ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SCWCC No. 0920040

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John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders SIF and Bridgefield Casualty Ins. Co., Defendants,

Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Appellants/Respondents.

and South Carolina Builders SIF is Respondent.

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**APPELLANTS' BRIEF OF APPELLANTS/RESPONDENTS**

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## STATEMENT OF THE CASE

On March 22, 2004, John R. Bowen ("Bowen") sustained an injury to his neck, lower back, and right upper extremity arising out of and in the course of his employment with Vinyl Services, Inc. ("Vinyl Services"). (R. p. 39). Vinyl Services' workers' compensation carrier at the time of Bowen's March 22, 2004 work accident was South Carolina Home Builders Self Insured Fund ("Home Builders"). (R. p. 37). A hearing was held on March 7, 2006 to determine if Bowen was entitled to an award of permanent partial disability and to determine if Bowen was entitled to additional medical treatment. Id.

On August 9, 2006, Commissioner George F. Funderburk issued a Decision and Order finding that Bowen had sustained 35% permanent partial disability to his back and 10% permanent partial disability to his right lower extremity as a result of his March 22, 2004 work accident. (R. p. 47). Commissioner Funderburk further found that, pursuant to Dodge v. Bruccoli, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999), Bowen was entitled to continuing medical treatment for his neck, back, and right lower extremity injuries in order to maintain his current level of functioning, prevent further deterioration of his condition, and allow him to continue working. (R. p. 48).

In April of 2007, Bowen contacted Home Builders and indicated that he needed to return to Dr. McCallum, the authorized treating physician for his 2004 workers' compensation claim, because his right ankle had become symptomatic. (R. p. 21, lines 19-24; R. p. 280). On April 23, 2007, Bowen was seen by Dr. McCallum. (R. p. 280). Dr. McCallum performed arthroscopic surgery on Bowen's right ankle on July 10, 2007,

and on October 22, 2007, Dr. McCallum opined that Bowen had reached maximum medical improvement with no additional impairment. (R. pp. 282-84; R. p. 430).

On February 19, 2010, Bowen filed a Form 50 Request for Hearing in his March 22, 2004 claim alleging that he had sustained a change of condition and alleging injuries to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay. (R. p. 50). On February 23, 2010, Vinyl Services and Home Builders filed a Form 51 denying that Bowen was entitled to any additional benefits as a result of his March 22, 2004 claim.

Bowen also filed a second Form 50 on February 19, 2010 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. p. 51). On March 17, 2010, Vinyl Services and Bridgefield Casualty Insurance Company ("Bridgefield"), Vinyl Services' workers' compensation carrier on November 11, 2009, filed a Form 51 denying that Bowen sustained a compensable injury by repetitive trauma arising out of and in the course of his employment. (R. p. 52).

On May 17, 2010, the Commission issued an Order consolidating Bowen's March 22, 2004 claim (WCC File #0402800) and Bowen's November 11, 2009 claim (WCC File #0920040), and a hearing was subsequently scheduled in front of Commissioner Avery B. Wilkerson on June 24, 2010 in Anderson, South Carolina. (R. pp. 15 & 36).

At the hearing, Bowen alleged that he sustained a change of condition for the worse to his back and right lower extremity resulting from his March 22, 2004 workers' compensation claim. (R. p. 67, lines 20-22). Bowen also alleged that he sustained an injury by repetitive trauma to his low back on November 11, 2009. (R. p. 67, lines 22-25).

Bowen sought additional medical treatment as recommended by Dr. Lucas. (R. p. 68, lines 9-11). He also sought an award of temporary total disabilty beneftis from November 11, 2009 and continuing. (R. p. 68, lines 7-9). Home Builders, the carrier on March 22, 2004, denied that Bowen sustained a compensable change of condition. (R. p. 69, lines 6-9). Home Builders contended that Bowen's current condition was not causally related to his March 22, 2004 work accident and that his current alleged condition was the result of repetitive trauma. (R. p. 69, lines 11-13). Bridgefield, the carrier on November 11, 2009, maintained that Bowen did not sustain a compensable repetitive trauma injury culminating on November 11, 2009. (R. p. 70, lines 22-25). Bridgefield contended that Bowen's job was not a repetitive job, that Bowen's injury was not an accident because there was no unexpected result, and that Bowen's job was one of many factors that caused his current problems. Bridgefield further contended that Bowen's current back condition was related to his March 22, 2004 work accident. (R. p. 71, line 1 – p. 75, line 5). Bridgefield also contended that even assuming Bowen sustained a compensable repetitive trauma injury culminating on November 11, 2004, Bowen's claim was barred because he failed to provide proper notice to Vinyl Services pursuant to S.C. Code Ann. § 42-15-20(C). (R. p. 73, lines 13-24).

On November 18, 2010, Commissioner Wilkerson issued an Order finding that Bowen sustained a compensable injury to his low back as the result of repetitive trauma culminating on November 11, 2009. (R. pp. 15 & 29). Commissioner Wilkerson further found that Bridgefield was responsible for all causally related medical treatment incurred to date as a result of Bowen's injury by repetitive trauma and also for additional related medical treatment as directed by Dr. Lucas. (R. p. 34). Finally, Commissioner Wilkerson

found that Bridgefield was responsible for temporary total disability benefits at the compensation rate of $430.52 from December 20, 2009 to the present and continuing. Id.

On December 1, 2010, Bridgefield filed an appeal to the Appellate Panel of the Workers' Compensation Commission, and on December 6, 2010, Bowen filed an appeal to the Appellate Panel of the Workers' Compensation Commission. (R. pp. 53-56). Oral argument was heard before the Appellate Panel on April 18, 2011. (R. p. 1). On July 21, 2011, the Appellate Panel issued a Decision and Order fully affirming Commissioner Wilkerson's Decision and Order. (R. pp. 1-14).

Bridgefield filed a Notice of Appeal with the South Carolina Court of Appeals on July 28, 2011. (R. pp. 57-61). Bowen filed a Notice of Cross-Appeal with the South Carolina Court of Appeals on August 1, 2011. This appeal follows.

## STATEMENT OF THE FACTS

On March 22, 2004, Bowen sustained an injury to his neck, back, and right upper extremity arising out of and in the course of his employment with Vinyl Services when he fell approximately 18 feet from a scaffold to the ground. (R. p. 44). On the day of his accident, Bowen presented to Oconee Memorial Hospital with complaints of pain in his lumbar spine, both ankles, and right foot. (R. p. 265). Bowen was diagnosed with a lumbar strain and sprain of both ankles and instructed to follow up at Blue Ridge Orthopaedics. (R. pp. 266-67).

Following his accident, Bowen received treatment for his right ankle and right foot injury from Dr. P. Sean McCallum at Blue Ridge Orthopaedics. (R. pp. 274-79). On May 28, 2004, Dr. McCallum opined that Bowen had reached maximum medical improvement for his right ankle and right foot injury and that Bowen had sustained 5% permanent partial impairment to his right lower extremity as a result of his March 22, 2004 work injury. (R. p. 279).

Bowen also received treatment from Dr. S. Emmett Lucas for the neck and back injuries that he sustained as a result of his March 22, 2004 work accident. (R. pp. 298-307). On January 24, 2005, Dr. Lucas performed a C5-6 anterior cervical diskectomy and interbody fusion on Bowen's cervical spine. (R. pp. 317-19). Following his surgery, Bowen continued to treat with Dr. Lucas. (R. pp. 305-07). On April 24, 2005, Dr. Lucas opined that Bowen had reached maximum medical improvement and that Bowen had sustained 15% permanent impairment as a result of his injury. (R. p. 43).

On February 15, 2006, Bowen presented to Dr. Robert A. Dameron, Jr. for an independent medical evaluation. (R. p. 320). Dr. Dameron noted that as a result of the

injuries Bowen sustained in his March 22, 2004 work accident, "[h]is activities of daily living have been impaired." (R. p. 321). Dr. Dameron further noted that Bowen "was unable to put in heavy work on his farm because heavy work aggravates his low back pain." Id. Dr. Dameron also noted that Bowen stated that at work "he can do reasonably well for about two and half hours before he starts having pain." (R. pp. 320-21). After evaluating Bowen, Dr. Dameron opined that as a result of his March 22, 2004 work accident, Bowen had sustained 11% impairment to the lumbar spine, 80% impairment to the cervical spine, 5% impairment to the left upper extremity, and 9% impairment to the right lower extremity. (R. p. 322).

A hearing was held in Bowen's March 22, 2004 workers' compensation claim on March 7, 2006 before Commissioner George F. Funderburk. (R. p. 37). On August 9, 2006, Commissioner Funderburk issued an Order and specifically noted that "[Bowen] testified he continues to experience pain and difficulty in his neck, low back, and right ankle." (R. p. 40). He further noted that "[Bowen] stated that he has low back pain consistently but that it is worse on some days than others" and that Bowen "stated that he has bad days with his low back about three times per week, and he cannot function much when that happens." Id. Commissioner Funderburk found that Bowen had sustained 35% loss of use of his spine and 10% loss of use of his right lower extremity as a result of his March 22, 2004 work accident. (R. p. 47). Commissioner Funderburk further found that Home Builders was responsible for "continuing medical treatment for his neck, back, and right lower extremity injuries, including medications, as is needed to maintain his current level of functioning, prevent further deterioration of his condition, and allow him to continue working." (R. pp. 48-49).

In April of 2007, Bowen contacted Home Builders indicating that he needed to return to Dr. McCallum because his right ankle had become symptomatic. (R. p. 21, lines 19-24; R. p. 280). On April 23, 2007, Bowen was evaluated by Dr. McCallum, who recommended an MRI of his right ankle. (R. p. 280). Following the MRI of his right ankle Dr. McCallum recommended surgery to address Bowen's right ankle complaints. (R. p. 281). On July 10, 2007, Dr. McCallum performed arthroscopic surgery on Bowen's right ankle. (R. pp. 282-84). Following his right ankle surgery, Bowen continued to treat with Dr. McCallum, and on October 22, 2007, Dr. McCallum opined that Bowen had reached maximum medical improvement with no additional impairment. (R. p. 430).

On May 20, 2009, Bowen presented to Dr. Edward H. Booker, his family doctor, with complaints of back pain. (R. p. 402). Dr. Booker noted that Bowen had "back pain s/p work accident 5 years ago." Id.

On November 11, 2009, Bowen went out of work because business was slow and Vinyl Services had a temporary layoff. (R. p. 103, lines 3-11). After going out of work, Bowen began drawing full unemployment benefits. (R. p. 103, lines 12-14).

On December 28, 2009, a little over a month after he went out of work, Bowen presented to Dr. Booker with complaints of back pain and leg pain. (R. p. 399). Dr. Booker noted that Bowen's back pain was chronic. Id. He specifically indicated that Bowen "presents with back and leg pain that has reached a crisis point. He fell at work 4 years ago and has been suffering since then." Id. Dr. Booker noted that Bowen had contacted his workers' compensation company, Home Builders, and that Home Builders

was arranging a follow up appointment with his original workers' compensation physician, Dr. Lucas. (R. p. 400).

Home Builders authorized treatment with Dr. Lucas, and on January 20, 2010, Bowen presented to Dr. Lucas for an evaluation of his lower back problems. (R. pp. 308 & 368). Prior to the evaluation, Bowen completed a Patient Information Form and related his lower back pain to his March 22, 2004 work accident. (R. p. 364). In his January 20, 2010 note, Dr. Lucas indicated that since his March 2004 work accident, Bowen "says he has always had some chronic back pain, but it has been worsening in the last 2 years with no specific injury." (R. p. 308). Dr. Lucas recommended MRIs of Bowen's cervical spine and lumbar spine. (R. p. 309). Dr. Lucas also wrote Bowen out of work. (R. p. 310). Following the MRIs of his cervical spine and lumbar spine, Bowen returned to Dr. Lucas for a follow up appointment on February 3, 2010. (R. p. 311). Dr. Lucas specifically noted that the onset date of Bowen's complaints was March 22, 2004. Id. Dr. Lucas reviewed Bowen's MRIs and recommended a series of lumbar steroid injections. Id. Bowen underwent his first epidural steroid injection on February 3, 2010. Id. In addition to paying for Bowen's evaluations with Dr. Lucas, Home Builders, Vinyl Services' workers' compensation carrier for his March 22, 2004 work accident, authorized and paid for Bowen's MRIs and steroid injection. (R. pp. 367-70).

In January of 2010, February of 2010, and April of 2010, Bowen completed several short-term disability forms and indicated that his current lower back condition was a result of his March 22, 2004 work accident. (R. pp. 376-78; R. pp. 380-82). Dr. Lucas also completed multiple Attending Physician's Statements for Bowen's short-term

disability application, and he opined in each statement that Bowen's current back condition resulted from his fall at work on March 22, 2004. (R. pp. 379 & 382).

As noted above, on February 19, 2010, Bowen filed a Form 50 Request for Hearing in his March 22, 2004 claim alleging that he had sustained a change of condition and alleging injuries to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay. (R. p. 50). Bowen also filed a Form 50 on February 19, 2010 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. p. 51). On February 23, 2010, Vinyl Services and Home Builders filed a Form 51 denying that Bowen was entitled to any additional benefits as a result of his March 22, 2004 claim. On March 17, 2010, Vinyl Services and Bridgefield, Vinyl Services' workers' compensation carrier on November 11, 2009, filed a Form 51 denying that Bowen sustained a compensable injury by repetitive trauma arising out of and in the course of his employment. (R. p. 52).

On May 12, 2010, the parties took the deposition of Dr. S. Emmett Lucas. (R. p. 193). After reviewing Bowen's prior medical records and the prior Order from the South Carolina Workers' Compensation Commission dated August 9, 2006, Dr. Lucas testified that Bowen has had a fairly significant degree of ongoing chronic back pain in his lower back since his March 22, 2004 work injury. (R. p. 238, lines 5-21). With regards to Bowen's February 2, 2010 MRI of the lumbar spine, Dr. Lucas testified that most of the findings in the MRI were degenerative in nature. (R. p. 214, lines 5-9). Dr. Lucas also testified that Bowen's condition has progressed since his 2004 lower back injury and that his progression is consistent with the progression of degenerative changes over time. (R.

p. 214, lines 13-25). While Dr. Lucas testified that he believed Bowen's job activities aggravated his preexisting back problems, Dr. Lucas also testified that multiple factors could have been the precipitator of Bowen's current back problems, including another fall from a scaffold, deer hunting a couple of times per week, any vigorous activity, and any activity that required Bowen to bend and lift, including picking laundry off of the floor. (R. p. 224, lines 3-25; R. p. 236, lines 21-25). Dr. Lucas also testified that Bowen's preexisting degenerative disc disease could have developed idiopathically. (R. p. 27, lines 16-21). Dr. Lucas specifically testified that Bowen's current condition could be multifactorial and that if Bowen continued to perform other activities, such as hunting, after he went out of work in November of 2009, those activities could be contributing to his current back condition. (R. p. 28, lines 2-4; R. p. 29, lines 16-21).

At the hearing, Bowen testified that he worked as a crew foreman for Vinyl Services and that his job with Vinyl Services required him to go to different houses or businesses and perform different types of projects. (R. p. 78, lines 11-16; R. p. 113, lines 18-25). He testified that his job required him to build scaffolds, to install vinyl siding, to install windows, to install Hardie board, to set columns, to install doors, and to load and unload materials that are used on the job site. (R. p. 78, lines 11-16; R. p. 114, lines 1-6). Bowen specifically testified that every job he performed for Vinyl Services is different and that each job required him to do a variety of different tasks throughout the day. (R. p. 113, lines 22-25; R. p. 114, lines 7-9).

Bowen testified that his prior workers' compensation claim on March 22, 2004 was his third workers' compensation claim with Vinyl Services. (R. p. 106, lines 9-10). With regards to his March 22, 2004 work accident, Bowen testified that he fell off of a

walk board and that he sustained injuries to his right ankle, neck, and lower back. (R. p. 80, lines 15-24). Bowen testified that following his March 22, 2004 work accident, he returned to work for Vinyl Services in May of 2005. (R. p. 92, lines 17-19). When specifically asked about his prior lower back injury, Bowen testified that he sustained a fairly significant injury to his lower back on March 22, 2004 and that he continued to have problems with his lower back at his prior workers' compensation hearing in March of 2006. (R. p. 94, lines 19-25). Bowen further testified that he has continued to have lower back problems since his 2004 injury and that his problems have gotten worse over time. (R. p. 95, lines 20-23). Bowen testified that his job duties with Vinyl Services, specifically bending, lifting, and carrying the Hardie board, which weighed up to 100 pounds, caused his back problems to get worse. (R. p. 85, lines 11-20).

Bowen testified that he has known for some years, at least since 2008, that his current back problems was being caused by his job duties with Vinyl Services. (R. p. 97, lines 8-11). However, Bowen testified that he never told Vinyl Services that his job was causing the pain in his lower back to increase. (R. p. 97, lines 12-18). Bowen also testified that a couple of years before the hearing, he fell off of an eight foot walk board while working for Vinyl Services and that his fall off of the walk board caused some pain and "a shocking feeling" in his lower back. (R. p. 95, line 24–p. 96, line 12).

Bowen testified that when he did not think he could perform his job any more because of his back problems, he contacted Home Builders, the workers' compensation carrier for his 2004 work accident, because Home Builders was supposed to provide him with continued medical care for his back. (R. p. 97, line 22–p. 100, line 11). Bowen

testified that Home Builders initially sent him back to Dr. Lucas for treatment to his back. (R. p. 100, lines 12-15).

Finally, Bowen testified that after he went out of work on November 11, 2009 due to Vinyl Services' temporary layoff, he hunted twice per week and that he stocked his freezer full of deer that season. (R. p. 103, line 24–p. 104, line 7). Bowen specifically testified that when he hunts, he rides his four-wheeler to his tripod and that he climbs up and hunts in his tripod, which is approximately 12 feet off of the ground. (R. p. 106, line 16–p. 107, line 18).

## STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307.

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

> The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for further proceedings. The Court may

> reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007)(emphasis added).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)). "The determination of legislative intent is a matter of law." Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841 (1995). It is also well settled that:

> In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. [Citation omitted] Notwithstanding, this Court will afford the most respectful consideration to the interpretation of the statute by the agency charged with its administration. [Citation omitted]

Hardee v. McDowell, et. al., 372 S.C. 413, 417, 642 S.E.2d 632, 634 (Ct. App. 2007) (citing Bursey v. South Carolina Dep't of Health & Environmental Control, 369 S.C. 176, 186, 631 S.E.2d 899, 905 (2006)).

# ARGUMENTS

## I.

## THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT BOWEN SUSTAINED A COMPENSABLE REPETITIVE TRAUMA INJURY CULMINATING ON NOVEMBER 11, 2009.

A claimant has the burden of proof to show such facts as will render an injury compensable under the Workers' Compensation Act. Holman v. Bulldog Trucking Co., 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). An award of benefits must not be based on surmise, conjecture or speculation. Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998).

### A. Bowen's job with Vinyl Services was not a repetitive job as required by S.C. Code Ann. § 42-1-172 (2007).

South Carolina Code Ann. § 42-1-172(A) defines a repetitive trauma injury as "an injury which is gradual in onset and caused by the cumulative effects of **repetitive traumatic events**." (emphasis added). Additionally, **S.C. Code Ann. § 42-1-172(B) mandates that a claimant must establish that the job consists of repetitive activities.** In the present case, the substantial evidence in the record does not support the Commission's finding that Bowen's job with Vinyl Services was repetitive and sufficient to cause repetitive trauma within the meaning of S.C. Code Ann. § 42-1-172.

While Bowen's job with Defendant Vinyl Services was a physical job, Bowen's own testimony clearly establishes that his job was not a repetitive job as required by S.C. Code Ann. § 42-1-172. Bowen worked as a crew foreman for Vinyl Services. (R. p. 78, lines 11-12). Bowen's job with Vinyl Services required him to go to different houses or businesses and perform different types of projects. (R. p. 114, lines 7-13). Specifically,

Bowen's job required him to build scaffolds, to install vinyl siding, to install windows, to install Hardie board, to set columns, to install doors, and to load and unload materials that are used on the job site. (R. p. 78, lines 11-16; R. p. 114, lines 1-6). Bowen's job did not require him to perform the same tasks each day. In fact, Bowen specifically testified that every job he performed for Vinyl Services is different:

> Q: (Mr. Lewis) Okay. It's fair to say every -- every job is a little bit different from the others?
>
> A: (Bowen) That's correct.

(R. p. 114, lines 7-9). Bowen further testified that his job required him to do a variety of different tasks throughout the day:

> Q: (Mr. Lewis) Your most -- well, let me ask you this way. Is your -- your job involves a variety of different tasks that you do throughout the day?
>
> A: (Bowen) That's correct.

(R. p. 113, lines 18-21).

While Bowen's job with Vinyl Services was a physical job, Bowen's own testimony establishes that his job was not a repetitive job as required by S.C. Code Ann. § 42-1-172. **Hard work in itself is not compensable.** There is no dispute that Bowen's job with Vinyl Services was a physical job; however, the substantial evidence in the record, specifically Bowen's own testimony, clearly establishes that his job with Vinyl Services was not a repetitive job. Bowen did not perform the same tasks throughout the day. In fact, Bowen's testimony clearly establishes that he worked a variety of jobs and that each job required him to perform an array of different tasks.

Thus, since Bowen's job was not a repetitive job, the Commission erred in finding that Bowen sustained a compensable injury by repetitive trauma. As such, Appellant

Bridgefield respectfully requests that the Court reverse the Commission's decision that Bowen sustained an injury by repetitive trauma.

B. Bowen's alleged repetitive trauma injury was not an accidental result as required by the Act.

Even though a repetitive trauma injury under S.C. Code Ann. § 42-1-172 (2007) has separate requirements from an injury by accident under S.C. Code Ann. § 42-1-160 (2007), both a repetitive trauma injury and an injury by accident require an accidental result. The word "accident," as used in a workers' compensation act, means an unlooked for and untoward event that the person who suffered the injury did not expect, design, or intentionally cause. Yates v. Life Ins. Co. of Georgia, 291 S.C. 301, 353 S.E.2d 291 (Ct. App. 1986). An injury is unexpected, so as to bring it within the category of "accident" if the workman did not intend or expect that it would result on the particular occasion from what he was doing. Colvin v. E.I. Du Pont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955).

The South Carolina Court of Appeals addressed the requirement of an accidental injury in Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (1992). In Havird, the claimant, who suffered from varicose veins, worked at the Columbia YMCA as a masseur. Id. at 398, 418 S.E.2d at 329-30. His job required him to stand during 85% of his work day or about seven hours per day. Id. at 398, 418 S.E.2d at 330. The claimant had received previous treatment for his varicose veins and was aware that long periods of standing were bad for his condition. Id. However, the claimant continued to work as a masseur, which required long periods of standing. Id. The claimant later filed a claim for workers' compensation benefits alleging that he had sustained an accidental injury to the vascular systems of his legs. Id. at 397, 418 S.E.2d at 329. The claimant's physician

testified that "the nature of [claimant's] job aggravated his condition and made it worse and made it progress faster than it would if he'd had a job that did not require standing for long periods in a limited area." Id. at 399, 418 S.E.2d at 330. The Court of Appeals affirmed a denial of the claimant's claim for benefits on the basis that he had not sustained an accidental injury. Id. at 400, 418 S.E.2d at 331. The Court noted that even though the claimant's condition may have been aggravated by standing for seven hours per day as required by his job, the claimant's job did not cause his varicose veins. Id. The Court further noted that the claimant knew standing in his job aggravated his condition and that the worsening of his condition was the natural and expected result of working in a job that was performed while standing. Id. Thus, the Court held that the claimant had not sustained an accidental injury within the meaning of the Workers' Compensation Act. Id.

The facts in Havird are analogous to the facts in the current case. In the present case, Bowen suffered from prior back problems, and Bowen received treatment for his prior back problems. The prior medical records and Bowen's own testimony indicate that Bowen was aware that heavy work, including his job with Vinyl Services, aggravated his prior back problems. Additionally, Bowen's physician, Dr. Emmett S. Lucas, also opined that Bowen's prior back problems were aggravated by his job duties. Yet, like in Havird, even though Bowen was aware that heavy work, including his job with Vinyl Services, was aggravating his prior back problems, Bowen continued to work for Vinyl Services. Thus, pursuant to the Court's decision in Havird, because Bowen knew his job was aggravating his preexisting condition and because Bowen continued to work, Bowen's

alleged repetitive trauma injury is not an accidental injury because it was not unexpected or unforeseen.

In the present case, Bowen suffered from prior lower back problems. In fact, Bowen suffered a prior work-related injury to his lower back, neck, and right lower extremity while working for Vinyl Services on March 22, 2004, when he fell to the ground from a scaffold that was approximately 18 feet high. (R. p. 44). Following his injury, Bowen received treatment from a number of physicians, including Dr. Emmett S. Lucas and Dr. Robert A. Dameron. (R. p. 45). On March 7, 2006, a hearing was held in Bowen's March 22, 2004 workers' compensation claim in front of Commissioner George N. Funderburk to determine the extent of Bowen's permanent disability resulting from his 2004 work accident. (R. pp. 37 & 39). On August 9, 2006, Commissioner Funderburk issued an Order and specifically noted that Bowen testified "that he has low back pain consistently but that it is worse on some days than others" and "that he has bad days with his low back about three times per week, and he cannot function much when that happens." (R. p. 40).

When questioned about his March 22, 2004 work accident at the hearing in the current matter, Bowen confirmed that he sustained a fairly significant injury to his lower back and that he continued to have problems with his lower back in March of 2006:

Q: (Mr. Lewis) ...I mean, in addition to injuring your neck you had a fairly significant injury to your low back, correct?

A: (Bowen) Correct. Yes, sir.

Q: All right. And we've talked a little about the order in this case. And you testified in a hearing in 2006, that your low back pain was bothering your pretty constantly; isn't that right?

A: Correct.

(R. p. 94, lines 22-25). Bowen further testified that he has continued to have lower back problems since his 2004 injury and that his problems have gotten worse over time:

> Q: (Mr. Lewis) Okay. And really what's happened here is your back has always been bad since this initial injury and its just gotten worse and worse over time; is that right?
>
> A: (Bowen) That's correct.

(R. p. 95, lines 20-23).

While it is undisputed that Bowen had prior lower back problems that have continued to worsen since his 2004 work accident, substantial evidence in the record also supports a finding that Bowen knew that heavy work, including his job with Vinyl Services aggravated his preexisting lower back problems. First, Bowen's prior medical records indicate that Bowen was aware that heavy work aggravated his prior lower back problems. Bowen returned to full duty work following his 2004 work accident in May of 2005. (R. p. 92, lines 17-19). On February 15, 2006, approximately 5 weeks before the permanency hearing in his 2004 workers' compensation claim, Bowen presented to Dr. Robert A. Dameron for an evaluation of his March 22, 2004 work-related injuries. (R. p. 320). In his report, Dr. Dameron specifically noted that Bowen's activities of daily living have been impaired, that he has been unable to perform heavy work because heavy work aggravates his lower back pain, and that Bowen's pain increases when he works for Vinyl Services:

> His activities of daily living have been impaired...**He is unable to put in heavy work on his farm because heavy work aggravates his low back pain. At work he states he can do reasonably well for about two and half hours before he starts having pain.**

(R. pp. 321-22)(emphasis added).

Additionally, Commissioner Funderburk's August 9, 2006 Order indicates that Bowen was aware that heavy work, including heavy work with Vinyl Services aggravated his lower back problems. It is specifically noted in the Order that Bowen testified "that he has low back pain consistently" and that **due to his continued lower back problems "[h]e has to avoid any heavy lifting, and he cannot bend or stoop to work on things on the ground."** (R. p. 40)(emphasis added).

It is clear that prior to the resolution of his 2004 workers' compensation claim, based on Dr. Dameron's February 15, 2006 report and based on Bowen's testimony at the March 6, 2006 hearing, that Bowen was aware that heavy work aggravated his lower back problems. **In fact, Bowen was specifically aware that heavy lifting, bending, and stooping all aggravated his lower back condition.** Even though Bowen knew that these activities aggravated his prior lower back problems, Bowen returned to his job Vinyl Services.

When asked about his job duties with Vinyl Services at the hearing in the current matter, Bowen testified that his job required him perform a variety of tasks, including: installing vinyl siding, installing windows, installing Hardie board, building scaffolds, and loading and unloading the materials for each job site. (R. p. 78. lines 11-16). Bowen testified that the Hardie board that he has to install weighs up to 100 pounds. (R. p. 84, lines 17-25). Bowen testified that he had to bend, lift, and carry the Hardie board all day when he was installing it. (R. p. 85, lines 6-10). He specifically testified that in order to perform his job, he bend and stoop at least 50 to 100 times per day. (R. p. 79, lines 1-7).

While it is clear that prior to the resolution of his 2004 worker's compensation claim Bowen was aware that heavy lifting, bending, and stooping aggravated his lower

back condition, Bowen continued to perform these activities for Vinyl Services. Bowen even testified at the hearing that he was aware that his job duties were causing his lower back problems:

> Q: (Mr. Lewis) All right. So, you've known for some years now that that work was what's causing your problem that you're having now; is that right?
>
> A: (Bowen) Yes. I'd have to answer that yes.

(R. p. 97, lines 8-11).

Finally, like the physician in Havird, Dr. S. Emmett Lucas, Bowen's physician, testified at his deposition that he believed Bowen's job activities aggravated his preexisting back problems. (R. p. 235, line 11–p. 236, line 5). Dr. Lucas testified that Bowen has had a fairly significant degree of ongoing chronic back pain in his lower back since his 2004 injury. (R. p. 238, lines 5-21). Dr. Lucas also testified that Bowen's condition has progressed since his 2004 lower back injury and that his progression is consistent with the progression of degenerative changes over time:

> Q: (Mr. Lewis) Okay. If you -- If you're looking at this M.R.I. from February 2010 and then you looked at the C.T. from six years before in 2004, are those -- I realize they're different studies, but are those fairly similar in terms of the findings; degenerative changes and L5-S1 issues?
>
> A: (Dr. Lucas) Yes, they're -- they're similar. They're not exact, but they're similar.
>
> Q: All right. Would the difference between the C.T. that you saw in '04 and the M.R.I. that's in 2010, would that be consistent with the progression of degenerative changes over time?
>
> A: Yes.

(R. p. 214, lines 13-25).

The facts of the present case are analogous to the facts in Havird. Bowen suffered from prior lower back problems, and even though Bowen was aware that his job activities were aggravating his prior lower back problems, Bowen continued to work for Vinyl Services. Since Bowen knew prior to the resolution of his March 22, 2004 workers' compensation claim that his lower back problems would be aggravated by his job duties with Vinyl Services and since Bowen continued to work for Vinyl Services knowing that his preexisting lower back condition was being aggravated by his job duties, Bowen's current alleged injury by repetitive trauma was not unforeseen or unexpected. Thus, pursuant to the Court's decision in Havird, Bowen did not sustain an accidental result as required by the Act. Therefore, Appellant Bridgefield respectfully requests that the South Carolina Court of Appeals reverse the South Carolina Worker's Compensation Commission's decision that Bowen sustained a compensable injury by repetitive trauma.

C. Bowen's current low back condition is multifactorial.

For an injury to "arise out of" employment, as would support compensability of injury under Workers' Compensation Act, the injury must be proximately caused by the employment. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008). South Carolina requires the employee's job be more than one factor, to any extent, in the injury or death. Nawa v. Wackenhut Corp., 288 S.C. 250, 341 S.E.2d 800 (Ct. App. 1986). In the present case, the preponderance of the evidence establishes that Bowen's job was just one of many factors causing his current condition.

At his deposition on April 8, 2010, Bowen testified that he fell off of an eight foot walk board approximately a year and a half earlier. (R. p. 139, line 19–p. 140, line 5). He did not report his fall or seek medical treatment. (R. p. 140, lines 6-13). However, at

the hearing, Bowen testified that his fall caused some pain and "a shocking feeling" in his lower back. (R. p. 95, line 24–p. 96, line 12).

Bowen also testified that on November 11, 2009, Vinyl Services had a temporary layoff, and he started drawing unemployment benefits as a result. (R. p. 103, lines 3-14). Bowen testified that while he was out of work, he hunted approximately twice per week:

Q: (Mr. Lewis) Okay. And, in fact, I think while you were out you -- you hunted pretty avidly didn't you?

A: (Bowen) Well, I hunted but not like I wanted to.

Q: Okay. Well, you -- I think you told us in your deposition that you hunted probably a couple of times a week?

A: Uh-huh.

Q: Is that correct?

A: That's correct.

Q: Okay. And you stocked you cooler with -- I mean, your freezer full of deer that season?

A: Oh, yeah, that's correct.

(R. p. 103, line 24–p. 104, line 10). When examined by the undersigned, Bowen testified that when he hunts, he rides his four-wheeler to his tripod. (R. p. 106, line 16–p. 107, line 6). He further testified that he climbs up and hunts in his tripod that is approximately twelve feet off of the ground. (R. p. 106, lines 13-18).

On May 12, 2010, the parties took the deposition of Dr. Lucas. (R. p. 193). When asked if he was aware Bowen fell off of a scaffold approximately a year and a half ago, Dr. Lucas testified that he was unaware of such a fall and that such a fall could have been the precipitator of Bowen's back pain:

Q: (Mr. Lewis) Did he tell you that he had -- that he had a fall about a year and a half ago off an eight-foot walkway as well?

A: (Dr. Lucas) No.

Q: Do you agree that it's likely that if he's told you that his pain started to increase within the last two years, that that could have been the precipitator of his back pain?

A: It could, yes.

(R. p. 219, lines 7-15). Dr. Lucas also testified that hunting a couple of times per week could also contribute to Bowen's current back condition. (R. p. 218, line 9–p. 219, line 6). While Dr. Lucas testified that based on Bowen's subjective reports his job activities contributed to the worsening of his pain that he's had over time, Dr. Lucas further testified that "... But I also think that basically any type of vigorous activity or activity that requires you to bend and lift, you know, whether it's picking laundry off the floor, will contribute to that as well" and that even less strenuous type activity can contribute to his symptoms. (R. p. 224, lines 17-21).

Dr. Lucas further testified that Bowen's preexisting degenerative disc disease could have developed idiopathically:

Q: (Mr. Lewis) And folks that have degenerative disc disease, which I know that that's what his films from back to at least 2004 show, is it common for those folks to just kind of develop pain for no reason at all just idiopathically?

A: (Dr. Lucas) Yes.

(R. p. 219, lines 16-21).

After he was given the history of Bowen's fall from an eight-foot walkway and after he was given a history of Bowen's physical activities, Dr. Lucas specifically testified that Bowen's current condition could be multifactorial:

Q: (Mr. Lewis) Would you agree that his back condition, the things that contribute to it, could be multifactorial?

A: (Dr. Lucas) Yes.

Q: Is it possible to quantify how much one activity versus another one, you know percentage wise or whatever, is contributing to his overall back condition?

A: No.

(R. p. 220, lines 2-9). He further testified that if Bowen continued to perform other activities, such as hunting, after he went out of work in November of 2009, those other activities could be contributing to his back condition:

Q: (Mr. Lewis) If he went out of work in November, '09, as he told you that he did, and he continued doing those other physical activities in the interim, those things could also be contributing to his back condition, isn't that right?

A: (Dr. Lucas) Yes.

(R. p. 221, lines 16-21).

Based on the foregoing, substantial evidence in the record clearly establishes that Bowen's job was just one of many factors causing his current condition. Dr. Lucas testified that a variety of things could contribute to Bowen's current lower back condition, including Bowen's fall from an 8 foot walk board, hunting a couple of times per week before and after November 11, 2009, and any type of bending and lifting. He further testified that Bowen's condition could be an idiopathic condition. Thus, substantial evidence in the record establishes that Bowen's job was just one of many factors that could have contributed to his current condition. Therefore, based on the Court's decision in Nawa, Appellant Bridgefield respectfully requests that the South Carolina Court of Appeals reverse the Commission's decision that Bowen sustained a compensable injury by repetitive trauma commencing on November 11, 2009.

## II.

## THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT BOWEN PROVIDED PROPER NOTICE TO VINYL SERVICES OF HIS ALLEGED REPETITIVE TRAUMA INJURY.

Assuming arguendo that Bowen's job with Vinyl Services was a repetitive job under S.C. Code Ann. § 42-1-172 (2007), substantial evidence in the record establishes that Bowen failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury. South Carolina Code Ann. § 42-15-20(C) (2007) states that "In the case of repetitive trauma, **notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence**, that his condition is compensable..." (emphasis added).

South Carolina Code Ann. § 42-15-20(C) mandates that notice must be given within ninety days from the time the claimant knew, or should have known, the case was "compensable." One argument is that a claimant does not know the case is "compensable" until it is either accepted by the carrier or awarded by the Commission. However, no matter how clear the language of a statute, a Court will reject a meaning that leads to an absurd result. Hamm v. S.C. Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (1985). The argument that a claimant does not know the case is "compensable" until it is either accepted by the carrier or awarded by the Commission would in fact eliminate the notice requirement. It would be absurd for the Legislature to draft a notice statute that has no practical effect. *See* Hamm at 182, 336 S.E.2d at 470.

Another interpretation of S.C. Code Ann. § 42-15-20(C) is that a claimant does not know his repetitive trauma case is compensable until he or she is actually informed by a physician that his condition is caused by his repetitive work activities. In the present

case, the Commission followed this interpretation and found "that claimant did not know or discover that his low back injuries were compensable under the Act until on or about April 21, 2010 when Dr. Lucas indicated that his low back condition was aggravated as a result of repetitive trauma sustained in his work for employer-defendant." (R. pp. 9-10). However, the Commission's interpretation of S.C. Code Ann. § 42-15-20(C) is also absurd because it clearly ignores the portion of S.C. Code Ann. § 42-15-20(C) that specifically states "or could have discovered by exercising reasonable diligence, that his condition is compensable."

Substantial evidence in the record clearly establishes that Bowen failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury. First, Bowen knew for years that his job duties with Vinyl Services were the cause of his alleged injuries; however, Bowen did not properly notify Vinyl Services of his alleged injuries.

On February 19, 2010, Bowen filed a Form 50 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. p. 51). **It is undisputed that this is the first time Bowen notified Appellant Bridgefield or Vinyl Services of his alleged repetitive trauma injury.** While Bowen did not notify Vinyl Services of his alleged repetitive trauma injury until February 19, 2010, **100 days after his alleged November 11, 2009 date of injury**, the preponderance of the evidence clearly establishes that Bowen had known since at least 2008 that his job duties were the cause of his alleged injuries.

Bowen specifically testified at his deposition and at the hearing that he had known since at least 2008 that the problems he is currently experiencing were the result of his activities at work:

> Q: (Mr. Lewis) Well, do you know -- we can go back over your deposition but when -- when you gave the deposition on this case, I mean, you told us that you knew at least back in 2008, that the problems you were having, the pain you were having, was being caused by your work?
>
> A: (Bowen) I did, definitely, yeah.
>
> Q: All right. So, you've known for some years now that that work was what's causing your problems that you're having now; is that right?
>
> A: Yes. I'd have to answer yes to that.

(R. p. 97, lines 2-11). Bowen further testified that even though Vinyl Services knew he had physical problems after his first injury, he never told Vinyl Services that his job was causing his pain to increase:

> Q: Okay. And while you testified that Mr. Bolt, you know, knew that you had physical problems ever since you came back to work from your first injury you never went to him and said, hey, look, this particular job duty or whatever is causing me increased pain; I'm going to have to go out of work, did you?
>
> A: No, I did not.

(R. p. 97, lines 12-18).

The Commission found that the earliest day Bowen could have known his injury was compensable was on April 21, 2010, when Dr. Lucas completed a questionnaire from Bowen's attorney opining that Bowen's condition was aggravated as a result of his repetitive work activities. (R. pp. 9-10). However, this finding is unmistakably

conflicting with Bowen's own testimony that he knew his job was causing his problems to get worse well before Dr. Lucas completed his questionnaires:

Q: (Mr. Lewis) And you -- you testified earlier today that you knew ever since the day you returned to work that your problems were getting worse over time, that it was from you job; is that right?

A: (Bowen) Yes, sir.

**Q: You didn't need Dr. Lucas to tell you that?**

**A: No, I didn't.**

(R. p. 101, lines 1-7)(emphasis added). Bowen's own testimony clearly contradicts the Commission's finding "that claimant did not know or discover that his low back injuries were compensable under the Act until on or about April 21, 2010 when Dr. Lucas indicated that his low back condition was aggravated as a result of repetitive trauma sustained in his work for employer-defendant." (R. pp. 9-10).

Bowen's testimony clearly establishes that he was aware that his work activities were causing his alleged problems since at least 2008. However, even though he was aware his work activities were causing his problems in 2008, Bowen did not notify Vinyl Services or Appellant Bridgefield of his alleged injury until February 19, 2010, when he filed his Form 50. This is obviously outside of the 90 day requirement in S.C. Code Ann. § 42-15-20(C).

Furthermore, even if Bowen was not actually aware until April 21, 2010, when he was informed by Dr. Lucas, that his work activities were causing his current back problems, the Commission failed to consider the portion of S.C. Code Ann. § 42-15-20(C) that specifically states "or could have discovered by exercising reasonable diligence, that his condition is compensable." As noted above, the Commission determined that Bowen did not know or discover that his low back injuries were

compensable under the Act until on or about April 21, 2010 when Dr. Lucas indicated that his low back condition was aggravated as a result of repetitive trauma sustained in his work for Vinyl Services. (R. pp. 9-10). The Commission based this finding in part on Claimant's testimony at the hearing. (R. p. 10). Bowen testified that he did not know that a repetitive trauma claim could be a compensable claim under the Act until he was informed by his attorney:

Q: (Ms. Willliams) Did you know anything -- did you know that there was such a thing as a repetitive trauma claim?

A: (Bowen) No, ma'am --

Q: Okay.

A: -- I did not.

Q: Okay. Did you know that a repetitive trauma claim could be a compensable one under Workers' Comp?

A: No, ma'am, I did not.

Q: Okay. Did you know that – was – was the first time you knew that when I told you about it?

A: Yes, ma'am.

(R. p. 91, lines 2-12). The Commission's finding that Bowen did not know his alleged repetitive trauma claim was compensable until he was informed by Dr. Lucas on April 21, 2010 appears to be based in part on Bowen's ignorance that a repetitive trauma claim could be compensable under the South Carolina Workers' Compensation Act. However, it has long been held by the Supreme Court of South Carolina that "while there is no presumption that every one knows the law, still **ignorance of the law excuses no one**." Fairey v. Strange, 115 S.C. 10, 104 S.E. 325 (1920)(emphasis added).

The fact that Bowen was unaware that a repetitive trauma injury could be compensable under the Act does not excuse him from failing to provide Vinyl Services

with notice of his alleged injury. Bowen testified that he has known for years, since at least 2008, that his job duties with Vinyl Services were the cause of his current back problems. (R. p. 97, lines 2-11). However, Bowen failed to provide notice to Vinyl Services of his alleged repetitive trauma injury until February 19, 2010, when he filed a Form 50 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. pp. 10 & 51).

It is clear from Bowen's own testimony that he knew, "or could have discovered by exercising reasonable diligence," that his alleged repetitive job duties for Vinyl Services were the cause of his current back problems. Therefore, based on the foregoing, even if Court finds that Bowen sustained an injury by repetitive trauma as defined in S.C. Code Ann. § 42-1-172, Appellant Bridgefield requests that the Court reverse the Commission's Order and deny Claimant's claim for benefits based on the fact that he failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury under S.C. Code Ann. § 42-1-172.

## III.

## THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FAILING TO FING THAT BOWEN'S CURRENT BACK CONDITION IS CAUSALLY RELATED TO HIS MARCH 22, 2004 WORK ACCIDENT.

While substantial evidence does not support a finding that Bowen sustained a compensable injury by repetitive trauma, substantial evidence in the record clearly supports a finding that Bowen's current lower back problems are related to his March 22, 2004 work accident.

On March 22, 2004, Bowen sustained an admitted injury to his neck, lower back, and right ankle arising out of and in the course of his employment with Vinyl Services when he fell from a scaffold approximately 18 feet off of the ground. (R. p. 44).

A hearing was held on March 7, 2006 to determine Bowen's permanent disability and to determine if Claimant was entitled to continuing medical treatment. (R. p. 37). An Order was issued by Commissioner George N. Funderburk on August 9, 2006. Id. Commissioner Funderburk's Order indicates that "Claimant testified that he continued to experience pain and difficulty in his neck, **low back**, and right ankle." (R. p. 40)(emphasis added). With regards to his lower back, Commissioner Funderburk's Order specifically states:

> ...[Bowen] stated that he has low back pain consistently but that it is worse on some days than others. He stated that he has bad days with his low back about three times per week, and he cannot function much when that happens.

Id.

Bowen was clearly having continued problems with his lower back at the March 7, 2006 hearing for his 2004 workers' compensation claim. In fact, at the hearing in the present matter, Bowen specifically testified that he has continued to have lower back problems since his March 22, 2004 work accident and that his problems have gotten progressively worse over time:

> Q: (Mr. Lewis) Okay. And really what's happened here is your back has always been bad since this initial injury and its just gotten worse and worse over time; is that right?
>
> A: (Bowen) That's correct.

(R. p. 95, lines 20-23).

**Additionally, when Bowen first sought treatment for his lower back problems after he went out of work in November of 2009, Bowen contacted Home Builders, the carrier at the time of his 2004 work accident, because he believed that his current condition was related to his March 22, 2004 work accident.** (R. p. 98, line 16–p. 100, line 25). He specifically testified that he contacted Home Builders because they were supposed to provide him with medical treatment:

> Q: (Mr. Lewis) Okay. And you contacted them because there was an order for -- for them to provide you with ongoing medical care; is that right?
>
> A: (Bowen) They was supposed to provide me with medical care, yes, sir.

(R. p. 100, lines 7-11). In fact, after Bowen contacted Home Builders, Home Builders sent Bowen to Dr. Lucas. (R. p. 100, lines 12-15).

Bowen's testimony clearly indicates that his current lower back problems are related to his March 22, 2004 work accident. In addition to Bowen's testimony, the medical records of Dr. Edward H. Booker, Jr., Bowen's family doctor, also support a finding that Bowen's current condition is related to his March 22, 2004 work accident.

On May 20, 2009, Bowen presented to Dr. Booker with complaints of back pain. Dr. Booker noted that Bowen had "back pain s/p work accident 5 years ago." (R. p. 402). On December 28, 2009, a little over a month after he went out of work, Bowen presented to Dr. Booker with complaints of back pain and leg pain. (R. p. 399). Dr. Booker noted that Bowen's back pain was chronic. Id. He specifically indicated that Bowen "presents with back and leg pain that has reached a crisis point. **He fell at work 4 years ago and has been suffering since then.**" Id.

Dr. Booker's records clearly indicate that Bowen's back pain is causally related to his March 22, 2004 work accident. Dr. Booker noted in multiple records that Bowen has continued to experience lower back pain since his 2004 work accident.

Additionally, as previously noted, Home Builders referred Bowen to Dr. Lucas after Bowen contacted Home Builders in 2009 requesting treatment to his lower back. (R. p. 100, lines 12-15). Home Builders authorized the treatment, and Bowen presented to Dr. Lucas on January 20, 2010 for an evaluation of his lower back problems. (R. pp. 368-72). **Prior to the evaluation, Bowen completed a Patient Information Form and related his lower back pain to his March 22, 2004 work accident.** (R. p. 364). Dr. Lucas indicated in his January 20, 2010 note that since his March 2004 work accident, Bowen "says he has always had some chronic back pain, but it has been worsening in the last 2 years with no specific injury." (R. p. 308). Dr. Lucas' records from January 20, 2010 indicate that Bowen's has had chronic lower back pain since 2004 and that his current condition is related to his March 22, 2004 work accident.

In addition to relating his lower back problems to his March 22, 2004 work accident during his initial evaluation with Dr. Lucas, Bowen testified that he completed numerous disability forms and that he indicated in each form that his current problems were related to his March 22, 2004 work accident:

Q: (Mr. Lewis) When you applied for these various disability policies you'd have to take things to the doctors and they would sign them?

A: (Bowen) That's correct.

Q: And you applied for multiple ones, correct?

A: That's correct.

Q: Okay. And in those you were representing that you problems were from your accident in '04; is that right?

A: That's correct.

(R. p. 112, line 25–p. 113, line 9).

Substantial evidence in the record establishes that Bowen's current condition is related to his March 22, 2004 work accident. Bowen has had chronic lower back problems ever since his March 22, 2004 work injury. In fact, Bowen originally related all of his current problems to his March 22, 2004 work injury, and Home Builders, the carrier in 2004, initially provided Bowen with medical treatment for his current lower back problems. Thus, based on the foregoing, Appellant Bridgefield respectfully requests that the Court reverse the Commission's decision that Bowen's current lower back problems are not related to his March 22, 2004 work injury.

## CONCLUSION

For the reasons set forth above, Appellant Bridgefield request that the South Carolina Court of Appeals reverse the South Carolina Workers' Compensation Commission's finding that Bowen sustained a compensable injury to his low back as the result of repetitive trauma culminating on November 11, 2009. Additionally, even if Bowen's job with Vinyl Services was repetitive as required by S.C. Code Ann. § 42-1-172 (2007), Appellant Bridgefield request that the Court reverse the Commission's finding that Bowen provided Vinyl Services proper notice of his alleged repetitive trauma injury pursuant to S.C. Code Ann. § 42-15-20(C) (2007).

Finally, Appellant Bridgefield requests that the Court reverse the Commission's finding that Bowen's current lower back problems are not related to his March 22, 2004 work injury.

Respectfully submitted,

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March 15, 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SCWCC No. 0920040

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John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders SIF and Bridgefield Casualty Ins. Co., Defendants,

Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Appellants/Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the Final Briefs comply with Rule 211(b), SCACR.

March 19, 2012

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PROOF OF SERVICE

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I certify that I have served the Final Brief of Appellants, Final Reply Brief of Appellants, and Final Brief of Respondents on John R. Bowen by depositing a copy of it in the United State Mail, postage prepaid, on March 19, 2012, addressed to his attorney of record, Kathryn Williams, Esquire, Kathryn Williams, P.A., P.O. Box 10693, Greenville, South Carolina 29603.

March 19, 2012

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