

**Reply To**

HELEN F. HISER  
Direct Dial: (843) 576-2930  
helen.hiser@mgclaw.com

March 2, 2018

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**  
MAR 05 2018  
SC Court of Appeals

RE: Thomas Hebert v. Drucker & Falk, LLC and Key Risk Insurance Company  
of SC c/o Key Risk Management Services, Inc.  
Date of Accident: December 8, 2014  
WCC File No.: 1422259  
Our File No.: 2016.15038  
Claim No.: 15018596  
Appeal No.: 2018-000325

Dear Ms. Kitchings:

On behalf of Appellants Drucker & Falk, LLC and Key Risk Management Services, Inc., the undersigned filed an appeal of the February 8, 2018 Decision and Order of the South Carolina Workers' Compensation Commission on February 19, 2018. Upon receipt of Appellants' Notice of Appeal, counsel for Drucker & Falk, LLC and Respondent American Zurich Insurance Co./Zurich North America c/o Gallagher Basset Services, Inc. ("Zurich") notified the Commission that they had not been served with a copy of the Commission Decision. (Att. 1). In response, the Commission advised the parties that it would re-serve the Commission Decision with a revised filing date. (Att. 2). The attached Commission Decision is identical to the Commission Decision attached to Appellants' Notice of Appeal with the exception of the filing date, and is attached hereto for the Court's files. (Att. 3). Appellants' Notice of Appeal encompasses both filed versions of the Commission Decision.

Thanking you in advance for your assistance, I am

Very truly yours,

*Helen Hiser by Amy Zentgraf*  
Helen F. Hiser

Enclosures

cc: Amy Bracy, S.C. Workers' Compensation Commission  
Thomas M. White, Esq.  
Vincent C. Northcutt, Esq.

# ATTACHMENT 1

---

**From:** Kate Hemingway [<mailto:KHemingway@luederlaw.com>]  
**Sent:** Wednesday, February 21, 2018 12:45 PM  
**To:** WCC Appeals,  
**Cc:** Tom White; Brian O'Keefe; Ansley DeVita; Vince Northcutt  
**Subject:** Thomas Hebert vs. Drucker & Faulk, L.L.C. - SCWCC: 1422259 & 1507127  
**Importance:** High

Ms. Hollmon,

We received a Notice of Appeal of the Decision of the Appellate Panel of the Commission on February 19, 2018, and it is my understanding that an Order was issued by the Full Commission on February 8, 2018. Mr. Northcutt was not aware that an Order was issued by the Appellate Panel until we received the Notice of Appeal in the mail today.

We were also not served with some of the prior Hearing notices, so we want to be sure that the Commission has us in the system for any future matters relating to service. Can you please ensure that Mr. Northcutt is served with the Order and any further documents issued by the Commission? Thank you.



**Kate Hemingway**  
Partner

**LUEDER, LARKIN & HUNTER, LLC**  
503 Wando Park Boulevard, Suite 205  
Mt. Pleasant, South Carolina 29464

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**From:** WCC Appeals, [<mailto:appeals@wcc.sc.gov>]  
**Sent:** Wednesday, January 17, 2018 1:20 PM  
**To:** Vince Northcutt <[VNorthcutt@luederlaw.com](mailto:VNorthcutt@luederlaw.com)>; WCC Appeals, <[appeals@wcc.sc.gov](mailto:appeals@wcc.sc.gov)>  
**Cc:** Tom White <[twhite@steinberglawfirm.com](mailto:twhite@steinberglawfirm.com)>; Brian O'Keefe <[BOKeefe@mgclaw.com](mailto:BOKeefe@mgclaw.com)>; Kate Hemingway <[KHemingway@luederlaw.com](mailto:KHemingway@luederlaw.com)>; Ansley DeVita <[ADeVita@luederlaw.com](mailto:ADeVita@luederlaw.com)>  
**Subject:** RE: Thomas Hebert vs. Drucker & Faulk, L.L.C. - SCWCC: 1422259 & 1507127

Thank you. I will get the review process started as soon as possible.

Genia

Eugenia Hollmon  
SC Workers' Compensation Commission  
Judicial Docketing Director  
803-737-5737  
[ehollmon@wcc.sc.gov](mailto:ehollmon@wcc.sc.gov)

**From:** Vince Northcutt [<mailto:VNorthcutt@luederlaw.com>]  
**Sent:** Monday, January 15, 2018 3:40 PM  
**To:** WCC Appeals, <[appeals@wcc.sc.gov](mailto:appeals@wcc.sc.gov)>  
**Cc:** Tom White <[twhite@steinberglawfirm.com](mailto:twhite@steinberglawfirm.com)>; Brian O'Keefe <[BOKeefe@mgclaw.com](mailto:BOKeefe@mgclaw.com)>; Hollmon, Eugenia <[EHollmon@wcc.sc.gov](mailto:EHollmon@wcc.sc.gov)>; Kate Hemingway <[KHemingway@luederlaw.com](mailto:KHemingway@luederlaw.com)>; Ansley DeVita <[ADeVita@luederlaw.com](mailto:ADeVita@luederlaw.com)>  
**Subject:** Thomas Hebert vs. Drucker & Faulk, L.L.C. - SCWCC: 1422259 & 1507127

Dear Appeals Division:

Attached hereto please find the **Proposed Appellate Panel Decision and Order** with respect to the above-captioned matters (WCC File Nos. 1422259 & 1507127 were consolidated pursuant to a prior Consent Order), which I am submitting pursuant to the December 5, 2017 Request for a Proposed Decision and Order issued by Commissioners Taylor (Chair), James, and McCaskill.

I suspect Attorney O'Keefe and Attorney White will want time to review the Proposed Appellate Panel Decision and Order, and I am certainly amenable to allowing them time to do so and/or considering any changes they request and/or that the Appellate Panel requires.

Sincerely,

Vince Northcutt



**Vince Northcutt**  
Partner

**LUEDER, LARKIN & HUNTER, LLC**  
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# ATTACHMENT 2

-----Original Message-----

From: WCC Appeals, [<mailto:appeals@wcc.sc.gov>]

Sent: Thursday, February 22, 2018 8:25 AM

To: WCC Appeals,; Brian O'Keefe; Lea Mason; [SDALES@STEINBERGLAWFIRM.COM](mailto:SDALES@STEINBERGLAWFIRM.COM); [SREBECCA@STEINBERGLAWFIRM.COM](mailto:SREBECCA@STEINBERGLAWFIRM.COM); [TWHITE@STEINBERGLAWFIRM.COM](mailto:TWHITE@STEINBERGLAWFIRM.COM); WCC Appeals,; Vince Northcutt ([VNorthcutt@luederlaw.com](mailto:VNorthcutt@luederlaw.com)); Ansley DeVita ([ADeVita@luederlaw.com](mailto:ADeVita@luederlaw.com))

Subject: RE: Full Commission Order - WCC#:1422259 - HEBERT and 1507127

Pursuant to discussion with Mrs. Hollmon, we had the same computer/technology error occur on this matter with the service of the Order as we did with having to do the Notice for the Hearing itself. While the Order was "linked" and attached to both files, it did not pick up service emails to the second file. Pursuant to instructions of Mrs. Hollmon, I will be today mailing all parties a copy of this Order. It will have today's date of service. This will allow for a date to be corrected for purposes of any possible higher court appeal. Thank you for your time and cooperation in this matter.

Valerie D. Deller  
Judicial Analyst  
SCWCC  
PO Box 1715  
Columbia, SC 29202  
803 737 5732

-----Original Message-----

From: [appeals@wcc.sc.gov](mailto:appeals@wcc.sc.gov) [<mailto:appeals@wcc.sc.gov>]

Sent: Thursday, February 08, 2018 4:43 PM

To: [BOKEEFE@MGCLAW.COM](mailto:BOKEEFE@MGCLAW.COM); [LEA.MASON@MGCLAW.COM](mailto:LEA.MASON@MGCLAW.COM); [SDALES@STEINBERGLAWFIRM.COM](mailto:SDALES@STEINBERGLAWFIRM.COM); [SREBECCA@STEINBERGLAWFIRM.COM](mailto:SREBECCA@STEINBERGLAWFIRM.COM); [TWHITE@STEINBERGLAWFIRM.COM](mailto:TWHITE@STEINBERGLAWFIRM.COM); WCC Appeals, <[appeals@wcc.sc.gov](mailto:appeals@wcc.sc.gov)>

Subject: Full Commission Order - WCC#:1422259 - HEBERT

Attached is the Full Commission Order for WCC#: 1422259

R08 ORD - Full Commission Order - 2/8/2018 - ORDER#: 70859 - WCC #: 1422259

# ATTACHMENT 3

DECISION AND ORDER OF THE APPELLATE PANEL  
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NOS. 1422259 & 1507127

**Thomas Hebert,**

*Employee/Claimant,*

vs.

**Drucker & Falk, I.,L.C.,**

*Employer,*

and

**American Zurich Insurance Co./Zurich North America c/o  
Gallagher Bassett Services, Inc. (Carrier as to WCC File No.: 1507127),**

*Carrier/Appellant,*

**Key Risk Management Services, Inc. (Carrier as to WCC File No.: 1422259),**

*Carrier/Respondent.*

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HEARING: Appellate Panel Review held in Columbia, South Carolina, on November 14, 2017, per Notices timely and properly served upon all parties of interest.

APPEARANCES: Employee/Claimant represented by Thomas M. White, Esquire of Goose Creek, South Carolina.

American Zurich Insurance Co./Zurich North America c/o Gallagher Bassett Services, Inc. and Drucker & Falk, L.L.C. represented by Vincent C. Northcutt, Esquire, of Mount Pleasant, South Carolina.

Key Risk Management Services, Inc. and Drucker & Falk, L.L.C. represented by Brian O'Keefe, Esquire of Mount Pleasant, South Carolina.

COMMISSIONERS: Melody James, Aisha Taylor (Chair), and Gene McCaskill

FILED:

February 22 2018

## STATEMENT OF THE CASE

This matter came before Commissioners Gene McCaskill, Aisha Taylor (Chair), and Melody James (hereinafter "the Appellate Panel") of the South Carolina Workers' Compensation Commission (hereinafter "the Commission") on November 14, 2017. The purpose of the Hearing on November 14, 2017, was to review the findings contained in the Decision and Order issued by Avery B. Wilkerson, Jr. (hereinafter "the Single Commissioner") on June 19, 2017, at the request of American Zurich Insurance Co./Zurich North America c/o Gallagher Bassett Services, Inc. and Drucker & Falk, L.L.C. (hereinafter "the Appellants").

On December 8, 2014, the Claimant, Thomas Hebert, sustained an injury to his lower back (lumbar spine) arising out of and in the course and scope of his employment with Drucker & Falk, L.L.C. Specifically, the Claimant alleges he injured his back, right leg, foot, and toes while lifting and carrying a concrete stair tread that weighed between 100 and 110 pounds. At the time of the accident on December 8, 2014, Key Risk Management Services, Inc. (hereinafter "Key Risk") was the workers' compensation carrier for Drucker & Falk, L.L.C.

On May 5, 2015, the Claimant stepped off a ladder at work, landing on his feet, and filed a second workers' compensation claim against his employer. On May 5, 2015, American Zurich Insurance Co./Zurich North America c/o Gallagher Bassett Services, Inc. was the workers' compensation carrier for Drucker & Falk, L.L.C.

Upon being notified of the May 5, 2015 incident, Key Risk began to deny further liability for the December 8, 2014 claim. (Zurich Ex. C). Following the denial, the Claimant's Attorney filed the first Form 50 with respect to the May 5, 2015 incident.

A subsequent dispute arose between Key Risk and the Appellants, who was the workers' compensation carrier for Drucker & Falk, L.L.C. at the time of the May 5, 2015 incident. The Single Commissioner's Decision and Order was issued following a Hearing held on March 24, 2017, pursuant to Form 50s (Requests for Hearing) filed by the Claimant's Attorney with respect to both the accidents of December 8, 2014, and May 5, 2015, as well as the Form 51s (Employer's Answer to Request for Hearing) filed by counsel for Key Risk and the Appellants.

At the Hearing, the Appellants argued the May 5, 2015 incident represented a mere recurrence of the first injury, based upon the medical evidence and testimony of Dr. Stovall and the Claimant himself. The Appellants further argued the December 8, 2014 accident proximately caused the Claimant's disability. Consequently, Key Risk, the insurer responsible for the risk at the time of the December 8, 2014 accident, should be found to be fully responsible for the Claimant's resulting disability, as well as any and all medical treatment required to tend to lessen the period of the Claimant's disability. Finally, Appellants argued that even assuming the Appellants is the responsible carrier, there is no evidence the Claimant is permanently and totally disabled.

On June 19, 2017, Commissioner Wilkerson issued a Decision and Order on June finding the Appellants solely liable for all medical and indemnity benefits that the Claimant has received following the May 5, 2015 incident, with the following Findings of Fact, which are listed verbatim:

**FINDINGS OF FACT OF THE SINGLE COMMISSIONER**

1. The parties to these proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. This finding is based upon the stipulations and omissions of the parties.

2. The Claimant's applicable compensation rate for the December 8, 2014 injury is \$417.43 based upon an average weekly wage of \$626.11.

3. The Claimant's applicable compensation rate for the May 5, 2015 injury is \$493.32 based upon an average weekly wage of \$739.94.

4. This matter was heard on March 24, 2017 and Order instructions were sent to all parties on April 26, 2017.

5. Pursuant to Commission regulation, the parties participated in mediation which resulted in an impasse.

6. The Claimant, Thomas Hebert, testified and was found to be honest. He also testified to 138 IE band on a test too while working for a car dealership.

7. Claimant is taking narcotics, specifically oxycodone 5 mg, three times per day for over two years.

8. Most employers will not hire an individual who is having to take narcotics during the work day. Current employer has not offered the Claimant a job.

9. Claimant was asked many questions about comments from the doctors and medical interpretations, and the Claimant agrees with his deposition and the medical records and notes, and all parties have agreed that he is not a medical expert.

10. There was some surveillance done February 11, 2017. The Claimant does not deny what is on the video.

11. There were multiple opinions to include Dr. Stovall who is his treating physician and Dr. Johnson. Dr. Stovall indicated in his May 27, 2015 medical narrative that "the patient aggravated his lower back condition with the ladder incident three weeks ago.

12. The last exposure to the injury was the May 5, 2015 accident. There was a second accident, and the second accident was compensable. *Geathers v. 3V, Inc.* (641 SE 2<sup>nd</sup> 29 (S.C. Supreme Court 2007)) would apply making the Carrier for the second accident of May 5, 2015 responsible for this injury aggravated the first work-related injury and bears a causal relation to the Claimant's resulting disability, making the insurer on risk at the time of the second injury solely liable.

13. Claimant has reached maximum medical improvement by September 22, 2016 by agreement of all parties.

14. Claimant had a fusion at L4-L5 by Dr. Stovall on January 12, 2016.

15. The deposition of Dr. Stovall of Lowcountry Orthopaedics was taken February 16, 2017, and was the only deposition presented at the hearing. Pursuant to Dr. Stovall's deposition, Claimant suffered a compression of the back when he slipped off the ladder on May 5, 2015. [APA Submission p. 268 (Stovall Dep. 21:10-18)]. Claimant complained of worsening symptoms and a worsened pre-existing back condition when he presented on May 27, 2015, after the second work-related accident. [APA Submission p. 264 (Stovall Dep. 17:16-18:7)]. After the work-related injury, Claimant experienced symptoms that were different from the symptoms he had prior to the fall off the ladder. He complained of increased lower back pain and some occasional left-sided leg pain and left-sided back pain. Dr. Stovall was unable to give an opinion to a reasonable degree of medical certainty that the second injury did not contribute to the need for surgery, or whether it contributed to 1% or 15% to the need for surgery. [APA Submission 300; 307 (Stovall Dep. 53:31-23; 60:12-18)]. Claimant's fall off the ladder and his increased pain complaints were the reason Dr. Stovall took Claimant out of work on May 27, 2015 [APA Submission p. 269 (Stovall Dep. 22:5-8)].

16. The Claimant has a 20% to the whole person impairment rating based upon the single level fusion. Claimant is having problems in his right leg that are of a radicular nature. The EMG confirmed a chronic right L5 radiculopathy.

17. A vocational evaluation was done by David Price, M.Ed. CRC, on November 7, 2016.

18. A vocational evaluation was done by Cassandra L. Townsend, CPC, CRC, ABVE, A. IPE on March 15, 2017.

19. A disability rating is only one part of the determination of permanent disability.

20. Based on the greater weight of the evidence presented, this Commissioner finds the Claimant is permanently and totally disabled.

The Single Commissioner's Decision and Order also included the following Rulings of Law, which are listed verbatim:

#### **RULINGS OF LAW OF THE SINGLE COMMISSIONER**

1. Pursuant to § 42-1-130 and § 42-1-140, at the time of the accident the Claimant and Defendant/Employer were covered parties under the provisions of the South Carolina Workers' Compensation Act.

2. Under § 42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course and scope of his employment on December 8, 2014 and a second compensable injury by accident arising out of and in the course and scope of his employment on May 5, 2015, when he suffered a compression to the lower back, aggravating his pre-existing lower back condition, with a radiating pain into his legs.

3. Pursuant to § 42-15-60 and *Geathers v. 3V, Inc.* (641 S.E. 2d 29 (S.C. 2007)), the Defendant Zurich, the Carrier for the May 5, 2015 injury is responsible for the payment to the providers under the South Carolina Workers' Compensation fee schedule for all causally related medical expenses to the Claimant's back and affected body parts from the date of the second accident May 5, 2015 forward. Key Risk, the insurer for the date of accident December 8, 2014 shall be responsible for the medicals incurred and causally related between the date of that injury up until the date of the second injury when they then become the responsibility of Zurich.

4. Pursuant to § 42-15-60 and *Geathers v. 3V, Inc.* (641 S.E. 2d 29 (S.C. 2007)), the Defendant Zurich for the injury of May 5, 2015 is responsible for the future medical care as testified to by Dr. Stovall to include injections, medication, physical therapy, and even possibly a spinal column stimulator as recommended by the authorized treating physicians and if causally related for as long as his medicals will tend to lessen the overall disability of Claimant.

5. Pursuant to § 42-9-10, the Claimant is entitled to a period of weekly benefits with Zurich, the Carrier for the May 5, 2015 injury being responsible for the payment of all weekly benefits through the date of maximum medical improvement.

6. The Claimant is permanently and totally disabled. As his incapacity to work resulting from the injury is total, and his benefits would be awarded under § 42-9-10 as the Claimant has a back injury with documented impairment rating and documented by EMG nerve conduction study chronic L5 radiculopathy. There are two body parts involved and pursuant to § 42-9-30, as he has lost more than 50% of the use of his back.

7. *Geathers v. 3V, Inc.* (641 SE 2<sup>nd</sup> 29 (S.C. Supreme Court 2007)) applies and Zurich as the Carrier for the May 5, 2015 injury is the insurer on risk at the time of the second injury, and they will be solely liable because the second injury aggravated the first injury and bears a causal relation to the resulting disability; therefore, the May 5, 2015 injury would be the last injurious exposure to the Claimant.

8. Pursuant to *Geathers v. 3V, Inc.* (641 S.E. 2d 29 (S.C. 2007)) and the October 13, 2015 Consent Order, Defendant Key Risk is entitled to reimbursement for: (a) all temporary total disability benefits paid from October 3, 2015 through September 22, 2016, the date on which Claimant reached maximum medical improvement for the lower back injury, at the compensation rate of \$417.43; (b) a credit for any temporary total disability benefits paid beyond September 22, 2016; (c) any and all medical benefits paid following May 5, 2015; and (d) any and all further benefits disbursed during the pendency of the litigation, pursuant to the Parties' Consent Order dated October 13, 2015.

**EVIDENCE**

**A. Stipulations**

The record on appeal reflects that counsel for the parties stipulated at the Single Commissioner Hearing to the following:

1. The Claimant and the Defendants were subject to and bound by the terms and conditions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and sufficiency of the notice of the hearing were admitted.
3. At the time of the December 8, 2014 injury, the Claimant's average weekly wage was \$626.11, with a compensation rate of \$417.43.
4. At the time of the May 5, 2015 injury, the Claimant's average weekly wage was \$737.94, with a compensation rate of \$493.32.
5. Venue for the Hearing was properly in Dorchester County, South Carolina.

**B. Administrative Procedures Act Submissions**

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

**Claimant's APAs and Exhibits:**

<b>APA</b>	<b>Medical Provider</b>	<b>Dates</b>	<b>Pages</b>
1	Nason Medical Center	02/25/15 - 03/26/15	1 - 22
2	Dr. Don Stovall	03/12/15 - 01/23/17	23 - 152
3	Lowcountry Outpatient Surgery Center	04/13/15 - 05/28/15	153 - 156
4	Dr. Shailesh Patel	05/21/15	157 - 176
5	Sports Plus	05/31/16 - 08/16/16	177 - 234
6	Dr. Don Johnson	08/31/15	235 - 239
<b>EX</b>			
7	Vocational Evaluation, David Price	11/07/16	240 - 246
8	Deposition of Don O. Stovall, Jr., M.D.	02/16/17	247 - 263

**Defendant American Zurich Insurance Co./Zurich North America c/o Gallagher Bassett Services, Inc. and Drucker & Falk, L.L.C.s' APAs and Exhibits:**

<b>APA</b>	<b>Medical Provider</b>	<b>Dates</b>	<b>Pages</b>
1	Walter S. Bartynski, M.D.	04/14/16	1 - 4
<b>EX</b>			
A	Letter from Kimberly Holston of Key Risk	06/05/15	5
B	Consent Order dated October 13, 2015	10/13/15	6 - 10
C	Deposition of Don O. Stovall, Jr., M.D.	02/16/17	11 - 71

**Defendant Key Risk Management Services, Inc. and Drucker & Falk, L.L.C.s' APAs and Exhibits:**

<b>APA</b>	<b>Medical Provider</b>	<b>Dates</b>	<b>Pages</b>
8	Deposition of Don O. Stovall, Jr., M.D.	02/16/17	247 - 307
9	Vocational Assessment Report of Cassandra Townsend	03/22/17	308 - 325
10	Dr. Don Stovall	05/04/15	326

**C. Testimony**

In addition to the APAs and Exhibits, the Single Commissioner received into evidence the live testimony of the Claimant. The Claimant testified on his own behalf, and did not present any other live witnesses at the Hearing. The Defendants did not call any witnesses to testify at the Hearing.

Following receipt of the Single Commissioner's Decision and Order, the Appellants filed a Form 30 (Request for Commission Review) and Addendum on or about June 30, 2017. All parties submitted briefs outlining their positions prior to oral arguments, which were presented before the Appellate Panel at the Hearing on November 14, 2017.

**STANDARD OF REVIEW**

S.C. Code Ann. § 42-17-50 governs appeals from the Single Commissioner to the Full Commission. "The Full Commission may review an award of the Single Commissioner and make its own findings of fact and conclusions of law." *Brayboy v. Clark Heating Company*,

*Inc.*, 306 S.C. 56, 58, 409 S.E.2d 767, 768 (1991); S.C. Code Ann. § 42-17-50. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission." *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. See *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct.App. 2002). The Claimant has the burden of proving entitlement to permanent and total disability or partial disability, and such an award "may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 630-631, 142 S.E.2d 43, 45 (1965) (citing *Colvin v. E.I. Du Pont De Nemours Co.*, 227 S.C. 465, 474, 88 S.E.2d 581, 585 (1955)).

#### **FINDINGS OF FACT OF THE APPELLATE PANEL**

WE, THE APPELLATE PANEL, having reviewed the evidence of the record, the Single Commissioner's Order, and the briefs and oral arguments of the parties, hereby following findings of fact and conclusions of law:

1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. This finding is based upon stipulation of the parties at the commencement of the Hearing.
2. The Claimant's applicable compensation rate for the December 8, 2014 injury is \$417.43, based upon an average weekly wage of \$626.11.
3. The Claimant's applicable compensation rate for the May 5, 2015 injury is \$493.32, based upon an average weekly wage of \$739.94.

4. The Claimant, Thomas Hebert, testified at the Single Commissioner Hearing and was found to be honest. He also testified to 138 IE band on a test too while working for a car dealership.

5. The Claimant is taking narcotics, specifically oxycodone 5 mg. three times per day and has been for over two years.

6. Most employers will not hire an individual who is having to take narcotics during the work day. The Claimant's current employer has not offered the Claimant a job.

7. At the Single Commissioner Hearing, the Claimant was asked many questions about comments from the doctors and medical interpretations, and the Claimant agreed with his deposition and the medical records and notes, and all parties have agreed that he is not a medical expert.

8. There was some surveillance conducted on February 11, 2017. The Claimant does not deny what is on the video.

9. There were multiple medical opinions provided in this case, including those of Dr. Johnson, and Dr. Stovall, the Claimant's treating physician. Dr. Stovall indicated in his May 27, 2015 medical narrative that "the patient aggravated his lower back condition with the ladder incident three weeks ago."

10. The South Carolina Supreme Court has adopted "last injurious exposure rule," which applies to cases in which there is a work-related injury and then an alleged second injury. *Geathers v. 3V, Inc.*, 371 S.C. 570, 577-78, 641 S.E.2d 29, 33 (2007). The last injurious exposure rule "places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." *Id.* (quoting 9 Larson's Workers' Compensation Law at § 153.02[1]). "However, if the second injury is merely a recurrence of the

first injury, then the insurer on the risk at the time of the original injury remains liable for the second." *Id.* at 578, 641 S.E.2d at 33 (quoting 9 Larson's Workers' Compensation Law at § 153.02 [4]).

11. The evidence in this case clearly demonstrates that the incident on May 5, 2015 was merely a recurrence of the progressive, worsening back pain the Claimant had been experiencing on a daily basis since December 8, 2014. The May 5, 2015 incident fits squarely within the framework of the concept of a "recurrence" as intended under the South Carolina Workers' Compensation Act.

12. The medical evidence, the Claimant's own testimony, and the testimony of Dr. Stovall clearly demonstrate that the Claimant had a brief, temporary increase in pain following the May 5, 2015 incident, before returning to the baseline pain he had been experiencing as a result of the December 2014 accident.

13. Dr. Stovall testified that the Claimant's symptoms waxed and waned following the December 2014 injury, but were brought out by, and continue to be symptomatic as a result of the December 2014 injury. (Stovall Dep. P. 57:1-6). Dr. Stovall's opinion that the Claimant's symptoms were not proximately caused by the May 5, 2015 incident is also supported by the fact that there was no change between the March 31, 2015 MRI and the November 2, 2015 MRI. (*Id.* at 51:22 – 25).

14. Walter Bartynski, M.D., a neuro-radiologist retained by the Appellants, also agreed that there was no change in the MRIs. (Def. APA 1).

15. On January 12, 2016, the Claimant underwent a lumbar fusion surgery at L4-L5, which was performed by Dr. Stovall.

16. The Claimant reached maximum medical improvement on September 22, 2016, by agreement of all parties.

17. The Claimant was assigned a 20% to the whole person impairment rating by Dr. Stovall, based upon the single level fusion. The Claimant has problems in his right leg that are of a radicular nature, and the EMG study confirmed a chronic right L5 radiculopathy.

18. On November 7, 2016, a vocational evaluation was performed by David Price, M.Ed. CRC, at the request of the Claimant's attorney.

19. On March 15, 2017, a vocational evaluation was conducted by Cassandra L. Townsend, CPC, CRC, ABVE, A. IPE at the request of the attorney for Key Risk.

20. A disability rating is only one part of the determination of permanent disability.

21. Based on the greater weight of the evidence presented, this Commissioner finds the Claimant is permanently and totally disabled.

#### **RULINGS OF LAW OF THE APPELLATE PANEL**

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

1. Pursuant to § 42-1-130 and § 42-1-140, at the time of the accident, the Claimant and the Defendants were covered parties under the provisions of the South Carolina Workers' Compensation Act.

2. Pursuant to § 42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course and scope of his employment on December 8, 2014.

3. Pursuant to § 42-15-60 and *Geathers v. 3V, Inc.*, 371 S.C. 570, 577-78, 641 S.E.2d 29, 33 (2007), full liability shall be placed upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. The medical

evidence, the Claimant's own testimony, and the testimony of Dr. Stovall clearly demonstrates that the incident on May 5, 2015 was merely a recurrence of the progressive, worsening back pain the Claimant had been experiencing on a daily basis since December 8, 2014. While the Claimant experienced a week or two of pain after the May 5, 2015 incident, there is simply no evidence that the Claimant sustained an actual worsening of his underlying lumbar condition, or that the May 5, 2015 incident resulted in the Claimant's ultimate disability or need for surgery.

4. The true determining factor as to whether a second insurer is liable for a claimant's disability is whether the aggravation or worsening of the Claimant's symptoms was the proximate cause of the claimant's resulting disability. See *Gordon v. E.I. du Pont de Nemours & Co.*, 228 S.C. 67, S.E.2d 844, 848 (1955). The Claimant was on modified or restricted duty at Dr. Stovall's recommendation from the March 23, 2015, through May 27, 2015. (Clmt. APA 2, P. 31, 49; Stovall Dep. P. 49:23 – 25; 50:1 – 3). Dr. Stovall only took the Claimant out of work entirely once it became readily apparent that the second injection had failed and the Claimant was going to undergo surgery.

5. The Claimant was working under restrictions with constant pain prior to the May 5, 2015 incident, and felt he was able to continue working after the May 5, 2015 incident. Ultimately, the Claimant's placement on sedentary duty was due to a symphony of circumstances, including the EMG results, ongoing back pain, two failed injections, and the recommendation for surgery, all of which stemmed from the December 2014 accident. Therefore, the evidence supports that it was the Claimant's ultimate need for surgery that took him out of work, and the surgery as well as any permanent work restrictions the Claimant has been assigned are the result of the December 2014 injury. (Stovall Dep. P. 50; 52 – 53).

6. Pursuant to § 42-15-60 and *Geathers* and *Gordon*, Key Risk, the carrier for the Employer at the time of the December 8, 2014 accident, is responsible for the payment to the providers under the South Carolina Workers' Compensation fee schedule for all causally related medical expenses to the Claimant's back and affected body parts from December 8, 2014, and continuing.

7. Pursuant to § 42-15-60 and *Geathers* and *Gordon*, Key Risk is responsible for the future medical care as testified to by Dr. Stovall, to include injections, medication, physical therapy, and even possibly a spinal column stimulator, for as long as his medicals will tend to lessen the overall disability of Claimant.

8. Pursuant to § 42-9-10, Key Risk shall be responsible for any and all temporary total (and/or partial) disability compensation benefits from December 8, 2014, to the present date, and continuing.

9. Key Risk shall reimburse the Appellants for the temporary total disability benefits they paid pursuant to the Consent Order for the period from May 6, 2015, through October 2, 2015, a total of **Ten Thousand Five Hundred Seventy-One and 16/100 (\$10,571.16) Dollars**; however, Key Risk shall receive a dollar-for-dollar credit in the amount of **Ten Thousand Five Hundred Seventy-One and 16/100 (\$10,571.16) Dollars** for any balance due to the Claimant under this Decision and Order, as the Claimant has already received, and presumably exhausted, the **Ten Thousand Five Hundred Seventy-One and 16/100 (\$10,571.16) Dollars** he was paid under the parties' prior Consent Order.

10. Key Risk shall also reimburse the Appellants for any and all medical benefits the Appellants provided to the Claimant following the May 5, 2015 incident, save for the cost associated with any medical experts retained by the Appellants.

11. The Claimant is permanently and totally disabled. The Claimant's incapacity to work resulting from the injury is total, and his benefits would be awarded under § 42-9-10, as he has a back injury with a documented impairment rating and documented by EMG nerve conduction study chronic L5 radiculopathy. There are two body parts involved, and pursuant to § 42-9-30, he has lost more than 50% of the use of his back.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED ADJUDGED AND DECREED that the Claimant sustained a compensable injury by accident arising out of and in the course and scope of his employment on December 8, 2014.

IT IS FURTHER ORDERED that the May 5, 2015 incident represented a mere recurrence of the first injury, and the Claimant's disability was and is proximately caused by the December 8, 2014 accident.

IT IS FURTHER ORDERED that Key Risk, the carrier for the Employer at the time of the December 8, 2014 accident, is responsible for the payment to the providers under the South Carolina Workers' Compensation fee schedule for all causally related medical expenses to the Claimant's back and affected body parts from December 8, 2014, and continuing for as long as his medicals will tend to lessen the overall disability of Claimant.

IT IS FURTHER ORDERED that Key Risk shall be responsible for any and all temporary total (and/or partial) disability compensation benefits from December 8, 2014, to the present date, and continuing.

IT IS FURTHER ORDERED Key Risk shall reimburse the Appellants for the temporary total disability benefits they paid pursuant to the Consent Order for the period from May 6, 2015, through October 2, 2015, a total of **Ten Thousand Five Hundred Seventy-One and 16/100**

(\$10,571.16) Dollars; however, Key Risk shall receive a dollar-for-dollar credit in the amount of Ten Thousand Five Hundred Seventy-One and 16/100 (\$10,571.16) Dollars for any balance due to the Claimant under this Decision and Order, as the Claimant has already received, and presumably exhausted, the Ten Thousand Five Hundred Seventy-One and 16/100 (\$10,571.16) Dollars he was paid under the parties' prior Consent Order.

IT IS FURTHER ORDERED Key Risk shall also reimburse the Appellants for any and all medical benefits the Appellants provided to the Claimant following the May 5, 2015 incident, save for the cost associated with any medical experts retained by the Appellants.

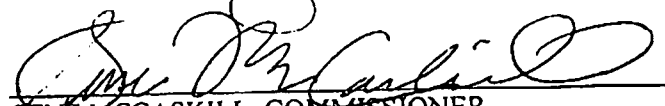
IT IS FURTHER ORDERED that the Claimant is permanently and totally disabled pursuant to § 42-9-10 and § 42-9-30(21), and shall receive the maximum benefits allowed under the Act or 500 weeks of benefits with a credit for weeks paid to date.


The Single Commissioner's Order of June 19, 2017, is, therefore, **AFFIRMED IN PART AND REVERSED IN PART.**

**AND IT IS SO ORDERED.**

**APPELLATE PANEL OF THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION:**

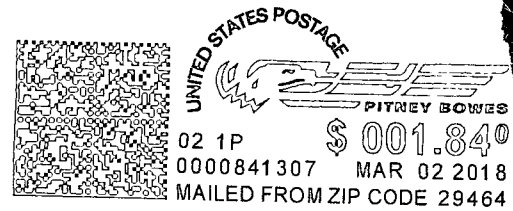
  
\_\_\_\_\_  
AISHA TAYLOR, CHAIR

  
\_\_\_\_\_  
GENE MCCASKILL, COMMISSIONER

  
\_\_\_\_\_  
CERTIFICATE OF SERVICE

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

**By Valerie Deller on February 22, 2018**



**mgc** | **INSURANCE  
DEFENSE**

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**MAR 05 2018**

**SC Court of Appeals**

**2016.15038/HFH/kea**  
The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

