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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Court of Appeals Opinion No. 2023-UP-291
(Filed August 9, 2023; Rehearing denied September 21, 2023)

Doretta Butler-Long, Employee, Claimant.....Respondent,

v.

ITW Labels, Employer, and American Zurich Insurance
Company/Zurich North America c/o Broadspire, Carrier Petitioners.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

CERTIFICATE OF COUNSEL	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
BACKGROUND FACTS.....	3
STANDARD OF REVIEW	15
ARGUMENTS	
I. The Court of Appeals misapplied the proper standard of review	16
II. The Court of Appeals conducted an independent review of the evidence and reaching its own factual conclusions based on its weighing of conflicting evidence.....	19
A. The medical records and testimony in this case constitute substantial evidence supporting the Commission Decision.....	20
B. Petitioners were not required to introduce an expert opinion opposing that of Dr. Mazoue in order to disprove Claimant's case.....	22
III. The Court of Appeals misapplied this Court's ruling in <i>McGuffin v.</i> <i>Schlumberger-Sangamo</i> , 307 S.C. 184, 414 S.E.2d 162 (1992) to the facts of this case	33
CONCLUSION.....	36

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that its Petition for Rehearing was filed on August 24, 2023, (Appx. pp. 14-21), and finally ruled on by the Court of Appeals on September 21, 2023. (Appx. p. 1).

QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR BY MISAPPLYING THE PROPER STANDARD OF REVIEW?
- II. DID THE COURT OF APPEALS ERR BY CONDUCTING AN INDEPENDENT REVIEW OF THE EVIDENCE AND REACHING ITS OWN FACTUAL CONCLUSIONS BASED ON ITS WEIGHING OF CONFLICTING EVIDENCE?
- III. DID THE COURT OF APPEALS ERR IN ITS APPLICATION OF *McGUFFIN v. SCHLUMBERGER-SANGAMO*, 307 S.C. 184, 414 S.E.2D 162 (1992) TO THE FACTS OF THIS CASE IN ORDER TO REVERSE THE COMMISSION DECISION?

Pursuant to Rule 242, SCACR, Petitioners Illinois Tool Works d/b/a Central Label Products and American Zurich Insurance Company/Zurich North America c/o Broadspire respectfully request that this Court grant this Petition and review the Court of Appeals' Opinion No. 2023-UP-291(Ct. App. filed August 9, 2023). The Court of Appeals exceeded the proper standard of review on appeal, making its own findings of fact, some of which are entirely unsupported by the evidence. The Court of Appeals conducted its own, independent review of the evidence, weighing the medical evidence and reaching its own findings of fact even though the Commission's determinations are supported by substantial evidence. In addition, the Court of Appeals misapplied *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992), to the facts of this case in order to overturn the Commission Decision.¹

¹ Petitioners agree with the Court of Appeals' determination that the record does not support Claimant's theory of a repetitive injury and do not seek rehearing of that part of the Opinion.

STATEMENT OF THE CASE

Respondent Doretta Butler-Long, Claimant below (“Claimant”), filed a Form 50 alleging an injury by accident and/or repetitive trauma to her right shoulder, right arm, right hand and neck that she asserted occurred on April 13, 2012. She alleged she had been injured by the “[r]epetitive motion of lifting materials, inspecting them and running jobs through a laminating machine,” although she also checked the “injury” box. (R. pp. 47-48). On March 7, 2016, she filed another Form 50, alleging the same injury to the same body parts, and requesting a hearing. (R. pp. 49-50).

Petitioners filed a Form 51, denying the claim. Petitioners asserted that Claimant was unable to meet her burden of proving a compensable injury. (R. p. 51).

The parties filed Form 58 Pre-Hearing Briefs and APA submissions. (R. pp. 52-55) (R. p. 317). An attachment to Claimant’s Form 58 alleged that she had injured herself on April 10, 2012, “while lifting laminate,” which injury was exacerbated by continued “repetitive use of lifting heavy materials and running them through a machine culminating in inability to work after April 13, 2012.” In particular, she asserted that, on April 10, 2012,² “[a]s she was lifting a load, Butler felt pain in her right arm coming from her shoulder and neck.” She alleged that she continued to work but her “fingers started going numb” and, on April 13, 2012, she went to the emergency room at Providence Hospital. (R. p. 53).

The Court of Appeals also correctly determined that Claimant’s “dead zone” argument is unpreserved for appellate review, as it was never raised below.

² It is unclear whether Claimant alleges she injured her shoulder by accident on April 10 or April 11, 2013, although it appears that she means to allege an April 11, 2013 accidental injury. *See* (R. p. 413, lines 2-5 (“I didn’t notice until that Wednesday or on the 11th or the 10th, whichever day the Wednesday before the 13th.”)) (Appx. p. 30 (alleging an April 11, 2013 incident)). The exact date of her alleged injury is not outcome determinative.

The parties were heard by Commissioner Gene McCaskill on August 30, 2016. After hearing Claimant's testimony and reviewing all of the medical evidence in the case, Commissioner McCaskill concluded that, viewing the evidence as a whole, Claimant had failed to meet her burden of proving a compensable injury under either S.C. Code Ann. § 42-1-160 or S.C. Code Ann. § 42-1-172. (Decision and Order, filed Jan. 9, 2017, R. pp. 1-19) ("Single Commissioner Decision").

Claimant appealed to the Full Commission, raising nine issues. (R. pp. 318-319). In a decision filed June 14, 2017, the Appellate Panel of the Full Commission affirmed the Single Commissioner Decision with amendments. Like the Single Commissioner, after viewing the evidence as a whole, the Commission found that Claimant failed to meet her burden of proving a compensable injury under either Section 42-1-160 or Section 42-1-172. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed June 14, 2017, R. pp. 20-46) ("Commission Decision").

Claimant timely appealed to the Court of Appeals, which heard oral argument on February 3, 2020. On August 9, 2023, the Court of Appeals issued an unpublished opinion, Opinion No. 2023-UP-291, affirming the Commission's finding that Claimant failed to prove a repetitive trauma injury, but reversing the Commission's finding that Claimant failed to meet her burden of proving an accidental injury by accident to her right shoulder on April 11, 2012. Petitioners sought rehearing which was denied on September 21, 2023.

BACKGROUND FACTS

Claimant began working for ITW in 2000. (R. p. 408, lines 9-13). Her title was laminator inspector: "I mostly laminated and inspected my material all day long." She testified that she ran four different types of laminating machines. (R. p. 409, lines 8-23). She explained

her job duties as follows: "I got my material, I ran the machines, I ... ran my decals and things like that, but if I had to go on the other side, just inspected things, I looked at them The first thing I would do, I will pick up my job jacket to see what I need to do the job ... It depends on what the job jacket say I need to do to the job. I go get that type of material, whatever material it needs. Once I get the material, if it's a printed job, I pull the sheets from off the shelf and put it ... on my table, and once I get to my table, if it's a roll I need to pick up, I put the roll on the machine, but if it's not – it depends on what kind of material it needs is what type roll I need to put up or if I need to put up one at all, and then I just run the material." (R. p. 323, line 7 – p. 324, line 6) (R. p. 410, line 7 – p. 411, line 6). Claimant testified that some of the rolls of adhesive weighed "about 300 pounds," (R. p. 411, lines 22-23), and that, although at one time they had lifted them mostly by hand, they "eventually" had gotten a lift. (R. p. 324, line 23 – p. 325, line 8). Claimant primarily ran her machine but also did some hand lamination. (R. p. 325, line 21 – p. 326, line 3).

Claimant testified alternately that she was injured, "[a]s a result from lifting the heavy rolls," (R. p. 328, lines 12-13), and "[f]rom lifting the rolls and from the repetitive of just sending it through the machine from the rolls." (R. p. 412, lines 18-21). She recalled that, on the day she first noticed pain in her right upper extremity, she was lifting and running sheets of material. (R. p. 329, lines 9-12).

Claimant testified that her pain started at work. (R. p. 413, lines 10-13). "At first it was just hurting. Just hurting. After a while it was just from—this whole right side just start throbbing, throbbing like a toothache. Just throbbing, throbbing. Sometimes it just feel like something sitting on my shoulder and just sits there." (R. p. 414, lines 1-6). Claimant testified that she did not know that her injury was work-related because she "was really not diagnosed

with my right rotator cuff until August.” (R. p. 332, lines 10-13; p. 334, lines 23-25 (Claimant testified that she did not inform her physicians she had been injured on the job because, “[a]t that time, I still didn’t have no diagnosis”)) (R. p. 415, lines 4-6 (“I didn’t think that it came from the job. I just thought I was hurting those days until I find out the right diagnosis”))).

She worked the next two days and then went to the Providence Emergency Room on April 13, 2012, after she noticed her hand and fingers going numb. (R. p. 330, line 7 – p. 331, line 14). Notes from the Providence ER indicate that, on April 13, 2012, Claimant complained of “right sided shoulder and forearm pain x3 days. pain worse to touch or movement. pt feels better with holding shoulder adducted with elbow flexed. pt denies any trauma. no swelling in this arm. pain described as throbbing. pt has job in which she has repetitive arm movements.” (R. p. 58). Her right shoulder, right forearm and chest were x-rayed, with normal results. She was given Percocet and a sling. (R. p. 414, line 20 – p. 415, line 8) (R. pp. 57-66). The ER notes do not reflect Claimant reported that her pain began while she was at work, and Claimant acknowledged that she did not tell the ER physicians that she had been injured at work. (R. p. 333, lines 15-19) (R. p. 428, line 1 – p. 429, line 1).

On April 17, 2012, she sought treatment at Palmetto Health Richland ER, reporting “right arm pain that has been going on for a week She states that she does not know what is causing this pain but is just causing some concern.” Claimant “denie[d] any trauma to her arm.” She was diagnosed with right upper extremity pain and muscle spasm. Again, the notes do not reflect Claimant reported that her pain began at or was associated with her work. (R. pp. 72-76).

She returned to Palmetto Health ER on April 24, 2012, complaining of arm pain “radiating from the neck all the way down to the arm.” The notes do not reflect Claimant reported that her pain was associated with or began while she was at work. (R. pp. 77-80). An

MRI of Claimant's neck revealed mild degenerative changes at C5-6. An x-ray and MRI were performed on her right shoulder. (R. pp. 80-87).

Claimant was seen by Dr. Mark Shaffer, a resident at Palmetto Health Family Medical Center on April 27, 2012, complaining of pain that started on the right side of her chest and migrated to her right clavicle and up her right arm, with tingling down her arm and into her fingers. The notes indicate, "[s]he recalls no injury," and do not reflect that she reported that her pain began at work. (R. pp. 93, 89-90) (emphasis added).

She returned to Palmetto Health Family Medical Center on May 2, 2012 complaining of "upper extremity pain" in the "right and upper arm(s)." Although Claimant reported that the pain had begun four weeks prior, the notes report that it "occurred not following a fall, not during sports and **not in association with work.**" Her symptoms included "Joint Pain, Muscle pain, Decreased range of motion, No trauma." (R. p. 94) (emphasis added). Dr. Simon Tanksley, another resident, indicated that her mood was "Depressed, Sad, Tearful," and reported that Claimant was "asking for me to sign disability papers and refill percocet Rx from ER. Very suspicious for malingering, will get MRI." (R. pp. 95-96). A cervical MRI performed on May 9, 2012 showed mild stenosis at C5-6. (R. p. 98).

On May 11, 2012, Claimant returned to Palmetto Health Family Medical Center and saw Dr. Tanksley. Notes from that visit indicate she reported pain in her upper right extremity that had begun a month previously. Dr. Tanksley noted that her pain "occurred not following a fall, not during sports and **not in association with work.**" (R. pp. 99-101) (emphasis added).

Claimant saw Dr. Tanksley again at Palmetto Health Family Medical Center on May 15, 2012. Notes from that visit indicate she reported pain in her upper right extremity that had begun

a month previously. Dr. Tanksley noted that her pain “occurred not following a fall, not during sports and **not in association with work.**” (R. pp. 102-104) (emphasis added).

Claimant filled out a Short Term Disability form which she signed on May 11, 2012. On the form, Claimant checked or had checked on her behalf a statement that her right arm condition was not work related. (R. pp. 303-308). Claimant testified that her husband filled out the bottom of the page at R. p. 303, but she was present when he filled it out and she signed the form at the bottom. (R. p. 308) (R. p. 419, line 17 – p. 420, line 22; p. 442, line 13 – p. 443, line 10).

Claimant saw Dr. Raymond C. Sweet, a neurologist, on May 31, 2012. The intake form filled out for this visit indicate Claimant presented with a chief complaint of “extreme pain in right arm & shoulder.” (R. p. 123). Dr. Sweet reviewed the MRI of Claimant’s cervical spine, which he concluded showed an “asymptomatic cervical disk bugle [sp] at C5-6.” His opinion was that Claimant had “shoulder pathology on the right of some sort,” and that he did “not feel that she has a neurosurgical problem.” Dr. Sweet’s notes do not indicate that Claimant reported that her pain started at work or had any relationship to her work. (R. pp. 122-126) (*See also* R. p. 434, lines 1-8 (Claimant agreeing she did not tell Dr. Sweet her problems were related to her employment)).

She was seen again at Palmetto Health Family Medical Center on June 1, 2012, indicating her pain had begun a month earlier, occurred with movement but was “not following a fall.” Dr. Tanksley’s medical notes remark on her “bizarre presentation,” and indicate that neurosurgery did not think her pain was associated with cervical stenosis but that it was “more of orthopedic shoulder problem.” Dr. Tanksley indicated a referral to orthopedics. (R. pp. 106-108). Again, the notes do not indicate that Claimant reported that the pain was associated with or began while she was at work.

On June 11, 2012, Claimant saw Dr. Andrew T. McGown at the University Specialty Clinics Department of Orthopedic Surgery “with regard to right shoulder issues.” Although Claimant advised Dr. McGown that her pain had been going on for about three months, his notes reflect, “[s]he has had no specific injury but she started with chest pain and then had some cervical spine issues.” He diagnosed Claimant with right shoulder pain, right rotator cuff tendonitis/bursitis, and “[r]ight questionable early adhesive capsulitis.” The intake form indicates that her occupation is a “finisher for printing company,” and lists “Cause of Pain: Started with chest pain and generated to shoulder and fingers.” Dr. McGown diagnosed her with “[r]ight shoulder rotator cuff tendinitis but with adhesive capsulitis.” Again, there is no indication that she reported that her shoulder pain began at work. (R. pp. 128-129).

After Dr. McGown’s diagnosis, Claimant saw Dr. Tanksley again at Palmetto Health Family Medical Center on June 15, 2012, complaining of right arm pain that was improving, and depression. There is no indication that she reported that her injury was work-related or even that her pain started when she was at work. (R. pp. 110-112).

Claimant returned to Dr. McGown on July 13, 2012. His impression was, right shoulder pain and “[r]ight shoulder rotator cuff tendinitis but with adhesive capsulitis.” (R. p. 130). Interestingly, Claimant insisted that she told Dr. McGown that her injury was work-related because, “[o]nce I found out it was my rotator cuff, whoever asked me, whichever doctor I went to, I told them it was my rotator cuff and how it could have happened on my job.” (R. p. 434, line 15 – p. 436, line 12). Dr. McGown’s medical notes do not reflect any such conversation. (R. pp. 128-130).

On July 30, 2012, Claimant returned to Palmetto Health Family Medical Center. For the first time, Dr. Tanksley’s notes indicate that the right arm pain occurred three months ago,

“occurred with movement, **in association with work**, not following a fall,” and noted, “Dr. McGowen [sp] thinks is rotator cuff tendonitis.” However, Dr. Tanksley also noted that he had filled out FMLA paperwork for Claimant, who was “now asking how to get disability. Advised patient she will need Ortho evaluation.” (R. pp. 114-116) (emphasis added). Claimant testified that she never informed Dr. Tanksley that her problems were related to her job: “No sir. I was informed that I had a slipped disc in my neck. I didn’t know it was my rotator cuff.” (R. p. 459, lines 10-20).

Claimant was advised in a letter dated August 2, 2012 that the ITW facility in Chapin, S.C., where she worked would be closed by the end of the year. As a result, her position was being terminated. (R. p. 312).

Claimant returned to Palmetto Health Family Medical Center on August 27, 2012 complaining of right arm pain. Dr. Joshua Riggsbee, another resident physician with the same practice who had access to all of the notes from Claimant’s prior visits, including those of Dr. Tanksley, recorded that Claimant was “[s]cheduled to see ortho (Mazoue) in Sept.” Dr. Riggsbee’s August 27 notes make no mention of work-relatedness but, instead, indicate her complaints of right arm pain had an “[u]nsure etiology but has had extensive w/u recently including MRI.” (R. pp. 118-121) (emphasis added).

Claimant confirmed at the hearing that, throughout the time she treated with Palmetto Health Family Medical Center, she did not advise them of her job duties or tell them that she had been injured at work. (R. p. 430, line 5 – p. 433, line 23).

Claimant saw Dr. Christopher Mazoue on September 14, 2012. His notes indicate that Claimant’s, “[p]ain started April 10th and has not been to work since then. Does not remember a specific event. Says that pain originated at her chest and radiated out.” Although Claimant

testified that, "when I found out it was my rotator cuff, I told him it come from me lifting boxes at work" and running machines, (R. p. 337, line 8 – p. 338, line 7) (R. p. 436, line 22 – p. 438, line 8), Dr. Mazoue's notes contain no mention that Claimant reported that her pain began at work or was related to her work in any way. (R. p. 439, lines 17-22). Dr. Mazoue diagnosed her with chronic right shoulder pain and ordered an MR arthrogram of Claimant's right shoulder. (R. pp. 131-133).

Dr. Mazoue saw Claimant on September 26, 2012. Again, her chief complaint was right shoulder pain, but there is no mention in his notes that her pain began at or was associated with Claimant's work. Dr. Mazoue noted that, "this is a very difficult problem. Ms. Butler certainly appears depressed. She is exhibiting pain and depression that are certainly out of proportion from what we see on exam or the MRI." She was diagnosed with right shoulder impingement syndrome, AC joint arthropathy and trigger points around the trapezius. She was given a corticosteroid injection. (R. pp. 134-136).

Claimant returned to Dr. Mazoue on November 28, 2012, indicating that her shoulder pain was about 50% better. She was given another corticosteroid injection. Again, there is no indication that Claimant mentioned that her shoulder pain started at work or might be associated with her work. (R. pp. 137-139).

Claimant saw Dr. Mazoue on February 11, 2013 for a follow up. Although the injections helped temporarily, the decision was made to "proceed with a right shoulder arthroscopy with SCD, DCE, possible rotator cuff debridement versus repair and possible biceps tenotomy versus tenodesis." The notes do not indicate Claimant reported that her pain started while at work or had any association with her job. (R. pp. 140-141).

Claimant returned to Dr. Mazoue five months later, after cancelling the proposed shoulder surgery. "She is not interested in surgery due to financial reasons. She is here today to discuss other options." Dr. Mazoue provided a subacromial corticosteriod injection and indicated Claimant was to follow up as needed in the future. Again, there no notation that Claimant mentioned that her shoulder pain started at work or might be associated with her work. (R. pp. 142-145).

On June 14, 2013, Claimant returned to Providence Hospital, explaining that she was supposed to have surgery performed on her rotator cuff but did not have it done due to insurance issues. Although the notes indicate she complained of right arm and shoulder pain, there is no indication she told the physician that her pain started at work or was related in any way to her job. (R. pp. 67-71).

Claimant did not see Dr. Mazoue again until February 28, 2014. His notes affirmatively state that her, "[p]ain began April 10, 2012 **no known MOI** and has had problems ever since." At that time, Claimant had health insurance and opted to proceed with the shoulder surgery, (R. pp. 146-149) (emphasis added), which was performed on April 1, 2014. (R. pp. 150-152).

She had follow-up appointments with Dr. Mazoue in May, August, October and November of 2014. She appeared to be "doing well," but still complained of right shoulder pain, pain over her scar and biceps tendon. Dr. Mazoue ordered an MRI of her right shoulder and biceps tendon. There is no indication that Claimant advised Dr. Mazoue on any of these visits that her pain began at work or was associated with her work. (R. pp. 153-168).

Claimant saw Dr. Mazoue for the last time on December 29, 2014 to obtain the results of her MRIs. He indicated "an unusual circular signal at the top of the intertubercular groove," and

recommended a corticosteroid injection. Again, there is no mention that Claimant's pain began at work or was associated with her work. (R. pp. 169-171).

On January 20, 2015, however, after meeting with Claimant's counsel, Dr. Mazoue filled out a "check the box" questionnaire indicating, for the first time, that Claimant's right shoulder injury is most likely related to her work activities, "most likely occurred on April 10, 2012" and was "further exacerbated and aggravated by continuing to work." Per the form, Dr. Mazoue agreed that his opinion was based "on the history and symptoms reported by the patient, the signs shown on physical examination, imaging studies, and the operative findings." However, he added in his own hand-writing, "and review of records with reports to onset of pain and dysfunction and subsequent medical care." (R. p. 172).

At her 2014 deposition, Claimant testified that she did not tell the medical providers at Providence that she had been injured at work because, "[a]t that particular time, I didn't know what was wrong with me. I didn't know – all I just know, I was hurting." (R. p. 333, lines 15-19). She testified that she did not tell the physicians at Family Medicine Center that she had been injured at work because, "[a]t that time, I still didn't have no diagnosis. All I just know, is my right side was hurting." (R. p. 334, line 19 – p. 335, line 1). Although she testified that, when she went to see Dr. Mazoue for the first time, she had been diagnosed with a rotator cuff tear and that she had told him she had been injured at work, from lifting boxes and running the laminating machines, (R. p. 337, line 8 – p. 338, line 7), not one of Dr. Mazoue's medical notes indicates any such information was conveyed to him. (R. pp. 131-171).

Dr. Mazoue was deposed on August 19, 2016. After being shown medical records from Dr. Sweet and Dr. McGown, and other medical records, and agreeing that none of them indicated that Claimant's shoulder injury was associated with her job, (R. p. 344, line 16 – p. 347, line 23;

p. 364, line 17 – p. 366, line 23), Dr. Mazoue was asked about the questionnaire provided by Claimant's counsel that he had filled out. Dr. Mazoue "guessed" that he had filled out the questionnaire after meeting with Claimant's counsel but could not give the date that the meeting might have occurred. More importantly, however, Dr. Mazoue was unable to identify what records he had reviewed in order to reach his opinion that Claimant's right shoulder injury was causally related to her work. (R. p. 358, line 12 – p. 360, line 4; p. 361, line 24 – p. 362, line 24).

On cross-examination, Claimant's counsel showed Dr. Mazoue some additional documents and asked him to read some pages from Claimant's November 24, 2014 deposition transcript, and then asked him if that had refreshed his "memory as to the records that you reviewed when you filled out and signed the questionnaire," to which Dr. Mazoue merely replied, "Helpful, yes, sir." (R. p. 376, lines 12-17). Dr. Mazoue later agreed again that **none** of his medical notes reflected Claimant providing him with "a description ... of her ... work injury or the onset of her problems" prior to his reading her deposition transcript at his own deposition, (R. p. 383, line 1 – p. 384, line 24), and confirmed that he could not tell "at this point" what records he had reviewed in order to reach his January 20, 2015 opinion. (R. p. 385, line 16 – p. 386, line 1).

When asked whether the information that formed the basis of his opinion had been provided to him by Claimant, as opposed to her counsel, Dr. Mazoue stated, "I cannot recall that Ms. Butler gave me any, meaning that I don't believe she did." (R. p. 361, lines 1-16; *see also* p. 384, lines 3-24 (new patient intake form makes no mention of her job duties and responsibilities or of an "occupational onset of her problems"))). Instead, he agreed that **"a significant portion of"** his opinion was based on information provided by Claimant's counsel in their meeting. (R. p. 361, lines 17-23) (emphasis added). Dr. Mazoue testified, "[s]o I can give you an overall gist

of what I think is going on So I think that I reviewed some records that suggested that her onset of shoulder pain, there was some association with work or a work-related injury.” (R. p. 363, lines 8-14). However, he was never able to point to the records that provided that suggestion. (R. p. 363, line 24 – p. 364, line 11). Instead, he testified that, “her job as a laminator where she’s, you know, asked to do repetitive movements and lifting up heavy objects can over time result in shoulder pain.” When asked:

Q: Okay. But in her case, how can you come to that conclusion if she didn’t tell you during your initial examinations that that was the cause of her problems?

A: I’m assuming at some point we talked about it, and I just didn’t document in the record appropriately.

Q: Okay. And none of the other physicians who examined her documented it either?

A: That’s correct.

(R. p. 367, line 24 – p. 368, line 11). In fact, on cross-examination, Dr. Mazoue agreed that Claimant’s medical records did not reveal “one specific incident that resulted in [her] pain,” like a fall or sudden lifting, and concluded “it could be lifting. It could be a fall. Could be a car accident. It could be any number of different things.” (R. p. 370, line 16 – p. 371, line 4).

Claimant’s counsel went through a lengthy exercise of showing Dr. Mazoue documents that showed Claimant consistently relating the onset of her shoulder pain to April 10, 2012, (R. p. 371, line 19 – p. 376, line 1), but the date alone says nothing about whether the injury was work-related or not, or even whether the pain began while she was at work. Claimant’s counsel finally showed him Dr. Tanksley’s July 30, 2012 note that indicates Claimant’s injury was “in association with work,” which Dr. Mazoue simply agreed “suggests there’s a connection.” (R. p. 386, lines 7-22). This last comment was not stated to a reasonable degree of medical certainty. (R. p. 386, line 23 – p. 388, line 17).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court must affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5); *see also Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 467-468, 40 S.E.2d 681, 683 (1946) (appellate courts must not invade “the province of the Commission, the statutory finders of the facts. [citation omitted] It matters not that we may have concluded differently from the Commission upon the conflicting evidence”). The Administrative Procedures Act “mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case.” *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

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 same conclusion the administrative agency reached in order to justify its action. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.” *Sharpe v. Case Prod., Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial

evidence or based on an error of law. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). On appeal from the Commission, "the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact." *Baryton v. Higgs*, 381 S.C. 368, 369-370, 674 S.E.2d 145, 146 (2009). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. See *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. [citation omitted] Indeed, 'medical testimony should not be held conclusive irrespective of other evidence'").

ARGUMENT

I. The Court of Appeals misapplied the proper standard of review.

The Court of Appeals misapplied the proper standard of review by engaging in independent fact-finding, ignoring and discounting the substantial evidence supporting the Appellate Panel's decision, and substituting its own judgment for that of the Appellate Panel. As a starting place, this Court has long held that a claimant bears the burden of proving all the facts necessary to support her claim, which "must not be based on surmise, conjecture or speculation." *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998). Here, the Court of Appeals appears to have flipped this standard and required Petitioners to disprove her claim.

Appellate review is limited to determining whether a Commission decision is based on an error of law or is clearly erroneous in view of the substantial evidence of the whole record. *See Lark*, 276 S.C. at 136, 276 S.E.2d at 307. By engaging in its own fact finding, weighing the evidence and reaching its own findings of fact, the Court of Appeals exceeded its appellate role, usurped the Commission's role as fact-finder, and is at odds with this Court's precedent. As noted above, substantial evidence is not viewing the evidence blindly from one side or the other but, instead, is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the Full Commission reached. *See Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. Concomitantly, the fact that one possibly could draw "two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe*, 336 S.C. at 160, 519 S.E.2d at 105. Here, the Court of Appeals impermissibly engaged in a one-sided review of the evidence, focusing only on evidence favorable to Claimant's case, while disregarding or discounting all other evidence.

However, the Full Commission—not the appellate court—is the ultimate fact finder in workers' compensation cases. *See Shealy*, 341 S.C. at 455, 535 S.E.2d at 442. The Full Commission—not the appellate court—determines the weight to be accorded to the evidence. *Barton v. Higgs*, 381 S.C. 367, 369-370, 674 S.E.2d 145, 146 (2009) (on review, "the appellate court may not weigh the evidence or substitute its judgment of that of the full commission as to the weight of evidence on questions of fact"). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. *See Anderson*, 343 S.C. at 492-93, 541 S.E.2d at 528.

This Court's decision in *Tiller* is both instructive and controlling. Contrary to the Court of Appeals' Opinion in this case, in *Tiller*, this Court rejected the premise that expert medical

testimony/opinion is always required or controlling. 334 S.C. at 339, 513 S.E.2d at 845-846 (rejecting the holding in *Smith v. Michelin Tire Corp.*, 320 S.C. 296, 465 S.E.2d 96 (Ct. App. 1995), that expert medical testimony always is required in medically complex cases). “[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. [citation omitted] Indeed, ‘medical testimony should not be held conclusive irrespective of other evidence.’” 334 S.C. at 340, 513 S.E.2d at 846, *citing Ballenger*, 209 S.C. at 467-468, 40 S.E.2d at 682-683 (noting that “[i]t is common knowledge that even experts sometimes err”).³ Here, there is substantial “other competent evidence in the record” supporting the Commission Decision, which should be affirmed.

And, while the Court of Appeals cited and relied on the principle that “[w]orkers’ compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers’ Compensation Act,” citing *Nicholson v. S.C. Dep’t of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015), that rule does not apply either to the evaluation of the evidence or to determining whether a claimant has met her burden of proof. “[T]he rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are. A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim.” *Cross v. Concrete Materials*, 236 S.C. 440, 446, 114 S.E.2d 828, 831-832 (1960). In other words, “[t]here is no sound reason for the translation of the rule of liberal construction of the law to the finding of the facts to the end that doubt with respect

³ In fact, Dr. Mazoue’s notes on September 14, 2012 indicate he thought she worked “laminating furniture.” (R. p. 133). Notes from Palmetto Health Richmond Family Medical Center indicate Claimant works doing “manual labor for a flooring company.” (R. p. 90). Both of these notations are incorrect.

to the latter shall be resolved in favor of the claimant.” 236 S.C. at 447, 114 S.E.2d at 832. That is precisely what the Court of Appeals has done—resolved the conflicts in the evidence in Claimant’s favor and even going so far as to reach conclusions that patently are not supported by the Record—and why this Court should grant this Petition in order to correct. Clearly, “[t]he difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party.” *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 209, 143 S.E.2d 376, 380-381 (1965).

This Court should grant the Petition and apply the correct standard of appellate review.

II. The Court of Appeals conducted an independent review of the evidence to reach its own factual conclusions based on its weighing of conflicting evidence.

After conducting its own fact-finding exercise, the Court of Appeals reached several factual findings/conclusions that are not supported by the Record. For example the Court of Appeals erroneously concluded that Claimant’s medical records “demonstrate the nexus of her injury to her work: the time of the onset of the shoulder/chest/arm pain connects it to her work.” The Court of Appeals also wrongly concluded that “Claimant’s medical records demonstrate she was consistent about the onset of her pain: she knew where, when and how it began—she simply did not understand the cause or mechanics of her injury.” At another point, the Court of Appeals states that “Claimant consistently reported her right arm and shoulder pain began at work on April 11.” However, the Court of Appeals does not and cannot point to any medical records to support these statements. Instead, the medical records in this case consistently demonstrate that all that Claimant reported to her medical providers was that the pain started sometime around April 10 or 11, 2012. There is no evidence that she ever told a single provider that her pain started while she was performing her work tasks, or even while she was at work, let alone that it might have been related in any way to her job. Thus, the premise on which much of the Court of Appeals’

reversal is based—that Claimant consistently told medical care providers that her pain began at work on April 10 or 11—has absolutely no support in the Record and, consequently, must be reversed.

A. The medical records and testimony in this case constitute substantial evidence supporting the Commission Decision.

The Court of Appeals erroneously reversed the Commission on the basis of its conclusion that the only relevant medical evidence that addressed causation were “Dr. Mazoue’s medical questionnaire and deposition testimony and Dr. Tanksley’s July 30 record amending his conclusion to note the work connection for Claimant’s shoulder pain.” Both pieces of medical evidence are problematic. More importantly, Dr. Tanksley’s July 30 note and Dr. Mazoue’s opinion do not constitute either unanimous or overwhelming evidence that justifies overturning the Commission Decision. In fact, in reaching its independent conclusions, the Court of Appeals completely ignored the vast majority of medical evidence in this case that supports the Commission’s determination that Claimant failed to meet her burden of proving an injury by accident on April 10 or 11, 2012.⁴

First, the Court of Appeals’ suppositions regarding the genesis and significance of Dr. Tanksley’s July 30 medical record are not supported by any actual evidence. The Court of Appeals suggests he intentionally “amend[ed] his conclusion” on July 30, and that he was

⁴ The relevant statutory provision, S.C. Code Ann. § 42-1-160, requires that, in medically complex cases, *i.e.*, cases “requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques,” a claimant must prove work-relatedness through “medical evidence.” S.C. Code Ann. § 42-1-160(E). The term “medical evidence” is defined to include *both* “expert opinion and testimony stated to a reasonable degree of medical certainty,” *and* “documents, records, or other material that is offered by a licensed health care provider.” S.C. Code Ann. § 42-1-160(G). Here, the evidence that contradicts Dr. Mazoue’s causal opinion and Dr. Tanksley’s ambiguous July 30 note is found in the documents, records and other material from treating licensed health care providers—coincidentally including Dr. Mazoue’s own treatment records which reveal no relation between Claimant’s work and her shoulder pathology.

“initially unable to recognize the relationship to Claimant’s work until he learned Claimant’s continuing pain was, in fact, the result of a rotator cuff injury,” after which he “corrected his initial ‘Unknown’ and ‘not in association with work.’” These conclusions are nothing more than speculation. *Clade*, 330 S.C. at 11, 496 S.E.2d at 8 (holding awards “must not be based on surmise, conjecture or speculation”). In fact, the July 30 note is directly contradicted by Claimant’s subsequent visit to Palmetto Health Richmond Family Medical Center where Dr. Riggsbee noted that her pain had an “[u]nsure etiology.” (R. p. 120). Moreover, Claimant testified that Dr. Sweet, whom she saw on May 31, 2012, told her that her problem was her rotator cuff, and not something neurological. (R. p. 422, line 24 – p. 423, line 2). She testified that, after seeing Dr. Sweet and by the time she “got to” Dr. McGown, she told “whoever doctor I went to, I told them it was my rotator cuff and how it could have happened on my job.” (R. p. 434, line 15 – p. 436, line 12). However, the medical records following her diagnosis of a rotator cuff issue overwhelmingly do not reflect any work-relatedness. (See R. p. 106-108 (June 1, 2012 visit with Dr. Tanksley where he notes the neurosurgeon did not think the pain was cervical but, instead, was “more of an orthopedic shoulder problem,” and noting Claimant’s “bizarre presentation,” but no reference to work-relatedness); pp. 110-112 (June 15, 2012 visit with Dr. Tanksley with no indication of work-relatedness); pp. 118-121 (Dr. Riggsbee notes indicating her complaints had an unsure etiology); pp. 128-130 (notes from visits with Dr. McGown which do not reference any relation of her shoulder problem to her work); pp. 131-171 (numerous visits with Dr. Mazoue that do not contain any association of her shoulder pathology with her job).

The Court of Appeals’ conclusion that Dr. Tanksley and Dr. Mazoue were “the only two physicians who actually followed and treated Claimant,” is belied by the fact that she saw Dr. Tanksley at Palmetto Health Richmond Family Medical Center, where she was seen by a number

of physicians, include Drs. Shaffer and Riggsbee. Moreover, the point is not that the other physicians who saw Claimant failed to provide any causal opinion, but that their notes reflect that she did tell a single medical provider, including Dr. McGown or Dr. Mazoue, that her pain started at work or that it might be related to her work in any way.⁵

Moreover, although the Court of Appeals points to the date Claimant “received the initial shoulder diagnosis” as the turning point in this case, which occurred, at the earliest in May 2012 with Dr. Sweet, (R. pp. 122-126 (diagnosing her with “shoulder pathology on the right of some sort”)), and by June 11, 2012 at the latest (R. pp. 128-129 (Dr. McGown diagnosing her with right shoulder rotator cuff tendinitis/bursitis and early adhesive capsulitis)), what is remarkable is that the vast majority of medical notes following this diagnosis do not reveal any notations of work-relatedness. (R. pp. 110-112, 128-130). Furthermore, **no** medical record, with the exception of Dr. Tanksley’s questionable July 30 note, suggests her injury was associated with her job and, as noted above, Dr. Tanksley’s note was immediately followed by Dr. Riggsbee’s note from the same practice indicating that the origin of Claimant’s shoulder pain had an unsure etiology. (R. pp. 118-121).

B. Petitioners were not required to introduce an expert opinion opposing that of Dr. Mazoue in order to disprove Claimant’s case.

The Court of Appeals suggests that, since Claimant provided an expert opinion, Petitioners were required to disprove that opinion by either presenting one of their own or that they should have “successfully cross-examined him to demonstrate the error of his conclusions.” First, it is a claimant’s burden to prove all elements that entitle her to benefits under the Act.

⁵ Indeed, Claimant’s allegation on her Form 50, that, on April 10, 2012, “[a]s she was lifting a load, Butler felt pain in her right arm coming from her shoulder and neck,” (R. p. 53), suggests she at least knew her pain started at work. Incredibly, she failed to convey this information to any medical provider for months following her alleged injury.

Clade, 330 S.C. at 11, 496 S.E.2d at 858. It is not the employer's burden to disprove her claim. Second, Dr. Mazoue was successfully cross-examined. While it is true that he maintained his casual opinion, the basis for and validity of that opinion was seriously undermined and called into question. Dr. Mazoue rendered his expert causal opinion only after meeting with Claimant's counsel, who discussed the claim and presented him with materials. Later, Dr. Mazoue could not recall what materials he reviewed or, critically, on what records his causal opinion was based. (R. p. 358, line 12 – p. 360, line 4; p. 361, line 24 – p. 362, line 24; p. 363, line 24 – p. 364, line 11; p. 385, line 16 – p. 386, line 1). Dr. Mazoue acknowledged that none of his own medical notes reflect any causal connection between Claimant's job and her shoulder pathology. (R. p. 383, line 1 – p. 384, line 24).⁶ In fact, he agreed that "a significant portion of" his causal opinion was based on information provided by Claimant's counsel during their meeting. (R. p. 361, lines 17-23). In short, Dr. Mazoue was effectively cross-examined, during which both the basis for and validity of his opinion was significantly undercut.

The Court of Appeals' reference to and reliance on *Clark v. Philips Elecs./Shakespeare*, 433 S.C. 186, 857 S.E.2d 378 (Ct. App. 2021), is misplaced as the instant case does not turn on Claimant's credibility. Unlike in *Clark*, Petitioners did not defend this claim by alleging Claimant lacked credibility, which in turn affected the value of her medical records. Indeed, Petitioners rely on the vast majority of her medical records as evidence that she did not tell a single medical provider that her shoulder problem began at work, much less that it might be

⁶ The Court of Appeals appears to afford Dr. Mazoue's opinion greater weight based on its supposition that it was during the actual arthroscopy in 2014 that Dr. Mazoue discovered the causal connection between Claimant's rotator cuff tear and her job. However, there is no logical basis to presume that finding a rotator cuff tear, as opposed to diagnosing Claimant with rotator cuff injury/impairment of some kind, would lead a medical provider to determine an injury is work related. Furthermore, and tellingly, none of Dr. Mazoue's notes following the surgery indicate any causal relationship between Claimant's shoulder injury and her job.

related in some way to her job. The problem with Dr. Mazoue's expert opinion is not Claimant's credibility but, as noted above, that he rendered it only after meeting with Claimant's counsel, who discussed the case and provided him with certain medical records, which records Dr. Mazoue could not later recall or identify. More importantly, his opinion is in conflict with every other medical note that either does not reference any relation whatsoever to Claimant's job (either temporal or causal), with the exception of one ambiguous and unsubstantiated medical note by Dr. Tanksley,⁷ and a number of records that affirmatively state her injury is not work-related. (R. pp. 94, 99, 102).

As noted above, any determination that Dr. Tanksley's July 30 note was an intentional change of opinion, as opposed to simply a typographical error, (*see Ballenger*, 209 S.C. at 467-468, 40 S.E.2d at 682-683 (noting that "[i]t is common knowledge that even experts sometimes err")), requires impermissible speculation. *Clade*, 330 S.C. at 11, 496 S.E.2d at 8 (holding awards "must not be based on surmise, conjecture or speculation"). Thus, the Court of Appeals' reliance on Dr. Tanksley's medical note, which requires speculation to find that it provides an intentional casual statement, and which is challenged if not completely reversed by Dr. Riggsbee's subsequent note, is insufficient to support the Opinion or Claimant's case.

The Court of Appeals relies on *Herndon* for the proposition that, where the subject of causation requires specialized expert testimony, "the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses." 246 S.C. at 216, 143 S.E.2d at 384. While that proposition is not contested, it is not controlling here. In *Herndon*, the issue was whether a fall of two or three feet and landing hard on one's feet could

⁷ Claimant clearly could have either sent Dr. Tanksley a questionnaire asking what he meant by that anomalous change in his notes, or deposed him in order to clarify that the July 30 note was intentional as opposed to—what is more likely—a typographical error. She did not and, consequently, she is left with an ambiguous medical note.

cause or accelerate bone marrow cancer. In contrast, here the question is not whether lifting a heavy object can cause a rotator cuff tear—there is no question that it can. The question posed by this case is whether Claimant carried her burden of proving she injured her right shoulder at work, as opposed to having injured it elsewhere. *See Tobey v. L&P Constr. Co.*, 296 S.C. 122, 126, 370 S.E.2d 896, 900 (Ct. App. 1988) (explaining that expert testimony is not required to prove whether an accident occurred as a claimant alleges). On this point, the evidence is not unanimous but, instead, is conflicting. Claimant’s argument that her shoulder injury was caused by her work is seriously weakened by the fact that she did not report to any medical provider for almost four months that she thought she might have been injured by her work, or even that her pain began while she was at work:

- Notes from the Providence ER on April 13, 2012 indicate that Claimant complained of right shoulder and forearm pain the past three days but the ER notes do not reflect Claimant reported that her pain began while she was at work, and Claimant acknowledged that she did not tell the ER physicians that she had been injured at work. (R. pp. 57-66);
- Notes from the Providence ER on April 17, 2012, reflect Claimant reported “right arm pain that has been going on for a week She states that she does not know what is causing this pain but is just causing some concern.” Claimant “denie[d] any trauma to her arm.” She was diagnosed with right upper extremity pain and muscle spasm. Again, however, the notes do not reflect Claimant reported that her pain began at or was associated with her work. (R. pp. 72-76);
- Claimant returned to Palmetto Health ER on April 24, 2012, complaining of arm pain “radiating from the neck all the way down to the arm.” The notes do not reflect Claimant reported that her pain was a result of or began while she was at work. (R. pp. 77-80). An MRI was performed of Claimant’s neck, which revealed mild degenerative changes at C5-6, and an x-ray and MRI were performed on her right shoulder. (R. pp. 80-87);
- Claimant began being seen at Palmetto Health Family Medical Center. She was first seen by Dr. Shaffer, a resident, on April 27, 2012, complaining of right arm and chest pain.

Dr. Shaffer's notes indicate, "[s]he recalls no injury," and do not reflect that she stated that her pain began at work. (R. pp. 93, 89-90) (emphasis added);

- Claimant returned to Palmetto Health Family Medical Center on May 2, 2012, where she was seen by Dr. Tanksley, another resident. Although Claimant reported that her right upper extremity pain had begun four weeks prior, the notes report that it "occurred not following a fall, not during sports and **not in association with work.**" (R. p. 94) (emphasis added). Dr. Tanksley indicated that her mood was "Depressed, Sad, Tearful," and reported that Claimant was "asking for me to sign disability papers and refill percocet Rx from ER. **Very suspicious for malingering, will get MRI.**" (R. pp. 95-96) (emphasis added);
- Claimant returned to Palmetto Health Family Medical Center where she saw Dr. Tanksley on May 11, 2012. Notes from that visit record pain in her upper right extremity that had begun a month previously. Dr. Tanksley noted that her pain "occurred not following a fall, not during sports and **not in association with work.**" (R. pp. 99-101) (emphasis added);
- Claimant saw Dr. Tanksley again at Palmetto Health Family Medical Center on May 15, 2012. Notes from that visit report pain in her upper right extremity that had begun a month previously. Dr. Tanksley noted her pain "occurred not following a fall, not during sports and **not in association with work.**" (R. pp. 102-104) (emphasis added).
- Claimant filled out a Short Term Disability form, which she signed on May 11, 2012. On the form, Claimant checked or had checked on her behalf a statement that her right arm condition was not work related. (R. pp. 303-308);
- Claimant saw Dr. Sweet, a neurologist, on May 31, 2012. After reviewing an MRI, Dr. Sweet concluded that Claimant had "shoulder pathology on the right of some sort," and that he did "not feel that she has a neurosurgical problem." Claimant did not tell Dr. Sweet that her pain started at work or had any relationship to her work. (R. pp. 122-126; R. p. 434, lines 1-8);
- Claimant returned to Palmetto Health Family Medical Center on June 1, 2012, where she saw Dr. Tanksley again. His medical notes remark on her "bizarre presentation," and indicate that neurosurgery concluded her pain was an "orthopedic shoulder problem." Dr. Tanksley made a referral to orthopedics. His notes do not indicate that Claimant

reported that the pain was associated with or began while she was at work. (R. pp. 106-108);

- On June 11, 2012, Claimant saw Dr. McGown. Although Claimant advised him that her pain had been going on for about three months, his notes do not reflect that she told him her pain began at work or might be associated with her job. Dr. McGown diagnosed Claimant with right shoulder pain, right rotator cuff tendonitis/bursitis, and “[r]ight questionable early adhesive capsulitis.” (R. pp. 128-129);
- Following Dr. McGown’s diagnosis, Claimant saw Dr. Tanksley again at Palmetto Health Family Medical Center on June 15, 2012, complaining of right arm pain that was improving, and depression. There is no indication that she reported that her injury might be work-related or even that her pain started when she was at work. (R. pp. 110-112);
- Claimant returned to Dr. McGown on July 13, 2012, who diagnosed her with right shoulder pain and “[r]ight shoulder rotator cuff tendinitis but with adhesive capsulitis.” Although Claimant insisted that she had told Dr. McGown that her injury was work-related, (R. p. 434, line 15 – p. 436, line 12), his notes do not reflect any such conversation. (R. pp. 128-130);
- On July 30, 2012, Claimant returned to Palmetto Health Family Medical Center. For the first time, Dr. Tanksley notes indicate that Claimant’s right arm pain “occurred with movement, **in association with work**, not following a fall,” and noted, “Dr. McGowen [sp] thinks is rotator cuff tendonitis.” However, there is no indication that this change in his notes was intentional, as opposed to a typographical error omitting the word “not.” (R. pp. 114-116);
- Claimant returned to Palmetto Health Family Medical Center on August 27, 2012 complaining of right arm pain. Dr. Riggsbee, who had access to all of Dr. Tanksley’s notes made no mention of work-relatedness but, instead, indicated her complaints of right arm pain had an “[u]nsure etiology.” (R. pp. 118-121);
- Claimant confirmed at the hearing that, throughout the time she treated with Palmetto Health Family Medical Center, she did not advise them of her job duties or tell them that she had been injured at work. (R. p. 430, line 5 – p. 433, line 23); and,
- None of Dr. Mazoue’s medical notes indicate any association between Claimant’s job and her shoulder pathology. (R. pp. 131-171).

Thus, the Court of Appeals' conclusion that Claimant "consistently reported her right arm and shoulder pain began at work on April 11," is flatly contradicted by the evidence in this case. In reaching such conclusions, the Court of Appeals impermissibly engaged in surmise, conjecture or speculation, at best, *e.g.*, *Clade*, 330 S.C. at 11, 496 S.E.2d at 8 (holding awards "must not be based on surmise, conjecture or speculation"), and based its Opinion on "facts" that simply do not exist. The only conclusion that is supported by the Record in this case is that Claimant did not tell a single medical provider for, at best and assuming solely for the sake of argument that Dr. Tanksley's July 30 note is not a typographical error, over three months that her pain even *began* at work, much less that it might be *related* to her work.

This leaves Dr. Mazoue's opinion as the sole piece of evidence supporting the Court of Appeals' reversal of the Commission Decision. While the Court of Appeals focuses only on Finding of Fact 33, which correctly states that his check-the-box opinion was rendered after he was no longer treating Claimant,⁸ the Commission also noted in Finding of Fact 19 that Dr. Mazoue completed the questionnaire only "after meeting with Claimant's counsel," to which Dr. Mazoue testified in his deposition. (R. pp. 38-39; p. 358, line 12 – p. 360, line 4 (Dr. Mazoue testifying that he met with Claimant's counsel, who showed and discussed with him some documents, after which he rendered his opinion)). The Commission also pointed out in Finding of Fact 24 that there was no "description in the medical records or in the Claimant's Testimony

⁸ Footnote #3 to the Court of Appeals' opinion, which finds the Commission's "discounting of Dr. Mazoue's questionnaire and deposition testimony on such a basis ... further troubling" in light of Claimant's testimony that she could not afford to pay the balance of his medical bills suggests that sympathy may have played an outsized role in the Court of Appeals' reversal. While sympathy is understandable and, in many situations laudable, it cannot substitute for proper legal analysis or loosen the proper standard of review. In *Howell v. Pacific Columba Mills*, 291 S.C. 469, 473, 354 S.E.2d 384, 386 (1987), this Court noted that "Professor Larson warns against extending the area of coverage in order to accommodate claims in cases with sympathetic factual situations such as the one at bar," which admonition applies with equal force in this case.

that persuades us that there was an injury by accident as defined in the Act.” (R. p. 40). Instead, the Commission pointed out in Finding of Fact 27 the numerous portions of the Record that support the Commission’s finding that her shoulder injury was not job related. (*See, e.g.*, R. pp. 58, 70, 94, 99, 129, 131, 133, 146, 304).

As is discussed above, Dr. Mazoue’s expert “opinion” is suspect in other respects. For one, he could not identify what records he had reviewed in order to reach his causal opinion. (R. p. 359, line 19 – p. 360, line 4; p. 361, line 24 – p. 362, line 24). Dr. Mazoue agreed that **none** of his medical notes reflect that Claimant provided him with “a description ... of her ... work injury or the onset of her problems” prior to his reading her deposition transcript at his own deposition. (R. p. 383, line 1 – p. 384, line 24). Ultimately, he confirmed that, “at this point,” he could not tell what records he had reviewed in order to reach his January 20, 2015 opinion. (R. p. 385, lines 16 – p. 386, line 1).

When asked whether the information that formed the basis of his opinion had been provided to him by Claimant, as opposed to her counsel, Dr. Mazoue stated, “I cannot recall that Ms. Butler gave me any, meaning that I don’t believe she did.” (R. p. 361, lines 1-16; *see also* p. 384, lines 3-24 (new patient intake form makes no mention of her job duties and responsibilities or of an “occupational onset of her problems”)). Instead, he agreed that **“a significant portion of”** his opinion was based on information provided by Claimant’s counsel in their meeting. (R. p. 361, lines 17-23) (emphasis added). Dr. Mazoue testified, “[s]o I can give you an overall gist of what I think is going on So I think that I reviewed some records that suggested that her onset of shoulder pain, there was some association with work or a work-related injury.” (R. p. 363, lines 8-14). However, he was never able to point to the records that provided that “suggestion.” (R. p. 363, line 24 – p. 364, line 11). Instead, he testified that, “her job as a

laminator where she's, you know, asked to do repetitive movements and lifting up heavy objects can over time result in shoulder pain." When asked:

Q: Okay. But in her case, how can you come to that conclusion if she didn't tell you during your initial examinations that that was the cause of her problems?

A: I'm **assuming** at some point we talked about it, and I just didn't document in the record appropriately.

Q: Okay. And none of the other physicians who examined her documented it either?

A: That's correct.

(R. p. 367, line 24 – p. 368, line 11) (emphasis added). This is nothing more than pure speculation. In fact, Dr. Mazoue agreed that Claimant's medical records did not reveal "one specific incident that resulted in [her] pain," like a fall or sudden lifting, and concluded "it could be lifting. It could be a fall. Could be a car accident. It could be any number of different things." (R. p. 370, line 16 – p. 371, line 4). Again and based on the Record in this case, in order to reach the causal opinion that her shoulder problem was caused by Claimant's job required Dr. Mazoue to engage in surmise, conjecture and speculation, which cannot serve as the basis for a finding of compensability. *Clade*, 330 S.C. at 11, 496 S.E.2d at 8.

The Court of Appeals suggests that it is understandable that Claimant did not know she was hurt while working because "the mechanism of her injury was complicated." To be clear, it was not the mechanism of her injury that was complicated in this case; instead, it was the presentation of her symptoms to various medical providers that was complicated, sometimes seen as a "confusing patient," sometimes seen as malingering, sometimes seen as bizarre, sometimes seen as "exhibiting pain ... certainly out of proportion" to what was seen in exam or on her MRI. (R. pp. 90, 95-96; 106-108; 136).

The Court of Appeals discounts the fact that Claimant indicated on her Short-Term Disability form that her condition was not work-related, pointing to the dissent in *Massey v. W.R. Grace & Co.*, 286 S.C. 434, 334 S.E.2d 122 (1985) and to *Herndon*. In *Massey*, this Court found the evidence supporting compensability to be “overwhelming,” discounting the facts cited in the dissent that the claimant “failed to report his injury as work-related, and indeed, at one point stated it was not work-related.” 286 S.C. at 436, 334 S.E.2d at 122. The quote cited by the Court of Appeals from *Herndon*, discusses “the unanimous opinion of medical experts” which “may be conclusive, even if contradicted by lay witnesses.” 245 S.C. at 216 143 S.E.2d at 384. Here, in contrast, the evidence in support of a finding of compensability is decidedly not overwhelming, and clearly is not unanimous. Instead, it consists solely of one ambiguous medical note and a problematic expert opinion by Dr. Mazoue, whose causal opinion conflicts with his own medical notes,⁹ and which was rendered only after meeting with Claimant’s counsel to discuss the case. Moreover, here, Claimant did not report her shoulder as being job-related—or even that her pain began while she was at work—for over three months, and affirmatively stated on an application for Short-Term Disability benefits that it was not. (R. p. 303). Unlike in *Clark*, where the claimant answered a question on an SSDI form regarding prior treatment for emotional or mental problems inconsistently (once answering “yes” and once answering “no”), and where the question was worded somewhat ambiguously, 433 S.C. at 195, 857 S.E.2d at 382, the question on the Short-Term Disability form is straightforward and

⁹ See R. pp. 131-171 (no indication that Claimant’s symptoms began at work or were related in any way to her job, despite Claimant’s testimony that, once she found out it was her rotator cuff she allegedly “told him it come from me lifting boxes at work” and running machines); R. p. 337, line 8 – p. 338, line 7; R. p. 436, line 22- p. 438, lines 17-22; and particularly R. p. 146 (where Dr. Mazoue specifically notes “no known MOI”).

unambiguous: "Is this condition work related?" Claimant answered it by checking "no" and there is no other form that contradicts this response. (R. p. 303).

Here, the Court of Appeals committed reversible error by engaging in its own review of the evidence in order to reach its own factual conclusion in the face of conflicting expert evidence. In doing so, the Court of Appeals' Opinion is in conflict with a number of this Court's precedents. *See, e.g., Lark*, 276 S.C. at 136, 276 S.E.2d at 307; *Ballenger*, 209 S.C. at 467-468, 40 S.E.2d at 683 (1946) (appellate courts must not invade "the province of the Commission, the statutory finders of the facts. [citation omitted] It matters not that we may have concluded differently from the Commission upon the conflicting evidence"); *Baryton*, 381 S.C. at 369-370, 674 S.E.2d at 146 (on appeal from the Commission, "the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact"). Indeed, the recent trend of appellate courts making independent findings of fact based on their review and weighing of the evidence threatens to fulfill the warning raised by the dissent in *Massey*, *i.e.*, that, where an appellate court "believe[s] the facts should have been found differently by the Full Commission," appellate courts "perhaps unwittingly, transform[] this Court into the ultimate factfinder." 286 S.C. at 436-437, 334 S.E.2d at 122.

This Court should grant this Petition and rule that the Court of Appeals impermissibly exceeded the proper scope of review by conducting its own review and weighing of the evidence, which renders its reversal of the Commission erroneous.

III. The Court of Appeals misapplied this Court's ruling in *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992) to the facts of this case.

The Court of Appeals relied heavily on *McGuffin* in its Opinion. However, the facts of this case are meaningfully distinguishable from the facts in *McGuffin*, such that it does not support overturning the Commission Decision.

In *McGuffin*, the claimant, who had a history of a congenital deformity of her right kidney, felt a "bad stinging" in her back when she lifted a tray of parts at work. Believing her pain was due to a pre-existing kidney condition, the claimant sought emergency treatment and was examined by a urologist who, after tests were run, concluded the claimant did not have a kidney stone. Instead, the urologist treated her with muscle relaxants and rest, concluding that her pain was musculoskeletal. Five weeks later, the claimant saw an orthopedic surgeon who diagnosed her with a lumbosacral sprain, which the surgeon opined had been caused by "lifting or lifting and twisting." The Commission, which denied benefits to the claimant, relied heavily on the claimant's initial (but erroneous) self-diagnosis and the fact that she did not immediately attribute her pain to lifting the trays. "This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her kidneys but was in fact musculoskeletal. Considering the record as a whole, the [claimant's] own misdiagnosis does not constitute substantial evidence from which the Commission could infer that the respondent's muscle strain did not result from an accident at work." 307 S.C. at 187-188, 414 S.E.2d at 164.

Here, unlike the claimant in *McGuffin*, who had a congenital deformity of her kidney that could have caused her pain, Claimant had no such pre-existing condition.¹⁰ Thus, in *McGuffin*, the claimant thought her symptoms were related to a purely personal, pre-existing condition, whereas here, any confusion as to Claimant's proper diagnosis was due to her complicated and inconsistent presentation of symptoms. This alone distinguishes the instant case from *McGuffin*. There was no confusion on Claimant's part that her pain was due to a purely personal pre-existing condition versus something work-related. Regardless of whether Claimant thought she had injured her arm or neck (with accompanying radiculopathy) or her shoulder, the fact is that she did not relate her pain to her job—or even tell anyone that her pain *began* at work—until months after her alleged injury.

Regardless of whether Claimant thought she had injured her arm or neck (with accompanying radiculopathy) or her shoulder, the fact is that she did not relate her pain to her job—or even tell anyone that her pain *began* at work—until months after her alleged injury. Moreover, there is no basis in the record or, frankly, in logic to suggest that a shoulder injury could be work related, but that an arm or neck injury could not have been. Thus, Claimant's testimony that she did not know her shoulder was work-related until she received a proper diagnosis, (R. p. 332, lines 10-13; p. 334, lines 23-25 (Claimant testified that she did not inform her physicians she had been injured on the job because, “[a]t that time, I still didn't have no diagnosis”)) (R. p. 415, lines 4-6 (“I didn't think that it came from the job. I just thought I was hurting those days until I find out the right diagnosis”))), is entirely unconvincing. The fact is

¹⁰ Although the Court of Appeals focused on various misdiagnoses such as rhabdomyolysis and deep vein thrombosis, they were ruled out quickly, (R. p. 74), and do nothing to alter the fact that for months following her alleged injury, Claimant failed to relate to a single medical provider that her pain began at work.

that she failed to tell her treating physicians—even Dr. Mazoue—that her pain began at work, much less that it might be related to her work tasks.

Furthermore, here, the Commission did not place the same emphasis on an erroneous self-diagnosis as it did in *McGuffin*. Instead, the Commission relied on numerous medical records that affirmatively state that Claimant's pain or injury was "**not in association with work.**" The Commission also relied on the fact that Claimant did not tell a single medical provider for months that she had hurt her shoulder at work or even that her pain *began* while she was at work. She was not required to make a correct self-diagnosis; however, she was required to accurately report her symptoms, their onset, and any relevant information to her medical providers. Tellingly, the medical notes are silent about any connection between her pain and her job, even *after* she was diagnosed with a shoulder injury, with the exception of Dr. Tanksley's ambiguous note on July 30, which is followed by another note from the same practice indicating her right arm symptoms had an "unsure etiology." (R. pp. 114, 120). Thus, as the Commission relied on numerous medical records in addition to Claimant's failure to connect her shoulder pain or injury to work, *McGuffin* is distinguishable and not determinative in this case.

This Court should grant this Petition, rule that this case is factually and substantively different from *McGuffin*, and affirm the Commission Decision.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that this Court grant certiorari review, reverse the Court of Appeals and affirm the Commission Decision in its entirety.

Respectfully submitted,

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