

RECEIVED

Dec 05 2022

S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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

**Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner**

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2022-000003

Vickie Rummage, Employee,..... Petitioner,

vs.

**BGF Industries, Employer, and Great American Alliance Insurance Co.,
Carrier,..... Respondents.**

PETITIONER'S REPLY BRIEF

**Andrew N. Safran, Esquire
South Carolina Bar #4811
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
*Attorney for Petitioner***

Other Counsel of Record:

**David A. Wilson, Esquire
Wilson & Englehardt, LLC
200 Whitesett Street, Suite 100B
Greenville, South Carolina 29601
(864) 232-2329
*Attorney for Respondents***

INDEX

TABLE OF AUTHORITIES.....ii

I. ARGUMENTS.....1

 ARGUMENT A.....1

 ARGUMENT B.....3

 ARGUMENT C.....4

 ARGUMENT D.....7

 CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

CASES

<u>Bass v. South Carolina Dept. of Social Services</u> , 414 S.C. 558, 780 S.E. 2d 252, 261 (2015).....	1
<u>Brock v. Board of Adjustment and Appeals of the City of Rock Hill</u> , 308 S.C. 539, 419 S.E. 2d 773, 776 (1982).....	2
<u>Busby v. State Farm Mutual Automobile Insurance Company</u> , 280 S.C. 330, 312 S.E. 2d 716, 719 (Ct. App. 1984).....	5
<u>Clark v. Philips Electronics/Shakespeare</u> , 433 S.C. 186, 857 S.E. 2d 378, 381 (Ct. App. 2001).....	8
<u>Collins v. Doe</u> , 352 S.C. 462, 574 S.E. 2d 739, 743 (2002).....	6
<u>Conits v. Conits</u> , 422 S.C. 74, 810 S.E. 2d 253, 254 (2018).....	2
<u>Doe v. South Carolina Department of Health and Human Services</u> , 398 S.C. 62, 727 S.E. 2d 605, 611 n. 11 (2011).....	5
<u>Dreher v. South Carolina Department of Health and Environmental Control</u> , 399 S.C. 259, 730 S.E. 2d 922, 924 (Ct. App. 2012).....	3
<u>Hansson v. Scalise Builders of South Carolina</u> , 374 S.C. 352, 650 S.E. 2d 68, 72 (2007)...	1
<u>Hartzell v. Palmetto Collision, LLC</u> , 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016).....	1
<u>Holly v. Spartan Grain & Mill Co.</u> , 210 S.C. 183, 42 S.E. 2d 59, 64 (1947).....	7
<u>James v. Knotts</u> , 227 W. Va. 65, 705 S.E. 2d 572, 581 (2010).....	6
<u>Johnson v. Roberts</u> , 422 S.C. 406, 812 S.E. 2d 207, 210 (Ct. App. 2018).....	3
<u>Kearney v. State</u> , 184 Ga. App. 64, 360 S.E. 2d 633, 634 (1987).....	6
<u>Martin v. Bay</u> , 400 S.C. 140, 732 S.E. 2d 667, 675 (Ct. App. 2012).....	4
<u>Means v. Gates</u> , 348 S.C. 161, 558 S.E. 2d 921, 926 (Ct. App. 2001).....	8
<u>Michau v. Georgetown County</u> , 396 S.C. 589, 723 S.E. 2d 805 (2012).....	<i>passim</i>
<u>Niggel v. Sears, Roebuck and Company</u> , 219 Pa. Super. 353, 281 A. 2d 718, 719 (1971) ..	6

<u>Poston v. Southeastern Construction Co.</u> , 208 S.C. 35, 36 S.E. 2d 858, 860 (1946)	6
<u>Richland County v. South Carolina Department of Revenue</u> , 422 S.C. 292, 811 S.E. 2d 758, 767 (2018).....	6
<u>Smith v. NCCI, Inc.</u> , 369 S.C. 236, 631 S.E. 2d 268, 279 (Ct. App. 2006)	2
<u>South Carolina Farm Bureau Mutual Insurance Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group</u> , 353 S.C. 249, 578 S.E. 2d 8, 9 n. 1 (2003).....	7
<u>Sparks v. Palmetto Hardwood, Inc.</u> , 406 S.C. 124, 750 S.E. 2d 61, 63 (2013).....	5
<u>State v. Baroso</u> , 328 S.C. 268, 493 S.E. 2d 854, 855 (1997).....	7
<u>State v. Franks</u> , 432 S.C. 58, 849 S.E. 2d 580, 592 (Ct. App. 2020)	3
<u>State v. Ramsey</u> , 311 S.C. 555, 430 S.E. 2d 511, 516 (1993).....	5
<u>Stone v. Roadway Express</u> , 367 S.C. 575, 627 S.E. 2d 695, 698 (2006)	2
<u>Transportation Insurance Co. and Flagstar Corp. v. South Carolina Second Injury Fund</u> , 389 S.C. 422, 699 S.E. 687, 691 (2010).....	6
<u>United Technologies v. South Carolina Second Injury Fund</u> , 318 S.C. 213, 456 S.E. 2d 901, 904 (1995).....	5

STATUTES

S.C. Code Ann. Section 1-23-330 (1).....	7
S.C. Code Ann. Sections 42-1-172.....	1,5,6
S.C. Code Ann. Section 42-9-35	<i>passim</i>
S.C. Code Ann. Section 42-15-60	1

ARGUMENTS

A. MS. RUMMAGE ADEQUATELY PRESERVED HER CONTENTION RESPONDENTS HAD NOT REBUTTED HER CORROBORATIVE MEDICAL PROOF WITH COMPETENT EVIDENCE AS REQUIRED BY S.C. CODE ANN. SECTION 42-9-35 (2015).

In 2007, the legislature materially amended several statutes comprising the South Carolina Workers' Compensation Act to "create . . . an additional heightened standard" of proof for what it determined to be medically-driven issues. (See, Michau v. Georgetown ex. rel. South Carolina Counties Workers Compensation Trust, 396 S.C. 589, 723 S.E. 2d 805, 807 (2012); Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016); see also, Ex. S.C. Code Ann. Sections 42-1-172 (2015), 42-9-35 (2015), 42-15-60 (2015)). "Standard of proof" regulates the degree/level of factual proof to legally establish a position, claim, entitlement, etc. (See, Petitioner's Brief, pp. 20-21). As this Court has repeatedly recognized, the mere presence of evidence does not ensure satisfaction of the governing standard of proof. (See, Hansson v. Scalise Builders of South Carolina, 374 S.C. 352, 650 S.E. 2d 68, 72 (2007); Bass v. South Carolina Dept. of Social Services, 414 S.C. 558, 780 S.E. 2d 252, 261 (2015)).

Given the legislature's recognition certain remedies require "expert opinion or testimony stated to a reasonable degree of medical certainty", the focus is not on the admissibility of evidence, but rather whether it meets the "heightened standard of medical evidence" prescribed by Section 42-9-35. In view of this distinction between admissibility and compliance with the requisite standard of proof, the absence of objection to Dr. Gualtieri's report is inconsequential.

Additionally, while Respondents maintain "the Full Commission never held that . . . [Ms. Rummage] properly raised the Michau argument", the Appendix contents belie not only this assertion, but also any notion the Appellate Panel's amendment of the proposed order was simply an acknowledgment of her "exception to the Full Commission's instructions". Specifically, as

fully discussed on pages 14, 18-19 and 23 of Petitioner’s Brief: (a) the proposed appellate panel order prepared by Respondents’ counsel excluded any reference to Ms. Rummage’s assertion they had not complied with the requirements of Section 42-9-35 or the Michau decision; (b) this omission prompted the undersigned to seek clarification from the appellate panel through submission of a January 11, 2018 letter identifying the factual basis for his belief these issues had been preserved; (c) Respondents’ counsel, in turn, disputed these arguments had been preserved; and (d) when undeniably obliged to determine this preservation issue, the appellate panel revised the proposed order to recognize the vitality of Ms. Rummage’s assertions (including application of the Michau rationale) Respondents had not rebutted her corroborative medical evidence through submission of competent evidence in compliance with Section 42-9-35.

Ms. Rummage respectfully submits: (a) the appellate panel’s revision of Respondents’ proposed order can hardly be characterized as the mere reference of an exception to proposed order instructions; and (b) Respondents’ contrary contention misses the mark.

The fundamental inquiry in this context has traditionally required an issue be “raised and ruled upon by the commission”. Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695, 698 (2006); Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E. 2d 268, 279 (Ct. App. 2006). This Court has also adhered to a longstanding policy: (a) favoring application of “issue preservation rules with a practical eye and not in a rigid, hyper-technical manner”; and (b) elevating form over substance, whenever possible, to allow for merits determination of significant legal issues. See, Brock v. Board of Adjustment and Appeals of the City of Rock Hill, 308 S.C. 539, 419 S.E. 2d 773, 776 (1982) (substance will generally take precedence over technical rules in considering exceptions); Conits v. Conits, 422 S.C. 74, 810 S.E. 2d 253, 254 (2018).

The Court has similarly afforded substantial deference to the appellate panel, in recognition of the substantial evidence rule, on factual determinations. (See, Petitioner's Brief, p. 19). Recognition of this latitude is particularly relevant in this instance, as resolution of the preservation issue necessarily/materially entails a factual assessment; (b) "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation"; and (c) the panel's recognition these points were adequately raised (despite Respondents' pointed argument they were not) surely weighs heavily "in favor of preservation." See, Johnson v. Roberts, 422 S.C. 406, 812 S.E. 2d 207, 210 (Ct. App. 2018) (quoting Atlantic Coast Builders & Contractors, LLC v. Lewis, 730 S.E. 2d at 287) (Toal, C.J., concurring in result in part and dissenting in part); State v. Franks, 432 S.C. 58, 849 S.E. 2d 580, 592 (Ct. App. 2020).

Ms. Rummage would finally note the appellate panel's resolution of this preservation issue in her favor allowed her to pursue merits ruling of her contentions from the Court of Appeals, to the extent further analysis of Respondents' contrary position was not warranted in her Brief to that court. However, once Respondents attempted to contest preservation, she obviously timely replied to their assertions.

B. RESPONDENTS WERE OBLIGED TO PERFECT AN APPEAL TO PRESERVE ANY CONTENTION OF ERROR IN COONECTION WITH THE APPELLATE PANEL'S DETERMINATION AS TO THE SCOPE/BREADTH OF MS. RUMMAGE'S APPELLATE ISSUES.

The undersigned would initially note that while the Court of Appeals' Decision in Dreher v. South Carolina Department of Health and Environmental Control, 399 S.C. 259, 730 S.E. 2d 922, 924 (Ct. App. 2012) was affirmed by this Court, it further determined the Court of Appeals had misapprehended the law of the case doctrine. The undersigned apologizes for this inadvertent citation oversight.

During the same time frame, the Court of Appeals similarly ruled a respondents' failure to file a cross appeal on an issue directly addressed by the Master precluded them from contesting the issue on appeal. See, Martin v. Bay, 400 S.C. 140, 732 S.E. 2d 667, 675 (Ct. App. 2012). This Court subsequently denied certiorari on February 21, 2014.

In this instance, the respective parties affirmatively contested the issue relative to the breadth/scope of Ms. Rummage's appeal. As the appellate panel did not initially provide specific instruction on this point, Ms. Rummage was obliged to seek clarification. This request prompted Respondents' unqualified contention she had not preserved this argument. Notwithstanding Respondents' objection, the panel, in full compliance with Ms. Rummage's position, revised Respondents' proposed order to reflect its consideration of all issues she currently pursues on appeal.

It is respectfully submitted Respondents were required to seek cross-appeal of the appellate panel's rejection of their position to preserve any opportunity to dispute the preservation issue. As they did not do so, Ms. Rummage respectfully submits preservation could not be contested before the Court of Appeals and should be disallowed at this stage based upon the law of the case doctrine.

C. APPLICATION OF GOVERNING RULES OF CONSTRUCTION REVEALS: (A) SECTION 42-9-35 PRESCRIBES THE SAME HEIGHTENED STANDARD OF PROOF THIS COURT ADDRESSED IN MICHAU; (B) "EXPERT OPINION OR TESTIMONY STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY" IS REQUIRED TO REBUT CORROBORATIVE MEDICAL EVIDENCE SATISFYING THIS HEIGHTENED STANDARD OF PROOF; AND (C) MS. RUMMAGE ESTABLISHED A COMPENSABLE AGGRAVATION OF A PREEXISTING CONDITION IN THIS INSTANCE.

In Michau, this Court determined: (a) subsection C of this statute "expressly creates an additional heightened standard" in the context of repetitive trauma injury; (b) ". . . [t]he plain reading of the statute requires that 'opinion or testimony' must be 'stated to a reasonable degree of medical certainty'"; (c) a medical opinion "specially sought . . . [by an employer] . . . to decide

the compensability of . . . [an employee's] claim . . . constitute[d] . . . an 'opinion or testimony' that must be 'stated to a reasonable degree of medical certainty'; and (d) absent compliance with this heightened standard of proof, rebuttal evidence was not "competent". Michau, 723 S.E. 2d at 807 – 809.

Inspection of Section 42-9-35 unequivocally reveals the legislature: (a) likewise instructed aggravation of a preexisting condition "shall [be] . . . established by a preponderance of the evidence, including medical evidence"; and (b) defined the term "medical evidence" through exactly the same terms found in Section 42-1-172.

"The Workers' Compensation Act should be read *in pari materia* when possible." United Technologies v. South Carolina Second Injury Fund, 318 S.C. 213, 456 S.E. 2d 901, 904 (1995). It "must [also] . . . be presumed that the legislature intended to achieve a consistent body of law." Busby v. State Farm Mutual Automobile Insurance Company, 280 S.C. 330, 312 S.E. 2d 716, 719 (Ct. App. 1984); State v. Ramsey, 311 S.C. 555, 430 S.E. 2d 511, 516 (1993). To promote this consistency, the Court has further recognized "the same word should not be given disparate meanings within a single statutory scheme." Doe v. South Carolina Department of Health and Human Services, 398 S.C. 62, 727 S.E. 2d 605, 611 n. 11 (2011); Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E. 2d 61, 63 (2013).

Given this Court's prior construction of the term "medical evidence" in an identical context, Ms. Rummage respectfully submits: (a) the heightened standard of proof embodied in Section 42-9-35 necessarily requires an employer-solicited rebuttal opinion be "stated to a reasonable degree of medical certainty"; and (b) this construction constitutes a logical extension of the Michau analysis, rather than the "nonsensical . . . interpretation" alleged by Respondents. (See, Respondents' Brief, p. 31).

While Respondents also attempt to distinguish the requirements of Sections 42-1-172 (“must be determined”) and 42-9-35 (“shall establish”), “use of the words . . . ‘shall’ or ‘must’ . . . [uniformly expresses] the legislature’s intent to enact a mandatory requirement.” Collins v. Doe, 352 S.C. 462, 574 S.E. 2d 739, 743 (2002); Richland County v. South Carolina Department of Revenue, 422 S.C. 292, 811 S.E. 2d 758, 767 (2018). Their inordinate focus on admissibility similarly overlooks: (a) the fundamental distinction between admissibility and its competency to satisfy the applicable standard of proof (See, Petitioner’s Brief, p. 21; see also, Niggel v. Sears, Roebuck and Company, 219 Pa. Super. 353, 281 A. 2d 718, 719 (1971) (as “expert witness” testimony was the only evidence on causation, and it did not meet the required standards of proof”, judgment notwithstanding the verdict was warranted); Kearney v. State, 184 Ga. App. 64, 360 S.E. 2d 633, 634 (1987) (conviction overturned because admitted evidence “was not sufficient to meet the standard of proof”); James v. Knotts, 227 W. Va. 65, 705 S.E. 2d 572, 581 (2010) (verdict vacated where “evidence certainly does not satisfy the . . . [requisite] standard of proof”)); and (b) the Court’s recognition competency in this context nonetheless demands “an ‘opinion or testimony’ that must be ‘stated to a reasonable degree of medical certainty.’” (Michau, 723 S.E. 2d at 808 – 809).

Finally, Respondents’ contention Dr. Gualtieri’s opinions are unassailable is materially flawed, as: (a) this physician’s denial Ms. Rummage sustained a head injury is conflicts with the law of this case (See, Appendix, p. 33; see also, Transportation Insurance Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E. 687, 691 (2010)); (b) this statement (upon which substantially premises his ultimate conclusion) is wholly inconsistent with the physical facts of record; and (c) “a medical opinion which conflicts with the physical facts will not be permitted to control the determination of a factual controversy.” Poston v. Southeastern

Construction Co., 208 S.C. 35, 36 S.E. 2d 858, 860 (1946); Holly v. Spartan Grain & Mill Co., 210 S.C. 183, 42 S.E. 2d 59, 64 (1947).

D. THE ADMISSION OF THE MARCH 5, 2008 ORDER: (A) WAS LEGALLY ERRONEOUS PER THE LAW OF THIS CASE; (B) NOT ONLY ADDRESSED MS. RUMMAGE'S CREDIBILITY, BUT ALSO PREJUDICIALLY IMPUGNED THE CREDIBILITY OF DR. FRED D. MCQUEEN, JR., A KEY MEDICAL EXPERT WHO OFFERED OPINIONS FROM A UNIQUE PERSPECTIVE WHICH COULD NOT BE REPLICATED BY ANY SUBSEQUENT EVALUATOR; (C) THE ABSENCE OF ANY REFERENCE TO THESE DISPOSITIVE OPIONIONS BY THE APPELLATE PANEL CERTAINLY VALIDATES THIS PREJUDICIAL IMPACT; AND (D) THIS ERROR CANNOT BE REASONABLY CHARACTERIZED AS HARMLESS.

Although Respondents attempt to challenge the Court of Appeals' ruling admission of the March 5, 2008 order was legally erroneous, Respondents did not challenge this holding through Petition for Writ of Certiorari to this Court. The Court of Appeals' determination admission of this Order was inconsistent with the provisions of S.C. Code Ann. Section 1-23-330 (1) (2005), to the extent "a harmless error analysis" was warranted, is consequently the law of this case. See, State v. Baroso, 328 S.C. 268, 493 S.E. 2d 854, 855 (1997); South Carolina Farm Bureau Mutual Insurance Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 353 S.C. 249, 578 S.E. 2d 8, 9 n. 1 (2003).

While the erroneously admitted order may well be cumulative relative to aspects of Ms. Rummage's credibility, it cannot be legitimately argued the contents of this order do not include a legally impermissible attack on Dr. McQueen's credibility. The significant impact of this taint is highlighted by the facts: (a) despite initial concerns as to her credibility, Ms. Rummage's **authorized treating physician (Dr. Daniel L. Collins) nonetheless acknowledged** during the early stages of her lengthy period of treatment that **"a long-term physician would be able to give the best information about the progression of her"** psychological condition following the May 18, 2012 compensable trauma (See, Appendix, p. 617); (b) **Dr. McQueen (Ms. Rummage's long-**

term physician) verified her psychological distress had, to a reasonable degree of medical certainty, been aggravated by this compensable trauma; (c) Dr. Collins ultimately validated (“to a reasonable degree of medical certainty”) not only the aggravation of her preexisting depression/anxiety, but also the validity/credibility of Ms. Rummage’s current symptoms (See, Appendix, pp. 326 – 337); and (d) none of these uncontradicted facts are referenced in either the single commissioner’s or appellate panel’s orders. (Emphasis added).

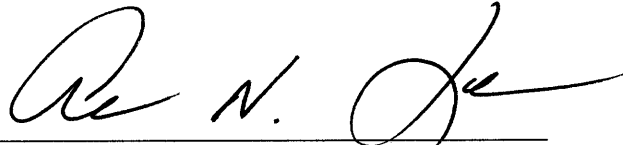
This silence is actually quite deafening given: (a) the undeniable materiality of Dr. McQueen’s unique perspective as a “before and after” treating physician; (b) the single commissioner’s/appellate panel’s failure **to even mention** Dr. Collins’ change of heart after substantially **relying upon his early credibility concerns as a basis for the underlying ruling;** (c) erroneous inclusion of the March 5, 2008 order’s commentary “on the credibility of Dr. McQueen, a key medical provider in the present case”, in the hearing record (See, Appendix, p. 578); and (d) the absence of any plausible rationale for ignoring Dr. McQueen’s legally competent corroborative causation opinions **other than summary dismissal of their import based upon the adverse credibility comments contained in the March 5, 2008 Order.**

An adverse credibility finding “does not make all of the parties’ other evidence incredible”. Clark v. Philips Electronics/Shakespeare, 433 S.C. 186, 857 S.E. 2d 378, 381 (Ct. App. 2001). Review of the record reveals nothing suggesting the opinions expressed by Dr. McQueen are unfounded, while validating they are absolutely essential to the proper adjudication of the pending dispute, as **“no equivalent” perspective on the aggravation issue exists.** See, Means v. Gates, 348 S.C. 161, 558 S.E. 2d 921, 926 (Ct. App. 2001) (Emphasis added). These factors preclude characterization of this error as harmless.

CONCLUSION

Ms. Rummage respectfully submits she has established the compensability of her aggravated psychological injury component per Section 42-9-35 as a matter of law and requests the respective decisions of the Court of Appeals and appellate panel be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. N. Safran", written over a horizontal line.

Andrew N. Safran, Esquire, SC Bar #4811
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Attorney for Petitioner

Columbia, South Carolina
December 5, 2022