other words with a degree of medical certainty, is that there was pre-existing lumbar spine disease ... it's clear that he had a seizure," and also, "[s]o I would say that there was pre-existing disease, likely exacerbated by seizure." (R. p. p. 784, line 19 – p. 785, line 4).

When pressed, Dr. Healy testified:

[17] In any event and as noted above, a patient's own recollection of the events surrounding a seizure is inherently unreliable. (R. p. 789, lines 22-24; p. 793, line 3 – p. 794, line 6).

Q: If you assume ... 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.

Q: Do you have an opinion as we sit here today as to whether it did or not assuming he **slid down the stairs** as Mr. Bone describes?

A: Well, I think it's hard for me to say if that resulted in a trauma to the lumbar spine. You know, **I would have to defer to if anybody saw him hit** and that's not clear to me."

(R. p. 785, lines 5-16) (emphasis added). When asked to "assume" there was "trauma to his lumbar spine, if his lumbar spine did come into contact with those stairs **on his way down** ... if we were asked to assume that fact, would that have aggravated the pre-existing condition of his lumbar spine," Dr. Healy merely stated, "Could; yes." (R. p. 785, lines 17-25) (emphasis added). Dr. Healy commented, "I don't know if I can comment other than conjecture as to how, what type of trauma there was other than the seizure." (R. p. 784, line 11 – p. 785, line 4). Dr. Healy consistently stated, to a reasonable degree of medical certainty that the seizure could have contributed to Claimant's back complaints and refused to speculate as to whether "his surroundings contributed or not." (R. p. 791, line 21 – p. 792, line 3).

Tiller provides that, "[i]f a medical expert is unwilling to state with certainty a connection between an accident and an injury, the 'expression of a cautious opinion' may support an award if there are facts outside the medical testimony that also support an award." 334 S.C. at 340, 513 S.E.2d at 846. Here, there is expert evidence in the form of Dr. White's medical opinion that Claimant's seizure was the most probable cause of his back pain, and "that his back pain is also unrelated to work activity." (R. pp. 498-499). In contrast, there is no expert or credible lay testimony that any slide on the stairs caused

or contributed to Claimant's back pain. In addition, the record contains reliable lay testimony that Claimant did not fall or hit anything, including the stairs, during his seizure.

The Commission also attempts to discredit Dr. Healy's written opinion based on his acknowledgment that he had not been provided with a copy of Dr. Green's deposition at the time he rendered that opinion. However, Dr. Healy's written opinion was dated August 17, 2006, (R. pp. 304-305), the same date on which Dr. Green's deposition was taken. (R. p. 797). It would have been impossible for Dr. Healy to have had a copy of the transcript on that same date. This is not mere nit-picking. This is evidence of the extremes to which the Commission had to go to discredit Dr. Healy's opinion in order to find a causal connection between Claimant's job and his lower back pain – when, in fact, the evidence before the Commission does not support that conclusion.

Remarkably, the Commission appears to credit the Bone diagram as a diagnostic tool when it notes the portion of Dr. Healy's deposition where Claimant's counsel pressed Dr. Healy to identify that the drawing depicted the last stair touching "the low back, roughly the lower lumbar spine: "Q: In the area of L4-5 and L5/S1? A: yes." (Commission Decision, R. pp. 20-21, 22). There is no indication that Bone is an anatomical artist or that his rendering is accurate enough to confirm the specific vertebrae that may or may not have touched the steps. In fact, Bone who admitted, "I can't draw people," had to draw Claimant's position twice, and finally admitted his drawing was only a close approximation of Claimant's position on the steps: "That's one. And I guess this, it's a little bit further out but anyway, there. I think that's a little bit better on the elevation." (R. p. 678, line 5 – p. 679, line 22). For the Commission to credit Bone's

diagram and this portion of Dr. Healy's deposition as anything more than speculation as to the causal relationship between the seizure and Claimant's back pain is legal error. *See, e.g.*, 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").

In addition, the Commission attempts to discredit Dr. White's opinion that, to a reasonable degree of medical certainty, Claimant's "back pain is related to musculoskeletal activity, which was provoked by his seizure" and unrelated to work activity, (R. pp. 498-501), by pointing out that, "Dr. White was only given excerpts of Mr. Bone's deposition," and speculating that he prepared his opinion "without knowledge of the evidence contained in Mr. Bone's deposition." (Commission Decision, R. p. 22). However, a cursory review of Dr. White's opinion shows that he was provided with various records, including medical records from Andrews Tidelands Medical Center, Dr. Healy's August 17, 2006 opinion, excerpts from the deposition transcripts of Claimant, Bone, and Oditt, as well as the full transcript of the deposition of Dr. Green and Claimant's Pre-Hearing Brief. (R. p. 498). Although there is no indication in Dr. White's opinion as to which pages of the Bone deposition he was provided, given Claimant's counsel's repeated statements and queries to Dr. Healy regarding both the Green and Bone depositions, (R. p. 774, line 15 – p. 775, line 19; p. 777, line 3 – p. 782, line 16; p. 783, line 9 – p. 784, line 10), and given that the entire Green deposition was provided to Dr. White, it is logical to presume that the select pages Claimant's counsel presented to Dr. Healey during his deposition also were presented to Dr. White. At any

rate, the Commission's conclusion that "Dr. White prepared a report without knowledge of the evidence contained in Mr. Bone's deposition," (Commission Decision, R. p. 22), is speculative at best, and without any support in the record. As noted above, Dr. White was never deposed.

In the end, the Commission gave greater weight to Dr. Green's testimony because it was based on Bone's deposition "to significant extent ... and his diagram of the incident." However, as noted above, all Dr. Green opined to was that Claimant's lower back injury was the result of a **fall**, an assumption not supported by any credible evidence in the record. Bone did not testify that he saw Claimant fall, he only speculated or guessed that that was what may have happened. (R. p. 672, line 2 – p. 673, line 18; p. 674, lines 8-20; p. 692, lines 9-16). Since Dr. Green's opinion is based on an unproven fall, the Commission's reliance on and decision to give greater weight to Dr. Green's opinion is legal error and does not support the award to Claimant. There is no credible, reliable evidence that Claimant suffered a work-related accident on March 28, 2016 or that anything associated with his job aggravated his pre-existing lumbar spine condition. There is, however, reliable and substantial evidence that Claimant's non-work related seizure aggravated his pre-existing lower back symptoms and that his back problems are unrelated to his work activity. (R. pp. 498-499, 304-305) (R. p. 791, lines 21-23).

Because the evidence is susceptible of only one reasonable inference, this Court should conclude, as a matter of fact and law, that Claimant failed to prove either that he suffered an injury by accident, as defined by the Act, on March 28, 2016 or that there is any causal connection between his work and his back pain. *See* Glover, 274 S.C. at 647, 267 S.E.2d at 79 ("where the evidence is susceptible of but one reasonable inference the

question is one of law for the court, rather than one of fact for the commission"). In addition, the Commission's findings that Appellants are responsible for Claimant's past and future medical treatment, as well as the finding that he is entitled to temporary total disability payments, are in error.

CONCLUSION

For all the reasons stated herein, 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.

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December 20, 2017

By: _____

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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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellants Three D Machinery Installers, LLC and Amerisure Mutual Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Appellants complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

December 20, 2017

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