

**THE STATE OF SOUTH CAROLINA**

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**In The Court of Appeals**

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**APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION**

Commission Appellate Panel

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WCC No.: 062913  
Appellate Case No. 2013-000437

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**SC Court of Appeals**

Fairfield County School System/SC School Boards Insurance Trust,..... Appellants,

v.

Gloria Parker, ..... Respondent.

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**INITIAL BRIEF OF APPELLANTS**

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## STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE FULL COMMISSION ERRED IN FAILING TO FIND THAT CLAIMANT SUFFERED A NONCOMPENSABLE, IDIOPATHIC INJURY WHERE CLAIMANT'S OWN DOCUMENTED INITIAL ACCOUNT OF THE INCIDENT, AS WELL AS THE DOCUMENTED ACCOUNT AND SWORN DEPOSITION TESTIMONY OF CLAIMANT'S EYEWITNESS, INDICATE THAT CLAIMANT TWISTED HER KNEE DUE TO SIMPLY "MOVING THE WRONG WAY" WHILE WALKING ON A LEVEL, FLAT, UNOBSTRUCTED SURFACE.
  
- II. WHETHER THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT'S ALLEGED INJURY TO HER KNEE AGGRAVATED AND WORSENERED HER PRE-EXISTING BACK PROBLEMS WHERE CLAIMANT'S DOCUMENTED MEDICAL HISTORY ESTABLISHES THAT SHE SUFFERED FROM AND SOUGHT EXTENSIVE TREATMENT FOR THE SAME PROGRESSIVE BACK PROBLEMS BEFORE AND AFTER THE ALLEGED ACCIDENT.
  
- III. WHETHER THE SINGLE COMMISSIONER AND FULL COMMISSION ERRED IN ALLOWING INTO EVIDENCE AND CONSIDERING IRRELEVANT, IMMATERIAL, AND INCOMPETENT EVIDENCE.

## STATEMENT OF THE CASE

This denied case was heard before the Single Commissioner on September 30, 2011. At the hearing, Gloria Parker (“Claimant”) alleged she sustained a work-related injury on October 19, 2006 when she twisted her right knee while getting up from a desk. Claimant further alleged that the injury to her knee caused her to suffer an altered gait which in turn aggravated her pre-existing back condition. Fairfield County School System (“the School District”) and the South Carolina School Boards Insurance Trust (collectively “Appellants”) denied the claim, maintaining that the Claimant’s October 19, 2006 injury to her right knee did not arise out of her employment with the School District; rather, the incident was idiopathic in nature, and, therefore non-compensable. Alternatively, Appellants asserted that even if Claimant’s October 19, 2006 injury is deemed compensable, Claimant suffered from extensive pre-existing back problems as well as a pre-existing altered gait, which conditions were not exacerbated by her knee injury within the meaning of the case, statutory, and regulatory law governing determination of the compensability of such injuries.

By order dated June 29, 2012, the Single Commissioner determined that Claimant “suffered a compensable injury to her right leg, aggravating her back, causing her leg and back pain, arising out of and in the course and scope of her employment with Fairfield County School System.” In reaching this determination, the Single Commissioner found the Claimant’s testimony at the hearing regarding how the accident occurred credible without addressing or determining the impact of Claimant’s own prior inconsistent and contradictory statements as to the mechanism of the injury. In determining Claimant’s credibility, the Single Commissioner also erroneously failed to recognize that Claimant’s own eye-witness’s deposition testimony contradicted rather than corroborated the account Claimant offered for the first time at the

hearing. The Single Commissioner also failed to make specific findings of fact based on medical documentation regarding the extent of Claimant's pre-existing back condition.

On appeal to the Full Commission, Appellants argued that the Single Commissioner erred in finding that the Claimant sufficiently established that she suffered a work-related injury to her right leg. Appellant's specifically challenged the credibility of the Claimant's account of the alleged accident as relayed, for the first time, by the Claimant at the hearing on the merits of this action. Appellants further specifically challenged the erroneous characterization of the deposition testimony of Claimant's eye-witness, Richard Woodle, as essentially corroborating the testimony the Claimant offered for the first time at the hearing on this matter with respect to the condition of the carpeting in the area where Claimant's alleged accident occurred. Further, Appellants asserted on appeal to the Full Commission that medical evidence in the record clearly establishes that the Claimant did not suffer a re-injury to or aggravation of her pre-existing back condition within the meaning of the applicable case and statutory law; rather Claimant's back condition was the same after the alleged accident as before the incident.

By order dated February 20, 2013, the Full Commission affirmed the Single Commissioner's order, again without directly addressing the inconsistent and contradictory accounts Claimant offered as to the mechanism of the accident and without correcting the erroneous finding that Claimant's eyewitness's testimony was consistent with the account Claimant offered for the first time at the hearing on the merits. This appeal followed.

## STATEMENT OF FACTS

### Medical History

Claimant's medical records establish that she consistently suffered from daily lower back pain, right leg pain/radiculopathy, and incidents of her right leg "giving way" since at least 1998. A November 23, 1999 MRI revealed degenerative facet disease at L4-5 and L5-S1. (Defend. APAs at 197). Claimant's medical records indicate that by at least 2000, she suffered from degenerative facet disease at L4-5 and L5-S1, lumbar radiculopathy, lumbar spondylosis, bone spurs, and arthritis in her lumbar spine. (Defend. APAs at 164-166, 176-178, 210) Symptoms resulting from Claimant's pre-existing lower back problems were severe enough to require that Claimant undergo lumbar epidural steroid injections and physical therapy beginning in 2000. (Defend. APAs at 165.)

Nonetheless, by February of 2002, Claimant's back condition had deteriorated to point that she had seen "many" doctors about her back, and reported to her regular physician that she was "very frustrated about her persistent lower back pain, which sometimes causes radiation down the right leg associated with numbness and tingling. Apparently she has been to many doctors for this and none of them have been able to tell her a cause other than some bone spurs in her lower spine. . . . She is very frustrated and unable to do her usual activities and is willing to try anything. . . . Chart reviewed and does show evidence of multiple consults including chronic pain referral and multiple imaging studies including MRI." (Defend. APAs at 161, 221). Claimant's complaints in 2002 led her physician opine he was unsure he could anything do to help her "considering the vast amount of resources that she has tried" including "multiple consults including chronic pain referral and multiple imaging studies including MRI." On

February 25, 2002, Claimant's physician increased the dosage of Claimant's medications, added a nerve pain medication to her regimen, and referred her to the Southeastern Spine Institute. (Defend. APAs at 161).

In March of 2002, Claimant was seen at the Southeastern Spine Institute for evaluation of persistent low back pain and right sided leg pain, with the history of pain being most prominent over the 2001-2002. A March 13, 2002 office note from Southeastern Spine Institute noted that an epidural injection failed to help Claimant at all. (Defend. APAs at 194) An MRI revealed facet arthropathy at L5-S1 lateralizing to the right with facet irregularity causing encroachment of the transiting L5 root. (Defend. APAs at 194). Her treating physician at the time recommended an injection in the facet articulation at the L5-S1 level lateralizing to the right. (Id.)

In April of 2002, Claimant returned to her treating physician at Southeastern Spine complaining of profound right sided hip and leg pain. (Defend APAs at 195) Dr. Poletti noted that an MRI of her sacroiliac joints was normal but the MRI of her lumbar spine showed definitive asymmetric facet arthropathy greater on the right with facet irregularity causing S1 root contact. (Defend. APAs at 195). Although Claimant alleges in her workers' compensation action that she has no recollection of ever having been considered surgical before the October 2006 incident, Dr. Poletti notes in his April 25, 2002 office note that "The option for this lady is decompressive laminectomy and fusion," but recommended that she first consult with a colleague about undergoing facet rhizotomy. (Id.) In December of the same year, Dr. Poletti referred to Claimant's back problems as "a severe lumbar spine condition." (Defend. APAs at 193).

Claimant's medical records reveal that by June of 2004, Claimant's back condition was such that her last lumbar injection had lasted only about 3 months and, despite a 65 pound weight loss, she was experiencing a progressive worsening of symptoms of lower lumbosacral pain which radiated down her right leg. By that time, Claimant already suffered from an antalgic gait favoring the right leg and was using a walking stick. (Defend. APAs at 192) Dr. Johnson at that time noted disc space narrowing and spondylitic change and spondylosis in the sacroiliac joint region. (Defend. APA's 192, see also 240-243, 245,249).

In December of 2004, Dr. Johnson noted the Claimant had experienced some relief from a right SI joint with a right LESI, but had a progressive return of symptoms and was reporting pain of 8/10 on the visual analogue pain scale. She was taking Codeine for pain relief. She continued to complain of her right leg giving way and was having difficulty particularly walking up steps. She continued to suffer from an antalgic gait favoring the right leg and had a positive straight leg raise on the right. Dr. Johnson assessed discogenic pain with radiculitis. (Defend APAs at 191).

One month later, in January of 2005, Claimant returned to Dr. Johnson complaining that her right SI joint injection had offered her a 50% reduction in pain for only about a week and her symptoms at the time of the January 2005 visit were "as bad as ever." At that juncture, Dr. Johnson released her from his care PRN and recommended PROLO therapy. (Defend. APAs at 190).

After being released from Southeastern Spine with her painful back symptoms being "as bad as ever" Claimant continued to treat for her progressive, unresolved back pain. Specifically, Claimant sought medical care at Carolina Spine Center in On November 22, 2005 complaining

of a three year history of lower back pain with right radiation down the leg with a recent episode of increased intensity and constancy. She indicated that pain caused her lower extremities to give away, and described her prior injections as lasting first up to a year, then 3 months, then 1 week. She had not had an injection for 1 year before visiting Carolina Spine Center. Dr. Eva Jane Rawl noted that the Claimant continued to suffer from an antalgic gait sympathetic to the right. (Defend. APAs at 323). Claimant indicated her back pain and leg pain in November of 2005 ranged from 7/10 to 10/10. And that the pain interfered significantly with, among other things, her mood (8/10), walking ability (10/10 - interfered completely), normal work (7/10), sleep (10/10), enjoyment of life (10/10), and ability to concentrate (10/10). (Defend. APA's at 323)

Claimant sought additional care at Carolina Spine Center on January 1, 2006 when she saw Dr. W. Daniel Westerkam complaining of continuing pain, reluctance to attend therapy as recommended by Dr. Rawl and Dr. Westerkam, and seeking a surgical evaluation. (Defend. APAs at 331)

Claimant sought surgical evaluation Columbia Neurosurgical Associates in February of 2006 at the recommendation of Dr. Barnett, for recommendations on management due to her ongoing symptoms. More than a year after being released PRN from Southeastern Spine with unimproved symptoms, Claimant continued to complain of bilateral leg radiation 7/10 pain in the lower back and 10/10 pain in the right hip and leg with subjective weakness in the right leg. She complained that the lumbar injections she'd received at Southeastern Spine had been of minimal or no help to her (contrary to her claims in this workers' compensation action), and complained that her pain was still getting progressively worse. Doctor Gunter at Columbia Neurosurgical noted that a 10/25/2005 MRI of the lumbar spine revealed degenerative disc disease at L3-4,

L5/S1, and showed lumbar stenosis at L3-4 with a right paracentral disc protrusion. (Defend. Amended APA's at 314-317, 331) Dr. Gunter recommended Claimant return to see Dr. Rawl (whom she had last seen in November 2005 for a lumbar injection)(Defend. Amended APAs at 316).

Claimant continued to treat for her back and continued to take Lortab until at least April of 2006, with no indication that her condition had improved or ceased being degenerative in nature. (Defend. APAs at 260).

### **October 19, 2006 Knee Injury**

According to Claimant's initial, documented account of her knee injury on October 19, 2006, Claimant stood up from her desk, "moved wrong," and twisted her knee. (Employee Report of Accident.) Claimant made no mention of any defects with the flooring at or near her workstation when she initially described the incident. (See ERA) Moreover, in response to a specific inquiry as to what could have prevented the alleged accident, Claimant answered "nothing." (Id.)

Richard Woodle, Claimant's eyewitness and assistant principle at the time of the alleged accident, testified by deposition, a transcription of which, along with several exhibits, was offered into evidence at the hearing on this matter. Mr. Woodle testified he was present at the time of Claimant's alleged accident, saw the incident occur, and, in fact, steadied her and prevented her from falling at the moment of the incident. (Woodle Deposition at 10) According to Mr. Woodle, the flooring in the area of the alleged incident was similar to "indoor/outdoor" carpeting and had a very low nap. (Woodle Depo at 34) Mr. Woodle, upon whose account of the

incident Claimant relies heavily, testified there was no tear, lifting, or other damage to the carpeting in the area where Claimant's alleged accident occurred. (Woodle Depo at 34) In fact, according to Mr. Woodle, the carpet in the area where Claimant was working was perfectly "flat." (Woodle Depo. at 35)

At the hearing before the Single Commissioner, Latongia Brown, Workers' Compensation and Benefits Coordinator for Fairfield County Schools, testified on behalf of the employer. Ms. Brown stated that the Employee Report of Accident (ERA) in Claimant's case was submitted to her two days after the alleged incident. (Tr. 10) The ERA indicated that the alleged accident was caused by Claimant "moving the wrong way" and indicated that "nothing" could have prevented the incident wherein Claimant twisted her knee. Upon receiving the ERA, Ms. Brown contacted the Claimant to discuss the content of the report in further detail, as was her normal practice. (Tr. 10) Ms. Brown recalled that upon asking Claimant for detailed information concerning the incident, Claimant stated she "basically got up from the desk, walked around the desk, and felt pain in her knee." (Tr. 10) Claimant's account as relayed to Ms. Brown was consistent with the information Claimant provided on the ERA. Ms. Brown indicated that she told the Claimant during the same conversation that she did not believe the accident, as initially described by the Claimant, would be compensable under workers' compensation.

## STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Full Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). On appeal from the Appellate Panel, this court may reverse or modify a decision if the findings or conclusions of the Appellate 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)(6)(e) (2005). This court cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact; however, a finding is not supported by substantial evidence if “there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” Lark, 276 S.C. at 136, 276 S.E.2d at 307. 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 Full Commission reached. Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996).

## ARGUMENT

- I. **THE FULL COMMISSION ERRED FAILING TO FIND THAT CLAIMANT SUFFERED A NONCOMPENSABLE, IDIOPATHIC INJURY WHERE CLAIMANT’S OWN DOCUMENTED INITIAL ACCOUNT OF THE INCIDENT, AS WELL AS THE DOCUMENTED ACCOUNT AND SWORN DEPOSITION TESTIMONY OF CLAIMANT’S EYEWITNESS, INDICATE THAT CLAIMANT TWISTED HER KNEE DUE TO SIMPLY “MOVING THE WRONG WAY” WHILE WALKING ON A LEVEL, FLAT, UNOBSTRUCTED SURFACE.**

In order to be entitled to workers' compensation benefits, the employee must show he or she sustained an “injury by accident arising out of and in the course of the employment.” S.C.Code

Ann. § 42-1-160 (1985). The term “arising out of” in the Workers' Compensation Act refers to the origin of the cause of the accident, while the term “in the course of” refers to the time, place, and circumstances under which the accident occurred. Owings v. Anderson County Sheriff's Department, 315 S.C. 297, 433 S.E.2d 869 (1993). “An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.” Id. If the injury can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct.App.1990), aff'd. 302 S.C. 518, 397 S.E.2d 377 (1990). Excluded from the Act, however, is an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. Jones v. Hampton Pontiac, 304 S.C. 440, 405 S.E.2d 395 (1991) (quoting Eagle v. South Carolina Electric and Gas, 205 S.C. 423, 32 S.E.2d 240 (1944)).

Where an employee suffers an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, furniture, or other objects such as would contribute to the effect of the fall, the majority of jurisdictions deny compensation. 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law § 12.14(a) (1997). The reasoning behind this viewpoint is that the basic cause of the harm is personal, and the employment does not significantly add to the risk. Thus, there is ample reason to assign the risk to the employee personally. Id. See Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) (wherein our Supreme Court adopted the viewpoint established by the line of cases denying compensation for such idiopathic level-floor falls in the absence of special conditions or circumstances). Denial of

compensation based on some internal breakdown of the body has also been extended by our courts to a situation that did not involve a level-floor fall. See Miller v. Springs Cotton Mills, 225 S.C. 326, 82 S.E.2d 458 (1954) (wherein our Supreme Court affirmed the denial of compensation based on failure to show an injury by accident where claimant was not walking across a level floor, but was rising from a seated position when she twisted her knee; noting there was no medical evidence to establish what caused the twisting of the knee, the court determined the injury was the result of some internal breakdown of the knee).

See Generally, Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 493, 499 S.E.2d 253, 256 (Ct. App. 1998) (holding claimant not entitled to benefits because claimant failed to show causal connection between her fall and her employment where evidence indicated that claimant fell while walking on level floor in employer's store).

In the instant case, the Full Commission's findings as to compensability are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Similar to the circumstances of Miller v. Springs Cotton Mills and Crosby v. Wal-Mart Stores, the evidence establishes that the Claimant's alleged injury, if any, was idiopathic in nature and not causally connected to the conditions under which she was required to perform her employment. With the sole exception of Claimant's own self-serving account of her injury, offered for the first time at the hearing on this matter, the evidence overwhelmingly establishes that Claimant was injured while simply walking on a level floor.

At the hearing before the Single Commissioner, Latongia Brown, Workers' Compensation and Benefits Coordinator for Fairfield County Schools, testified on behalf of the employer. Ms. Brown stated that the Employee Report of Accident (ERA) in Claimant's case

was submitted to her two days after the alleged incident. (Tr. 10) The ERA indicated that the alleged accident was caused by Claimant “moving the wrong way” and indicated that “nothing” could have prevented the incident wherein Claimant twisted her knee. Upon receiving the ERA, Ms. Brown contacted the Claimant to discuss the content of the report in further detail, as was her normal practice. (Tr. 10) Ms. Brown recalled that upon asking Claimant for detailed information concerning the incident, Claimant stated she “basically got up from the desk, walked around the desk, and felt pain in her knee.” (Tr. 10) Claimant’s account as relayed to Ms. Brown was consistent with the information Claimant provided on the ERA. Ms. Brown indicated that she told the Claimant during the same conversation that she did not believe the accident, as described by the Claimant, would be compensable under workers’ compensation.

Despite having the opportunity to fully explain the mechanism of her alleged accident both on the ERA and during her contemporaneous conversation with Ms. Brown, Claimant at no time indicated that her misstep was due to any defect in the flooring/carpeting in the area where she worked. To the contrary, in response to a specific inquiry as to what caused the alleged accident, Claimant stated she simply moved the wrong way. She made no mention of any defects with the flooring at or near her workstation when she initially described the incident. (See ERA) Moreover, in response to a specific inquiry as to what could have prevented the alleged accident, Claimant answered “nothing.” (Id.) Again, given ample opportunity at a time contemporaneous to the incident to describe any defect with the flooring which might have caused or contributed to the alleged accident, Claimant made absolutely no mention of any problem with the flooring at or near her work station.

The Full Commission's finding that Richard Woodle's testimony as to the condition of the flooring at the time of Claimant's injury was "consistent with" Claimant's testimony at the hearing is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Mr. Woodle, Claimant's eyewitness and assistant principle at the time of the alleged accident, testified by deposition, a transcription of which, along with several exhibits, was offered into evidence at the hearing on this matter. Mr. Woodle testified he was present at the time of Claimant's alleged accident, saw the incident occur, and, in fact, steadied her and prevented her from falling at the moment of the incident. (Woodle Deposition at 10) According to Mr. Woodle, the flooring in the area of the alleged incident was similar to "indoor/outdoor" carpeting and had a very low nap. (Woodle Depo at 34) Mr. Woodle, upon whose account of the incident Claimant relies heavily, testified there was no tear, lifting, or other damage to the carpeting in the area where Claimant's alleged accident occurred. (Woodle Depo at 34) In fact, according to Mr. Woodle, the carpet in the area where Claimant was working was perfectly "flat." (Woodle Depo. at 35) In response to a specific inquiry as to what about the condition of the carpet caused Claimant's foot to catch, Mr. Woodle responded:

A. I've had the same thing to happen many times, and I've -- I've often wondered, well, what caused that, you know. Just your foot just -- It just -- You just don't get it up high enough or it comes down to soon in the step, and it just -- it was just like -- just -- It just stopped. I mean her foot just hit, and it just stopped right there on the carpet.

Q. Okay, I mean, was there a part of the carpet that actually hung on her shoe? Was there like a --

A. No. There was no tear. There was no damage to the carpet. The carpet was --

Q. It was flat?

A. Flat. (Woodle Deposition at 35)

Neither the Claimant's initial account of the incident as reported on the Employee Report of Accident nor the Supervisor's Report that Mr. Woodle completed days after incident conflict in any way with Mr. Woodle's deposition testimony that the carpeting in the area where Claimant's alleged accident occurred was flat and undamaged. (See Woodle Depo. Exh.) To the contrary, the Supervisor's Report specifically includes questions as to whether "Unsafe Conditions" such as "improper maintenance," "slippery conditions," "poor housekeeping" or the like contributed to the reported accident. Mr. Woodle made no notation as to any unsafe condition with carpeting, such as lifting or ruffling, in the Claimant's work area because, as he testified time and again in deposition, no such condition existed at the time of the incident. Moreover, Mr. Woodle specifically stated that following the accident, nothing was done with respect to the carpet in the area where the incident occurred because "there was nothing to do," because the carpet was in no way irregular or damaged in Claimant's work area. (Woodle deposition at 33-34) In short, Mr. Woodle, Claimant's own eyewitness, was adamant that nothing was wrong with the carpeting in the Claimant's work area at the time of the incident that could have contributed to the Claimant's alleged accident.

Only after: 1) having given a contemporaneous Employee Report of Accident which made no mention of any defect, damage or irregularity of the flooring/carpeting in her work area; 2) denying that anything could have been done to prevent the accident from occurring (such as securing loose carpeting); 3) learning from Latongia Brown that the incident as initially reported was likely not compensable under workers' compensation; 4) retaining and consulting with an

attorney; and, 5) sitting in on Richard Woodle's deposition, did the Claimant for the first time at the hearing before the Single Commissioner, nearly six years after the incident, give an account wherein she alleged that the carpeting in her work area was "ruffle[d] up" from being vacuumed, causing her to stumble.<sup>1</sup>

While the credibility findings of the Full Commission are generally due and afforded great deference, recognized tenants of jurisprudence require that the findings of an adjudicative body be based on evidence rather than conjecture or surmise, and no tenant of jurisprudence requires this Court to ignore clear error in order to effectuate deference to the fact finder on matters of credibility. In light of the facts and circumstances set forth above, the Full Commission erred in finding the Claimant's account of the mechanism of her injury, presented for the first time at the hearing on this matter, credible. Claimant's self serving account offered at the hearing not only conflicts with her own initial and contemporaneous account of the accident, but also conflicts with the testimony of Robert Woodle. Further, the Full Commission erred in misapprehending the deposition testimony of Robert Woodle such that the Commission erroneously determined Woodle's testimony corroborated or was consistent with the Claimant's testimony when, in fact, his testimony regarding the condition of the flooring directly contradicted Claimant's account.

Accordingly, the Full Commission erred in failing to find that Claimant failed to establish that her injury arose out of her employment and the Order should, therefore, be reversed and an Order entered finding the Claimant's injuries not compensable. Alternatively, the matter should

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<sup>1</sup> Tellingly, the Claimant offered pictures of carpeting from her attorney's office (allowed into evidence over Appellants' objection on the ground of relevance) depicting a "loose string" in support of her claim; however, when Claimant's counsel inquired on direct examination whether the carpeting in her work area had a "loose string," presumably such as the one depicted in the Claimant's photographs, Claimant admitted there was no loose string and instead offered the account that the carpeting was ruffled. (Tr. 49-50)

be remanded to the Full Commission for further proceedings including specific factual findings supporting the conclusion that Claimant's testimony at the hearing was credible despite prior inconsistent statements regarding the mechanism of her alleged injury, and how the testimony of Richard Woodle can be deemed consistent with that of the Claimant despite the accounts being inapposite of one another.

**II. THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT'S ALLEGED INJURY TO HER KNEE AGGRAVATED AND WORSENERD HER PRE-EXISTING BACK PROBLEMS WHERE CLAIMANT'S DOCUMENTED MEDICAL HISTORY ESTABLISHES THAT SHE SUFFERED FROM AND SOUGHT EXTENSIVE TREATMENT FOR THE SAME PROGRESSIVE BACK PROBLEMS BEFORE AND AFTER THE ALLEGED ACCIDENT.**

Generally, a claimant's right to compensation for aggravation of a pre-existing condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001). With respect to Claimant's claim that the alleged accident in October of 2006 aggravated her pre-existing back claim, the record is replete with evidence indicating that not only did claimant suffer from pre-existing back problems prior to the alleged incident in October of 2006, but the progressive condition of Claimant's back was the same before the alleged incident as it was afterward, belying Claimant's disingenuous attempts to minimize her prior back problems within the context of this litigation.

Claimant testified, in support of her allegations that she is entitled to workers' compensation benefits due to the aggravation of her pre-existing back problems, that her back problems prior to October 2006 were "bearable" and adequately relieved with medications. She asserted she would get spinal injections that would afford her relief for over a year at a time. She

denied any recollection of having considered surgical intervention for her back problems prior to October of 2006.

Claimant's medical records give an entirely different account of the severity of her pre-October 2006 back problems. Claimant's medical records establish that she consistently suffered from lower back and right leg pain/ridiculopathy since at least 1998. She was advised that she suffered from bone spurs and arthritis in her lumbar spine. (Defend. APAs at 164-166, 176-178, 210) Claimant's lower back problems were severe enough to require lumbar injections and cause incidents of her right leg giving way dating back to at least 2000, when an MRI revealed degenerative facet disease at L4-5 and L5-S1. (Defend APAs at 165.) By February of 2002, Claimants back condition had deteriorated to point that she had seen "many" doctors about her back and reported to her regular physician that she was "very frustrated about her persistent lower back pain, which sometimes caused radiation down the right leg associated with numbness and tingling. Apparently she has been to many doctors for this and none of them have been able to tell her a cause other than some bone spurs in her lower spine. . . . She is very frustrated and unable to do her usual activities and is willing to try anything. . . . Chart reviewed and does show evidence of multiple consults including chronic pain referral and multiple imaging studies including MRI." (Defend. APAs at 221). Claimant's complaints in 2002 led her physician to refer her to the Southeastern Spine Institute.

In March of 2002, Claimant was seen at the Southeastern Spine Institute for evaluation of persistent low back pain and right sided leg pain, with the history of pain being most prominent over the 2001-2002. Despite Claimant's assertions in connection with her workers' compensation action that one injection would afford her a year's worth of relief from back pain

prior to the October 2006 incident, a March 2002 office note from Southeastern Spine Institute noted that an epidural injection failed to help Claimant at all. (Defend. APAs at 194) An MRI revealed facet arthropathy at L5-S1 lateralizing to the right with facet irregularity causing encroachment of the transiting L5 root. (Defend. APAs at 194). Her treating physician at the time recommended an injection in the facet articulation at the L5-S1 level lateralizing to the right. (Id.)

In April of 2002, Claimant returned to her treating physician at Southeastern Spine complaining of profound right sided hip and leg pain. Dr. Poletti noted that an MRI of her sacroiliac joints was normal but the MRI of her lumbar spine showed definitive asymmetric facet arthropathy greater on the right with facet irregularity causing S1 root contact. (Defend. APAs at 195). Although Claimant alleges in her workers' compensation action that she has no recollection of ever having been considered surgical before the October 2006 incident, Dr. Poletti notes in his April 25, 2002 office note that "The option for this lady is decompressive laminectomy and fusion," but recommended that she first consult with a colleague about undergoing facet rhizotomy. (Id.) In December of the same year, Dr. Poletti referred to Claimant's back problems as "a severe lumbar spine condition." (Defend. APAs at 193).

Despite Claimant's allegations in the context of her workers compensation claim that her pre-existing back problems were nowhere near as severe as her post October 2006 problems, her medical records reveal that by June of 2004, Claimant's back condition was such that her last lumbar injection had lasted only about 3 months and, despite a 65 pound weight loss, she was experiencing a progressive worsening of symptoms of lower lumbosacral pain which radiated down her right leg. By that time, Claimant already suffered from an antalgic gait favoring the

right leg and was using a walking stick. (Defend. APAs at 192) Dr. Johnson at that time noted disc space narrowing and spondylitic change and spondylosis in the sacroiliac joint region. (Defend. APA's 192, see also 240-243, 245,249).

In December of 2004, Dr. Johnson noted the Claimant had experienced some relief from a right SI joint with a right LESI, but had a progressive return of symptoms and was reporting pain of 8/10 on the visual analogue pain scale. She was taking Codeine for pain relief. She continued to complain of her right leg giving way and was having difficulty particularly walking up steps. She continued to suffer from an antalgic gait favoring the right leg and had a positive straight leg raise on the right. Dr. Johnson assessed discogenic pain with radiculitis. (Defend APAs at 191).

One month later, in January of 2005, Claimant returned to Dr. Johnson complaining that her right SI joint injection had offered her a 50% reduction in pain for only about a week and her symptoms at the time of the January 2005 visit were "as bad as ever." At that juncture, Dr. Johnson released her from his care PRN and recommended PROLO therapy. (Defend. APAs at 190).

Incredibly, when Claimant's former attorney later wrote seeking the opinions of the physicians at Southeastern Spine Institute in connection with Claimant's current workers' compensation action, the correspondence forwarded to the physicians indicated that "After 12/20/04, Mrs. Parker did not receive any further medical treatment for her back condition again at Southeastern Spine Institute until 2/29/07, which was just over 4 months after her knee injury on 10/19/06." (Defend. APAs at 182, 180-189) With this faulty premise, Claimant's former counsel sought and received opinions from Southeastern Spine physicians that Claimant's pre-

existing back problems were worsened by her knee injury “leading to her need medical treatment with Southeastern Spine Institute commencing again on February 26, 2007 and eventual low back surgery on 11/26/07, i.e., “disectomy/disc decompression, L4-5, L5-S1” and the need for continuing medical treatment through the present time.”

Importantly, and indicative of the overall manner Claimant has employed in seeking workers’ compensation benefits in the instant case, Claimant’s former attorney’s correspondences to the physicians at Southeastern Spine (as well as the opinions later rendered by those physicians) fail to account for, *inter alia*, the following vital facts:

- 1) Claimant was complaining of back pain being just as bad (profound) as it had ever been at her January 2005 visit when she was released PRN and advised to pursue further medical care for her ongoing, unimproved symptoms.**
- 2) While it is not clear whether claimant actually sought to undergo PROLO therapy, Claimant continued to treat for her back and continued to take Lortab until at least April of 2006 (Defend. APAs at 260)**
- 3) Claimant sought medical care at Carolina Spine Center in On November 22, 2005 complaining of a three year history of lower back pain with right radiation down the leg with a recent episode of increased intensity and constancy. She indicated that pain caused her lower extremities to give away, and described her prior injections as lasting first up to a year, then 3 months, then 1 week. She had not had an injection for 1 year before visiting Carolina Spine Center. Dr. Eva Jane Rawl noted that the Claimant continued to suffer from an antalgic gait sympathetic to the right. (Defend. Amended APAs at 323). Contrary to her**

attempts during this workers compensation litigation to minimize the severity of her pre-existing back problems, Claimant indicated her back pain and leg pain in November of 2005 ranged from 7/10 to 10/10. And that the pain interfered significantly with, among other things, her mood (8/10), walking ability (10/10 - interfered completely), normal work (7/10), sleep (10/10), enjoyment of life (10/10), and ability to concentrate (10/10).

- 4) Claimant sought additional care at Carolina Spine Center on January 1, 2006 when she saw Dr. W. Daniel Westerkam complaining of continuing pain, reluctance to attend therapy as recommended by Dr. Rawl, and seeking a surgical evaluation.
- 5) Claimant sought surgical evaluation Columbia Neurosurgical Associates in February of 2006 at the recommendation of Dr. Barnett, for recommendations on management due to her ongoing symptoms. More than a year after being released PRN from Southeastern Spine with unimproved symptoms, Claimant continued to complain of bilateral leg radiation 7/10 pain in the lower back and 10/10 pain in the right hip and leg with subjective weakness in the right leg. She complained that the lumbar injections she'd received at Southeastern Spine had been of minimal or no help to her (contrary to her claims in this workers' compensation action), and complained that her pain was still getting progressively worse. Doctor Gunter at Columbia Neurosurgical noted that a 10/25/2005 MRI of the lumbar spine revealed degenerative disc disease at L3-4, L5/S1, and showed lumbar stenosis at L3-4 with a right paracentral disc protrusion. (Defend. Amended APA's at 314-317, 331) Dr. Gunter

**recommended Claimant return to see Dr. Rawl (whom she had last seen in November 2005 for a lumbar injection)(Defend. Amended APAs at 316).**

Because evidence in the record clearly establishes that Claimant suffered from the same progressive back problems prior to her alleged injury in October of 2006 as she complained of after the alleged injury, and because the evidence fails to establish an actual “aggravation” or “worsening” of the claimant’s pre-existing back problems as contemplated by the governing case, statutory and regulatory law, the Full Commission erred in finding to the contrary and in basing an award of permanent and total disability on such findings. Accordingly, the Order should be reversed and an order entered denying the Claimant workers’ compensation benefits.

**III. THE SINGLE COMMISSIONER AND FULL COMMISSION ERRED IN ALLOWING INTO EVIDENCE AND RELYING UPON IRRELEVANT AND IMMATERIAL EVIDENCE.**

The Full Commission erred in affirming the Single Commissioner’s admission, over Appellant’s objection, of irrelevant and immaterial evidence into the record, including photographs of the carpeting from Claimant’s counsel’s office, which photographs are not relevant or material inasmuch as they do not depict the condition of the carpeting at the Claimant’s place of employment at the time the alleged injury occurred. Further, the Full Commission erred in affirming the Single Commissioner’s admission, over Appellant’s objection, and reliance upon medical and or vocational evaluation reports prepared in connection with and specifically relating to Claimant’s actions seeking Long Term Disability, Disability Retirement, or Social Security. Appellants have historically alleged, and continue to allege, that such documentation is irrelevant to Claimant’s workers’ compensation action inasmuch as other,

varying standards apply to the pursuant of benefits under statutory and regulatory schemes for other benefits programs.

**CONCLUSION**

For all of the foregoing reasons, the decision of the Workers' Compensation Commission should be reversed and an order entered denying workers' compensation benefits.

Respectfully Submitted,

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