THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Appellate Case No. 2018-002087

Dale Brooks, Employee, Appellant,

v.

Benore Logistic Systems, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

BRIEF OF APPELLANT

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2. DID THE FULL COMMISSION MAKE AN ERROR OF LAW IN CONCLUDING THE SINGLE COMMISSIONER'S ORDER DID NOT CONTAIN THE CAUSATION FINDING AS REQUIRED BY LAW?

STATEMENT OF THE CASE

In this workers' compensation case, Appellant Dale Brooks alleged a repetitive trauma injury to his low back and right leg. (R. p. 31). Respondents denied the claim. A hearing was held on September 7, 2017, before the Workers' Compensation Commission Single Commissioner, Gene McCaskill. On December 27, 2017, Commissioner McCaskill issued an order finding Appellant met his burden of proving a compensable repetitive trauma injury to his low back affecting his right leg. (R. p. 28, Finding of Fact 14; R. p. 29, Conclusion of Law 3). The Commissioner awarded Appellant temporary total disability benefits for the period January 19, 2017 through June 28, 2017, as well as prior and future causally-related medical treatment. R. p. 29, Finding of Fact 20, Conclusion of Law 4-5.

Respondent timely appealed Commissioner McCaskill's Order to the Full Commission. After the parties served briefs, the Full Commission held oral argument. On October 26, 2018, the Full Commission issued its order reversing the Single Commissioner's order. *See* Full Commission Order at R. pp. 7-13.

On November 19, 2018, Appellant served the Notice of Appeal on Respondents and the Workers' Compensation Commission.

STANDARD OF REVIEW

The Court of Appeals held in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), cert den. (2014):

> The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Under the APA, this Court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision . . . is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. [citing S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2011)]. This Court can also reverse the Commission if its ruling is affected by an error of law.
>
> The Commission is the ultimate factfinder in workers' compensation cases. As a general rule, this court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.

Id. at 401 S.C. 417, 426, 737 S.E.2d 200, 205 (internal citations and quotations omitted except as noted).

The findings of the Commission will be set aside if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

FACTS

Evidence from the hearing before the Single Commissioner. Appellant worked for Respondent Benore Logistics System, Inc. (Benore) as a switcher truck operator for approximately five months before he alleges he suffered the repetitive trauma injury. (R. p. 155, lines 4-7). Appellant's duties basically required him to use a truck to move trailers or sea containers across a huge yard at the BMW manufacturing plant, which he estimated to be 2 miles wide. (R. p. 87, lines 14-24). He worked 12 hour shifts. (R. p. 88 , lines 6-7).

To do his job, Appellant drove a "switcher truck," which wasn't set up for driver comfort

like a tractor-trailer. (R. p. 89 line 23- R. p. 90, line 9). According to Appellant, the tractor trailer is made for long distance driving comfort and has air-ride in the suspension, cab, and seat. Id. In contrast, the switcher truck is designed to move heavy trailers. (R. p. 92, lines 2-5). A switcher truck is a rigid frame truck with a spring-ride; it only has one seat. (R. p. 90, lines 6-7; R. p. 91, lines 4-5). Appellant described the switcher truck ride as "extremely rough." (R. p. 90, lines 10-11).

Appellant testified in detail about the process he underwent to do his job. (R. p. 92, line 21- R. p. 97, line 3):

1. When summoned by computer for a pickup, he stepped up on his truck by climbing 3 steps, using a handle. (R. p. 92, line 24- R. p. 93, line 14).
2. That took him to a platform, where he went through a small door to enter the truck, requiring him to stoop. (R. p. 93, lines 14-19).
3. Once he maneuvered himself to sit down in the small cab, he drove for the pickup. (R. p. 93, line 19- R. p. 94, line 1).
4. On arrival at the trailer, he twisted his body to look out the back door by turning his torso all the way to the rear. (R. p. 94, lines 1-3). This meant his knees remained pointed straight out while his back twisted all the way around. Id. at lines 10-13. Appellant responded he performed this twist 5 times per trailer move. Id. at lines 14-23.
5. Once he backed the truck up, he used a lever to raise the trailer. (R. p. 95, lines 6-10).
6. Then he got up. Because of the cramped cab space and lack of grab handles, getting up required him to use his legs and back to get up and hoist himself up, then twist around to get to the door. (R. p. 95 , lines 10-11, line 20- R. p. 96, line 5).

7. Next, he walked through the door, and hooked the trailer to the truck. This required him to bend over at least 90 degrees for a few minutes. (R. p. 95, lines 11-19).
8. After hooking up the trailer, he got back in the truck. (R. p. 96, lines 6-9). He pulled the truck up 4 to 5 feet. Id. at line 10.
9. Then he got up again, went back out, walked to the rear of the trailer and closed the trailer doors. (R. p. 96, lines 11-13).
10. Then he returned to the cab to drive it to the designated area. (R. p. 96, lines 13-15).
11. Once he arrived at the drop off, he reversed the whole process. (R. p. 96, line 16- p. 97, line 3).

The whole process took about 15 minutes. (R. p. 97, lines 5-8). On average, Appellant completed the process 45 times a shift. Id. at lines 9-11. Appellant agreed his job description required him to do up to 50-60 trailer moves a shift. (R. p. 98, lines 3-9, *citing* R. p. 323). Appellant agreed he got in and out of the truck 225 times on an average shift. (R. p. 98, line 14- R. p. 99, line 10). When asked if the repetitive part of his job was getting in and out of the truck, Appellant responded every aspect of his job was repetitive. (R. p. 154, line 7- R. p. 155, line 3).

Appellant testified about sea containers as "a switcher operator's worst nightmare." (R. p. 99, lines 17-22). The reason is, salt and contaminants the containers pick up on their ocean voyage "make it exceptionally hard to open the doors." Id. at line 22- R. p. 100, line 5. The trailer is higher off the ground and has a ceramic seal on the back, which has to be cut with a 2-foot bolt cutter held over the switcher operator's head. (R. p. 100, lines 5-11). After that, the operator must open four latches on the back of the trailer. Id. at lines 12-14. Appellant related, "Most of the time, it took two people to open the doors." Id. at lines 17-19. But if no one could help, time restraints required Appellant to do it alone. Id. at line 20- R. p. 101, line 2. And

sometimes the drivers bringing the containers in didn't slide the axles. (R. p. 101, lines 6-9). This required him to pull four pins underneath the trailer by stooping and pulling each with all his weight, since the job sometimes required moving the pins out from under a trailer weighing 40,000 pounds. Id. at line 9 - R. p. 102, line 3. Appellant moved six to ten sea containers a shift. (R. p. 102, lines 18-22). But sometimes he did it all night. (R. p. 102, lines 4-9).

Appellant described the pace of his job as "extremely fast." (R. p. 103, lines 1-4). If you didn't respond to the computer's demand for pickup within 15 minutes, "you caught some grief about it by your supervisor." Id. at lines 4-8.

Appellant agreed he began to feel symptoms of his injury around early January 2017. (R. p. 103 , lines 9-16). Both thighs burned, as did his lower back. Id. at lines 17-21. It started mid shift and by the end of it, became "pretty unbearable." Id. at lines 22-24. On January 17, he began to feel work caused the injury when it felt like somebody stabbed him in his leg as he stepped into his truck. Id., line 25- R. p. 104, line 8. It hurt all the way to his foot. (R. p. 104, lines 2-4). That was the last day he worked. Id. at lines 15-16.

Appellant described telling every provider he got hurt from "getting in and out of the truck so much." (R. p. 111, lines 9-13).

Appellant testified counsel referred him to Dr. Loudermilk. Appellant testified Dr. Loudermilk's treatment helped him "dramatically." (R. p. 114, lines 21-22). At the time of the hearing, Appellant was not being treated by Dr. Loudermilk because he couldn't afford it. (R. p. 108, lines 13-22).

The Single Commissioner reviewed Appellant's medical records. *See* R. p. 23-25. On January 20, 2017, Appellant reported to Oconee Memorial Hospital Emergency Room for his injuries. Appellant stated he got in and out of trucks about 150 times per shift. (R. p. 287).

On February 1, 2017, Appellant reported to WorkWell. (R. p. 295). He reported low back pain climbing into the truck. He also reported feeling sharp low back pain while stepping into the truck and pulling himself in.

The doctor ordered an MRI. The report states, "in his case specifically, I think it best to get the imaging first." (R. p. 300).

WorkWell records reflect Appellant left the appointment at 9:36am. (R. p. 303). Two minutes later, the doctor's office received notice the claim was denied. (R. p. 304).

Appellant reported to Dr. Loudermilk on May 1. (R. p. 306). Appellant reported climbing up and down stairs approximately 150 times a day, moving a minimum of 30 trailers per shift. He reported "switching trucks in and out multiple times during the day, opening and closing doors, bending and stooping, and climbing ladders." Id. Dr. Loudermilk ordered an MRI. (R. p. 307). Appellant got the MRI June 27. (R. p. 317). On July 7, Dr. Loudermilk concluded the MRI showed a disc protrusion at L4-5, which Dr. Loudermilk deemed the source of his symptoms. (R. p. 314).

Defense ergonomic report. Respondents hired erogonomist Glen Adams to review Appellant's job and to issue an ergonoomics report. (R. p. 8 , Finding of Fact 5, *citing* R. p. 339). The report is at R. p. 339-345. Adams reviewed Appellant's deposition, his medical records, and visited the job site where Appellant worked. (R. p. 8, at Finding of Fact 6, *citing* R. p. 339-345). Adams found that, contrary to Appellant's testimony, Appellant would be able to enter and exit the cab of the truck without having to bend over. Id., *citing* R. p. 344 and R. p. 147-148. He further found that the job tasks of a switcher do not require lifting that exceeds any recommended safe lifting limits. Id., *citing* R. p. 345. Finally, Adams concluded the job involved two activities with forward bending (connecting the harness and entering and exiting the cab); however, neither

of those tasks involved elevated risks for the development of lumbar musculoskeletal disorders. Id., *citing* R. p. 344-345.

Single Commissioner's order. The Commissioner viewed the evidence as a whole, noting only one medical opinion existed – Dr. Loudermilk's. (R. p. 28, Finding of Fact 12-14). The Commissioner concluded, "As such, it must be given great weight." Id. The Commissioner found Dr. Loudermilk affirmed in a questionnaire from Apellant's counsel, "[T]he repetitive activities of [Appellant]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping and climbing ladders, most probably cause[d] low back pain with the right leg radiculopathy[.]" (R. p. 27, Finding of Fact 8, *citing* R. p. 315). The Single Commissioner also found the doctor affirmed, "[T]he work injuries from repeated work activities above cause[d] an L4-5 disc protrusion shown on [Appellant]'s MRI of 6.27.17." Id. Finally, the Single Commissioner found Dr. Loudermilk "confirms these repeated work activities caused Appellant's low back pain with right leg radiculopathy." Id.

Turning to the ergonomics report, the Single Commissioner deemed it "instructive, but it does not control." (R. p. 28, Finding of Fact 13). The Single Commissioner also noted "Dr. Loudermilk indicates that he has read the report and it does not alter his opinion." Id., *citing* R. p. 316.

The Single Commissioner concluded Appellant suffered a compensable repetitive trauma injury to his low back affecting his right leg. (R. p. 28, Finding of Fact 14). Specifically, he found "a direct causal relationship between the repetitive acts and the employment." Id. He based the finding "on the entire record." Id. Additionally, he held, "Under § 42-1-172 and Murphy v. Owens Corning, 710 S.E.2d 454 (Ct.App 2011), medical evidence established a causal

connection between [Appellant]'s repetitive activities in regular employment duties and the injury." R. p. 29 , Conclusion of Law 3.

Full Commission reversal. The Full Commission reversed the Single Commissioner, concluding Appellant failed to prove a repetitive trauma injury under S.C. Code Ann. § 42-1-172. (R. p. 9 - 10, Finding of Fact 11). First, the Commission held there was no finding of fact by the Single Commissioner that Appellant's job activities were repetitive as required under S.C. Code Ann. § 42-1-172(B). Id.

Second, the Commission noted Respondents presented ergonomics evidence that the job was not sufficiently repetitive and noted Appellant presented no ergonomics evidence (R. p. 8, Finding of Fact 7-8; R. p. 9-10, Finding of Fact 11). The Commission found Respondents' "unbiased" ergonomics report "entitled to greater weight than [Appellant]'s testimony on that issue." R. p. 9-10, Finding of Fact 11.

Third, the Full Commission found Dr. Loudermilk's opinion entitled to less weight than the ergonomics report because the doctor appeared to rely on "Appellant's own self-serving statements as to the alleged repetitive job activities," and a description of them from Appellant's attorney in questionnaires. (R. p. 10, Finding of Fact 12, *citing* R. p. 309-310, 315-316). The Full Commission found it "especially troubling" because the record from Appellant's initial visit with Dr. Loudermilk showed Appellant reporting symptoms "since around January 3, 2017," but at the hearing Appellant testified he did not tell Dr. Loudermilk "a specific date." Id., *citing* R. p. 306; R. p. 135, lines 19-22. Additionally, the Full Commission noted the lack of evidence Dr. Loudermilk reviewed Appellant's job description. (R. p. 10 at Finding of Fact 12). The Full Commission concluded Dr. Loudermilk "assume[d] the job is sufficiently repetitive." Id. It noted Appellant's attorney's questionnaires to Dr. Loudermilk "never asked whether those job

activities are sufficiently repetitive." Id., *citing* R. p. 309.

The Full Commission concluded "the only ergonomic evidence in the record found that his activities were not repetitive." (R. p. 11, Finding of Fact 13). In giving greater weight to the ergonomics report, the Commission made several findings. Ergonomist Adams went onsite to observe the job duties of a switcher. Id., *citing* R. p. 339. Adams concluded the observed job duties "do not meet any of the criteria above for elevated risks to the low back/lumbar spine." Id., *citing* R. p. 343. The Full Commission went on, "[H]e noted that connecting/disconnecting the trailer harness would only involve 60.5 seconds of forward bending of the spine per hour." [*citing* R. p. 343-344]. Next, Adams found [Appellant] would be able to sit upright in the cab, and the task of entering/exiting the cab would require "minimal forward bending." Id., *citing* R. p. 344. Accordingly, the Full Commission concluded "neither medical nor ergonomics evidence supports a finding that Appellant's job activities as a "[s]witcher" were repetitive as required under S.C. Code Ann. § 42-1-172(B)." Id. at p. 11, Finding of Fact 15.

ARGUMENTS

I. BECAUSE APPELLANT'S MEDICAL EVIDENCE SUPPORTS CAUSATION AS REQUIRED BY THE REPETITIVE MOTION STATUE, THE FULL COMMISSION'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Repetitive trauma injuries are specifically defined under the workers' compensation statute. The statute also defines the analysis of proving a repetitive trauma injury. Here, Appellant satisfied both aspects of the law, requiring reversal for lack of substantital evidence to support the Full Commission's denial of benefits.

A. Repetitive trauma injury law.

"Repetitive trauma injury" means an injury which is "gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C.Code Ann.§ 42-1-172(A).

A repetitive trauma injury is compensable only under the explicit terms of § 42-1-172. Id. at sub-§(A). "Indeed, section 42–1–172(C) commands that the '[c]ompensability of a repetitive trauma injury must be determined *only* under the provisions of this statute.'" Michau v. Georgetown Cty. ex rel. S.C. Ctys. Workers Comp. Tr., 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) (internal citations omitted).

Specifically, a repetitive trauma injury is covered under workers' compensation "only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C.Code Ann.§ 42-1-172(D).

"Medical evidence" means an expert opinion "stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C.Code Ann.§ 42-1-172(C).

B. The Full Commission's decision erroneously elevates the ergonomics report to outweigh medical evidence, which subverts the legal standard.

In determining whether Appellant's injury was repetitive, the Full Commission accorded Respondent's ergonomics report more weight than Appellant's doctor's medical conclusions. (R. p. 11, Finding of Fact 14). The Full Commission also noted Appellant presented no ergonomic evidence. (R. p. 8, Finding of Fact 8). Likewise, the Full Commission gave more weight to the ergonomic report's "unbiased opinion" than Appellant's testimony the job was repetitive. (R. p. 9-10, Finding of Fact 11). The Full Commission's unjustified over-reliance on the ergonomics report was unsupported by substantial evidence.

1. Respondent's ergonomics report does not satisfy the required legal standard for causation.

The Full Commission elevates the ergonomics report to what it can never be: medical evidence on causation, as required by law. In repetitive injury cases, the law makes clear only

doctors can supply evidence of causation. S.C.Code Ann.§ 42-1-172(B) and (C). Strikingly, in mandating how causation is proven, the statute makes no mention of ergonomics. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Thus, the statute makes clear ergonomics does not determine whether a job is sufficiently repetitive to cause a repetitive motion injury. Medical evidence does. S.C.Code Ann.§ 42-1-172(A)-(C). The Supreme Court holds parties to the strict principle that repetitive motion cases are governed by the terms of § 42-1-172, as evidenced by Michau v. Georgetown Cty. ex rel. S.C. Ctys. Workers Comp. Tr., 396 S.C. 589, 723 S.E.2d 805 (2012). There, the Full Commission denied compensability of the appellant's repetitive trauma injury, based in part on a medical exam obtained by the respondents. However, the respondent's medical examiner did not state his opinion to a reasonable degree of medical certainty. Appellant's appeal centered on whether that evidence was admissible in light of § 42-1-172(C)'s requirement that medical opinions be stated to a reasonable degree of medical certainty. The Supreme Court made clear the plain terms of the statute prevail.

The Michau Court first proclaimed, "'[C]ompensability of a repetitive trauma injury must be determined *only* under the provisions of [42-1-172].'" Id. at 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) (internal citations omitted).

Next, the Court held, "The plain reading of the statute requires that [medical] 'opinion or testimony' must be 'stated to a reasonable degree of medical certainty.'" Id. at 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012). The Court then deemed respondent's medical opinion "an 'opinion or testimony' that must be 'stated to a reasonable degree of medical certainty'" under §

42–1–172. Id. at 396 S.C. 589, 596, 723 S.E.2d 805, 808 (2012). In reversing the Full Commission, the Supreme Court held the opinion inadmissible because it did not conform to the statutory standard.

Here, the Full Commission creates a new, strict standard for repetitive trauma injuries – the requirement of an ergonomics report for claimants to prove compensability. This requirement is especially evidenced by the finding Appellant presented no ergonomics evidence. (R. p. 8, Finding of Fact 7-8; R. p. 9-10, Finding of Fact 11). The Full Commission's ergonomics standard is not what the law requires.

Section 42-1-172 is the law. It requires medical evidence of causation, which Appellant presented and Respondent did not dispute. Here, the only causation evidence conforming to § 42-1-172 came from Appellant. The Full Commission should be reversed, as Appellant proved causation using the proper legal standard.

2. Finding Appellant less credible than the ergonomics report is unsupported by substantial evidence.

Because the Full Commission gave Dr. Loudermilk's conclusion less weight in part because he relied on Appellant's "self-serving statements" about the job's repetition, the Court should consider the credibility of Appellant's account of his job activities compared to the ergonomist's. *See* R. p. 10, Finding of Fact 12. In weighing the ergonomist's credibility against Appellant's, the Court should first understand the prime distinction in their experience: Appellant did the job, day in, day out, for months. The ergonomist watched someone else do it. To use a football analogy, Appellant stepped on the field and took the hits. The ergonomist Monday-morning quarterbacked him.

The finding Appellant didn't prove his job repetitive overlooks the exhaustive job description Appellant gave at the hearing, as recited at p. 2-5 *supra*, of the "rough ride" he faced

in his truck, the repetitive nature of his job duties, how often he did them during his shift, the "sea container nightmare" and the pace he needed to maintain to do his job. (R. p. 91-103).

At the hearing before the Single commissioner, Appellant's counsel presented justifiable concerns about the ergonomics report to consider in evaluating its credibility versus Appellant's, at R. p. 78, li. 25- R. p. 80, li. 23:

A. The ergonomist never saw **Appellant** do his job.

B. The ergonomist never observed the long-term impact of the job on **Appellant**, doing it for 12 hour shifts for about 5 months.

C. Unlike Dr. Loudermilk's records, the report is not specific to the job's impact on Appellant. It speaks only in terms of vague generalizations about "elevated risks" to operators in general.

D. The report leaves some gaps in the job observation, especially how Appellant describes twisting his back while backing up the truck to the trailer.

E. Appellant's testimony questions whether Respondent gave the ergonomist the right information about the seat Appellant sat in, as Appellant described the seat in the report as a "luxury model" far superior in comfort and support to the one Appellant actually used on the job. *See also* R. p. 91, li. 6- R. p. 92, li. 19.

F. The report concludes no increased risk of lumbar spine/low back injuries for switcher operators. (R. p. 345). In sum, all the report means is, Respondent didn't intentionally expose Appellant to a known risk of injury.

Additionally, the report does not observe the "sea container nightmare" described by Appellant in his testimony at R. p. 99, line 17 – R. p. 102, line 4. That's a major part of his job the report leaves completely unaddressed.

Nothing in the report makes Appellant's injury impossible. Note the word "increased" before "risk." (R. p. 345). There's still risk of injury, especially due to the repetitive nature of the work. It would be different if the report said **no** risk of injury. But it doesn't. Because it can't. Appellant's job carries the risk of getting injured just like he did, which happened here.

Most importantly, the ergonomics report does not evaluate the impact of the job on Appellant. That's why the statute requires a doctor to provide evidence of causation, which is what Dr. Loudermilk did.

Giving the ergonomist report more weight here endorses the opinion of a witness who never saw Appellant do the job and isn't qualified to assess the job's impact on Appellant's medical condition. Appellant credibly testified in painstaking detail about the repetitiveness of his work, work he actually did instead of merely watching it done for a day. Substantial evidence does not support the Full Commission's credibility determination here.

3. Appellant provided the only evidence of causation sufficient to withstand legal scrutiny: the medical evidence of Dr. Loudermilk.

"Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct.App.2004). The ergonomics report falls short of competent evidence, as expressed by arguments first made by counsel at the Single Commissioner hearing, cited at p. 13-14, *supra*. Those same concerns reveal why the report should not override the medical conclusion here.

Additionally, Appellant relies on the Single Commissioner's Order, p. 14-15, Findings of Fact 6-13 at R. pp. 27-28. Notably, Dr. Loudermilk's conclusion of medical causation remains, as the Commissioner found, "uncontroverted." (R. p. 28, Finding of Fact 12). Respondent made no effort to challenge it with its own medical evidence, which Respondent could have done

easily by merely hiring a doctor of its choosing to either evaluate Appellant, or even easier, just review his records. Respondent could also depose Dr. Loudermilk to attempt undermining his conclusion. Instead, Respondent did not counter Appellant's medical evidence with medical evidence.

Moreover, Dr. Loudermilk's involvement with Appellant in developing his medical conclusion surpasses the medical treatment provided by Respondents and its ergonomist's exposure to the job. Dr. Loudermilk's conclusion came not from a one-time office visit, but a course of treatment. (R. p. 306-316). He confirmed his diagnosis with an MRI. (R. p. 314). In contrast, while Respondent initially sent Appellant to a doctor, Respondent denied this claim two minutes after that doctor requested an MRI – an MRI the doctor concluded it "best" to get. (R. p. 303-304). Respondent's ergonomist spent just a single day watching the switcher job done by someone else.

Nevertheless, the Full Commission gave Dr. Loudermilk's conclusion less weight, finding he relied on Appellant's "self-serving statements" about the job's repetition, and his counsel's description of them in questionnaires. (R. p. 10-11, Finding of Fact 12). The Full Commission gave several reasons for this, none of which are supported by substantial evidence.

First, the Full Commission found Dr. Loudermilk's reliance on Appellant's and his counsel's statements:

> especially troubling because according to the record from [Appellant]'s initial visit with Dr. Loudermilk, [Appellant] reported his back and leg pain had 'been present since **around** January 3, 2017,' however, at the hearing [Appellant] testified he did not tell Dr. Loudermilk "a specific date."

Id., citing R. p. 306 *and* p. 135, lines 19-22 (emphasis added).

This finding does not reflect how the law views these injuries, as the Supreme Court revealed:

> Repetitive trauma injuries . . . . have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury.
>
> Schulknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002).

Thus, by their nature, repetitive trauma injuries do not support a specific date of injury. As Schulknight wisely intimated, courts expect the date of injury to require some estimation. Oddly here, the Full Commission was "especially troubled" by Appellant doing exactly what the Supreme Court expects him to.

The finding does not reflect all the facts, as it infers Dr. Loudermilk contrived a date of injury, contrary to the evidence. At the hearing before the Single Commissioner, Appellant confirmed he told Dr. Loudermilk approximate dates of onset. (R. p. 137, line 23-138, line 2). The record in question states Appellant suffered symptoms since "**around** January 3, 2017." (R. p. 306). Common sense tells us when you state you got hurt **around** a specific date, that means you're approximating. And Appellant testified he told Dr. Loudermilk those approximate dates were two weeks before January 17 or 18. Id. That timeframe definitely encompasses "around January 3." Unfortunately, by the terms of its order, the Full Commission attacks the credibility of Dr. Loudermilk with a hairsplitting detail that doesn't reflect all the facts- or the law. "[I]t is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." Schulknight, *supra*.

Next, the Full Commission found Dr. Loudermilk never reviewed Appellant's job description. The law does not require this, nor should it, as it might not always be available for a doctor to review. We turn to the law for guidance here.

A repetitive trauma injury is covered under workers' compensation "only if it is established by medical evidence that there is a direct causal relationship between the condition

under which the work is performed and the injury." S.C.Code Ann. § 42-1-172(D). "Medical evidence" means an expert opinion "stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C.Code Ann.§ 42-1-172(C). Thus, § 42-1-172 makes clear a critical consideration in repetitive injury causation decisions is a doctor's understanding of the job duties alleged to cause the problem, which can come from a discussion with the Appellant. And an examination of the Appellant helps.

Here, Dr. Loudermilk did both. At Appellant's first examination, Dr. Loudermilk records the duties Appellant reported as causing the problem: climbing up and down stairs approximately 150 times a day, moving a minimum of 30 trailers per shift. He reported "switching trucks in and out multiple times during the day, opening and closing doors, bending and stooping, and climbing ladders." (R. p. 306). Dr. Loudermilk confirmed his diagnosis with an MRI, and continued to examine Appellant as he treated him. (R. p. 306-316).

The finding overlooks the fact Dr. Loudermilk clearly acknowledged the repetitive acts causing the injury. In two questionnaires almost three months apart, counsel asked:

> Did the repetitive activities of [Appellant]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping, and climbing ladders, most probably cause low back pain with right leg radiculopathy?

Doctor Loudermilk answered "Yes." R. p. 309, 315.

Dr. Loudermilk also plainly indicated he reviewed at least one description of Appellant's job – the ergonomist report. In the more recent questionnaire, counsel asked, "Does the attached ergonomics report change your opinion in any way?" Doctor Loudermilk answered the question, "No." (R. p. 316). This presents the clear inference the doctor read the ergonomics report and remained steadfast in his medical conclusion the job was repetitive. Respondent never deposed

the doctor to challenge this answer.

The Full Commission found Dr. Loudermilk "assume[d] the job is sufficiently repetitive," based on the double-indented question above. (R. p. 10, Finding of Fact 12, *citing* R. p. 309). This overlooks the fact the doctor could've answered the question "No." It also forgets the doctor's records- part of the entire record on which the Single Commissioner based the finding- which describe Appellant's repetitive job tasks. (R. p. 306-316; R. p. 28, Finding of Fact 14). It also overlooks the more recent questionnaire, where Dr. Loudermilk declared the ergonomics report describing the ergonomist's view of Appellant's job duties changed nothing in his medical conclusion. R. p. 315-316.

In the end, the paramount consideration in repetitive motion cases is proving causation with medical evidence, which is exactly what Appellant did here. The medical evidence is rooted in a doctor's conclusion founded on discussions with Appellant about the cause, a diagnosis confirmed with an MRI, a course of treatment, and uncontroverted evidence Respondent's ergonomics report made no impact on the doctor's conclusion. Appellant satisfied the repetitive motion statute.

Requiring anything further creates a legal requirement for workers with repetitive motion injuries to pay for their own ergonomics report. It's a requirement that does not exist. The additional cost it imposes could prevent workers with legitimate repetitive motion injuries from obtaining benefits they desperately need, which defeats the purpose of the workers' compensation law expressed by Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2003):

> It is essential to remember that the Legislature created a system, for good or ill, which "serve[s] a social function by providing the injured employee with sufficient income and medical care to keep him from destitution .... [they] are not designed to compensate the employee for his injury, but merely to provide him

with the bare minimum of income and medical care to keep him from being a burden to others.

Here, affirming the Full Commission unjustifiably deprives Appellant of meager benefits to which he proved legal entitlement.

II. BECAUSE THE SINGLE COMMISSIONER MADE THE CAUSATION FINDING BASED ON MEDICAL EVIDENCE AS REQUIRED BY LAW, THE FULL COMMISSION MADE AN ERROR OF LAW IN CONCLUDING THE SINGLE COMMISSIONER'S ORDER CONTAINED NO SUCH FINDING.

The Full Commission found the Single Commissioner made no finding of fact Appellant's job activities "were repetitive as required under S.C.Code Ann. § 42-1-172(B)." (R. p. 9, Finding of Fact 11).

S.C.Code Ann. § 42-1-172(B) states:

> An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury.

A single appellate case gives guidance to practitioners and workers' compensation commissioners in crafting the proper finding under § 42–1–172(B). The Court of Appeals upheld compensability in Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011). In addressing a challenge to the sufficiency of compensability findings, Murphy held:

> The single commissioner found in part that "the preponderance of the evidence is that there is a direct causal connection between the repetitive activities of [Murphy's] job and the aggravation of her ... condition. This finding is based on the medical records...." The Commission sustained the commissioner's order in its entirety, and found in part: (1) Murphy suffered an aggravation of her underlying condition by the repetitive trauma of performing overhead work on her job; (2) the finding was based on the record as a whole, including the medical record; and (3) there was a direct causal connection between the repetitive activities of Murphy's job and the aggravation of her condition.

As Murphy dictates, the Single Commissioner in this case found:

1. **by the preponderance of the evidence, a direct causal connection between the repetitive activities of Appellant's job and the injury.**

   The Single Commissioner held:

   > Based on the preponderance of the evidence before me in this case, I must conclude that [Appellant] has suffered a compensable repetitive trauma injury to his low back affecting his right leg.
   > A. I find a direct causal relationship between the repetitive acts and the employment.
   > B. This finding is based on the entire record.
   >
   > (R. p. 28, Finding of Fact 14).

   Additionally, he held, "Under § 42-1-172 and Murphy v. Owens Corning, 710 S.E.2d 454 (Ct.App 2011), medical evidence established a causal connection between [Appellant]'s repetitive activities in regular employment duties and the injury." Id. at p.16, Conclusion of Law 3. Thus, the Single Commissioner expressly relied on Murphy to make his findings.

   If needed, the specific repetitive acts can be inferred from a prior factual finding, to which we now turn.

2. **work caused the repetitive trauma.**

   Here, the Single Commissioner cites the medical record:

   > Dr. Loudermilk answers, "yes" in a questionnaire dated 08/11/17 to the question, "Did the repetitive activities of [Appellant]'s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping and climbing ladders, most probably cause low back pain with the right leg radiculopathy?" He also answers "yes" to the question, "Did the work injuries from repeated work activities above cause an L4-5 disc protrusion shown on [Appellant]'s MRI of 6.27.17?" Likewise, he confirms these repeated work activities caused [Appellant]'s low back pain with right leg radiculopathy.
   >
   > R. p. 27, Finding of Fact 8.

3. **the finding was based on the record as a whole.** *See* R. p. 28, Finding of Fact 14B, quoted in number 1 above.

Based on Murphy, the Commissioner rightfully made the finding required by § 42-1-172 based on all the evidence, including Appellant's extensive testimony about his job duties, plus the medical records, and even the ergonomics report. Because the Full Commission concluded he made no such finding, it committed an error of law that should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Full Commission.

Respectfully submitted,

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