

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. SUPREME COURT

Opinion No. 5660 (S.C. Ct. App. filed June 26, 2019)

Otis Nero, Claimant,.....Respondent,

v.

South Carolina Department of Transportation, Employer, and
State Accident Fund, Carrier.....Petitioners.

APPENDIX VOL. I

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

Appeal From The Workers' Compensation Commission

Opinion No. 5477

Heard November 17, 2016 – Filed March 29, 2017

REVERSED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for
Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter &
Baxley, P.A., of Columbia, for Respondent.

MCDONALD, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), Otis Nero argues the Appellate Panel erred in failing to find (1) his employer, the South Carolina Department of Transportation (SCDOT), received adequate notice of his workplace accident and (2) he demonstrated reasonable excuse for—and SCDOT was not prejudiced by—any late formal notice. We reverse.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing their work and cleaning up, the crew, including Nero, Durant, and Bostick, was talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again while sitting in his driveway. His wife immediately took him to the hospital where he was admitted and treated.

At the emergency room, Nero filled out a "History and Physical Report" and stated, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not mention the squeegee incident in this submission, and under the section designated "approximate date condition commenced," Nero stated, "several years—neck and syncope." During his deposition, Nero testified he had not been treated for any back or neck problems prior to the squeegee board incident.

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and

ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's supervisors witnessed him pass out, Nero never reported that the squeegee board accident involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated his preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010); see also S.C. Code Ann. § 1-23-380(5)(d)-(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 829-30 (Ct. App. 2009). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42-15-20(A) of the South Carolina Code (2015). We agree.

Section 42-15-20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472-73, 617 S.E.2d 369, 379 (Ct. App. 2005); see also *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*,

367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.").

"Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). The provision for notice should be liberally construed in favor of claimants. *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). "Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52. In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury").

Our review of the record confirms Nero never formally reported his injury to his employer. Nero was able to communicate with SCDOT because he submitted the necessary paperwork for benefits under the Family and Medical Leave Act¹ (FMLA). As Nero has not alleged any mental condition, physical issue, or third party prevented his formal reporting, we must determine whether SCDOT had knowledge of Nero's accident pursuant to section 42-15-20(A).

Nero submits the following facts in support of his argument that SCDOT had adequate notice of his workplace injury. On June 20, 2012, Bostick was concerned about Nero due to both the heat and his age and temporarily pulled Nero off of the squeegee board. After finishing for the day, though while still on the clock, Nero lost consciousness and fell to the ground—Durant and Bostick both witnessed the

¹ 29 U.S.C.A. §§ 2601-2654 (2009 & Supp. 2011).

incident. After regaining consciousness and driving home, Nero passed out a second time. His wife immediately took him to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis. He underwent neck surgery approximately two months later. Durant and Bostick were both aware that Nero was hospitalized and had surgery. In fact, they spoke with Nero while he was in the hospital. Nero never returned to work thereafter.

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department on July 9, 2012.² Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."³ Next, SCDOT contends Nero never actually reported his injury to his employer, despite speaking to both Bostick and Durant while hospitalized. Finally, SCDOT remarks on the medical evidence in the record. In the "Patient Health History Questionnaire" Nero prepared and signed for Dr. Naso, Nero stated his problems were not related to his job and this was not a worker's compensation injury. Dr. Naso initially commented, "I do not think his syncope is related to cervical spine pathology." However, Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

Q: And tell me what happened during that process of you pulling the squeegee board?

A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in

² Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident.

³ SCDOT failed to note that Exhibit 1 also indicated Nero required neck surgery and that his beginning date for incapacity was listed as June 20, 2012.

there, due to whoever is left on the squeegee has got less to help pull it.

Q: Yes Sir.

A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .

Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?

A: No, I didn't tell him that.

Q: Okay, when he took you off, what did you do?

A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not report that he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks*, 286 S.C. at 381, 335 S.E.2d at 93 ("Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability."). Significantly, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there." We find the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to put SCDOT on notice of a potential injury. *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious

supervisor that the case might involve a potential compensation claim"). Because our supreme court has long held that this notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner's determination that SCDOT received adequate notice under section 42-15-20(A).

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for any notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42-15-20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129-30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and ... to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness. Moreover, Durant and Bostick talked with Nero while he was hospitalized and were aware of his treatment and subsequent surgery, as well as the fact that he never returned to work after his collapse. Further, as the single commissioner recognized, Durant testified he never reported the incident to his own supervisor, Bostick, because it happened in Bostick's presence.

Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?

A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.

Q: I mean, a guy hurts his thumb, you've got to report it?

A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.

....

Q: But do you have any responsibility as the lead man to report injuries?

A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A: Well—

Q: Can you say, no, we're not going to tell the supervisor?

A: No, I am not going to do that because there's too much that [can] come back and bite you.

Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?

A: He was right there.

....

Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there" during the incident. Therefore, the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to provide a "reasonable excuse" for failing to provide timely notice pursuant to section 42-15-20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.

Conclusion

Based on the foregoing analysis, the decision of the Appellate Panel is

REVERSED.

LOCKEMY, C.J., and KONDUROS, J., concur.

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State Accident Fund, Carrier, Respondents.

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MCDONALD, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), Otis Nero argues the Appellate Panel erred in failing to find (1) his employer, the South Carolina Department of Transportation (SCDOT), received adequate notice of his

workplace accident and (2) he demonstrated reasonable excuse for—and SCDOT was not prejudiced by—any late formal notice. We reverse.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing their work and cleaning up, the crew, including Nero, Durant, and Bostick, was talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again while sitting in his driveway. His wife immediately took him to the hospital where he was admitted and treated.

At the emergency room, Nero filled out a "History and Physical Report" and stated, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not mention the squeegee incident in this submission, and under the section designated "approximate date condition commenced," Nero stated, "several years—neck and syncope." During his deposition, Nero testified he had not been treated for any back or neck problems prior to the squeegee board incident.

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the

possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's supervisors witnessed him pass out, Nero never reported that the squeegee board accident involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated his preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010); *see also* S.C. Code Ann. § 1-23-380(5)(d)-(e) (Supp. 2016). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

"Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; "only exceptions and restrictions on

coverage are to be strictly construed." *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, "the [c]ourt may take its own view of the preponderance of the evidence." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951) (reversing award of compensation and noting hearing commissioner awarded compensation without discussion of "the jurisdictional defense of timely notice.").

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42-15-20(A) of the South Carolina Code (2015). We agree.

Section 42-15-20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving

timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472-73, 617 S.E.2d 369, 379 (Ct. App. 2005); see also *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.") "Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). The provision for notice shall be liberally construed in favor of claimants. See *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002) (reiterating "the liberal construction our Supreme Court requires of workers' compensation provisions for notice."). In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury"). The purpose of the notice provision "is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Our review of the record confirms Nero never formally reported his injury to his employer. Nero was able to communicate with SCDOT because he submitted the

necessary paperwork for benefits under the Family and Medical Leave Act¹ (FMLA). As Nero has not alleged any mental condition, physical-issue, or third party prevented his formal reporting, we must determine whether SCDOT had knowledge of Nero's accident pursuant to section 42-15-20(A).

Nero submits the following facts in support of his argument that SCDOT had adequate notice of his workplace injury. On June 20, 2012, Bostick was concerned about Nero due to both the heat and his age and temporarily pulled Nero off of the squeegee board. After finishing for the day, though while still on the clock, Nero lost consciousness and fell to the ground—Durant and Bostick both witnessed the incident. After regaining consciousness and driving home, Nero passed out a second time. His wife immediately took him to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis. He underwent neck surgery approximately two months later. Durant and Bostick were both aware that Nero was hospitalized and had surgery. In fact, they spoke with Nero while he was in the hospital. Nero never returned to work thereafter.

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department on July 9, 2012.² Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."³ Next, SCDOT contends Nero never actually reported his injury to his employer, despite speaking to both Bostick and Durant while hospitalized. Finally, SCDOT remarks on the medical evidence in the record. In the "Patient Health History Questionnaire" Nero prepared and signed for Dr. Naso, Nero stated his problems were not related to his job and this was not a worker's compensation injury. Dr. Naso initially commented, "I do not think his syncope is related to

¹ 29 U.S.C.A. §§ 2601–2654 (2009 & Supp. 2011).

² Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident.

³ SCDOT failed to note that Exhibit 1 also indicated Nero required neck surgery and that his beginning date for incapacity was listed as June 20, 2012.

cervical spine pathology." However, Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

Q: And tell me what happened during that process of you pulling the squeegee board?

A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.

Q: Yes Sir.

A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .

Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?

A: No, I didn't tell him that.

Q: Okay, when he took you off, what did you do?

A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not report that he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks*, 286 S.C. at 381, 335 S.E.2d at 93 ("Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability."). Significantly, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there." Because our supreme court has long held that the statutory notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner's determination that SCDOT received adequate notice under section 42-15-20(A). *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim").

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for any notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42-15-20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129-30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness. Moreover, Durant and Bostick talked with Nero while he was hospitalized and were aware of his treatment and subsequent surgery, as well as the fact that he never returned to work after his collapse. Further, as the single commissioner recognized, Durant testified he never reported the incident to his own supervisor, Bostick, because it happened in Bostick's presence.

Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—~~you have some discretion in choosing what~~ injuries to report and what injuries not to report?

A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.

Q: I mean, a guy hurts his thumb, you've got to report it?

A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.

....

Q: But do you have any responsibility as the lead man to report injuries?

A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A: Well—

Q: Can you say, no, we're not going to tell the supervisor?

A: No, I am not going to do that because there's too much that [can] come back and bite you.

Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?

A: He was right there.

Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there" during the incident. The preponderance of the evidence in the record does not support the Appellate Panel's finding that Nero presented no "reasonable excuse" for failing to provide timely notice pursuant to section 42-15-20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.

Conclusion

Based on the foregoing analysis, the decision of the Appellate Panel is

REVERSED.

LOCKEMY, C.J., and KONDEROS, J., concur.

... in the

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

Appeal From The Workers' Compensation Commission

Opinion No. 5660

Submitted May 3, 2018 – Filed June 26, 2019

REVERSED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter & Baxley, P.A., of Columbia, for Respondent.

MCDONALD, J.: Otis Nero lost consciousness and fell to the ground in the presence of his two immediate supervisors while working on a South Carolina Department of Transportation (SCDOT) road crew. Nero argues the Appellate Panel of the Workers' Compensation Commission erred in reversing the Single Commissioner's findings that (1) SCDOT received adequate notice of his workplace accident and (2) Nero demonstrated reasonable excuse for—and

SCDOT was not prejudiced by—Nero's late formal notice. Upon our prior review of Nero's arguments, we considered the question of timely notice as a jurisdictional issue and applied a de novo standard of review in reversing the Appellate Panel decision. *Nero v. S.C. Dep't of Transp.*, 420 S.C. 523, 804 S.E.2d 269 (Ct. App. 2017). Our supreme court granted SCDOT's petition for a writ of certiorari and reversed, reiterating that "timely notice under section 42-15-20 is not a jurisdictional determination, and must be reviewed under the substantial evidence standard." *Nero v. S.C. Dep't of Transp.*, 422 S.C. 424, 812 S.E.2d 735 (2018). We now reverse the Appellate Panel because the substantial evidence in the record does not support its findings that Nero failed to provide SCDOT with adequate notice of his workplace injury or that SCDOT was prejudiced by Nero's late formal notice.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing the day's work and cleaning up, the crew, including Nero, Durant, and Bostick, were talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again in his driveway. His wife immediately took him to the hospital where he was admitted, diagnosed with cervical stenosis, and treated by a neurosurgeon.

While at the emergency room, Nero filled out a "History and Physical Report" stating in part, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the employer's human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not specifically mention a neck "popping" incident with the squeegee

board in this submission, but did report that he required neck surgery. Under the section designated "approximate date condition commenced," Nero wrote, "several years—neck and syncope."

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's two immediate supervisors witnessed him collapse, Nero never reported that an incident with the squeegee board involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated any preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court may reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 829–30 (Ct. App.

2009). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519; 613 S.E.2d 544, 547 (2005)).

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42-15-20(A) of the South Carolina Code (2015). We agree.

Section 42-15-20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472, 617 S.E.2d 369, 379 (Ct. App. 2005); *see also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.").

"Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). Satisfaction of the notice provision should be liberally construed in favor of claimants. *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury").

We agree with SCDOT that Nero never formally reported the mechanics of his injury to his employer. However, the undisputed evidence in the record demonstrated SCDOT had adequate notice within the statutory requirement. On the day of the incident, Bostick became concerned about Nero and temporarily pulled him off of the squeegee board work.¹ Later that day, as the crew was

¹ Bostick explained in his deposition that although Nero never made any complaints to him about his ability to pull the squeegee board, he was concerned for Nero due to both the summer heat and Nero's age.

cooling down and preparing to leave the job site, Nero lost consciousness and fell to the ground. Durant and Bostick both witnessed this. Both men called Nero while he was in the hospital, and both were aware he needed to have neck surgery. Both were aware that Nero did not return to work at SCDOT following his surgery, and Nero filled out the necessary leave paperwork through SCDOT's human resources department.

Significantly, the undisputed documentary evidence in the record further established notice. As early as July 13, 2012, SCDOT received written notification from Nero's family doctor, Richey, that Nero had been out of work since the date of his collapse and needed neck surgery. In July and August 2012, SCDOT received correspondence from Florence Neurosurgery and Spine confirming Dr. Naso was treating Nero for cervical radiculopathy. SCDOT corresponded with the medical provider in November 2012 regarding whether Nero would be able to return to work. There is simply no support in the record for the Appellate Panel's finding that SCDOT lacked knowledge of Nero's workplace injury—or of the cervical problems for which he was being treated—for purposes of section 42-15-20(A).

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" form (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department in July 2012.² Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."³ SCDOT contends Nero never actually reported an "injury," despite his

² Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident. Nero received this form with his "paperwork from Human Resources," Dr. Richey completed a portion of the FMLA form, and it was returned to SCDOT.

³ However, SCDOT's own Question 4 and Nero's response provide additional context: "4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such relevant facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment): Have to have neck surgery." Nero's beginning date for the period of incapacity was listed as June 20, 2012 (the day he collapsed at the job site). As for

conversations with both Bostick and Durant while hospitalized. SCDOT further remarks on the medical evidence in the record, however, the medical opinions it references address causation, not notice.⁴

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

Q: And tell me what happened during that process of you pulling the squeegee board?

A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.

Q: Yes Sir.

A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .

Nero's possible return to work date, Dr. Richey noted on the form "For now he is out - after surgery we can estimate this 7/12/12."

⁴ It appears the Appellate Panel conflated the concept of notice with the evidentiary concept of an injured worker's proof of his claim. Still, we recognize that some of the evidence SCDOT submits in support of its argument that SCDOT lacked notice of the mechanism of Nero's injury may be relevant to both notice and causation. For example, in the medical history questionnaire Nero prepared and signed for Dr. Naso, Nero left blank this line: "Complaint Related to an Injury? _____ Workman's Compensation? _____." And Dr. Naso initially commented, "I do not think his syncope is related to cervical spine pathology." But Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?

A: No, I didn't tell him that.

Q: Okay, when he took you off, what did you do?

A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not tell them he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Supervisor Bostick's deposition testimony is more illustrative of SCDOT's notice. With regard to Nero's "Family Medical Leave Act" form completed in part by Dr. Richey, Nero's counsel asked:

Q: You haven't ever seen [the SCDOT FMLA leave form], but you would agree with me that by July of 2012—this document is dated July the 9th of 2012, I think—yeah, July the 9th. By July the 9th, DOT was aware that Mr. Nero had been out of work since June the 20th and that he had to have neck surgery?

A: Would I have known that?

Q: No. No. I'm asking if you agree with me that the Department of Transportation knew that.

A: I don't know, because I don't know what paperwork he passed on to get to that point.

Q: Fair enough.

Well, I got this document from the Department of Transportation.

A: Right.

Q: So --

A: But I wouldn't have known.

Q: I'm—well, you know. I'm not asking what you knew. I'm asking whether you would agree with me that, given this document, the Department of Transportation would have known that.

[Objection to the form].

Q: Go ahead and answer.

A: That they would have known something then?

Q: Yeah.

A: I guess they would have start[ed] doing their investigation.

Q: Okay. Do you know whether they did start doing an investigation at that point?

A: No, I don't. Like I said, the only—the only thing we ever heard of this is whenever that initial call was made, and whoever they talked to, I wouldn't [know] all that. The only thing I knew, Greg, my boss, called me in and asked me about the situation.

Bostick testified that he provided a written statement over a year prior to his March 2014 deposition in response to a call from his own supervisor. Bostick elaborated, "The only time I ever wrote anything, when they—we—it was brought to our attention that he called the department to say he got hurt on the job, so then that's when our safety guy—district safety guys started investigating what's going on, trying to find out was this eligible that happened, when it happened, whatever." Although Bostick's written statement is undated, a file notation of 2012-4525 appears at the top of the document.

Nero's situation is a far cry from that of the auto body paint technician who reported to his employer that he was "pretty sore" and "must have hurt [himself]" in *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 620, 785 S.E.2d 194, 195 (2016). The *Hartzell* petitioner did not seek immediately seek medical care, and he ended his employment approximately one month after this conversation because "business was slow." *Id.* at 620, 785 S.E.2d at 196. Over one year later, Hartzell filed a claim alleging a partial permanent injury to his back. *Id.* Although both the single commissioner and the Workers' Compensation Commission determined Hartzell "reported his work-related injury to Employer within the requisite time" as required by 42-14-20, this court reversed the Commission's notice finding. *Id.* at 621, 785 S.E.2d at 196.

Our supreme court reversed the court of appeals' finding of a notice failure in *Hartzell*, explaining, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." *Id.* at 623, 785 S.E.2d at 197. There, the employer, while not denying a conversation with the employee may have occurred, testified it did not "ring a bell." *Id.* at 620, 785 S.E.2d at 196. In *Hartzell*, the substantial evidence of notice was this forgotten conversation— with no seeking of immediate medical care or correspondence between the treating physicians and employer prior to the claimant's filing of a Form 50. *Id.* at 623, 785 S.E.2d at 197.

Conversely, here, as the single commissioner's order explained, the "evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1-5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5)." In sum, the substantial evidence in this record simply does not support the Appellate Panel's finding that SCDOT lacked adequate notice of Nero's workplace injury under section 42-15-20(A). See *Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim").

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for the formal notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42-15-20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129-30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness and he was hospitalized the same day of the incident. Further, as the single commissioner recognized, Nero's lead man, Durant, testified he never reported the incident to his own supervisor, Bostick, because Bostick was "right there."

Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?

A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.

Q: I mean, a guy hurts his thumb, you've got to report it?

A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.

....

Q: But do you have any responsibility as the lead man to report injuries?

A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A: Well—

Q: Can you say, no, we're not going to tell the supervisor?

A: No, I am not going to do that because there's too much that [can] come back and bite you.

Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?

A: He was right there.

....

Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.⁵

⁵ And we know, based on Bostick's own deposition testimony as to when he provided his statement to SCDOT, that "the district safety guys" and Bostick's own supervisor were investigating Nero's incident and injury at least a year prior to Nero's filing of the Form 50 on January 6, 2014.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. SCDOT was aware Nero never returned to work following the June 2012 episode and knew of his hospitalization and need for neck surgery well within the ninety-day notice window. Within a few weeks of Nero's collapse, SCDOT was aware of Nero's treatment by a qualified neurosurgeon, that he was having neck surgery, and that he would be unable to return to work. At some point long before Nero filed his Form 50, SCDOT was conducting its own investigation as to Nero's injury at the job site. Thus, the employer suffered no prejudice to either its ability to investigate or furnish medical care in order to minimize Nero's disability and its own liability. As the substantial evidence in the record does not support the contrary conclusions of the Appellate Panel, we reverse.

Conclusion

Based on the foregoing analysis, we reverse the decision of the Appellate Panel and reinstate the order of the single commissioner.

REVERSED.

LOCKEMY, C.J., and KONDUROS, J., concur.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Otis Nero, Respondent,

v.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Petitioners.

Appellate Case No. 2017-001970

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 27789
Submitted March 7, 2018 – Filed April 4, 2018

REVERSED AND REMANDED

John Gabriel Coggiola, of Willson, Jones, Carter &
Baxley, P.A., of Columbia, for Petitioners.

Stephen J. Wukela, of Wukela Law Firm, of Florence, for
Respondent.

PER CURIAM: Petitioners seek a writ of certiorari to review the court of appeals' decision in *Nero v. South Carolina Department of Transportation*, 420 S.C. 523, 804 S.E.2d 269 (Ct. App. 2017). We grant the petition, dispense with further briefing,

reverse, and remand the case to the court of appeals to issue a ruling applying the substantial evidence standard of review.

Respondent filed a workers' compensation claim alleging he sustained injuries to his back and shoulder while on the job. The single commissioner found respondent suffered an injury by accident arising out of and in the course of respondent's employment, and awarded benefits. The appellate panel reversed the decision of the single commissioner, finding respondent failed to provide timely notice of the injury. *See* S.C. Code Ann. § 42-15-20 (2015) (setting forth the requirement of timely notice).

On appeal from the commission's decision, the court of appeals employed the de novo standard of review applicable to jurisdictional questions, 420 S.C. at 529, 804 S.E.2d at 272, and reversed the commission, 420 S.C. at 535, 804 S.E.2d at 276. In finding the question of timely notice was a jurisdictional question subject to de novo review, the court of appeals relied on *Shatto v. McLeod Regional Medical Center*, 406 S.C. 470, 753 S.E.2d 416 (2013) and *Mintz v. Fiske-Carter Construction Co.*, 218 S.C. 409, 63 S.E.2d 50 (1951). However, neither *Shatto* nor *Mintz* supports the court of appeals' use of the de novo standard. *Shatto* involved "the question of whether [the claimant] was . . . an employee . . . or an independent contractor," and thus is inapplicable to this case. 406 S.C. at 475, 753 S.E.2d at 419. *Mintz* did involve what we called "the jurisdictional defense of no timely notice," 218 S.C. at 413, 63 S.E.2d at 52, but in that case we did not review a finding of the commission. Rather, after the commission neglected to rule on the question, we made our own finding of fact. 218 S.C. at 415, 63 S.E.2d at 52-53. Our casual use of the word "jurisdictional" was not necessary to our decision, and thus dictum.

Until this case, the court of appeals has consistently applied the substantial evidence standard when reviewing decisions of the commission on the question of timely notice. *See, e.g., King v. Int'l Knife & Saw-Florence*, 395 S.C. 437, 443, 718 S.E.2d 227, 230 (Ct. App. 2011) ("The Appellate Panel's findings concerning notice are subject to the substantial evidence standard."); *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011) ("The Commission's findings of fact regarding notice and the statute of limitations are reviewed under the substantial evidence standard of review."); *Watt v. Piedmont Auto.*, 384 S.C. 203, 212, 681 S.E.2d 615, 620 (Ct. App. 2009) (holding the commission's ruling that a claimant failed to provide the required notice was supported by substantial evidence); *Lizee v. S.C. Dept. of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) (holding substantial evidence did not support the commission's finding that a claimant provided timely notice); *Bass v. Isochem*, 365 S.C. 454, 461, 617 S.E.2d

369, 372 (Ct. App. 2005) (holding substantial evidence did not support the commission's decision to deny benefits because claimant failed to give timely notice); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 459, 562 S.E.2d 679, 683 (Ct. App. 2002) (holding the commission's findings regarding notice were supported by substantial evidence); *Muir v. C.R. Bard*, 336 S.C. 266, 300, 519 S.E.2d 583, 601 (Ct. App. 1999) (holding substantial evidence supported the commission's finding that a claimant gave timely notice of his claim); *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 382, 335 S.E.2d 91, 93 (Ct. App. 1985) (substantial evidence supported the finding that employer was notified of worker's job-related injury within ninety days).

In *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013), *rev'd*, 415 S.C. 617, 785 S.E.2d 194 (2016), the employer raised the jurisdictional question of whether "it regularly employed four or more employees." 406 S.C. at 241, 750 S.E.2d at 101. The court of appeals reviewed the commission's decision on this question *de novo*, stating "'an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel.'" *Id.* (quoting *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007)). The employer also raised the question of timely notice. 406 S.C. at 246, 750 S.E.2d at 103-04. The court of appeals reviewed the commission's decision on the notice question, however, using the substantial evidence standard. 406 S.C. at 246, 750 S.E.2d at 104. The court of appeals stated, "We find the Appellate Panel's determination that Claimant provided Employer with adequate notice he had suffered a work-related injury is not supported by substantial evidence in the record" 406 S.C. at 247, 750 S.E.2d at 104. We reversed the court of appeals, also applying the substantial evidence standard of review to the question of timely notice, stating,

While reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual findings on these issues. . . . We find the Commission's findings are supported by substantial evidence.

Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016).

Thus, the court of appeals erred in applying the *de novo* standard. Under well-settled law, the commission's determination of whether a claimant gave timely notice under section 42-15-20 is not a jurisdictional determination, and must be reviewed on appeal under the substantial evidence standard. We reverse the court of appeals and remand for a decision under the proper standard of review.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

Otis Nero (Claimant).....Appellant,

vs.

S.C. Department of Transportation (Employer), and
State Accident Fund (Carrier).....Respondents.

PETITION FOR REHEARING

This is an appeal involving a workers' compensation case. Respondents, by and through
~~their undersigned counsel, hereby files this Petition for Rehearing pursuant to Rule 221, SCA CR.~~

On March 29, 2017, this Court filed an opinion reversing the May 29, 2015 Decision and Order of the South Carolina Worker's Compensation Full Commission Appellate Panel ("Appellate Panel"). Nero v. SCDOT, Opinion No. 5477 (S.C. Ct. App. filed March 29, 2017). As a matter of background, August 5, 2014, the initial Hearing Commissioner found that Appellant sustained a compensable injury by accident arising out of and in the course of his employment on June 20, 2012, "while pulling a squeegee board leveling concrete; and that, pursuant to S.C. Code Ann. §42-9-35, the accident aggravated the pre-existing cervical disc condition that was present in his neck." (R. p.32).

Respondents appealed the Hearing Commissioner's Order to the Appellate Panel, and on May 29, 2015, the Appellate Panel reversed the Hearing Commissioner's Order in full based on their findings that Appellant failed to provide Respondents with timely notice of his alleged accident in accordance with S.C. Code Ann. §42-15-60 or provide a reasonable excuse for failure to provide notice to the satisfaction of the Commission, and as a result, the Appellate Panel found Respondents were prejudiced and denied Appellant's entitlement to benefits under the Workers Compensation Act. Appellant appealed the Full Commission's decision, and on March 29, 2017, this Court reversed the Full Commission on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to put Respondent on notice of a potential injury. Nero, at p.7 (S.C.Ct. App. 2017). This Court further held that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to provide a "reasonable excuse" for failure to provide timely notice, and this Court held Respondents were not prejudiced by the lack of timely notice. Id at p.9.

As grounds for this Petition, Respondents would respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the "substantial evidence" standard of review, and the Court exceed their role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders. As our Courts have previously stated, "[u]nder the scope of review established in the APA, this Court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Taylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct.App.2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); Stephan v. Avrus Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996); S.C.Code Ann. § 1-23-380(A)(6)(d)

(Supp.2003).

ARGUMENT

Respondents first direct the Court's attention to the fact that this Court has cited no error of law in the case, and instead stated their decision to reverse based on the "substantial evidence" standard of review. Although normally the proper interpretation of a statute is a question of law subject to de novo review (see Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010)), "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dumon v. S.C. Bd. of Examiners In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

Appellant attempted to argue in his Appellant's brief to this Court that there was an error of law because there were no facts in dispute, but this statement is incorrect. The facts of the claim were unquestionably in dispute with regard to (1) whether there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim, and (2) whether Appellant sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident, including his pulling of the squeegee board as alleged in his pleadings or his subsequent syncope episodes at the job site and at home.

Therefore, since there was no finding of an error of law in the case, the question turns to whether the Court of Appeals appropriately applied the "substantial evidence" in reversing the Full Commission.

- 1. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving the "substantial evidence" standard of review and whether they exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the Full Commission's role as the**

appropriate fact finder in this case.

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. Lark v. B-I, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by an error of law. Harrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy v. Aiken City, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses 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 requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

- (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
- (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Since Appellant admittedly failed to tell his employer about his alleged work accident

During the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had "adequate notice" of a possible work related injury. In Etheredge v. Monsanto Co., this Court stated, "[f]or adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 457 (S.C.Ct.App. 2002).

In its current opinion, this Court recited the conflicting factual evidence presented to the Commission Appellate Panel in order for them to make a decision on whether Appellant provided timely notice in accordance with the law. This Court cited several facts raised by Appellant in support of the position that although Appellant stipulated to never reporting his alleged accident to his supervisor, Respondents still had adequate notice of his injury in accordance with the Etheredge case, including the following facts:

1. That on the day of the alleged accident, Appellant's supervisor briefly pulled him from the squeegee board for a to rest as a result of his age and the heat;
2. That after finishing their work for the day, though still on the clock, Appellant lost consciousness and fell to the ground, and his supervisors, Mr. Durant and Mr. Bostick, both witnessed the fall;
3. That Appellant regained consciousness and drove home, where he passed out for a second time in his driveway, and was taken by his wife to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis;
4. That appellant underwent neck surgery approximately two months later, and both Mr. Durant and Mr. Bostick were aware of Appellant's hospitalization and surgery, and in fact, both supervisors spoke with appellant while he was in the hospital;
5. That Appellant never returned to work for Respondent.

The Court then then went on to recite facts argued by Respondents that contraindicated a finding that sufficient accompanying facts existed to put Respondent Employer, as a reasonably

conscientious supervisor, on notice that the case might involve a potential claim. Specifically, this Court referenced the following facts:

1. On July 9, 2012, only one (1) month after his alleged accident, Appellant submitted to Human Resources a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor. The document submitted by Appellant to Respondent's HR department made no mention of his alleged work accident, and instead stated that the date Appellant's condition commenced was "several years -- neck and syncope";
2. Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he stated his problems were not related to his job and this was not a workers compensation injury.
3. Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his accident, and during their visits to him at the hospital, and Appellant chose to never report any work accident involving the pulling of a squeegee board as alleged in his pleadings and the Hearing Commissioner's finding of compensability.
4. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology," but, Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

Without further explanation, this Court goes on to state that after weighing the same arguments and evidence presented to the Appellate Panel, this Court did not agree that the substantial evidence supported the conclusions reached by the Commission Appellate Panel, and instead this Court substituted its own judgment on the weight on the conflicting evidence and facts. As stated above, these were conflicting factual determinations to be made by the Commission as the fact finder in the case. Instead this Court weighed the same facts, evidence, and supporting law, and came to their own conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Appellate Panel's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. Prime v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Appellate Panel did exactly that. Specifically, the Appellate Panel stated the following Findings of Fact:

FOF #10: We find that the only actual or in formal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday. (R. p.52).

With respect to this finding, our Supreme Court held in Sanders v. Richardson, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325 (1968).

In addition, the Appellate Panel went on to state several additional pertinent Findings of Fact, including the following:

FOF #15: We find that pursuant to S.C. Code Ann. §42-15-20, claimant failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice is required by the statute. Although claimant supervisors witness claimant sync up episode, claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years instead of requesting workers compensation. (R. p. 53)

FOF #16: We find that pursuant to SC code annotated section 42 – 15 – 20, defendants suffered a prejudice as a result of claimant's third provide timely notice. Defendants were unable to fully investigate whether claimants alleged squeegee accident cause sync up episode, or whether the alleged squeegee accident or sink a fall cause the aggravation of his cervical condition. As a result of the prejudice against defendants caused by claimant's failure to provide timely notice, claimant's request for benefits is denied. (R. p.53)

Application of the appropriate standard of review is imperative in this case. The case presented questions of conflicting facts over whether Appellant's supervisors were presented with sufficient accompanying circumstances that should have triggered a supervisor's effort to investigate a potential claim despite Appellant's failure to report it to them and instead turn in HR paperwork denying that his condition was related to any recent alleged accident, and conflicting facts over the medical causation of the Appellant's injuries and resulting treatment. The Appellate Panel found that Appellant failed to provide a reasonable excuse for his failure to give timely notice, and as a result, Respondents were prejudiced. The Appellate Panel's findings were sufficiently detailed to enable the Appellate Court to determine whether the evidence supported the findings and whether the law was properly applied to those findings.

~~Instead, this Court reversed the fact finding conclusion of the Commission Appellate~~
Panel and substituted its judgment in coming to the conclusion that Respondents had adequate notice. In addition to exceeding their role as the appellate court, this court's decision would result in an almost impossible and impractical application of the law to future workers compensation claims. If an injured worker refuses to tell his employer he was hurt at work, and he then submits formal paperwork confirming it was not a work accident and his condition predated his alleged date of injury, it is unreasonable to expect a manager to disregard the signed statement from the injured worker and continue to investigate any potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's

Compensation Act.

This Court states in its opinion, without referencing any supporting case law, that because the Supreme Court has long held that the notice provision is to be liberally construed in favor of claimants, they therefore found the Appellate Panel erred in reversing the Hearing Commissioner's determination that Respondents had "adequate notice." Even if the notice requirement is to be construed liberally in favor of the injured worker, the notice statute is there for a reason and there must be some limitation on an injured worker's ability to satisfy notice when he does not report his injury to his employer. The General Assembly has placed the burden upon the claimant to prove entitlement to worker's compensation benefits. See Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture[,] or speculation.").

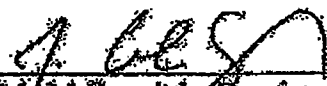
When Appellant failed to tell his employer about his alleged accident, told his doctor it was not related to any work injury, and submitted formal paperwork to Respondent Employer ~~denying his condition was related to a recent work injury and instead has existed for years, it is~~ illogical to find that the injured worker has satisfied his burden.

Finally, this Court held that Respondents were not prejudiced by Appellant's failure to provide notice in accordance with the statute. As discussed above, there were disputed facts and competing medical opinions regarding whether Appellant's aggravated cervical stenosis or his syncope episodes were causally related to his accident he described while operating the squeegee board, and Respondents were deprived of the right to timely investigate the causation of Appellant's injuries, the extent of Appellant's pre-existing conditions, and whether Appellant sustained his burden improving a compensable aggravation of a pre-existing condition pursuant

to S.C. Code Ann. §42-15-35.

CONCLUSION:

Respondents/Appellants respectfully submit that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the standard of review and the Full Commission's role as the appropriate fact finder in the case, and Respondents/Appellants would respectfully request that this Court grant their Motion for Rehearing.



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April 13, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1222136
Appellate Case No.: 2015-001277

Otis Nero, Appellant,

vs.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

Appellants by and through their undersigned counsel hereby opposes the
Respondents' Petition for Rehearing as follows:

ARGUMENT

Respondents argue that the Court of Appeals misapprehended the evidence, law,
or arguments involving the standard of review. This case involved the application of the
following undisputed facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of
Transportation road crew supervised by lead man Benjamin Durant and supervisor
Danny Bostick. (R. p. 69, lines 17-20; R. p. 107, lines 10-12).

Claimant, along with other members of the crew, worked that day pulling a "squeegee board", that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (R. p. 69, lines 20-24; R. p. 107, lines 11-12; R. p. 194, line 20 - p. 197, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (R. p. 220, lines 10-12; R. p. 70, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (R. p. 69, line 24 - p. 70, line 10).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (R. p. 79, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (R. p. 70, lines 10-13; R. p. 79, lines 18-20; R. p. 125, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (R. p. 107, lines 14-15).

After finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (R. p. 70, lines 15-22; R. p. 107, lines 15-19; p. 125, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (R. p. 107, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (R. pp. 331-351).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (R. p. 123, lines 16-20).

Plaintiff never returned to work thereafter. (R. p. 229, lines 11-12).

The Claimant's lead man, Mr. Durant, testified that he did not report Mr. Nero's incident to his supervisor, Mr. Bostick, because Mr. Bostick was "right there". (R. pp. 24-28).

Where the relevant facts are undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law"). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.").

The Respondent argues that there are facts in dispute. In particular, Respondent argues "the facts of the claim were unquestionably in dispute with regard to (1)¹ whether

¹Respondents also cite, as facts in dispute, "(2) whether Appellant sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident..." (Respondents Petition for Rehearing, p. 3)

Whether or not there was an issue of fact as to medical causation is irrelevant to the question of the proper standard of review on the issue of notice.

The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant's treating physician Dr. Robert Richey. (R. pp. 20-23). The Appellant Panel reversed the Single Commissioner's award on the issue of notice alone. (R. pp. 55-56). The parties briefed and argued this case to the Court of Appeals on the issue of notice. It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, as the Respondent seeks to do here. See Kennedy v. S.C. Pet. Sys, 349 S.C. 531 (2001).

there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim.” (p. 3, Respondents’ Petition for Rehearing). The Respondent has not identified any genuine facts in dispute. Instead, the Respondent seeks to recast the legal standard for notice set by the Court in Etheredge v. Monsanto as a factual issue.

For adequate notice, as a matter of law, the facts must demonstrate that the employer had, “ ‘some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.’ ” Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson’s Workers’ Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

It is certainly the case that the legal issue as to whether the undisputed facts meet the legal standard of notice was directly contested in this appeal. What is critical to the applicable standard of review, however, is that the legal conclusion was in dispute, not the underlying facts.

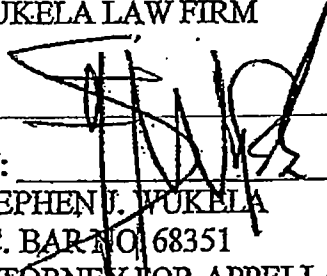
The Court did not misapply the standard of review or invade the province of the Commission by making its own findings of fact. Instead, the Court applied the law to undisputed facts.

In truth, the Court applied a stricter standard of review, substantial evidence, then was required, given that the Court is entitled to review questions of law de Novo. Even under the substantial evidence standard, however, the Court properly found that the Commission’s decision was contrary to the substantial evidence. That is to say, the Court considered the undisputed evidence of the record as a whole and found it insufficient to allow reasonable minds to reach the conclusion that Nero failed to put the South Carolina Department of Transportation on notice of a potential injury.

For the foregoing reasons the Respondents Petition for Rehearing should be denied.

Respectfully submitted,

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April 21st, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5477 (S.C. Ct. App. filed August 23, 2017)

Otis Nero, Claimant,.....Respondent,

v.

South Carolina Department of Transportation, Employer, and
State Accident Fund, Carrier.....Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) (1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on April 13, 2017 and granted by the Court of Appeals on August 22, 2017, with an attached opinion dated August 23, 2017 that substituted the previous March 29, 2017 opinion. (Appendix, p.50). Out of an abundance of caution, a Successive Petition for Rehearing was filed on September 6, 2017, since a new opinion was issued and the previous opinion was withdrawn. (Appendix, p.39). The Successive Petition for Rehearing has not been addressed by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the Commission's denial of benefits based on Respondent's failure to provide timely notice in accordance with S.C. Code Ann. §42-15-20 and accompanying case law?
2. Whether the Court of Appeals erred in their application of either the "substantial evidence" or "preponderance of the evidence" standard of review, exceeding their role as an appellate court by substituting their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case.

STATEMENT OF THE CASE

This appeal involves a workers' compensation matter. On January 6, 2014, Respondent filed a Form 50 Request for Hearing, wherein he alleged injuries to his neck and bilateral shoulders as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012. (Appendix, p.107). Petitioners timely filed a Form 51 Answer to Respondent's Request for Hearing, denying Respondent sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged, and arguing that Respondent failed to provide the Employer with timely notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law.

A hearing was held before the Single Commissioner on March 28, 2014. At the hearing, Respondent took the position that while working with a road crew on June 20, 2014, he was using a squeegee to pull cement when he felt an immediate onset of pain in his back and shoulders that he described as a "snap." (Appendix, pp.183, lines 9-13). Respondent testified that he did not report the squeegee accident to his supervisors, and he continued to work the rest of the day. (Appendix, p.183, lines 18-24). Respondent further testified that at the end of his shift, he and his co-workers were standing around, talking, and joking with his supervisors at the work shed, and Respondent passed out and fell to the ground. (Appendix, p. 185, lines 3-18). Respondent testified was able to get back up, and he told his supervisors "I feel okay" and "I don't know what happened, you know." (Appendix, p.185, lines 20-23). Respondent testified that his supervisors asked again if he was okay, and he replied "well, I feel like I'm all right" and "I'm hot." (Appendix, p.186, lines 8-15). Respondent testified that he cooled off in his truck and drove home, and as he pulled into his yard and started to get out of his truck, he fainted a second time. (Appendix, p. 186, lines 14-18).

Respondent testified that his wife took him to the hospital, where he filled out a "History and Physical Report" stating that he was being seen because "I passed out talking to my boss." (Appendix, p.422). Respondent's medical records made no mention of an accident that took place pulling a squeegee board. At the emergency room, Respondent was seen by his primary care physician, Dr. Robert Richey, who ordered a series of diagnostic tests to determine the cause of his syncope episode, including Head CT, x-ray of the right foot, chest x-ray, cardiac work up, gastrointestinal work up, and a cervical MRI, which revealed cervical stenosis. (Appendix, pp. 423-430). Based on the cervical MRI findings, Dr. Richey referred Respondent to a neurosurgeon, Dr. William Naso, who performed a fusion surgery on August 28, 2012. (Appendix, p.434-435).

In his "patient health history questionnaire" prepared on June 28, 2012 for Dr. Naso, Respondent stated that his complaints were not related to an injury or Worker's Compensation. (Appendix, p.438). In addition, Respondent submitted a certification of health care provider for employee's serious health condition to his employer on July 9, 2012, wherein he stated that he had a neck condition that commenced several years ago with syncope episodes. (Appendix, pp. 417-420).

At the hearing before the Single Commissioner, Respondent took the position that as a result of his accident pulling the squeegee board, Respondent aggravated his pre-existing cervical stenosis. (Appendix, p.171, lines 21-25). Petitioners argued Respondent lacked sufficient evidence to satisfy his burden of proving a compensable injury by accident while pulling the squeegee board as alleged in his pleadings, or that the alleged accident pulling the squeegee board caused either of his two (2) syncope episodes or aggravated his pre-existing cervical condition. (Appendix, pp. 174, lines 20-25). Petitioners further argued Respondent failed to provide his employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and therefore his claim for benefits should be denied. (Appendix, p.172, lines 11-23).

On August 5, 2014, the Single Commissioner issued a decision and order, wherein she found Respondent sustained a compensable injury by accident while pulling a squeegee board leveling concrete, aggravating a pre-existing disease in the Respondent's cervical spine that was asymptomatic prior to the accident. (Appendix, p. 124-125). The Single Commissioner further found that Respondent's accident affected both arms and shoulders in the form of radiculopathy, and Respondent was not currently at a point of maximum medical improvement ("MMI"). (Appendix, pp. 127-128). The Single Commissioner ruled that Respondent had a reasonable excuse for not reporting his work injury due to the facts that (1) his lead man and supervisor were present when he passed out and had knowledge of pertinent facts surrounding the accident

sufficient to indicate the possibility of a compensable injury, (2) the Employer was aware that Respondent had not returned to work after June 20, 2012, and (3) Petitioners were notified Respondent had been hospitalized and ultimately underwent neck surgery. (Appendix, pp.128-129). The Single Commissioner found that Petitioners were not prejudiced by the late formal reporting of the injury and ordered Respondent was entitled to TTD benefits from June 20, 2012 and continuing, and Petitioners were responsible for all causally related medical treatment, including past, present, and future treatment. (Appendix, p. 133).

On August 28, 2014, Petitioners filed a Form 30 Request for Review to the Full Commission Appellate Panel ("Full Commission"). Petitioners argued the Single Commissioner erred in finding that Respondent sustained a compensable injury by accident to his neck arising out of and in the course of his employment while pulling a squeegee as alleged in his pleadings, nor did he meet his burden in proving an aggravation of his pre-existing cervical condition as a result of his accident pulling the squeegee board. Petitioners further argued the Single Commissioner erred in finding that Respondent had reasonable excuse for not providing notice of his alleged work accident pursuant to S.C. Code Ann. §42-15-20, and that Petitioners were not prejudiced by the late formal reporting of the accident.

Following the submission of briefs by both parties, oral arguments were held on February 23, 2015. On May 29, 2015, the Full Commission issued a Decision and Order, reversing the August 5, 2014 decision of the Single Commissioner. (Appendix, pp.155-160). The Full Commission ruled that although the Respondent's supervisors witnessed his syncope episode, Respondent never reported the alleged accident pulling the squeegee board alleged in his pleadings and awarded by the Single Commissioner's finding of compensability. (Appendix, p.155). The Full Commission ruled that Petitioners were prejudiced by Respondent's failure to provide timely

notice in accordance with S.C. Code Ann. §42-15-20, and Petitioners were deprived of the opportunity to investigate the causation of the Respondent's injury, and whether it was caused by the accident Respondent alleged pulling the squeegee board, or whether his injury was a result of Respondent's first syncope episode at work or his second syncope that took place at home in his driveway. (Appendix, p.157). The Full Commission concluded that based on Respondent's failure to provide notice as required by S.C. Code Ann. §42-15-20, Respondent's failure to provide a reasonable excuse made to the satisfaction of the Commission for not giving timely notice, and the resulting prejudice suffered by Petitioners, Respondent's request for benefits as a result of his alleged June 20, 2012 accident were denied. (Appendix, p. 159).

On June 10, 2015, Petitioner filed their Notice of Intent to Appeal with the South Carolina Court of Appeals. Following submission of briefs by both parties, oral arguments were held on November 17, 2016. On March 29, 2017, the Court of Appeals issued an opinion reversing the decision of the Full Commission on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Respondent failed to put Petitioners on notice of a potential injury. (Appendix, p.7). The Court of Appeals further stated that the substantial evidence in the record did not support the Full Commission's finding that Respondent failed to provide a "reasonable excuse" for failure to provide timely notice, and Petitioners were not prejudiced by the lack of timely notice. (Appendix, p.10).

On April 13, 2017, Petitioners filed a Petition for Rehearing, arguing the Court of Appeals March 29, 2017 opinion cited no error of law on the part of the Full Commission, and the Court of Appeals may have misapprehended, or overlooked the law involving the "substantial evidence" standard of review, exceeding their role as an appellate court by substituting its judgment for that of the Commission, who are the appropriate fact finders.

(Appendix, pp22-32). On August 22, 2017, the Court of Appeals issued an Order granting the Petition for Rehearing, and withdrawing the March 29, 2017 opinion and substituting it with a new refiled August 23, 2017 opinion. (Appendix, p.50)

In the substituted August 23, 2017 opinion, this Court added an additional paragraph to the “Standard of Review” section of the opinion, stating:

“Statutory interpretation is a question of law subject to de novo review.” *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. “The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; “only exceptions and restrictions on coverage are to be strictly construed.” *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, “the [c]ourt may take its own view of the preponderance of the evidence.” *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951) (reversing award of compensation and noting hearing commissioner awarded compensation without discussion of “the jurisdictional defense of timely notice.”).

(Appendix, pp.13-14).

Essentially, the Court of Appeals made no substantive changes to its previous opinion, but instead recognized that they incorrectly applied the “substantial evidence” standard of review and simply replaced it with the “preponderance of the evidence” standard of review to support their own view of the evidence on the issue of notice and reverse the Commission’s decision.

Since the Court of Appeals replaced the March 29, 2017 opinion with a new August 23, 2017 opinion, Petitioners, in an abundance of caution, filed a Successive Petition for Rehearing

on September 6, 2017 in addition to the current Petition for Writ of Certiorari. (Appendix, pp.39-47).

ARGUMENT

- I. **The Petition for Writ should be granted because the Court of Appeals erred in substituting the “substantial evidence” standard of review with the “preponderance of the evidence” standard of review, and continued to exceed their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinder in the case.**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court's review is limited to deciding whether the Full Commission's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses 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 requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

- (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such

giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Since Respondent admittedly failed to tell his employer about his alleged work accident during the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had "adequate notice" of a possible work related injury. In *Etheridge v. Monsanto Co.*, the Court of Appeals stated, "[f]or adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 457 (S.C.Ct.App. 2002).

In this case, the Court of Appeals recited the conflicting factual evidence presented to the Full Commission in order for them to render a decision on whether Respondent provided timely notice in accordance with the law. The Court of Appeals cited several facts raised by Respondent in support of the position that although Respondent stipulated to never reporting his alleged accident to his supervisor, Petitioners still had adequate notice of his injury in accordance with the *Etheridge* case, including the following facts:

1. That on the day of the alleged accident, Respondent's supervisor briefly pulled him from the squeegee board for a to rest as a result of his age and the heat;
2. That after finishing their work for the day, though still on the clock, Respondent lost consciousness and fell to the ground, and his supervisors, Mr. Durant and Mr. Bostick, both witnessed the fall;

3. That Respondent regained consciousness and drove home, where he passed out for a second time in his driveway, and was taken by his wife to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis;
4. That Respondent underwent neck surgery approximately two months later, and both Mr. Durant and Mr. Bostick were aware of Respondent's hospitalization and surgery, and in fact, both supervisors spoke with appellant while he was in the hospital;
5. That Respondent never returned to work for Petitioner.

(Appendix, pp. 5-6)

The Court then then went on to recite facts argued by Petitioners that contraindicated a finding that sufficient accompanying facts existed to put the Employer, as a reasonably conscientious supervisor, on notice that the case might involve a potential claim. Specifically, this Court referenced the following facts:

1. On July 9, 2012, only one (1) month after his alleged accident, Appellant submitted to Human Resources a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor. The document submitted by Appellant to Respondent's HR department made no mention of his alleged work accident, and instead stated that the date Appellant's condition commenced was "several years -- neck and syncope";
2. Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he stated his problems were not related to his job and this was not a workers compensation injury.
3. Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his accident, and during their visits to him at the hospital, and Appellant chose to never report any work accident involving the pulling of a squeegee board as alleged in his pleadings and the Hearing Commissioner's finding of compensability.
4. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology," but, Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

(appendix, p.6).

Without further explanation, the Court of Appeals went on to state that after weighing the same arguments and evidence presented to the Full Commission, the Court of Appeals did not agree that the substantial evidence supported the conclusions reached by the Full Commission,

and instead the Court of Appeals substituted its own judgment on the weight on the conflicting evidence and facts.(Appendix, p.7) As stated above, these were conflicting factual determinations to be made by the Commission as the fact finder in the case. Instead the Court of Appeals weighed the same facts, evidence, and supporting law, and came to their own conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Full Commission did exactly that, stating " We find that the only actual or in formal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday." (Appendix, p.17). With respect to this finding, this Court previously held in *Sanders v. Richardson*, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325 (1968).

In addition, the Appellate Panel went on to state several additional pertinent Findings of Fact, including, "We find that pursuant to S.C. Code Ann. §42-15-20, Respondent failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice is required by the statute. Although Respondent's supervisors witness

Respondent's syncope episode, Respondent never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Respondent was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years instead of requesting workers compensation. (Appendix, pp.156-157).

The Full Commission further held that S.C. code Ann. §42-15-20, Petitioners suffered a prejudice as a result of Respondent's failure to provide timely notice. Petitioners were unable to fully investigate whether Respondent's alleged squeegee accident caused the syncope episode, or whether the alleged squeegee accident or syncope fall cause the aggravation of his cervical condition. As a result of the prejudice against Petitioners caused by Respondent's failure to provide timely notice, claimant's request for benefits is denied. (Appendix, p.159).

The Full Commission's findings were sufficiently detailed to enable the Court of Appeals to determine whether the evidence supported their findings and whether the law was properly applied to those findings. Instead, the Court of Appeals reversed the factual conclusions of the Commission and substituted its own judgment that Petitioners had adequate notice. In addition to exceeding their role as the appellate court, the Court of Appeals decision would result in an almost impossible and impractical application of the law to future workers compensation claims.

When Respondent failed to tell his employer about his alleged accident, told his doctor it was not related to any work injury, and submitted formal paperwork to Petitioner/Employer denying his condition was related to a recent work injury and instead has existed for years, it is illogical to find that the injured worker has satisfied his burden or that an employer should disregard his statements and investigate a potential injury they know nothing about.

Finally, the Court of Appeals held that Petitioners were not prejudiced by Respondent's failure to provide notice in accordance with the statute. As discussed above, there were disputed facts and competing medical opinions regarding whether Respondent's aggravated cervical stenosis or his syncope episodes were causally related to the accident he alleged operating the squeegee board, and Petitioners were deprived of the right to timely investigate the causation of Respondent's injuries, the extent of Respondent's pre-existing conditions, and whether Respondent sustained his burden in proving a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-15-35.

The substituted opinion of this Court filed August 23, 2017 continues to exceed the Court of Appeals role as an appellate court and inserts itself as the fact finder which established case law states should be reserved to the Commission. The Court of Appeals substituted opinion still fails to address any specific basis for the reversal of Full Commission's finding that Respondent failed to provide adequate notice in accordance with §42-15-20 and the accompanying case law, and instead simply recites the statement that the notice provision is to be liberally construed in favor of the injured worker.

In the August 24, 2017 opinion, this Court cites the *Transportation Co. & Flagstar* case in support of its statements the "statutory interpretation is a question of law subject to de novo review" and "the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration will not be overruled absent compelling reasons." 389 S.C. 422, 699 S.E.2nd 687 (2010).

In *Transportation Co. & Flagstar*, this Court goes into more detail on the issue of an appellate court's review of workers compensation statutes, stating:

When reading a workers' compensation statute, this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. See *id.* "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted). "The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citation omitted).

This case is not a case of statutory interpretation. The language of §42-15-20 is plain, unambiguous, and conveys a clear meaning. Further, the Court of Appeals has already interpreted §42-15-20 in the 2002 *Etheridge vs. Monsanto* case, wherein the Court of Appeals stated, "for adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 562 S.E.2nd 679 (S.C.App. 2002). This Court previously stated that although the notice statute is to be liberally construed in favor of the claimant, "there are limitations upon that rule and the statutory requirement cannot be disregarded altogether." *Mintz v. Fiske Carter Construction Co.* 218 S.C. 409, 63 S.E.2nd 50 (1951).

In the August 23, 2017 opinion, this Court again recited the conflicting factual evidence presented to the Full Commission on the issue of whether there was some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential workers compensation claim. Despite the conflicting evidence presented by both parties, and the Commission's

interpretation and findings based on that conflicting evidence, the Court of Appeals simply states that the Full Commission erred in reversing the Single Commissioner's decision on notice, but does not provide any evidence based support for its reversal. The Court of Appeals cites no additional facts or case law in support of their decision, but instead simply disagrees with the Full Commission's view of the facts. As soon as our appellate courts are allowed to begin reversing the fact-finding decisions of the Worker's Compensation Commission, the role of the commission and the appellate courts overlap, and the appellate courts inappropriately become the second line factfinder, ignoring the authority of the commission to make factual determinations in accordance with the law.

Petitioners argue the Court of Appeals reliance on the fact that Respondent's supervisors witnessed him pass out at the end of a work day does not support a finding of compensability. The evidence is clear after Respondent passed out at this work place, he drove himself home, and he passed out again in his own driveway before being taken to the emergency room. Respondent even admits to suffering from dizzy spells in the past. In order for the Court of Appeals to reverse the Full Commission's decision based on the fact that the Respondent's supervisors witnessed him fall at the end of the day, it would require them to find that the syncope episode at the worksite, and not the alleged squeegee incident or the subsequent syncope episode in his own driveway, was the mechanism of injury that aggravated his pre-existing cervical condition, even though it was the raking, and not the syncope episode that was pled by Respondent and awarded by the Single Commissioner. Such a finding would be speculative, and this Court has been clear that, "an award cannot be based on surmise, conjecture, or speculation." *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999);


As this Court has previously stated, "In the review of a finding of the Worker's Compensation Commission, the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence. *Fox v. Newberry Co. Memorial Hospital*, 319 S.C. 278, 461 S.E.2nd 393 (1995).

Although the Court of Appeals previously applied the substantial evidence standard of review used in the *Etheredge* case, which also interpreted §42-15-20, the new application of the preponderance of the evidence still does not support a reversal of the Full Commission. A reversal of the Full Commission's decision in this case would result in an almost impossible and impractical application of the notice statute to future workers compensation claims. If an injured worker refuses to tell his employer he was hurt at work, he submits formal paperwork to his employer stating he did not suffer a work accident and his condition pre-dated his alleged date of injury, and he denies any work injury in his medical reports to his doctors, it is unreasonable to expect a "reasonably conscientious" manager to disregard those facts and continue to investigate a potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's Compensation Act.

CONCLUSION

For the reasons set forth above, Petitioner argue that the Court of Appeals decision in this case conflicts with prior Supreme Court holdings involving the role of the Commission as fact finders in workers compensation claims, and Petitioners respectfully requests that this Court grant the Petition for Writ of Certiorari and allow further briefing on the issues.

Respectfully submitted,



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September 21, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court of the State of South Carolina

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

Otis Nero, Claimant, Respondent,

vs.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Petitioners.

**RESPONDENT'S RETURN TO PETITIONERS'
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

This is a Workers' Compensation matter. The Respondent filed a claim alleging that, while working on a South Carolina Department of Transportation crew using a squeegee board to level cement, he suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope.

The Defendants denied the accident and notice. The case was tried before the Single Commissioner on March 28, 2014. As presented during the hearing, the following facts are undisputed:

Undisputed Facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of Transportation road crew of ten to twelve people supervised by lead man Benjamin Durant and supervisor Danny Bostick. (App. p. 173, lines 17-20; App. p. 211, lines 10-12).

Claimant, along with four to five other members of the crew, worked that day pulling a "squeegee board", that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (App. p. 173, lines 20-24; App. p. 211, lines 11-12; App. p. 298, line 20 - p. 301, line 24).

The pad was located in the center of a field; there was no shade, it was summertime, and it was very hot. (App. p. 324, lines 10-12; App. p. 174, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (App. p. 173, line 24 - p. 174, line 10). Specifically, Bostick testified:

Q. ... So on June 20, 2012, did you see him do any of what you

describe as straining work?

A. Well, I have — I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.

Q. Okay.

A. And he will come off of it.

Q. So —

A. Because it's hot.

Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?

A. Yes.

Q. Okay. You told him to get off the squeegee board?

A. Yes.

Q. Okay. Now, why did you do that?

A. It's hot, and I know he's an older guy, so if I know I can — we've got other people that can relieve him, I try to take him off of that.

Q. Okay. Did he make any complaints to you about not being able to perform his — his job?

A. No.

Q. Okay. Is it fair to say you did that out of an abundance of caution?

A. Yeah. That's — I try to protect the people, too, at work. As far as doing our job, I also take it personal to try to get them home safely.

Q. Okay. Now, what job did you put him on after you took him off the squeegee board?

A. Basically he just took a break. He got up, wiped the sweat mostly. It was hot. Like I said, it was real hot out there. We was in the center of a field, no trees, no nothing. He's hot. So when I can — if I see a guy on the field like he's looking weary or like he's trying to get overheated, I try to give them a break.

Q. So did he look weary and overheated?

A. Well, he looked hot to me, you know. Like I said, it was a hot day. It was a hot day, I know. I can remember that much of it. It was real hot, and, like I said, I always try to look out, especially for the — if they're older guys, ladies, whatever.

(Bostick p. 33, line 2 - p. 34, line 21).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the

squeegee board. (App. p. 183, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (App. p. 174, lines 10-13; App. p. 183, lines 18-20; A. p. 229, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (App. p. 211, lines 14-15).

At approximately 3:00 in the afternoon, after finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (App. p. 174, lines 15-22; App. p. 211, lines 15-19; App. 229, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (App. p. 211, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (App. p. 438-455).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (App. p. 227, lines 16-20).

Plaintiff never returned to work thereafter. (App. p. 333, lines 11-12).

The Single Commissioner found accident and causation, found notice was adequate, that reasonable excuse was given for lack of more formal notice, and that the Employer failed to demonstrate prejudice as the result of the absence of more formal notice. The Workers'

Compensation Appellate Panel reversed on the issue of notice, and the Claimant appealed.

The Court of Appeals found:

Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks*, 286 S.C. at 381, 335 S.E.2d at 93 (“Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.”) Significantly, Durant’s reason for not reporting Nero’s incident to Bostick was that Bostick was “right there.” We find the substantial evidence in the record does not support the Appellate Panel’s finding that Nero failed to put SCDOT on notice of a potential injury. *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding “notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim”). Because our supreme court has long held that this notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner’s determination that SCDOT received adequate notice under section 42-15-20(A). (App. pp. 7-8).

* * *

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant’s reason for not reporting Nero’s incident to Bostick was that Bostick was “right there” during the incident. Therefore, the substantial evidence in the record does not support the Appellate Panel’s finding that Nero failed to provide a “reasonable excuse” for failing to provide timely notice pursuant to section 42-15-20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established. (App. p. 10).

On Petition for Rehearing, the Court of Appeals withdrew that opinion and substituted for

it a refiled opinion of August 23, 2017, which maintained the same holdings but added to the discussion of the Standard of Review the following language:

“Statutory interpretation is a question of law subject to de novo review.” *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. “The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *Id.* (quoting *Dunton v. S.C. Bd. of Exam’rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)(citations omitted)). However, workers’ compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers’ Compensation Act; “only exceptions and restrictions on coverage are to be strictly construed.” *James v. Anne’s Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, “the [c]ourt may take its own view of the preponderance of the evidence.” *Shatto v. McLeod Reg’l Med. Ctr.*, 406 S.C. 470, 475, 732 S.E.2d 416, 419 (2013)(quoting *Wilkerson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951)(reversing award of compensation and noting hearing commissioner awarded compensation without discussion of “the jurisdictional defense of timely notice”). (App. pp. 13-14).

Similarly, the Court of Appeals amended their holdings to reflect the application of de novo review of the issue of notice, reasonable excuse and prejudice. (App. pp. 18, 20).

Petitioners’ Petition for Certiorari followed.

ARGUMENT

I. THE COURT OF APPEALS DID NOT EXCEED THEIR AUTHORITY AS AN APPELLATE COURT WHEN THEY APPLIED THE LAW TO THE UNDISPUTED FACTS PRESENTED IN THIS CASE.

Where the relevant facts are undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding “where, as here, the

facts are undisputed, the question of whether an accident is compensable is a question of law"). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.").

This case involved the application of the following undisputed facts:

On June 20, 2012, the Claimant was working on a road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. (App. p. 173, lines 17-20; App. p. 211, lines 10-12).

Claimant, along with other members of the crew, worked that day pulling a "squeegee board", to level freshly poured concrete. (App. p. 173, lines 20-24; App. p. 211, lines 11-12; App. p. 298, line 20 - p. 301, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (App. p. 324, lines 10-12; App. p. 174, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (App. p. 173, line 24 - p. 174, line 10).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (App. p. 183, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (App. p. 174, lines 10-13; App. p. 174, lines 18-20; App. p. 229, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (App. p. 211, lines 14-15).

After finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (App. p. 174, lines 15-22; App. p. 211, lines 15-19; App p. 229, lines 9-10).

The Claimant regained consciousness, got up, told his co-workers, lead man, and supervisor he was fine, and drove himself home; where he passed out a second time in his driveway. (App. p. 211, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (App. pp. 438-455).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (App. p. 227, lines 16-20).

Plaintiff never returned to work thereafter. (App. p. 333, lines 11-12).

The Claimant's lead man, Mr. Durant, testified that he did not report Mr. Nero's incident to his supervisor, Mr. Bostick, because Mr. Bostick was "right there". (App. pp. 128 - 132).

Thus, the facts pertinent to the issue of notice are undisputed. The question of whether notice was adequately given, or properly excused, is a question of law. Its determination by the Court of Appeals, de novo, was not an invasion of the fact finding field of the Commission by the Court.

The Petitioners conflate factual findings with legal conclusions; arguing that the Court of Appeals found its own facts. (Pet. for Writ of Cert. p.10). The Petitioners, however, never identify what facts, relevant to notice, were in dispute.

In their first Petition for Rehearing to the Court of Appeals, the Petitioners argued "the facts

of the claim were unquestionably in dispute with regard to (1)¹ whether there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim.” (App. p. 24). There, as here, the Petitioners do not identify any genuine issue of material fact. Instead, they seek to recast the legal standard for notice, set by the Court in Etheredge v. Monsanto, as a factual issue.

For adequate notice, as a matter of law, the facts must demonstrate that the employer had, “‘some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.’” Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson’s Workers’ Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

It is certainly the case that the legal issue as to whether the undisputed facts meet the legal standard of notice was directly contested in this appeal. What is critical to the applicable standard of review, however, is that the legal conclusion was in dispute, not the underlying facts upon which a conclusion was based.

The Court did not misapply the standard of review or invade the province of the Commission. The Court simply applied the law to undisputed facts.

In any event, the Court of Appeals also properly found that, because the issue of notice is a

¹Petitioners also cited, as facts in dispute, “(2) whether [Claimant] sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident...” (App. p. 24).

Whether or not there was an issue of fact as to medical causation is irrelevant to the question of the proper standard of review on the issue of notice.

The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant’s treating physician Dr. Robert Richey. (App. pp. 124-127). The Appellate Panel reversed the Single Commissioner’s award on the issue of notice alone. (App. pp. 159-160). The parties briefed and argued this case to the Court of Appeals on the issue of notice. (App. pp. 52, 81). It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, or Petition for Certiorari as the Employer seeks to do here. See Kennedy v. S.C. Pet. Sys., 349 S.C. 531 (2001).

jurisdictional issue, the Court had the authority, and the obligation, to take its own view of the preponderance of the evidence. (App. p. 14. (citing Shatto v. McLeod Regional Medical Center, 406 S.C. 470, 475 (2013); Mintz v. Fiske-Cooler Constr. Co., 218 S.C. 409, 413 (1951)).

In sum, because notice is a jurisdictional issue, the Court of Appeals had the authority to find facts based on its own view of the preponderance of the evidence. However, the material facts as to the issue of notice were not in dispute and all that remained was a question of law. Based upon those undisputed facts the Court properly found both adequate notice and reasonable excuse.

II. THE COURT OF APPEALS CORRECTLY FOUND ADEQUATE NOTICE AND REASONABLE EXCUSE WITHOUT UNDUE PREJUDICE.

A. ADEQUATE NOTICE.

South Carolina Code §42-15-20 requires that:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

S.C. Code Ann. §42-15-20 (Supp. 2014).

It is well-established, and the parties agree, that:

For adequate notice, there must be 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'

Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson's Workers' Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

In Etheredge v. Monsanto Co., the Court of Appeals explained:

'The object [of providing timely notice under §42-15-20] being that an employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.' [citing Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1995), which, in turn, cited Teigue v. Appleton Co., 221 S.C. 52 (1952)].

The provisions of §42-15-20 regarding notice should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409 (1951). In Mintz our Supreme Court held:

It is concluded there, upon many authorities, that the provision for notice should be liberally construed in favor of claimants, but there are limitations upon that rule and the statutory requirement cannot be disregarding altogether. Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.

Etheredge at 458.

The Etheredge Court held:

We conclude that notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

Id. at 459.

Thus, to establish adequate notice under South Carolina Code §42-15-20, it is not necessary

that the employee prove his claim, or even state his claim with specificity. Instead, the employer need only have "some knowledge of accompanying facts connecting the injury or illness with the employment" sufficient to alert the employer that the "case might involve a potential compensation claim" so that the employer may investigate the case while memories are unfaded and furnish medical care in order to minimize the claimant's disability.

The Employer argued, and the Commission Panel cited, Sanders v. Richardson, 251 S.C. 325 (1968), in support of their conclusion that the claimant failed to provide adequate notice. In Sanders this Court found that the fact that the claimant told the employer, "I feel like I'm kind of hurting ... I've got a kind of hurting in my side and in my back ... I got a knot on my side ..." was insufficient to provide notice of an injury suffered while lifting a heavy bag of mortar. Sanders, at 327-328.

The Sanders Court found that the claimant's comments "would make the employer aware of the fact that the [claimant] was having some physical difficulty while at work but the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." Id.

Here, however, the Employer had far more knowledge than the employer in Sanders. While it is undisputed that the Claimant did not tell the Employer, within ninety (90) days of the incident; that he suffered pain in his neck while pulling a squeegee board, it is also undisputed that the Employer was aware that the Claimant had been working all day in the heat pulling the squeegee board, that the supervisor had pulled him from that work during the day due to fatigue, that at the conclusion of the day the Claimant lost consciousness and fell to the ground in the presence of his supervisors, that the Claimant was, that day, admitted to the hospital where he was treated by a neurosurgeon who diagnosed cervical stenosis and, shortly thereafter, performed neck surgery, and

that the Claimant had not returned to work thereafter.

The Employer argues that based on those facts the Employer could not know that the Claimant's neck condition had been aggravated by the pulling of the squeegee board, causing him to pass out. Certainly, given the Employer's knowledge at that time, it was equally likely from the Employer's perspective that the Claimant passed out from heat prostration, or that the Claimant's passing out and falling to the ground itself caused him a neck injury.

However, it is not necessary that the Claimant prove his claim to provide adequate notice.

It is not even necessary that the Claimant even make his claim to provide notice. Instead, what

Etheredge requires is:

... some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

Etheredge, at 459. (emphasis added).

While the Employer may not have been aware of the precise mechanism of the Claimant's injury, they had sufficient knowledge to alert them that the Claimant's condition might potentially be connected to work, given the day's events.

Ultimately, after investigation, the testimony of Dr. Richey revealed that pulling the squeegee board in the heat aggravated the Claimant's pre-existing, though previously asymptomatic, neck condition and that aggravation, along with getting overheated, caused him to pass out.

What is important for notice, though, is not the precise mechanism of injury that the investigation ultimately uncovers, but, rather, that the employer has sufficient knowledge of a potential work connection to trigger an investigation in the first place.

The Employer's undisputed knowledge was, as a matter of law, sufficient to trigger a

reasonably conscientious supervisor to investigate what had occurred on the job that day, its cause, and its consequence.

In sum, it is undisputed that the Claimant did not notify the Employer that he had pain in his neck while pulling the squeegee board within ninety (90) days. However, the Employer was aware that he passed out and fell to the ground after pulling the squeegee board during the heat of the day, that he was hospitalized later that day, and required neck surgery shortly thereafter.

On that knowledge it was, admittedly, equally possible Claimant had suffered from heat prostration causing him to fall, or that the fall caused him to have a neck injury, or that he had hurt his neck while pulling the squeegee board causing him to pass out, or some combination thereof. That knowledge was sufficient to make the Employer aware that the case might involve a potential compensation claim; alerting them to the need for investigation.

Pursuant to Etheredge, that was adequate notice as a matter of law.

B. REASONABLE EXCUSE.

The Single Commissioner found:

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

* * *

The Claimant demonstrated reasonable excuse for not

formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital.

(App. pp. 128-129).

The Single Commissioner went on to find:

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, line 1 - p. 43, line 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he

passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, line 18 – p. 47, line 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

(App. pp. 128-132)(emphasis added).

Essentially the Claimant's excuse for not filling out a formal report of the incident was that his supervisor was present when it occurred, he had talked to him while in the hospital, and the supervisor was aware of his treatment. In fact, this is precisely the same excuse that his lead man, Mr. Durant, gave for not reporting the incident to his supervisor, Mr. Bostick. "He was right there." (App. pp. 128 - 132 (quoting Dep. Durant p. 47, line 12)).

In reversing the Single Commissioner's finding of reasonable excuse, the Commission's Appellate Panel found:

15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given

several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers' compensation.

(App. p. 157).

In essence, in evaluating reasonable excuse, the Commission's Appellate Panel just reiterated their finding that notice was inadequate because "Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim." (App. p. 157).

The Court of Appeals reversed, finding that the Appellate Panel misapprehended what the law requires of adequate notice. That is, it was only necessary for the Employer to have knowledge of the accompanying facts connecting the accident with the employment to indicate that the case might involve a potential workers' compensation claim. The Court of Appeals held that the Employer's knowledge that the Claimant passed out and fell to the ground after working in the heat all day, was hospitalized, and underwent neck surgery, was sufficient to prompt a reasonable employer to investigate whether there might be a potential workers' compensation claim. (App. p. 122).

However, what was at issue in the Commission Panel's Finding No. 15 was not the adequacy of notice, but whether the Claimant had a reasonable excuse for not providing more formal notice.

Even assuming that the notice was inadequate, the Court of Appeals correctly found the Claimant reasonably believed that the notice was adequate because his lead man and supervisor were present and aware of his treatment; the same excuse his lead man gave for not filing a report himself. (App. p. 20).

The Commission Panel made no explanation in its Order as to why that excuse was not reasonable.

The Court of Appeals correctly found that the Claimant reasonably believed, as did his lead man, that the Employer's presence at the syncopal episode and their knowledge of his treatment gave the Employer adequate notice to trigger their investigation of the case.

C. ABSENCE OF PREJUDICE

The Single Commissioner found:

7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being

treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, line 24 – p. 12, line 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.
(App. pp. 133-135).

The Commission Appellate Panel reversed finding:

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (App. p. 157).

South Carolina Code §1-23-350 requires that findings of fact "be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Our courts have consistently held that findings of fact must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been properly applied. See, Kiawah Prop. Owners Group v. PSC, 338 S.C. 92 (1999).

The Commission Appellate Panel's finding states no facts supporting its conclusion that the Employer's investigation of the events was impaired.

The Commission's finding fails to address the fact that the Claimant's supervisors were present when he passed out, that they were aware of his treatment, and by whom it was being provided. The Commission Panel's finding does not consider the fact that the Claimant's supervisors testified in deposition with clarity as to their recollection of the facts.

The Employer offered no evidence in the record, and the Commission's Appellate Panel finding cites no evidence, indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

The object of providing timely notice under §42-15-20 is to put the employer on notice of a potential claim so they can investigate it and furnish medical care for the employee in order to minimize the disability and their own liability. See Etheredge, at 381.

The Employer offers, and the Commission cited, no evidence establishing what further investigation it would have done, or what further medical treatment it would have provided, had it received timely formal notice.

Given these facts, the Court of Appeals properly held “because SCDOT was aware Nero never returned to work following the June, 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.” (App. p. 20).

CONCLUSION

This case does not involve a novel question of law, a dissent, a conflict in Appellate Court decisions, or any other basis sufficient to justify review by this Court. Instead, it involves only the Court of Appeals’ application of the well-settled law of notice to undisputed facts.

The established facts are that the Claimant never formally reported his injury to his supervisor, or lead man, although they both witnessed his fall to the ground on the job after a day of physically challenging work, they were aware that he never returned to work following the incident, and they knew of his immediate hospitalization and subsequent surgery. Moreover, the Claimant’s excuse for not formally reporting his injury to his lead man was the same excuse his lead man offered for not reporting the incident to his own supervisor: He was “right there”.

Based on these undisputed facts, the Court of Appeals properly applied the well-settled law of Etheridge v. Monsanto Co. to find that notice was adequate because there was “some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a

reasonably conscientious manager that the case might involve a potential workers' compensation claim". Moreover, the Court of Appeals properly held that, given the lead man and supervisor's knowledge and the Claimant's prompt medical treatment, the Claimant's excuse was reasonable and no prejudice was suffered by the Employer due to the lack of more formal notice.

The Court of Appeals applied settled law to undisputed facts. The Petition for Certiorari should be dismissed.

Respectfully submitted,

Dated: 10/12/17

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

OCT 24 2017

Opinion No. 5477 (S.C. Ct. App. filed August 23, 2017)

S.C. SUPREME COURT

Otis Nero, Claimant,.....Respondent,

v.

South Carolina Department of Transportation, Employer, and
State Accident Fund, Carrier.....Petitioners.

**PETITIONERS' REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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Statement of the Case

This appeal involves a workers compensation claim resulting from an alleged injury on June 20, 2012. On January 6, 2014, Respondent filed a Form 50 request for hearing, alleging injuries to the neck and bilateral shoulders as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012, which was subsequently followed by an episode of syncope. (Appendix, p. 141). Respondent's Form 50 Request for workers compensation benefits was filed over eighty (80) weeks after his alleged accident. Petitioner's timely filed responsive pleadings, denying Respondent sustained a compensable injury by accident arising out of and in the course of his employment as alleged by Respondent. Petitioners further argued that respondent failed to provide the employer with the proper ninety (90) period of Notice in accordance with S.C. Code Ann. §42-15-20. (Appendix, p.141).

The case was argued before the Single Commissioner on March 28, 2014, and on August 5, 2014, the Single Commissioner issued a Decision and Order, wherein she found Respondent sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete, and that claimants work accident aggravated a pre-existing cervical condition. (Appendix, pp. 124-125, Finding of Fact #3). With regards to notice, the single Commissioner found,

“Claimant (Respondent) had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostic, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the claimant after the accident; moreover, the Department of Transportation was aware that the claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and he had ultimately been treated by a neurosurgeon and undergone neck surgery. (Appendix, p.128, Finding of Fact #6).

Petitioners appealed the Single Commissioner's decision to the Workers Compensation

Full Commission Appellate Panel: After briefing by the parties and oral arguments, the Full Commission issued a May 29, 2015 Decision and Order, reversing the Single Commissioner's August 5, 2014 order. The Full Commission found that pursuant to S.C. Code Ann. §42-15-20, Respondent failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice is required by the act, and Petitioners suffered a prejudice as a result of respondent's failure to provide timely notice. (Appendix, p.157).

Respondent filed an appeal with the South Carolina Court of Appeals, and on March 29, 2017, the Court of Appeals issued an opinion reversing the Full Commission's denial of benefits, stating "although Nero failed to give SCDOT formal notice, his excuse was reasonable because the supervisors were both present at the time of his injury and were aware of his treatment." The

Court stated, "we find the substantial evidence in the record does not support the appellate panels finding that respondent failed to put SC DOT on notice of a potential injury" (Appendix, p.7) Petitioners filed a Petition for Rehearing, arguing the Court of Appeals did not follow the substantial evidence standard of review, and they exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinders. (Appendix, p.22) On August 22, 2017, the Court of Appeals issued an Order granting the petition for rehearing. (Appendix, p. 50). The Order stated, "we dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn." (Appendix, p.50). The Court of Appeals withdrew, substituted, and refiled the new opinion on August 23, 2017. (Appendix, pp.11-21). In the substituted opinion, the Court of Appeals found that because the issue of timely notice is a jurisdictional question, "the court may take its own view of the preponderance of the evidence." (Appendix, p.14). Based on the Court of Appeals new opinion on the standard of review, they maintained their reversal of the Worker's Compensation commission's denial of the claim.

Out of an abundance of caution, Petitioners simultaneously filed a Successive Petition for

Rehearing, (Appendix, p.39) since a new order was issued, and the current Petition for Writ of Certiorari, which was filed on September 21, 2017. Respondents filed a Return to the Petition for Writ of certiorari on August 21, 2017, and this reply follows.

Argument

- I. This is a case involving disputed facts, and the Court of Appeals exceeded their role as an appellate court, by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinders, and there were sufficient facts in dispute that the Court of Appeals could not rule as a matter of law.**

In his Return to Respondents' Petition for Writ of Certiorari, Respondent erroneously states that the Court of Appeals in this case could rule as a matter of law, since the relevant facts are not in dispute. Respondent goes even further to state that Petitioners' conflate factual findings with legal conclusions and never identify what facts, relevant to notice, were in dispute.

In support of his argument, Respondent relies on the following "undisputed facts;" (1) Claimant was working on a road crew with his supervisors on June 20, 2012, (2) Respondent, along with other crews members worked that day pulling a "squeegee board" to level concrete, (3) there was not shade and Respondent was working in the heat, (4) during the day or work, Respondents supervisors allowed him to take a break before he returned to work pulling the squeegee board, (5) Respondent testified that he felt a sudden onset of pain in his neck that he described as a "snap" or a "pop," (6) Respondent never told his employer at that point, or at any time within the ninety (90) day notice period that he suffered pain in his neck while pulling the squeegee, (7) after finishing their work and cleaning up, Claimant passed out by the work shed in front of his supervisors, (8) Respondent got himself up and walked around before telling his supervisors he as fine to drive home, (9) upon arriving home, Respondent suffered a second syncope episode in his driveway and was taken to the hospital by his wife, (10) Respondent spoke with his supervisors at the hospital and they were aware that he eventually underwent

surgery, and (11) Respondent never returned to work.

Although Petitioner agrees that the facts set forth above were not disputed; however, Petitioner would respectfully show that additional facts were in dispute, and these were facts directly relevant to whether Respondent/Employer had enough knowledge to signify to a reasonably conscientious supervisor that the case might involve a potential compensation claim, as required by the test in *Etheredge v. Monsanto Co.* 349 S.C. 451, 457 (S.C.Ct. App. 2002).

In the May 29, 2017 Decision and Order of the Workers' Compensation Full Commission, the Full Commission set forth a number of Findings of Fact, which highlight Petitioners' argument that there were facts in dispute. Included in the full commission's findings of fact, where the following:

- FOF #5: We find that the knowledge the employer had that anything was wrong with claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift. (Appendix, p.156)
- FOF #6: we find that claimant (respondent) admitted to having other previous dizzy spells on the job. (Appendix, p. 156)
- FOF #7: we find that none of the medical records of Dr. Ritchie or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as claimant passing out while talking to his boss. (Appendix, p.156)
- FOF #8. We find that on June 28, 2014, Claimant's handwritten answers on a "patient health questionnaire" stated that his problems were not related to a job and this was not a workers compensation injury. (Appendix, p.156)
- FOF #9: We find that there is conflicting medical evidence regarding whether claimants (Respondent's) alleged incident pulling the squeegee board cause the subsequent syncopal episode. Specifically, claimant's family doctor, Dr. Ritchie, testified that he had a "hypothesis" that "the cause of the sink I had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Nay so, the neurosurgeon who performed the claim and surgery, stated, I do not think his syncope is related to his spinal pathology." (Appendix, p.156)
- FOF #10: We find that the only actual or in formal notice the employer had of an injury was that claimant, who previously suffered from dizzy spells on the job, passed out in front of the supervisors at the shed at the conclusion of the workday.

- FOF #11: We find the claimant assured the employer he was fond to return home, and he suffered a second syncopal episode in his driveway, he was taken to the hospital by his wife. (Appendix, p.156)
- FOF #12: We find that claimant spoke with both Mr. Durant and Mr. Bostic while he was in the hospital and although he informed them he was having neck surgery, claimant never reported any work related accident. (Appendix, p.157)
- FOF # 13: We find that claimant submitted FMLA paperwork to his employer, describing his condition as several years -- neck and syncope," but again claimant made no mention of a work accident to his employer at that time. (Appendix, p.157)

The most important of the facts in dispute involves the facts that Respondent not only admittedly never reported his alleged work accident to his employers, but Respondent also submitted paperwork to his Employer on July 9, 2012, only 19 days after his alleged accident, requesting FMLA. (Appendix, p.419). On the paperwork prepared and signed by Respondent, when asked the approximate date the condition commenced, Respondent wrote "Several Years -- Neck and Syncope." (Appendix, p.4129) This is significant for two reasons. First, it involves a disputed fact over when the Respondent's condition commenced, or at least when he thought it commenced. Respondent's statement on his FMLA paperwork to petitioner/employer that he suffered from his condition for years directly contradicted his hearing testimony that he never had any neck pain or problems before June 20, 2012. (Appendix, p.187, lines 11-13). Respondent's contradictory statements alone create a factual dispute.

Second, the paperwork submitted by Respondent to Petitioner/Employer supports the argument that Respondent had knowledge of how to report his condition to his employer through formal paperwork in order to request FMLA, but he did not tell his Employer that his condition was a result of the accident as alleged in his pleadings. Respondent's excuse that he didn't tell his Employer about his accident because they were standing there not only contradicts Respondent's pleadings wherein he alleged took place as a result of pulling cement with a road crew using a large squeegee board, but it also fails to explain why he never told his Employer

about the accident in subsequent conversations at the hospital, but at the same time submitted FMLA but making no reference to a work accident or resulting benefits.

Petitioner cannot emphasize enough the importance of Respondent's post-accident preparation and submission of paperwork to his Employer, which Petitioners argue distinguish his case from other cases involving notice and reasonable excuse. Respondent's FMLA submission was essentially an affirmative statement that his Employer that condition had lasted for a duration of years, and making no mention of a work accident or the conditions of his employment. This kind of statement to an employer from an injured worker should clearly absolve the Employer from any ongoing responsibility to investigate whether the injured worker's medical condition was related to an alleged work accident. It would be unreasonable and illogical to place this heightened expectation, which petitioners argue is more than what is required in *Etheredge*, and the result would create a landscape of cases where injured workers could wait years to tell their employer that a previous medical condition for which they sought medical treatment and requested FMLA only, without requesting or inquiring about workers compensation benefits, can then later come back and file a claim, eliminating the 90 day statutory notice requirement.

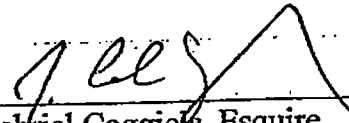
Finally, petitioners would respectfully submit that the findings of fact listed above clearly demonstrate a factual dispute involving the medical records and opinions on causation. If the courts were to allow petitioner benefits based on the sink go episode alone, which is all petitioner/employer witnessed, any finding that respondent's aggravation of his pre-existing condition was a result of his syncopal episode at work, as opposed to his subsequent syncopal episode at home, would be improper as it is based on speculation and surmise.

Conclusion

In conclusion, petitioners would respectfully submit that respondent erroneously states

that there were no facts in dispute. Further, petitioners respectfully argue that this is a case that is appropriate before the Supreme Court, since it deals with a novel issue of law, specifically the heightened requirement placed on an employer investigating a potential accident without formal notice is given after the injured worker submitted paperwork contradicting the time and cause of his medical condition. Therefore, petitioners respectfully request that the court grant the pending petition for writ of certiorari.

Respectfully submitted,



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October 23, 2017

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

Otis Nero (Claimant).....Appellant,

vs.

S.C. Department of Transportation (Employer), and
State Accident Fund (Carrier).....Respondents.

PETITION FOR REHEARING

This is an appeal involving a workers' compensation case. Respondents, by and through their undersigned counsel, hereby files this petition for rehearing pursuant to Rule 221, SCACR.

PROCEDURAL HISTORY

This matter stems from an alleged injury by accident sustained by Appellant on June 20, 2012. On August 5, 2014, the Single Commissioner found that Appellant sustained a compensable injury by accident arising out of and in the course of his employment on June 20, 2012, "while pulling a squeegee board leveling concrete, and that, pursuant to S.C. Code Ann. §42-9-35, the accident aggravated the pre-existing cervical disc condition that was present in his neck, albeit asymptomatic until the accident" (R. pp.20-21). On May 29, 2015, the Full Commission reversed the Single Commissioner's Order in full based on its findings that

Appellant failed to provide Respondents with timely notice of his alleged work accident in accordance with S.C. Code Ann. §42-15-60 or provide a reasonable excuse for failure to provide notice to the satisfaction of the Commission, and as a result, Respondents suffered prejudice. (R. p.51)

On March 29, 2017, this Court reversed the Full Commission's Order on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to provide a "reasonable excuse" for failure to provide timely notice, resulting in a prejudice to Respondents. *Nero v. SCDOT*, Opinion No. 5477 (Ct. App. filed March 29, 2017). On April 13, 2017, Respondents filed a petition for rehearing, arguing this Court overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review, and this Court exceeded its role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders.

On August 22, 2017, this Court issued an Order granting Respondents' petition for rehearing and attached an opinion substituting its previous opinion. *Nero v. SCDOT*, 420 S.C. 523, 804 S.E.2nd 269 (Ct. App. 2017). In the substituted opinion, this Court changed the substantial evidence standard of review to a de novo review, stating, "[b]ecause the issue of timely notice is a jurisdictional question, 'the [c]ourt may take its own view of the preponderance of the evidence.'" *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2nd 416, 419 (2013)(quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2nd 700, 702(2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2nd 50, 52.(1951)." *Id.* at 529.

The South Carolina Supreme Court granted Respondents' petition for writ of certiorari,

and on April 4, 2018, the Supreme Court reversed the opinion of the Court of Appeals and remanded for a decision under the proper substantial evidence standard of review. *Nero v. SCDOT*, 422 S.C. 424, 812 S.E.2nd 735 (2018). The Supreme Court found that neither the *Shatto* nor *Mintz* cases relied on by the Court of Appeals supported the use of the de novo standard, and “until this case, the Court of Appeals has consistently applied the substantial evidence standard when reviewing decisions of the commission on the question of timely notice.” *Id.* at 426. The Supreme Court concluded that court of appeals erred in applying the de novo standard, and under well settled law, the commission’s determination of whether a claimant gave timely notice under section 42-15-20 was not a jurisdictional determination and must be reviewed on appeal under the substantial evidence standard. *Id.* at 427.

This Court granted Respondents’ previous petition for rehearing on August 22, 2017. In granting the petition, this Court agreed with Respondents that the substantial evidence in the record supported the findings of the Full Commission; however, rather than affirm the Full Commission, this Court elected to adopt a revised de novo standard of review in order to arrive at its previous conclusion that the Full Commission’s decision should be reversed. Based on the Supreme Court’s reversal of this Court’s de novo decision, along with this Court’s previous acknowledgment of the existence of substantial evidence supporting the Full Commission’s decision, it follows that the decision of the Full Commission should be affirmed. Now, without the addition of any new evidence, this Court has inexplicably reversed the Full Commission’s decision again under the substantial evidence standard of review, despite its prior decision to grant Respondents petition for rehearing. As a result, Respondents respectfully request this Court adhere to their August 22, 2017 decision and grant Respondents petition for rehearing on the grounds that the substantial evidence supports the decision of the Full Commission.

ARGUMENT

As grounds for this petition, Respondents again respectfully argue this Court may have overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review, and this Court exceeded its role as an appellate court by substituting its judgment for that of the Commission instead of deferring to the Commission as the appropriate fact finders.

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this Court's review is limited to deciding whether the Full Commission's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses 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).

As the Supreme Court stated in *Hartzell v. Palmetto Collision*, a case applying the substantial evidence standard of review to the question of timely notice, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual findings on these issues." 415 S.C. 617, 623, 785 S.E.2nd 194, 196 (2016).

The requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

As stated by the Supreme Court, "[p]ursuant to S.C. Code Ann. §42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing his claim," (emphasis added) *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2nd 286, 290 (2002). It is significant to note the accident upon which Appellant based his claim, and upon which the Single Commissioner awarded compensability, was the pulling of a squeegee and not Appellant's subsequent passing out and falling at the end of the work day. It is further significant to note that Appellant admittedly passed out and fell a second time in his driveway at home before presenting to the hospital, an incident that would not be considered to arise out of and in the course of Appellant's employment.

Since Appellant admittedly failed to report to his employer about his alleged work accident during the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had "adequate notice" of a possible work related injury. In *Etheredge v. Monsanto Co.*, this Court stated, "[f]or adequate notice, there must be some

knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim.” 349 S.C. 451, 457 (Ct. App. 2002).

In its current opinion, this Court states that the undisputed evidence demonstrates that Respondents had adequate notice since: (1) on the date of the incident, Appellant’s supervisor became concerned about Appellant and temporarily pulled him off the squeegee board work; (2) later in the day as the crew was preparing to leave the job site, Appellant lost consciousness and fell to the ground, which was witnessed by Appellant’s supervisors; (3) Appellant’s supervisors called Appellant while he was in the hospital, and they were aware he needed to have neck surgery; and (4) Appellant’s supervisors were aware that Appellant did not return to work for Respondents following his surgery, and Appellant filled out necessary paperwork through Respondents’ human resources department.

This Court goes on to state that the undisputed documentary evidence in the record further established notice since: (1) as early as July 13, 2012, Respondents received written notification from Appellant’s family doctor, Richey, that Appellant had been out of work since the date of his collapse and needed neck surgery; (2) in July and August 2012, Respondents received correspondence from Florence Neurosurgery and Spine confirming Dr. Naso was treating Appellant for cervical radiculopathy; (3) Respondents corresponded with the medical provider in November 2012 regarding whether Appellant would be able to return to work.

Despite what this Court considers to be undisputed evidence, Respondents respectfully submit that the substantial evidence in the record supports the Full Commission’s finding that Appellant failed to provide Respondents with adequate notice.

Respondents point first to the fact that on July 9, 2012, only one (1) month after his alleged

accident, Appellant submitted to Respondents' human resources department a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor, which not only fails to reference any alleged work accident, but states that the date Appellant's condition commenced was "several years -- neck and syncope." (R. p.420) Further, on June 28, 2012, Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he explicitly stated his problems were not related to an injury and this was not workers compensation. (R. p.331). In its current opinion, this Court references a medical questionnaire prepared by Appellant and signed for Dr. Naso on August 22, 2012, wherein Appellant left blank the lines "Complaints related to injury? _____ and Workers Compensation? _____," (R. p.343). Respondents argument relies instead on the medical questionnaire prepared and signed by Appellant on June 28, 2012, wherein Appellant did not leave this line blank, but instead wrote "no" in both blanks. (R. p.331).

Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his alleged accident, and during their visits to him at the hospital, and Appellant chose not to report any work accident involving the pulling of a squeegee board as alleged in his pleadings and awarded in the Single Commissioner's finding of compensability. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology," but Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

As stated above, these were conflicting medical opinions to be weighed by the Commission as the fact finder in the case. Instead this Court weighed the same evidence and came to its own

conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Full Commission did exactly that. Specifically, the Full Commission stated the following Findings of Fact:

FOF #10: We find that the only actual or informal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday. (R. p.52).

With respect to this finding, our Supreme Court held in *Sanders v. Richardson*, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325, 328, 162 S.E.2nd 257, 258 (1968).

In addition, the Commission went on to state several additional pertinent Findings of Fact, including the following:

FOF #15: We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years

instead of requesting workers compensation. (R. p. 53)

FOF #16: We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident cause syncope episode, or whether the alleged squeegee accident or syncope fall cause the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (R. p.53)

Application of the appropriate standard of review is imperative in this case. The case presented questions of conflicting evidence over whether Appellant's supervisors were presented with sufficient accompanying circumstances that should have triggered a supervisor's effort to investigate a potential claim despite Appellant's failure to report it to them and instead turn in human resources paperwork stating that his condition predated any recent alleged accident, as well as conflicting medical evidence over the causation of the Appellant's injuries and resulting treatment. The Commission found that Appellant failed to provide a reasonable excuse for his failure to give timely notice, and as a result, Respondents were prejudiced by their inability to fully investigate the causation of Appellant's alleged accident and resulting injuries. The Commission's findings were sufficiently detailed to enable the appellate court to determine whether the evidence supported the findings and whether the law was properly applied to those findings.


Instead, this Court reversed the fact-finding conclusions of the Commission and substituted its judgment to reach the conclusion that Respondents had adequate notice. In addition to exceeding its role as the appellate court, this Court's decision would result in an almost impossible and impractical application of the law to workers' compensation claims. If an injured worker refuses to tell his employer he was hurt at work, and he then submits formal paperwork confirming it was not a work accident and his condition predated his alleged date of

injury, it is unreasonable to expect a manager to disregard the signed statement from the injured worker and continue to investigate any potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's Compensation Act.

Finally, this Court held that Respondents were not prejudiced by Appellant's failure to provide notice in accordance with the statute. As discussed above, there is disputed medical evidence regarding whether Appellant's aggravated cervical stenosis or his syncope episodes were causally related to the alleged accident, and Respondents were deprived of the right to investigate timely the causation of Appellant's injuries, the extent of Appellant's pre-existing conditions, and whether Appellant sustained his burden improving a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-15-35.

CONCLUSION:

Respondents respectfully submit that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review and the Full Commission's role as the appropriate fact finder in the case, and Respondents would respectfully request this Court adhere to its previous decision on August 22, 2017 and grant Respondents' petition for rehearing.



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July 11, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

Otis Nero, Appellant,

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

APPELLANT'S RETURN TO
RESPONDENTS' PETITION FOR REHEARING

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The Respondents, in their Petition for Rehearing of the Court's Order of June 26, 2019, argue that in granting a previous Petition for Rehearing on August 22, 2017:

... this Court agreed with Respondents that the substantial evidence in the record supported the findings of the Full Commission; however, rather than affirm the Full Commission, this Court elected to adopt a revised de novo standard of review in order to arrive at its previous conclusion that the Full Commission's decision should be reversed. Based on the Supreme Court's reversal of this Court's de novo decision, along with this Court's previous acknowledgment of the existence of substantial evidence supporting the Full Commission's decision, it follows that decision of the Full Commission should be affirmed.
(Resp. Pet. for Rehearing, p. 3)(emphasis added).

The Appellant respectfully contends that the Respondents have misconstrued this Court's Order of August 23, 2017. This Court never "agreed with Respondents that the substantial evidence in the record supported the findings of the Full Commission." No such language is found anywhere in the Court's Order of August 23, 2017.

To the contrary, this Court found by Orders of March 29, 2017, August 23, 2017, and now June 26, 2019, that the undisputed evidence of the record does not support the Commission's finding that the SCDOT lacked adequate notice of the Appellant's work place injury under S.C. Code §42-15-20(a), nor does that evidence support the conclusion that the Appellant failed to establish a reasonable excuse for the lack of more formal notice or that SCDOT was prejudiced by the lack of more formal notice.

Such has been this Court's finding in three separate orders now, irrespective of what standard of review is applied to the evidence of the record.

The facts of the case have been oft repeated, including at length in this Court's Order of June 26, 2019, and they do not bear repetition again here. Similarly, the legal standard that:

... notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
Bheredge v. Monsanto Co., 349 S.C. 451, 454 (Ct. App. 2002).

is also well-established in the law, and not disputed.

The Respondents have variously attempted to cast the legal finding of adequate notice or excuse based on these undisputed facts as a factual finding by the Commission which requires this Court's deference to the Appellant Panel, or to conflate factual determinations on unrelated issues, (such as causation¹), with the concept of notice.

Those attempts, however, do not change the undisputed facts that the Employer's supervisor and lead men were aware that the Appellant passed out and fell to the ground after pulling a squeegee board during the heat of the day, that he was hospitalized later that day, and that he required neck surgery shortly thereafter.

That knowledge, as a matter of law, was sufficient to make the Employer aware that the case might involve a potential compensation claim alerting them to the need for investigation. Pursuant to Bheredge that was adequate notice as a matter of law. Moreover, the Appellant, on the undisputed facts, established reasonable excuse for not providing more formal notice, given the fact that his lead man and supervisor were present at the time of the fall and were aware that he was in the hospital and required neck surgery. In fact, this was precisely the same excuse the lead man gave for not giving formal notice to his supervisor. When asked why he had not told his supervisor about

¹The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant's treating physician Dr. Robert Richey. (App. pp. 124-127). The Appellate Panel reversed the Single Commissioner's award on the issue of notice alone. (App. pp. 159-160). The parties briefed and argued this case to the Court of Appeals on the issue of notice. (App. pp. 52, 81). It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, or Petition for Certiorari as the Employer seeks to do here. See Kennedy v. S.C. Pet. Sys., 349 S.C. 531 (2001).

Mr. Nero passing out, the lead man testified "he was right there." (R. p. 24-28). Moreover, the undisputed evidence is that the Employer suffered no prejudice in its ability to investigate or furnish medical care, given they were aware of Mr. Nero's treatment by a qualified neurosurgeon very shortly after the accident and Appellant's supervisors testified at deposition with clarity as to their recollection of the facts. Neither the Employer, nor the Appellant Panel findings, cite any evidence indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

For the foregoing reasons, the Petition for Rehearing should be denied.

Respectfully submitted,

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July 14th 2019

The South Carolina Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,


AND


State Accident Fund, Carrier, Respondents.

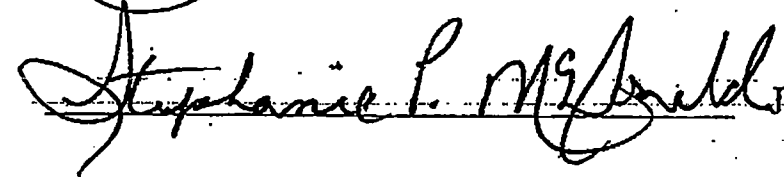
Appellate Case No. 2015-001277

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.


C. J.


J.



Columbia, South Carolina

cc:

Stephen J. Wukela, Esquire
John Gabriel Coggiola, Esquire
Amy Bracy

FILED

August 22, 2017

The South Carolina Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

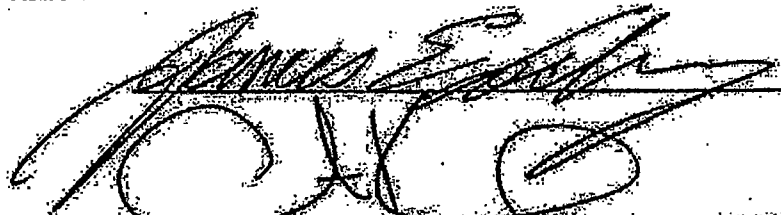
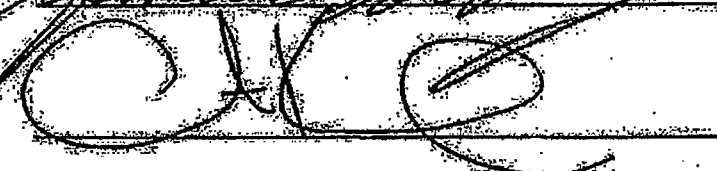
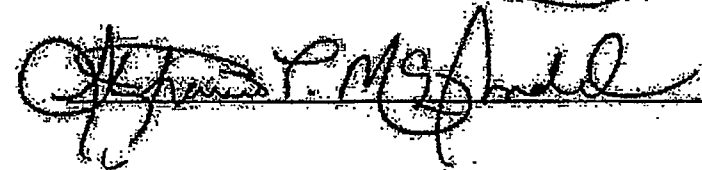
AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 CJ.
 J.
 J.

Columbia, South Carolina

cc:

FILED

August 23, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

Otis Nero, Appellant,
South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE FULL COMMISSION ERR IN FAILING TO FIND THAT THE EMPLOYER RECEIVED ADEQUATE NOTICE UNDER S.C. CODE §42-15-20?
- II. ~~ASSUMING THE CLAIMANT FAILED TO GIVE ADEQUATE NOTICE, DID THE APPELLATE PANEL ERR IN FAILING TO FIND THAT THE CLAIMANT HAD DEMONSTRATED REASONABLE EXCUSE AND THAT THE EMPLOYER HAD NOT BEEN UNDULY PREJUDICED THEREBY?~~
- A. Did the Appellate Panel Err in Failing to Find Reasonable Excuse?
- B. Did the Appellate Panel err in finding that the employer had suffered prejudice as a result of the absence of formal notice?

STATEMENT OF THE CASE

This is a Workers' Compensation matter. On January 6, 2014, the Claimant filed an Amended Form 50 alleging that on June 20, 2012, while working on a South Carolina Department of Transportation crew using a squeegee board to level cement, Claimant suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope, or "passing out."

The Defendants denied the accident and notice. The case was tried before the Single Commissioner on March 28, 2014. As presented during the hearing, the following facts are undisputed:

Undisputed Facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of Transportation road crew of ten to twelve people supervised by lead man Benjamin Durant and supervisor Danny Bostick. (R. p. 69, lines 17-20; R. p. 107, lines 10-12).

Claimant, along with four to five other members of the crew, worked that day pulling a "squeegee board", that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (R. p. 69, lines 20-24; R. p. 107, lines 11-12; R. p. 194, line 20 - p. 197, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (R. p. 220, lines 10-12; R. p. 70, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (R. p. 69, line 24 - p. 70, line 10).

Specifically, Bostick testified:

Q. ... So on June 20, 2012, did you see him do any of what you describe as straining work?

A. Well, I have — I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.

Q. Okay.

A. And he will come off of it.

Q. So —

A. Because it's hot.

Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?

A. Yes.

Q. Okay. You told him to get off the squeegee board?

A. Yes.

Q. Okay. Now, why did you do that?

A. It's hot, and I know he's an older guy, so if I know I can — we've got other people that can relieve him, I try to take him off of that.

Q. Okay. Did he make any complaints to you about not being able to perform his — his job?

A. No.

Q. Okay. Is it fair to say you did that out of an abundance of caution?

A. Yeah. That's — I try to protect the people, too, at work. As far as doing our job, I also take it personal to try to get them home safely.

Q. Okay. Now, what job did you put him on after you took him off the squeegee board?

A. Basically he just took a break. He got up, wiped the sweat mostly. It was hot. Like I said, it was real hot out there. We was in the center of a field, no trees, no nothing. He's hot.

So when I can — if I see a guy on the field like he's looking weary or like he's trying to get overheated, I try to give them a break.

Q. So did he look weary and overheated?

A. Well, he looked hot to me, you know. Like I said, it was a hot day. It was a hot day, I know. I can

remember that much of it. It was real hot, and, like I said, I always try to look out, especially for the — if they're older guys, ladies, whatever.
(Bostick p. 33, line 2 - p. 34, line 21).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (R. p. 79, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (R. p. 70, lines 10-13; R. p. 79, lines 18-20; R. p. 125, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (R. p. 107, lines 14-15).

At approximately 3:00 in the afternoon, after finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (R. p. 70, lines 15-22; R. p. 107, lines 15-19; p. 125, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (R. p. 107, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (R. pp. 331-351).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of

Dr. Naso. (R. p. 123, lines 16-20).

Plaintiff never returned to work thereafter. (R. p. 229, lines 11-12).

Single Commission Determination:

The Claimant argued at trial that he suffered a cervical spine and upper extremity injury while pulling the squeegee board, which caused him to pass out. Claimant argued that he was entitled to treatment at the hands of Dr. Richey and Dr. Naso; and that he was entitled to temporary total disability from the date of the accident and continuing.

The Defendants denied the claim on notice and causation.

The Commission awarded the case, finding causation based upon the testimony of Dr. Richey who testified on March 12, 2014, at deposition, that Claimant's pulling of the squeegee board aggravated the pre-existing, albeit previously asymptomatic, condition of his cervical spine and, along with the stress of working in the heat, caused his syncope. (R. pp. 20-23).

As to notice, the Single Commissioner found:

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery. (R. p. 24).

Appellate Panel Determination:

The Defendants appealed to the Appellate Panel of the Workers' Compensation Commission. The Appellate Panel did not make any finding reversing the Single Commissioner's finding as to accident or causation.

The Appellate Panel did, however, find that the Claimant failed to prove adequate notice or reasonable excuse pursuant to South Carolina Code §42-15-20. In relevant part, the Commission found:

4. We find that Claimant admits he did not report the alleged incident pulling the squeegee to his supervisors, and he continued to work for the remainder of his shift.

5. We find that the knowledge the employer had that anything was wrong with Claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisor and other employees after the conclusion of their work shift.

6. We find that Claimant admitted to having other previous dizzy spells on the job. (Hr. Tr., p. 34).

7. We find that none of medical records of Dr. Richey or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as Claimant passing out while talking to his boss.

8. We find that on June 28, 2014, Claimant's handwritten answers on a "Patient Health Questionnaire" stated that his problems were not related to a job and this was not a worker's compensation injury.

9. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope had

to do with his spinal canal stenosis and a reflex mechanism.” On the other hand, Dr. Naso, the neurosurgeon who performed Claimant’s surgery, stated, “I do not think his syncope is related to his spinal pathology.”

10. We find that the only actual or informal notice the employer had of an injury was that Claimant, who previously suffered from dizzy spells on the job, passed out in front of them at the shed after the conclusion of the work day.

11. We find that Claimant assured the employer that he fine to return home, and he suffered a second syncope episode in his driveway, and he was taken to the hospital by his wife.

12. We find that Claimant spoke with both Mr. Durant and Mr. Bostick while he was in the hospital, and although he informed them he was having neck surgery, Claimant never reported any work related accident.

13. We find that Claimant submitted FMLA paperwork to his employer, describing his condition as “several years – neck and syncope,” but again Claimant made no mention of a work accident to his employer at that time.

14. We find that pursuant to S.C. Code §42-15-20, Claimant failed to provide Defendants the required ninety (90) day notice of his accident so as to be entitled to benefits under the Act.

15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant’s supervisors witnessed Claimant’s syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers’ compensation.

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant’s

failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (R. pp. 51-53).

This appeal followed.

STANDARD OF REVIEW

While the Commission's Findings of Fact regarding notice are generally reviewed under the substantial evidence standard of review, see Watt v. Piedmont Auto, 384 S.C. 203 (Ct. App. 2009); where, as here, the pertinent facts are undisputed, the question of compensability becomes a question of law. See Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510 (Ct. App. 2000); Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950).

Judicial review of the Workers' Compensation Commission Appellate Panel's factual findings is generally governed by the substantial evidence standard. See Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006). In particular, the Appellate Panel's factual findings must be affirmed if supported by substantial evidence in the record. See Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). That is, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5)(d)-(e)(Supp. 2006); see also Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). However, a reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial

evidence on the whole record.” S.C. Code Ann. §1-23-380(A)(5)(e)(Supp. 2006); See also Bass v. Kenco Group, 366 S.C. 450 (Ct. App. 2005).

It is not within the appellate court’s province to reverse the Appellate Panel’s factual findings if they are supported by substantial evidence. See, Etheredge v. Monsanto Co., 349 S.C. 451, 454 (Ct. App. 2002). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622 (2004).

Thus, where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied).

However, if the evidence is undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding “where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law”). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding “upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.”).

ARGUMENT

I. THE FULL COMMISSIONER ERRED IN FAILING TO FIND THAT THE EMPLOYER RECEIVED ADEQUATE NOTICE UNDER S.C. CODE §42-15-20.

South Carolina Code §42-15-20 requires that:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

S.C. Code Ann. §42-15-20 (Supp. 2014).

It is well-established that:

For adequate notice, there must be 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'

Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson's Workers' Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

In Etheredge v. Monsanto Co., this Court explained:

'The object [of providing timely notice under §42-15-20]

being that an employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.' [citing Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1995), which, in turn, cited Teigue v. Appleton Co., 221 S.C. 52 (1952)].

The provisions of §42-15-20 regarding notice should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409 (1951). In Mintz our Supreme Court held:

It is concluded there, upon many authorities, that the provision for notice should be liberally construed in favor of claimants, but there are limitations upon that rule and the statutory requirement cannot be disregarding altogether. Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.

Etheredge at 458.

The Court held:

We conclude that notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

Id. at 459.

Thus, to establish adequate notice under South Carolina Code §42-15-20, it is not necessary that the employee prove his claim, or even state his claim with specificity. Instead, the employer need only have "some knowledge of accompanying facts connecting the injury or illness with the employment" sufficient to alert the employer that the "case might involve a potential compensation claim" so that the employer may investigate the case while memories are unfaded and furnish medical care in order to minimize the claimant's

disability.

The Employer argued, and the Panel cited, Sanders v. Richardson, 251 S.C. 325 (1968), in support of their conclusion that the claimant failed to provide adequate notice. In Sanders the Supreme Court found that the fact that the claimant told the employer, "I feel like I'm kind of hurting ... I've got a kind of hurting in my side and in my back ... I got a knot on my side ..." was insufficient to provide notice of an injury suffered while lifting a heavy bag of mortar. Sanders at 327-328.

The Court, citing the similar case of Teigue v. Appleton Co., 221 S.C. 52 (1952), found that the claimant's comments "would make the employer aware of the fact that the respondent was having some physical difficulty while at work but the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury."

Id.

Here, however, the Employer had far more knowledge than the employer in Sanders. While it is undisputed that the Claimant did not tell the Employer, within ninety (90) days of the incident, that he suffered pain in his neck while pulling a squeegee board, it is also undisputed that the Employer was aware that the Claimant had been working all day in the heat pulling the squeegee board, that the supervisor had pulled him from that work during the day due to fatigue, that at the conclusion of the day the Claimant lost consciousness and fell to the ground in the presence of his supervisors, that the Claimant was, that day, admitted to the hospital where he was treated by a neurosurgeon who diagnosed cervical stenosis and, shortly thereafter, performed neck surgery, and that the Claimant had not returned to work

thereafter.

The Employer argues that based on those facts the Employer could not know that the Claimant's neck condition had been aggravated by the pulling of the squeegee board, causing him to pass out. Certainly, given the Employer's knowledge at that time, it was equally likely from the Employer's perspective that the Claimant passed out from heat prostration, or that the Claimant's passing out and falling to the ground itself caused him a neck injury.

However, it is not necessary that the Claimant prove his claim to provide adequate notice. It is not even necessary that the Claimant even make his claim to provide notice. Instead, what Etheredge requires is:

... some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
Etheredge, at 459. (emphasis added).

While the Employer may not have been aware of the precise mechanism of the Claimant's injury, they had sufficient knowledge to alert them that the Claimant's condition might potentially be connected to work, given the day's events. The fall (they were aware of) may have injured his neck necessitating the surgery (of which they were aware), the Claimant pulling the squeegee board in the heat and getting overheated (of which they were aware) might have caused the passing out (of which they were aware).

Ultimately, after investigation, the testimony of Dr. Richey revealed that pulling the squeegee board in the heat aggravated the Claimant's pre-existing, though previously asymptomatic, neck condition and that aggravation, along with getting overheated, caused him to pass out.

What is important for notice, though, is not the precise mechanism of injury that the investigation ultimately uncovers, but, rather, that the employer has sufficient knowledge of a potential work connection to trigger an investigation in the first place.

The Employer's undisputed knowledge was, as a matter of law, sufficient to trigger a reasonably conscientious supervisor to investigate what had occurred on the job that day, its cause, and its consequence.

Indeed, Claimant's actual supervisor, Mr. Bostick, was questioned directly in that regard.

In particular, the Employer admits that on July 9, 2012, just under three (3) weeks after the accident, the Claimant provided the Employer's Human Resources Department with a Family Medical Leave form from his family doctor, Dr. Richey, dated July 9, 2012, which was admitted as Claimant's Exhibit 1 at trial. (R. p. 108, lines 3-7; p. 123, lines 21-25). The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (R. pp. 362-365).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have expected to in the normal course of business. Instead, as was customary, Claimant gave the form to the Human Resources office. (R. pp. 362-365).

Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, (R. pp. 362-365), such knowledge would have caused him to do further investigation into the accident. (R. pp. 229-235). In particular, Bostick testified:

Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.

Q. Okay. You didn't know it on July the 9th, when this form was delivered to the DOT?

A. No.

Q. Okay. But if you had known that, it would have caused you to — to be on notice that you needed to do an investigation?

A. Yeah.

(R. p. 235, lines 6-12)(emphasis added).

In sum, it is undisputed that the Claimant did not notify the Employer that he had pain in his neck while pulling the squeegee board within ninety (90) days. However, the Employer was aware that he passed out and fell to the ground after pulling the squeegee board during the heat of the day, that he was hospitalized later that day, and required neck surgery shortly thereafter.

On that knowledge it was, admittedly, equally possible Claimant had suffered from heat prostration causing him to fall, or that the fall caused him to have a neck injury, or that he had hurt his neck while pulling the squeegee board causing him to pass out, or some combination thereof. The Employer's knowledge of those facts did not prove, or even make, Claimant's claim. That knowledge was sufficient to make the Employer aware that the case might involve a potential compensation claim; alerting them to the need for investigation.

Pursuant to Etheredge, that was adequate notice as a matter of law.

II. ASSUMING THE CLAIMANT FAILED TO GIVE ADEQUATE NOTICE, THE APPELLATE PANEL ERRED IN FAILING TO FIND THAT THE CLAIMANT HAD DEMONSTRATED REASONABLE EXCUSE AND THAT THE EMPLOYER HAD NOT BEEN UNDULY PREJUDICED THEREBY.

A. The Appellate Panel Erred in Failing to Find Reasonable Excuse

The Single Commissioner found:

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

* * *

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital.

(R. pp. 24-25).

The Single Commissioner went on to find:

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p: 42, line 1 – p. 43, line 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, line 18 -- p. 47, line 12).
(emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

finding that notice was inadequate because "Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim." (R. p. 53).

Again, as the Claimant argues above, the Appellate Panel misapprehends what the law requires of adequate notice. That is, it was only necessary for the Employer to have knowledge of the accompanying facts connecting the accident with the employment to indicate that the case might involve a potential workers' compensation claim. The Employer's knowledge that the Claimant passed out and fell to the ground after working in the heat all day, was hospitalized, and underwent neck surgery, was sufficient to prompt a reasonable employer to investigate whether there might be a potential workers' compensation claim.

Again, the Employer admits knowledge of the facts sufficient to suggest the potential that the Claimant could have suffered from heat prostration, the fall could have caused him a neck injury, pulling the squeegee board could have caused him a neck injury. This knowledge, as Claimant's supervisors both admitted, were sufficient to trigger further investigation. It is not necessary that Claimant prove or set out with specificity the basis of his claim to provide notice sufficient to trigger an investigation by the Employer.

However, what was at issue in the Panel's Finding No. 15 was not the adequacy of notice, but whether the Claimant had a reasonable excuse for not providing more formal notice.

Even assuming that the notice was inadequate, the Claimant reasonably believed that the notice was adequate because the supervisors were present and aware of his treatment; the

same excuse his lead man gave for not filing a report himself.

The Commission made no explanation in its Order as to why that excuse was not reasonable.

Instead, the Commission focused on the fact that the Claimant did not tell the Employer that he hurt his neck while pulling the squeegee board, which ultimately caused him to pass out. However, the Commission does not make any finding as to when the Claimant himself learned of that causal connection.

Certainly the Claimant must be excused for failing to notify the Employer of the specific mechanism of his injury before he discovered it himself. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18 (1992) (finding that the statute of limitations runs from the date the claimant knew, or should have known by the exercise of reasonable diligence, that a cause of action exists; and that claimant who had only a high school education, reasonably relied upon an initial diagnosis by an emergency room physician of her knee injury as a sprain and her continuing problems as arthritis such that the statute of limitations did not begin to run until over two years after the accident at which point an orthopaedic surgeon diagnosed her torn medial meniscus).

Indeed, as the Appellate Panel found:

9. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Naso, the neurosurgeon who performed Claimant's surgery, stated, "I do not think his syncope is related to his spinal pathology."
(R. p. 52).

The Claimant is not sophisticated. He is unable to read a newspaper and left school in the ninth grade for work in order to take care of his family. (R. p. 74, lines 14-24).

No physician advised the Claimant of the precise causal link until Dr. Robert Richey testified in his deposition on March 12, 2014. There, Dr. Richey testified that the Claimant suffered from a pre-existing condition of his cervical spine that was aggravated by pulling the squeegee board, and that, along with working in the heat, caused the syncope. (R. p. 145, lines 12 – 18; p. 180 line 6 - p. 181, line 15). Whether the heat caused the syncope, or the fall caused the neck condition, or the neck and the heat caused the fall, was not revealed until investigation produced Dr. Richey's deposition testimony.

Still, irrespective of how the ultimate causal connection played out after investigation, the Claimant reasonably believed, as did his lead man, that the Employer's presence at the syncopal episode and their knowledge of his treatment gave the Employer adequate notice to trigger their investigation of the case.

B. The Appellate Panel erred in finding that the employer had suffered prejudice as a result of the absence of formal notice.

The Single Commissioner found:

7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the

opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 - 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, line 24 - p. 12, line 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery &

Spine reveal that he recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.
(R. pp. 29-31).

The Appellate Panel reversed finding:

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.
(R. p. 53).

South Carolina Code §1-23-350 requires that findings of fact "be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Our courts have consistently held that findings of fact must be sufficiently detailed to enable the

reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been properly applied. See, Kiawah Prop. Owners Group v. PSC, 338 S.C. 92 (1999).

The Appellate Panel's finding states no facts supporting its conclusion that the Employer's investigation of the events was impaired.

The Appellate Panel's finding fails to address the fact that the Claimant's supervisors were present when he passed out, that they were aware of his treatment, and by whom it was being provided. The Panel's finding does not consider the fact that the Claimant's supervisors testified in deposition with clarity as to their recollection of the facts.

The Employer offered no evidence in the record, and the Appellate Panel finding cites no evidence, indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

The Panel fails to explain the factual basis for their finding that "Defendants were unable to fully investigate ... whether ... the syncope[sic] fall caused an aggravation of his cervical condition." The Panel fails to state any evidence explaining why, for example, the Employer was unable to contact Dr. Richey (of whose treatment they were aware) to investigate whether the fall (which they witnessed) caused the neck injury (of which they were aware). Had they done so, Dr. Richey would have, presumably, testified (as he did later) that the fall did not cause the neck problems but, rather, the neck problems caused the fall.

The object of providing timely notice under §42-15-20 is to put the employer on notice of a potential claim so they can investigate it and furnish medical care for the employee in order to minimize the disability and their own liability. See Etheredge at 381.

The Employer offers, and the Commission cited, no evidence establishing what further investigation it would have done, or what further medical treatment it would have provided, had it received timely formal notice. Therefore, even if the Employer did not receive adequate notice pursuant to the statute, the Claimant has demonstrated reasonable excuse and the Employer has demonstrated no prejudice.

CONCLUSION

For the foregoing reasons, Claimant respectfully requests that the Appellate Panel Order be reversed and the Single Commission Order be reinstated.

Respectfully submitted,

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September , 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1222136

Otis Nero, Appellant,

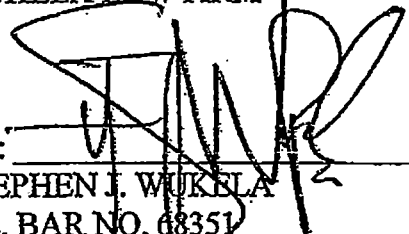
vs.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Order

WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

Otis Nero.....Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier.....Respondents.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE WORKERS COMPENSATION COMMISSION APPELLATE PANEL CORRECTLY FOUND THAT APPELLANT FAILED TO PROVIDE RESPONDENTS WITH NOTICE OF HIS ACCIDENT AS REQUIRED BY S.C. CODE ANN. §42-15-20.

II. ASSUMING APPELLANT FAILED TO PROVIDE RESPONDENTS WITH NOTICE AS REQUIRED BY THE ACT, WHETHER THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL CORRECTLY FOUND THAT APPELLANT FAILED TO DEMONSTRATE REASONABLE EXCUSE AND THAT THE RESPONDENTS HAVE BEEN UNDULY PREJUDICED THEREBY.

STATEMENT OF THE CASE

This appeal involves a workers' compensation matter. Appellant alleges to have been involved in a work related accident on June 20, 2012. On January 6, 2014, Appellant filed an Amended Form 50 Request for Hearing, alleging injuries to the neck and shoulders that occurred "while pulling cement on the road crew using a squeegee board, Claimant [Appellant] suffered a sudden onset of pain in his neck and shoulders followed by an episode on syncope." Appellant requested additional medical treatment to his neck and shoulders, payment for past medical treatment, and Temporary Total Disability ("TTD") benefits for "various dates and times" from 06/20/12 to the present.

On January 9, 2014, Respondents timely filed a Form 51 Answer to Appellant's Request for Hearing, denying that Appellant sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged. In addition, Respondents argued that Appellant failed to provide the Employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law.

A hearing was held before the Single Commissioner on March 28, 2014. At the hearing, Appellant took the position that while working with a road crew on June 20, 2014, he was using a squeegee to pull cement, and Appellant felt an immediate onset of pain in his back and shoulders that he described as a "snap." (R. p. 64, lines 18-23, p. 78, lines 11-13.) Appellant testified that he did not report the incident to his supervisors, and he continued to work the rest of the day. (R. pp. 79, line 18-, p. 80, -line 2). Appellant testified that at the end of his shift, he was standing around, talking, and joking with his supervisors at the shed, when Appellant had a sudden syncope episode, causing him to pass out and fall to the ground. (R. p. 81, lines 9-14). After Appellant was able to get back up, he walked around the property for a short time and

informed his supervisors that he was fine to drive home. (R. p.82, lines 8-15). When he reached his house, Appellant suffered a second syncope episode in his driveway, and he was taken to the emergency room by his wife. (R. p. 82, lines 14-20).

Upon arrival at the Emergency Room, Appellant filled out a "History and Physical Report" stating that he was being seen because "I passed out talking to my boss." (R. p. 315). At the emergency room, Appellant was seen by his primary care physician, Dr. Robert Richey. In an effort to explain the syncope episode described by Appellant, Appellant was sent a number of tests, including Head CT, x-ray of the right foot, chest x-ray, cardiac work up, gastrointestinal work up, and a cervical MRI, which revealed cervical stenosis. (R. pp. 315-323). As a result of his cervical MRI findings, Dr. Richey referred Appellant to a neurosurgeon, Dr. William Naso, who performed a fusion surgery on August 28, 2012. (R. pp. 327-328). Appellant alleges that the as a result of his accident pulling the squeegee, he suffered an aggravation of his pre-existing stenosis that caused the syncope episode and aggravation of his cervical spine. (R. pp.67, line 21-p.11, line 3).

Respondents took the position that Appellant lacked sufficient evidence of causation to satisfy their burden of proving Appellant sustained an injury by accident while pulling the squeegee board, or that the alleged accident pulling the squeegee board caused either the syncope episode or an aggravation of his Appellant's pre-existing condition. (R. p. 72, lines 3-7). As a result, Respondents argued they were not responsible for his subsequent medical treatment, or any future treatment or benefits under the Act. Respondents also took the position that Appellant failed to provide his employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and therefore his claim for benefits should be denied. (R. p.68, lines 11-14).

The Single Commissioner issued a Decision and Order on August 5, 2014, wherein she found that Appellant sustained a compensable injury by accident while pulling a squeegee board leveling concrete, aggravating a pre-existing disease in the Appellant's cervical spine that was asymptomatic prior to the accident. (R. pp. 20-21, Finding of Fact #3). The Single Commissioner further found that Appellant's injury affected both arms and shoulders in the form of radiculopathy, and Appellant was not currently at a point of MMI. (R. pp. 23-24, Findings of Fact #4 and #5). The Commissioner found that Appellant had a reasonable excuse for not reporting his work injury due to the facts that (1) his lead man and supervisor were present and had knowledge pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Appellant, and (2) the Employer was aware that Claimant had not returned to work after his syncope accident on June 20, 2012 and they were further notified that he had been hospitalized and ultimately treated by a neurosurgeon and undergone neck surgery. (R. p. 24, Finding of Fact #6). The Single Commissioner found that the Respondents were not prejudiced by the late formal reporting of the injury. (R. p. 29, Finding of Fact #7). The Single Commissioner ordered that Appellant was entitled to TTD from June 20, 2012 and continuing, and Respondents are responsible for all causally related medical treatment, including past, present, and future treatment. (R. pp. 31, Findings of Fact # 8 and #9).

On August 28, 2014, Respondents filed a Form 30 Request for Review. On their Form 30, Respondents listed seventeen (17) grounds for appeal, including whether the Single Commissioner erred in finding that Appellant sustained a compensable injury by accident to his neck arising out of and in the course of his employment while pulling a squeegee, and whether the alleged accident aggravated a pre-existing cervical condition that was present in Appellant's neck. (R. p. 48, No.1). Respondents further listed as grounds for appeal whether the Single

Commissioner erred in finding that Appellant had reasonable excuse for not formally reporting his work injury to his supervisors within the statutory timeframe, and whether the Single Commissioner erred in finding. Respondents were not prejudiced by the late formal reporting of the accident. (R. pp. 48-49, Nos. 4 and 5).

Both Parties submitted briefs to the Workers' Compensation Appellate Panel, and oral arguments were held on February 23, 2015. On May 29, 2015, the Workers' Compensation Commission Appellate Panel issued a Decision and Order, wherein they reversed the August 5, 2014 Order of the Single Commissioner. (R. pp. 36-56). In the Order, the Appellate Panel found that although the Appellant's supervisors witnessed the Appellant's syncope episode, Appellant never reported his alleged accident that he described as a "snap" in his shoulders and neck while pulling the squeegee board, which was the basis for his claim and the Single Commissioner's finding of compensability. (R. p. 51, Finding of Fact #4). The Appellate Panel further found that Respondents were prejudiced by Appellant's failure to provide timely notice, since they were deprived of the opportunity to investigate whether the alleged accident pulling the squeegee board caused the syncope episode, or whether the alleged squeegee board accident or subsequent syncope episode aggravated Appellant's pre-existing cervical stenosis. (R. p. 53, Finding of Fact #16).

Based on Appellant's failure to provide notice as required by S.C. Code Ann. §42-15-20, Appellant's failure to provide a reasonable excuse made to the satisfaction of the commission for not giving timely notice, and the resulting prejudice suffered by Respondents, the Appellate Panel found that Appellant's request for benefits as a result of his alleged June 20, 2012 accident was denied. (R. p. 53, Finding of Fact #16).

On June 10, 2015, Appellant filed his Notice of Intent to Appeal with the South Carolina Court of Appeals. This appeal follows.

STATEMENT OF THE FACTS/EVIDENCE

Appellant alleges to have sustained an injury to his upper back and shoulders as a result of pulling a squeegee over a concrete pad. Specifically, Appellant testified:

Q: Okay. And tell me what happened during that process of you pulling the squeegee board?

A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.

Q: Yes Sir.

A: But you also still got to keep going 'cause if you don't keep going -- you're going to blotch up. So I was doing that, I felt like a pressing like a , you now, snap of back there between my shoulder and my neck."

Q: Okay. Now did you tell him, "Hey Mr. Bostick, I -- I think I've hurt my neck just now"?

A: No, I didn't tell him that.

Q: Okay, when he took you off, what did you do?

A: I just step out of the way, got off to see -- out of the cement, took a little break, and then I went right back.

(R. p. 79, lines 2-24).

In addition, Appellant testified at his deposition that while pulling he squeegee, he felt "like a bone snapped or something snapped -- or popped." (R. p. 258, lines 1-7). Again, Appellant never reported this alleged accident where he describes the "snap" or "pop" of his bones to the Respondent Employer.

At the end of the shift, after cleaning his equipment, Appellant returned to the shed with his supervisors and co-workers. According to Appellant, "I just walked up over there and was standing and just talking to him you know. And we were talking, just like jiving a laugh, you know, cutting a fool laughing. Then, all the sudden - I went out." (R. p. 81, lines 1-7).

According to the Appellant's supervisor, Mr. Bostic, when he asked Appellant if he was ok, "because we asked him, and his words was - to me was, I get dizzy sometimes." (R. p. 209, lines 9-11). Mr. Bostic further indicated that Appellant suffered from previous dizzy spells, and testified, "I mean, the - the time I witnessed it, we could be laughing or joking, cutting the crazy on the job - to me it seemed like he laughs so loud, like he, he'll get dizzy, and he - I have seen him grab his head and say 'Whew, I'm Dizzy.'" (R. p. 216, lines 23-, p. 217, lines -2).

After returning home following his syncope episode at the shed, Appellant had a second syncope episode in his driveway. (R. p. 82, lines 10-20). Appellant presented to Carolinas Hospital System, where he was seen by his primary care physician, Dr. Robert Richey. On his "history and physical," Appellant did not describe the squeegee accident, but instead stated "passed out talking to my boss." (R. p. 315). Dr. Richey discussed the possibility of a GI bleed, and he was given a CT scan of the head, a GI work up, a cardiac workup, and a cervical MRI. (R. pp. 318, 321, and 322).

Appellant's cervical MRI revealed cervical stenosis, and Dr. Richey referred Appellant to a neurosurgeon, Dr. William Naso. (R. p. 324). On Appellant's June 28, 2012 Florence Neurosurgery and Spine "Patient Health History Questionnaire" filled out and signed by Appellant, he states that his condition was not related to an injury and not a worker's compensation accident. (R. p. 331). Following his examination of Appellant, Dr. Naso stated "I do not think his syncope is related to his cervical spine pathology." (R. p. 325). Like his other

medical records, Appellant again failed to make any mention of an alleged accident sustained while pulling a squeegee board.

Appellant went on to undergo surgery with Dr. Naso and remain out of work. (R. pp. 327-328). Appellant spoke with both Mr. Bostick and Mr. Durant while he was in the hospital, and again he declined to report the alleged accident pulling the squeegee board. (R. p. 93, lines 14-23). Specifically, Appellant testified that he told Mr. Bostic, "I think he asked me what -- what was the -- what was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since." (R. p. 273, lines 17-21).

Finally, prior to undergoing surgical treatment, Appellant provided Respondent Employer's Human Resources Department with a "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork that he signed on July 9, 2012. (R. pp. 362-365). While there remains no single mention of any accident pulling a squeegee, under the section designated "approximate date condition commenced," Appellant's paperwork states "several years -- neck and syncope." (R. p. 363). This directly contradicts Appellant's testimony that he never had any neck pain or problems prior to June 20, 2012. (R. p. 83, lines 11-13).

STANDARD OF REVIEW

In his brief, Appellant erroneously states that since the pertinent facts of this claim are undisputed, the question of compensability becomes a question of law. In this case, the facts are not undisputed with regards to compensability, since there are contradicting medical opinions regarding causation and which, if any, of Appellant's activities on the date of the alleged accident aggravated his pre-existing cervical stenosis and caused the need for medical treatment.

Therefore, the standard of review for this case is the same as it would be for other workers' compensation appeals.

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 South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence rule" as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the 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; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses 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). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. THE WORKERS COMPENSATION COMMISSION APPELLATE PANEL CORRECTLY FOUND THAT APPELLANT FAILED TO PROVIDE RESPONDENTS WITH TIMELY NOTICE AS REQUIRED BY S.C. CODE ANN. §42-15-20

The South Carolina Workers' Compensation Act sets forth the requirements for notice of an accident to an employer in S.C. Code Ann. §42-15-20. That sections states:

- (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
- (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

In this case, the Single Commissioner found that Appellant "sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code Ann. §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the pre-existing cervical disc disease that was present in Claimant's [Appellant's] neck, albeit asymptomatic until the accident." (R. pp. 20-21, Finding of Fact #3).

It is imperative to note that one undisputed fact in the claim is that Appellant never reported to his employer any accident or injury that he sustained while pulling the squeegee board at work. (R. p. 64, lines 18-23). The question then turns to whether the Respondents "had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental capacity or by fraud or deceit of some third person." S.C. Code Ann. §42-15-20(A). In this case, Appellant was able to communicate with representatives from the employer and submit FMLA paperwork for benefits, so there is no issue regarding his mental or physical capacity. In addition there has been no allegation of any fraud or deceit.

The final step in the inquiry then becomes whether Respondents had knowledge of the accident despite Appellant's failure to report the accident. In support of his argument on this point, Appellant relies heavily on the language of Etheridge v. Monsanto Co. to support his definition of "adequate notice to an employer." 349 S.C. 451 (Ct. App. 2002). In Etheridge, the Court of Appeals stated the following:

For adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim.
(*Id.* at 457).

Appellant argues that based on the following facts, Respondents should have been aware of a potential compensation claim: (1) Appellant was working all day in the sun; (2) Appellant's supervisor pulled him from the squeegee board for a brief period to rest based on his age and the heat; (3) at the end of the day, while laughing with his supervisors at the shed, Appellant passed out; (4) Appellant was admitted to the hospital and diagnosed with cervical stenosis by a neurosurgeon, and (5) Appellant never returned to work.

Appellant leaves out several crucial facts that counter his argument that a reasonable conscientious manager in this case should have known that the case might involve a potential compensation claim. First, and most importantly, Respondents point the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)." (R. pp. 362-365). This form was signed by Appellant and delivered to Respondent Employer's Human Resource's Department. On the form, Appellant states that the approximate date his condition commenced was "several years - neck and syncope." (R. p. 363). This directly contradicts Appellant's hearing testimony that he never suffered from any previous issues with his back prior to the incident pulling the squeegee board. (R. p. 83, lines 11-13).

Next, Respondents point the Court's attention to Appellant's post-accident communication with the employer. Despite going through the process of a previous workers compensation claim with the same employer, Appellant testified repeatedly that at no point did he ever report the incident pulling the squeegee board to any of his supervisors. (R. p. 79, lines 18-20, p. 89, lines 13-18, pp. 93, lines 18-, p. 94, - line 4, p. 258, lines 1-9). Second, when he spoke with both Danny Bosstick and Steven Durant, his supervisors, at the hospital, he informed them that he was receiving treatment for his neck, but again he never reported any work accident or requested any information regarding workers compensation. (R. p. 93, lines 18-23). As stated

in the evidence section above, Appellant even told Mr. Bostick he was in the hospital, "ever since I fell out, I said, I 've been here ever since." (R. p. 273, lines 17-21).

Finally, Respondents point the Court's attention to the medical evidence in the record. Respondents would first note that of the 47 pages of medical evidence submitted by Appellant at the Single Commissioner Hearing, the records are completely absent of any mention of description of an injury sustained while pulling a squeegee board. Instead, Dr. Richey's original "History and Physical" report from Carolinas Hospital System states "I passed out talking to my boss." (R. p. 315). Dr. Richey stated that he would "try to figure out what happened to him," and he ordered a series of test including a Head CT, X-Ray of the right foot, a chest x-ray, a cardiac work up, a gastrointestinal work up, and a cervical MRI. (R. pp. 315-325).

Based on the cervical stenosis identified on the cervical MRI, Appellant was referred for a consult with Dr. William Naso, a neurosurgeon. (R. pp. 324-325). Dr. Naso's June 24, 2014 report listed diagnoses of C6-C7 and C7-T1 stenosis, cervical radiculopathy, and chronic back pain. (R. p. 325). Dr. Naso noted at that time, *I do not think his syncope is related to cervical spine pathology.*" (R. p. 325)(emphasis added). Appellant saw Dr. Richey again on the same day for a discharge, at which time Dr. Richey stated that he felt "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism. We really cannot prove this, but from a monitoring standpoint, we found no problems." (R. p. 326).

On June 28, 2014, Appellant followed up again with Dr. Naso for further treatment. The "Patient Health History Questionnaire," prepared and signed by Appellant states that his problems were not related to a job and this was not a worker's compensation injury. (R. p. 331). Dr. Naso continued to provide Claimant with conservative care until August 28, 2012, when he ultimately performed surgery. (R. pp. 327-328).

In this case, Appellant is asking the Court to take a leap forward in the requirements of the burden placed on an employer, and require a heightened level of investigation, despite the facts that Appellant never reported the alleged accident, Appellant submitted paperwork to their Human Resources Department indicating that this was an issues that existed for years, and Appellant denied a workers' compensation injury in his doctor intake sheets. This heightened burden is not consistent with the Workers Compensation Act, and it is in direct contradiction with the Supreme Court holding in Sanders v. Richardson, wherein the Court stated "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325 (1968). If an employee refuses to report his alleged accident, submits paperwork his medical provider denying a work injury, and submits FMLA paperwork to his employer indicating that he has suffered from a neck condition for years with no mention of his alleged work accident, it is impossible to expect a reasonably conscientious manager to go even further to investigate additional facts that might support a potential compensable claim.

II. ASSUMING APPELLANT FAILED TO PROVIDE RESPONDENTS WITH NOTICE AS REQUIRED BY THE ACT, WHETHER THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL CORRECTLY FOUND THAT APPELLANT FAILED TO DEMONSTRATE REASONABLE EXCUSE AND THAT THE RESPONDENTS HAVE BEEN UNDULY PREJUDICED THEREBY.

The Appellate Panel correctly found that Appellant did not have a reasonable excuse for not timely reporting his work injury due to the fact that his lead man, Mr. Durant, and his crew supervisor, Mr. Bostick, were present at the end of the day when Appellant suffered his first syncope episode, and the employer was aware that Appellant remained in the hospital and received treatment from a neurosurgeon. (R. p. 53, Finding of Fact #15). Again, the question for the Court turns on whether the "accident" was the syncope episode witnessed by the Respondent

Employer, or the alleged "snap" described by Appellant while pulling the squeegee, which was never reported to his employer or his doctors, or even his second syncope episode in his driveway at home.

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

The South Carolina Supreme Court has also made it clear that "an employer's knowledge of the fact that that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." Sanders Richardson, 162 S.E.2d 257, 251 S.C. 325 (1968).


In this case, the only knowledge the Respondent Employer had on the date of the alleged accident was that at the end of the shift, Appellant passed out while they were laughing at the shed. This was something the Respondent Employer had witnessed the Appellant do in the past. (R. p. 216, lines 11-12, pp.216 lines 23-, p. 217, -line 2). Appellant's syncope episode itself was not alleged to be the Appellant's accident, and Appellant did not provide evidence the syncope episode was caused by heat prostration or any other condition related to his employment that day. The Respondent Employer was never given notice of the reason Appellant was receiving treatment, or that the possible cause of his spinal injury was due to pulling the squeegee on June 20, 2014. As such, no reasonable notice was provided to the Respondent Employer to investigate the pertinent facts of the claim. As a result, Respondents were prejudiced by the lack

of sufficient notice since they were unable to investigate promptly the cause of the Appellant's stenosis aggravation, and whether the Appellant's problems were the result of pulling a squeegee, passing out and falling while laughing with supervisors, or passing out in his driveway at home.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the Appellate Panel appropriately found that Appellant failed to provide Respondents the required ninety (90) day notice of an alleged work accident as required by S.C. Code Ann. §42-15-20, and Appellant failed to provide a reasonable excuse for failure to timely report his accident to the satisfaction of the Commission. As a result, the Workers' Compensation Commission Appellate Panel correctly found that Respondents were prejudiced thereby, and the Appellate Panel correctly denied Appellant's entitlement to any benefits under the Workers' Compensation Act.

Respectfully Submitted,



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October 2, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Order

WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

Otis Nero.....Appellant,

v.


South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier.....Respondents.

CERTIFICATE OF COUNSEL

Respondents, by and through their undersigned counsel, certify that Respondents' Final Brief complies with Rule 211(b), SCACR.



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October 2, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
~~WORKERS' COMPENSATION COMMISSION~~

Appellate Panel Order

WCC File No. 1222136

Otis Nero,Appellant,
South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

RECORD ON APPEAL
VOLUME I

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DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1222136

Otis Nero, Employee,

Claimant,

VS.

S.C Department of Transportation, Employer,
and State Accident Fund, Carrier,

Defendants.

HEARING:

Held in Columbia, South Carolina, on March 28, 2014

APPEARANCES:

Claimant represented by Stephen J. Wukela, Esquire,
Florence, SC

Defendants represented by Justin T. Williams, Esquire,
Columbia, SC

PURPOSE OF HEARING:

To determine the issues set forth in the Form 50 and Form
51

DECISION AND ORDER:

By: Aisha Taylor, Commissioner

FILED:

August 5, 2014

I. STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51, and any other issues which may timely come before the Commissioner;
2. Notice of the hearing was timely and properly served upon all parties of interest;
3. Venue, set in Richland County, is proper;
4. The Claimant has an average weekly wage of \$519.83 yielding a compensation rate of \$346.57. (Hrg. Tr. p. 5 ll. 21 - 24).

II. APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

Claimant's APA Submissions:

APA #	PHYSICIAN/ OTHER	GROUP/AGENCY	DATE OF REPORT	PAGES
APA#1		Carolinas Hospital System	06/20/12 - 08/29/12	000001 - 000016
APA#2	William B. Naso, M.D.	Florence Neurosurgery & Spine, P.C.	06/28/12 - 09/11/12	000017 - 000037
APA#3	Robert M. Richey, M.D.		07/09/12 - 12/13/12	000038 - 000047
APA#4	Claimant's Check Stub		07/16/12	000048
APA#5	Claimant's Statement		06/18/13	000049

EXHIBITS

	EXHIBITS	DATE OF REPORTS	PAGES
A.	SCDOT Safety Memo and Sign-In Sheet	June 12, 2012	A1 - A5
B.	SCDOT Power Point		B1 - B14
C.	SCDOT FMLA Leave Letter	June 26, 2012	C1 - C2
D.	SCDOT Leave Transaction Form	December 10, 2012	D1
E.	Ben Durant Statement	June 20, 2013	E1
F.	Danny Bostic Statement		F1

G.	Deposition Transcript of Dr. Robert Richey		
H.	Deposition Transcript of Ben Durant		
I.	Deposition of Danny Bostic		
J.	Deposition of Cristi Junkin		
K.	Deposition of the Claimant		

Also, admitted into evidence without objection were Plaintiff's Exhibits 1 - 5 containing portions of the employer's personnel file on the Claimant as follows:

	EXHIBITS	DATE OF REPORTS
1.	Certification of Healthcare Provider for Employee's Serious Health Condition (Family & Medical Leave Act)	07/09/12
2.	Work Excuse completed by Dr. R. Blake Kline, M.D.	07/12/12
3.	Medical Release Letter by Dr. Robert Richey, M.D.	07/13/12
4.	Work Excuse from Lisa Jones, RN	11/23/12
5.	Letter from Employer to Dr. William Naso, M.D.	11/27/12

(Hrg Tr. p. 6, l. 1 - 22).

STATEMENT OF THE CASE

This is a denied case before the Commission on the Claimant's Form 50. Claimant alleges that on June 20, 2012, while working on a S.C. Department of Transportation (hereinafter "DOT") crew at the DOT shop yard, while using a squeegee board smoothing cement, Claimant suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope.

Defendants admit that Danny Bostick, the road crew supervisor, and his immediate subordinate Ben Durant, the crew lead man or foreman, witnessed the syncopal episode, resuscitated Mr. Nero and directed him to go home. The Claimant drove home by himself and had another passing out episode when he got into the yard at his house. His wife then took him to the emergency room at Carolinas Hospital System.

There the records reflect he was seen, and admitted by, Dr. Robert Richey, his family doctor. Dr. Richey ordered a CT of the brain, right foot and chest x-ray, a stress test and, ultimately, a MRI of the cervical spine. After the cervical MRI revealed abnormality at multiple levels, Dr. Richey consulted with neurosurgeon, Dr. William Naso. (Claimant's APA No. 1, pp. 1 - 11).

Dr. Naso noted a chief complaint of neck pain and in his history recorded that "the patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand. He complains of numbness and weakness in both hands." (Claimant's APA No. 1, p. 10).

Ultimately, Dr. Naso diagnosed cervical radiculopathy and recommended conservative measures including a series of epidural steroid injections and physical therapy. Although he opined, "I do not think his syncope is related to his cervical spine pathology." (Claimant's APA No. 1, pp. 10 - 11).

Dr. Richey discharged the Claimant from the hospital on June 24, 2012 and indicated, "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism." (Claimant's APA No. 1, p. 12).

After discharge, the Claimant followed up with Dr. Naso who recommended anterior cervical discectomy and fusion at C6-7 and C7-T1. That was performed by Dr. Naso on August 28, 2012. (Claimant's APA No. 1, pp. 13 - 14).

The Claimant contends that he suffered a cervical spine and upper extremity injury, that he is entitled to treatment at the hands of Dr. Richey and Dr. Naso, and that he is entitled to temporary total disability from the date of the accident and continuing.

The Defendants deny the claim on notice and causation.

EVIDENCE

Above-listed APAs, depositions, and exhibits were admitted into evidence without objection. In addition, the following testimony was admitted into evidence:

CLAIMANT. OTIS NERO

Claimant testified at trial that he is 64 years old and has a ninth grade education but he has very few reading skills and is unable to read a newspaper. He testified that he left school in the ninth grade to go to work to take care of his family as his father was ill. He started off plowing fields with a mule, has driven trucks, run backhoes, trackhoes, and bulldozers, welded, and performed other sorts of labor-type work. (Hrg. Tr. p. 17, l. 25 - p. 18, l. 10).

He testified that he has worked for the Department of Transportation for two stints. The most recent period was approximately three and a half to four years. (Hrg. Tr. p. 18, l. 11 - p. 19, l. 3). He testified that on June 20, 2012 he was working for a DOT road crew, that Mr. Durant was the lead man of that crew, and that Mr. Bostick was the supervisor. (Hrg. Tr. p. 19, ll. 4 - 14).

He testified that on June 20, 2012 he and other members of the road crew were pouring a slab of cement approximately 30 feet wide. (Hrg. Tr. p. 19, ll. 15 - 22). He testified that leveling the cement involved the use of a squeegee board that was in fact a two-by-four approximately 30 feet in length. He testified that the squeegee board was operated by a number of men who stretched the board across the form and worked it back and forth, pulling it to level the cement. (Hrg. Tr. p. 20, l. 6 - p. 22, l. 8).

Mr. Nero testified that during that process he felt an onset of pain in his shoulder and his neck. He testified:

- A. So as I was doing that, I felt a pressing like a, you know, snap of back there between my shoulder and my neck. And I don't know whether it's the boss that was spotting me or something when I -- when that happened or then that. I don't know exactly that's when -- when he took me off towards there, you know.

(Hrg. Tr. p. 22, ll. 11 - 17).

Mr. Nero further testified:

- Q. Okay. Now, did you tell him, "Hey, Mr. Bostick, I -- I think I've hurt my neck just now"?
- A. No, I didn't tell him that.
- Q. Okay. When he took you off, what did you do?
- A. I just stepped out the way, got off to see -- out of the cement, took a little break, and then I went back.

(Hrg. Tr. p. 22, ll. 18-24).

Mr. Nero testified that after finishing that job the employees cleaned up the equipment and walked to the parking lot where their supervisor and lead man were sitting in a truck. Mr.

Nero testified:

- A. Mr. Bostick and my supervisor -- supervisor and lead man, Mr. Bostick and Ben Durant, they pulled up in the truck, parked it right beside facing in the shed. Then I walked on over there and walked around the right hand side of the truck, and Mr. Durant had the door open. I just walked up there and was standing and was just talking to him, you know. And we were talking, just like jiving and a laugh, you know, laughing, cutting a fool laughing, you know. Then just all of the sudden, I -- went out. It was hot, and he asked me, he said, "Are you all right?" I had done fell to the ground then. Matter of fact, he was getting out -- out of the truck, then and trying to help me get up.
- Q. And -- And what did you tell him?
- A. I -- I told him then, I said -- I said, "Well I feel like I'm all right." You know, I said -- I said, "I feel okay." I said, "I don't know what happened, you know," So I just went out. So generally when we leave, we knock off, we walk -- I said, "Well, I tell you what, let me walk around..."

(Hrg. Tr. p. 24, ll. 4-25).

Mr. Nero further testified that he drove home, but that as soon as he pulled up in the yard and started to get out of the truck he had a second episode of syncope. (Hrg. Tr. p. 25, ll. 14-18).

Thereafter, his wife took him to the emergency room where he was admitted by Dr. Robert Richey. (Hrg. Tr. p. 25, ll. 19 - 22). The hospital records reflect that Dr. Richey performed a number of tests and consulted with a neurosurgeon, Dr. William Naso, who ultimately performed neck surgery. (Claimant's APA No. 1, p. 2). Mr. Nero testified that he had never had neck pains or problems before that day. (Hrg. Tr. p. 26, ll. 1 - 13).

He further testified that, after the accident, Mr. Benjamin Durant called him and he let Mr. Durant know that he was in the hospital and that he was going to have surgery. He talked to Mr. Bostick while in the hospital as well in the same vein. (Hrg. Tr. p. 26, ll. 17 - 23). He testified that he received some paperwork from Human Resources, had it signed by his doctor, and returned it to them as well. (Hrg. Tr. p. 26, l. 24 - p. 27, l. 17). Claimant's Exhibit No. 1 is a Family Medical Leave form that is filled out by Dr. Richey on July 9, 2012 and was produced from the records of the South Carolina Department of Transportation. (Hrg. Tr. p. 6, ll. 2- 11; Plaintiff's Exhibit 1).

Mr. Nero testified that he had an accident on the job in the past during which he was operating a machine and injured his knee. (Hrg. Tr. p. 27, l. 17 - p. 28, l. 15). He testified that during that accident his supervisor at the time was present. He testified:

Q. Okay. And did you report that accident to anybody?

A. Yes, sir. A matter of fact, it was the workers around there at that time see'd (sic) what happened. And I tried to, thought I could walk, went to get down off the machine, and when I got down to the ground, I noticed I ain't had no -- nothing in my leg. I just fell out.

Q. Mr. Phillips saw the accident?

A. Yeah.

(Hrg. Tr. p. 29, ll. 1-9).

Mr. Nero went on to testify:

- Q. Okay. Now, the -- the -- the one of the issues in this case is the employer says, listen, they never -- he never said to Mr. Bostick and Mr. Durant, "Hey, I hurt my neck that day pulling that squeegee board," Is that correct?
- A. Correct.
- Q. Okay. And they say, you know, you never told Ms. Christy, "Hey, Ms. Christy, I hurt my neck that day pulling that squeegee board," Is that correct?
- A. That's correct.
- Q. Okay. Why didn't you report it?
- A. Well, I didn't report it because they was there. You know, they -- they saw what happened. And from the time when I went to the hospital, I didn't never get back to work. That's why when Ben called me, I let him know. And then Ben obviously had to tell Danny 'cause he turned around and called me directly behind them but right after he called, both of them calling. So I figured they'd know, you know.

(Hrg. Tr. p. 29, l. 10 -- p. 30, l. 3) (emphasis added).

The Claimant testified he was still having problems with his neck and his hands and he had to take medication every night. (Hrg. Tr. p. 30, ll. 4 - 8). He is receiving social security disability benefits. (Hrg. Tr. p. 30, ll. 9 - 21).

On cross examination, Mr. Nero testified that he was working with approximately six people on the squeegee board. He testified:

- Q. Thank you, sir. And isn't it true that you -- you're saying that you hurt your back or you felt some pain while you were on that squeegee board; Is that true, sir?
- A. I said I heard something snap, a pop in my -- my neck and my shoulder.
- Q. Okay. All right, sir. And at any -- Isn't it true that at no time when you heard that snap, crackle, and pop in your neck and shoulder, at no time did you tell anyone that you had sustained that injury; Isn't that true?
- A. That's true. That's true.

- Q. Isn't it also true, sir, that at some point in time your supervisor, crew leader, Mr. Bostick, took you off of that squeegee board; Is that true, sir?
- A. Yes, sir.
- Q. Isn't it true that at that time you did not notify him that you heard a snap, crackle, and pop in your neck; Is that true, sir?
-
- A. That's true.

(Hrg. Tr., p. 32, l. 7 - p. 33, l. 1).

He further testified:

- Q. Okay. Now, isn't it true that while you were pulling that squeegee board that you did not pass out?
- A. No, I did not pass out --
- Q. Okay.
- A. -- While I was pulling the squeegee board.
- Q. Okay. Isn't true that when you were pulled off that squeegee board that you did not pass out?
- A. No, not until after I took off again.
- Q. And isn't it also true that you did not pass out while you walked to the shed?
- A. No, I passed -- No, I -- that's true.
- Q. Okay. So isn't it also true that you passed out after you were laughing; isn't that true, sir?
- A. Yes, sir. We was standing, like I said, I was standing at the boss man's truck.
- Q. Okay. And isn't it true that you didn't pass out until you started laughing; isn't that true?
- A. Yeah, I was laughing. We was laughing or just finished laughing when that -- when that -- when that occurred. Yes, sir.

(Hrg. Tr. p. 33, l. 17 - p. 34, l. 12).

Mr. Nero admitted to having had dizzy spells in the past while on the job. (Hrg. Tr. p. 34). He admitted to having a workers' compensation claim in the past. (Hrg. Tr. p. 34). He further admitted that when he was asked on this injury by Mr. Durant and Mr. Bostick whether he was okay, he indicated that he felt like he was okay. (Hrg. Tr. p. 36). He admitted having been trained about how to report a workers' compensation claim, that he had the opportunity to

communicate with members of the Department of Transportation after the injury and that no one encouraged him not to file a workers' compensation claim. (Hrg. Tr. pp. 38 - 40).

On re-direct, the Claimant testified that in his prior workers' compensation claim he did not have to report it to his supervisor because the supervisor witnessed the incident. (Hrg. Tr. pp. 42-43).

BENJAMIN DURANT

The deposition of Benjamin Durant, lead man, was also admitted into evidence. Mr. Durant testified that he remembered Mr. Nero passing out on the date of the accident. (Dep. Durant, pp. 10 - 11). He described the employees pouring of the concrete pad that day and the spreading of the pad using the squeegee board. (Dep. Durant, pp. 12 - 13). He testified that he did not recall specifically one way or another whether Mr. Nero was one of the guys pulling the squeegee board. (Dep. Durant, p. 18). He testified, however, that it would not have been unusual for him to have done so. (Id.).

He further testified:

- Q. Okay. At any point during the time he worked for you, did Mr. Nero complain about his neck giving him trouble or his arms giving him trouble?
- A. I never heard him say anything about his neck, and I never heard him say anything about his arms.
- Q. Did he ever complain about any body part?
- A. I've heard him say, "Oy. Owe." I don't what Oy, owe could mean for anything. I say Oy, Owe sometimes. You know what I mean?
- Q. Did he -- did he say that that day?
- A. Did he say it that day?
- Q. Yes, sir.
- A. I can't remember, sir.
- Q. Is it possible that he did?
- A. He may have. Like I said, I don't -- I don't -- we all -- like I said, we're always back there cutting the fool, laughing, doing whatever under the shed. Well, I wasn't under the shed. I actually was, like I said, sitting in the truck, and a few of them was under the shed or

whatever, and he was standing right there with me talking with me on my side of the truck.

(Dep. Durant, p. 27, ll. 3 - 23).

He went on to testify:

- A. Yeah. I don't remember who he -- I don't remember what he was doing or what, but I know -- like I said, we was sitting in the truck, me and him. And I don't remember him -- I don't know if he seen something of what, I mean, as far as, you know, that, but I know when I looked over there, I heard the loud noise, and it was him.
- Q. It was Mr. Nero?
- A. It was Mr. Nero.
Like I said, the cooler he had in his hand fell. He hit the ground with the cooler.
- Q. So what did you do -- what did Mr. Nero say to you once he staggered?
- A. Whew, like that.
And I said, Otis, are you all right?
He said, Yeah, I'm all right. I just go a little dizzy.
- Q. At that point in time did he tell you that he hurt himself while working that day?
- A. No. He didn't tell me anything like that.
- Q. Did he tell you that his neck was hurting?
- A. No.
- Q. Did he tell you that his back was hurting?
- A. No.
- Q. Did he tell you that his shoulders were hurting?
- A. No. He didn't tell me anything.
- Q. He didn't tell you -- did he tell you anything was hurting?
- A. No, sir.
- Q. Did he tell you what caused him to have that dizzy spell?
- A. No, sir, he didn't.

(Dep. Durant, p. 37, l. 6 -- p. 38, l. 13).

Mr. Durant testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 -- p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

- Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some

discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, l. 18 - p. 47, l. 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

DANNY BOSTICK

The deposition of Danny Bostick was also admitted into evidence. Mr. Bostick described the use of the squeegee board. (Dep. Bostick, pp. 9 - 10). He further testified:

A. I was sitting in the truck talking to the guys up under the shed. Ben was in the passenger seat of the truck. My back is turned to them. Nero is standing inside the truck talking to Ben.

So the only thing I knew, I felt the truck rock, because I'm sitting in the truck. When I looked back, he was holding on to the side of the door, so I said, Ben ask him and see what's wrong with him. So when that happened, he asked, well -- he asked him what was wrong, and he said, well, I just get dizzy like that, and he stood up. I said, Are you okay?
He said, yeah.

(Dep. Bostick, p. 13 l. 13 - 25).

With regard to Plaintiff's Exhibit 1, the Family Medical Leave Act form filled out by Dr. Richey, Mr. Bostick testified:

- Q. You haven't ever seen [Plaintiff's Trial Exhibit 1], but you would agree with me that by July of 2012 -- this document is dated July the 9th of 2012, I think -- yeah, July the 9th.
By July the 9th, DOT was aware that Mr. Nero had been out of work since June the 20th and that he had to have neck surgery?
- A. Would I have known that?
- Q. No. No. I'm asking if you agree with me that the Department of Transportation knew that.
- A. I don't know, because I don't know what paperwork he passed in to get to that point.
- Q. Fair enough.
Well, I got this document from the Department of Transportation.
- A. Right.
- Q. So --
- A. But I wouldn't have known.
- Q. I'm -- well, I know. I'm not asking what you knew. I'm asking whether you would agree with me that, given this document, the Department of Transportation would have known that.

MR. WILLIAMS: Objection to the form.

BY MR. WUKELA:

- Q. Go ahead and answer.
- A. That they would have known something then?
- Q. Yeah.
- A. I guess they would have start doing their investigation.
- Q. Okay. Do you know whether they did start doing an investigation at that point?
- A. No, I don't.

(Dep. Bostick, p. 27, l. 11 - p. 28, l. 17).

When Claimant's counsel asked Mr. Bostick whether he would have conducted an investigation into the accident if he had received Plaintiff's Trial Exhibit 1, Mr. Bostick testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 -- p. 29, l. 12).

On cross examination, Mr. Bostick testified that Mr. Nero had dizziness in the past while laughing. (Dep. Bostick pp. 30 -- 31). He further testified:

- Q. So on June 20, 2012, did you see him do any of what you describe as straining work?
- A. Well, I have -- I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.
- Q. Okay.
- A. And he will come off of it.
- Q. So --
- A. Because it's hot.
- Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?
- A. Yes.
- Q. Okay. You told him to get off the squeegee board?
- A. Yes.
- Q. Okay. Now, why did you do that?
- A. It's hot, and I know he's an older guy, so if I know I can -- we've got other people that can relieve him, I try to take him off of that.

(Dep. Bostick, p. 33, ll. 2 -- 23).

He testified that his crew members have all had training on reporting injuries if they get injured on the job. (Dep. Bostick, pp. 38 – 39). On re-direct he testified:

Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.

A. Exactly.

Q. But you didn't -- he didn't come back?

A. He never came back.

Q. You didn't know why he didn't come back?

A. No.

Q. Okay. If he had, on July the 9th, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20th, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?

A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.

Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?

A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets -- starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.

Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]

A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.

Q. But if it had --

A. We would have went back in the office.

Q. And you have said let's -- let's go through this work-related injury paperwork?

A. Yeah. We would have talked to the people we needed to talk to, to get it -- get that -- get it solved, whatever is going on.

(p. 43, l. 6 – p. 44, l. 25) (emphasis added).

MEDICAL RECORDS

The medical records of Carolinas Hospital System, Florence Neurosurgery and Spine, and Dr. Robert Richey were also admitted without objection. Those records reveal that the Claimant presented at Carolinas Hospital System on June 20, 2012. (Claimant's APA No. 1, p. 1).

There he was seen and admitted by Dr. Robert Richey, his family doctor. Dr. Richey ordered a CT of the brain, right foot and chest x-rays, a stress test and, ultimately, a MRI of the cervical spine. (Claimant's APA No. 1, pp. 1 - 8). After the cervical MRI revealed abnormality at multiple levels, Dr. Richey consulted with neurosurgeon, Dr. William Naso. (Claimant's APA No. 1, pp. 10 - 11).

Dr. Naso noted a chief complaint of neck pain and that "the patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand. He complains of numbness and weakness in both hands." (Claimant's APA No. 1, p. 10).

Ultimately, Dr. Naso diagnosed cervical radiculopathy and recommended conservative measures including a series of epidural steroid injections and physical therapy. (Claimant's APA No. 1, pp. 10 - 11; Claimant's APA No. 2). Although he opined, "I do not think his syncope is related to his cervical spine pathology." (Claimant's APA No. 1, p. 11).

Dr. Richey discharged the Claimant on June 24, 2012 and indicated, "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism." (Claimant's APA No. 1, p. 12).

After discharge, the Claimant followed up with Dr. Naso who recommended anterior cervical discectomy and fusion at C6-7 and C7-T1. That procedure was performed by Dr. Naso on August 28, 2012.

DR. ROBERT RICHEY

The deposition of Dr. Robert Richey, who saw him at Carolinas Hospital beginning June 20, 2012, was admitted into evidence. He testified that he began taking care of Mr. Nero as his family doctor in 2007. (Dep. Richey, p. 8, ll. 5 - 11).

In the hospital on June 24, 2012, Dr. Richey ordered a cervical MRI given Mr. Nero's complaints of bilateral hand, and arm numbness, and syncope. (Claimant's APA No. 1, p. 8; Dep. Richey, p. 10, ll. 6 - 23). The MRI report showed moderate narrowing at C6-7 and C7-T1 and stenosis at C3-4. (Claimant's APA No. 1, pp. 8-9). In the hospital, Dr. Richey had also performed other tests including an EKG, telemetry, and CT of the brain, all to exclude alternate possible causes for the Claimant's syncope. (Dep. Richey, p. 9). None of those other tests explained the syncope. (Dep. Richey, p. 10, ll. 2 - 5).

He testified:

- Q. Okay. Was it your conclusion at that time that you had solved the mystery, if you will, that you had figured out what was the cause of this syncopal episode?
- A. I didn't solve the mystery, but I had a hypothesis.
- Q. All right. Talk to me about that.
- A. Well, on page 12 --
- Q. Yes, sir.
- A. -- the next to the last paragraph it's the cause -- "The cause of the syncope, I think, I think has something to do with his spinal stenosis and a reflex mechanism. We really cannot prove it, but from a monitoring standpoint, we found no problems. Cardiology consultation was also made."
- Q. All right. Tell me what you mean by that, and you say -- when you use this term "a reflex mechanism," explain to me what you mean by that?

A. Well, first I will say that the opinion of the neurosurgeon was that that wasn't the case.

Q. Uh-huh.

A. Although, he's not an expert on syncope. I would also state that I have seen a case that he and I were both involved in to where we were certain that it was the cause of the syncope and yet he said it wasn't, so we all differ.

Q. Sure.

A. And there is literature on this, but the body is very, very complicated and the sympathetic nervous system comes out of the brain. They both are involved in the neck and mechanisms of pain make people pass out. I did not document as well as I could have possibly what happened to make him pass out. It is so infrequently we really find the cause and so you have to go through the exercise of what happened. And so my hypothesis was that that this was some type neurogenic mechanism.

Q. Well, good and I'm sure he's glad of that as well. Well, can you say that of all the possible causes of the syncope that this was the most probable even if you can't be absolutely sure about it?

A. It was my opinion at the time.

Q. Okay. And was that opinion to a reasonable degree of medical certainty.

A. I would argue it is.

(Dep. Richey, p. 12, l. 22 - p. 14, l. 9; p. 16, l. 4-11) (emphasis added).

Dr. Richey also noted that he consulted with Dr. William Naso, who did not believe that the syncope was caused by the stenosis; however, Dr. Naso did ultimately recommend and perform anterior cervical discectomy and fusion at C6-7 and C7-T1 to correct the stenosis. With regard to Dr. Naso's opinion about the cause of the syncope, Dr. Richey testified:

A. -- and so I gave you a hypothesis or an opinion which is reasonable

Q. Right.

A. -- and I think that you can find people on both sides of that issue if you wanted to, but I would say I disagree with the neurosurgeon in regard to the fact that but for the fact that he had spinal stenosis, this probably wouldn't have happened. That's my opinion and I'm entitled to it, but he's entitled to his.

Q. So you're saying but for the fact a spinal --

A. If he, if he didn't have that spinal cord pressure, I don't think he would have passed out.
(Dep. Richey, p. 56, l. 18 -- p. 57, l. 6).

Nevertheless, setting aside whether the stenosis directly caused the syncope, as Dr. Richey opined, Dr. Richey also testified to a reasonable degree of medical certainty that it was also his opinion that Mr. Nero had preexisting stenosis that was aggravated by pulling the squeegee board. He testified:

- Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?
A. More than likely, certainly.
Q. And is that opinion to a reasonable degree of medical certainty?
A. I think so.

(Dep. Richey, p. 19, ll. 12 - 18) (emphasis added).

In sum, he testified:

- Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20th, 2012, that he had a arthritic condition?
A. He would have to have.
Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?
A. Yes, sir.
Q. That was caused -- that was age and years of working?
A. That's my opinion.
Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?
A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.
Q. Potentially causing that syncope?
A. Adding to it.
Q. Adding to it?
A. Yes.
Q. Given the fact that it's June and he's been working?

- A. Correct.
- Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?
- A. Yes, sir.
- Q. Okay. And that's your opinion to a reasonable degree of medical certainty?
- A. That's the fact.

(Dep. Richey, p. 54, l. 6 – p. 55, l. 15).

FINDINGS OF FACT

After the hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals:

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. I find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

This is pursuant to the stipulation of the parties at the commencement of the hearing.

3. I find that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical

evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic until the accident.

This finding is based on the above set out evidence. The preponderance of the medical evidence, including the diagnoses of Dr. Naso and the causation statement of Dr. Richey, forms the basis, in particular, for this conclusion.

Dr. Naso, the treating neurosurgeon, saw the Claimant on June 24, 2012 in the hospital at the request of Dr. Richey. (Claimant's APA No. 1, pp. 10 - 11). This evaluation was performed only four days after the accident. Dr. Naso reviewed an MRI of the cervical spine dated June 24, 2012 which showed:

On the axial images, C2-3 is unremarkable.

At C3-4 there is mild spinal stenosis with the AP diameter of the canal measuring 9.5 mm. There is moderate narrowing of the right foramen and mild narrowing of the left foramen due to a diffuse disc bulge.

At C4-5 there is moderate narrowing of both foramen and mild spinal stenosis due to a diffuse disc bulge. AP diameter of the canal is 1 cm.

At C5-6 there is mild narrowing of the right foramen. The left foramen is spinal stenosis secondary to diffuse disc bulge. AP diameter of the canal is 9.5 mm.

At C6-7 there is moderate narrowing of both foramen with spinal stenosis. AP diameter of the canal measures 9.5 mm.

At C7-T1 there is moderate spinal stenosis with the AP diameter of the canal measuring 8 mm. There is moderate narrowing of both neural foramen due to a diffuse disc bulge.

IMPRESSION:

ABNORMALITY AT MULTIPLE LEVELS. MOST SEVERELY INVOLVED IS C7-T1. CLINICAL CORRELATION RECOMMENDED.

(Claimant's APA No. 1, p. 8).

On June 24, 2012, Dr. Naso noted the Claimant's complaints of syncope and neck pain into both arms, predominantly the right upper extremity, as well as numbness and weakness in both hands. He diagnosed cervical radiculopathy and ordered epidural steroid injections. (APA No. 1, pp. 10 - 11).

The Claimant's uncontradicted testimony was that he had not had any neck pain prior to June 20, 2012. (Hrg. Tr. p. 26, ll. 11 - 13).

Dr. Richey testified unequivocally that the Claimant suffered from a preexisting condition that was aggravated by pulling the squeegee board to level the concrete on June 20, 2012. He testified:

- Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?
- A. More than likely, certainly.
- Q. And is that opinion to a reasonable degree of medical certainty?
- A. I think so.

(Dep. Richey, p. 19, ll. 12 - 18).

- Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20th, 2012, that he had a arthritic condition?
- A. He would have to have.
- Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?
- A. Yes, sir.
- Q. That was caused -- that was age and years of working?
- A. That's my opinion.
- Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?
- A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.
- Q. Potentially causing that syncope?
- A. Adding to it.
- Q. Adding to it?

A. Yes.

Q. Given the fact that it's June and he's been working?

A. Correct.

Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?

A. Yes, sir.

Q. Okay. And that's your opinion to a reasonable degree of medical certainty?

A. That's the fact.

(Dep. Richey, p. 54, l. 6 - p. 55, l. 15).

Also, while there appears to be some disagreement between Drs. Richey and Naso as to whether the neck condition directly caused the syncope, it was Dr. Richey's uncontradicted testimony that pulling the squeegee board on the afternoon of June 20, 2012 aggravated the preexisting but previously asymptomatic stenosis in Mr. Nero's neck; causing neck pain and bilateral upper extremity pain.

4. I find that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.

This finding is based on the above set out records and testimony. In particular, both Dr. Richey and Dr. Naso clearly opined that the Claimant was suffering radiculopathy into his upper extremities as a result of his neck condition. Dr. Naso diagnosed cervical radiculopathy and noted:

The patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand.

(Claimant's APA No. 1, p. 10).

The uncontroverted testimony of the Claimant at trial was that he was still having problems with his hands, even subsequent to the two-level fusion. (Hrg. Tr. p. 30, ll. 4 - 6).

5. I find that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

This finding is based on the stipulation of the parties at the commencement of the hearing. (Hrg. Tr. p. 17, ll. 2 - 6).

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable ~~excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.~~

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

The Courts have also held that the notice section should be liberally construed in favor of claimants, but that there are limitations upon the rule and the statutory requirements cannot be

disregarded altogether. (Id.) (See also Hartzell v. Palmetto Collision LLC, 406 S.C. 233 (S.C. App. 2013)).

The Claimant bears the burden of proving either notice or reasonable excuse. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). However, once reasonable excuse has been shown, it is the employer's burden to show prejudice resulting from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)).

Here, I find that the employer had actual knowledge and informal notice of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and; therefore, trigger investigation of the accident and treatment of the injury. The Claimant's supervisors were present during the incident of syncope which ultimately led the Claimant to the hospital on the same day. The employer was also aware that the Claimant remained in the hospital and was treated by a neurosurgeon, who performed two-level fusion shortly thereafter. (See Plaintiff's Exhibits 1 - 5).

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital. (Hrg. Tr. p. 29, l. 21 - p. 30, l. 3) Moreover, the Claimant subsequently provided the employer with documents describing his condition including Plaintiff's Exhibit 1, which is a Family Medical Leave Act form from his family doctor, Dr. Richey, dated July 9, 2012, just under three weeks after the accident. The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Plaintiff's Exhibit 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have in the normal course of business. Instead, as was customary, Plaintiff gave the form to the Human Resources office. (Dep. Bostick, pp. 16 – 29). Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, it would have caused him to do further investigation into the accident. He testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 – p. 29, l. 12).

- Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
- A. Exactly.
- Q. But you didn't -- he didn't come back?
- A. He never came back.
- Q. You didn't know why he didn't come back?
- A. No.
- Q. Okay. If he had, on July the 9th, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20th, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?
- A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.
- Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?

- A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets -- starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.
- Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]
- A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.
- Q. But if it had --
- A. We would have went back in the office.
- Q. And you have said let's -- let's go through this work-related injury paperwork?
- A. Yeah. We would have talked to the people we needed to talk to, to get it -- get that -- get it solved, whatever is going on.

(p. 43, l. 6 -- p. 44, l. 25) (emphasis added).

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 -- p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

- Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?
- A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.
- Q. I mean, a guy hurts his thumb, you've got to report it?
- A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

- Q. But do you have any responsibility as the lead man to report injuries?

- A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.
- Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.
- A. Well --
- Q. Can you say, no, we're not going to tell the supervisor?
- A. No. I'm not going to do that because there's too much that come back and bite you.
- Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?
- A. He was right there.

(Dep. Durant, p. 44, l. 18 - p. 47, l. 12) (emphasis added).

- Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?
- A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

The Plaintiff's Exhibits 2 - 4 contain out-of-work slips from the Claimant's treating neurosurgeon, Dr. Naso, to the employer indicating he was unable to work due to cervical radiculopathy. Indeed, Plaintiff's Exhibit 5 contains a letter written by the employer to Dr. Naso acknowledging that they were aware that Dr. Naso was treating the Claimant and asking Dr.

Naso his opinions as to the Claimant's ability to return to work.

Thus, the employer was obviously aware the Claimant had an incident where he passed out after pulling the squeegee board; that he had not returned to work, and that, instead, he had been taken to the hospital where he was treated by his family doctor and a neurosurgeon, who diagnosed cervical stenosis and recommended, and ultimately performed, neck surgery.

The Claimant's lead man testified that he did not fill out a formal report of incident after the Claimant's passing out episode because his supervisor was present and he believed that was sufficient. It is certainly reasonable for Mr. Nero to have believed the same thing.

~~Claimant's crew supervisor, Danny Bostick, testified that if he had been aware of the details that the Human Resources department received in the form of the FMLA form contained in Plaintiff's Trial Exhibit 1, he would have further investigated the incident.~~

On cross examination, the Defendants explored the fact that the Claimant had a prior workers' compensation injury on the job. However, the testimony revealed that during that prior incident, like this one, his employer was present and therefore no more formal mode of notice was required. (Hrg. Tr. p. 27, l. 18 - p. 29, l. 9).

Thus, the undersigned finds that the employer had sufficient actual knowledge and informal notice of the pertinent facts surrounding Mr. Nero's injury to indicate the possibility of a compensable injury, and, therefore to trigger them to do an investigation of Claimant's injury and to direct Claimant's medical treatment. The undersigned further finds that given the Claimant's knowledge that the employer had been present during his passing out episode and was aware of his subsequent treatment, it was reasonable for the Claimant to conclude that no more formal reporting was required.

7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the

facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 - 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, l. 24 - p. 12, l. 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections

and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

8. I find that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.

This finding is based on the above set out records and testimony. In particular, Dr. Richey's uncontroverted statement in Claimant's Exhibit 1 indicates that he expects that the Claimant will be incapacitated due to his medical condition from June 20, 2012, indefinitely. Also, Claimant's Exhibits 2 and 3 contain out-of-work slips from Dr. Richey and Dr. Kline of Florence Neurosurgery & Spine.

9. I find that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen

the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.

2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

3. Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident.

4. Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.

5. The Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

6. Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

7. Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury.

8. Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.

9. Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

ORDER

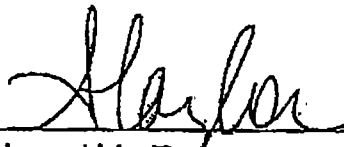
IT IS, THEREFORE, ORDERED that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident.

IT IS FURTHER ORDERED that the Employer, South Carolina Department of Transportation, and their Carrier, State Accident Fund, shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; ~~including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.~~

IT IS FURTHER ORDERED that the Employer/Carrier shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission.

No hearing costs are assessed in this instance.

S.C. WORKERS' COMPENSATION COMMISSION



Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic

mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

August 5, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

APPELLATE PANEL
DECISION AND ORDER
OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1222136

Otis Nero,

Respondent
CLAIMANT;

vs.

~~South Carolina Department of Transportation,~~

EMPLOYER,

AND

State Accident Fund,

CARRIER,
DEFENDANTS/Appellants

Appellate Panel Review held in Columbia, South Carolina,
on per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
May 29th, 2015

APPEARANCES:

Respondent Otis Nero, Claimant, of Florence, South
Carolina represented by Stephen J. Wukela.

Defendants/Appellants represented by John Gabriel
Coggiola, Esquire of Willson Jones Carter & Baxley, P.A. in
Columbia, South Carolina.

STATEMENT OF THE CASE

On January 6, 2014, Claimant filed a Form 50 Request for Hearing, alleging injuries to the neck and bilateral shoulders, as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012. Claimant's Form 50 alleges that Claimant suffered an immediate onset of pain in his neck and shoulders, which was subsequently followed by an episode of syncope. On his Form 50, Claimant requested additional medical treatment to his neck and shoulders and TTD benefits for "various dates and times" from 06/20/12 to the present.

On January 9, 2014, Defendants timely filed a Form 51 Answer to Claimant's Request for Hearing. Defendants denied Claimant sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged. Specifically, Defendants argued that Claimant failed to provide the employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and Claimant lacked sufficient causation to establish a compensable injury by accident.

A hearing was held before Commissioner Aisha Taylor on March 28, 2014. At the hearing, Claimant took the position that while working on June 20, 2014 with a crew laying a large concrete pad, Claimant felt an onset of pain in his back and shoulders, although he admits that he did not report the incident to his supervisors and continued to work. Claimant further alleges that at the end of the work day, he was standing around, talking, and joking with his supervisors at the shed, and he had a sudden syncope episode, causing him to fall to the ground and knocking him unconscious. After Claimant was revived, he instructed his supervisors that he was fine to drive home, but when he reached his house he suffered another syncope episode in the driveway, and he was taken to the E.R. by his wife. In an effort to determine the cause of his syncope episode, Claimant underwent a variety of tests, including a cervical MRI, which identified cervical stenosis. Claimant was referred to a neurosurgeon, Dr. William Naso, who

performed a fusion surgery on August 28, 2012. Claimant alleges that he suffered an aggravation of pre-existing stenosis that caused the syncope episode and aggravation of his cervical spine.

Defendants' position at the hearing was that Claimant lacked sufficient evidence of causation to satisfy their burden of proving Claimant sustained an injury by accident while pulling the squeegee board, and Claimant failed to prove that that pulling the squeegee board caused the syncope episode and aggravation of Claimant's pre-existing cervical condition, which led to surgery. Further, Defendants took the position that Claimant failed to provide his employer notice within the required ninety (90) day notice period set forth in S.C. Code Ann. §42-15-20 and supporting case law, and as a result, Claimant's request for benefits should be denied.

On August 5, 2014, Commissioner Taylor issued the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. I find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

This is pursuant to the stipulation of the parties at the commencement of the hearing.

3. I find that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic

until the accident.

This finding is based on the above set out evidence. The preponderance of the medical evidence, including the diagnoses of Dr. Naso and the causation statement of Dr. Richey, forms the basis, in particular, for this conclusion.

Dr. Naso, the treating neurosurgeon, saw the Claimant on June 24, 2012 in the hospital at the request of Dr. Richey. (Claimant's APA No. 1, pp. 10 - 11). This evaluation was performed only four days after the accident. Dr. Naso reviewed an MRI of the cervical spine dated June 24, 2012 which showed:

On the axial images, C2-3 is unremarkable.

At C3-4 there is mild spinal stenosis with the AP diameter of the canal measuring 9.5 mm. There is moderate narrowing of the right foramen and mild narrowing of the left foramen due to a diffuse disc bulge.

At C4-5 there is moderate narrowing of both foramen and mild spinal stenosis due to a diffuse disc bulge. AP diameter of the canal is 1 cm.

At C5-6 there is mild narrowing of the right foramen. The left foramen is spinal stenosis secondary to diffuse disc bulge. AP diameter of the canal is 9.5 mm.

At C6-7 there is moderate narrowing of both foramen with spinal stenosis. AP diameter of the canal measures 9.5 mm.

At C7-T1 there is moderate spinal stenosis with the AP diameter of the canal measuring 8 mm. There is moderate narrowing of both neural foramen due to a diffuse disc bulge.

IMPRESSION:

ABNORMALITY AT MULTIPLE LEVELS. MOST SEVERELY INVOLVED IS C7-T1. CLINICAL CORRELATION RECOMMENDED.

(Claimant's APA No. 1, p. 8).

On June 24, 2012, Dr. Naso noted the Claimant's complaints of syncope and neck pain into both arms, predominantly the right upper extremity, as well as numbness and weakness in both hands. He diagnosed cervical radiculopathy and ordered epidural steroid injections. (APA No. 1, pp. 10 - 11).

The Claimant's uncontradicted testimony was that he had not had any neck pain prior to June 20, 2012. (Hrg. Tr. p. 26, ll. 11 - 13).

Dr. Richey testified unequivocally that the Claimant suffered from a preexisting condition that was aggravated by pulling the squeegee board to level the concrete on June 20, 2012. He testified:

Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?

A. More than likely, certainly.

Q. And is that opinion to a reasonable degree of medical certainty?

A. I think so.

(Dep. Richey, p. 19, ll. 12 - 18).

Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20th, 2012, that he had a arthritic condition?

A. He would have to have.

Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?

A. Yes, sir.

Q. That was caused -- that was age and years of working?

A. That's my opinion.

Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?

A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.

Q. Potentially causing that syncope?

A. Adding to it.

Q. Adding to it?

A. Yes.

Q. Given the fact that it's June and he's been working?

A. Correct.

Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?

A. Yes, sir.

Q. Okay. And that's your opinion to a reasonable degree of medical certainty?

A. That's the fact.

(Dep. Richey, p. 54, l. 6 - p. 55, l. 15).

Also, while there appears to be some disagreement between Drs. Richey and Naso as to whether the neck condition directly caused the syncope, it was Dr. Richey's uncontradicted testimony that pulling the squeegee board on the afternoon of June 20, 2012 aggravated the preexisting but previously asymptomatic stenosis in Mr. Nero's neck; causing neck pain and bilateral upper extremity pain.

4. I find that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.

This finding is based on the above set out records and testimony. In particular,

both Dr. Richey and Dr. Naso clearly opined that the Claimant was suffering radiculopathy into his upper extremities as a result of his neck condition. Dr. Naso diagnosed cervical radiculopathy and noted:

The patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand.

(Claimant's APA No. 1, p. 10).

The uncontroverted testimony of the Claimant at trial was that he was still having problems with his hands, even subsequent to the two-level fusion. (Hrg. Tr. p. 30, ll. 4 - 6).

5. I find that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

This finding is based on the stipulation of the parties at the commencement of the hearing. (Hrg. Tr. p. 17, ll. 2 - 6).

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., *Mintz vs. Fiske-Carter Construction Company*, 218 S.C. 409 (1951)).

The Courts have also held that the notice section should be liberally construed in favor of claimants, but that there are limitations upon the rule and the statutory requirements cannot be disregarded altogether. (*Id.*) (See also *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233 (S.C. App. 2013)).

The Claimant bears the burden of proving either notice or reasonable excuse. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)). However, once reasonable excuse has been shown, it is the employer's burden to show prejudice resulting from the absence of formal notice. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)).

Here, I find that the employer had actual knowledge and informal notice of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and; therefore, trigger investigation of the accident and treatment of the injury. The Claimant's supervisors were present during the incident of syncope which ultimately led the Claimant to the hospital on the same day. The employer was also aware that the Claimant remained in the hospital and was treated by a neurosurgeon who performed two-level fusion shortly thereafter. (See Plaintiff's Exhibits 1 - 5).

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital. (Hrg. Tr. p. 29; l. 21 - p. 30, l. 3) Moreover, the Claimant subsequently provided the employer with documents describing his condition including Plaintiff's Exhibit 1, which is a Family Medical Leave Act form from his family doctor, Dr. Richey, dated July 9, 2012, just under three weeks after the accident. The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Plaintiff's Exhibit 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have in the normal course of business. Instead, as was customary, Plaintiff gave the form to the Human Resources office. (Dep. Bostick, pp. 16 - 29). Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, it would have caused him to do further investigation into the accident. He testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 - p. 29, l. 12).

- Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
- A. Exactly.
- Q. But you didn't -- he didn't come back?
- A. He never came back.
- Q. You didn't know why he didn't come back?
- A. No.

Q. Okay. If he had, on July the 9th, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20th, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?

A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.

Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?

A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets -- starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.

Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]

A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.

Q. But if it had --

A. We would have went back in the office.

Q. And you have said let's -- let's go through this work-related injury paperwork?

A. Yeah. We would have talked to the people we needed to talk to, to get it -- get that -- get it solved, whatever is going on.

(p. 43, l. 6 - p. 44, l. 25) (emphasis added).

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 - p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a

responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, l. 18 -- p. 47, l. 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

The Plaintiff's Exhibits 2 -- 4 contain out-of-work slips from the Claimant's treating neurosurgeon, Dr. Naso, to the employer indicating he was unable to work due to cervical radiculopathy. Indeed, Plaintiff's Exhibit 5 contains a letter written by the employer to Dr. Naso acknowledging that they were aware that Dr. Naso was treating the Claimant and asking Dr. Naso his opinions as to the Claimant's ability to return to work.

Thus, the employer was obviously aware the Claimant had an incident where he passed out after pulling the squeegee board; that he had not returned to work, and that, instead, he had been taken to the hospital where he was treated by his family doctor and a neurosurgeon, who diagnosed cervical stenosis and recommended, and ultimately performed, neck surgery.

The Claimant's lead man testified that he did not fill out a formal report of incident after the Claimant's passing out episode because his supervisor was present and he believed that was sufficient. It is certainly reasonable for Mr. Nero to have believed the same thing.

Claimant's crew supervisor, Danny Bostick, testified that if he had been aware of the details that the Human Resources department received in the form of the FMLA form contained in Plaintiff's Trial Exhibit 1, he would have further investigated the incident.

On cross examination, the Defendants explored the fact that the Claimant had a prior workers' compensation injury on the job. However, the testimony revealed that during that prior incident, like this one, his employer was present and therefore no more

formal mode of notice was required. (Hrg. Tr. p. 27, l. 18 – p. 29, l. 9).

Thus, the undersigned finds that the employer had sufficient actual knowledge and informal notice of the pertinent facts surrounding Mr. Nero's injury to indicate the possibility of a compensable injury, and, therefore to trigger them to do an investigation of Claimant's injury and to direct Claimant's medical treatment. The undersigned further finds that given the Claimant's knowledge that the employer had been present during his passing out episode and was aware of his subsequent treatment, it was reasonable for the Claimant to conclude that no more formal reporting was required.

7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., *Mintz vs. Fiske-Carter Construction Company*, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, l. 24 – p. 12, l. 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he

recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

8. I find that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.

This finding is based on the above set out records and testimony. In particular, Dr. Richey's uncontroverted statement in Claimant's Exhibit 1 indicates that he expects that the Claimant will be incapacitated due to his medical condition from June 20, 2012, indefinitely. Also, Claimant's Exhibits 2 and 3 contain out-of-work slips from Dr. Richey and Dr. Kline of Florence Neurosurgery & Spine.

9. I find that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.
2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

3. Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident.
4. Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.
5. The Claimant is not at maximum medical improvement and determination of permanency is premature at this time.
6. Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.
7. Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury.
8. Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.
9. Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

ORDER

IT IS, THEREFORE, ORDERED that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident.

IT IS FURTHER ORDERED that the Employer, South Carolina Department of Transportation, and their Carrier, State Accident Fund, shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission.

No hearing costs are assessed in this instance.

Following receipt of the executed Decision and Order, counsel for Defendants filed an Application for Review in the case setting forth the following Assignments of Error:

1. Whether the Hearing Commissioner erred in Finding of Fact No. 3 that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, further finding, that pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic until the accident, when such a Finding is against the greater weight of the evidence in the record.
2. Whether the Hearing Commissioner erred in Finding of Fact No. 4 that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such a Finding is against the greater weight of the evidence in the record.
3. Whether the Hearing Commissioner erred in Finding of Fact No. 5. that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such a Finding is against the greater weight of the evidence in the record.
4. Whether the Hearing Commissioner erred in Finding of Fact No. 6 that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck

surgery, when such a Finding is against the greater weight of the evidence in the record.

5. Whether the Hearing Commissioner erred in Finding of Fact No. 7 that the Defendants were not prejudiced by the late formal reporting of the injury, when such a Finding is against the greater weight of the evidence in the record.

6. Whether the Hearing Commissioner erred in Finding of Fact No. 8 that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission, when such a Finding is against the greater weight of the evidence in the record.
7. Whether the Hearing Commissioner erred in Finding of Fact No. 9 that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012, when such a Finding is against the greater weight of the evidence in the record.
8. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident, when such conclusion is against the greater rule of the evidence in the record.
9. Whether the Hearing Commissioner erred in Concluding that Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such conclusion is against the greater rule of the evidence in the record.
10. Whether the Hearing Commissioner erred in Concluding that The Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such conclusion is against the greater rule of the evidence in the record, when such conclusion is against the greater rule of the evidence in the record.
11. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable

injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery, when such conclusion is against the greater rule of the evidence in the record.

12. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury, when such conclusion is against the greater rule of the evidence in the record.
13. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission, when such conclusion is against the greater rule of the evidence in the record.
14. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012, when such conclusion is against the greater rule of the evidence in the record.
15. Whether the Hearing Commissioner erred in ordering that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident, when such an Order is against the preponderance of evidence in the record.
16. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012, when such an Order is against the preponderance of evidence in the record.
17. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission, when such an Order is against the preponderance of evidence in the record.

Copies of the above assignments of error were furnished to all interested parties prior to oral argument presented before the Appellate Panel on February 23, 2015.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and weighed the evidence in the record as presented at the initial hearing. The Panel also considered all issues raised in the briefs of both parties.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined the Order of the Hearing Commissioner is hereby REVERSED.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACTS:

1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.
2. We find that pursuant to S.C. Code §42-1-40, the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.
3. We find that the Claimant alleges he sustained an injury by accident to his back (Cervical spine), affecting both shoulders and arms in the form of radiculopathy, on June 20, 2012 while pulling a large squeegee board over concrete with a road crew.
4. We find that Claimant admits he did not report the alleged incident pulling the squeegee to his supervisors, and he continued to work for the remainder of his shift.

5. We find that the knowledge the employer had that anything was wrong with Claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift.

6. We find that Claimant admitted to having other previous dizzy spells on the job. (Hr. Tr., p. 34).

7. We find that none of medical records of Dr. Richey or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as Claimant passing out while talking to his boss.

8. We find that on June 28, 2014, Claimant's handwritten answers on a "Patient Health Questionnaire" stated that his problems were not related to a job and this was not a worker's compensation injury.

9. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Naso, the neurosurgeon who performed Claimant's surgery, stated, "I do not think his syncope is related to his spinal pathology."

10. We find that the only actual or informal notice the employer had of an injury was that Claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the work day.

11. We find that Claimant assured the employer that he was fine to return home, and he suffered a second syncope episode in his driveway, and he was taken to the hospital by his wife.

12. We find that Claimant spoke with both Mr. Durant and Mr. Bostick while he was in the hospital, and although he informed them he was having neck surgery, Claimant never reported any work related accident.

13. We find that Claimant submitted FMLA paperwork to his employer, describing his condition as "several years - neck and syncope," but again Claimant made no mention of a work accident to his employer at that time.

14. We find that pursuant to S.C. Code §42-15-20, Claimant failed to provide Defendants the required ninety (90) day notice of his accident so as to be entitled to benefits under the Act.

15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers' compensation.

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.

CONCLUSIONS OF LAW

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

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.
2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.
3. Pursuant to S.C. Code §42-15-20 and supporting case law, Claimant failed to provide Defendants with proper Notice as required by S.C. Code Ann. §42-15-20, so as to afford protection of the defendant employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it may afford the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).
4. Pursuant to Sanders v. Richardson, "an employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury," so the Defendant Employer's witness of the syncope episode itself does not constitute either actual or informal notice. 251 S.C. 325, 162 S.E.2nd 257 (1968).

5. Pursuant to Cranford v. Hutchison Construction, "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." 399 S.C. 65, 731 S.E.2nd 303 (S.C. Ct.App., 2012)(see Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999)).

6. Pursuant to S.C. Code Ann. §42-15-20(B) and supporting case law, Claimant failed to provide a reasonable excuse to the satisfaction of the Commission for his failure to report a work accident to Defendants within the ninety (90) notice period, and therefore no compensation is payable.

7. Pursuant to S.C. Code §42-15-20 and supporting case law, Defendants were prejudiced by Claimant's failure to timely report his alleged June 20, 2012 work accident within the ninety (90) day period required.

8. Pursuant to S.C. Code Ann. §42-15-20 and supporting case law, Claimant's failure to provide timely notice or a reasonable excuse to the Commission for failure to provide notice, bars Claimant's entitlement to benefits, including medical benefits and/or compensation, under the Workers' Compensation Act as a result of his alleged June 20, 2012 accident.

ORDER

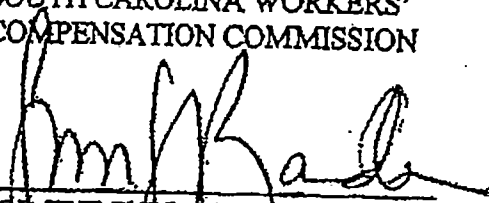
Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that Claimant's request for benefits as a result of his alleged accident on June 20, 2012 is DENIED. Claimant failed to provide Defendants the required ninety (90) day notice of an alleged work accident as required by S.C. Code Ann. §42-15-20, and Claimant further failed to provide a reasonable excuse made to the satisfaction of the commission for not giving timely notice. As a result, Defendants were prejudiced by Claimant's

Claimant's failure to provide timely notice, and Claimant is not entitled to any benefits under the Act.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

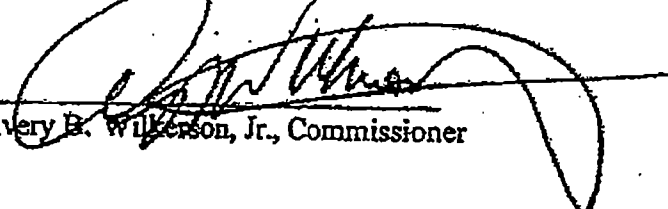


FOR THE FULL COMMISSION
Susan S. Barden, Commissioner

WE CONCUR:



T. Scott Beck, Commissioner



Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

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

By Kim Falls on May 29, 2015

Stephen J. Wukela

From: appeals@wcc.sc.gov
Sent: Friday, May 29, 2015 10:35 AM
To: EFARTHING@SAF.SC.GOV; JGCOGGIOLA@WJLAW.NET; JMURRAY@SAF.SC.GOV;
JTWILLIAMS@WJLAW.NET; KLCHILDERS@WJLAW.NET; LLEPPERT@WJLAW.NET;
STEPHEN@WUKELALAW.COM; APPEALS@WCC.SC.GOV
Subject: Full Commission Order - WCC#:1222136 - NERO
Attachments: R08 ORD - SCWCC Order PDF - 05_29_2015 - WCC #_ 1222136.PDF

Attached is the Full Commission Order for WCC#: 1222136

R08 ORD - Full Commission Order - 5/29/2015 - ORDER#: 53482 - WCC #: 1222136

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1222136

EMPLOYEE/CLAIMANT:

OTIS NERO



EMPLOYER:

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

INSURER:

STATE ACCIDENT FUND

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 28TH DAY OF
MARCH, 2014, COMMENCING AT THE HOUR OF 2:39 P.M., IN
COLUMBIA, SOUTH CAROLINA, BEFORE THE HONORABLE AISHA TAYLOR,
ATTENDED BY COUNSEL AS FOLLOWS:

SALLYE DEANNE NELSON
VERBATIM REPORTER

JAN L. WHITWORTH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, S.C. 29376

APPEARANCES

STEPHEN J. WUKELA, ESQUIRE, OF THE FIRM
WUKELA LAW FIRM
403 2ND LOOP ROAD
FLORENCE, SOUTH CAROLINA 29505

ATTORNEY FOR THE EMPLOYEE/CLAIMANT,

JUSTIN T. WILLIAMS, ESQUIRE, OF THE FIRM
WILLSON JONES CARTER & BAXLEY, P.A.
4500 FORT JACKSON BOULEVARD
COLUMBIA, SOUTH CAROLINA 29209

ATTORNEY FOR THE EMPLOYER/INSURER

I N D E X

PAGE

OTIS NERO:

DIRECT EXAMINATION BY MR. WUKELA	17
CROSS EXAMINATION BY MR. WILLIAMS	31
RE-DIRECT EXAMINATION BY MR. WUKELA	41
CERTIFICATE OF NOTARY PUBLIC	45

1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN COLUMBIA,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * * *

6 BY COMMISSIONER TAYLOR:

7 TODAY IS MARCH 28TH. WE'RE HERE ON WORKERS'
8 COMP FILE NUMBER 1222136. THIS IS THE CLAIM OF MR.
9 OTIS NERO WHO IS REPRESENTED TODAY BY MR. STEPHEN J.
10 WUKELA. THE EMPLOYER IS THE SOUTH CAROLINA
11 DEPARTMENT OF TRANSPORTATION, AND THE CARRIER IS THE
12 STATE ACCIDENT FUND, BOTH OF WHOM ARE REPRESENTED
13 TODAY BY MR. JUSTIN T. WILLIAMS. WE HAVE A DATE OF
14 ACCIDENT OF JUNE 20TH, 2012. WE'RE HERE ON THE
15 EMPLOYEE'S OR THE CLAIMANT'S FORM 50 REQUEST FOR
16 HEARING SEEKING A DETERMINATION OF COMPENSABILITY
17 AND ENTITLEMENT TO BENEFITS UNDER THE ACT. I WILL
18 ALLOW THE PARTIES TO PUT BRIEF POSITION STATEMENTS
19 ON THE RECORD; HOWEVER, PRIOR TO DOING SO ARE THERE
20 ANY OBJECTIONS TO APAs, JURISDICTION, VENUE, OR ANY
21 OTHER ITEMS? MR. WUKELA?

22 BY MR. WUKELA:

23 NONE FROM THE CLAIMANT, COMMISSIONER.

24 BY COMMISSIONER TAYLOR:

25 AND MR. WILLIAMS?

1 BY MR. WILLIAMS:

2 NONE FROM THE DEFENDANT.

3 BY COMMISSIONER TAYLOR:

4 ALL RIGHT. WITHOUT OBJECTION THE COMMISSION
5 FILE BECOMES A PART OF THE RECORD WITH THE EXCEPTION
6 OF SELF SERVING DECLARATIONS AND UNSTIPULATED
7 MEDICAL REPORTS. PRIOR TO GOING ON HEARING, THE
8 DEFENDANTS DID PROVIDE AN AMENDED FORM 20 RESULTING
9 IN AN AVERAGE WEEKLY WAGE OF \$419.83 AND ---

10 BY MR. WUKELA:

11 I -- I THINK IT'S 519.

12 BY MR. WILLIAMS:

13 THAT'S CORRECT.

14 BY MR. WUKELA:

15 I'M SORRY.

16 BY COMMISSIONER TAYLOR:

17 OH.

18 BY MR. WUKELA:

19 FIVE-NINETEEN.

20 BY COMMISSIONER TAYLOR:

21 FIVE-NINETEEN. \$519.83, YIELDING A
22 COMPENSATION RATE OF \$346.57. THE PARTIES HAVE
23 STIPULATED THAT THIS WILL BE THE AVERAGE WEEKLY WAGE
24 AND COMPENSATION RATE FOR THE CLAIM. MR. WUKELA,
25 YOUR POSITION STATEMENT?

1 BY MR. WUKELA:

2 THANK YOU, COMMISSIONER. AND VERY BRIEFLY
3 FIRST, COMMISSIONER, I -- I'D TO FORMALLY ALSO OFFER
4 ANY ADDITION TO THOSE THE APAs AND DEPOSITIONS WHICH
5 WE HAVE PROVIDED THE COURT IN CLAIMANT'S EXHIBITS
6 ONE THROUGH FIVE, WHICH I'VE ALSO PROVIDED THE COURT
7 AND COUNSEL. THOSE DOCUMENTS ARE VARIOUS DOCUMENTS
8 THAT WERE PRODUCED BY THE EMPLOYER BY SUBPOENA, IN
9 RESPONSE TO MY SUBPOENA, THAT WERE THE CONTENTS OF
10 THEIR FILE ON MR. NERO, AND I WOULD -- I WOULD OFFER
11 THOSE INTO EVIDENCE.

12 BY COMMISSIONER TAYLOR:

13 OKAY. MR. WILLIAMS, ANY OBJECTION TO EXHIBITS
14 ONE THROUGH FIVE AS PORTIONS OF THE PERSONNEL FILE?

15 BY MR. WILLIAMS:

16 NO OBJECTION, YOUR HONOR.

17 BY COMMISSIONER TAYLOR:

18 ALL RIGHT. EXHIBITS ONE THROUGH FIVE FOR THIS
19 CLAIMANT WILL BE ADMITTED INTO THE RECORD.

20 (COURT REPORTER MARKS DOCUMENTS CLAIMANT'S EXHIBIT
21 NUMBERS ONE THROUGH FIVE, RETAINED IN THE COMMISSION
22 FILE)

23 BY MR. WUKELA:

24 THANK YOU, COMMISSIONER.

25 BY COMMISSIONER TAYLOR:

1 THANK YOU. MR. WUKELA.

2 BY MR. WUKELA:

3 COMMISSIONER, THE -- THIS CASE IS A COMPLETELY
4 DENIED CASE. IT TURNS ON NOTICE AND CAUSATION. THE
5 FACTS OF THE CASE ARE BRIEFLY THAT MR. NERO WHO WAS
6 AN EMPLOYEE OF THE DEPARTMENT OF TRANSPORTATION
7 WORKED ON A ROAD CREW. THAT HIS ROAD CREW WAS
8 TASKED ON JUNE THE 20TH, 2012, WITH LAYING A
9 CONCRETE PAD THAT WAS SOMETHING IN THE NATURE OF 30
10 FEET BY 30 FEET. IT WAS STEEL FRAME THAT THE
11 CONCRETE WAS POURED INTO, AND THEN HE AND A NUMBER
12 OF OTHER DEPARTMENT OF TRANSPORTATION EMPLOYEES,
13 THREE OR FOUR OF THE FELLOWS, WERE MANNING WHAT THEY
14 REFER TO AS A SQUEEGEE BOARD, WHICH IS ABOUT A
15 THIRTY FOOT TWO-BY-FOUR THAT IS RUBBED BACK --
16 RUBBED ON ISN'T THE RIGHT WORD BUT MANEUVERED BACK
17 AND FORTH OVER THE -- OVER THE FRAME TO TRY TO LEVEL
18 AND SPREAD THE CONCRETE. DURING THAT PROCESS, HE
19 FELT AN ONSET OF PAIN IN HIS NECK AND HIS UPPER
20 EXTREMITIES. IT -- IT'S UNDISPUTED THAT HE DID NOT
21 NOTIFY HIS CO-WORKERS OR HIS SUPERVISOR THAT HE HAD
22 SUFFERED THAT ONSET OF PAIN IN HIS NECK AND UPPER
23 EXTREMITIES. HE CONTINUED WORKING. ULTIMATELY HIS
24 SUPERVISOR TOOK HIM OFF THE SQUEEGEE BOARD AND --
25 AND TOOK HIM AWAY FROM THAT PROCESS. THEY FINISHED

1 THE JOB SOMEWHERE AROUND THREE O'CLOCK JUST BEFORE
2 TIME TO -- TO BE COMPLETED WITH THEIR WORK FOR THE
3 DAY. THEY -- THEY CLEANED THE TOOLS, AND MR. NERO
4 WAS STANDING AT A WORK TRUCK NEXT TO HIS LEAD MAN,
5 MR. DURANT, AND HIS SUPERVISOR, MR. BOSTICK, TALKING
6 TO THEM, JOKING WITH THEM, AND DURING THAT PROCESS
7 HE HAD A SUDDEN ONSET OF SYNCOPE, A PASSING OUT
8 EPISODE, WHICH CAUSED HIM TO FALL TO THE GROUND. IN
9 FACT, MR. DURANT I BELIEVE AT PAGE 10 TESTIFIED
10 SPECIFICALLY THAT HE FELL COMPLETELY TO THE GROUND
11 AND WAS UNCONSCIOUS, AND THAT HE WAS REVIVED AND
12 TESTIFIED THAT HE FELT ALL RIGHT, THAT HE'D GOTTEN
13 DIZZY. THEY SENT HIM HOME. HE GOES HOME, DRIVES
14 HIMSELF HOME. WHEN HE GETS INTO THE DRIVEWAY, HE
15 HAS ANOTHER SYNCOPAL EPISODE. HIS WIFE WAS
16 CONCERNED. SHE TAKES HIM TO THE EMERGENCY ROOM.
17 DR. RICHEY, HIS FAMILY DOCTOR, ADMITS HIM THERE,
18 DOES A VARIETY OF TESTS TO TRY TO IDENTIFY THE --
19 THIS CAUSE OF THE SYNCOPE, AND ULTIMATELY AFTER
20 HAVING PERFORMED A CERVICAL M.R.I. IDENTIFIES
21 CERVICAL STENOSIS, WHICH HE IDENTIFIES AS THE CAUSE
22 OF THE SYNCOPE. HE BRINGS IN A NEUROSURGEON, DR.
23 NASO. DR. NASO INDICATES IN HIS RECORD THAT HE
24 DOESN'T THINK THE SYNCOPE WAS CAUSED THE STENOSIS
25 BUT THAT THE STENOSIS DID NEED TO BE TREATED, AND

1 ULTIMATELY DR. RICHEY PERFORMED A TWO-LEVEL FUSION
2 ON MR. NERO. OF COURSE THE ISSUE IS NOTICE. IT'S
3 THE CLAIMANT'S CONTENTION THAT HIS -- HIS LEAD MAN
4 AND SUPERVISOR WITNESSED THE SYNCOPAL EPISODE. THAT
5 THE EMPLOYER WAS AWARE THAT HE -- HE, THE CLAIMANT,
6 HAD NOT RETURNED TO WORK FROM THAT DAY FORWARD.
7 THAT -- THAT THE EMPLOYER WAS AWARE THAT HE HAD --
8 HE WAS GOING TO AND THAT HE DID ULTIMATELY UNDERGO
9 CERVICAL SURGERY. AND PARTICULAR POINT, WE -- WE
10 REFER TO EXHIBIT ONE, WHICH IS A D.O.T. FAMILY
11 MEDICAL LEAVE FORM FILMED OUT (SIC) -- FILLED OUT BY
12 DR. RICHEY, WHICH REFERENCES NECK AND SYNCOPE, AND
13 ALSO REPRESENTS THE FACT THAT HE HAD TO HAVE NECK
14 SURGERY. OTHER EXHIBITS TWO THROUGH FIVE INCLUDE
15 NOTES FROM FLORENCE NEUROSURGERY AND SPINE AND HIS
16 FAMILY DOCTOR MAKING REFERENCE TO HIS CERVICAL
17 STENOSIS AND HIS INABILITY TO WORK. IN THE
18 DEPOSITIONS OF MR. DURANT AND MR. BOSTICK, THE LEAD
19 MAN INDICATED THAT HE DID NOT REPORT THE FALL
20 BECAUSE THE SUPERVISOR WAS PRESENT. THAT'S AT PAGES
21 46 THROUGH 47 AND 49. HE ALSO INDICATED THAT HE
22 FELT IT HAD BEEN REPORTED. MR. BOSTICK TESTIFIED
23 THAT IF HE HAD HAD THE JULY 9TH DOCUMENT WITH WHICH
24 MR. BOSTICK DIDN'T HAVE BUT WAS UNDISPUTABLE IN THE
25 EMPLOYERS FILE AND THE EMPLOYER HAD, THAT MR.

1 BOSTICK WOULD HAVE CONDUCTED AN INVESTIGATION TO
2 WHETHER IT WAS A WORK-RELATED INJURY. IT'S THE
3 CLAIMANT'S CONTENTION THAT IN THE EVENT THE
4 COMMISSION FINDS THAT THE EMPLOYER WAS NOT ON NOTICE
5 BY VIRTUE OF THE FACT THAT HE HAD THE SYNCOPAL
6 EPISODE, WAS ABSENT AND HAD SURGERY, THAT HE HAD A
7 REASONABLE EXCUSE FOR NOT NOTIFYING THEM BECAUSE
8 THEY WERE PRESENT AND THAT THERE WAS NO PREJUDICE TO
9 THE EMPLOYER, REMINDING THE COMMISSION THAT IT'S THE
10 EMPLOYER'S BURDEN OF PROOF OF PREJUDICE ONCE YOU
11 FIND REASONABLE EXCUSE. WE CONTEND THAT THERE WAS
12 NO PREJUDICE GIVEN THE FACT THAT HE WAS SEEN BY A
13 NEUROSURGEON IN THE HOSPITAL JUST DAYS AFTER THE
14 EPISODE AND THAT THE EMPLOYER WAS AWARE OF HIS
15 TREATMENT BY A QUALIFIED NEUROSURGEON AND -- AND
16 THAT THERE WAS NO LOSS IN THEIR ABILITY TO EITHER
17 INVESTIGATE OR PROVIDE MEDICAL CARE. OF COURSE AS
18 TO CAUSATION, COMMISSIONER, WE REFER YOU TO THE
19 DEPOSITION OF DR. RICHEY, PARTICULAR TO THOSE PAGES
20 FOUND AT 16 THROUGH 19, AND 54 -- REALLY 54 THROUGH
21 59. BUT IT'S OUR CONTENTION THAT DR. RICHEY
22 INDICATED IN HIS TESTIMONY THAT WHILE MR. NERO HAD A
23 PRE-EXISTING STENOSIS BY VIRTUE OF AGE THAT HE HAD
24 AN AGGRAVATION OF THAT CONDITION THAT DR. RICHEY
25 BELIEVES CAUSED THE SYNCOPAL AND AGGRAVATED THE

1 CONDITION OF HIS CERVICAL SPINE. MR. NERO WILL
2 TESTIFY THAT HE DIDN'T HAVE ANY PRIOR NECK OR UPPER
3 EXTREMITY PROBLEMS.

4 BY COMMISSIONER TAYLOR:

5 ALL RIGHT.

6 BY MR. WUKELA:

7 THANK YOU, COMMISSIONER.

8 BY COMMISSIONER TAYLOR:

9 THANK YOU. MR. WILLIAMS.

10 BY MR. WILLIAMS:

11 THANK YOU, YOUR HONOR. DEFENDANTS TAKE THE
12 POSITION THAT CLAIMANT FAILED TO NOTIFY HIS -- HIS
13 EMPLOYER OF HIS ALLEGED WORK INJURY ACCORDING TO 42--
14 15-20. AND THE DEFENDANTS ALSO ARE STANDING ON
15 SANDERS V. RICHARDSON, THERE IS A DIFFERENCE IN THE
16 VERSION OF 42-15-20 THAN WHAT'S CITED IN SANDERS V.
17 RICHARDSON; HOWEVER, THAT YOUR HONOR WILL NOTICE
18 THAT IN THAT CASE THE COURT SPECIFICALLY REFERS TO
19 WHAT THE DEFENDANT TOLD THE -- TOLD THE EMPLOYER AS
20 OPPOSED TO HOLDING THE EMPLOYEE TO THE WRITTEN
21 NOTICE REQUIREMENT AT THAT TIME. THAT IS A
22 DISTINGUISHABLE FACT REGARDING THE DIFFERENCE
23 BETWEEN THE STATUTES. IN ADDITION TO NOT NOTIFYING
24 HIS EMPLOYER, THE DEFENDANTS HAVE BEEN PREJUDICE IN
25 BY THE WAY OF NOT BEING ABLE TO SEND MR. NERO TO A

1 PHYSICIAN OF THEIR CHOICE TO INVESTIGATE AS TO
2 WHETHER OR NOT MR. NERO COULD HAVE HAD AN
3 ~~ALTERNATIVE FORM OF TREATMENT AS OPPOSED TO THE~~
4 SURGERY. CONSIDERING THE WAY HE PRESENTED TO THE
5 HOSPITAL, IT WAS REALLY UNDER EMERGENCY
6 CIRCUMSTANCES IN THAT DR. RICHEY, AS YOU WERE
7 READING IN HIS DEPOSITION, WAS VERY VERY VERY
8 CONCERNED ABOUT THE EPISODE OF SYNCOPE, AND HE
9 PERFORMED A NUMBER OF TESTS ON MR. NERO, AND
10 ACTUALLY HE WASN'T DISCHARGED FROM THE HOSPITAL
11 UNTIL THREE OR FOUR DAYS LATER. AND SO AND -- AND
12 THE DEFENDANTS TAKE THE POSITION THAT IF THIS INJURY
13 WAS REPORTED AS REQUIRED, THEY COULD HAVE FOCUSED
14 SOLELY ON THE WORK -- ALLEGED WORK-RELATED INJURY
15 AS OPPOSED TO ANY OTHER CONDITION THAT MR. NERO MAY
16 HAVE BEEN -- MAY HAVE SUFFERED FROM AT THAT POINT IN
17 TIME. WE -- THE DEFENDANTS POSITION ON THE FACTS
18 ARE THAT MR. NERO WAS WORKING WITH A CREW OF TEN TO
19 TWELVE PEOPLE SUPERVISED BY DANNY BOSTICK AND
20 BENJAMIN DURANT. MR. NERO WAS WORKING ON WHAT THEY
21 CALL A SQUEEGEE BOARD. HE WASN'T WORKING BY
22 HIMSELF. HE WAS WORKING WITH FOUR TO FIVE PEOPLE ON
23 THAT SQUEEGEE BOARD AS YOU WILL SEE IN MR. BOSTICK'S
24 DEPOSITION. AS YOU WILL ALSO SEE IN MR. BOSTICK'S
25 DEPOSITION, MR. BOSTICK PULLED MR. NERO OFF OF THE

1 SQUEEGEE BOARD BECAUSE HE SAID IT WAS A HOT DAY, AND
2 HE SAID THAT MR. NERO'S ONE OF THE OLDEST MEMBERS OF
3 HIS TEAM AND HE TAKES IT SERIOUS. HE TAKES -- HE
4 TAKES IT PERSONALLY TO ENSURE THAT EVERY MEMBER OF
5 HIS TEAM LEAVES WORK WITHOUT INJURY, AND SO HE TOOK
6 HIM OFF BECAUSE HE DIDN'T WANT HIM TO OVEREXERT
7 HIMSELF AS IT WAS HOT AND AS HE DOES IN THE NORMAL
8 COURSE OF BUSINESS. THIS IS NOT SOMETHING HE JUST
9 DID FOR THIS AND MR. NERO. HE DOES THIS FOR ALL OF
10 HIS EMPLOYEES. AT NO TIME -- AT NO TIME -- AT NO
11 TIME, YOUR HONOR, DID MR. NERO EVER TELL ANY OF THE
12 MEMBERS OF THAT TEN TO TWELVE MEMBER CREW THAT HE
13 HAD AN ISSUE WITH HIS NECK OR HIS BACK, AT NO TIME.
14 THERE'S NO -- NO EVIDENCE TO SUPPORT THAT HE HAD ANY
15 PAIN OTHER THAN HIS TESTIMONY. AFTER THEY FINISHED
16 FOR THE DAY AT ABOUT 3:30 -- 3:00 -- BETWEEN 3:00
17 AND 3:30, THEY WENT TO A SHED. AT THAT POINT IN
18 TIME, YOUR HONOR, MR. NERO WAS TALKING WITH BENJAMIN
19 DURANT, THEY WERE LAUGHING, JOKING, JUST KICKING IT
20 BEFORE THEY CLOSED FOR THE DAY. AND AFTER HE WAS
21 LAUGHING HYSTERICALLY ABOUT SOMETHING THAT MR.
22 DURANT SAID, MR. NERO HAD AN EPISODE OF SYNCOPE. HE
23 GOT DIZZY. NOW, WE'RE TRANSITIONING INTO CAUSATION
24 HERE. THERE'S NO EVIDENCE TO SUPPORT BEYOND WHAT
25 THE DEFENDANTS WERE TO CONSIDER SPECULATION BY MR. -

1 - DR. RICHEY IN THAT THE SYNCOPE WAS CAUSED BY THE
2 SQUEEGEE BOARD ACTIVITY EARLIER THAT DAY. NOW, HE
3 SAYS THAT'S HIS OPINION, AND HE HAS A RIGHT TO HIS
4 OPINION, BUT HE ALSO ADMITS THAT DR. NASO DISAGREED
5 WITH HIM. AND I THINK, YOUR HONOR, WHAT'S IMPORTANT
6 TO NOTE IS THAT DR. RICHEY ALSO SAID THAT ANY
7 PRESSURE ON MR. NERO'S SPINE COULD CAUSE THE EPISODE
8 OF SYNCOPE, AND HE MAY EVEN WENT AS FAR TO SAY IT
9 WOULD CAUSE BECAUSE HE SUFFERED FROM PRE-EXISTING
10 SPINAL STENOSIS TO THE POINT THAT ANY -- ANY
11 ACTIVITY TO PUT PRESSURE ON HIS SPINE, A HYSTERICAL
12 LAUGH, A COUGH OR A SNEEZE, COULD CAUSE AN EPISODE
13 OF SYNCOPE. YOU WILL SEE IN MR. BENJAMIN DURANT'S
14 DEPOSITION THAT CLAIMANT WAS LAUGHING RIGHT BEFORE
15 THE EPISODE OF SYNCOPE. YOUR HONOR, DEFENDANTS
16 ADMIT TO YOU THAT IF THE SQUEEGEE BOARD ACTIVITY --
17 IF THE SQUEEGEE BOARD ACTIVITY WERE ACTUALLY -- WAS
18 ACTUALLY THE CAUSE OF THE SYNCOPE, MR. NERO WOULD
19 HAVE HAD A EPISODE OF SYNCOPE WHEN HE WAS ON THE
20 SQUEEGEE BOARD. THAT'S NOT WHAT MR. NERO TESTIFIED
21 TO THOUGH HERE TODAY. HE WILL TESTIFY TO THE FACT
22 THAT HE HAD AN EPISODE OF SYNCOPE AFTER HE FINISHED
23 HIS WORK FOR THE DAY, AFTER HE WAS CALM, AFTER HE
24 WAS INSIDE THE SHED, NOT OUTSIDE IN THE HEAT, BUT
25 AFTER HE WAS IN A PLACE WHERE THEY WERE QUOTE

1 UNQUOTE, IF YOU WILL, RELAXING. AFTER HYSTERICAL
2 LAUGHTER AS DESCRIBED BY MR. BENJAMIN DURANT, MR.
3 NERO HAD A EPISODE OF SYNCOPE. YOUR HONOR,
4 DEFENDANTS BELIEVE THAT CLAIMANT CANNOT CONNECT HIS
5 EPISODE OF SYNCOPE OR HIS CERVICAL RADICULOPATHY OR
6 THE CERVICAL FUSION TO ANY WORK RELATED INJURY, AND
7 DEFENDANTS STAND ON -- WE STAND ON HARGROVE ---

8 BY MR. WUKELA:

9 SANDERS.

10 BY MR. WILLIAMS:

11 WE STAND ON -- WE STAND ON HARGROVE FOR
12 CAUSATION. WE STAND ON HARGROVE VERSUS CAROLINA
13 ORTHOPEDIC SURGERY ASSOCIATES IN REFERENCE TO
14 CAUSATION. AND FINALLY, YOUR HONOR, WE THINK IT'S
15 IMPORTANT THAT YOU CONSIDER ALL THE FACTS IN THIS
16 CASE BECAUSE EACH OF THEM CONTRIBUTE TO WHAT WE
17 BELIEVE SHOULD BE THAT -- SHOULD LEAD TO A DENIED
18 CASE. WHEN -- WHEN WE TALK ABOUT PREJUDICE, IT IS
19 TRUE THAT MR. NERO SEEMINGLY RECEIVED QUALITY CARE,
20 AND I COMMEND DR. RICHEY FOR THE WAY HE WORKED HIM
21 UP. HE -- YOUR HONOR, QUITE HONESTLY, HE PROBABLY
22 SAVED HIS LIFE. NOT WITHSTANDING THAT, DEFENDANTS
23 STILL HAD THE OPPORTUNITY OR SHOULD HAVE HAD THE
24 OPPORTUNITY IF MR. NERO WOULD HAVE NOTIFIED HIS
25 EMPLOYER ABOUT HIS WORK INJURY, IF HE WOULD HAVE

1 DONE SOMETHING TO TRIGGER THEM TO INVESTIGATE THIS
 2 CASE OR TO DO SOMETHING AS HE DID IN HIS PRIOR
 3 WORKERS' COMPENSATION MATTER, DEFENDANTS WOULD HAVE
 4 HAD THE OPPORTUNITY TO DETERMINE WHETHER OR NOT
 5 THERE WAS ANOTHER COURSE OF TREATMENT FOR MR. NERO
 6 AS OPPOSED TO A CERVICAL FUSION WHICH, YOU KNOW, NOW
 7 SOME TWO YEARS LATER, WE'RE -- WE'RE -- WE'RE
 8 LOOKING AT THIS CASE AND -- AND WHO KNOWS WHAT HAS
 9 HAPPENED SINCE THAT -- THAT SURGERY. AND DEFENDANTS
 10 FEEL AS IF THEY'RE IN A VERY COMPROMISING POSITION.
 11 THANK YOU, YOUR HONOR.

12 BY COMMISSIONER TAYLOR:

13 THANK YOU. MADAM COURT REPORTER, WILL YOU
 14 PLEASE SWEAR THE CLAIMANT.

15 BY THE COURT REPORTER:

16 WILL YOU RAISE YOUR RIGHT HAND, PLEASE, SIR.

17 * * * * * * * * * * * * * * * *

18 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
 19 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
 20 MATTER HEREIN:

21 OTIS NERO

22 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS
 23 FOLLOWS:

24 BY COMMISSIONER TAYLOR:

25 MR. WUKELA.

1. BY MR. WUKELA:

2. THANK YOU, COMMISSIONER. AND I SHOULD ADD TOO,
3. COMMISSIONER, THAT ALTHOUGH I DIDN'T SAY IT IN MY
4. OPENING THAT THAT CLAIMANT'S NOT SEEKING A
5. DETERMINATION OF MAXIMUM MEDICAL BURDEN OR
6. PERMANENCY AT THIS POINT.

7. BY COMMISSIONER TAYLOR:

8. RIGHT. OKAY.

9. DIRECT EXAMINATION BY MR. WUKELA:

10. Q. GOOD AFTERNOON, MR. NERO.

11. A. GOOD AFTERNOON.

12. Q. TELL US HOW OLD YOU ARE?

13. A. SIXTY-FOUR.

14. Q. AND HOW MUCH EDUCATION DO YOU HAVE?

15. A. NINTH GRADE, VERY LITTLE READING SKILLS.

16. Q. OKAY. AND ARE YOU ABLE TO READ A NEWSPAPER?

17. A. NO.

18. Q. DID -- HOW FAR DID YOU GO IN SCHOOL?

19. A. NINTH GRADE.

20. Q. OKAY. AND WHY DID YOU LEAVE SCHOOL IN THE NINTH
21. GRADE?

22. A. WELL, I WAS ONE OF THE OLDEST LEFT HOME. MY OLDEST
23. BROTHER WAS IN SERVICE. MY DAD WAS SICK, SO I HAD
24. TO TAKE CARE OF THE FAMILY.

25. Q. WHAT KIND OF WORK HAVE YOU DONE IN YOUR LIFE?

1 A. ALL KIND. STARTED OFF BEHIND A MULE, JUST WORKED MY
2 WAY UP.

3 Q. ~~OKAY. HAVE YOU DRIVEN TRUCKS?~~

4 A. YEAH, I DO TRUCKS.

5 Q. RUN BACKHOES?

6 A. BACKHOES, TRACKHOES, BULLDOZERS.

7 Q. OKAY. ANYTHING OTHER THAN LABOR TYPE WORK?

8 A. I DID WELDING WHEN I WORKED IN THE STEEL PLANT ---

9 Q. OKAY.

10 A. --- DID WELDING WORK.

11 Q. NOW, DO YOU -- THERE WERE TWO STINTS AT THE TIME
12 DURING WHICH YOU WORKED FOR THE DEPARTMENT OF
13 TRANSPORTATION; IS THAT CORRECT?

14 A. YES, SIR.

15 Q. OKAY. TELL US, DO YOU REMEMBER HOW LONG THE FIRST
16 STINT WAS?

17 A. I'M NOT SURE BUT IT'S -- IT WAS A PRETTY GOOD WHILE,
18 I STARTED THE FIRST -- FIRST TIME I'M NOT -- I'M NOT
19 SURE HOW LONG IT WAS THE FIRST TIME, BUT IT WAS
20 LONGER THAN -- THAN THIS TIME.

21 Q. IT WAS LONGER THAN THE SECOND TIME?

22 A. RIGHT.

23 Q. AND THE SECOND TIME, HOW LONG DO YOU THINK YOU
24 WORKED FOR THE D.O.T.?

25 A. I BELIEVE ABOUT THREE-AND-A-HALF YEARS OR FOUR

1 YEARS, SOMEWHERE IN THERE.

2 Q. OKAY. OKAY.

3 A. I'M NOT GOING TO SAY ---

4 Q. THAT'S WHAT WE WERE GUESSING EARLY AND THAT -- THAT
5 SOUNDS ABOUT RIGHT. NOW -- NOW, ON JUNE THE 20TH,
6 2012, WERE YOU WORKING FOR A D.O.T. ROAD CREW?

7 A. YES, SIR.

8 Q. OKAY. AND IT LOOKS LIKE WE'VE TALKED TO MR. DURANT
9 ~~WHO WAS THE LEAD MAN OF THAT CREW?~~

10 A. YES, SIR.

11 Q. IS THAT YES?

12 A. YES, SIR.

13 Q. AND MR. BOSTICK WAS THE SUPERVISOR OF THE CREW?

14 A. YES, SIR.

15 Q. ALL RIGHT. AND DO YOU REMEMBER WHAT HAPPENED THAT
16 DAY, JUNE THE 21ST, 2012?

17 A. LET'S SEE, WE WAS POURING A SLAB OF CEMENT OUT BACK.

18 Q. OKAY.

19 A. AND LIKE I SAID, IT WAS ABOUT 30 WIDE, AND 30 TO 35
20 FEET WIDE. WE HAD FRAMED IT UP THE DAY BEFORE, MOST
21 OF IT. WE HAD TO FINISH THE REST OF IT UP THAT SAME
22 DAY WE POURED.

23 Q. YES, SIR.

24 A. AND AFTER WE GOT IT, THE TRUCK STARTED COMING SO --
25 THE CEMENT TRUCK, IT WAS A LOT OF CEMENT AT ONE TIME

1 YOU DUMP -- YOU DUMP THAT ONE OUT AND STARTED TO
2 SQUEEZING IT. BEFORE WE GOT THAT SQUEEZED OUT GOOD,
3 ~~ANOTHER TRUCK WAS RIGHT THERE WAITING, SO WE DIDN'T~~
4 GET A CHANCE TO STOP. EVERYTHING WAS LIKE PILING UP
5 ON US.

6 Q. NOW, MR. NERO, I -- I'VE LAID A LITTLE BIT OF CEMENT
7 IN MY TIME, AND I DESCRIBED TO THE COMMISSIONER
8 BEFORE WE STARTED THAT THE SQUEEGEE BOARD IS A LONG
9 ~~TWO-BY-FOUR ABOUT THIRTY FEET; IS THAT RIGHT?~~

10 A. YES, SIR. IT STRETCHES OUT. CONCRETE FORMS ON EACH
11 SIDE, AND IT STRETCHES OUT ALL THE WAY ACROSS PAST
12 THE OPPOSITE SIDE 'CAUSE YOU'VE GOT TO HAVE SOME
13 ROOM ON THE END OF IT TO -- TO BE ABLE TO WORK IT.

14 Q. WORK IT BACK AND FORTH?

15 A. UH-HUH.

16 Q. AND THE PURPOSE OF IT IS IT GOES, IT CREATES A LEVEL
17 PLANE ---

18 A. SMOOTH EVERYTHING OUT.

19 Q. --- ACROSS THE TWO PARTS OF THE FRAME; IT SMOOTHS IT
20 OUT?

21 A. RIGHT.

22 Q. OKAY. AND THERE WERE A NUMBER OF MEN REQUIRED TO
23 WORK THAT BOARD; IS THAT RIGHT?

24 A. YES, SIR.

25 Q. AND DO YOU REMEMBER HOW MANY MEN WERE ON THE DAY

1 THERE?

2 A. TO START OFF WITH WE -- WE HAD WAS I THINK WAS TWO
3 OR THREE ON THAT SIDE AND TWO OR THREE ON THIS SIDE
4 (INDICATING) OF THE CENTER OF THE BOARD, AND I
5 BELIEVE I WAS IN THE CENTER OF THE BOARD. AND, YOU
6 KNOW, TO KEEP MOVING -- KEEP MOVING BY AS IT -- AS
7 YOU GET FURTHER DOWN THE ROW, SOME WILL HAVE TO MOVE
8 AND MAYBE SHOVEL SOME MORE CEMENT WHERE YOU GOT A
9 ~~LOW SPOT, SOMEBODY BE THERE WITH TO SCOOP OR TO PUSH~~
10 IT BACK, AND THAT TAKES SOME OFF OF THE SQUEEGEE
11 BOARD.

12 Q. DOES THE CEMENT, WHEN YOU PULL IT AND WORK IT, DOES
13 THE CEMENT BUILD UP BEHIND THE BOARD?

14 A. YEAH, IT BUILDS UP.

15 Q. ALL RIGHT. AND THEN -- THEN SOME OF THE MEN USE THE
16 SHOVELS TO TAKE THE PILE ---

17 A. SOMETHING LIKE THAT.

18 Q. --- AND MOVE IT TO A PLACE THAT'S SLOW?

19 A. YOU GOT SOMETHING LIKE A HOE. IT'S A BLADE ABOUT SO
20 LONG (INDICATING) ON A HANDLE, AND SOME OF THEM HAVE
21 TO GET OFF THE SQUEEGEE BOARD, THEN TAKE THAT ON
22 EACH SIDE OF THE MIDDLE MAN AND PULL IT OUT FROM IN
23 THE FRONT OF THE BOARD SO EVERYTHING WILL LIGHTEN UP
24 ON THE SQUEEGEE BOARD, AND WHEN IT YOU GET A LOW
25 SPELL, YOU MIGHT HAVE TO PUSH IT BACK AND MAKE SURE

1 YOU AIN'T LEAVING A HOLE.

2 Q. OKAY. AND TELL ME WHAT HAPPENED DURING THAT PROCESS
3 OF YOU PULLING THE SQUEEGEE BOARD?

4 A. I GOT A PAIN IN BETWEEN PULLING THE SQUEEGEE BOARD
5 WHEN THEY TAKE SOMEBODY OFF OF IT THAT PUT MORE
6 STRESS ON THERE, DUE TO WHOEVER IS LEFT ON THE
7 SQUEEGEE HAS GOT LESS TO HELP PULL IT.

8 Q. YES, SIR.

9 A. BUT YOU ALSO STILL GOT TO KEEP GOING 'CAUSE IF YOU
10 DON'T KEEP GOING IT'S GOING -- YOUR GOING TO BLOTCH
11 UP. SO AS I WAS DOING THAT, I FELT A PRESSING LIKE
12 A, YOU KNOW, SNAP OF BACK THERE BETWEEN MY SHOULDER
13 AND MY NECK. AND I DON'T KNOW WETHER IT'S THE BOSS
14 THAT WAS SPOTTING ME OR SOMETHING WHEN I -- WHEN
15 THAT HAPPENED OR THEN THAT. I DON'T KNOW EXACTLY
16 THAT'S WHEN -- WHEN HE TOOK ME OFF TOWARDS THERE,
17 YOU KNOW.

18 Q. OKAY. NOW, DID YOU TELL HIM, "HEY, MR. BOSTICK, I -
19 - I THINK I'VE HURT MY NECK JUST NOW"?

20 A. NO, I DIDN'T TELL HIM THAT.

21 Q. OKAY. WHEN HE TOOK YOU OFF, WHAT DID YOU DO?

22 A. I JUST STEP OUT THE WAY, GOT OFF TO SEE -- OUT OF
23 THE CEMENT, TOOK A LITTLE BREAK, AND THEN I WENT
24 BACK.

25 Q. OKAY. AND -- AND THEN YOU WENT BACK TO SQUEEGEE

1 BOARDING?

2 A. I WENT RIGHT BACK TO THE SQUEEGEE BOARD.

3 Q. OKAY. HOW MUCH LONGER DID THAT -- DID THAT TAKE
4 FINISHING THE JOB?

5 A. WELL, WE HAD TO FINISH POURING -- WE POURED TWO? I
6 WANT TO SAY WE POURED TWO OR THREE TRUCKS THAT DAY.
7 TWO, AND IT HAD TO BEEN -- HAD BEEN OVER TWO. IT
8 HAD TO BEEN TWO, TWO-AND-A-HALF.

9 Q. OKAY.

10 A. BACK TO BACK. AND WE HAD FINISHED UP -- WE HAD TO
11 FINISH UP ABOUT TWO O'CLOCK, 2:30, BECAUSE WHEN I
12 GOT TO THE WORK PLACE WHERE WE KNOCK OFF AT, YOU
13 KNOW, WHERE WE TEND TO WASH UP AND STAGE UP AT, I
14 MIGHT HAVE NOTICED BUT THERE WAS A -- A QUARTER TO --
15 - FIFTEEN MINUTES BEFORE TIME TO KNOCK OFF..

16 Q. OKAY.

17 A. UH-HUH.

18 Q. ALL RIGHT. AND -- AND WHAT TIME IS THE KNOCK OFF
19 AND -- KNOCK -- TIME TO KNOCK OFF?

20 A. KNOCK OFF TIME IS 3:30.

21 Q. OKAY. OKAY. AND Y'ALL CLEANED THE EQUIPMENT?

22 A. YEAH.

23 Q. OKAY. AND ---

24 A. YES, SIR.

25 Q. AND THEN WHAT DID YOU DO?

1 A. EXCUSE ME.

2 Q. NO. YEAH, THAT'S FINE. AND THEN WHAT DID YOU DO?

3 A. ~~WALKED FROM OUT THERE WHERE WE WAS AT. I WALKED~~
4 ACROSS THE PARKING LOT. MR. BOSTICK AND MY
5 SUPERVISOR -- SUPERVISOR AND LEAD MAN, MR. BOSTICK
6 AND BEN DURANT, THEY PULLED UP IN THE TRUCK, PARKED
7 IT RIGHT BESIDE FACING IN THE SHED. THEN I WALKED
8 ON OVER THERE AND WALKED AROUND THE RIGHT HAND SIDE
9 ~~OF THE TRUCK, AND MR. DURANT HAD THE DOOR OPEN. I~~
10 JUST WALKED UP THERE AND WAS STANDING AND WAS JUST
11 TALKING TO HIM, YOU KNOW. AND WE WERE TALKING, JUST
12 LIKE JIVING AND A LAUGH, YOU KNOW, LAUGHING, CUTTING
13 A FOOL LAUGHING, YOU KNOW. THEN JUST ALL OF THE
14 SUDDEN I -- I WENT OUT. IT WAS HOT, AND HE ASKED
15 ME, HE SAID, "ARE YOU ALL RIGHT?" I HAD DONE FELL
16 TO THE GROUND THEN. MATTER OF FACT, HE WAS GETTING
17 OUT -- OUT OF THE TRUCK THEN AND TRYING TO HELP ME
18 GET UP.

19 Q. AND -- AND WHAT DID YOU TELL HIM?

20 A. I -- I TOLD HIM THEN, I SAID -- I SAID, "WELL, I
21 FEEL LIKE I'M ALL RIGHT. " YOU KNOW, I SAID -- I
22 SAID, "I FEEL OKAY." I SAID, "I DON'T KNOW WHAT
23 HAPPENED, YOU KNOW," SO I JUST WENT OUT. SO
24 GENERALLY WHEN WE LEAVE, WE KNOCK OFF, WE WALK -- I
25 SAID, "WELL, I TELL YOU WHAT, LET ME WALK AROUND,"

1 DECIDED THEN I'D GO AROUND AND GO IN THERE AND GET
2 THE UNIFORMS. SO I WALKED AROUND THE BUILDING AND
3 WALKED INSIDE THIS SHED WHERE WE KEEP -- PUT THE
4 UNIFORMS BE HANGING, CHECK TO SEE IS THAT I HAD ANY
5 OF THEM. I -- I STILL FELT PRETTY GOOD, YOU KNOW.
6 I SAID, WELL IT WAS SO HOT I WENT PAINED, YOU KNOW,
7 DIDN'T THINK OR NOTHING MUCH ABOUT IT, TRYING TO GET
8 HOME OUT OF THERE. SO I WALKED OUT OF THE GATE
9 ALONG WITH THEM, AND THEY LOOKED AT ME AGAIN AND
10 SAID, "SO, ARE YOU ALL RIGHT?" I SAID, "WELL, I
11 FEEL LIKE I'M ALL RIGHT." I SAID, "I'M HOT," AND I
12 CRANKED MY TRUCK AND LET THE AIR CONDITIONING GET
13 COOLING A LITTLE BIT IN IT, AND THEN I GOT IN, AND I
14 SAID, "WELL, I'LL SEE Y'ALL TOMORROW." THEN I DROVE
15 OFF. AS SOON AS I PULL UP IN THE YARD, MY WIFE WAS
16 ON THE PORCH. SHE WAS SAYING, "HONEY, YOU ALL
17 RIGHT?" AND I STARTED TO GET OUT OF THE TRUCK, AND
18 I FAINTED AGAIN, YOU KNOW.

19 Q. AND THEN WHAT HAPPENED?

20 A. SHE TOOK ME TO THE EMERGENCY ROOM.

21 Q. OKAY. AND THE RECORDS INDICATE THAT YOU WERE
22 ADMITTED THERE BY DR. RICHEY?

23 A. (WITNESS NODS HEAD)

24 Q. IS THAT YES?

25 A. THAT SAME -- YES, SIR. THAT SAME AFTERNOON.

1 Q. OKAY. AND HE DID A BUNCH OF TESTS ON YOU?

2 A. RIGHT.

3 Q. ~~ULTIMATELY SENT YOU, HAD YOU SEE DR. NASO IN THE~~
4 HOSPITAL?

5 A. YES, SIR.

6 Q. AND THEN DR. NASO ULTIMATELY DID NECK SURGERY ON
7 YOU?

8 A. YES, SIR.

9 Q. ~~HAD --- DID YOU EVER RETURN TO WORK TO WORK?~~

10 A. NO.

11 Q. OKAY. HAD YOU EVER HAD ANY NECK PAIN OR PROBLEMS
12 BEFORE THAT DAY?

13 A. NO, SIR.

14 Q. OKAY. DID -- AFTER YOU WERE GONE FOR A PERIOD OF
15 TIME, DID YOU HAVE ANY COMMUNICATIONS AT ALL WITH
16 THE JOB; DID YOU TALK TO ANYBODY OVER THERE?

17 A. YES, SIR. I DID. MR. BENJAMIN DURANT CALLED ME. I
18 WANT TO SAY HE CALLED ME TWO DAYS OR THREE DAYS
19 LATER, AND I LET HIM KNOW THEN THAT I WAS IN THE
20 HOSPITAL AND THAT I WAS GOING TO HAVE TO HAVE
21 SURGERY. TEN OR FIFTEEN MINUTES RIGHT AFTER I
22 TALKED TO MR. DURANT, MR. BOSTICK CALLED; THEN I
23 TALKED TO HIM.

24 Q. OKAY. DID YOU EVER HAVE ANY COMMUNICATIONS WITH
25 ANYBODY AT HUMAN RESOURCES; DID THEY EVER HAVE ANY

1 PAPERWORK FOR YOU?

2 A. YEAH, I HAD TO GET SOME PAPERWORK SIGNED FROM MS.
3 CHRISTY.

4 Q. MS. CHRISTY?

5 A. YEAH, MS. CHRISTY.

6 Q. WAS SHE THE HUMAN RESOURCES PERSON UP THERE?

7 A. WELL, MS. CHRISTY'S THE SUPER -- IS THE SECRETARY.

8 Q. OKAY. AND YOU SAID YOU HAD TO GET PAPERWORK SIGNED
9 FOR HER?

10 A. YES, SIR.

11 Q. WHO DID IT HAVE TO BE SIGNED BY?

12 A. IT HAD TO BE SIGNED BY MY DOCTOR.

13 Q. AND WHICH DOCTOR WAS THAT?

14 A. DR. RICHEY.

15 Q. OKAY. AND DID YOU PROVIDE THOSE DOCUMENTS TO MS.
16 CHRISTY?

17 A. YES, SIR.

18 Q. OKAY. AND HAD YOU EVER HAD A WORKERS' COMPENSATE --
19 A -- AND INJURY ON THE JOB BEFORE?

20 A. YES, SIR. ON MY FIRST TIME I WORKED THERE, I ---

21 Q. FIRST -- FIRST TIME YOU WORKED FOR THE D.O.T.?

22 A: THE FIRST TIME I WORKED FOR THE D.O.T. I HAD
23 OPERATING A MACHINE, AND I HAD AN ACCIDENT ON MY
24 KNEE.

25 Q. HOW DID THAT HAPPEN?

1 A. CLEARING DEBRIS OFF A DITCH BANK AND THERE WAS A LOT
2 OF VINES, AND NOT KNOWING IT WAS A DEAD TREE WITH
3 ~~THE VINES WRAPPED AROUND IT, THE GREEN, AND PULLING~~
4 THEM OFF AND THE TREE BROKE ABOUT HALF WAY, AND THE
5 TOP FELL OVER. THE MACHINE I WAS RUNNING DIDN'T
6 HAVE NOTHING BUT THE TOP AND THE RACKS ON THE SIDE.
7 IT DIDN'T HAVE A CLOSED-IN CAB. AND WHEN IT HIT THE
8 GROUND, THE HEAD OF THE TREE BRANCH AT THE TOP OF IT
9 ~~HIT THE GROUND LIKE THAT--(INDICATING)~~ SO THAT GAVE
10 IT A SPRINGING MOVEMENT. IT HIT THE GROUND, AND IT
11 CAME BACK, AND THAT POST ON THE SIDE OF WHERE MY
12 KNEE WAS AT, IT HIT THAT POST, DRIVING THE MACHINE
13 AND SLIPPED OFF OF THAT AND IT HIT THAT DIGGED (SIC)
14 INTO MY KNEE.

15 Q. OKAY. ALL RIGHT.

16 BY MR. WUKELA:

17 AND FOR THE RECORD, COMMISSIONER, THIS IS
18 DISCUSSED AT PAGE 24 OF HIS DEPOSITION, WHICH IS IN
19 THE RECORD AS WELL.

20 BY COMMISSIONER TAYLOR:

21 OKAY.

22 DIRECT EXAMINATION RESUMED BY MR. WUKELA:

23 Q. AND IN YOUR DEPOSITION, YOU SAY THAT DOUG PHILLIPS
24 WAS THERE?

25 A. YES, SIR. THAT WAS MY SUPERVISOR THEN.

1 Q. OKAY. AND DID YOU REPORT THAT ACCIDENT TO ANYBODY?

2 A. YES, SIR. A MATTER OF FACT, IT WAS THE WORKERS
3 AROUND THERE AT THAT TIME SEE'D (SIC) WHAT HAPPENED.
4 AND I TRIED TO, THOUGHT I COULD WALK, WENT TO GET
5 DOWN OFF THE MACHINE, AND WHEN I GOT DOWN TO THE
6 GROUND, I NOTICED I AIN'T HAD NO -- NOTHING IN MY
7 LEG. I JUST FELL OUT.

8 Q. MR. PHILLIPS SAW THAT ACCIDENT?

9 A. YEAH.

10 Q. OKAY. NOW, THE -- THE -- THE ONE OF THE ISSUES IN
11 THIS CASE IS THE EMPLOYER SAYS, LISTEN; THEY NEVER --
12 -- HE NEVER SAID TO MR. BOSTICK AND MR. DURANT, "HEY,
13 I HURT MY NECK THAT DAY PULLING THAT SQUEEGEE
14 BOARD"; IS THAT CORRECT?

15 A. CORRECT.

16 Q. OKAY. AND THEY SAY, YOU KNOW, YOU NEVER TOLD MS.
17 CHRISTY, "HEY, MS. CHRISTY, I HURT MY NECK THAT DAY
18 PULLING THAT SQUEEGEE BOARD"; IS THAT CORRECT?

19 A. THAT'S CORRECT.

20 Q. OKAY. WHY DIDN'T YOU REPORT IT?

21 A. WELL, I DIDN'T REPORT IT BECAUSE THEY WAS THERE.
22 YOU KNOW, THEY -- THEY SAW WHAT HAPPENED. AND FROM
23 THE TIME WHEN I WENT TO THE HOSPITAL, I DIDN'T NEVER
24 GET BACK TO WORK. THAT'S WHY WHEN BEN CALLED ME, I
25 LET HIM KNOW. AND THEN BEN OBVIOUSLY HAD TO TELL

1 DANNY 'CAUSE HE TURNED AROUND AND CALLED ME DIRECTLY
2 BEHIND THEM BUT RIGHT AFTER HE CALLED, BOTH OF THEM
3 CALLING. SO I FIGURED THEY'D KNOW, YOU KNOW.

4 Q. ARE YOU STILL HAVING PROBLEMS WITH YOUR NECK AND
5 YOUR HANDS?

6 A. YES, SIR.

7 Q. ALL RIGHT.

8 A. I GOT TO TAKE PAIN PILLS LIKE EVERY NIGHT.

9 Q. ~~OKAY. HAVE YOU APPLIED FOR SOCIAL SECURITY~~
10 ~~DISABILITY BENEFITS?~~

11 A. YEAH, I HAVE.

12 Q. AND ARE YOU ---

13 A. AT THAT TIME, I DON'T THINK I WAS GETTING -- WAS I
14 GETTING SOCIAL SECURITY DISABILITY THEN? I THINK I
15 JUST STARTED.

16 Q. OKAY. AFTER THE ACCIDENT?

17 A. YEAH, I'M PRETTY SURE.

18 Q. OKAY. AND YOU'RE GETTING IT NOW?

19 A. UH-HUH.

20 Q. IS THAT A YES?

21 A. YES, SIR.

22 BY MR. WUKELA:

23 OKAY. THOSE ARE ALL OF THE QUESTIONS I HAVE
24 FOR THE CLAIMANT, COMMISSIONER. PLEASE ANSWER ANY
25 QUESTIONS ---

1 BY THE WITNESS:

2 OKAY.

3 BY MR. WUKELA:

4 --- THAT MR. WILLIAMS HAS FOR YOU, MR. NERO.

5 BY THE WITNESS:

6 YES, SIR.

7 BY COMMISSIONER TAYLOR:

8 MR. WILLIAMS.

9 BY MR. WILLIAMS:

10 THANK YOU, YOUR HONOR.

11 CROSS EXAMINATION BY MR. WILLIAMS:

12 Q. GOOD AFTERNOON, MR. NERO.

13 A. GOOD AFTERNOON. HOW ARE YOU DOING?

14 Q. DOING WELL, SIR. HOW ARE YOU DOING TODAY?

15 A. I'M DOING PRETTY FAIR.

16 Q. GOOD.

17 A. OTHER THAN THE PAIN, I'M DOING GOOD.

18 Q. ALL RIGHT. MR. NERO, I HAVE A FEW QUESTIONS FOR
19 YOU, SIR. ON THE DAY OF THE -- THE ALLEGED INJURY,
20 THE DAY THAT -- THAT WE'RE SAYING THAT -- THAT
21 YOU'RE SAYING THIS INJURY TOOK PLACE, ISN'T IT TRUE
22 THAT YOU WERE WORKING WITH MORE THAN THREE OR FOUR
23 PEOPLE ON THAT SQUEEGEE BOARD?

24 A. I -- YOU DIDN'T UNDERSTAND ME. I SAID TWO TO THREE
25 ON ONE SIDE OF IT AND TWO TO THREE ON THE OTHER SIDE

1 WOULD BE SIX OR MORE.

2 Q. OKAY. SO YOU ---

3 A. ~~I'M SAYING ---~~

4 Q. YOU WERE WORKING WITH ABOUT SIX PEOPLE ON THAT
5 SQUEEGEE BOARD; IS THAT CORRECT?

6 A. YES, SIR.

7 Q. THANK YOU, SIR. AND ISN'T IT TRUE THAT YOU --
8 YOU'RE SAYING THAT YOU HURT YOUR BACK OR YOU FELT

9 ~~SOME PAIN WHILE YOU WERE ON THAT SQUEEGEE BOARD; IS~~
10 THAT TRUE, SIR?

11 A. I SAID I HEARD SOMETHING SNAP, A POP IN MY -- MY
12 NECK AND MY SHOULDER.

13 Q. OKAY. ALL RIGHT, SIR. AND AT ANY -- ISN'T IT TRUE
14 THAT AT NO TIME WHEN YOU HEARD THAT SNAP, CRACKLE,
15 AND POP IN YOUR NECK AND SHOULDER, AT NO TIME DID
16 YOU TELL ANYONE THAT YOU HAD SUSTAINED THAT INJURY;
17 ISN'T THAT TRUE?

18 A. THAT'S TRUE. THAT'S TRUE.

19 Q. ISN'T IT ALSO TRUE, SIR, THAT AT SOME POINT IN TIME
20 YOUR SUPERVISOR, CREW LEADER, MR. BOSTICK, TOOK YOU
21 OFF OF THAT SQUEEGEE BOARD; IS THAT TRUE, SIR?

22 A. YES, SIR.

23 Q. ISN'T IT TRUE THAT AT THAT TIME YOU DID NOT NOTIFY
24 HIM THAT YOU HEARD A SNAP, CRACKLE, AND POP IN YOUR
25 NECK; IS THAT TRUE, SIR?

1 A. THAT'S TRUE.

2 Q. OKAY. ISN'T IT ALSO TRUE THAT YOU WALKED BACK TO
3 THE CREW -- OR TO THE SHED WITH THE CREW RIGHT
4 BEFORE KNOCK OFF TIME?

5 A. YES, SIR. THAT'S TRUE.

6 Q. OKAY. AND AT NO TIME BETWEEN LEAVING THE JOB SITE
7 AND GOING TO THE SHED DID YOU TELL ANYONE THAT YOU
8 SUSTAINED THIS OR YOU HAD A SNAP, CRACKLE, AND
9 ~~POPPING NOISE IN YOUR NECK AND SHOULDER AREA; IS~~

10 THAT TRUE, SIR?

11 A. THAT'S TRUE.

12 Q. OKAY. ISN'T IT TRUE THAT YOU WERE TALKING WITH
13 BENJAMIN DURANT I BELIEVE AND JUST SORT OF JOKING
14 AND -- AND LAUGHING, AS YOU DESCRIBED CUTTING A
15 FOOL; ISN'T THAT TRUE, SIR?

16 A. THAT'S TRUE.

17 Q. OKAY. NOW, ISN'T IT TRUE THAT WHILE YOU WERE
18 PULLING THAT SQUEEGEE BOARD THAT YOU DID NOT PASS
19 OUT?

20 A. NO, I DID NOT PASS OUT ---

21 Q. OKAY.

22 A. --- WHILE I WAS PULLING THE SQUEEGEE BOARD.

23 Q. OKAY. ISN'T TRUE THAT WHEN YOU WERE PULLED OFF THAT
24 SQUEEGEE BOARD THAT YOU DID NOT PASS OUT?

25 A. NO, NOT UNTIL AFTER I TOOK OFF AGAIN.

1 Q. AND ISN'T IT ALSO TRUE THAT YOU DID NOT PASS OUT
2 WHILE YOU WALKED TO THE SHED?

3 A. NO. I PASSED -- NO, I -- THAT'S TRUE.

4 Q. OKAY. SO ISN'T IT ALSO TRUE THAT YOU PASSED OUT
5 AFTER YOU WERE LAUGHING; ISN'T THAT TRUE, SIR?

6 A. YES, SIR. WE WAS STANDING, LIKE I SAID, I WAS
7 STANDING AT THE BOSS MAN'S TRUCK.

8 Q. OKAY. AND ISN'T IT TRUE THAT YOU DIDN'T PASS OUT
9 UNTIL YOU STARTED LAUGHING; ISN'T THAT TRUE?

10 A. YEAH, I WAS LAUGHING. WE WAS LAUGHING OR JUST
11 FINISHED LAUGHING WHEN THAT -- WHEN THAT -- WHEN
12 THAT OCCURRED. YES, SIR.

13 Q. YES, SIR. ISN'T IT ALSO TRUE THAT YOU HAD DIZZY
14 SPELLS BEFORE AFTER LAUGHING ON THE JOB?

15 A. THE WAY I -- PRIOR, I HAD NOTHING WAS AFFECTING MY
16 JOB, BUT THAT I CAN'T SAY, YOU KNOW, BUT AGAIN I SAY
17 -- I CAN'T SAY.

18 Q. AND ISN'T IT TRUE THAT MR. BENJAMIN DURANT NOTICED
19 SOME OF THOSE EPISODES WHEN YOU WERE DIZZY AT THE
20 JOB?

21 A. BEING THERE, HE MIGHT HAVE, YES, SIR.

22 Q. OKAY. NOW, MR. NERO, ISN'T IT TRUE THAT YOU FILED A
23 WORKERS' COMPENSATION CLAIM BEFORE THIS INJURY;
24 ISN'T THAT TRUE, SIR?

25 A. I FILED A WORKMAN'S COMP CLAIM BEFORE THIS ACCIDENT?

1 Q. YES.

2 A. ON THE FIRST ONE I DID.

3 Q. YES, SIR. AND ISN'T IT TRUE THAT WHEN YOU FILED
4 THAT CLAIM OR WHEN YOU SUSTAINED THAT INJURY AND
5 EVERYONE WAS AROUND, YOU SENT -- YOU HAD A PRETTY
6 SIGNIFICANT INJURY; ISN'T THAT TRUE, SIR?

7 A. YES, SIR.

8 Q. ISN'T IT TRUE THAT YOUR KNEE WAS IN SUCH A STATE
9 ~~THAT YOU COULD NOT WALK; IS THAT TRUE?~~

10 A. NO, I COULDN'T WALK AT THE TIME.

11 Q. ISN'T IT TRUE THAT WHEN YOU TRIED TO WALK YOU
12 ACTUALLY FELL TO THE ---

13 A. --- FELL TO THE GROUND.

14 Q. --- BECAUSE YOUR KNEE WAS SO MESSED UP?

15 A. YES, SIR.

16 Q. OKAY. AND ISN'T IT TRUE THAT EVERYONE AROUND YOU
17 SAW YOU -- SAW YOU IN A DISABLED STATE; ISN'T THAT
18 TRUE?

19 A. YES, SIR.

20 Q. OKAY. AND ISN'T IT TRUE THAT AT THAT POINT IN TIME
21 YOU DID NOT TELL ANYONE THAT YOU WERE OKAY; ISN'T
22 THAT TRUE?

23 A. WHICH TIME ARE YOU TALKING ABOUT?

24 Q. THE FIRST TIME.

25 A. THIS FIRST TIME?

1 Q. RIGHT. ISN'T IT TRUE THAT YOU NEVER TOLD ANYONE --
2 ONCE YOU MESSED YOUR KNEE UP, YOU NEVER TOLD ANYONE
3 THAT I'M OKAY?

4 A. NO, SIR.

5 Q. OKAY.

6 A. NOBODY NEVER ASKED ME THAT.

7 Q. OKAY. ISN'T IT TRUE THAT ON THIS INJURY WHEN YOU
8 WERE ASKED WHETHER OR NOT YOU WERE OKAY, YOU TOLD
9 MR. DURANT AND MR. BOSTICK THAT YOU WERE OKAY; ISN'T
10 THAT TRUE?

11 A. I TOLD THEM I FELT LIKE I WAS OKAY.

12 Q. OKAY. AND SO IS THAT A YES OR A NO, SIR?

13 A. WELL, I -- YES, SIR.

14 Q. OKAY. ISN'T IT TRUE THAT MR. BOSTICK AND MR. DURANT
15 CALLED YOU WHILE YOU WERE IN THE HOSPITAL; ISN'T
16 THAT TRUE?

17 A. YES, SIR.

18 Q. OKAY. AND ISN'T IT TRUE THAT WHILE YOU TALKED TO
19 THEM ON THE PHONE, YOU DID NOT TELL THEM THAT YOU
20 WERE HAVING SURGERY AS A RESULT OF A WORKERS' -- AS
21 A RESULT OF BEING INJURED ON THE JOB; ISN'T THAT
22 TRUE?

23 A. NOW, THAT'S TRUE.

24 Q. ISN'T IT TRUE THAT YOU NEVER AT ANY TIME DURING THIS
25 ENTIRE PROCESS TOLD ANYONE WHETHER IT WAS CHRISTY

1 JUNKIN -- JUNKIN, MR. DURANT, OR MR. BOSTICK, THAT
2 YOU HEARD A SNAP, CRACKLING, AND POPPING SENSATION
3 IN YOUR NECK; ISN'T THAT TRUE?

4 A. WELL, THAT'S TRUE.

5 Q. OKAY. NOW, ISN'T IT TRUE, MR. NERO, THAT YOU HIRED
6 AN ATTORNEY FOR YOUR FIRST WORKERS' COMPENSATION
7 INJURY?

8 A. YES, SIR.

9 ~~Q. OKAY. ISN'T IT TRUE THAT YOU HIRED THAT ATTORNEY~~
10 BECAUSE YOU WERE NOT RECEIVING TEMPORARY TOTAL
11 DISABILITY PAYMENTS? IN ESSENCE, YOU WERE NOT
12 RECEIVING A CHECK AFTER YOU WERE OUT; ISN'T THAT
13 TRUE?

14 A. THAT'S TRUE.

15 Q. OKAY. ISN'T IT TRUE THAT YOU NEVER RECEIVED ANY
16 DISABILITY CHECK, TEMPORARY COMPENSATION WHILE YOU
17 WERE OUT FOR THIS INJURY?

18 A. THAT'S TRUE.

19 Q. OKAY. ISN'T IT TRUE THAT EVEN THOUGH YOU DIDN'T
20 RECEIVE THAT TEMPORARY COMPENSATION THAT YOU DID NOT
21 HIRE AN ATTORNEY UNTIL AFTER YOU WERE TERMINATED
22 FROM YOUR POSITION AT S.C.D.O.T.; ISN'T THAT ALSO
23 TRUE?

24 A. THAT'S TRUE.

25 Q. OKAY. MR. NERO, ISN'T IT TRUE THAT ON JUNE 20 OF

1 2012, WHEN YOU REPORTED TO THE HOSPITAL UNDER DR.
2 RICHEY'S CARE, THAT YOU DID NOT MENTION TO HIM THAT
3 ~~YOU FELT PAIN IN YOUR NECK OR YOUR SHOULDER; ISN'T~~
4 ~~THAT TRUE?~~

5 A. THE QUESTION AGAIN?

6 Q. ON JUNE 20 OF 2012, WHEN YOU FIRST REPORTED TO THE
7 HOSPITAL AND YOU HAD A CONVERSATION WITH DR. RICHEY,
8 ISN'T IT TRUE THAT YOU DID NOT TELL HIM THAT YOU HAD
9 ~~PAIN IN YOUR NECK AND YOUR SHOULDER AREA?~~

10 A. I -- I CAN'T -- I DON'T REMEMBER.

11 Q. OKAY. ISN'T IT TRUE THAT YOU DID TELL HIM THAT YOU
12 PASSED OUT WHILE YOU TALKED TO YOUR BOSS; ISN'T THAT
13 TRUE?

14 A. YES.

15 Q. OKAY.

16 A. IT'S TRUE.

17 Q. OKAY. SO IT IS YOUR TESTIMONY TODAY YOU CAN'T
18 REMEMBER WHETHER OR NOT YOU TALKED TO MR. -- TALKED
19 TO DR. RICHEY ABOUT YOUR NECK WHEN YOU FIRST ARRIVED
20 TO THE HOSPITAL?

21 A. I CAN'T REMEMBER. I WAS -- LIKE I SAY I -- WHEN I
22 PASSED OUT, I DON'T KNOW WHAT WAS GOING ON DURING
23 THE TIME I -- I CAN'T REMEMBER.

24 Q. ISN'T IT TRUE, MR. NERO, THAT YOU ATTENDED OR AT
25 LEAST YOUR NAME WAS ON THE SIGN IN SHEET FOR

1 WORKERS' COMPENSATION TRAINING?

2 A. YES, SIR.

3 Q. OKAY. ISN'T IT TRUE THAT YOU SAT THROUGH THAT
4 TRAINING?

5 A. YES, SIR.

6 Q. OKAY. ISN'T IT TRUE THAT THAT TRAINING WAS THE SAME
7 MONTH AS YOUR ACCIDENT?

8 A. I'M -- I'M NOT SURE, IT COULD HAVE BEEN, 'CAUSE I --

9

10 Q. OKAY.

11 A. IT COULD HAVE BEEN, I'M NOT SURE.

12 Q. OKAY.

13 A. BUT IT'S WE HAVE THOSE MEETINGS AS YOU'RE SPEAKING
14 OF EVERY SO OFTEN AND EVERYBODY THERE HAVE TO SIGN
15 OUT ON.

16 Q. OKAY. ISN'T IT TRUE, MR. NERO, THAT AT ANY TIME IF
17 YOU WANTED TO, OR I SHOULD SAY AT THE RIGHT TIME,
18 WHEN IT'S -- THE PRESENTATION IS COMPLETE, IF YOU
19 WANTED TO ASK QUESTIONS YOU COULD ASK QUESTIONS
20 ABOUT THE PRESENTATION?

21 A. YES, SIR.

22 Q. OKAY. DID YOU EVER ASK ANY QUESTIONS ABOUT THE
23 PRESENTATION?

24 A. YEAH, IF THERE'S SOMETHING I DIDN'T UNDERSTAND, I
25 WOULD.

- 1 Q. YOU WOULD? SO IT'S TRUE THAT IF YOU DIDN'T
2 UNDERSTAND SOMETHING THAT YOU WOULD ASK A QUESTION
3 ABOUT THE PRESENTATION?
- 4 A. YES, SIR.
- 5 Q. OKAY. MR. NERO, ISN'T IT TRUE THAT YOU SUFFER WITH
6 ARTHRITIS?
- 7 A. YES, SIR.
- 8 Q. ISN'T IT TRUE THAT YOU SUFFERED FROM ARTHRITIS
9 BEFORE THIS INCIDENT?
- 10 A. YES, SIR.
- 11 Q. OKAY. ISN'T IT ALSO TRUE THAT YOU SUFFER FROM HIGH
12 BLOOD PRESSURE?
- 13 A. YES, SIR.
- 14 Q. ISN'T IT TRUE THAT YOU SUFFERED FROM HIGH BLOOD
15 PRESSURE BEFORE THIS ACCIDENT?
- 16 A. YES, SIR.
- 17 Q. MR. NERO, ISN'T IT TRUE THAT YOU'VE HAD THE
18 OPPORTUNITY TO COMMUNICATE WITH MEMBERS OF
19 S.C.D.O.C. [sic] RIGHT AFTER YOUR INJURY?
- 20 A. YES, SIR.
- 21 Q. OKAY. ISN'T IT TRUE THAT NO ONE ENCOURAGED YOU NOT
22 TO FILE A WORKERS' COMPENSATION CLAIM?
- 23 A. NO, SIR.
- 24 Q. AND IS -- IS YOUR TESTIMONY THAT NO ONE ENCOURAGED
25 YOU NOT TO FILE?

1 A. THAT'S TRUE.

2 BY MR. WILLIAMS:

3 OKAY. NO FURTHER QUESTIONS, YOUR HONOR.

4 BY COMMISSIONER TAYLOR:

5 THANK YOU. MR. WAKULA.

6 BY MR. WUKELA:

7 AND JUST BRIEFLY, COMMISSIONER. I DIRECT THE
8 COMMISSION'S ATTENTION TO APA ONE, PAGE 8, WHICH IS
9 THE M.R.I. REPORT.

10 RE-DIRECT EXAMINATION BY MR. WUKELA:

11 Q. MR. NERO, DO YOU REMEMBER WHEN YOU WERE HOSPITALIZED
12 THAT DR. RICHEY ORDERED AN M.R.I. OF YOUR CERVICAL
13 SPINE?

14 A. YES, SIR.

15 Q. DO YOU REMEMBER THAT OCCURRING, YOU WENT TO A KIND
16 OF A DOUGHNUT SHAPED THING?

17 A. YES, SIR.

18 Q. ON THE -- ON THE REPORT THAT TALKS ABOUT THAT UNDER
19 ADMITTING DIAGNOSIS IT SAYS, "DIAGNOSIS, BILATERAL
20 HANDS, ARM NUMBNESS AND SYNCOPE," AND THAT THE
21 ORDERING PHYSICIAN WAS DR. ROBERT RICHEY?

22 A. YES, SIR.

23 Q. APPARENTLY AT SOME POINT IN THAT PROCESS IN THE
24 HOSPITAL YOU TOLD DR. RICHEY THAT YOU WERE HAVING
25 NECK PAIN AND BILATERAL HANDS, ARM NUMBNESS, WHICH

1 CAUSED HIM TO ORDER THIS M.R.I.; IS THAT RIGHT?

2 A. YES, SIR. I HAD TO.

3 Q. OKAY.

4 A. YES.

5 Q. DO YOU REMEMBER AT WHAT POINT?

6 A. THE BACK, I TELL HIM THE FRONT AND ALL THAT I GUESS
7 I'M -- LIKE I SAY I'M -- I'M ---

8 Q. OKAY.

9 A. I AM STUCK. I HAD -- I -- DOCTOR -- FOR THEM TO

10 ORDER IT, I GUESS I HAD TO BE TELLING HIM. SO I'D
11 SAY THAT I GUESS A, YES.

12 Q. BUT YOU DON'T HAVE A RECOLLECTION?

13 A. OH. NO.

14 Q. OKAY. DEFENSE COUNSEL TOOK YOUR DEPOSITION ABOUT
15 THAT -- HE ASKED YOU ABOUT THAT FIRST ACCIDENT, AND
16 WE -- YOU TESTIFIED EARLIER ABOUT THAT FIRST
17 ACCIDENT?

18 A. YES, SIR.

19 Q. IN THAT DEPOSITION AT PAGE 24, HE ASKED YOU, "AND,
20 OKAY, SO DID DOUG, DID YOU TELL DOUG?" AND DOUG
21 PHILLIPS WAS YOUR FOREMAN OR SUPERVISOR?

22 A. YES. YES, SIR.

23 Q. "DID YOU TELL DOUG WHAT HAPPENED OR DID -- THERE
24 WASN'T A NEED FOR YOU TO TELL HIM BECAUSE HE SAW
25 IT?" AND YOUR ANSWER WAS, "HE SAW IT. YEAH, HE SAW

1 IT"?

2 A. YES, SIR. HE SAW IT.

3 Q. IS THAT RIGHT?

4 A. YES, SIR.

5 Q. SO YOU DIDN'T TELL DOUG ABOUT THAT TREE 'CAUSE HE
6 SAW IT?

7 A. YES, SIR.

8 Q. NOW, LATER YOU DID HIRE A LAWYER IN THAT CASE
9 BECAUSE ULTIMATELY THEY DIDN'T PAY YOUR WORKERS'

10 COMPENSATION BENEFIT?

11 A. YES, SIR.

12 Q. OKAY. IN THIS CASE, MR. BOSTICK AND MR. DURANT WERE
13 THERE WHEN YOU PASSED OUT?

14 A. YES, SIR.

15 Q. THEY WERE AWARE THAT YOU WERE IN THE HOSPITAL?

16 A. YES, SIR.

17 Q. THEY WERE AWARE THAT YOU HAD NECK SURGERY?

18 A. YES, SIR.

19 Q. THEY WERE AWARE THAT YOU HADN'T RETURNED TO WORK
20 SINCE THAT DAY?

21 A. YES, SIR.

22 Q. AND ULTIMATELY IN THIS CASE YOU HIRED ME 'CAUSE THEY
23 WEREN'T PAYING YOUR WORKERS' COMPENSATION BENEFITS?

24 A. YES, SIR.

25 BY MR. WUKELA:

1 COMMISSIONER, THAT'S ALL THE QUESTIONS I HAVE.

2 BY COMMISSIONER TAYLOR:

3 ALL RIGHT. MR. WILLIAMS, ANYTHING FURTHER?

4 BY MR. WILLIAMS:

5 I BEG THE COURT'S INDULGENCE, YOUR HONOR.

6 BY COMMISSIONER TAYLOR:

7 NO PROBLEM.

8 BY MR. WILLIAMS:

9 NOTHING FROM THE DEFENDANTS, YOUR HONOR.

10 BY COMMISSIONER TAYLOR:

11 ALL RIGHT.

12 BY MR. WUKELA:

13 THAT'S THE CLAIMANT'S CASE, COMMISSIONER.

14 BY COMMISSIONER TAYLOR:

15 ALL RIGHT. DO THE DEFENDANTS HAVE ANY
16 WITNESSES?

17 BY MR. WILLIAMS:

18 NO, MA'AM, YOUR HONOR.

19 BY COMMISSIONER TAYLOR:

20 OKAY. THAT CONCLUDES THIS MATTER. THANK YOU
21 VERY MUCH.

22 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
23 CONCLUDED AT THE HOUR OF 3:24 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1222136

EMPLOYEE/CLAIMANT: OTIS NERO
EMPLOYER: SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION
INSURER: STATE ACCIDENT FUND

I, SALLYE DEANNE NELSON, A NOTARY PUBLIC FOR THE
STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED
AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 44 PAGES
REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE
FOREGOING HEARING OF OTIS NERO TAKEN ON THE 28TH DAY OF
MARCH, 2014.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND
ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL
HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE
QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND
OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY
ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND THIS 10TH DAY
OF APRIL, 2014.

SALLYE DEANNE NELSON
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 5-08-2022

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #1222136

OTIS NERO)	
)	
CLAIMANT,)	
)	SC WORKERS' COMPENSATION COMMISSION
VS.)	
)	FULL BOARD HEARING OF
SC DOT)	
)	OTIS NERO
EMPLOYER,)	
AND)	VS
)	
STATE ACCIDENT FUND)	SC DEPARTMENT OF TRANSPORTATION
)	
CARRIER.)	

This is the Transcript of the South Carolina Workers' Compensation Full Board Hearing of Otis Nero versus South Carolina Department of Transportation, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 4:07 P.M., Monday, February 23, 2015, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

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COMMISSIONERS PRESENT:

T. Scott Beck, Chair
Susan S. Barden
Avery Wilkerson

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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STIPULATIONS

Commissioner Beck: All right. Please call the case.

Court Reporter: Today is February 25th, 2015. This is South Carolina Workers' Compensation case number 1222136. This is the case of Otis Nero, Claimant, versus South Carolina Department of Transportation, Employer and the State Accident Fund is the Carrier. The Appellant is the Defendant, represented by Gabe Coggiola. The Respondent is represented by Stephen J. Wukela. Each side is allowed ten (10) minutes for oral argument and the Appellant three (3) minutes in reply. You are requested to argue the grounds of exception and stay within the record. The Single Hearing Commissioner was Commissioner Taylor.

Commissioner Beck: Mr. Coggiola?

ARGUMENT FOR THE APPELLANT

By Mr. Coggiola:

Good afternoon. May it please the court. We're here today on behalf of Defendant's appeal and a request for Commission review of the Single Commissioner's August 5th, 2014 order in the above

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1 captioned matter. Essentially there's two (2) claims.
2 This is a denied claim and there's two (2) -- not two
3 (2) claims, excuse me, two (2) issues. The first was
4 whether the Hearing Commissioner erred in finding that
5 the accident arose out of and in the course of
6 employment. And then the second issue is whether or
7 not the Claimant provided sufficient notice in
8 accordance of Section 42-15-20, starting with the first
9 section, basically, just on causation and whether the
10 accident itself took place. As a very general, general
11 background, this gentleman was working on a road crew
12 pushing a squeegee board with several other co-workers.
13 According to his hearing testimony, he felt a pop and a
14 pinch in his back, takes a few minutes off, he goes
15 back onto the board and finishes doing that, cleans the
16 equipment, goes back to the shed at the end of the day
17 and he's sitting laughing and talking with the crew and
18 the bosses and all of a sudden he passes out and falls
19 down. He wakes up, he tells the boss that he's fine,
20 he can drive home, he drives home, he passes out again
21 when he was -- when he gets home. In this the accident
22 cited by the Single Commissioner was the raking of the
23 -- the actual raking, not the syncope episode when he
24 was standing at the shed and fell down. Looking at
25 their brief, the Claimant states that the outset in his

1 testimony was uncontradicted, the he had never had any
2 neck pain prior to June 20th, 2012; we would first cite
3 that that's inaccurate. He submitted FMLA paperwork to
4 the employer following this accident and that was a --
5 in Claimant's Exhibit One (1). And if you look at it,
6 there on the paperwork he submitted it says no accident
7 and no Workers' Compensation. Further, if you look
8 into the medical records, Defendants would argue that
9 they are completely absent of any mention of an
10 accident pulling a squeegee board, pushing the cement.
11 If you look at his intake sheet, he says I passed out
12 while talking to my boss. If you look at Dr. Boyd's
13 intake or he -- excuse me -- he saw Dr. Richey, his
14 family surgeon -- family doctor -- who referred him to
15 a neurosurgeon. The neurosurgeon looks at him, on is
16 intake sheet it says not work related, not an accident,
17 and further on his FMLA where it says a description of
18 the accident it says neck pain, several years, syncope
19 episode. So, basically what you've got is -- and the
20 Single Commissioner found that not the syncope episode
21 but the pulling of the squeegee was -- was the
22 accident. And, again, we'd -- we'd argue that there is
23 nothing in the medical records that even mentions that
24 accident. And then, Dr. Richey, who is the primary
25 care physician, is later -- he is later deposed on the

1 issue and he does say that, yes, that could have
2 aggravated the upper back condition. Now, he -- in the
3 same statement he says a number of other factors could
4 have contributed to the syncope episode, there is no
5 way to tell which one broke the -- the -- which one was
6 the straw that broke the camel's back. Now, he says,
7 take out the syncope episode and, yes, you could have
8 an aggravation. Well, take out the syncope episode and
9 the gentleman is not at the hospital. He -- he never
10 -- as far as the raking one -- and we'll get into
11 notice second -- he never told anybody about that, he
12 never reported that injury, he doesn't report it to his
13 doctors and, in fact, he describes the mechanism --
14 there is no mechanism of injury described at all other
15 than I passed out while talking to my boss. As far as
16 whether the syncope itself is related, there's two (2)
17 opinions in there. There is Dr. Richey, the family
18 care physician, and the neurosurgeon that he referred
19 him to. The neurosurgeon very clearly states in his
20 records that he does not think the syncope episode is
21 related, and that's at APA page 11. You know, in our
22 opinion, if there is conflicting medical evidence there
23 -- this is different than the Court of Appeals. This
24 is no substantial evidence review; the Full Commission
25 has the right to -- to make findings inconsistent or

1 consistent with the previous Commissioner. It is our
2 position that from a medical standpoint what you have
3 are these two (2) opinions of a primary care physician
4 who, when you go through the medicals, had no idea what
5 was going on. I mean, he recommended a CT scan, x-rays
6 of the foot, a CT of the back; everything under the sun
7 to figure out why the guy passed out and in the course
8 of that discovered the cervical condition. But the
9 question of whether the syncope was actually related to
10 that cervical condition, we would refer to the
11 neurosurgeon that he asked to look at him and give an
12 opinion, and that neurosurgeon said it's not causally
13 related. So, basically, it's -- it's our position
14 first that the Claimant failed to meet his burden in
15 proving that his pre-existing stenosis was aggravated
16 by the pulling of the squeegee as opposed to falling
17 down at the shed, falling down at home or any other --
18 any other incident. Moving on to the second half of
19 our argument is the notice under Section 42-15-20. You
20 all know the purpose of the -- of notice is basically
21 two-fold, to give the parties time for -- to
22 investigate the claim while memories are fresh and to
23 provide medical treatment. In this case, in the
24 decision and order, the Single Commissioner found that
25 the parties had notice of the accident because the

1 foreman and the supervisor were standing there when he
2 passed out and -- and by that, he has -- they have
3 notice of the accident. But, again, that's not the
4 accident they're alleging. They're alleging an
5 accident that occurred pulling the squeegee and at no
6 point he testifies -- at no point did he ever tell them
7 that he injured his back while pulling the squeegee.

8 Commissioner Wilkerson: So, you don't
9 think that's a difference of half a dozen or
10 six (6)?

11 Mr. Coggiola: I do. I think it's -- I
12 think it's very different because the -- the first
13 purpose of notice is to give us an opportunity to
14 investigate whether it's a compensable accident.
15 Whether that syncope fall was a compensable accident
16 would be a -- a contested legal issue as well and --
17 and in this case it makes a very big difference. They
18 weren't put on notice until December; this all took
19 place in June. So, he'd had already had his surgery,
20 everything had already happened and we were never given
21 the opportunity to investigate whether that was caused
22 by the squeegee, caused by the syncope, which one
23 aggravated what. So, as a result, we would say we were
24 deprived of -- of that opportunity. Now, the Claimant
25 will testify that Mr. Durrant and Mr. Voss, the two (2)

1 supervisors, did call him at the hospital the following
2 day and he told them that he was in the hospital and he
3 was going to have surgery on his neck. The Claimant
4 also went on to testify specifically in -- in this
5 hearing, I did not tell them at that time about the
6 squeegee incident, I didn't tell them that it was from
7 pulling anything; I didn't tell them it was from a work
8 accident. He told them he was in the hospital and he
9 was going to have surgery. He also turned in the --
10 his FMLA paperwork. Again, at the top of FMLA
11 paperwork where it lists the condition it says, neck
12 several years. This was filled out on July 9th, the
13 accident is on June 20th. So, it's less than a month
14 later he submits to the employer paperwork, FMLA
15 paperwork, that said he has neck pain for years and
16 recent syncope episode, which, again, is not the
17 accident that he is alleging. And then, further, he
18 testified that, you know, because they saw him pass out
19 they had knowledge of the accident. Again, not the
20 accident they're alleging but if you read the record he
21 also testifies that he previously had dizzy spells on
22 the job and that they had previously seen him have
23 these incidents before. So, this wasn't the first time
24 something like this had ever happened, you know, he --
25 he -- his bosses were aware that sometimes he would get

1 overheated. And in this case what they didn't know is
2 the most important fact and that's the alleged accident
3 here, the -- the squeegee; the one that they're saying
4 caused the aggravation of the stenosis. So, basically,
5 in summary what you're left with is a worker who never
6 mentions a work accident, never mentions the specific
7 work accident to his employer; he never mentions that
8 in his medical records. Looking at the records he
9 denies an accident. He denies that it's related to
10 Workers' Compensation. The neurosurgeon denies that
11 the syncope episode is causally related. And,
12 basically, the only notice that the Employer really had
13 was that they had notice that he passed out. And under
14 the Sanders versus Richardson case it's our position
15 the Supreme Court has very clearly set forth that
16 knowledge that an employee becomes ill while on the job
17 does not necessarily constitute knowledge of an
18 accident. So, just because he passed out, which they
19 had seen him do before, doesn't mean that they have
20 knowledge of an accident. So, basically, the gist of
21 it is our -- it's our position that our prejudice was
22 our inability to investigate which of these multiple
23 incidents could have caused the aggravation prior to
24 the claim moving all along. And, you know, to take the
25 statement that take out the syncope episode and there

1 is still aggravation, it just defies logic. I mean, if
2 -- if you take -- again, if you take out the syncope
3 episode he's not at the hospital. This didn't send him
4 to the doctor. This didn't ask for medical treatment.
5 This was never reported. All that was reported was
6 basically when they saw him pass out, and that's not
7 the accident alleged or the accident awarded by
8 Commissioner Taylor. Thank you.

9 Commissioner Beck: Thank you, sir. Mr.
10 Wukela?

11 Mr. Wukela: Thank you, Commissioners.

12 ARGUMENT FOR THE RESPONDENT

13 By Mr. Wukela:

14 The squeegee board in question is a long board
15 that they use to drag across concrete forms to spread
16 concrete, that's what he'd been doing that day in the
17 heat; at the end of doing that he falls out. The
18 Employer knew that that had happened, they knew he
19 hadn't returned to work, they knew he had been taken to
20 the hospital where he was treated by his family doctor
21 and a neurosurgeon, they knew he had had neck surgery.
22 The question becomes what do you have to have notice
23 of? They -- and there is no dispute, they knew he had
24 passed out but he hadn't ever told them, within ninety
25 (90) days, I hurt my neck pulling that squeegee board.

1 Now, the -- the Employer's witness testified they saw
2 him, you know, having some trouble pulling it, that the
3 supervisor put him out of that job for a little while
4 but put him back, but there was no allegation at any
5 point that he had said, boss, I hurt my neck pulling
6 that squeegee board. But there also was no question
7 that he fell out and that they knew it, and that they
8 knew that he had surgery, and they knew he had been
9 treated for his neck. The question becomes -- the
10 purpose of notice is to give the Employer the
11 opportunity to investigate. To investigate what? To
12 investigate what they knew about, why he fell out,
13 which is precisely what the doctors investigated when
14 he got to the hospital; they had that opportunity.
15 They weren't prejudiced in any way because of the
16 passage of time. The witnesses that testified were
17 there, present, they saw it happen; they testified in
18 deposition with clarity about what had happened, and
19 the Employer had the opportunity to investigate and to
20 determine what the cause of having that episode was and
21 could have been. Now, they might have investigated and
22 found out that it was non-work related, they might have
23 investigated and found out that it was heat
24 prostration, or they might have investigated, as the
25 doctor did, and found out that it was related to a

1 rupture of a cervical disk, but they had that
2 opportunity and --- and they weren't deprived of it.
3 And, furthermore, the Employer -- as the Commissioner
4 found, the Claimant demonstrated that he had a
5 reasonable excuse for not giving a more formal notice.
6 What was the reasonable excuse he gave? They were
7 there. They were there. And, in fact, I asked his
8 supervisor why it was that he hadn't given formal
9 delivered notice to the -- to the Employer and he said,
10 because my supervisor was there. And so, the Claimant
11 -- it's fair for the Claimant to rely on the knowledge
12 of his supervisor just as it was fair for that
13 supervisor to rely on the knowledge of his supervisor.
14 The other element of notice is that they have to have
15 an opportunity to provide him medical care. Well, he
16 was in the hospital that day; he was treated by his
17 family doctor in the hospital. He had a consult in the
18 hospital when he was there from a neurosurgeon; they
19 were aware he had been treated by the neurosurgeon and
20 he had surgery within two (2) months. So, I -- I don't
21 think that it's very strong and I don't think the
22 Single Commissioner found that it was a very strong
23 argument that in any way they were prejudiced by the
24 absence of adequate medical care or the opportunity to
25 direct that medical care. Then the question becomes

1 causation and the -- the clear testimony of Dr. Richey
2 was -- and I'm going to refer you to a specific page
3 here -- page 19, lines 12 through 8 of his deposition,
4 this is found on page 3 of my brief. He unequivocally
5 said, do you have an opinion, though, as to whether the
6 activity would have aggravated the condition of the
7 cervical spine; the activity of pulling the squeegee
8 board? More than likely, certainly. And that is -- is
9 that opinion to a reasonable degree of medical
10 certainty? I think so. Now, what they -- the
11 Defendants would argue is, yeah, but we didn't have
12 notice, specifically, of that element of causation
13 within ninety (90) days, and there's no question about
14 it but that's not the purpose of notice. The purpose
15 of notice is to give them the opportunity to
16 investigate the incident and they had that opportunity.
17 Dr. Richey's opinion about the causation of the neck
18 while pulling -- pulling the squeegee board is
19 uncontradicted. The only contradiction from the
20 neurosurgeon is that he doesn't think that the neck
21 injury caused the syncope; Dr. Richey thinks it did.
22 But, again, that's not -- that's not the causation that
23 the Commissioner found.

24 Commissioner Beck: Do you believe that
25 the legal defenses would or could have been

1 different if the method -- the mechanism of
2 injury was the passing out as opposed to the
3 pulling the rake?

4 Mr. Wukela: And if it had -- for
5 example, had it been heat prostration, Commissioner.
6 Certainly I think you're absolutely right. There --
7 there are, as the Commission well knows, legal
8 requirements as to what is required for --

9 Commissioner Beck: But if they're --
10 but if --

11 Mr. Wukela: -- heat prostration to be
12 compensable.

13 Commissioner Beck: -- but if they're
14 not on notice of what the mechanism of injury
15 being claimed is, how do they investigate it?

16 Mr. Wukela: Well, Commissioner, they
17 had the opportunity to investigate why it was he passed
18 out. Now, if they had -- and they -- listen, it wasn't
19 like -- they knew what doctors he was seeing, they knew
20 he was seeing a -- a surgeon for neck surgery. Now,
21 they may have investigated and decided, well, this is
22 heat prostration and it's not compensable because it
23 doesn't meet the elements necessary to -- to prove an
24 accident.

25 Commissioner Beck: But they never

1 really knew what your -- what your theory was
2 until after all the medical had been done,
3 without their direction, until you filed a 50
4 for compensability; everything had already
5 been done to that point.

6 Commissioner Barden: Your theory was it
7 was the squeegee, right; it wasn't the
8 syncope?

9 Mr. Wukela: That's correct,
10 Commissioner. That's correct and not only --

11 Commissioner Barden: But then you're
12 saying they should have investigated the
13 syncope but if it wasn't the syncope that
14 caused the injury then --

15 Mr. Wukela: -- because, Commissioner,
16 it was precisely the same investigation that the
17 doctors did. Counsel was quite right. He showed up in
18 the emergency room because he had a passing out episode
19 and they wanted to investigate and find out what caused
20 him to pass out.

21 Commissioner Beck: But -- but you never
22 filed -- if you were even retained at this
23 point --

24 Mr. Wukela: I was not, but yes.

25 Commissioner Beck: -- so, the Claimant

1 never filed a 50 with the Commission before
2 he went out and got all this medical
3 treatment and surgery?

4 Mr. Wukela: Well, that's true,
5 Commissioner, but keep in mind, the medical treatment
6 -- he's seen by the neurosurgeon in the hospital when
7 he's taken to the hospital because they're trying to
8 figure out why he passed out. And they did the
9 cervical MRI and they said he's got --

10 Commissioner Beck: But he didn't have
11 --

12 Mr. Wukela: -- a herniated disk.

13 Commissioner Beck: -- surgery for what
14 --

15 Mr. Wukela: Two (2) months.

16 Commissioner Beck: -- two (2) months
17 later?

18 Mr. Wukela: That's right. But,
19 Commissioner, the -- the doctor -- the Employer was
20 aware that he had been in the hospital, that they had
21 -- that he had been taken there after he passed out.

22 Commissioner Beck: Well, they aware he
23 was asserting a compensable claim?

24 Mr. Wukela: Well, Commissioner, they --
25 they had knowledge that he had passed out that day.

1 And the question becomes -- and I -- I see the
2 Commissioner's -- the Commissioner's point, does --
3 ~~does notice of the fact that something happened that~~
4 day and that he was getting treatment and having neck
5 surgery give them sufficient notice to cause them to do
6 an investigation to determine whether that was a
7 compensable injury?

8 Commissioner Beck: Right.

9 Mr. Wukela: I -- and -- and it was the
10 Commissioner's finding that that was sufficient notice
11 and our argument that it was as well. And,
12 Commissioner, if it -- even -- let's assume that wasn't
13 sufficient notice. Then the question becomes does the
14 Claimant have a reasonable excuse and was the Employer
15 prejudiced in any way by the absence of that more
16 specific notice as to causation? What was -- and the
17 Commissioner found the Claimant did have reasonable
18 excuse. And what was his excuse? Everybody was there.

19 Commissioner Beck: Okay.

20 Mr. Wukela: And, moreover,
21 Commissioner, he had given them the family medical
22 leave form that -- that they knew he was having
23 surgery. He had called his Employer, he told them --

24 Commissioner Beck: That said there was
25 not a Workers' Comp claim or injury.

1 Mr. Wukela: -- that's right,
2 Commissioner. But he also told them that -- that he
3 knew -- that he had syncope and he was having neck
4 surgery. And, Commissioner, again, there was no
5 prejudice to the Employer. The Employer -- the -- the
6 witnesses who were there testified with clarity about
7 what had happened that day. And -- and, you know, he
8 had prompt and immediate medical treatment by a
9 neurosurgeon within -- within a day of having appeared
10 in the -- in the emergency room. The -- and the -- and
11 I understand the Commission's point. Does -- is it the
12 Claimant's obligation to give notice, not only the fact
13 that something occurred here, that there was an
14 accident or incident of some sort or does the -- or is
15 it the Claimant's obligation to give you specific
16 information about what caused it? No question, the
17 Employer knew he had fallen and lost consciousness.
18 Was it the Claimant's obligation then to prove the
19 compensability by virtue of notice by saying, and here
20 is specifically why? And, Commissioner, it's our
21 contention that that's not what the law requires. The
22 law requires the Employer to have an opportunity to
23 investigate, and they had an opportunity to investigate
24 why he passed out, precisely what the doctors did, and
25 they reached the conclusion that he passed out because

1 of the squeegee incident and the Employer wasn't
2 prejudiced by that delay in any event.

3 ~~Commissioner Beck: All right.~~

4 Mr. Wukela: Thank you all.

5 Commissioner Beck: All right. Thank
6 you.

7 Commissioner Barden: Thank you.

8 Commissioner Beck: Mr. Coggiola?

9 Mr. Coggiola: Thank you, Commissioners.

10 REPLY FOR THE APPELLANT

11 By Mr. Coggiola:

12 In brief rebuttal, again, the question comes back
13 to, what did they have notice of? They did not have
14 notice of the alleged squeegee pulling. Now, what is
15 listed as the mechanism of injury for this accident the
16 Employer had no notice of. Now, we can say that they
17 had knowledge that he was in the hospital and that he
18 had surgery. He had not -- and why do we know that?
19 Because he spoke to his supervisors there; he spoke to
20 them on the phone, another opportunity that he had to
21 tell them that he had a work accident. He fills -- he
22 sends in the FMLA paperwork. I mean, if -- if they are
23 supposed to investigate it, they get FMLA paperwork
24 that says he's had neck pain for years and makes no
25 reference of an injury on the job.

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1 Commissioner Wilkerson: Mr. Coggiola,
2 how would an injured worker know they have a
3 Workers' Compensation claim?

4 Mr. Coggiola: When he was doing his
5 job, when he felt the pop in his back, he -- he should
6 have reported it to his --

7 Commissioner Wilkerson: How would he
8 know that's Workers' Comp?

9 Mr. Coggiola: -- if you review the
10 hearing transcripts, he went through Workers'
11 Compensation training at the beginning of his --

12 Commissioner Wilkerson: Okay.

13 Mr. Coggiola: -- employment and they
14 told him exactly, and he has had claims before and he
15 has reported them before but that's how he knows, is he
16 was trained and he testified that he knows how to
17 report it. But, again, the knowledge comes back to,
18 what did they have knowledge of? They had knowledge
19 that he passed out.

20 Commissioner Wilkerson: Did they do an
21 investigation of any type?

22 Mr. Coggiola: What -- they called him
23 two (2) days later at the hospital to find out what was
24 going on and he said, I'm in the hospital and I'm --
25 and I'm having surgery. And they also found out that

1 he passed out again at home, there was another pass
2 out; let's not forget that there's two (2) syncope
3 episodes. ~~He goes home and then he passes out again.~~

4 So, and -- and his testimony couldn't be more clear
5 that even in the hospital conversations, in the
6 records, at no point does he tell them about the
7 squeegee incident and that's what the Commissioner says
8 is the compensable accident. And, again, it's just our
9 position that they did have knowledge, they had
10 knowledge that he passed out, they had seen him do it
11 before; it happened that day. They get FMLA paperwork
12 that says he's had the condition for years. His
13 neurosurgeon's intake report says it's not work related
14 and it's not Workers' Comp. His intake sheet at the
15 hospital says he passed out talking to his boss. And
16 no where, no where, in the APA's will you find a
17 mention of pulling a squeegee and aggravating an
18 accident.

19 Commissioner Beck: All right. Thank
20 you, gentlemen. That will conclude this
21 proceeding.

22 (There being no further arguments, the hearing concluded at
23 4:30 P.M.)

24
25

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF RICHLAND)

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Full Board Hearing of Otis Nero, vs. South Carolina Department of Transportation;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 23 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 15th Day of June, 2015.

Gloria G. Davis
Gloria G. Davis
Notary Public for South Carolina
My Commission Expires 12/21/21

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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1222136

Otis Nero, Employee,

Claimant,

-vs-

S.C. Department of Transportation,
Employer, and State Accident Fund,

Defendants.

DEPOSITION OF:

ROBERT M. RICHEY, M.D.

Deposition of ROBERT M. RICHEY, M.D., taken
before Laura W. Little, Verbatim Reporter and Notary
Public in and for the State of South Carolina, at the law
offices of Wukela Law Firm, 403 Second Loop Road,
Florence, South Carolina, commencing at 10:17 a.m. on the
12th day of March, 2014.

Laura W. Little
Laura Little Reporting Service
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In Attendance:

Otis Nero
Betty Nero

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EXHIBITS

NUMBER	DESCRIPTION.	PAGE-LINE
(No Exhibits Introduced)		

Court Reporter's Note:
 --Indicates Incomplete Phrases or Sentences;
 ---Indicates Interruption.

STIPULATIONS

Prior to the giving of any testimony by the witness, it was expressly stipulated and agreed between the parties to this action, through their respective counsel, that:

By Notice and/or Consent, said deposition is being taken in accordance with Section 42-3-160, Code of Laws of South Carolina 1976, and Rule 30 of the South Carolina Rules of Civil Procedure, which shall control the taking of said deposition and its use thereof;

Said deposition shall be taken for the purpose of discovery and/or for use as evidence in the above entitled action, or for both purposes;

That all objections would be reserved until the time of the hearing except as to the form of the question;

Reading and signing of the transcript of testimony by the witness was waived.

1 ROBERT M. RICHEY, M.D.,
2 after being first duly sworn to tell the truth, was
3 deposed and testified as follows:

4 DIRECT EXAMINATION BY MR. WUKELA:

5 Q. Dr. Richey, my name, of course, is Stephen
6 Wukela. We've met many times. It's good to see you
7 again. I'm here to take your deposition in a Workers'
8 Compensation claim. I represent Mr. Otis Nero, and you
9 saw Mr. Nero at and around the time of his injury of
10 June the 20th, 2012, and I've got some questions for
11 you about that. But before we get into that, can you
12 give me a very brief rundown of your educational
13 background starting from college, say, please?

14 A. I went to LSU and went to medical school at
15 Tulane from 1979-1983. Did an internship at Charity
16 Hospital. Did a residency at the University of South
17 Carolina, Richland Memorial. I did a fellowship there
18 also and then I went into practice in Columbia in '94.
19 Moved back home to Louisiana in '96 and then moved here
20 in '99. I've been here every since and I practiced
21 Internal Medicine. Presently, I'm employed as a
22 hospitalist at Carolinas Hospital.

23 Q. You're board certified in internal medicine?

24 A. Yes, sir.

25 Q. All right. And how long have you been working

1 as a hospitalist?

2 A. Six months.

3 Q. Okay. And up to that point, you were in
4 family practice or general practice?

5 A. Internal Medicine practice here for fifteen
6 years.

7 Q. Very good. Very good. The first note I have,
8 and I understand, Doctor, you've advised us before we
9 started the deposition that you don't have access to
10 your chart, which is a much more convenient way for you
11 to understand exactly what was going on. What you do
12 have are the medical records that I have provided to
13 you that I have obtained from Carolinas Hospital System
14 and from your office. You don't have access to your
15 chart because you're now working for the hospital and
16 for HIPPA reasons you don't have access. And I
17 understand that presents some difficulty as far as
18 figuring out exactly what was going on, but I
19 understand that you're going to muddle through with us
20 today and I appreciate that.

21 A. Thank you.

22 Q. The first document, I think, that I have that
23 gives an account of your treatment of Mr. Nero is a
24 History and Physical from Carolinas Hospital System on
25 June the 20th, 2012 which is marked as Tab 1, APA 1,

1 Page 1. Do you have that document before you?

2 A. Yes, sir.

3 Q. Okay. Would that have been the first document

4 generated by you during his stay there at Carolinas,

5 Dr. Richey?

6 A. Yes, sir.

7 Q. Okay. All right.

8 A. Well, actually, there was handwritten

9 document that you also have a copy of.

10 Q. Okay. This -- okay, and this is that

11 document that is page 3?

12 A. Yes, sir.

13 Q. Okay. All right, good. Can you tell us from

14 looking at that History and Physical, which is pages 1

15 and 2 and your handwritten document on page 3, what was

16 going on when you saw Mr. Nero on June the 20th?

17 A. Well, he had passed out at work, and it was

18 without Proton and apparently, it was getting towards

19 the end of day, as I recall, and so they came to the

20 hospital to get checked.

21 Q. Do you -- I would be surprised if you did,

22 but do you have an independent recollection of this

23 visit?

24 A. My recollection of this visit, there were a

25 couple of times when I saw him in here, and I think I

1 was working at the nursing home that afternoon, so I
2 got to the hospital and didn't get to see him in the ER
3 but went up, upstairs and so I had several concerns,
4 and I note them in the dictation.

5 Q. Mr. Nero -- was Mr. Nero a patient of your
6 practice outside of this visit?

7 A. Yes, sir.

8 Q. How long had been, do you have any
9 recollection of that?

10 A. I think I started taking care of him around
11 2007.

12 Q. Okay. Okay.

13 A. I'm not sure, but it goes back a long time.

14 Q. Tell me about your concerns when you saw him
15 then in the hospital on June the 20th?.

16 A. Well, since he had passed out or had syncope,
17 I had to worry that he could have had gastrointestinal
18 hemorrhage and become anemic and standing up, his
19 pressure would have dropped and he could have passed
20 out. Because we had him on medicine for his arthritis
21 that potentially could have made him have a
22 gastrointestinal bleed. The second thing would be if
23 it was a cardiac arrhythmia or a neurogenic cause
24 making him pass out and the term we use for that, not
25 used here, would be something like vasovagal.

1 Q. Uh-huh.

2 A. And so he placed in the hospital to go down
3 that algorithm.

4 Q. And then you go through the process of trying
5 to eliminate these desperate possible problems, I

6 suppose?

7 A. Yes, sir.

8 Q. Okay. And you performed some tests in order
9 to achieve that?

10 A. Well, he was put on telemetry and we did
11 look, looked in his stomach to make sure he didn't have
12 an ulcer bleed, which he didn't, and he apparently
13 eventually got an MRI, and then we consulted a
14 neurosurgeon for what he had was some spinal stenosis,
15 severe spinal stenosis on top of his other multiple
16 arthritic problems.

17 Q. Okay. All right. And I'm going to get to
18 that in a second, but it looks like that you've just
19 described you had the CT the brain which was negative,
20 EKG was negative?

21 A. Well, the EKG didn't have -- the EKG had -- I
22 don't have a copy of the EKG here, but my comment about
23 the EKG is he had two P wave morphologies and probable
24 left ventricular hypertrophy, but he didn't have any
25 interval problems that would lead you to believe that

1 he had had ventricular tachycardia.

2 Q. Is it fair to say that none of those other
3 tests gave you a cause for the syncope?

4 A. No, sir. I hypothesized at the end what I
5 thought happened.

6 Q. Okay. All right. And let's go on to that
7 then. The MRI, what led you to perform the MRI of the
8 cervical spine?

9 A. Without the hospital notes, I couldn't tell
10 you exactly, but it was the next thing to do with his
11 symptoms in his arms. He had some musculoskeletal
12 problems and so the MRI, I don't know when it was
13 performed, but it was done and he had severe cervical
14 stenosis.

15 Q. I'm looking at page 8 of the APA, Dr. Richey,
16 which appears to be the report of that cervical MRI.

17 A. Yes, sir.

18 Q. There's a mention in the admitting diagnoses
19 of diagnosis of what I understand to mean diagnosis of
20 bilateral hands, arms numbness and syncope. Are those
21 the upper extremity symptoms that you were referring
22 to?

23 A. Yes, sir.

24 Q. Okay. And did he -- do you have a
25 recollection of him complaining to you then of these

1 upper extremity symptoms?

2 A. Correct. And it's conceivable he was
3 complaining about this stuff for some time, because he
4 had a lot of musculoskeletal problems. Most notably the
5 knees, but I don't have that to look back upon.

6 Q. Right. Indeed, he -- and I think you
7 testified that you had him on medicine for arthritis?

8 A. Yes, sir.

9 Q. And that he had preexisting arthritic
10 conditions in many of his joints?

11 A. Correct.

12 Q. Okay. And did that cervical MRI bear that
13 out, that in the findings of the MRI scan was there
14 evidence of that preexisting arthritic condition in his
15 spine as well?

16 A. Well, spinal stenosis is not only just from
17 herniated disks, but the way I'd describe it in
18 layman's terms is it's like barnacles growing inside
19 your spine.

20 Q. Spinal canal?

21 A. The spinal canal. And so they -- the actual
22 spinal cord doesn't like to be held tight. It likes to
23 have a little -- like a loose fitting shirt.

24 Q. Right. Right.

25 A. So, when it starts getting squeezed upon,

1 things start happening and nerves get damaged and
2 muscles get weak and pain happens and that's kind of
3 what was happening to him.

4 Q. That MRI report indicates moderate narrowing
5 at C6-7 and C7/T1. It says the cervical cord is normal
6 and that there was unremarkable findings at C2-3 and
7 stenosis at C3-4. Again that's indicative, I imagine,
8 at least in part, of some preexisting arthritic
9 condition that was there probably well prior to June?

10 A. This didn't happen in one day, correct.

11 Q. This didn't happen in one day. And after
12 having performed that MRI, you have, and there's a
13 consultation in the record on page 10, where it looks
14 like you called in Dr. Bill Naso?

15 A. Correct.

16 Q. Okay. And it looks like from his report, Dr.
17 Naso also assessed the spinal stenosis and cervical
18 radiculopathy, and at that point, he was ultimately
19 discharged and advised, I guess by you, to follow up
20 with Dr. Naso?

21 A. Correct.

22 Q. Okay. Was it your conclusion at that time
23 that you had solved the mystery, if you will, that you
24 had figured out what was the cause of this syncopal
25 episode?

1 A. I didn't solve the mystery, but I had a
2 hypothesis.

3 Q. All right. Talk to me about that.

4 A. Well, on page 12---

5 Q. Yes, sir.

6 A. ---the next to the last paragraph it's the
7 cause -- "The cause of the syncope, I think, I think
8 has something to do with his spinal stenosis and a
9 reflex mechanism. We really cannot prove it, but from a
10 monitoring standpoint, we found no problems.
11 Cardiology consultation was also made."

12 Q. All right. Tell me what you mean by that,
13 and when you say -- when you use this term "a reflex
14 mechanism," explain to me what you mean by that?

15 A. Well, first I will say that the opinion of
16 the neurosurgeon was that that wasn't the case.

17 Q. Uh-huh.

18 A. Although, he's not an expert on syncope. I
19 would also state that I have seen a case that he and I
20 were both involved in to where we were certain that
21 it was the cause of the syncope and yet he said it
22 wasn't, so we all differ.

23 Q. Sure.

24 A. And there is literature on this, but the body
25 is very, very complicated and the sympathetic nervous

1 system comes out of the spinal column. The vagus nerve,
2 the parasympathetic nervous system comes out of the
3 brain. They both are involved in the neck and
4 mechanisms of pain make people pass out. I did not
5 document as well as I could have possibly what happened
6 to make him pass out. It is so infrequently we really
7 find the cause and so you have to go through the
8 exercise of what happened. And so my hypothesis was
9 that that this was some type neurogenic mechanism.

10 Q. Are you confident that you had excluded all
11 the other possible causes, that you're confident that
12 it wasn't cardiac in nature?

13 A. No. Well, I have only percentages.

14 Q. Okay.

15 A. Okay. Actually, there is a thing on here
16 that points out that he had an injection fraction of 40
17 percent, which I think was an error, and so we should
18 have an echocardiogram somewhere that would dispute
19 that and the echocardiogram would be correct, but
20 someone with an injection fraction of 40 percent could
21 have ventricular arrhythmias causing them to pass out,
22 but we found no sign of that when we monitored him in
23 the hospital.

24 Q. Sure. You can't prove it. I don't imagine
25 you can prove anything in science to an absolute

1 certainty, but can you identify any more probable
2 cause?

3 A. That's -- that was my opinion after looking
4 at all the data and like my first thought was that he
5 had bled and we quickly ruled that out, and the
6 monitoring didn't show anything, and he did have
7 significant spinal cord disease. The only, the only
8 other thing I can't remember where the foot fracture
9 came in on this.

10 Q. Yeah. There was mention in the records of
11 the fact that he had a -- let me, I'm looking at page
12 5, Dr. Richey. The fourth digit of the right foot there
13 was a fracture, which was non-displaced.

14 A. And I don't have in my records the
15 information that would tell me when that happened, if
16 it had anything to do with the pain that caused him to
17 pass out there.

18 Q. Right.

19 A. I just -- but you didn't ask me that
20 question, but it's, in here and I bring it up.

21 Q. Fair enough. No, no. You know part of what
22 we're doing and I'd imagine part of what you were doing
23 was trying to explore the different possible causes and
24 exclude them to the extent you could?

25 A. But, for my case, I have to be sure that his

1 life isn't in danger from an arrhythmia standpoint and
2 since he's sitting in the room now, I must have been
3 correct.

4 Q. Well, good and I'm sure he's glad of that as
5 well. Well, can you say that of all the possible causes
6 of the syncope that this was the most probable even if
7 you can't be absolutely sure about it?

8 A. It was my opinion at the time.

9 Q. Okay. And was that opinion to a reasonable
10 degree of medical certainty?

11 A. I would argue it is.

12 Q. Now, Doctor, set aside what caused the
13 syncope for a second. Okay. We have been dealing up
14 to this point with that discussion of possible causes
15 and trying to exclude possible causes. There's no
16 question that once you saw him in that hospital and had
17 the MRI, you were able to identify this spinal stenosis
18 that was ultimately treated by Dr. Naso. And, I think,
19 I've understood your testimony already today that
20 certainly that stenosis didn't happen in one day. That
21 there was arthritic processes going on with Mr. Nero
22 and that he certainly had preexisting conditions in
23 that spine, is that correct?

24 A. That's my opinion.

25 Q. Yes, sir. And I'm going to ask you to assume

1 this fact here because I know you didn't observe it and
2 you don't have any other way of knowing it, but I want
3 to ask you to assume that Mr. Nero works for a DOT road
4 crew and that part of his job with that road crew is

5 laying cement and, indeed, in the day in question, he
6 was with other gentlemen using what they call a
7 squeegee board to, a lot of people have seen them do
8 this, to flatten and smooth the cement that has been
9 laid by pulling the squeegee board up over laid cement
10 and that that was what he was doing just shortly prior
11 to the syncopal episode. My question for you, having
12 assumed both the preexisting stenosis and the facts
13 I've told you about what he was doing that day and,
14 indeed, what his job was, do you have an opinion to a
15 reasonable degree of medical certainty as to whether
16 that activity would have aggravated that preexisting
17 stenosis causing symptoms of bilateral hand numbness
18 and neck pain and so forth?

19 A. Well, you're referring to the thing that
20 looks like the buffer they use on the floors in the
21 hospital, the machine?

22 Q. Actually, I think, and I haven't seen it done
23 myself, but what I think it is, you know, they lay
24 concrete in a form, and then they've got to flatten
25 that form. In order to flatten that form, and I'm

1 looking at him, he can't talk, but I'm looking at him
2 to make sure I'm describing this correctly that they
3 drag that board, a number of gentlemen drag that board
4 over the form with the idea of smoothing out the
5 cement.

6 A. Okay.

7 Q. Now, of course it---

8 A. It's not the machine that goes round and
9 round?

10 Q. Right.

11 A. Okay.

12 Q. It backs up in front of that board, then they
13 have to push it out and pull a little bit more with the
14 idea of creating a flat and smooth surface by operation
15 of the combination of the boards to form within which
16 the concrete is laid and then this squeegee board that
17 goes across that form in order to, in order to smooth
18 out the cement. That's my understanding of how his job
19 is performed and that's what he, indeed, was doing that
20 day.

21 A. Run by sheer human power?

22 Q. Run by sheer human power of a number of, a
23 number of gentlemen.

24 A. It was June.

25 Q. Indeed.

1 A. It was hot, so the number of coincidental
2 things that would happen to lead someone to pass out is
3 significant. So, we have a man who is really beyond his
4 prime at doing that type of work, who has been getting

5 Cortisone shots regularly in the office to be able to
6 continue that type of work. Those even have their
7 effects. And so his passing out while talking to his
8 boss, at that point, could have been related just from
9 dehydration. It could have been a number of things,
10 but it's beyond me actually which straw broke the
11 camel's back.

12 Q. Sure. Do you have an opinion, though, as to
13 whether that activity would have aggravated the
14 condition of his cervical spine?

15 A. More than likely, certainly.

16 Q. And is that opinion to a reasonable degree of
17 medical certainty?

18 A. I think so.

19 Q. Doctor, I'm looking now at my Tab 3, and this
20 Tab includes the medical records that my office
21 obtained from your former office, beginning July the
22 9th, 2012 and ending it appears in December, December
23 the 13th of 2012. I don't -- I live in a glass house
24 here on this thing, so I'm not going to criticize you
25 for your handwriting, but I'm not able to read it, Dr.

1 Richey.

2 A. That's why I'm here.

3 Q. And I'm wondering whether you could just
4 briefly go through these records with us and tell us
5 what was going on during that time period as you saw
6 Mr. Nero in the days and weeks following this incident?

7 A. Well, this is about three weeks from when he
8 got admitted to the hospital and so he returns. Neck
9 pain going down the right shoulder and numbness and the
10 dizziness and passing out, that is the complaint. I'm
11 not sure if that was related to the 20th of June or
12 whether that was subsequent. I note, "Passed out post-
13 hospital," and he was having night sweats, cough,
14 headache, joint pain, and he had a sore throat. My
15 examination was cursory that day basically because he
16 was under the care of the specialist and those records
17 are elsewhere.

18 Q. Yes, sir.

19 A. My impression at the bottom is that he needs
20 long term disability. I thought the neck would take
21 three months. The right knee, he had a right total
22 knee, I believe, at that time and that is significant,
23 and then he had his right shoulder problems, and I put
24 a question mark there, 'cause I just didn't know how
25 long that would last. But I filled out the forms and I

1 put he can't work. He may be back in six months. But I
2 had been following this gentlemen for a long time,
3 keeping him working.

4 Q. Yes, sir.

5 A. And he was doing everything he could, in my
6 opinion, to keep working.

7 Q. Dr. Richey, the forms you refer to were
8 Family Medical Leave Forms from the employer or?

9 A. I have no idea.

10 Q. Okay.

11 A. But it was a time that -- these people, all
12 with these types of jobs all have some form or recourse
13 and I suggested that he do it.

14 Q. I understand. I understand. All right.

15 A. Now, the next page is nice because it puts
16 the diagnoses down which is helpful, cervical spinal
17 stenosis, syncope, osteoarthritis of the knee and right
18 rotator cuff.

19 Q. Okay. And he was -- with regard to the right
20 rotator cuff, he also was being treated by Dr. Naso for
21 the shoulder and upper extremity and neck and all that?

22 A. All the things he had been dealt with on June
23 the 20th were being followed up at Pee Dee
24 Neurosurgical and Spine.

25 Q. Thank you, sir. You see him again in August,

1 it looks like.

2 A. On 8/1/12, joint pain, neck and shoulder
3 pain. He was having some sweats, headache, stiffness,
4 joint pain, back pain, sinus problems. The itch I
5 scratched through. At that point, I did a lower
6 extremity reflex examination and his reflexes were one-
7 plus in the patella and one-plus in the Achilles. That
8 was improved because the documentation in the
9 hospitalization by Dr. Naso, I think, he had had no
10 Achilles reflexes and then the most important part of
11 the examination because of the cervical spine stenosis
12 was that he had no Clonus. And so clonus, I have a
13 zero with a line on the right and the left.

14 Q. And in layman's terms, tell us what the
15 clonus is.

16 A. When the spine is pressed especially
17 posteriorly, it will cause a reflex mechanism. When
18 you push the foot back, it will keep flopping, and it's
19 indicative of spinal cord compression from somewhere
20 and that was good that he had improved somewhat in that
21 regard, but he'd been out of work.

22 Q. Dr. Richey, traditionally, it seems that when
23 you talk about radiculopathy coming from the cervical
24 spine, you anticipate you'll see radiculopathy in the
25 upper extremities?

1 A. Yeah, yeah. And cord compression and
2 radiculopathy are two different things.

3 Q. Right, and that's what I'm getting ready to
4 get to.

5 A. Yes, sir.

6 Q. Will you distinguish that for us, please?

7 A. When the cord is compressed, that's the main
8 line, that's the interstate and the offshoots in each
9 spinal level are the nerves and that is the radicular
10 portion. So, when those nerves are compressed and they
11 don't have to be compressed at the spinal cord, they
12 still have to go out the exit foramina, and they can
13 actually be compressed farther out with certain
14 entrapments. So they are two separate entities, but
15 they often times run together.

16 Q. Cord compression can result in symptoms in
17 the lower extremities even if the cord is compressed in
18 the cervical area of the spine?

19 A. I would say findings more than symptoms.
20 It's a physical diagnostic finding, and so they may not
21 be aware, but when it's blocked up here in the neck or
22 the chest or the lumbar, you're going to get the clonus
23 finding.

24 Q. And that's what you were concerned about and,
25 luckily, you did not find that, is that correct?

1 A. Correct.

2 Q. Okay. Good, good.

3 A. Now, at that particular visit, I put disabled
4 at the moment, increased his -- increased him to
5 Percocet. More than likely, I had him on Hydrocodone,
6 and I have no idea what that last word says.

7 Q. That's fair enough. That's fair enough. All
8 right. And I hate to force you go through each one of
9 these, Doctor, but just briefly, it looks like the next
10 note is August the 9th of 2012, page 42, is that
11 correct?

12 A. Correct.

13 Q. Okay. How is he doing at that point?

14 A. Well, the complaint is pain in the head and
15 dizzy at dizzy at times, bilateral head and neck pain,
16 no change in his social history. The Review of Systems
17 shows headache, fatigue, stiffness, joint pain, back
18 pain, sinus and he is itching. The examination --
19 first, I must tell you that reflexes are not static.
20 The intensity comes and goes for a number of reasons.
21 He had no clonus. I had no reflexes noted at the
22 patellar or the knee and his reflexes in the upper
23 extremity were symmetrical, as tested. And on
24 musculoskeletal, I've got what is the passive range of
25 motion of his neck, which is that upside down V.

1 Q. Uh-huh.

2 A. And that instead of -- in my practice, it's
3 not important for me to know the exact degrees. I put
4 down an estimate or a drawing of what his range of
5 motion is and it is certainly around, according to this
6 drawing, less than a total of 90 degrees. So, his neck
7 is not moving very well. The writing, extremity
8 cramps, and then he had a nose problem, an abscess
9 problem and he had an hemoptysis problem in the past
10 and the next references are basically in that regard.
11 I'd given him some Mupirocin. And then I told him to
12 use a cane and I added Valium, two milligrams, three
13 times a day for muscle relaxant.

14 Q. Okay. All right. The next visit appears to
15 be in September?

16 A. That would be September 7th.

17 Q. Yes, sir.

18 A. He had some curious complaints at that time,
19 hallucinating, leg jumping and chest pain. I added the
20 leg jumping myself, probably restless legs, right
21 shoulder, elbow, pain with deep breath.

22 Q. Anything in that visit that adds or takes
23 away anything from the history with regard to the
24 cervical spine?

25 A. Well, the treatment, he was not orientated

1 correctly to the month. So, the hallucinating, my
2 assumption here would be that this is medicine effect.

3 Q. Yeah.

4 A. The Review of Systems, he had a cough, chest
5 pain on taking a deep breath, back pain, joint pain,
6 sinuses. His lungs were bronchial, which means that
7 when he was breathing, when he exhaled, I heard noise
8 and that's compatible with bronchitis. He was wearing
9 a cervical collar. I checked his calves to make sure
10 there was no sign of a blood clot. I found that he had
11 no reflex in the left triceps that day.

12 Q. Now, Doctor, this is -- there's an Operative
13 Report at page 13 where Dr. Naso performed C6, C7, and
14 C7/T1 discectomy infusion.

15 A. What date was that?

16 Q. August the 28th, 2012, which it looks like it
17 would have been just shortly before your visit on
18 September the 7th.

19 A. Correct.

20 Q. Does that, does that add anything?

21 A. Well, that's probably why he was
22 hallucinating was his medicines.

23 Q. Yes, sir. Now, did you adjust his medicines
24 at all or did it seem like that would, that would taper
25 off as his need for narcotics decreased?

1 A. I'm having to read this. I ordered, I
2 ordered a chest x-ray, 'cause I was worried about his
3 cough.

4 Q. Uh-huh.

5 A. I put him back on his Etodolac. I continued
6 the Valium and what I'm having to assume, without
7 having access to my records to see my prescriptions, is
8 I think I put him on Chlorzoxazone at bed time, which
9 is a muscle relaxer that has very little mental side
10 effects.

11 Q. Okay. All right, sir.

12 A. And then he was to see Dr. Naso on the next
13 Tuesday.

14 Q. All right. You then see him in December,
15 which I think is the last known time. -Translate for us
16 what was going on in December, Doctor?

17 A. December 13th, 2012, needs forms filled out.
18 Complaining of acid reflux. He had osteoarthritis neck
19 problem, original syncopal episode, and I wrote on here
20 this happen on the job by definition. All that
21 happened at work. He had essentially no change in his
22 Review of Systems. On examination, he had atrial
23 bigeminy. Atrial bigeminy means that you have
24 irregular beat and then an extra beat that's not from
25 the ventricle but the atria, so it's less of a hazard

1 than ventricular bigeminy. I informed him at that time
2 that if he was drinking any, he needed to stop because
3 that's one of the things that can cause that and that
4 would put him at risk for syncope. The lungs at that
5 time were clear. I did not do a neurologic examination
6 on him. At that point, he had apparently been to see
7 y'all. So there was, I imagine, the form that he
8 handed me to fill out. I noted that he had had some
9 anemia post-operatively. He was to see Dr. Naso on
10 January the 16th and I had put shoulder, neck and knee
11 problems. I don't see him working his -- what that
12 should say is his present job. And I dealt with his
13 blood pressure and benign prostatic hypertrophy and
14 gave him his Etodolac, and then I checked his nose
15 because of the problems he'd had chronically.

16 Q. You subsequently left your general practice
17 and went to work as a hospitalist. I assume that you
18 sent Mr. Nero on to seek an internist elsewhere?

19 A. My partner took over my practice.

20 Q. Okay.

21 A. She's a board certified family practitioner.

22 Q. Okay. Very well. Doctor, I appreciate your
23 time. You've been very patient with us and muddled
24 through these records that I know aren't what you would
25 have preferred to have, but thank you for your time and

1 please answer any questions Counselor has.

2 A. Yes, sir.

3 CROSS EXAMINATION BY MR. WILLIAMS:

4 Q. Yes, sir. Thank you, Doctor. Doctor, have

5 you ever had experience with a Workers' Compensation
6 claim before Mr. Nero?

7 A. Oh, certainly.

8 Q. Okay. And so you're familiar with the
9 Workers' Compensation process?

10 A. I can't say that I could quote it to you.

11 Q. Okay. But you have -- you have dealt in that
12 area in terms of practicing medicine for someone who is
13 filing a comp claim; you have familiarity with that?

14 You familiar with that?

15 A. I don't know how it works.

16 Q. Okay. But you've treated people that had
17 Workers' Compensation claims?

18 A. Yes, sir.

19 Q. Okay. At any point in time did Mr. Nero
20 present to you that this was a Workers' Compensation
21 matter?

22 A. I don't recall that.

23 Q. At any point in time did your office make
24 contact with an employee representative or insurance
25 carrier about Mr. Nero's treatment with you?

1 A. I have no way of knowing that.

2 Q. Okay. Because you -- why is that?

3 A. Because I just see them in the exam room.

4 Q. Okay. And so you never had -- so when he saw
5 you, he wasn't seeing you at your personal practice or
6 your---

7 A. He's seen me -- I saw him in this regard in
8 the hospital---

9 Q. In the hospital.

10 A. ---and out of the hospital and I had been
11 seeing him for years in the office.

12 Q. Okay. And this office, this is your office,
13 correct or was your office?

14 A. It was an office where I worked for Carolinas
15 Hospital System who is responsible for the billing and
16 collections and the running of the office.

17 Q. Okay. And so maybe -- so you don't know
18 specifically whether or not there were any Workers'
19 Compensation conversations but they might, is that what
20 you're saying?

21 A. I don't know.

22 Q. You don't know?

23 A. I don't know. But, I mean, it was something
24 that it occurred to me that it happened while he was
25 working.

1 Q. Right.

2 A. And I thought that that had something to do
3 with Workers' Comp, but he had insurance and, you know,
4 as far as the billings, I'm uncertain.

5 Q. Okay. But your testimony today is that he
6 never told you anything about a Workers' Compensation
7 matter regarding your treatment?

8 A. That's correct. I don't. I don't remember.

9 Q. You don't remember. Okay. And you've
10 mentioned something about filling out some forms. What
11 type of forms did you fill out?

12 A. Those forms would be copied on the original
13 chart and so I don't know, but it's -- my opinion was
14 that he should seek to have his short-term or long-term
15 disability plan, because he wasn't going to be able to
16 work for six months.

17 Q. Okay.

18 A. I'm not aware of what plan he had available.

19 Q. Okay. Did you ever fill out a 14B?

20 A. I have no idea what a 14B is.

21 Q. Okay. Did you ever fill out any form
22 relating to Mr. Nero's disability?

23 A. I'm sure I did. There is, there is
24 suggestion of that in the record here.

25 Q. Okay. And I understand it's in the record,

1 but I'm really referring to a specific form that you
2 would have filled out in a Workers' Compensation
3 matter. Your testimony today is that you don't
4 remember whether or not you filled out a form relating
5 to---

6 A. Regarding specifically a Form 14B, I have no
7 recollection of that.

8 Q. Okay. Where could I find -- if you did do
9 that, where could I find that information, would it be
10 with the Carolinas Hospital?

11 A. You should have a full copy of his medical
12 record from Carolina Medical Alliance. The telephone
13 number of the office is 679-4019, and my medical
14 records from my practice are located there in hard
15 copy.

16 Q. Okay. Now, in the Workers' Compensation
17 matters that you had before Mr. Nero, do you ever
18 remember filling out any specific form where you gave
19 an impairment rating or work restrictions outside of
20 the medical records?

21 A. I try my best never to do that, because they
22 never seem to make any sense.

23 Q. Uh-huh.

24 A. Okay. And so, generally, when a patient
25 comes to me and they're going to be involved in

1 something like that, I recommend they go to an
2 attorney.

3 Q. Okay.

4 A. And that way, I don't do anything

5 inappropriate. The attorneys -- y'all take care of
6 that and that's about -- and then you end up with some
7 type of deposition like this and that's all I know
8 about it.

9 Q. Okay. Did you recommend Mr. Nero to go to an
10 attorney?

11 A. More than likely.

12 Q. And would that recommendation have been made
13 to go to a Workers' Compensation attorney or would you,
14 would you just say you need to see an attorney? Would
15 that be a general statement or it would have a more
16 specific recommendation?

17 A. More than likely, I would have suggested that
18 he just call the law firm and tell him what his
19 situation was and let them deal with it, because my
20 problem is I've worked in two states and it's hard to
21 keep up with the changes in the law. There's been a
22 lot of things happened in thirty years, and I just
23 leave that to the attorneys and the patients and I just
24 try to do the medicine.

25 Q. Okay.

1 A. Now, the neurosurgeons on the other hand,
2 they're keen on it.

3 Q. Now, how long have you been practicing
4 medicine?

5 A. Thirty years.

6 Q. And during that thirty-year span, how many --
7 and you may not know this, but would you say that
8 you've seen or been involved in more than ten Workers'
9 Compensation claims?

10 A. When I first went into practice, I was the
11 attorney -- the lawyer for the Union Pacific Railroad
12 so---

13 Q. You say you were the lawyer?

14 A. I meant -- excuse me -- you guys have me --
15 I'm sleepy and confused. I was the doctor for the
16 Union Pacific Railroad in Dequincy, Louisiana and, like
17 I say, that was in Louisiana. It was the railroad and
18 I was doing depositions all the time for things that
19 happened to those fellows.

20 Q. Okay. What about in South Carolina?

21 A. In South Carolina, it's been -- I can recall
22 one case that the mayor had and, let's see, oh, there's
23 bound to be some, but we generally try to get them
24 referred out to people that do that.

25 Q. Okay. So you're saying it would have been

1 less than ten in South Carolina?

2 A. I don't know.

3 Q. You don't know. Okay. How did you come into
4 contact with Mr. Nero in 2007?

5 A. Without the chart, I'll just tell you what I
6 remember. Mrs. Nero, and I assume it's okay to talk
7 about her medical history since I'm being asked?

8 Q. I don't really need to hear about her
9 medical.

10 A. Well, it's significant for this, because she
11 had a syncopal problem so.

12 Q. Okay.

13 A. Anyway, I was taking care of her and started
14 taking care of him. That's my recollection. It could
15 have been vice-versa, but it was, it was close to the
16 same time.

17 Q. Okay. All right. And during that treatment
18 period, would you say he presented as a pretty healthy
19 individual or did he have significant chronic
20 illnesses?

21 A. He was being beat up by his job through the
22 years.

23 Q. Okay. And could you clarify that when you
24 say "beat up", what do you mean specifically?

25 A. Knees, shoulders, bone on bone on the knees

1 and, you know, he was coming in to be able to continue
2 to work.

3 Q. Okay. So he came to see you so he could
4 continue functioning at a capacity where he could
5 perform his job?

6 A. Yes, sir.

7 Q. Okay.

8 A. I would say that's a fair statement.

9 Q. Okay. And what type of treatment did you
10 provide for him?

11 A. He also had some medical problems that we
12 dealt with. He quit smoking, because he had coughed up
13 some blood and that was kind of scary. I'm giving you
14 that from memory. But, mainly, we dealt with the knees
15 and I do believe he ended up having a knee replacement.

16 Q. Okay. What else? Did he have any---

17 A. Aches and pains, blood pressure.

18 Q. So he suffered from high blood pressure, is
19 that correct?

20 A. I believe so; prostate trouble.

21 Q. Okay. What about diabetes?

22 A. I don't recall diabetes unless he got it
23 after a Cortisone shot but it would have been short
24 acting.

25 Q. What about dyslipidemia?

1 A. I don't recall. Don't have that data here.

2 Q. Okay. So the aches and pains or as you
3 describe it "being beat up by his job," would you
4 describe that as more wear-and-tear for someone working

5 in that type of industry or was it some type of acute
6 trauma that caused the aches and pains and the
7 problems?

8 A. Well, you know, aches and pains are
9 subjective. No cartilage in your knee is objective.

10 Q. Okay.

11 A. And so he was -- his joints were wearing out.

12 Q. Okay. So would you -- so when you say
13 "wearing out," would you consider that the normal wear-
14 and-tear and normal progression?

15 A. Well, you know, I don't have a right knee
16 cartilage and I don't do manual labor, so who knows.

17 Q. Okay. All right. So would you -- so what --
18 so why didn't he have a -- in your opinion, why didn't
19 he have a -- I don't know which knee, but why did he
20 not have knee cartilage?

21 A. Well, it just doesn't go away overnight.
22 Certainly, it could have had to do with the Q angle of
23 the patellar, previous injury to the meniscus, but the
24 final common pathway was he had no articular cartilage.

25 Q. Okay. Were there any other specific joints

1 like maybe the shoulder?

2 A. We mentioned the shoulder.

3 Q. Okay. And then all of---

4 A. But I don't have any data in this medical
5 record to go on. I don't know if I injected his
6 shoulder.

7 Q. Okay. But he did have shoulder problems?

8 A. Yes, sir.

9 Q. Okay. What other problems did he have and
10 we've talked about the knee and the shoulder?

11 A. Well, there's a way of gleaning this from the
12 medical records that we have, so I will read these off
13 to you when I get to them. The billing system lists
14 the previous diagnoses.

15 Q. Okay.

16 A. So, syncope and collapse, osteoarthritis
17 lower extremity, previous abscess of the trunk, pain in
18 joint ankle foot, pain in joint upper arm,
19 epicondylitis which is of the upper extremity, neck
20 pain called cervicalgia, pain abdominal not otherwise
21 specified, carbuncle of the face, rash not otherwise
22 specified of the skin, pain in the limb, cellulitis and
23 abscess of the neck.

24 MR. WUKELA: And, Dr. Richey, I'm sorry to
25 interrupt, but you're reading from page 39?

1 A. I'm reading from page 39.

2 MR. WUKELA: Thank you.

3 A. The very first one that you have.

4 MR. WUKELA: That's that date of?

5 A. 7/9/12.

6 MR. WUKELA: Thank you. Sorry to interrupt
7 but I want to make sure I'm on the same page.

8 A. But that would be what I can glean from this
9 medical record.

10 Q. And all of those, just so I'm clear,
11 everything you just read, he suffered from before
12 6/20/2012?

13 A. Well, before 7/9/2012, but it would be safe
14 to assume that most of those were before 6/20/2012.

15 Q. Okay. Now that's sort of important for me.

16 A. Yes, sir.

17 Q. And I mean you are his doctor, so I wouldn't
18 know, how many of those do you remember treating him
19 for before 6/20/2012?

20 A. Most of them, sir.

21 Q. Okay. So he suffered from syncope and
22 collapse before 6/20?

23 A. No, no, no, that was 6/20.

24 Q. Okay. Okay.

25 A. That -- do you see that's the newest

1 diagnosis on the---

2 Q. I got you.

3 A. ---recent list.

4 Q. Okay. So when he presented on 6/20/2012, did
5 he tell you how he broke his toe?

6 A. I can't remember. I don't.

7 Q. You can't remember?

8 A. I have that written down somewhere, but I
9 can't remember.

10 Q. Okay. And I know you say you can't remember
11 how he broke it. Did he mention the collapse causing
12 any significant trauma, the syncope?

13 A. If that data is available, it would be in the
14 Emergency Department record, and I make a note that Dr.
15 Weinstein went over him extremely well, so I must have
16 been impressed by the work up from the Emergency
17 Department. That comment -- you know, on page 2 under
18 Impression, it says, "Syncope; additionally, there is
19 an oblique fracture involving the proximal aspect of
20 the proximal phalanx of the fourth toe which is non-
21 displaced." I don't say how he got that, but that data
22 may be available from the ER physician.

23 Q. Okay. Now, based on your note on the, I
24 guess, it's the first page that says he had a episode
25 of syncope where he fell slowly to the ground. Based

1 on that note, is it fair to say that it's more -- it's
2 less likely that his toe was broken during the episode
3 of syncope or it's not likely -- likely, I should say?

4 A. I don't have an opinion on that. I just -- I
5 can't tell you. I just don't have it documented.

6 Q. Okay. So you don't know what -- so it could
7 be possible it could not be possible, you just have no
8 opinion at all?

9 A. Well, hypothetically, if he had just broken
10 his foot and he stepped and he winced from pain, he
11 could have passed out. You know that's possible, but I
12 don't know.

13 Q. And do you think the slow fall to the ground
14 could have broken his toe?

15 A. Give me a moment to read that note. I put on
16 here, "Awakened without significant trauma." Now,
17 possibly, I was referring to the head and not the
18 entire body.

19 Q. Okay.

20 A. But I did note, "But he has a recent fracture
21 of the left foot," and I don't know how those two are
22 time related.

23 Q. Okay. Could you talk a little bit more about
24 the differing opinions of the spinal stenosis causing
25 the syncope? I remember you testifying that you were

1 of the opinion that the spinal stenosis was the root
2 cause of the syncope but the neurosurgeon disagreed
3 with you on that.

4 A. Okay. I read the neurosurgeon's note, which
5 said he didn't think it was associated and I put that
6 into the record. We're referring to my Discharge
7 Summary and, again, I will read, "The cause of the
8 syncope, I think, has something to do with his spinal
9 stenosis and a reflex mechanism, but we cannot prove
10 it."

11 Q. Uh-huh.

12 A. But from a monitoring standpoint, we found no
13 problems. Monitoring being cardiac.

14 Q. And what did the neurosurgeon think?

15 A. On Item Number 11 under the last paragraph,
16 the third sentence, "I do not think his syncope is
17 related to cervical spine pathology."

18 Q. Okay. And do you remember testifying that
19 the neurosurgeon is not an expert on syncope?

20 A. Yes, I do.

21 Q. Okay. Doctor, are you an expert on syncope?

22 A. That's a good question. Since I spend most
23 of my work time as a hospitalist dealing with a high
24 percentage of patients that have syncope, I will have
25 to say that more so than the neurosurgeon.

1 Q. Okay. So you consider yourself an expert on
2 syncope?

3 A. I said I consider myself more of an expert on
4 syncope than a neurosurgeon.

5 Q. Okay. Now, what other activity could have
6 caused his syncope on that day? This did happen in
7 June and I remember you testifying about the heat could
8 have potentially caused that, the syncope as well?

9 A. It could have been a contributing factor.

10 Q. Okay.

11 A. I don't know what the temperature was that
12 day but June in Florence is usually hot.

13 Q. Okay. How would the, how would the heat
14 contribute to the syncope?

15 A. Dehydration.

16 Q. Okay. How would his level of activity
17 contribute to the syncope?

18 A. My feeling on this subject is that, and I am
19 not a physiology expert, but, the body functions by
20 getting blood from the feet back up against gravity to
21 the heart; otherwise, we would all pass out when we
22 stood up. The mechanisms that make that work are
23 spinal cord mediated, okay, and that's through the
24 sympathetic nervous system, and it's entirely rational
25 to me to think that his sympathetic nervous system was

1 impaired by his cervical spinal stenosis.

2 Q. Uh-huh.

3 A. That being said, the number of contributing
4 factors to this, especially if he were dehydrated, are
5 in my initial evaluation if he had had a
6 gastrointestinal bleed and that was my biggest fear is
7 that he had had a big bleed in his stomach and that's
8 why he had passed out. Now, we were able to prove or to
9 disprove that theory.

10 Q. Uh-huh. Uh-huh.

11 A. And then the third is, you know, if it was a
12 cardiac abnormality from an arrhythmia and since he did
13 not have a monitor on at the time, we'll never know.

14 Q. Okay. And so now you just sort of spoke in
15 language that's sort of over my head.

16 A. I'm sorry.

17 Q. So how -- I just want to know -- obviously,
18 this guy is a day laborer and he performs manual labor.
19 How would labor such as squeegeeing cement contribute
20 to the syncope?

21 A. When you squeegee cement and I have squeegeed
22 cement, now that it's been described, you are probably
23 in a flexed position dragging that big two-by-six or
24 whatever it is and you are forcing through your
25 abdominal muscles all kinds of fluid equilibria, and so

1 you got that spine sitting in there in that closed
2 space. Now, anything you do to increase the vascular
3 pressure which happens when you are straining will put
4 pressure on that spine. Now, you don't know how much

5 that dilates up and here we're talking about, you know,
6 a hundredth of an inch matters, a hundredth of an inch
7 matters. So all his pistons might not have been firing
8 on his sympathetic nervous system, and so I think it's
9 totally logical that that was contributory to his
10 syncope. But I think that he also had to be volume
11 depleted for that to happen.

12 Q. And what does volume depleted mean?

13 A. That means that he was dehydrated and that's
14 the nature of working in Florence, South Carolina on
15 June 20th. I do believe it was late in the day. Okay.

16 Q. So would it be fair to say based on your
17 opinion about this episode of syncope that Mr. Nero
18 could expect to suffer an episode of syncope anytime he
19 puts a high amount of pressure on his spinal cord due
20 to the spinal stenosis, would that lead to---

21 A. It predisposes it in my opinion.

22 Q. So would---

23 A. Right now, his cord probably is better
24 because he had surgery.

25 Q. Okay. So pre-surgery would hysterical

1 laughter or any type of overexertion or excitement
2 cause an episode of syncope?

3 A. People can pass out from hysterical laughter.

4 Q. So that's a yes?

5 A. That's a yes. People do pass out from
6 historical[sic] laughter, hysterical laughter, excuse
7 me.

8 Q. Well, based on what you know about Mr. Nero's
9 case and his condition pre-surgery, would it be
10 possible for him to do the same?

11 A. Was he laughing before this happened?

12 Q. I'm not really sure.

13 A. Well, I don't know. I mean, it just seems
14 like that's an irrelevant question.

15 Q. Okay. But is that -- and so is that a yes or
16 a no, is it possible?

17 A. Well, anything -- there is laugh syncope,
18 there's cough syncope. Those---

19 Q. That would actually be my next question would
20 coughing?

21 A. Yeah, I mean, if he had been coughing before,
22 he could have passed out.

23 Q. What about a heated argument, what if he got
24 in a argument with his boss, could that potentially
25 cause the syncope?

1 A. That mechanism in a dehydrated person who
2 then developed a tachycardia, a fast heart rate, might
3 have had a decreased cardiac output from it and could
4 have caused a brief syncope. That's a correct, a
5 correct statement. That's plausible, put it that way.

6 Q. Now, I remember you testifying to encouraging
7 Mr. Nero to limit his drinking. What would drinking
8 alcohol do to exacerbate anyone who, I guess, is -- or
9 is suffering from syncope, is that a disease, a disease
10 state?

11 A. Alcohol causes in certain predisposed people
12 atrial fibrillation.

13 Q. Okay.

14 A. Atrial fibrillation then predisposes people
15 to a rapid heart rate that can be short or long
16 depending on how long the arrhythmia lasts. Most
17 people, it becomes chronic. There is a big correlation
18 between atrial fibrillation and chronic alcohol use,
19 but he's never been documented to have atrial
20 fibrillation, but it's incumbent upon me to tell
21 somebody about that relationship. We were successful
22 at getting him to quit smoking, so we leave there and
23 go to the next hazard.

24 Q. Okay. So it's your testimony that drinking
25 could exacerbate the potential for him to have an

1 episode of syncope based on the atrial fibrillation?

2 A. We don't, we don't have any evidence that he
3 was in atrial fibrillation.

4 Q. Okay. All right. So you---

5 A. And, certainly, he wasn't drinking on the
6 job.

7 Q. Did you, did you test his blood/alcohol
8 level?

9 A. I didn't, 'cause I didn't see him in the
10 Emergency Department, but I gather nobody smelled
11 alcohol on his breath. They're prone to do that
12 automatically if they have just the slightest inkling
13 if there is a question involved, especially that
14 particular ER doctor.

15 Q. Okay. The cortisone shots, is it possible
16 for them to contribute to someone who is predisposed
17 for syncope?

18 A. Cortisone shots can cause a state in which
19 the pituitary gland is suppressed. Normally, intra-
20 articular cortisone shots don't do that because it's
21 walled off from the body and the absorption is not as
22 great. I don't recall how many he got, but he got a
23 lot of knee injections. Now, an injection into the
24 shoulder or in the muscles that might be out of the
25 articular space, those can lead to higher levels and

1 that the higher the level of the artificial cortisone,
2 then the more suppression of the pituitary gland, and
3 then you quit making your own, your own cortisone or
4 your cortisol. However, if that were part of this

5 deal, it would have -- he would have made it through
6 the day if he were suffering from pituitary
7 insufficiency. But, again, it's another theoretical
8 issue in the cause of this particular man's syncope.
9 And, of course, those shots were given to keep him
10 mobile so he could work.

11 Q. Okay. And based on what you know about Mr.
12 Nero's medical condition pre-June 20, 2012, he did not
13 suffer from syncope as far as you know?

14 A. I don't recall that.

15 Q. Okay. And the episode of syncope on June 20,
16 2012, did that exacerbate or aggravate any of his
17 preexisting injuries to his neck, knee, shoulder, back,
18 ankles?

19 A. According to my note that there was no acute
20 injury according to what my patient fee said.

21 Q. Okay. So that would be a no?

22 A. And that would be, that was my opinion at the
23 time that I discharged him from the hospital.

24 Q. Do you have the same opinion today?

25 A. Well, he went on to have surgery, so I think

1 the neck was like that when it happened.

2 Q. Okay. And is that opinion within a
3 reasonable degree of medical certainty?

4 A. Yes, sir.

5 Q. No further questions.

6 REDIRECT EXAMINATION BY MR. WUKELA:

7 Q. Doctor, let me make sure I understand your
8 testimony correctly.

9 A. May I ask a favor?

10 Q. Please, sir.

11 A. I would like some water.

12 Q. Absolutely and you know what, I don't know
13 why, I offered everyone else and I didn't offer you any
14 when you came in, tea or coffee or anything. Yes.

15 (OFF-THE-RECORD BREAK)

16 MR. WUKELA CONTINUES EXAMINATION:

17 Q. All right, Dr. Richey, I'll try to be as
18 brief as possible. You know, I didn't mention this,
19 but you were asked this. I think I have been
20 practicing almost fifteen years. I think maybe this is
21 the second time we have ever been involved in a case
22 together if I'm -- is it the third time? Okay. The
23 third. You remember better than I do. I don't
24 remember. This is one. I don't remember the third
25 one, but the second one, I believe you were the defense

1 expert and killed my case for me.

2 A. But the other one, I was your witness.

3 Q. Oh, were you? Okay.

4 A. Well, actually, I just -- I kept my mouth
5 shut.

6 Q. I'm not sure that I remember any of those
7 being comp cases, though?

8 A. That was the mixing, the mixing of ammonia
9 with Clorox and that lady.

10 Q. Oh yeah, I do remember that.

11 A. Ammonia with Clorox and she had a disease
12 that nobody asked me about.

13 Q. That's been a long time ago.

14 A. But it was -- yeah.

15 Q. Oh, yeah, that has been a long time ago. All
16 right. Yes. Okay.

17 A. Can we stay off the record a minute.

18 (OFF-THE-RECORD DISCUSSION)

19 MR. WUKELA CONTINUES EXAMINATION:

20 Q. There was some discussion of drinking. Has
21 there ever been any indication to you that Mr. Nero
22 abuses alcohol or drinks excessively or anything like
23 that?

24 A. The record here shows from Dr. Naso's
25 testimony that Mr. Nero could go weeks without

1 drinking. My opinion is that I am the advocate for
2 every patient's liver, and so I have to talk to them
3 about alcohol consumption and every chance I get to
4 make a blow against smoking or alcohol or anything
5 ~~else, I am going to do it and so, consequently, there~~
6 was a risk involved for him at some point in time to
7 have atrial fibrillation from too much drinking, so I
8 laid that on him.

9 Q. And he never did develop atrial fibrillation?

10 A. No, sir.

11 Q. Okay. And there is no evidence anywhere in
12 the record that he was drinking at all on the date of
13 this accident?

14 A. Not that I know of.

15 Q. Just to make that clear. You didn't find a
16 GI bleed?

17 A. No, sir.

18 Q. No evidence that he was hysterically laughing
19 or coughing excessively?

20 A. All it says is he was having a conversation
21 with his boss. That's all I've got documented.

22 Q. But you did find pretty significant cervical
23 stenosis?

24 A. Yes, sir.

25 Q. An narrowing of the neuroforamina?

1 A. Yes, sir.

2 Q. And that led you to your conclusions?

3 A. That led me to my hypothesis.

4 Q. Led you to you hypothesis. And it also
5 ultimately led to Dr. Naso doing a two-level fusion of
6 his cervical spine?

7 A. Yes, sir.

8 Q. So it was significant enough to lead the
9 neurosurgeon to perform bilateral fusion?

10 A. Yes, sir.

11 Q. You indicated that you had seen him on a
12 number of occasions prior to this accident for
13 cortisone shots?

14 A. Yes, sir.

15 Q. - And that he was pretty persistent in his
16 desire to have those shots so he could continue
17 working?

18 A. Yes, sir.

19 Q. Is it fair to say that he was a hard worker
20 and never showed any desire to be on disability or be
21 out of work?

22 A. It was my conclusion to him that he needed
23 not to work to get better.

24 Q. And that's after this June the 20th, 2012
25 incident?

1 A. Yes, sir.

2 Q. Okay. Prior to that, did he demonstrate to
3 you a desire to work?

4 A. Prior to that, it was the knees and he went
5 through that to continue working.

6 Q. You've also testified pretty unequivocally
7 that he had preexisting stenosis in that spine before
8 June the 20th, 2012, that he had a arthritic condition?

9 A. He would have to have.

10 Q. He would have to have had. And that
11 certainly wasn't caused by the squeegee board or the
12 syncope?

13 A. Yes, sir.

14 Q. That was caused -- that was age and years of
15 working?

16 A. That's my opinion.

17 Q. Okay. I think I also understood your
18 testimony that, however, using the squeegee board the
19 way he did that day aggravated that preexisting
20 stenosis?

21 A. My theory on that is that he had increased
22 pressure, abdominal pressure. It would have increased
23 his backflow in his veins and that might have been just
24 enough to offset his equilibrium in his spinal cord.

25 Q. Potentially causing that syncope?

1 A. Adding to it.

2 Q. Adding to it?

3 A. Yes.

4 Q. Given the fact it's June and he's been
5 working?

6 A. Correct.

7 Q. All right. And set aside the syncope,
8 though, also aggravating that preexisting stenosis
9 resulting in the bilateral arm numbness and the
10 aggravation of that condition to the point that Dr.
11 Naso recommended and performed a bilateral fusion?

12 A. Yes, sir.

13 Q. Okay. And that's your opinion to a
14 reasonable degree of medical certainty?

15 A. That's the fact.

16 Q.. Doctor, has he always been compliant with
17 you?

18 A. I would describe him as a compliant patient.
19 He came to the doctor regularly. He quit smoking for
20 me. I mean, he is more compliant than the average
21 patient.

22 Q. Have you ever had any reason to believe that
23 he was anything less than absolutely sincere with you?

24 A. No.

25 Q. Doctor, I thank you for your time. If

1 Counsel has any further questions, please answer them.

2 RECROSS EXAMINATION BY MR. WILLIAMS:

3 Q. I have one or two questions, Doctor.

4 A. Yes, sir.

5 Q. ~~And we'll let you go home and go to sleep. I~~

6 just want to be very clear about the role the squeegee

7 board played in the surgery or the aggravation of

8 whatever preexisting injuries Mr. Nero suffered from.

9 Is it fair to say that your opinion here today is that

10 whatever Mr. Nero did that day with that squeegee board

11 led to the cervical surgery, so whatever he did on June

12 the 20th, 2012?

13 A. No, sir. We are talking about that and I had

14 never thought about any of this with a squeegee board

15 until we came to this deposition, but -- so it didn't

16 cause the surgery, it caused the syncope.

17 Q. Okay.

18 A. Those are two different issues. But in

19 thinking of -- and so I gave you a hypothesis or an

20 opinion which is reasonable---

21 Q. Right.

22 A. ---and I think that you can find people on

23 both sides of that issue if you wanted to, but I would

24 say I disagree with the neurosurgeon in regard to the

25 fact that but for the fact that he had spinal stenosis,

1 this probably wouldn't have happened. That's my
2 opinion and I'm entitled to it, but he's entitled to
3 his.

4 Q. So you're saying but for the fact a spinal---

5 A. If he, if he didn't have that spinal cord
6 pressure, I don't think he would have passed out.

7 Q. Okay. Got you. No further questions. Thank
8 you for your time.

9 A. Yes, sir.

10 REDIRECT EXAMINATION BY MR. WUKELA:

11 Q. Let me ask one. The radiculopathy that he
12 complains of after the accident, do you have an opinion
13 as to whether that's a product of the aggravation of
14 the preexisting spinal stenosis?

15 A. Well, that was going to happen with a spinal
16 --- that was going to happen with his spinal disease.

17 Q. Eventually?

18 A. Eventually.

19 Q. At any rate?

20 A. Yeah.

21 Q. I understand that, but my question is, prior
22 to this accident he didn't have complaints of upper
23 extremity weakness?

24 A. He had upper extremity complaints, but I
25 don't think we -- I would have to have my old records

1 to see if I have an indication that I did the upper
2 reflexes.

3 Q. Let me ask it differently then. He didn't
4 have radiculopathy prior to June the 20th?

5 A. It wasn't demonstrated per se on Dr. Naso's
6 initial exam. That's what we do have in the chart.

7 Q. Right, right, right. No, no, no. I think
8 you're misunderstanding. What I'm asking is in Mr.
9 Nero seeing you in the days and weeks and months prior
10 to June the 20th, 2012, you didn't never diagnose
11 cervical radiculopathy?

12 A. I don't recall that.

13 Q. Okay. And my question is the cervical
14 radiculopathy that he was ultimately diagnosed with
15 after the accident, your opinion as to whether the
16 aggravation of his spinal stenosis produced that
17 radiculopathy?

18 A. That's plausible.

19 Q. Okay. Well, is it more likely than not?

20 A. I think it's a continuum of the disease so.

21 Q. Ultimately, in a man who's aging stenosis was
22 going to progress, no question about that? Arthritis
23 just doesn't get better over time, it gets worse over
24 time?

25 A. Well, in my opinion continuing to use a

1 squeegee board is going to aggravate it.

2 Q. Yes, sir. Yes, sir. Doctor, I think those
3 are the questions I have. Thank you for your time.

4 You've been very patient with us.

5 MR. WILLIAMS: I'm done.

6 (DEPOSITION CONCLUDED AT 11:35 A.M.)

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF DARLINGTON)

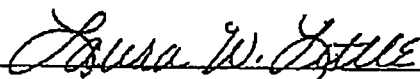
CERTIFICATE

3 I, Laura W. Little, Verbatim Reporter and Notary
4 Public in and for the State of South Carolina, certify
5 that I did have Robert M. Richey, M.D., appear before

6 me at 10:17 a.m. on the 12th day of March, 2014 at the
7 law offices of Wukela Law Firm, 403 Second Loop Road,
8 Florence, South Carolina; that the witness was duly
9 sworn and cautioned to tell the truth, the whole truth,
10 and nothing but the truth; that the foregoing pages
11 constitute a true and accurate transcript of his
12 testimony given at that time and place.

13 I certify that I am not of counsel or kin to any
14 of the parties, nor am I interested in any manner in
15 its outcome.

16 IN WITNESS WHEREOF I have hereunto set my hand and
17 seal this the 21st day of March, 2014.

18 

19 Laura W. Little, Verbatim Reporter

20 Notary Public, State of South Carolina

21 My Commission Expires September 21, 2015

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Otis Nero

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(Deposition of DANNY BOSTICK)

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1 This deposition is taken in accordance with
2 the South Carolina Rules of Civil Procedure.

3 It is agreed and stipulated by the deponent
4 and respective counsel that the reading and signing of
5 the deposition transcript by the deponent is expressly
6 waived.

7 WHEREUPON:

8 DANNY BOSTICK, being duly sworn and
9 cautioned to speak the truth, the whole truth and nothing
10 but the truth, testified as follows:

11 EXAMINATION

12 BY MR. WUKELA:

13 Q. Mr. Bostick, my name is Stephen Wukela. I
14 am a lawyer, and I represent Mr. Otis Nero in a workers'
15 compensation claim he has for an accident of June the
16 20th -- I think -- 20th of 2012.

17 I am here to take your deposition, as to
18 say, to ask you some questions under oath about what you
19 know about it.

20 A. Okay.

21 Q. Have you ever had your deposition taken
22 before?

23 A. Yes, sir.

24 Q. Okay. So you know how this works. It
25 ain't intended to be difficult.

DANNY BOSTICK 03-17-2014

1 A. No.

2 Q. And it's not my job to try to trick you or
3 to harass you or act like those lawyers do on television.
4 I'm just trying to find out answers to questions.

5 A. That's right.

6 Q. And so it should not be very difficult. If
7 I ask a question that you don't understand or I ask it so
8 poorly you can't figure out what in the world I'm trying
9 to ask, just stop me and say I do not understand what
10 you're trying to ask me. Rephrase it so I can understand
11 you.

12 A. Okay.

13 Q. Okay. How old are you?

14 A. 47.

15 Q. And where are you from?

16 A. Florence.

17 Q. Born and raised in Florence?

18 A. Yes.

19 Q. Did you go to South Florence High School,
20 too?

21 A. Uh-huh.

22 Q. That's yes?

23 A. Yes.

24 Q. And when I tell you to do that, it's not
25 because I'm --

DANNY BOSTICK 03-17-2014

- 1 A. Okay.
- 2 Q. She's trying to take everything down.
- 3 A. Okay.
- 4 Q. All right. And at some point you went to
5 work for the DOT?
- 6 A. Yes.
- 7 Q. How long have you been working for them?
- 8 A. ~~It's been about 27 years.~~
- 9 Q. Is that right?
- 10 A. Yeah.
- 11 Q. Okay. And what's your position with the
12 DOT?
- 13 A. A supervisor of a road crew.
- 14 Q. Okay. How did you -- what position did you
15 start at?
- 16 A. The bottom, as low as you can get.
- 17 Q. And worked your way up?
- 18 A. That's right.
- 19 Q. All right. And it goes crewman, and then
20 lead man, and then supervisor?
- 21 A. Yeah, somewhat.
- 22 Q. Okay.
- 23 A. You work on the road. You just come there
24 as a green man, and you learn and you keep moving.
- 25 Q. I'm with you.

1 Okay. I represent Otis Nero. I think he
2 was a crewman on one of those road crews that you
3 supervised. Is that right?

4 A. That's right.

5 Q. Okay. And I've also just talked to
6 Mr. Durant, and he's a lead man for -- for one of your
7 crews, anyway.

8 A. Yes.

9 Q. You -- are you -- I assume you're
10 responsible for more than one crew, or are you?

11 A. Well, it's -- it's one crew, like a 12-man
12 crew.

13 Q. Oh, okay.

14 A. And, you know, they split sometimes. I
15 have three -- I might have three operations at one time,
16 so they split basically.

17 Q. I'm with you.

18 So overall you're responsible for 12 men.
19 You might break them up into three crews or you might
20 have them all doing one job, depending on what the job
21 is?

22 A. That's right. It all depends on what it
23 calls for.

24 Q. I'm with you.

25 And who do you report to?

DANNY BOSTICK 03-17-2014

1 A. Greg Poston.

2 Q. And what's his title?

3 A. He's the assistant resident of Florence.
4 maintenance.

5 Q. I'm with you.

6 And then who does he report to?

7 A. Eric Minshew.

8 Q. And who is he?

9 A. He's the boss over maintenance.

10 Q. Okay. Okay. Now, look, I am -- I am here
11 primarily to ask you about an incident that occurred on
12 June the 20th, 2012. Mr. Nero has described it for us.
13 Mr. Durant has described it for us. And, as I
14 understand, that day the crew that Mr. Nero was on were
15 out laying some cement.

16 Do you have any recollection of that?

17 A. Yes.

18 Q. Tell me what you remember.

19 A. We was pouring a pad on the shop yard.

20 Q. How big of pad?

21 A. I think it's a 30 by 30.

22 Q. Okay. Tell me how that's done, just
23 briefly. Mr. Durant has gone through it a little bit for
24 us, but --

25 A. We basically go there, we dig out the

DANNY BOSTICK 03-17-2014

1 ground, the foundation, we form it. We call the cement
2 truck and we pour it.

3 Q. You put the frame down.

4 A. In the ground.

5 Q. Mr. Durant -- Durant said you all use metal
6 frames.

7 A. Yeah.

8 Q. Okay. And you make sure the frame is
9 graded the right way.

10 A. For the water to come off of it.

11 Q. So the water comes off of it.

12 A. Right.

13 Q. You get the truck in there. They pour it
14 in.

15 A. And we basically just level it out.

16 Q. Level it out.

17 A. Yeah.

18 Q. The truck does a pretty good job with that
19 arm of kind of putting it --

20 A. Exactly.

21 Q. -- putting it around?

22 A. Yeah. It's very little work you do with
23 it. Just making it level.

24 Q. And tell me how -- how does your crew level
25 it.

DANNY BOSTICK 03-17-2014

1 A. We have what you call a cement puller.

2 It's like a shovel or something, and if it's not level,
3 then we'll pull it to the whole -- to the low place and
4 make everything level.

5 Q. Okay. A squeegee board, tell me what that
6 does.

7 A. It's basically just like a finish piece.
8 It makes it look good and it makes a slick surface on it.

9 Q. And -- and we've described this a number of
10 times. In the experience I've had with pouring cement,
11 you take a -- it's a long board, maybe like a 2 by 6,
12 that goes from -- from frame to frame.

13 A. Right. And you just squeeze it across the
14 top of it.

15 Q. Squeeze across the top.

16 A. Just make it level.

17 Q. Kind of pull it back and forth sometimes
18 and pull it along until it flattens out that cement.

19 A. That's right.

20 Q. Okay. Mr. Nero was in the crew that did
21 that job that day?

22 A. Yes.

23 Q. Okay. Do you have -- do you recall him
24 operating that squeegee board?

25 A. Basically, yeah. He could have been, yeah.

DANNY BOSTICK 03-17-2014

1 Q. Okay. More than one man has to do that
2 board?

3 A. Exactly. It could have been four or five
4 guys on that board.

5 Q. Pulling that board?

6 A. Right.

7 Q. That board must have been 20 feet long or
8 thereabouts; is that right?

9 A. Well, whatever the pad is. It's -- if the
10 pad is 30, it had to have been 30 feet long.

11 Q. It had to have been 30 feet long.

12 A. Right.

13 Q. Okay. Do you all use a 2 by 6, or is there
14 some kind of special board you use?

15 A. It's about a 2 by 4.

16 Q. 2 by 4.

17 A. Yeah.

18 Q. So a 30-foot 2 by 4?

19 A. Joined together flat. And you got -- they
20 got six guys on it, and all they do is rub it back, and
21 all they do is just -- the cement gets on that board, and
22 it fills in the hole --

23 Q. Yeah.

24 A. -- and makes it level.

25 Q. Okay. All right. Do you miss -- do you

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1 recall Mr. Nero making any complaints of pain or anything
2 during the process of him pulling that squeegee board?

3 A. No.

4 Q. Okay. Tell me the next thing you do
5 remember.

6 A. Basically when we got through, we -- you've
7 got a -- what you call a -- we clean up most of the
8 tools, and we be finished with it mostly.

9 Q. Okay.

10 A. Unless you've got a -- a float -- what you
11 call a float. It's about 4 feet long, with a long tubing
12 on it, joints tubing, and you put that across it and just
13 smooth it out. It makes it look pretty.

14 Q. I'm with you.

15 A. That's basically what it do.

16 Q. Okay. You all finished all that.

17 A. Yeah.

18 Q. Then what's the next thing that happened?

19 A. Everybody got cleaned up and ready to go
20 home because it was basically knock time:

21 Q. All right. About what time did you finish?

22 A. It's maybe 3:15, and we get off at 3:30.

23 Q. Okay. And so, I guess, you had to clean
24 all the tools to get the cement off of them?

25 A. Yeah. Basically, yeah.

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1 Q. Then what happened?

2 A. We went up — we was on the back of the
3 shop yard. We walked up to where we basically meet at
4 every day before we go home and in the mornings, so we
5 was there. Everybody was trying to cool off so they
6 could go home.

7 Q. Was it a hot day?

8 A. It was hot.

9 Q. Okay. June in Florence, South Carolina.

10 A. It's hot.

11 Q. Okay. And then what's the next thing that
12 happened?

13 A. I was sitting in the truck talking to the
14 guys up under the shed. Ben was in the passenger seat of
15 the truck. My back is turned to them. Nero is standing
16 inside the truck talking to Ben.

17 So the only thing I knew, I felt the truck
18 rock, because I'm sitting in the truck. When I looked
19 back, he was holding on to the side of the door, so I
20 said, Ben ask him and see what's wrong with him.

21 So when that happened, he asked, well -- he
22 asked him what was wrong, and he said, Well, I just get
23 dizzy like that, and he stood up.

24 I said, Are you okay?

25 He said, yeah.

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1 Everybody walked out the gate.

2 Q. Anything else?

3 A. That was -- basically that day was it,
4 ~~because it was time to go home.~~

5 Q. Okay. Was the next day a workday, or do
6 you remember?

7 A. It could have been. I couldn't remember
8 what exactly was -- what the 20th was. I don't know for
9 sure exactly the day.

10 Q. I don't know either. I ain't going to
11 trick you. I just --

12 A. I'm not sure about the date or what it is.
13 I know we went home.

14 Q. The next day, what happened? The next day,
15 if it was a workday.

16 A. If that was a workday, the office -- the
17 secretary called me and said Otis called in and said he
18 wouldn't be here that particular day, and that was it.
19 He didn't hear anything else no more.

20 Q. And then -- then what happened?

21 A. I didn't hear no more until we started
22 getting complaints about someone owing him some money or
23 something. That was the only -- I hear nothing else, no
24 more, no nothing.

25 Q. Did you talk -- have you talked with

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1 Mr. Nero since that day that he fell out?

2 A. Not that I remember.

3 Q. Okay. Do you remember having any
4 conversation with him when he was in the hospital?

5 A. No, I don't. I don't remember talking to
6 him any more, to be honest with you.

7 Q. Okay. Is it possible that you did and
8 don't remember?

9 A. A year ago -- about two years ago, it could
10 have been, but I doubt it, because that's my job. If you
11 make a complaint that is in that nature, we take action.
12 That's my -- that's my job.

13 Q. Did you learn --

14 MR. WILLIAMS: Counsel, if you don't mind,
15 just maybe clarify the question for him a little bit. I
16 don't know if he --

17 BY MR. WUKELA:

18 Q. Well, let me ask you, do you remember
19 having any conversations with Mr. Nero at all since the
20 day he passed out?

21 A. I could have. I could -- I wouldn't be
22 able to remember.

23 Q. Okay. Fair enough.

24 A. If -- if that was the case.

25 Q. All right. Do you remember receiving any

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1 out-of-work slips from him?

2 A. No.

3 Q. Okay. If there was an out-of-work slip,
4 would you have received it?

5 A. Yeah, because I have to sign them.

6 MR. WUKELA: Okay. Mark that for me as
7 Exhibit 1, will you, please.

8 (PLF. EXH. 1, July 12, 2012, Return to Work
9 Slip, was marked for identification.)

10 MR. WUKELA: And I'm going to show you --
11 your counsel what's been marked.

12 MR. WILLIAMS: Yeah, I've seen that.

13 BY MR. WUKELA:

14 Q. Can you identify what's been marked as
15 Plaintiff's Exhibit 1?

16 A. It looks like a doctor's statement.

17 Q. Do you remember ever having seen that?

18 A. Huh-uh. No.

19 Q. Okay. Now, I'll represent to you that that
20 was produced to me by the Department of Transportation --

21 A. Right.

22 Q. -- in response to a subpoena, so that was a
23 document that the DOT had in Mr. Nero's file.

24 A. I won't get it. It goes to the office
25 then.

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1 Q. I'm with you. Okay.

2 A. We got a safety guy. Once a person is out,
3 whatever, then he takes over.

4 Q. Okay.

5 A. They don't come back to me until -- we get
6 them the safety guy, me and the boss, and say they could
7 return to the work, but as long as they're on a doctor's
8 care or whatever, I don't hear any more from him.

9 MR. WUKELA: Okay. Mark that as
10 Plaintiff's 2, please.

11 (PLF. EXH. 2, July 13, 2012, Letter from
12 Dr. Richey, was marked for identification.)

13 BY Mr. WUKELA:

14 Q. Given what you just told me, I think I know
15 what your answer is going to be to Plaintiff's Exhibit 2,
16 but have you ever seen that document?

17 A. No.

18 Q. Okay. I'll represent to you that's a
19 document that was in the DOT's files from Dr. Robert
20 Richey, who is Mr. Nero's family doctor --

21 A. Right.

22 Q. -- dated July 13, 2012, indicating Otis
23 Nero has been under Dr. Richey's care from June the 20th,
24 2012, and will continue to be until August the 1st, 2012.
25 During that time he will not be able to work.

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1 That — if that was in his file, that meant
2 it went directly through the office. It didn't go
3 through you?

4 A. Right. It won't come to me.

5 Q. And that wouldn't have been unusual?

6 A. No. That's the way we — they do — the
7 only thing I know, he's out. And, like I said, mostly
8 they will handle it from then on for us, the safety guy
9 who do the coordination or whatever. I don't — we don't
10 do the — do that.

11 MR. WUKELA: Mark that as Plaintiff's 3.

12 (PLF. EXH. 3, November 23, 2012, Return to
13 Work Slip, was marked for identification.)

14 BY Mr. WUKELA:

15 Q. One more. I think that's going to be the
16 same answer to that, too, but tell me if you can identify
17 Plaintiff's 3.

18 A. Yeah. It's a doctor's statement.

19 Q. Okay.

20 A. A doctor's care or whatever, they have to
21 bring in when they're out a period of time of work.

22 Q. You've never seen that one either before?

23 A. No, I don't.

24 Q. Once again, this came from the employer's
25 file from Florence Neurosurgery & Spine indicating that

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1. Mr. Nero was under their care for cervical stenosis.

2 Okay. And you didn't see that one either.

3 That would have gone directly to the --

4 A. It goes to the office.

5 Q. To the office.

6 Okay. Were you involved in any sort of
7 investigation about what happened on June the 20th and
8 why Mr. Nero continued to be out of work and why his
9 doctor was saying he had cervical stenosis?

10 A. No.

11 Q. Okay.

12 A. Because we never -- nobody never indicated
13 that he got hurt on the job.

14 Q. Okay. Well, do you know whether anybody
15 indicated he got hurt on, on the job?

16 A. Not to my knowledge.

17 Q. Okay.

18 A. On my part.

19 Q. Okay. You don't know whether the -- DOT
20 was aware that he had left work that day and had been in
21 the hospital and was having neck surgery?

22 A. DOT should have -- would have known. I
23 wouldn't. I don't know.

24 Q. Fair enough.

25 A. I wasn't, you know, aware of it.

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1 Q. Okay.

2 A. They didn't tell me anything about it.

3 Q. At some point the DOT asked you to prepare
4 a statement. Do you remember that?

5 A. Yes.

6 MR. WUKELA: Okay. I'm going to show you
7 what I'm marking as Plaintiff's 4.

8 And I keep -- I failed to show you these.

9 MR. WILLIAMS: Well, I'm familiar with all
10 of those.

11 MR. WUKELA: I know you have. I got them
12 from you, but it's still not the right way to do it.

13 MR. WILLIAMS: I'm with you. It's okay.
14 Got it.

15 (PLF. EXH. 4, Statement by Danny Bostick,
16 was marked for identification.)

17 BY MR. WUKELA:

18 Q. All right. Can you identify what that
19 document is?

20 A. Yeah. That's the statement I wrote out.

21 Q. Okay. Tell me how it came to pass that you
22 wrote that statement.

23 A. When we was notified that he was -- he
24 was -- he was out -- I don't know what happened. All I
25 knew, I got a call saying Nero called to the office

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1 saying he was looking for a check.

2 My supervisor, Greg, called me on his cell
3 phone, and I -- and I had the slightest idea what he was
4 talking about, so then, I guess, they started
5 investigating. We need to make out a statement. Then
6 they brought us up to speed that he said he got hurt on
7 the -- on the job.

8 Q. When did that happen, Mr. Bostick?

9 A. Whenever I made this statement out.

10 Q. And when was that?

11 A. I don't think it got the date on it when we
12 made it out -- or I made it out. Whenever he called to
13 the department and said he got hurt on the job, and
14 that -- that probably was over a year ago, so.

15 Q. Let me see -- would you mind letting me see
16 that for a second.

17 A. It just got the date on there when that
18 occurred.

19 Q. That -- that writing in the top right
20 corner, is that your writing?

21 A. Right there?

22 Q. Yes, sir.

23 A. No.

24 Q. Do you know what that writing means?

25 A. No.

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1 Q. It says 2012.

2 A. Yeah. 4525. What does that mean?

3 Q. I don't know.

4 A. I don't either.

5 Q. I don't know if it's a case number or
6 whether it has something to do with the date that
7 document was written. You don't know the answer to that
8 question?

9 A. No.

10 Q. And you don't remember the date you -- you
11 wrote that document?

12 A. The only time I wrote anything, when
13 they -- we -- it was brought to our attention that he
14 called to the department to say he got hurt on the job,
15 so then that's when our safety guy -- district safety
16 guys started investigating what's going on, trying to
17 find out was this eligible that happened, when it
18 happened, whatever.

19 And so we had to make a statement of it,
20 which we make them out any time a person said they got
21 hurt on the job. If anybody is involved in there, we
22 have to make a statement right then, right there, when
23 it -- whenever the paperwork is all sent.

24 Q. But you don't know when that was?

25 A. No.

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1 Q. It was over a year ago, I think you
2 testified.

3 A. I know it had to have been over a year ago.
4 That's the only time I ever got knowledge of it, that,
5 you know --

6 Q. Okay. That day he passed out, did you feel
7 like -- that there was any further reporting that was
8 necessary of that incident?

9 A. Well -- well, at the point, no, because we
10 asked him, and his words was -- to me was, I get dizzy
11 like that sometimes.

12 Q. So you felt like you shouldn't -- didn't
13 need to report it because it didn't look like that was
14 anything permanent?

15 A. No, because he complains about dizziness
16 sometimes on the job. He could be laughing, and he go,
17 Woo. Woo, I got dizzy. I don't know if it's from the
18 heat, whatever.

19 I don't know, because, like I said, he was
20 under the doc -- he goes to the doctor because he gets
21 off on the job to go to the doctor or whatever, so I
22 imagine he's got a medical doctor he was seeing about --
23 about whatever.

24 Q. Do you ever remember him complaining at any
25 time about neck pain or arm pain?

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1 A. Not to me, he hasn't.

2 Q. I'm sorry?

3 A. Not to me, he hasn't.

4 Q. Do you know whether he had to other people?

5 A. I wouldn't know.

6 Q. I'm going to show you what was marked as
7 Plaintiff's 5 — I'm sorry — Defendants' 5 to Mr. Nero's
8 deposition. I won't mark that again.

9 Have you ever seen that document before?

10 A. No.

11 Q. Okay. Do you know what that document is?

12 A. Not really.

13 Q. Do you know if it's a workers' compensation
14 form?

15 A. No, not nothing I ever seen. It could be.
16 I've never been on it, so I wouldn't know.

17 Q. Okay. The hands-on forms like that aren't
18 your job, anyway?

19 A. Certain points of it, once — once a case
20 is filed, I think what we call a 12B.

21 Q. Yes, sir.

22 A. The supervisor fills that out. That would
23 be the foreman out there. I would have filled one of
24 them out.

25 Q. Okay.

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1 A. He would do all his other paperwork,
2 meaning what he had to do.

3 Q. When the 12B gets filled out, how do you
4 know it's time to fill one out?

5 A. He would have come to me and said he got
6 hurt.

7 Q. He Mr. Nero?

8 A. Mr. Nero.

9 Q. Okay. There wasn't a 12B filled out that
10 day, though, that he passed out?

11 A. No.

12 Q. Okay. And the reason for that was that you
13 didn't feel like it was anything permanent?

14 A. Well, he never said he got hurt on the job.

15 Q. Well, now, wait a second.

16 A. He never --

17 Q. You saw him pass out that day on the job?

18 A. No. I can't say I saw him pass out. When
19 I looked around, he was on the ground, because I -- I'm
20 telling you, my back was turned to them. Him and Ben was
21 sitting on the passenger side of that pickup truck. My
22 back was to them.

23 I was talking to the guys up under the shed
24 like I'm talking to you. Him and Ben is back here behind
25 me. When the truck rocked -- because I was sitting

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1 sideways in the truck -- that's when I looked back there,
2 and he was leaning up on the truck like he had fell down.

3 Q. And you asked him or Durant asked him are
4 you okay?

5 A. Right.

6 Q. And he said he feels like he's okay?

7 A. And he said -- he said yeah, you know.

8 Q. Okay. And my question was, why wasn't a
9 12B filled out at that point?

10 A. First of all, he was -- Mr. Otis would have
11 to say he had been injured on the job. That's when we
12 take -- that's when it's up to them -- it's supposed to
13 be their part initially to say I cut my arm off, but if
14 I'm looking at him, I see he cut his arm off.

15 Q. That's what I was going to ask.

16 A. But if he have that type problem, I don't
17 know what's wrong with his body.

18 Q. Okay.

19 A. Because I can't visually see -- like a
20 man's arm hanging off or he got a saw and cut his hand or
21 leg, I can be -- I know we got -- first thing -- my first
22 initial would be get him to the hospital on a case like
23 that.

24 But when he do something like that, I don't
25 have -- if he don't say he hurt -- or we needed -- he

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1 goes to the office and say, well -- well, he don't even
2 have to ask me.

3 All he got to do, when he goes to the
4 office and say, well, I got hurt, a bee stung me or
5 whatever, wherever I'm at, that State phone is going to
6 ring. I'm coming back to that job. I could have been
7 home. I get to get back to the job. As long as he's
8 doing his part, I got to do mine.

9 So that wasn't nothing personal. That's
10 why the 12B wasn't ever made out.

11 Q. You haven't ever seen this Defendants'
12 Exhibit 5 to Mr. Nero's deposition, but you would agree
13 with me that by July of 2012 -- this document is dated
14 July the 9th of 2012, I think -- yeah, July the 9th.

15 By July the 9th, DOT was aware that
16 Mr. Nero had been out of work since June the 20th and
17 that he had to have neck surgery?

18 A. Would I have known that?

19 Q. No. No. I'm asking if you agree with me
20 that the Department of Transportation knew that.

21 A. I don't know, because I don't know what
22 paperwork he passed in to get to that point.

23 Q. Fair enough.

24 Well, I got this document from the
25 Department of Transportation.

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1 A. Right.

2 Q. So --

3 A. But I wouldn't have known.

4 Q. I'm -- well, I know. I'm not asking what

5 you knew. I'm asking whether you would agree with me

6 that, given this document, the Department of

7 Transportation would have known that.

8 MR. WILLIAMS: Objection to the form.

9 BY MR. WUKELA:

10 Q. Go ahead and answer.

11 A. That they would have known something then?

12 Q. Yeah.

13 A. I guess they would have start doing their
14 investigation.

15 Q. Okay. Do you know whether they didn't
16 start doing an investigation at that point?

17 A. No, I don't. Like I said, the only -- the
18 only thing that we ever heard of this is whenever that
19 initial call was made, and whoever they talked to, I
20 wouldn't knew all that. The only thing I knew, Greg, my
21 boss, called me and asked me about the situation.

22 Q. Fair enough. Fair enough.

23 And let me ask you one more thing. Listen,
24 Mr. Bostick, I know you didn't have this document,
25 Defendants' Exhibit 5. You've already told me that.

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1 A. Right.

2 Q. Okay. But if you had that, if Nero had.
3 brought it to you -- okay. Now, you knew he had been out
4 of work since that day he laid out and that this note
5 said that he had to have neck surgery. Would that have
6 triggered you to do an investigation?

7 A. Well, I would have went to the safety
8 coordination.

9 Q. Okay. Okay. Which is what you're --

10 A. -- suppose to do.

11 Q. -- supposed to do?

12 A. Yeah.

13 Q. Okay. And, actually, you didn't do that
14 that day when he passed out because you didn't know what
15 was wrong with him?

16 A. Exactly.

17 Q. Okay. And you had reason to believe that
18 he was okay. You had asked him and he said he thought he
19 was okay.

20 A. He was okay. Everybody walked out of the
21 gate, nothing else.

22 Q. Okay. Just bear with me for just one
23 second, Mr. Bostick, while I look at my records.

24 A. Uh-huh..

25 MR. WUKELA: Okay. I think those are all

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1 the questions I have. Please answer any questions
2 Mr. Williams has.

3 EXAMINATION

4 BY MR. WILLIAMS:

5 Q. All right. Mr. Bostick, based on what
6 happened on June 20, 2012, when you left for -- from work
7 that day after knocking off, do you -- were you given any
8 reason to be concerned about Mr. Nero's health at all?

9 A. No.

10 Q. No.

11 A. Because, like I said, he has said, you
12 know, he got -- he gets dizzy sometimes.

13 Q. Okay. During any point of his time with
14 DOT, since you've been there, has his -- has his
15 statements about his dizziness caused him to not work?

16 A. No.

17 Q. Has he -- did he ever complain to you about
18 those dizzy spells inhibiting his ability to perform
19 those jobs?

20 A. No.

21 Q. When he -- could you describe some of those
22 dizzy spells to us.

23 A. I mean, the -- the time I witnessed it, we
24 could be laughing or joking, cutting the crazy on the
25 job, and he'll -- to me it seemed like he laughs so loud,

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1 like he -- he'll get dizzy, and he -- I have seen him
2 grab his head and say, Whew, I'm dizzy.

3 So, man, you know, I don't -- I didn't pay
4 it any attention as, you know, he said that this is what
5 he goes through, so I don't know.

6 Q. So is it fair to say that every time that
7 he has had a dizzy spell, that you've seen, it came along
8 with him laughing hysterically?

9 MR. WUKELA: Well, no. That was flat
10 leading and not his testimony, Justin. So you try a
11 different way, not that you've led him. I suspect he'll
12 know what he's -- you're expecting of him, but go ahead.

13 BY MR. WILLIAMS:

14 Q. Whenever he's been dizzy, has he also been
15 laughing?

16 A. Yeah. That's the only time really I ever
17 known him to say he was dizzy, was like if he's laughing
18 or grinning or whatever, and, you know, we laugh, joke.
19 We go to -- he would do his job. We go to work.

20 Q. Okay. Did he ever make -- at any point did
21 he ever make any complaints to you about his neck
22 hurting?

23 A. No.

24 Q. What about his back?

25 A. Not to me, he never said anything about his

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1 back.

2 Q. What about his arms?

3 A. No.

4 Q. Has he always done his job in a manner that

5 would lead you to believe that he was fine or not

6 injured?

7 A. Yeah. As far as what I can see, you know,

8 what I operate, yeah, he did what he had to do.

9 Sometimes you have to calm him down, but as far as that,

10 he did what he was supposed to be doing.

11 Q. What do you mean by calm him down

12 sometimes?

13 A. He'll try to do things as what you call

14 straining working, you know. Like some guys overwork

15 themselves. Still let the machine handle it. He tries

16 to push a pipe, you know, manhandling stuff, which is why

17 when you've got equipment, you've got to let the

18 equipment do it.

19 Q. Now, how -- how many times have you seen

20 him do that?

21 A. I don't know the number. But by me out

22 there on the job, it's my part of the -- my job is to try

23 to keep everybody safe. When a person comes to work, I

24 want them to go back home the way they came. That's

25 my -- part of my job, so.

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1 Q. Okay. That's fair.

2 So on June 20, 2012, did you see him do any
3 of what you describe as straining work?

4 A. Well, I have -- I have stopped him because
5 he was the oldest guy mostly in the crew, and I have
6 younger guys, and I will tell him, give up that squeegee
7 board. Let one of them younger guys get a hold of that
8 board and do it.

9 Q. Okay.

10 A. And he will come off of it.

11 Q. So --

12 A. Because it's hot.

13 Q. Well, my question is very specific. On
14 June 20, 2012, the alleged date of injury, did you do any
15 of what you just described?

16 A. Yes.

17 Q. Okay. You told him to get off the squeegee
18 board?

19 A. Yes.

20 Q. Okay. Now, why did you do that?

21 A. It's hot, and I know he's an older guy, so
22 if I know I can -- we've got other people that can
23 relieve him, I try to take him off of that.

24 Q. Okay. Did he make any complaints to you
25 about not being able to perform his -- his job?

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1 A. No.

2 Q. Okay. Is it fair to say you did that out
3 of an abundance of caution?

4 A. Yeah. That's -- I try to protect the
5 people, too, at work. As far as doing our job, I also
6 take it personal to try to get them home safely.

7 Q. Okay. Now, what job did you put him on
8 after you took him off the squeegee board?

9 A. Basically he just took a break. He got up,
10 wiped the sweat mostly. It was hot. Like I said, it was
11 real hot out there. We was in the center of a field, no
12 trees, no nothing. He's hot.

13 So when I can -- if I see a guy on the
14 field like he's looking weary or like he's trying to get
15 overheated, I try to give them a break.

16 Q. So did he look weary and overheated?

17 A. Well, he looked hot to me, you know. Like
18 I said, it was a hot day. It was a hot day, I know. I
19 can remember that much of it. It was real hot, and, like
20 I said, I always try to look out, especially for the --
21 if they're older guys, ladies, whatever.

22 Q. Are there any ladies on your crew?

23 A. I have two ladies.

24 Q. Okay. Have you ever looked out for them in
25 the same manner?

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1 A. Yes, sir. Yeah, I really do.

2 Q. Okay. Did you do that for any of them that
3 day, the ladies?

4 A. They wasn't pulling no squeegee board.

5 Q. Okay.

6 A. They wasn't pulling it.

7 Q. Okay. Do you do that for anybody other
8 than the older members of the crew and the ladies?

9 A. No. I try to get all of them. Like I
10 said, I try to look out for all the people because I
11 can't function and do a job if they're home and we need
12 them there.

13 I've got 12 guys. I need 12 guys. I
14 probably need double that, but when they is not there,
15 they is not helping me or the department, because that's
16 what I need to do. I'm there to do a job, get paid, and
17 go home, but I also care about the people that work up
18 under me.

19 So I take it personally to try to look out
20 for everybody I can see and come in contact with. It
21 doesn't matter if it's a lady, older. Some of the
22 younger guys ain't as good as the older guys, so, you
23 know, age don't really matter a whole lot.

24 Q. I got you.

25 So when he took that break on June 20,

DANNY BOSTICK 03-17-2014

1 2012 -- you gave him an opportunity to take a break,
2 right?

3 A. Right.

4 Q. Okay. When he took that break, did he
5 drink water?

6 A. I don't know what he did after that.

7 Q. Okay.

8 A. I really -- I know he got up from there, so
9 I'm down there still watching the job.

10 Q. Okay.

11 A. I don't know what he did after that.

12 Q. Okay. Now, when he took that break, if
13 he -- if he wanted to, would he have an opportunity to
14 talk to you?

15 A. Yeah. Yeah.

16 Q. Okay. So hypothetically speaking, if he
17 were injured --

18 MR. WUKELA: When it starts with
19 hypothetically speaking, I'm going to object to
20 speculation. I'm sorry. I think I'm duty-bound, Justin.

21 MR. WILLIAMS: I got you. Can you strike
22 that.

23 BY MR. WILLIAMS:

24 Q. Did anyone report -- has anyone ever
25 reported an injury to you?

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1 A. Yes. Yeah.

2 Q. Okay.

3 A. Yeah.

4 Q. And once they made that report, what did
5 you do?

6 A. It all depends on where we're at and what's
7 going on, I mean, mostly. Like I said, if we was on the
8 road working, anyway, and one of my employees come to me
9 and said, Danny -- even a bee sting, I put them in the
10 truck, and we're going to Florence or wherever we at,
11 because I mostly work way out. I work mostly the
12 Pamplico area.

13 So I'm on the phone with the office letting
14 them know a way of what's going on. Either we're going
15 to take him -- if he allergic, we're getting him to the
16 hospital. If he's not allergic, we probably going by the
17 office, and we're going to start our paperwork.

18 And, you know, being on -- you know, at
19 that point it's up to them if they need to go see a
20 doctor's care or not. They have to -- they got that
21 option to say, yeah, I need to go see a doctor or, no, I
22 don't need to see a doctor, and they must sign.

23 Q. So have you done that before with a bee --
24 I've noticed you said bee sting.

25 A. Yeah.

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1 Q. So you have done that before?

2 A. Yeah.

3 Q. Okay.

4 A. Because I'm just taking -- this was

5 something simple to use.

6 Q. I got you.

7 A. But anything -- you know, anything -- any
8 time a man come to me and said I got hurt, if I'm there
9 on that job, even when I get a call, if somebody there is
10 responsible, put them in the truck. If they don't need
11 an ambulance, get them to the shop. We need to get them
12 care, you know.

13 Q. So is that -- is that known amongst your
14 crew members?

15 A. Yes. 9 -- 9 out of 10, if something
16 happens on that job -- and for the -- if I'm not there,
17 the phone is ringing or the radio is going off, so and so
18 happened. He falled in the ditch. He said he hurt his
19 arm or leg or whatever. We don't need an ambulance. Get
20 him in a truck, and I'll meet you at the hospital.

21 Q. Have you ever had any type of training or
22 conversation with all of your crew members or maybe even
23 with your crew members individually about what to do if
24 they get injured on the job?

25 A. They -- they do that amongst all the

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1 employees. They get safety training all the time, so,
2 yes, they know to -- and they tell them if a person is
3 out there bleeding to death, we need to be calling 911.

4 If -- you know, if it's not a threat
5 emergency, then we try to get them to the hospital. If
6 I'm not there, somebody else is going to get them in the
7 truck and get them to the hospital. On their way,
8 they're going to call me until they can get me. If they
9 can't get me, somebody in the office will meet them at
10 the hospital, but normally they get me and I'll meet them
11 there.

12 Q. Okay. And I'm just asking about you,
13 though, you and your member --

14 A. Yes.

15 Q. -- your 12-member crew.

16 A. That's right.

17 Q. Have you ever had a conversation with your
18 crew as a whole in your work shed --

19 A. Yeah.

20 Q. -- or individually --

21 A. Yes.

22 Q. About reporting injuries?

23 A. Yeah.

24 Q. Okay.

25 A. I think so.

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1 Q. Was -- was Mr. Nero ever present for any of
2 those discussions or talks?

3 A. Yes. And they know if you get injured,
4 we've got to get paperwork done. There is no ins. or outs
5 about it. We've got to do paperwork.

6 Q. Now, when you say paperwork --

7 A. That is filing a workers' comp case,
8 whatever. It's -- like I said, the B12, I do. They got
9 a package they have to do, what we call the first injury
10 of report. That's what they call it.

11 Q. Okay. So where would they go do that?

12 A. In the main office.

13 Q. Okay. So -- so is it possible that
14 initially you wouldn't even be brought in to a workers'
15 compensation matter until later?

16 A. No.

17 Q. So if someone on your crew is injured, you
18 would always know about that?

19 A. Yeah. I have to start the process, because
20 they ain't going to do most -- like I said, unless he --
21 he is taken in an ambulance and went straight to the
22 hospital, then it's -- you know, it's like whenever the
23 next day, whatever we can get them to do.

24 Q. Okay. I want to show you what has been
25 previously marked as Defendants' Exhibit Number 1. Do

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1 you recognize that document?

2 MR. WUKELA: We'll stipulate that he was
3 there and had that training to shorten stuff up.

4 MR. WILLIAMS: Okay. That's fine. That's
5 fine.

6 THE WITNESS: This looks like we had a
7 safety meeting that month. And everybody had to sign
8 that they've been into the safety meeting and saw what
9 was being presented, and they sign off that they was
10 there, and they was documenting that you was in that
11 meeting about -- and you was aware of what was going on
12 and what was being discussed about that safety meeting,
13 because we have one every Tuesday -- the second Tuesday
14 of every month.

15 BY MR. WILLIAMS:

16 Q. Okay. Now, what's the date on that?

17 A. June the 12th.

18 Q. Okay. And the -- and this is -- this is
19 Plaintiff's Exhibit 4. What's -- and this is your
20 statement, right?

21 A. That's my statement.

22 Q. And what's the date on that statement?

23 A. June the 20th.

24 Q. So that's about eight days away -- eight
25 days apart; is that fair --

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1 A. Yeah.

2 Q. -- to say? Right? About eight days?

3 A. That's right.

4 Q. Okay. So Mr. Nero would have had to be at
5 that meeting, right, or could he skip out on it?

6 A. If he called in, he wouldn't have been
7 there, but if his name is on this sheet, he had been
8 there.

9 Q. Okay. Would he have any opportunity to ask
10 any questions?

11 A. Yes. It's free for all.

12 MR. WILLIAMS: Okay. Okay. I think that's
13 all I have.

14 RE-EXAMINATION

15 BY MR. WUKELA:

16 Q. Just one real quick, Mr. Bostick.

17 A. All right.

18 Q. And I'm going to go back to this
19 Defendants' Exhibit 5 from Mr. Nero's deposition.

20 You never saw that thing, right?

21 A. No.

22 Q. Okay. It's dated and signed by Mr. Nero
23 July the 9th, 2012. He didn't give that to you?

24 A. No.

25 Q. If it -- it came from the employer's file,

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1 and it must have -- it's dated -- the fax top of it is
2 dated July 5, 2012, SCDOT, so that must have gone
3 directly to the main office and -- and cut you out of the
4 loop?

5 A. Exactly.

6 Q. Okay. The day he passed out, you didn't
7 feel like you needed to fill out any Form 12B because you
8 didn't know why he passed out, and he said he was all
9 right.

10 A. Exactly.

11 Q. But you didn't -- he didn't come back?

12 A. He never came back.

13 Q. You didn't know why he didn't come back?

14 A. No.

15 Q. Okay. If he had, on July the 9th, 2012,
16 brought you this document and it said he was out since
17 June the 20th, 2012, and he had to have neck surgery,
18 would that have triggered you to do an investigation, to
19 fill out a Form 12B?

20 A. Well, I would have went in the office and
21 got with Eric and Al Griggs. Al is our safety
22 coordinator. Eric is our boss. And we would have went
23 to investigating what we need to be doing in a situation
24 like that, you know.

25 Q. Okay. You would have considered that an

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1 indication there was a possible work-related injury that
2 we need to investigate?

3 A. I didn't know what it -- it would have --
4 could have been, you know. I wouldn't have known until
5 we got this. Then they would have start their process of
6 investigating how they go about notifying who they need
7 to notify and do their thing, because certain parts we'll
8 get out of the stage of it, when it gets -- starts going
9 up, you know, because I don't do the safety part of it.
10 They'll get to the safety coordinator. We got one in the
11 district. It goes to Columbia. It goes on to do their
12 thing.

13 Q. Yeah. But you didn't have that Exhibit 5.

14 A. No. It wouldn't have come to me. If he
15 would have brought -- unless he would have come on the
16 yard and brought it to me personally, it wouldn't have
17 come to me because they're supposed to go through the
18 office.

19 Q. But if it had --

20 A. We would have went back in the office.

21 Q. And you would have said let's -- let's go
22 through this work-related injury paperwork?

23 A. Yeah. We would have talked to the people
24 we needed to talk to, to get it -- get that -- get it
25 solved, whatever is going on.

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1 MR. WUKELA: Okay. Listen, Mr. Bostick, I
2 appreciate your time.

3 THE WITNESS: Thank you.

4 RE-EXAMINATION

5 BY MR. WILLIAMS:

6 Q. A few more questions regarding that -- that
7 form there.

8 A. Okay.

9 Q. Now, did you see anything over the course
10 of the day of June 20th -- and let me preface this
11 question.

12 You mentioned that if you were -- if you
13 would have saw someone get their arm chopped off, that
14 you would have -- you would have filled out a Form 12B
15 because you saw that and objectively --

16 A. Right. I can see that.

17 Q. Okay. Okay. And your testimony -- or your
18 testimony to that is because you see it, you -- you need
19 to report it.

20 A. I know what I've got --

21 Q. Is that fair to say?

22 A. Yes.

23 Q. Okay. Now, did you see anything on June
24 20, 2012, that would cause that -- where that would cause
25 you to say I need to file a Form 12B?

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1 A. No.

2 Q. Okay. You didn't see Mr. Nero suffer or
3 sustain any fall, injury, trip? You didn't see anything
4 by Mr. Nero that would initiate in your brain, if you
5 will, that you need to file a Form 12B?

6 A. No.

7 Q. No.

8 Okay. So as Mr. Wukela asked you, if you
9 were to receive that form -- that form there that he was
10 referring to -- what exhibit is that?

11 MR. WUKELA: It's Exhibit 5 to Nero's
12 deposition.

13 BY MR. WILLIAMS:

14 Q. Okay. Exhibit 5 to Mr. Nero's deposition,
15 if you were to receive that form there that said he
16 required neck surgery, would you have instantly filled
17 out a Form 12B then?

18 A. No.

19 Q. No.

20 Okay. And why is that?

21 A. We would have to investigate that.

22 Q. Okay.

23 A. Somebody would have to investigate to that
24 point, because you're talking about a whole different
25 period of time from when he left work and when that form

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1 probably was brought into our office.

2 Q. Okay. Okay. So -- so is it fair to say or
3 is it -- or are you -- and I know anything is possible,
4 but is it possible that someone conducted such an
5 investigation and maybe you were not privileged to that
6 investigation?

7 A. He had -- if they would have investigated,
8 it would have had to involve me to that point because
9 of -- it happened on -- on the site where I was at, you
10 know, so they would start with me --

11 Q. Okay.

12 A. -- what went on, what -- how and all this,
13 the same question.

14 Q. Okay. And -- and is it fair to say that
15 nothing like that happened until you wrote this
16 statement?

17 A. Exactly.

18 Q. Okay.

19 A. That's the first we ever known anything
20 about that.

21 Q. And that's Plaintiff's Exhibit 4. I
22 believe that came from Mr. Durant's -- no. This came
23 from your deposition.

24 A. That's mine.

25 Q. This deposition.

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1 A. Plaintiff's Exhibit 4.

2 Q. Okay. And this is the first time, and
3 you -- there is not a date here, is there?

4 A. No. I don't think a date was on it.

5 Q. Okay. And this is the first time that
6 anyone came to you regarding Mr. Nero and a work-related
7 injury?

8 A. That's right.

9 MR. WILLIAMS: Nothing further.

10 FURTHER RE-EXAMINATION

11 BY MR. WUKELA:

12 Q. But if you had received this, that would
13 have caused you to say I -- I need to do an investigation
14 on what this is all about?

15 A. Well, I would have brought it to the --
16 like I said, to Eric's attention and Al, which is why if
17 anything goes on, we've got to go through them,
18 especially when nothing was done at the time of -- they
19 are claiming.

20 Q. This form says Approximate date condition
21 commenced, and it says, Neck and syncope. Do you know
22 what syncope is?

23 A. Not sure.

24 Q. Syncope is passing out.

25 A. Okay.

1 Q. And then it goes on down here at the
2 bottom — and I'm looking at Page 2 — has to have neck
3 surgery. You didn't know any of that on June the 20th
4 when he passed out?

5 A. No.

6 Q. Okay. You didn't know it on July the 9th,
7 when this form was delivered to the DOT?

8 A. No.

9 Q. Okay. But if you had known that, it would
10 have caused you to — to be on notice that you needed to
11 do an investigation?

12 A. Yeah.

13 MR. WUKELA: That's all I've got. Thank
14 you for your time.

15 MR. WILLIAMS: That's it.

16 (The deposition concluded at approximately
17 1:24 p.m.)

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DANNY BOSTICK 03-17-2014

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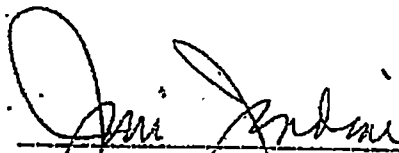
CERTIFICATE OF REPORTER

I, Janni Jardine, Court Reporter, and
Notary Public for the State of South Carolina at Large,
do hereby certify:

That the foregoing deposition was taken
before me on the date and at the time and location stated
on Page 1 of this transcript; that the deponent was duly
sworn to testify to the truth, the whole truth and
nothing but the truth; that the testimony of the deponent
and all objections made at the time of the examination
were recorded stenographically by me and were thereafter
transcribed; that the foregoing transcript as typed is a
true, accurate and complete record of the testimony of
the deponent and of all objections made at the time of
the examination to the best of my ability.

I further certify that I am neither related
to nor counsel for any party to the cause pending or
interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 22nd day of March, 2014, at Columbia,
Richland County, South Carolina.



Janni Jardine, Court Reporter,
Notary Public
State of South Carolina At Large
My Commission expires:
September 1, 2019

RETURN TO WORK OR SCHOOL
FLORENCE NEUROSURGERY AND SPINE, PC

ANDREW H. RHEA, M.D. • WILLIAM B. NASO, M.D.
JAMES J. BRENNAN, M.D. • CHRISTOPHER G. PARAMORE, M.D.
R. BLAKE KLINE, M.D.

1204 E. Cheves Street • Florence, South Carolina 29508
(843) 672-0122 • FAX: (843) 677-0227

Date 7/12/12

This is to certify that Mr Nero

has been under my care for the following:
Cervical Radiculopathy

and is unable to return to work school until after
Aug. 27-2012

Remarks _____

R. Blake Kline, M.D.

(Signature)

SS Form 6704

EXHIBIT
Lb...
317



Robert M. Richey Internal Medicine
Robert M. Richey, M.D.
Internal Medicine, Gastroenterology, Wellness

07/13/12

To whom it may concern,

Otis Nero has been under my care from 06/20/2012 and will continue to be until 08/01/2012. During this time, he will not be able to work.

Sincerely,

Robert M. Richey, MD

805 Pamlico Hwy., Suite B-230 • Florence, SC 29505
Office: (843) 679-4019 • Fax: (843) 679-4022

EXHIBIT
28
3-17-1
FENQAD 000-031-0509

RETURN TO WORK OR SCHOOL
FLORENCE NEUROSURGERY AND SPINE, PC

ANDREW H. RHEA, M.D. • WILLIAM B. NASO, M.D.
JAMES J. BRENNAN, M.D. • CHRISTOPHER E. PARAMORE, M.D.
ELIZABETH A. SNODERLY, D.O. • CHANNING D. WALDUGHEY, M.D.

1204 E. Charles Street • Florence, South Carolina 29508
(843) 673-0122 • FAX: (843) 673-0227

Date 11-23-12

This is to certify that

Qtis Nero

has been under my care for the following:

Acute Cervical Spondylitis

and is able to return to work on _____
or school on _____

Remarks Pt. had appt today
but physician had an
emergency. Pt. saw the
nurse & was rescheduled
for 11/16/13.

[Signature]
(Signature)

23 Form 0723

EXHIBIT
3
317
PERS/ID DIV-031-0000

On June 20-2012 I Danny Bostick
was seat in the truck about to go
home for the day. Otis Dero was
talk to Ben Durant on the pass side
of the truck, and fall down on his
knee and Ben Durant help Otis Der
up. I Danny Bostick ask Otis Dero
was he alright he said yes, I jke
got a little dizzy and we went
home.

Danny Bostick

PENGAD 800-881-5880
EXHIBIT
4 Bostick
317 411