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S.C. SUPREME COURT

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.

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The South Carolina Court of Appeals

Doretta Butler-Long, Employee, Claimant, Appellant,

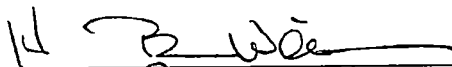
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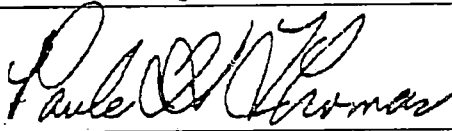
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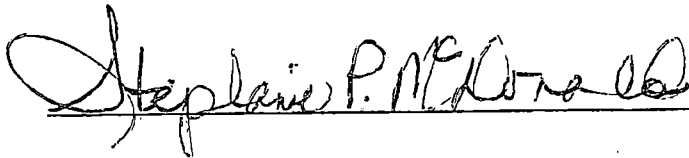
Appellate Case No. 2017-001535

ORDER

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

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Stephen Benjamin Samuels, Esquire

Jason Wendell Lockhart, Esquire

Helen F. Hiser, Esquire

Amy Bracy

FILED
Sep 21 2023

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

Doretta Butler-Long, Employee, Claimant, Appellant,

v.

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

Appellate Case No. 2017-001535

Appeal From The Workers' Compensation Commission

Opinion No. 2023-UP-291
Heard February 3, 2020 – Filed August 9, 2023

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Stephen Benjamin Samuels, of Samuels Law Firm, LLC,
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Jason Wendell Lockhart, of McAngus Goudelock &
Courie, LLC, of Columbia, and Helen F. Hiser, of
McAngus Goudelock & Courie, LLC, of Mount Pleasant,
both for Respondents.

MCDONALD, J.: Doretta Butler-Long (Claimant) appeals the denial of her workers' compensation claim, arguing the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) erred in (1) finding she failed to meet her burden of proving an injury by accident or, alternatively, a repetitive trauma injury and (2) disregarding her treating physicians' medical opinions that her injury was work-related when there was no expert medical opinion to the contrary. We affirm in part, reverse in part, and remand for a calculation of benefits.

Facts and Procedural History

In September 1999, Claimant began working as a laminator at ITW Labels (Employer), a printing company providing signs and labels of various sizes. By all reports, Claimant was a model employee—a December 2011 performance appraisal notes, "Doretta has proven to be the most valuable Laminator in the company. She can get out the most product in the shortest amount of time." Claimant's job included retrieving heavy materials from a warehouse, lifting heavy boxes containing rolls of printing material to process through a laminating machine, running the machinery, and inspecting the final product. The size of the rolls depended on which laminator machine she was running, but the rolls of adhesive could weigh up to 300 pounds; some required two people to lift them. At one time, Claimant and the other laminators lifted these rolls by hand, but "they eventually got a lift."

While working on Wednesday, April 11, 2012, Claimant began experiencing pain on her right side, but she attempted to continue working the remainder of that week. When asked at the hearing how she initially was hurt, Claimant explained, "From lifting the rolls and from the repetitive [sic] of just sending it through the machine from the rolls. A lot of the rolls [were] heavy, but I had to get my job done." Within two to three days, however, her fingers "started going numb." That Friday night, April 13, Claimant went to the emergency room at Providence Hospital, where she described a throbbing pain in her right shoulder and forearm that worsened with movement. The emergency room doctors took X-rays of her right arm, shoulder, and chest; prescribed Percocet; and gave her a sling to wear.

The following Monday, Claimant told her supervisor she was unable to come to work, but she did not report a work-related injury at that time because she believed she had a slipped disc in her neck and was suffering from chest pain, which she did not attribute to her employment. In the months following the onset of her pain, Claimant saw physicians and specialists who noted Claimant's symptoms were

confusing and abnormal; the doctors provided multiple possible diagnoses—initially, none were accurate. Unfortunately, the true cause of Claimant's pain—a rotator cuff injury—went undiagnosed for over two months. And, Claimant's partial rotator cuff tear was not discovered until her 2014 arthroscopic surgery, nearly two years after her injury at work.

Prior to *any* physician diagnosing a rotator cuff problem—much less the partial tear, Claimant saw several doctors. On April 17, Claimant went to the emergency room at Palmetto Health Richland, where the physician noted her symptoms were "[l]ikely secondary to muscle spasm as the patient had tense muscles" and instructed her to see her primary care physician. Claimant returned to Palmetto Health Richland on April 23 because the prescribed medication was not decreasing her pain. A cervical spine X-ray "showed degenerative joint disease as well as some signs consistent with muscle spasms"; the physician further noted Claimant would likely need an MRI if her symptoms persisted. One doctor ordered tests to rule out deep vein thrombosis and rhabdomyolysis.

On April 27, Dr. Mark Shaffer of the Palmetto Health Richland Family Medicine Center evaluated Claimant, noting her right "trapezius and paraspinal muscles [are] in marked spasm easily visible." He further observed Claimant held her arm in a guarded position and her right shoulder had a "markedly reduced" range of motion. Dr. Shaffer gave Claimant a Lidocaine injection and prescribed naproxen and Percocet. Dr. Shaffer reported, "Confusing [patient] with unusual exam but marked pain and [abnormal] findings. At least 2 pathologies present-neck spasm and some neuropathy affecting the [right] arm-likely brachial plexitis."

When Claimant returned to the Family Medicine Center on May 2, Dr. Simon Tanksley noted, "The context of the pain occurred not following a fall, not during sports and not in association with work." He indicated, "Patient asking for me to sign disability papers and refill Percocet Rx from ER. Very suspicious for malingering, will get MRI." A May 9 cervical MRI revealed "mild degenerative disc changes," and the MRI and X-ray of Claimant's right shoulder were "unremarkable." Dr. Tanksley reexamined Claimant on May 11, 2012; he prescribed her Percocet, an antidepressant, and naproxen and referred her to a neurosurgeon due to her bulging cervical disk and arm pain. That same day, Claimant applied for short-term disability benefits. Dr. Tanksley completed the accompanying attending physician statement and indicated it was "Unknown" whether Claimant's injury arose from her employment.

Claimant saw neurosurgeon Raymond Sweet on May 31; Dr. Sweet referred her to an orthopedic specialist because he did not find her problem to be neurological. On June 1, Claimant returned to the Family Medicine Center, where Dr. Tanksley described her appearance as depressed, sad, and tearful and referred her to an orthopedic surgeon. Orthopedic surgeon Andrew McGown evaluated Claimant's shoulder on June 11, noting, "1) Right shoulder pain. 2) Right rotator cuff tendonitis/bursitis. 3) Right questionable early adhesive capsulitis." He further described the onset of her pain as "Started with chest pain and generated to shoulder and fingers."¹

Dr. Tanksley's record of a July 30 visit notes,

Has been almost 4 months since start of right shoulder pain. Seeing sport med, Dr. [McGown] thinks is rotator cuff tendonitis, patient on second round of PT. I filled out FMLA paperwork, patient now asking how to get disability. Advised patient she will need Ortho[pedic] evaluation, then call Voc[atational] Rehab to start process. This is the last time I can give her work excuse.

As to the history of Claimant's present illness, Dr. Tanksley amended his prior opinion to note Claimant's "pain occurred 3 month(s). The context of the pain: occurred with movement, in association with work, not following a fall, not associated with cold weather, not associated with damp weather and not during sports."

After finding no relief through physical therapy, Claimant saw shoulder surgeon Christopher Mazoue on September 14. In his evaluation, Dr. Mazoue notes, "She, [I believe], works laminating furniture but cannot recall that her work actually caused this injury." Dr. Mazoue further stated, "Due to the chronicity of the symptoms, we will go ahead and get an MR arthrogram of the right shoulder." After a September 26 follow-up appointment, Dr. Mazoue reported Claimant's MR arthrogram revealed "some rotator cuff tendinosis, but the rotator cuff is still

¹ Dr. Sweet was the first physician to recognize a shoulder pathology. Claimant testified that after her visits to Dr. Sweet and Dr. McGown, she reported her work injury to Stacie Dash, a supervisor. She noted, "I told Stacie in the end of July when I found out for sure what was wrong with me. I told Stacie then what was wrong with me." Employer did not present evidence contradicting Claimant's report to Dash.

intact. . . . I think 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." Claimant had another follow-up appointment with Dr. Mazoue on November 28, during which he discussed surgery as an option. Unfortunately, Claimant declined to have surgery at that time; she later explained in her deposition that she could not afford the surgery and did not have health insurance.

On February 11, 2013, Claimant again visited Dr. Mazoue and reported the injections he had been administering provided her only one month of relief. Dr. Mazoue again discussed surgery with Claimant, noting, "At this point due to failure of nonoperative treatment we will proceed with a right shoulder arthroscopy with SCD, DCE, possible rotator cuff debridement versus repair and possibly biceps tenotomy versus tenodesis." Following an August 16, 2013 appointment, Dr. Mazoue reported, "[Claimant] returns today after cancelling her surgery 5 months ago for her R shoulder. . . . She is not interested in surgery due to financial reasons. She is here today to discuss other options."

Dr. Mazoue reevaluated Claimant on February 28, 2014, and performed the diagnostic arthroscopy under general anesthesia in April. The surgery revealed a partial thickness rotator cuff tear of the supraspinatus tendon. Once the cause of Claimant's ongoing shoulder/chest/arm pain was discovered, Dr. Mazoue was able to surgically repair the rotator cuff. At her appointments following the surgery, Claimant reported persistent pain on May 14, August 13, October 15, November 24, and December 29.

On January 20 or 26, 2015,² Dr. Mazoue reviewed Claimant's medical history and completed a questionnaire at the request of her attorney. In this document, Dr. Mazoue unequivocally opined Claimant's "right shoulder injury is most likely related to her activities as [a] laminator." In response to a question about the basis of his medical opinion, Dr. Mazoue added a handwritten note that his response was based on a "review of the records with regards to onset of pain and dysfunction and subsequent medical care."

Claimant filed a second Form 50 in 2016, alleging an April 2012 injury arising from her employment. Following a hearing, the Single Commissioner found

² Dr. Mazoue's handwriting is difficult to decipher as to the specific day, but whether he completed the questionnaire on the 20th or the 26th of January is not relevant to our analysis.

Claimant failed to meet her burden of proving a compensable injury arising from her employment either by accident or repetitive trauma. Claimant filed a Form 30 Notice of Appeal, and following a hearing, the Appellate Panel affirmed the Single Commissioner.

Standard of Review

The Administrative Procedures Act (APA) establishes this court's standard of review for the Appellate Panel's decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court may reverse or modify the Appellate Panel's decision when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); S.C. Code Ann. §1-23-380(5)(d)–(e) (Supp. 2022). We must affirm the Appellate Panel's factual findings if they are supported by substantial evidence not affected by an error of law.

Law and Analysis

While we agree with the Appellate Panel that the record does not support Claimant's alternative theory of repetitive injury, we disagree with the finding that Claimant failed to meet her compensability burden under section 42-1-160 of the South Carolina Code (2015), which addresses injury by accident in the scope of employment. Claimant persuasively argues that she proved she suffered a work-related injury on April 11, 2012, and that the Appellate Panel erroneously disregarded the only expert medical evidence addressing causation: 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. Much like Claimant, it appears Dr. Tanksley only recognized the connection between Claimant's work and her injury once a rotator cuff problem was diagnosed.

Despite the lack of any medical opinion challenging Dr. Mazoue's expert finding, both the Single Commissioner and the Appellate Panel found Claimant's injury was not compensable, dismissing Dr. Mazoue's opinion because "his conclusion as to the work nexus does not come while he was treating her." Specifically, the Appellate Panel concluded:

33. Based on the substantial evidence, including Claimant's testimony and the medical records of Claimant, we find that Dr. Mazoue has opined that those issues are work-related. That being said, Dr. Mazoue's conclusion as to the work nexus does not come while he is actively treating the Claimant. It comes sometime later in a medical questionnaire. (APA p. 111). As such, we cannot give the opinion the weight we would normally give such opinion offered contemporaneously to the alleged date of injury.

Not only is this finding factually inaccurate and, thus, not supported by the substantial evidence in the record, we find it legally erroneous as well. First, the not "actively treating" finding is not supported by the substantial evidence in the record because Dr. Mazoue gave his uncontradicted opinion less than one month after Claimant's fifth post-surgical appointment. She underwent shoulder surgery—where the rotator cuff tear was finally discovered—on April 1, 2014. Following a May post-surgical appointment, Claimant again saw Dr. Mazoue on August 13, October 15, November 24, and December 29. He completed the medical questionnaire less than thirty days later, on either January 20 or 26, 2015. Reviewing this chronology, we find no support in the record for the Appellate Panel's decision to disregard this uncontradicted opinion on the basis that Dr. Mazoue's written opinion "does not come while he is actively treating the Claimant." As both the Single Commissioner and the Appellate Panel properly recognized, Dr. Mazoue confirmed in his subsequent deposition that his opinion connecting Claimant's right shoulder injury to her work lifting heavy laminate sheets was given to a reasonable degree of medical certainty.³

The Appellate Panel again demonstrated its misunderstanding of the substantial evidence in the record when it found Dr. Mazoue provided the *only* evidence of a work nexus for Claimant's injury. This is factually erroneous because Dr. Tanksley revised his "Unknown" finding after the rotator cuff pathology was discovered. Dr. Tanksley was initially unable to recognize the relationship to Claimant's work until he learned Claimant's continuing pain was, in fact, the result

³ The Appellate Panel's discounting of Dr. Mazoue's questionnaire and deposition testimony on such a basis is further troubling in light of Claimant's own testimony that she could not continue to see Dr. Mazoue after her December 29 appointment because she could not afford to pay her balance with his medical practice.

of a rotator cuff injury—and not simply cervical radiculopathy. Once Dr. Tanksley learned this, he corrected his initial "Unknown" and "not in association with work" notations to report "the context of the pain occurred with movement, in association with work." Again, the Appellate Panel ignored this evidence in the record despite the absence of any expert medical opinion to the contrary.

The Appellate Panel's problematic rejection of these two medical opinions is compounded by the fact that Dr. Tanksley and Dr. Mazoue were the only two physicians who actually followed and treated Claimant. Dr. Tanksley followed Claimant from May 2 through July 30, 2012; Dr. Mazoue followed her from September 14, 2012, through December 29, 2014. Instead the Appellate Panel appears to have placed greater weight on the medical records of physicians who saw and perhaps evaluated the Claimant once or twice but did not otherwise treat her, other than to perhaps give her pain medicine. None of these other doctors addressed the actual cause of Claimant's injury or opined as to whether it was (or was not) work-related.

Employer's argument that "the medical records don't support" Dr. Mazoue's expert medical opinion connecting Claimant's injury to her work ultimately fails in light of a full review of the record. 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, and there is no evidence in the record to support a finding that such a rotator cuff injury can arise idiopathically. Employer could have presented its own expert to challenge Dr. Mazoue, or it could have successfully cross-examined him to demonstrate the error of his conclusions. *See, e.g., Clark v. Philips Elecs./Shakespeare*, 433 S.C. 186, 193–94, 857 S.E.2d 378, 381 (Ct. App. 2021) (reversing and finding clear error where Appellate Panel offered no medical testimony to support its conclusion that claimant's "doctors' opinions were based upon 'self-serving assertions of the claimant'"). Neither occurred here. As Claimant's varying—and erroneous—attempted diagnoses demonstrate, the mechanism of her injury was complicated, and Employer correctly notes she initially failed to attribute it to her work as a laminator.⁴ But, the findings of both

⁴ We find the short-term disability form Claimant's husband helped her complete did not provide a basis for the Appellate Panel to disregard Dr. Mazoue's expert testimony. On the form, "No" was checked in the response to the question "Is this condition work-related?" However, our supreme court rejected such as a basis for denying compensability in *Massey* when the majority agreed with the circuit court's finding that "evidence supporting a compensable injury is overwhelming." *See Massey v. W.R. Grace & Co.*, 286 S.C. 434, 436, 334 S.E.2d 122, 122 (1985)

the Single Commissioner and the Appellate Panel improperly penalized Claimant for not understanding the genesis of her injury—an injury for which several physicians provided a variety of clinical impressions and misdiagnoses until Dr. Mazoue finally discovered the rotator cuff tear during surgery.⁵ This was error—both factually and as a matter of law.

"Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015). The Act defines a compensable injury as "only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except when

(Gregory, J., dissenting) (in which the dissent noted that the employee failed to report his injury as work-related and at one point stated the injury was not work-related); *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 216, 143 S.E.2d 376, 384 (1965) ("[W]here the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses.").

⁵ Claimant's clinical impression notes and diagnoses (or misdiagnoses) included conditions ranging from "likely brachial plexitis" (Dr. Shaffer) to "right upper extremity pain" and "muscle spasm" (Dr. Tanner) to "mild degenerative disc changes at C5-6 (Dr. Fanning) to "asymptomatic cervical disk bugle [sic] at C5-6 and probably has shoulder pathology on the right of some sort" (Dr. Sweet), to "[r]ight questionable early adhesive capsulitis" and "[r]ight shoulder rotator cuff tendinitis but with adhesive capsulitis" (Dr. McGown), to cervical radiculopathy (Dr. Tanksley, initially) to rhabdomyolysis and deep vein thrombosis. While some of these diagnoses may have also been applicable to Claimant's condition, all missed the actual injury causing her pain—the rotator cuff tear. This is somewhat understandable in that Claimant herself did not understand the mechanics of her injury—she just knew she was in pain and could no longer do the lifting required for her job. As she explained in her deposition, she did not tell the doctors at Providence that she had been hurt at work because at that "particular time, I didn't know what was wrong with me. I didn't know—all I just know, I was hurting." 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. Neither did several doctors.

it results naturally and unavoidably from the accident except such diseases as are compensable under the provisions of Chapter 11 of this title." § 42-1-160. An injured employee is not required to identify a specific causal event to prove her injury is compensable. *See Clade v. Champion Labs*, 330 S.C. 8, 12, 496 S.E.2d 856, 858 (1998).

McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992), is helpful to our analysis. There, the claimant began to feel a "bad stinging" in her back while picking up a heavy tray at work. *Id.* The claimant initially believed the pain was related to a congenital deformity of her right kidney, which had caused soreness in the past. *Id.* When her pain worsened, the claimant went to the emergency room, and the urologist found her symptoms were consistent with a kidney stone. *Id.* When testing revealed a kidney stone was not the problem, the claimant was treated for muscle strain. *Id.* at 186-87, 414 S.E.2d at 163. As the muscle strain treatment was initially successful, the urologist determined her pain was musculoskeletal. *Id.* at 187, 414 S.E.2d at 163. Five weeks later, an orthopedic surgeon diagnosed the claimant with a lumbosacral strain caused by lifting. *Id.* at 187, 414 S.E.2d at 164. At a hearing before a single commissioner, McGuffin's orthopedic surgeon connected her injury to her work, and this medical evidence was not disputed. *Id.* Thus, the single commissioner awarded the claimant workers' compensation benefits; however, the full commission reversed, relying heavily on the initial erroneous diagnosis and the fact that the claimant "did not immediately attribute her pain to her lifting." *Id.* In reversing the commission, our supreme court noted, "The respondent had been lifting these trays eight to ten times a day for four months without incident. Therefore, it was not unreasonable for her not to make the connection at the time." *Id.* Our supreme court held the claimant's own misdiagnosis was not substantial evidence from which it could be inferred that her injury did not result from an accident at work. *Id.* at 187-88, 414 S.E.2d at 164.

As in *McGuffin*, Claimant's failure to immediately attribute her injury to her work is not fatal to her workers' compensation claim, particularly since several physicians were unable to make a correct diagnosis until some two months after the onset of her symptoms. Claimant consistently reported her right arm and shoulder pain began at work on April 11, and she first sought medical treatment at the emergency room on April 13. It was not until June 11, two months after Claimant's pain began, that Dr. McGown discerned some type of rotator cuff injury. Only later did Claimant realize her injury was related to her job, which involved lifting heavy rolls and sheets of laminating materials. According to Claimant, she told her supervisor in July 2012 that the injury was work-related, and

no evidence was presented to contradict this testimony. Still, the tear was not discovered until the 2014 surgery. Based on the record as a whole, most specifically the unequivocal expert opinion of Dr. Mazoue and the chronology of Claimant's reporting to the various doctors who examined her, we find the fact that Claimant did not report that her injury arose from her work until she received the initial shoulder diagnosis is not substantial evidence necessary to support the finding that the injury itself was not work-related. *See, e.g., id.* (holding employee's misdiagnosis of cause of her back pain did not constitute substantial evidence from which the commission could deduce employee's injury did not result from work-related accident as her treating physician testified).

Notably, the only medical opinion given to a reasonable degree of medical certainty is that of Dr. Mazoue: that the patient's right shoulder injury "most likely occurred on April 10, 2012 (sic), while the employee was engaged in the regular duties of her employment as a laminator lifting heavy rolls." Although no expert was called to challenge Dr. Mazoue's opinion—or the amended notation of Claimant's other treating physician, Dr. Tanksley—the Single Commissioner found, viewing the evidence "as a whole," he was "not persuaded that the Claimant had an injury by accident on or about 04/10/13 (sic)." The Appellate Panel's subsequent order affirming the Single Commissioner also recognized "Dr. Mazoue further indicated that there was a direct causal relationship between the condition under which the work is performed and the injury." And, the Appellate Panel specifically found that in his deposition, "Dr. Mazoue does not change his opinion as to any of the above."

Despite these findings, the Appellate Panel—like the Single Commissioner—declined to give Dr. Mazoue's opinion "normal weight" and instead relied on the medical records of various physicians who misdiagnosed Claimant's rotator cuff injury to reject the only expert opinions addressing causation—those of Dr. Mazoue and Dr. Tanksley. In the context of the chronology of this case—and absent an expert opinion to the contrary—this was error.

Conclusion

We affirm the Appellant Panel's decision as to section 42-1-172 of the South Carolina Code (2015) and repetitive trauma; however, we find the Appellate Panel's findings and conclusions as to section 42-1-160 and the lack of a work nexus are not supported by the substantial evidence in the record and are affected

by errors of law. Thus, we reverse this portion of the Appellate Panel's order and remand this matter for a calculation of benefits.⁶

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, C.J., and THOMAS, J., concur.

⁶ We agree with Employer that Claimant's argument addressing a "dead zone" created by the interaction of sections 42-1-160 and 42-1-172 was first made before this court; therefore, it is not appropriate for our review. *See Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

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

v.

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

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondents ITW Labels and American Zurich Insurance Company/Zurich North America c/o Broadspire petition this Court to rehear its Opinion in the above-captioned case, Opinion No. 2023-UP-291(Ct. App. filed August 9, 2023). Respondents received this Court's Opinion on August 9, 2023.

This Court overlooked and/or misapprehended the proper standard of review to apply to the appeal. Further, the Court overlooked and/or misapprehended that Appellant had failed to meet her burden under section 42-1-160 of the South Carolina Code. Accordingly, the Appellate Panel's decision should have been affirmed in its entirety.

A. This Court overlooked and/or misapprehended the proper standard of review.

This Court correctly noted that the Administrative Procedures Act (APA) establishes the Court's standard of review for the Appellate Panel's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Respectfully, however, this Court 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.

This Court must affirm the decision of the Appellate Panel's determination unless it was based on an error of law or was 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. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached in order to justify its action. *See 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).

Moreover, the Appellate Panel is the ultimate fact finder in workers' compensation cases. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Brunson v. American Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Appellate Panel are conclusive. *See Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Appellate Panel'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) (internal citations omitted) ("while medical testimony is entitled to great respect, the fact

finder may disregard it if there is other competent evidence in the record. Indeed, 'medical testimony should not be held conclusive irrespective of other evidence'").

Here, this Court substituted its judgment and its credibility determinations in place of the Appellate Panel. This Court erroneously determined that Dr. Mazoue's opinion and Dr. Tanksley's single amended medical note were the only credible evidence on the question of whether Appellant suffered a compensable injury at work. The Court expressly discounted the medical records of several other medical providers, the contrary opinions of both Dr. Tanksley and Dr. Mazoue, and Appellant's own statements to medical personnel that her injury was not work related.

There is no dispute that the April 13, 2012 emergency room records, Appellant's first medical treatment sought days after the alleged injury, do not reflect any indication that Appellant reported she had suffered a work related injury. (R. pp. 57-66). Records for visits to the Palmetto Health Richland emergency room on April 17, 2012 and April 24, 2012, indicate that Appellant did not know what was causing her pain and there was no indication that her pain was associated with work. (R. pp. 72-76 & 77-80).

On April 27, 2012, Appellant sought treatment from Palmetto Health's Family Medical Center and Dr. Tanksley, whose the notes indicate she recalled "no injury." (R. pp. 93, 89-90). On May 2, 2012, she returned and the notes reflect that her injury was "not in association with work" and there were suspicions she was "malingering." (R. pp. 94-96). Appellant saw Dr. Tanksley on May 11, 2012 and May 15, 2012 and, in both instances, it was noted that her pain was "not in association with work." (R. pp. 99-104).

On May 11, 2012, Appellant signed a Short Term Disability form in which she indicated her injury was not work related. (R. pp. 303-308).

On May 31, 2012, Appellant saw Dr. Sweet, who reviewed an MRI of her spine and gave no indication that her injury or pain was work related. (R. pp. 122-126).

On June 11, 2012, Appellant saw Dr. McGown at the University Specialty Clinics Department of Orthopedic Surgery, whose notes reflect Appellate “had no specific injury” and gave no indication that Appellant’s injury or pain was work related. However, he did diagnose Appellant with an injury to her right rotator cuff. (R. pp. 128-129). Despite receiving this diagnosis of a rotator cuff injury on June 11, 2012, the diagnosis that Appellant claims kept her from associating her injury with work, when she saw Dr. Tanksley on June 15, 2012 and Dr. McGown on July 13, 2012, medical records from neither visit indicated she claimed she was injured at work or noted any suspicion of a work related injury. (R. pp. 110-112 & 128-130).

It was not until July 30, 2012, over three months from the onset of pain and over one month from the diagnosis that her pain was caused by a shoulder injury that any medical professional gave any indication that her injury or pain was associated with work. Moreover, even in that case, Dr. Tanksley’s note on July 30, 2012 offers no explanation as to why or even if he intentionally changed or corrected his diagnosis of a work related injury. (R. pp. 114-116). Thus, the Single Commissioner, the Appellate Panel and this Court are left to speculate as to what caused any change from his previous medical records denying a work related injury and weight the credibility of such an alleged change in light of the entire record.

On August 27, 2012, Appellant returned to Dr. Tanksley’s medical practice and Dr. Riggsbee, who had access to all Dr. Tanksley’s notes, indicated that her complaint had an “unsure etiology.” (R. pp. 118-121).

Appellant began seeing Dr. Mazoue on September 14, 2012. She had visits with him in September 2012, November 2012, February 2013, July 2013, February 2014, May 2014, August

2014, October 2014, November 2014 and December 2014. The notes from all of those visits fail to connect her shoulder injury or pain to work. In fact, the notes from the February 28, 2014 visit note there was “no known [Mechanism of Injury].” (R. pp. 131-149 & 153-171).

On January 20, 2015, after Appellant’s last visit with Dr. Mazoue, and after Dr. Mazoue met with Appellant’s counsel, he filled out a questionnaire and for the first time indicated that her shoulder injury and pain was associated with her work. (R. p. 172). During cross-examination, Dr. Mazoue testified that “a significant portion of” his opinion was based on information provided by Appellant’s counsel in their meeting. (R. p. 361:17-23). Further, he acknowledged that the cause of Appellant’s injury “could be any number of different things.” (R. p. 370:166 – 371:4).

Thus, within a month of Appellant first seeking treatment, Dr. Tanksley had determined on multiple occasions that Appellant’s pain and injury was “not in association with work” and Appellant signed a document expressly stating her pain and injury were not work related. Even after she was diagnosed by Dr. McGown with a shoulder injury, which for some inexplicable reason Appellant insists prevented her from associating her pain with a work injury, the notes from her next two medical visits failed to connect her injury or pain with her work. Moreover, Dr. Mazoue’s medical records, consisting of eleven visits over a 26 month time period, failed to connect her injury or pain to her work. It was not until he met with Appellant’s counsel that the connection was made.

Put simply, there is substantial evidence from numerous medical records—including those of Dr. Tanksley and Dr. Mazoue, and Plaintiff herself—upon which the Appellate Panel based its Decision and reasonable minds could easily reach the same conclusion the Appellate Panel reached. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. Thus, this Court’s decision to weigh

what it considered contrary evidence more heavily contradicts the proper standard of review and leads to the inescapable conclusion that this Court erroneously substituted its judgement for the judgement of the Appellate Panel.

Accordingly, this Court should grant rehearing, reverse its decision and affirm the decision of the Appellate Panel.

B. This Court overlooked and/or misapprehended S.C. Code Ann. § 42-1-160 and *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992) by reversing the Appellate Panel's determination.

This Court discounts Appellant's repeated failure to associate her pain or injury to work as reflected in numerous medical records and her express rejection that her pain and injury were work related, relying on *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992). However, this Court misapplied *McGuffin* to the facts of this case.

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, she 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, which could have caused her pain, Appellant had no such pre-existing condition. Thus, in *McGuffin*, the claimant thought her symptoms were related to a purely personal, pre-existing condition, whereas here, the alleged confusion is centered on what body part Appellant injured but not whether it was a purely personal pre-existing condition versus something work-related. Regardless of whether Appellant potentially injured her arm or neck (with accompanying radiculopathy) or her shoulder, the fact is that she did not relate her pain to her job until months after her alleged injury. There is no basis in the record to suggest that an arm or neck injury could not have been work related but a shoulder injury could.

Furthermore, the Appellate Panel in this case did not place the same emphasis on an erroneous self-diagnosis as did the Commission in *McGuffin*. Here, the Appellate Panel relied on numerous medical records that not only failed to associate her pain or injury to her work, but rather rejected the idea the pain or injury was "in association with work," and the fact that Claimant did not tell a single medical provider for months that she had hurt her arm 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 initial medical notes are silent about any connection between her pain and her job, even *after* she was diagnosed with a shoulder injury.

Thus, as the Appellate Panel relied on numerous medical records in addition to Appellant's failure to connect her pain or injury to work, *McGuffin* is distinguishable and not determinative in this case. This Court should grant rehearing and rule that Plaintiff failed to meet her burden of proving a compensable injury under S.C. Code Ann. § 42-9-160.

C. Respondents agree with the Court's decision that no repetitive injury occurred.

Respondents agree with this Court's determination the record does not support Appellant's theory of a repetitive injury and do not seek rehearing of that part of the Opinion.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court rehear its decision in this case, and affirm the determinations by the Appellate Panel that Appellant did not suffer a compensable injury at work.

Respectfully submitted,

August 24, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

FEB 05 2018
SC Court of Appeals

Appellate Case No.: 2017-001535

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

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred as a matter of law in finding Appellant did not meet her burden of proving a compensable injury by accident under Section 42-1-160 when the medical and lay testimony proved her injury arose out of her employment.
2. Whether the Appellate Panel erred as a matter of law in analyzing the case under Section 42-1-172 when it found there was no evidence Appellant's job involved repetitive tasks which would thus require her injury by accident to be found compensable under Section 42-1-160.
3. Whether the Appellate Panel erred as a matter of law in failing to apply Schlumberger, Mauldin and Massey for the proposition that a misdiagnosis by the patient and/or doctor is not evidence that an injury is not connected to work?
4. Whether the Appellate Panel erred as a matter of law in finding it would require speculation to find a compensable repetitive trauma injury when Appellant proved by expert medical evidence that her injury was directly connected to the activities of her employment as required under Section 42-1-172.
5. Whether the Single Commissioner erred as a matter of fact and law in disregarding the opinions of Dr. Tanksley that Claimant's injury happened in connection with her work.
6. Whether the Single Commissioner erred as a matter of fact and law in refusing to give "normal weight" to the opinions expressed by Dr. Mazoue in the questionnaire and deposition because "his conclusion as to that work nexus does not come while he is actively treating her," when Dr. Mazoue gave these opinions less than a month after his examination of the Claimant at a time when he would have continued treating her had she been able to afford treatment or had the claim been accepted.

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Appellant Doretta Butler-Long was employed with Respondent ITW Labels, Inc.

On June 24, 2013, Appellant filed a Form 50 (Claim) alleging she had sustained work-related injuries to her right shoulder, right arm, right hand and neck on April 13, 2012 while employed with Respondent. [R. p. 47].

On March 7, 2016, Appellant filed a Form 50 (Employee's Request for Hearing) repeating the allegations made in her original Form 50. [R. p. 49].

On March 14, 2016, Respondents filed a Form 51 (Employer's Response to Request for Hearing). Respondents admitted Long was their employee, but denied that she had suffered an injury by accident or a repetitive trauma injury. [R. p. 51].

The case was tried before Commissioner Gene McCaskill on August 30, 2016. On January 9, 2017, Commissioner McCaskill issued a Decision and Order denying benefits. He ruled, "I find that did not satisfy her burden of proving a compensable injury by accident and/or compensable repetitive trauma while in the course and scope of her employment with the Defendants." [R. p. 17, lines 2-3].

Appellant timely filed her Form 30 (Notice of Appeal) on January 23, 2017.

Oral argument was held on April 18, 2017 before the Appellate Panel (Commissioners Susan S. Barden, Avery B. Wilkerson, Jr., and R. Michael Campbell, II). The Appellate Panel issued its Decision and Order affirming the single commissioner on June 14, 2017.

This appeal followed.

STATEMENT OF THE FACTS

Doretta Butler-Long, Appellant, was employed by Illinois Tool Works (ITW) as a laminator and finisher for over 12 years – starting on September 11, 1999. [R. p. 408, lines 9-13]. The job requires lifting up to 50 pounds. [R. pp. 275-6]. Long's performance consistently met or exceeded the job requirements. [R. pp. 292-6].

ITW manufactured and laminated printed products, such as labels and signs for McDonald's, Coca-Cola and Blockbuster. ITW shut down their plant on January 1, 2013. [R. p. 423, lines 6-12].

On Wednesday, April 11, 2012, Long was working in her job as a laminator and finisher. As she was lifting a load of sheets for a Blockbuster job, Long felt pain in her right arm coming from her shoulder and neck. [R. p. 412, line 18 - p. 415, line 6]. She described the way she got hurt as: "From lifting the rolls and from the repetitive motion of just sending it through the machine from the rolls. A lot of the rolls are heavy, but I had to get my job done." [R. p. 413, lines 18-24].

Long's arm continued to hurt, but she dealt with it and kept working. She testified "It started hurting that particular day and then it's just progressed just the way my arm was like numb and it started just tingling. So I just went to the emergency room on that Friday." [R. p. 214, lines 5-9].

Long was seen at Providence Hospital late Friday night on April 13, 2012. Although not realizing the nature of her injury at the time, Long plainly described a work injury, as she gave a history of the pain beginning at work and described her job. The report states: "[Patient] presents today with complaint of right sided shoulder and forearm pain x 3 days . . . [Patient] has job in which she has repetitive arm movements." [R. p. 58 (emphasis added)].

The ER doctors took x-rays of her right arm, shoulder and chest – as she complained of pain in these areas. As the pain was not limited to her shoulder and was accompanied by numbness and

tingling into her right arm and fingers, Long did not appreciate that the injury was to her shoulder (nor did the doctors).

Long was given a sling for her arm and Percocet for the pain.

She was scheduled to work on Monday, April 16, 2012. She called in to work and "told Stacie [Dash] I was not coming because I went to the doctor and I was hurting . . . from my understanding, I had a slipped disc in my neck and I'm in a lot of pain and I can't do anything. I'm hurting. I'm in pain. I can't come to work. She told me okay." [R. p. 416, line 9 - p. 417, line 3].

Long did not specifically state she had a work injury as "At that time, I didn't know it was a work injury. . . . to my understanding it was a slipped disc." [R. p. 417, lines 4-11].

The next day, Long was still in pain, so the next day – Tuesday, April 17, 2012 – she went to the ER at Palmetto Health Richland. The report states "She has developed this right arm pain that has been going on for a week. She says it hurts more at nighttime. She was seen at Providence and had a kind of pain in her right shoulder and progressed down her right arm . . . They did not give her any follow-up and she is just concerned as the pain has not gotten any better, it has gotten slightly worse. She states she does not know what is causing this pain but is just causing some concern." [R. p. 73].

The doctors at Palmetto Health were also unable to make a clear diagnosis. They ordered tests to rule out a Deep Vein Thrombosis and rhabdomyolysis – both of which were negative. [R. p. 74]. She was ultimately released with a referral to an orthopaedic surgeon and a clinical impression of right upper extremity pain and muscle spasm. [R. pp. 74-5].

Long continued to "have pain radiating from the neck all the way to the arm" – which continued to worsen. She returned to the ER at Palmetto Health Richland one week later on April

24, 2012. They again noted muscle spasms. They took cervical x-rays and stated "The patient will possibly need MRI" [R. pp. 77-8].

On April 27, 2012, Long went to the Family Medical Center. She described "Right upper extremity pain - Pain started 3 weeks ago in the right side of her chest. This hurt for 2 days, then migrated to her right clavicle, and then up her right arm. She presented when she developed tingling pain down her whole arm to her fingers." The reported added "She recalls no injury . . . she has been wearing a sling for 3 weeks now . . . The worst spot is the triceps and mid forearm." [R. p. 93].

On physical exam, the doctor noted "right trapezius and paraspinal muscles in marked spasm easily visible . . ." There was "markedly reduced ROM" in her shoulder and elbow. Long was diagnosed with "neck pain and neuropathy affecting the right arm – likely brachial plexitis." She was referred to neurosurgery. [R. pp. 89-90].

Long returned to the Family Practice Center on May 2, 2012, where she was seen by Dr. Simon Tanksley. [R. p. 94]. Dr. Tanksley ordered a cervical MRI. He also signed disability papers and made a notation "Very suspicious for malingering."¹ [R. pp. 94-6].

Long had the cervical MRI done on May 9, 2012. It showed "focal disc protrusion and mild stenosis at C5-6. Otherwise unremarkable exam." [R. p. 98].

She was not sure of the exact date, but somewhere around this time, Long attempted to return to work. She worked about an hour and a half – before her employer saw that she could not do the work and sent her home. [R. p. 417, line 16 - p. 418, line 2].

¹ There is no evidence that Long was actually malingering. At this point, several weeks after her work injury, no doctor had correctly diagnosed the problem. Dr. Tanksley noted arm pain but ordered a cervical MRI.

Her employer had a co-worker bring her short-term disability documents. On the employee portion, Long checked "No" to whether the condition was "work-related" or "the result of an accident." [R. p. 304]. As Long explained, "At the time when this paper was filled out, I was under the impression I had a slipped disc in my neck. So I didn't know it was a work-related injury." [R. p. 420, lines 2-15]. She also testified "The pain did start at work, but I didn't think it came from work." [R. p. 459, lines 24-25].

Dr. Tanksley filled out the Attending Physician Statement on May 11, 2012. He gave a date of disability beginning April 11, 2012 (the date of her injury) and a diagnosis of cervical radiculopathy. As to whether the "condition [is] due to injury or sickness arising out of patient's employment," Dr. Tanksley checked "Unknown."² [R. p. 307].

On May 31, 2012, Long was seen by a neurosurgeon, Dr. Sweet. Dr. Sweet's impression was "asymptomatic cervical disc C5-6 and probably has shoulder pathology of some sort."³ [R. p. 126]. He referred her to an orthopaedic surgeon.

Long saw Dr. Andrew McGowan specifically for her shoulder on June 11, 2012. Under cause of pain, the note states "Started with chest pain and generated to shoulder and fingers." [APA page 67]. Dr. McGowan diagnosed Long with "Right shoulder rotator cuff tendinitis but with adhesive capsulitis." [APA pages 68-69].

² The fact Dr. Tanksley was undecided was due to the incorrect diagnosis of cervical radiculopathy. Once he learned Long had a rotator cuff injury, he corrected his records to state "the context of the pain occurred with movement, **in association with work . . .**" [R. p. 144 (emphasis added)].

³ Dr. Sweet was the first doctor to actually diagnose shoulder pathology. After seeing Dr. Sweet and Dr. McGowan, Long reported her problem to her Employer as a work injury. She testified "I told Stacie [Dash] in the end of July when I found out for sure what was wrong with me." [R. p. 423, lines 13-22].

After physical therapy did not help, Long saw a shoulder surgeon, Dr. Chris Mazoue, on September 14, 2012. On that first visit, the history stated "Pain 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." [R. p. 133].

Dr. Mazoue followed Long from September 14, 2012 until December 29, 2014. Surgery was recommended but not done until April 1, 2014 due to a lack of insurance. Long is currently under a 5-pound lifting restriction.

On January 20, 2015, Dr. Mazoue reviewed Long's entire medical history – including his own records and those of the other medical providers – and then completed a questionnaire. **Dr. Mazoue opined to a reasonable degree of medical certainty that her "right shoulder injury is most likely related to her activities as a laminator."** He also opined she was not at MMI and should remain under work restrictions. [R. p. 172 (emphasis added)].

Dr. Mazoue agreed with the statement "My opinion is based on the history and symptoms reported by the patient, the signs shown on physical examination, imaging studies, and the operative findings." He added a handwritten notation stating: "*and review of records with reports to onset of pain and dysfunction and subsequent medical care.*" [R. p. 172].

Dr. Mazoue was deposed on August 29, 2016. He was cross-examined by Defense Counsel on his opinions and shown numerous medical records – both on cross and direct examination. After reviewing the records shown by the attorneys, he added the handwritten notation "Because I think it's different to make a determination on the previous three questions, and I think that that additional documentation helped me to understand that there was a likely correlation between her work and her onset of her right upper extremity symptoms." [R. p. 377, lines 1-6]. Dr. Mazoue affirmed his

opinion to a reasonable degree of medical certainty that Long had suffered a work-related injury to her right shoulder.

The case was tried before Commissioner Gene McCaskill on August 30, 2016. Commissioner McCaskill ruled " I find that did not satisfy her burden of proving a compensable injury by accident and/or compensable repetitive trauma while in the course and scope of her employment with the Defendants." [R. p. 17, lines 2-4].

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside-Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2017).

“[T]he guiding principle undergirding our workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission “based on rank speculation . . . cannot now be used as the basis for denying [an injured worker’s] claim for lost wages.” Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. Long proved she suffered a work-related injury to her right shoulder, right arm and neck on April 10, 2012.

The evidence shows Long injured herself while working as a laminator for the Employer. “She had a severe onset of chest pain that radiated outward from the arm” at work while lifting rolls of laminate on Wednesday, April 11, 2012. [R. p. 412, line 18 - p. 415, line 6; R. p. 133]. This is undisputed and there is no evidence to the contrary. Indeed, every medical record relates the onset of pain back to that date.⁴ The Appellate Panel erred in disregarding the testimony and medical records when it found “we are not persuaded that the Claimant had an injury by accident on or about April 10, 2012.” [R. p. 40, lines 2-3]. The Appellate Panel further erred in denying a repetitive trauma injury (Appellant’s alternate position) on the basis that “we find that there is no indication in the medical records – other than the opinion of Dr. Mazoue – that the Claimant was injured at work.” [R. p. 40, lines 12-13].

A. The statutory scheme for *injury by accident* versus *repetitive trauma injury*.

Historically, work-related repetitive trauma injuries were compensable as injuries by accident under section 42-1-160. See Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002) (“We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma.”). In 2007, the Legislature amended the Act to create the new category of “Repetitive trauma injury.” S.C. Code Ann. § 42-1-172 (2007).

⁴ Providence Hospital; April 13, 2012 (“right sided shoulder and forearm pain x 3 days”) [R. p. 58]. Palmetto Health Richland; April 17, 2012 (“this right arm pain that has been going on for a week.”) [R. p. 73]. Family Medical Center/Dr. Tanksley; April 27, 2012 (“Pain started 3 weeks ago in the right side of her chest”) [R. p. 93]. Short Term Disability Application; May 11, 2012 (“Date symptoms first appeared or accident happened Month April Day 11 year 2012 [R. p. 307]. Dr. Sweet; June 11, 2012 (“Injury Date: April 2012). Dr. Chris Mazoue; September 14, 2012. (“Pain started April 10th . . .”). [R. p. 131].

The vast majority of workplace injuries are still evaluated under § 42-1-160. The statute states “‘Injury’ and ‘personal injury’ mean only injury by accident arising out of and in the course of employment . . .” S.C. Code Ann. § 42-1-160 (A) (2007). As to repetitive trauma, the Legislature created a carve out whereby “[t]he word ‘accident’ as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease pursuant to the provisions of Chapter 11 of this title.” S.C. Code Ann. § 42-1-160 (F) (2007).

If the injury arises out of a series of similar events over an extended period of times, then the case is analyzed under section 42-1-172. The statute requires “a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury.” S.C. Code Ann. § 42-1-172 (B) (2007). The statute creates a heightened burden because it requires “expert opinion or testimony stated to a reasonable degree of medical certainty . . .” S.C. Code Ann. § 42-1-172 (C) (2007). Conversely, an injury by accident can be proven by lay testimony alone (although medical evidence is helpful and can be required in complex cases). See e.g., Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999).

The key point here is that there is no dead zone between an *injury by accident* and a *repetitive trauma injury*. So long as there is medical causation of a connection to the workplace, the injury will be compensable under either statute. If the work activity does not involve regular, continuous or

frequent repetitive trauma over an extended period of time, the case is analyzed as an injury by accident under section 42-1-160.

As an example, work in a chicken processing plant involving processing thousands of chickens daily using the same simple hand motion every few seconds is the classic repetitive trauma injury. Conversely, the fast food worker who unloads 50 boxes from a truck once a week has not engaged in repetitive trauma. The fast food worker may realize he or she is hurting from an injury after finishing the task, yet not be able to identify which of the 50 boxes caused the injury (a scenario akin to the case at bar). The fast food injury is nonetheless compensable as an injury by accident because it did not involve repeated similar events over an extended period time.

In the instant case, the Appellate Panel found “that, while an argument can be made that if her work is repetitive, there is little testimony as to the repetitive nature of the job.” [R. p. 40, lines 18 - 20; p. 275-6]. The Appellate Panel erred in creating a dead zone where the cause of the injury is proven to be work-related, yet is not compensable because in the Commission’s eyes it is neither a discrete one-time injury by accident nor a repetitive trauma injury. If there is no proof of “the repetitive nature of the job,” the claim does not fail for lack of proof – it remains an injury by accident. In short, as the Appellate Panel effectively found the job was not repetitive, the analysis defaults back to section 42-1-160 and must be found compensable as an injury by accident.

B. Long’s injury by accident arose out of her employment.

An injury arises out of the employment “when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.” Holley v. Owens Corning Fibreglas Corporation, 301 S.C. 519, 392 S.E.2d 804, 807 (Ct. App. 1990), *aff’d*. 302 S.C. 518, 397 S.E.2d

377 (1990)(per curiam). In this regard, “if the injury can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment.” Id. For an injury to arise out of employment, there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). An injury is compensable so long as it arises out of the employment “looked at in any of its aspects.” Jordan v. Dixie Chevrolet, 218 S.C. 73, 79, 61 S.E.2d 654, 657 (1950). See, also Barnes v. Charter 1 Realty, 411 S.C. 391, 399, 768 S.E.2d 651, 655 (2015)(“Barnes clearly established that she was performing her job when she sustained an accidental injury; we therefore hold her injuries arose out of her employment as a matter of law.”)

When it started, Long’s pain presented as chest, right arm and right shoulder pain. As she continued to work through Thursday and Friday, it got worse. She started getting radiating numbness and tingling down her arm into her fingers. With this onset of symptoms – and without a “slip, trip, fall or other fortuitous event” – Long did not understand what was going on. She should not be penalized or held to an impossible standard because she did not understand her injury. “The Act requires an injured employee to be diligent, not prescient.” King v. Int’l Knife, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).

Long was in such severe pain by Friday night that she went to the emergency room. At the ER, she discussed her job as a causative factor, as the record notes “[Patient] has job in which she has repetitive arm movements.” [R. p. 58]. The confusion arose because Long did not recognize what had happened to her and the doctors could not figure out what was wrong. It took several months, multiple doctors, and a shoulder MRI before Dr. Mazoue made the correct diagnosis.

Long had severe muscle spasms in her right trapezius and paraspinal areas. She complained of numbness and tingling. Working diagnoses ranged from a deep vein thrombosis to rhabdomyolysis, cervical radiculopathy, and brachial plexus neuropathy. No doctor figured out it was likely shoulder pathology until Dr. Sweet viewed her cervical MRI and determined her problems were likely emanating from shoulder pathology. If the doctors cannot figure it out, how can one expect a blue-collar factory worker with no medical experience to make the correct diagnosis? See McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by employee and her physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Cf. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(applying discovery rule to toll the statute of limitations because the employee did not suspect nor have reason to suspect her problem resulted from a work accident until she was correctly diagnosed by specialist orthopaedic surgeon).

The *only* evidence in this case is that Long suffered a work-related right shoulder and arm injury on April 10, 2012. There is no evidence of any other event that could have caused it, nor is there any evidence that the torn rotator cuff and biceps were preexisting, degenerative or idiopathic. Her injury occurred at work while she was doing the normal duties of her job. The fact it came on insidiously does not change that essential fact.

There has never been a requirement that a claimant identify a specific instant or event when the injury happened. In Clade, the Supreme Court criticized the Court of Appeals for “focus[ing] on [the employee’s] failure to prove a specific causal event instead of her failure to prove a causal relationship.” Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1997). The court explained: “This language which requires an injured employee to identify a specific event for an

injury to be compensable contradicts the established law of this state.” See Stokes v. First Nat’l Bank, 306 S.C. 46, 49, 410 S.E.2d 248, 250 (1991) (“[N]o slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident.”). Clade stands for the proposition that a claimant must prove “a causal relationship” between the injury and the work; not identify a “specific event” when the injury happened.

Unlike the employee in Clade, Butler has consistently reported her injury as occurring with the “insidious onset” of pain at work on Wednesday, April 11, 2012.⁵ Thus, while there was “no slip, fall or other fortuitous event,” the evidence shows the injury occurred at work on April 11, 2012 – gradually worsening over the course of three days until she went to the emergency room after work on Friday. Butler testified: “the pain came on gradually. It started hurting that Wednesday. And as it got closer to that Friday, it was hurting worse. Then by Friday, my hand was going numb and my hands and stuff were tingling. So I thought something was medically really wrong with me.” [R. p. 456, lines 9-14]. On cross-examination, she explained: “The pain did start at work, but I didn’t think it came from work.” [R. p. 459, lines 24-25].

This case is squarely controlled by McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992) (“misdiagnosis does not constitute substantial evidence from which the Commission could infer that [the injury] did not result from an accident at work.”). Respondents

⁵ Providence Hospital; April 13, 2012 (“right sided shoulder and forearm pain x 3 days”) [R. p. 58]. Palmetto Health Richland; April 17, 2012 (“this right arm pain that has been going on for a week.”) [R. p. 73]. Family Medical Center/Dr. Tanksley; April 27, 2012 (“Pain started 3 weeks ago in the right side of her chest”) [R. p. 93]. Short Term Disability Application; May 11, 2012 (“Date symptoms first appeared or accident happened Month April Day 11 year 2012 [R. p. 307]. Dr. Sweet; June 11, 2012 (“Injury Date: April 2012”). Dr. Chris Mazoue; September 14, 2012. (“Pain started April 10th . . .”). [R. p. 131].

attempt to distinguish McGuffin fails. Respondents argue "The Supreme Court's holding is wholly inapplicable because the claimant in McGuffin, unlike the Claimant in the present case, actually mentioned the nexus of the pain to the claimant's employment to both a coworker and the surgeon, but attributed her pain to her kidneys." [Respondents' Brief to the Full Commission, p. 6].

Respondents' characterization is not wholly accurate. "When [McGuffin's] pain continued to worsen during the night, she sought treatment in the local emergency room. The urologist who examined her at that time testified her complaints were certainly consistent with a kidney stone." Id. After making the original diagnosis of a kidney stone, the urologist performed additional tests, ultimately concluding "the fact that she improved with bed rest and treatment for muscle strain indicated this was musculoskeletal pain." Id. McGuffin was referred to an orthopaedic surgeon. The surgeon testified "[McGuffin] told him she had been experiencing low back pain since lifting a heavy tray of parts at work." [Id.].

The Supreme Court explained how the Commission's analysis was erroneous:

In reversing the award of the single Commissioner, the Full Commission relied heavily upon the preliminary diagnosis made by the respondent and her attending physicians. The Commission put great reliance on the fact that the respondent did not immediately attribute her pain to her lifting. The respondent had been lifting these trays eight to ten times a day for four months without incident. Therefore, it was not unreasonable for her not to make the connection at the time. This is especially so when as her physicians testified her pain was consistent with kidney type pain. 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.

[Id.]

We have the same situation here. The single commissioner puts great weight on the fact "the claimant testified that she did not know her injury was caused by work." [R. p. 16, lines 5-7]. The single commissioner omits the fact that Butler also testified she learned her injury was work-related

when she was given the correct diagnosis of a shoulder injury. She testified: "I told Stacie [in HR] in the end of July when I found out for sure what was wrong with me." [R. p. 423, lines 13-22]. Up until then, she had been misdiagnosed with a myriad of conditions ranging from cervical radiculopathy, brachial plexopathy; rhabdomyolysis and a deep vein thrombosis. The misdiagnosis, both from Butler and her doctors, is understandable given her presentation. As reported to the Family Practice Center on May 2, 2012, "Pain started 3 weeks ago in the right side of her chest. This hurt for 2 days, then migrated to her right clavicle, and then up her arm. She presented when she developed tingling pain down her whole arm to her fingers."⁶ The doctor noted "Confusing patient with unusual exam but marked pain and abnormal findings. At least 2 pathologies present-neck spasm and some neuropathy affecting the right arm – likely brachial plexitis." Not surprisingly, she was diagnosed with "Brachial neuropathic pain" on this visit – exactly three weeks after her injury. [R. p. 89].

As to not immediately attributing her pain to lifting, Butler had been doing the same job for 12 years without incident. She was asked by the single commissioner, "What did you think had happened?" She responded:

I didn't know because, see, I'm not a sickly person. So I didn't know what happened. I just knew that I was in pain and this is some kind of pain I never felt before. And then once my hand started going numb, I thought something might be wrong because of, you know, kind of physical. Like I might – I mean, I just thought something

⁶ Butler's testimony at the hearing was virtually identical. She testified:

I didn't notice until that Wednesday or on the 11th or the 10th, whichever day the Wednesday before the 13th. That's when I noticed it started – it was hurting. It started hurting that particular day and then it's just progressed just the way my arm was like numb and it started just tingling. It was hurting. So I just went into the emergency room then on that Friday. . . . I was at work [when it started hurting].

[R. p. 413, lines 2-13].

might have been bad, bad wrong. I just didn't think it was my arm or could have been my neck or anything. I just thought something other than that was wrong with me. . . . What initially made me go is because my arm was going numb and I was scared that I could – I could possibly die or something.⁷ So I went on to the doctor. [R. p. 429, line 9 - p. 430, line 2].

As in McGuffin, “it was not unreasonable for her not to make the connection at the time. This is especially so when as her physicians testified her pain was consistent with [cervical radiculopathy]. This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her [cervical spine] but was in fact [her shoulder].” McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(alterations added).

The fact is Butler's treating physicians *did* diagnose her with a work-related shoulder injury. Dr. Mazoue – as noted by the Appellate Panel – “opined that those issues are work-related.” Furthermore, “Dr. Mazoue does not change his opinion to any of the above [in his deposition testimony]. [R. p. 14, line 8 - p. 15, line 6].

The Appellate Panel overlooked Dr. Tanksley's final opinion. Dr. Tanksley's original *electronic* medical record of May 2, 2012 (cited by the Appellate Panel) states: “The context of the pain: occurred not following a fall, not during sports and not in association with work.” [R. p. 94]. On May 11, 2012, Dr. Tanksley avoided giving an opinion when filling out the Attending Physician Statement. As to whether the “condition [is] due to injury or sickness arising out of patient's employment,” Dr. Tanksley checked “Unknown.” [R. p. 307]. On July 30, 2012, once he learned Butler had a rotator cuff injury rather than cervical radiculopathy, he corrected his records to state

⁷Dr. Mazoue testified: “Well, whenever someone has chest pain, you know, you get worried about other non-musculoskeletal causes. You know, cardiac issues, things like that.” [R. p. 371, line 25 - p. 372, line 3].

“the context of the pain occurred with movement, **in association with work . . .**” [R. p. 114 (emphasis added)].

Dr. Tanksley and Dr. Mazoue have given explicit opinions making the causal connection between work and the injury. They are also the *only* two doctors who actually followed and treated Butler. Dr. Tanksley followed Butler from May 2nd through July 30, 2012. Dr. Mazoue followed her from September 14, 2012 through December 29, 2014. Drs. Sweet and McGowan each saw her one time – and neither gave an explicit opinion one way or the other as to the cause of her injury. *No doctor has given an opinion that Long’s shoulder injury is not work-related.* This is important because there is no conflict in the evidence – there is nothing to weigh. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission’s denial of claim because the “only evidence of causation is that Claimant’s mental injury was caused by her stress at work as stated by Dr. Lowe”); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)(“evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision of the Industrial Commission.”); Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965)(“Expert testimony is not binding upon the fact-finding body *if* there is competent substantial evidence to the contrary, though in matters of such kind which are not of common knowledge, fact finding body must accept opinion of experts.”)⁸.

⁸ Massey is particularly apropos to the instant case. In Massey, “There was evidence that respondent failed to report his injury as work-related, and indeed, at one point stated it was not work-related. Even after reporting the injury, he was unable to point to any specific accident. Respondent’s doctors diagnosed his injury as “degenerative” or developing over a period of time.” Id. Despite these observations, a majority of the South Carolina Supreme Court held the “evidence supporting a compensable injury is overwhelming . . .” Id. As in McGuffin, a claimant’s misapprehension about the nature of the injury is not substantial evidence to support a decision denying the claim.

Some of the medical records state “no trauma” or “no specific incident.” This is to be expected given the insidious nature of Long’s injury and difficulty in understanding exactly what the injury was. As we know from the case law, the lack of a specific event makes no difference. One only need prove the causal relationship between the work and the injury. Long met her burden by (1) consistently reporting that her pain began on Wednesday April 11, 2012, while she was at work; (2) making the causal connection to work once she was correctly diagnosed with a shoulder injury; and (3) by submitting *unrefuted* expert medical testimony stating her injury was work-related by two treating physicians. Respondents presented no evidence to contradict these medical opinions. As such, the Appellant Panel should be reversed and the Appellant should be awarded appropriate benefits for her compensable injury by accident. Long should be placed on a running award of temporary total disability compensation, her past medical treatment should be paid for, and she should be returned to Dr. Mazoue for additional follow-up evaluation and treatment.

C. If not an injury by accident due to the work being repetitive, Long suffered a compensable repetitive trauma injury arising out of her employment.

Should the Court find this case involves a repetitive trauma injury, then the Commission should still be reversed as there is a lack of substantial evidence to support the Appellate Panel’s holding that “we find that, even after extensive review, we cannot make a finding of compensability without speculation.” [R. p. 41, lines 18 - 21].

The statute states: “A ‘repetitive trauma injury’ is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.” S.C. Code Ann. § 42-1-172 (D) (2007). Dr.

Mazoue gave exactly that opinion in the suggested statutory language: "There is a direct causal relationship between the condition under which the work is performed and the injury. [R. p. 172].

Furthermore, the Appellate Panel need not resort to speculation. If anything, the denial is based on speculation. The Appellate Panel was reversed in Burnette for adopting the medical opinion of the single commissioner when "no evidence indicates this opinion originated from a medical provider." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013). As, Dr. Mazoue explicitly provided medical evidence of causation to a reasonable degree of medical certainty, the Panel need not resort to making its own medical diagnosis. It merely needs to rely on the evidence before it.

Therefore, if the Court does not find Long suffered an injury by accident, it should find Appellant met her burden of proof by medical evidence and should be awarded compensation and medical treatment for her injuries.

2. It was error to disregard Dr. Mazoue's uncontradicted medical opinion as proof of causation.

The Appellate Panel rejected Dr. Mazoue's expert opinion, making this finding of fact:

Based on the substantial evidence, including Claimant's testimony and the medical records of Claimant, we find that Dr. Mazoue has opined that those issues are work-related. **That being said, his conclusion as to that work nexus does not come while he is actively treating her. It comes some time later in a medical questionnaire.** (APA p. 111). As such, we cannot give that opinion the weight we would normally give such opinion offered contemporaneously to the alleged date of injury. [R. p. 41, lines 12-17 (emphasis added)].

Dr. Mazoue treated Long for quite a long time – September 14, 2012 through December 29, 2014. He would have kept on treating her had she not lost her health insurance at the beginning of

2015. He was very familiar with her and her condition, particularly since he had seen her longer and more frequently than any other doctor – and because he actually operated on her.

The “some time later in a medical questionnaire” referred to by the Single Commissioner and Appellate Panel was January 20, 2015. It was a mere *twenty-two* days from the previous date of active treatment. Respectfully, it is an error of law to disregard medical evidence in the absence of other competing evidence. “The nature and timing of [a patient’s] visits do not discredit [a physician’s] medical opinion.” Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner’s own medical opinion is not substantial evidence and must be reversed).

Dr. Mazoue’s opinion (and Dr. Tanksley’s opinion) that Long’s condition is work-related are unrefuted and uncontradicted. Both opinions were given close in time to when Long was actively treating with each doctor. In each case, the opinions were given with some thought behind them.

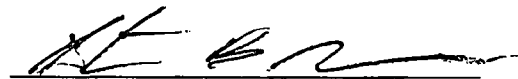
Dr. Tanksley originally indicated the cause of Long’s “pinched nerve” was “unknown.” Upon learning of the correct diagnosis, he *changed* his records to indicate “in association with work.” [R. p. 114 (emphasis added)]. He made the connection between the injury and work on July 30, 2012 – only three and a half months after the injury and well before the surgery. In fact, this was even *before* Dr. Mazoue saw Long for the first time.

Dr. Mazoue did not merely check a box on a questionnaire. He added a handwritten notation supporting his opinion. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) (“It is, of course, elementary that the factual or underlying basis for the expert’s opinion be set out, otherwise the opinion lacks probative value.”). Moreover, he defended his opinion in a deposition.

It was error to disregard the medical opinions of Dr. Mazoue and Dr. Tanksley in favor of speculation. The Decision and Order of the Appellate Panel should be reversed.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should issue an opinion awarding medical treatment and temporary total disability compensation to Appellant.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

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

v.

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

CERTIFICATE OF COUNSEL

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

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W.C.C. File No.: 1221499

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION PROPERLY HELD THAT CLAIMANT FAILED TO MEET HER BURDEN OF PROVING SHE SUFFERED A COMPENSABLE INJURY BY ACCIDENT?
- II. WHETHER THE COMMISSION PROPERLY HELD THAT CLAIMANT FAILED TO MEET HER BURDEN OF PROVING SHE SUFFERED A COMPENSABLE REPETITIVE TRAUMA INJURY.
- III. WHETHER CLAIMANT'S ARGUMENT REGARDING A "DEAD ZONE" IS NONSENSICAL AND NOT PRESERVED FOR APPELLATE REVIEW?
- IV. WHETHER THE COMMISSION ERRED IN GIVING DR. MAZOUÉ'S OPINION NORMAL WEIGHT AND CONSIDERING ALL OF THE MEDICAL EVIDENCE?

STATEMENT OF THE CASE

Appellant Doretta Butler-Long, Claimant below, 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.” (R. pp. 47-48).

On March 7, 2016, she filed another Form 50, alleging the same injuries and requesting a hearing. (R. pp. 49-50).

Respondents Illinois Tool Works d/b/a Central Label Products (“ITW”) and American Zurich Insurance Company/Zurich North America c/o Broadspire filed a Form 51, denying the claim and asserting 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, 2012,¹ “[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

¹ 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.”)) (App. Br. p. 3 (alleging an April 11, 2013 incident)).

going numb” and, on April 13, 2012, she went to the emergency room at Providence Hospital. (R. p. 53).

The parties were heard by Commissioner Gene McCaskill on August 30, 2016. After reviewing Claimant’s testimony and 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 Section 42-1-160 or Section 42-1-172. (Decision and Order, filed Jan. 9, 2017, R. pp. 1-19) (“Single Commissioner Decision”).

Claimant appealed the Single Commissioner Decision, raising nine issues. (R. pp. 318-319). The parties filed appellate briefs with the Full Commission and were heard by an Appellate Panel on April 18, 2017.

In a decision filed June 14, 2017, the Appellate Panel affirmed the Single Commissioner Decision with amendments. Like the Single Commissioner, after viewing the evidence as a whole, the Appellate Panel 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 this Court.

BACKGROUND FACTS

Claimant testified that, at the time of the hearing before Commissioner McCaskill, she was 44 years old. She has a high school diploma and attended technical college for two years. (R. p. 407, lines 5-13).

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 got 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).

At the hearing, 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 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 was seen at Palmetto Health's 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 stated that her pain began at work. (R, pp. 93, 89-90) (emphasis added).

She returned 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 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).

Claimant saw Dr. Tanksley on May 11, 2012. Notes from that visit report pain in her upper right extremity that had begun a month previously. Dr. Tanksley noted both times 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 on May 15, 2012. Notes from that visit report pain in her upper right extremity that had begun a month previously. Dr. Tanksley noted both times 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. 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’s pain started at 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." The medical notes 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." Again, there is no indication that Claimant told Dr. McGown that her pain began at work. The intake form, most likely filled out by Claimant, (R. p. 375, lines 4-13), 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).

Claimant saw Dr. Tanksley again on June 15, 2012, complaining of right arm pain that was improving, and depression. There is no indication that her injury was work-related or 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 had 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, 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). 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. Riggsbee, who had access to all of Dr. Tanksley's

notes, advised that Claimant was “[s]cheduled to see ortho (Mazoue) in Sept.” His August 27 notes make no mention of work but, instead, indicate her complaints had an “[u]nsure etiology but has had extensive w/u recently including MRI.” (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).

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.” There is no mention that Claimant’s pain began at work. 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), despite the fact that Dr. Mazoue’s notes do not reflect that assertion. (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 that the 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 mention that her shoulder pain 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 any association of Claimant's condition to 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 corticosteroid injection and indicated Claimant was to follow up as needed in the future. (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 or was related to her job. (R. pp. 67-71).

Claimant did not see Dr. Mazoue again until February 28, 2014. His notes indicate 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 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. He noted she should follow up in three months. Again, there is no mention that Claimant's pain began at or was associated with her work. (R. pp. 169-171).

On January 20, 2015, 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, they had diagnosed her 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, 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). 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).

At the hearing, Claimant's counsel stated on the record that, although they had pled in the alternative injury by accident pursuant to Section 42-1-160 and repetitive trauma injury pursuant to Section 42-1-172, "[w]e do believe it is better characterized as

an injury by accident, as the evidence will show that this is not a repetitive type of job ...” (R. p. 395, lines 3-13). Claimant’s counsel asserted that Claimant “knew it happened at work, but she didn’t know what it was.” (R. p. 396, lines 9-10). However, the medical notes consistently lack any indication that Claimant told anyone treating her that her injury “happened at work.” At the hearing before the Appellate Panel, Claimant’s counsel argued that the Single Commissioner had “erred by looking for a specific event. And certainly, this case would be a lot easier if Ms. Butler had picked up a 50 pound pile of laminate, felt an immediate pop, screamed, dropped it and immediately report[ed] it. But it didn’t happen that way.” (R. p. 466, lines 1-7).

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 should 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). 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 Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). 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 Commission properly held that Claimant failed to meet her burden of proving she suffered a compensable injury by accident.

A claimant seeking workers' compensation benefits bears the burden of proving all the facts necessary to support her claim. Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998). The Commission correctly and properly held that, under the facts of this case, Claimant failed to prove she suffered an injury by accident as defined by the Act in Section 42-1-160. (Commission Decision, R. pp. 35-45). Although Claimant told various medical providers that her symptoms began around the April 10-11, 2012 timeframe, that alone is insufficient to prove that she suffered a work-related injury, particularly in light of numerous medical records over months that fail to mention that her symptoms began while she was at work or relate her shoulder problems to her job duties.

Claimant alleges she should not be penalized or held to an impossible standard because she did not understand her injury. She cites King v. International Knife & Saw – Florence, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), a repetitive trauma injury case, for the proposition that an employee must "be diligent, not prescient." 395 S.C. at 445, 718 S.E.2d at 231. However, King dealt with when the 90-day notice requirement in Section 42-15-20(c) begins to run, and not whether the claimant's injuries were causally related to his work.² And, while a claimant is not held to the standard of being prescient

² In King, the claimant testified that, for years before providing notice to his employer, he believed that the pain in his arm was related to his work. 395 S.C. at 440-441, 718

or being able to diagnose herself correctly, the record in this case, viewed in its entirety, simply does not support her claim.

Claimant's sole excuse for not telling any of her treating physicians or anyone else that her symptoms began at work or might be associated with her job is that she did not have a correct diagnosis. (R. p. 415, lines 4-6; p. 419, line 17 – p. 420, line 15; p. 428, line 1 – p. 436, line 6; p. 459 lines 10-20) (R. p. 332, lines 8-19; p. 333, lines 15-19; p. 334, lines 19-25).³ This testimony is clearly calculated to attempt to come within the ambit of McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992). There, 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, she 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

S.E.2d at 229. Here, in contrast, Claimant alleges she just did not know the cause of her pain until she received the rotator cuff diagnosis.

³ Interestingly, although Claimant testified that, once she received the diagnosis of rotator cuff tear, she told Dr. Mazoue that she had been injured on the job, (R. p. 337, lines 8 – p. 338, line 7), his notes do not reflect this information. (R. pp. 131-171). In addition, Dr. Mazoue confirmed at his deposition that his notes show Claimant did not tell him that her symptoms were or might be related to her job. (R. p. 367, lines 11-13; p. 383, line 5 – p. 384, line 24).

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.

The operative facts in McGuffin are meaningfully distinguishable from the case at hand. There, the claimant's mis-diagnosis was related to her pre-existing congenital kidney problems, *i.e.*, something internal and personal to the claimant. In contrast, here, Claimant had pain on her right side and thought she had a pinched nerve, (R. p. 332, lines 10-13), cervical issues, (R. p. 417, lines 4-11 (Claimant testifying she did not tell her employer she had a work-related injury because, "to my understanding I had a slipped disc")), brachial plexitis, *etc.* – none of which are necessarily idiopathic. Other potential diagnoses (deep vein thrombosis and rhabdomyolysis) were quickly ruled out. (R. p. 74). At the hearing before Commissioner McCaskill, Claimant's counsel acknowledged that, "essentially ... we don't really have a diagnosis by Ms. Butler other than not really knowing what had happened or what was wrong with her ..." (R. p. 404, lines 6-9. In essence, this case is distinguishable from McGuffin in that, there, the claimant believed her pain was due to an internal non-work related condition, whereas here, Claimant had no such belief.

At the Full Commission, Claimant's counsel read part of the McGuffin opinion but substituted "cervical radiculopathy" for "kidney type pain," and "cervical spine" for "kidneys," concluding it was reasonable for Claimant to not know she had injured her shoulder at work. (R. p. 469, line 12 – p. 470, line 1). Again, the distinction is that, in

McGuffin, the claimant thought her symptoms were related to a purely personal, pre-existing condition, whereas here, the confusion is centered on what body part Claimant injured but not whether it was a purely personal pre-existing condition versus something work-related. Regardless of whether Claimant potentially injured her neck (with accompanying radiculopathy) or her shoulder, the fact is that she did not relate her pain to her job until months after her alleged injury, presumably after she retained counsel.

Furthermore, the Commission did not place the same emphasis on an erroneous self-diagnosis in this case as it did in McGuffin, but on the fact that Claimant did not tell a single medical provider for months that she had hurt her arm at work or even that her pain began while she was at work. She was not required to make a correct self-diagnosis – she was required to accurately report her symptoms, onset and any relevant information to her medical providers. Tellingly, the medical notes are silent for months as to any connection between her pain and her job until, all of a sudden, she allegedly “remembered” that she had hurt herself at work once she was diagnosed with a rotator cuff sprain.

Claimant also relies on Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), to argue that her failure to tell any medical provider that her pain began at work was “excused” until she received a correct diagnosis. However, Mauldin, a statute of limitations case, does not advance Claimant’s case. The claimant in Mauldin had an admittedly work-related injury to her left knee that initially was diagnosed as a “medial collateral sprain,” treated and resolved. Thereafter, she experienced intermittent swelling and pain, which her family doctor misdiagnosed as arthritis. She later was diagnosed by an orthopedic surgeon as having a torn medial meniscus, that had been

caused by her work accident. As was the case in McGuffin, the claimant in Mauldin mistakenly believed her chronic condition was something internal and personal to herself, arthritis. In contrast, here, Claimant's excuse that she could not have known her injury was work-related until she was informed she had injured her shoulder, as opposed to her cervical spine, does not hold water. There is no reason under the facts of this case to believe that a rotator cuff injury would be work-related whereas a slipped disc would not. The bottom line is that Claimant failed to advise a single medical provider for months on end that her pain began at work or might be related to her job in some way.

Claimant also attempts to analogize her case to Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985). However, other than failing to report his injury as work-related and stating "at one point" that it was not work-related, there is no indication that the claimant in Massey visited numerous medical providers over months without relating to a single one that his symptoms appeared while he was at work or were related to his work. In addition, the claimant's doctors diagnosed his condition as "degenerative," *i.e.*, personal to the claimant. Furthermore, it is unclear what evidence the Supreme Court found to be "overwhelming" in Massey. Here, not only substantial evidence but the preponderance of the evidence supports the Commission Decision. On these points, Massey is factually and significantly distinguishable from the case at hand.

Claimant argues that she consistently related the onset of symptoms to, "April 11th ... [a]lways going back to work." (R. p. 469, lines 1-6). If that is the case, regardless of the ultimate diagnosis, it is reasonable to expect her to report to some medical provider that her symptoms began at work where, according to Claimant, she lifts heavy rolls of laminate all day long. No such report appears in the records, however.

Thus her statement that, “[t]he *only* evidence in this case is that Long suffered a work-related right shoulder and arm injury on April 10, 2012,” (App. Br. p. 14), is misleading and incorrect. While the evidence supports a finding that her pain may have begun on April 10 or 11, 2012, it does not support a finding that her shoulder condition was work-related, as the Commission properly found.

Claimant argues there is no evidence of some other “event” that might have caused her rotator cuff injury. (App. Br. p. 14). However, it is not Respondents’ job to disprove Claimant’s claim by proving she injured her shoulder outside of work. Instead, it is her burden to prove all of the facts that will entitle her to workers’ compensation benefits. *See, e.g., Clade*, 330 S.C. at 11, 496 S.E.2d at 858.

Claimant asserts that she could not have known her shoulder pain was work related because she received several different diagnoses, including cervical radiculopathy, brachial plexopathy, rhabdomyolysis and deep vein thrombosis. (App. Br. p. 17). As explained above, whether she was misdiagnosed with cervical issues or shoulder issues does not determine whether her injury was work related. Tellingly, her workers’ compensation claim encompassed both her right shoulder and her neck. (R. pp. 47-50, 52-53 (alleging Claimant “suffered a work-related injury to her right shoulder, arm and neck”)). Rhabdomyolysis and deep vein thrombosis were ruled out quickly. (R. p. 74).⁴ As to brachial plexopathy, the Cleveland Clinic explains “brachial plexitis” as follows: “[b]rachial plexus problems (or “brachial plexopathy”) show up as pain, altered sensation, and weakness (or paralysis) in groups of muscles of the shoulder, arm, forearm, or hand.” Under “causes” the Cleveland Clinic notes that, “[t]rauma is an

⁴ Palmetto Health Richland ER notes indicate ultrasound and CPK were performed on April 17, 2012 in order to rule out DVT and “any type of rhabdo.” (R. p. 74).

important cause of brachial plexopathy. Milder trauma to the shoulder, often from a rough sport such as football, causes a “burner” or “stinger,” in which there is transient (temporary) weakness in the shoulder, numbness, and pain that rapidly improve. Severe injury, such as from motorcycle crashes and falls, can cause severe and persistent weakness, numbness, and pain.”⁵ Thus, any misdiagnosis relating to brachial plexus would not have ruled out an accidental injury at work – Claimant simply did not relate her pain to her work regardless of the diagnosis.

Claimant relies on Dr. Tanksley’s medical notes of July 30, 2012 as evidence that she proved her injury was work-related. As explained above, Dr. Tanksley’s July 30, 2012 notation is, at best, ambiguous.⁶ It conflicts with his prior medical notes from May 2, 2012 through June 15, 2012, (R. pp. 94-113), none of which indicate any association with work and some of which state specifically, “not in association with work.” (R. pp. 94, 99, 102). In addition, subsequent notes from the same practice indicate that her problems have an “[u]nsure etiology ...” (R. pp. 118-121). Dr. Tanksley’s July 30 notation is unexplained and any conclusion as to whether he changed or corrected his diagnosis is purely speculative.

Dr. Mazoue’s opinion is not dispositive. As is explained in detail below in Section IV, Dr. Mazoue’s notes do not reflect that Claimant told him her shoulder condition either began at or was related in any way to her job. None of his treatment records make any connection between her job duties and her shoulder injury. (R. pp. 131-171). Dr. Mazoue could not identify the records or information he reviewed in order

⁵ <https://my.clevelandclinic.org/health/articles/brachial-neuritis>.

⁶ In any event, Dr. Tanksley’s July 30 comment comes almost four months after Claimant’s alleged injury.

to reach his written opinion. (R. p. 358, line 12 – p. 360, line 4; p. 361, line 24 – p. 362, line 24). In addition, he testified that the cause of Claimant's shoulder condition "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) (emphasis added). Because Dr. Mazoue's treatment records do not reveal any causal connection between Claimant's shoulder and her job, and because he cannot identify the basis for his opinion, which is speculative, it does not provide grounds for overturning the Commission Decision.

The Commission's conclusion that Claimant failed to prove she suffered an injury by accident is supported by substantial evidence and should be upheld.

A. Claimant misconstrues a number of facts in an attempt to bolster her case.

Claimant's attempts to reconstruct the evidence in this case so as to show she reported to medical providers that her pain began on April 10-11, 2012 either "beginning at work," or "while she was at work," (App. Br. pp. 3, 10, 13, 15, 20), reveal her unspoken acknowledgement of the fatal flaw in her case. The medical evidence does not support her claim. (R. pp. 57-171). While she consistently reported the timing of the onset of her symptoms to medical providers as April 10-11, 2012, not a single medical note indicates she told anyone that her symptoms began at work or were related to her job. Nor do the ER notes of April 13, 2012 indicate that "she discussed her job as a causative factor," (App. Br. p. 13), as is suggested in her Brief. (See R. pp. 58-66). In fact, she specifically testified that she did not tell the physicians at Providence that she had been injured at or as a result of her work. (R. p. 333, lines 15-19 (Claimant testifying she did not tell the medical providers at Providence ER that she had been injured at work)) (R. p. 428, line 1 – p. 429, line 1 (Claimant confirming that she did not tell the

physicians at Providence Hospital that she had been injured at work or had had a work accident)) (*see also* R. p. 334, line 19 – p. 335, line 1 (Claimant testifying that she did not tell the physicians at Family Medicine Center that she had been injured at work)).

Claimant cites to pages 23-26 of the transcript of the hearing before the Single Commissioner, (R. pp. 412-415), for the assertion that, “[o]n Wednesday, April 11, 2012, Long was working in her job as a laminator and finisher. As she was lifting a load of sheets for a Blockbuster job, Long felt pain in her right arm coming from her shoulder and neck.” (App. Br. p. 3). However, a review of her testimony reveals that, on April 10-11, 2012 she was just performing her regular job when she allegedly felt her upper right extremity start hurting, and then it progressed down her arm. (R. p. 412, line 18 – p. 415, line 6). She did not testify – either at the hearing or at her prior deposition – that she felt a particular pain as she was lifting a load of sheets or anything else.

Claimant attempts to recast the medical evidence in light of her case theory that her injury is work-related and that she only discovered that fact once she received the diagnosis of torn rotator cuff. For example, Claimant testified that, she informed Dr. Mazoue that she had been injured on the job when she initially began seeing him, because at that point, she had received the diagnosis that she had a torn rotator cuff. (R. p. 337, lines 8 – p. 338, line 7). However, Dr. Mazoue’s notes from her initial and subsequent visits make no mention that Claimant’s shoulder injury was related to her work or lifting boxes and/or running machines. (R. pp. 131-171).

None of the medical notes from the first three to four months of treatment indicate anything other than the date her symptoms began – none of them state that Claimant’s

pain began at work or was associated with her work.⁷ Her later, understandably self-serving testimony attempts to pin the onset during her work hours while she was performing the normal duties of her job, but the lack of any evidence that she informed any medical provider of that fact is, as the Commission held, troubling. (Commission Decision, R. p. 40).

Although Claimant asserts several times, as though it were proven fact, that Dr. Tanksley changed his mind and corrected his records after learning of the rotator cuff diagnosis, (App. Br. p. 6 n.2, p. 18-19), there simply is no evidence whatsoever that that is the case. It is just as likely that the omission of the word "not" before the phrase "related to work" is a typographical error as it is the result of Dr. Tanksley changing his mind. In fact, Dr. Tanksley merely noted that Dr. McGown "thinks is rotator cuff tendonitis." (R. pp. 114-116). That is hardly a confirmed diagnosis. If, in fact, Claimant's conjecture were the case, the notes from her following visit to Family Medical would not state "unsure etiology." Dr. Riggsbee, who had access to all of Dr. Tanksley's notes, indicated Claimant's complaints had an "[u]nsure etiology but has had extensive w/u recently including MRI." (R. pp. 118-121). As a result, Claimant's attribution of motive and intent to Dr. Tanksley is nothing more than speculation, which is insufficient to support an award. Clade, 330 S.C. at 11, 496 S.E.2d at 858 (compensation awards "must not be based on surmise, conjecture or speculation").

This is important because Dr. Tanksley's July 30, 2012 note, even assuming that it is not a typographical error, is in conflict with his prior medical notes starting on May 2, 2012, as well as all of the other medical providers' notes, none of which contains any

⁷ As noted above, Dr. Tanksley's July 30, 2012 notation is ambiguous at best.

reference to Claimant's symptoms arising at or as a result of her work. Thus, unlike in Doe v. South Carolina Dep't of Disabilities & Spec. Needs, 377 S.C. 346, 660 S.E.2d 260 (2008), here, there is a conflict in the medical evidence. Furthermore, unlike in Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965), where the all the experts uniformly found no causal connection between the claimant's cancer and his job, here there is competent evidence that is in direct conflict with Dr. Mazoue's fill-in-the-box questionnaire and Dr. Tanksley's ambiguous July 30 treatment note, including Dr. Tanksley's prior notes extending over nearly three months of regular treatment, indicating "not in association with work." (R. pp. 94, 99, 102).

B. The Commission did not require Claimant to prove a specific event when the injury occurred.

Claimant argues that the Commission erroneously required her to point to a "specific instant or event when the injury happened." (App. Br. pp. 14, 15). This argument is no more than a straw man, presumably created in order to have something to knock down, as the Commission held no such thing. Ironically, in her recitation of the facts, she fabricates just such an event, (App. Br. p. 3 ("[a]s she was lifting a load of sheets for a Blockbuster job, Long felt pain in her right arm coming from her shoulder and neck")), an occurrence that is not supported by even Claimant's own testimony. Indeed, that fabricated event is in direct conflict with her later repeated suggestion that her symptoms "came on insidiously." (App. Br. pp. 14, 15, 20).

Furthermore, although a claimant does not have to identify a "slip, fall or other fortuitous event or accident," it is well-established that the claimant does bear "the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade, 330

S.C. at 11, 496 S.E.2d at 858. While Claimant correctly points out that the Supreme Court held that this Court erroneously required the claimant in Clade to identify a specific event that caused her injury, it also upheld the Commission's conclusion that the claimant nonetheless, "failed to prove by the necessary burden of proof that she sustained a specific injury by an accident ... or that her back problems arose out of and in the course of her employment." 330 S.C. at 11, 496 S.E.2d at 858. In Clade, the claimant told several people that she did not know the cause of her pain and, even though a treating physician indicated her injury had been aggravated by driving a forklift, and her symptoms "appeared while petitioner was performing her job, it was reasonable in light of the evidence presented for the commission to conclude petitioner failed to establish a causal relationship between her work and her injury." 330 S.C. at 12, 496 S.E.2d at 858. The same conclusion was properly reached in this case.

This Court should hold that the Commission correctly held that Claimant failed to meet her burden of proving a compensable injury by accident pursuant to S.C. Code Ann. § 42-1-160.

II. The Commission properly held that Claimant failed to meet her burden of proving she suffered a compensable repetitive trauma injury.

Here, there simply is no evidence, testimony or opinion that Claimant's job involved repetitive activities or that any repetitive job duties caused her injury. In fact, her counsel stated, "[w]e do believe it is better characterized as an injury by accident, as the evidence will show that this is not a repetitive type of job ..." (R. p. 395, lines 3-13). Parties are bound by concessions made by their counsel. See, e.g., Pope v. Heritage Comm., Inc., 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App 2011); Smith v. Pearson, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound

by its counsel's prior statement). There simply is insufficient evidence in this case that Claimant's job involved repetitive motions or trauma.

Even if Claimant had proved her job was repetitive, which she failed to prove, the Commission correctly determined she failed to meet her burden of proving a repetitive trauma injury. The fill-in-the-box questionnaire signed by Dr. Mazoue does not even discuss repetitive trauma and, therefore, falls woefully short of the kind of evidence necessary to meet the requirements of Section 42-1-172. Section 42-1-172(B) requires that a Commissioner or the Commission make a "finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." S.C. Code Ann. § 42-1-172(B). The medical evidence must establish "that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D). Repetitive trauma injury is statutorily defined as, "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A).

Dr. Mazoue's written opinion states that her "right shoulder injury most likely occurred on April 10, 2012, while the employee was engaged in the regular duties of her employment as a laminator, particularly lifting heavy rolls." His opinion does not refer in any way to any repetitive movements or trauma but, instead, suggests that, "[t]he original injury was further exacerbated and aggravated by continuing to work with the injury, resulting in arm numbness with chest, shoulder and neck pain." (R. p. 172). At his deposition, Dr. Mazoue mentioned repetitive movements only once, where he suggested that, "repetitive movements and lifting up heavy objects can over time result in shoulder

pain.” (R. p. 367, line 24 – p. 368, line 11) (emphasis added).⁸ A statement that work activities can or could cause an injury is insufficient to establish the requisite causal connection under Section 42-1-172. Dr. Mazoue did not testify that any repetitive activities caused Claimant’s shoulder pain but only that they can cause such pain in general.

Note that, with respect to her repetitive trauma injury allegation, Claimant was “rely[ing] on Dr. Mazoue’s deposition and Dr. Mazoue’s opinion.” (R. p. 395, lines 14-18). As such, medical opinion expressed in terms of “can” and “could” is insufficient to support a finding of medical causation under the Act. Bridges v. Housing Auth. of Charleston, 278 S.C. 342, 345, 295 S.E.2d 872, 874 (1982) (where a claimant relies on medical testimony alone to establish a causal connection between work and the injury, “the testimony must meet the ‘most probably’ rule, and it is not sufficient that the malady in question ‘possibly’ or ‘could have’ or ‘might have’ resulted from the injury”).

This Court should hold that the Commission properly held that Claimant failed to prove she suffered a repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172.

III. Claimant’s argument regarding a “dead zone” is nonsensical and not preserved for appellate review.

In her attempt to find or create an error in the Commission Decision, Claimant concocts a theory that the Commission created a “dead zone between an *injury by accident* and a *repetitive trauma injury*.” (App. Br. p. 10-12). First, this issue is not preserved for appellate review. The Commission Decision is substantively the same as

⁸ He also discussed “overuse” injuries in general but did not opine that Claimant had suffered one. (R. p. 363, lines 11-23).

the Single Commissioner Decision.⁹ Finding of Fact No. 28 in the Commission Decision, (Commission Decision, R. p. 40), is substantively the same as Finding of Fact No. 29 in the Single Commissioner Decision. (Single Commissioner Decision, R. p. 15). Claimant did not raise this argument to the Appellate Panel. (R. pp. 318-319) (R. pp. 462-481). It is, therefore, not preserved for appellate review. *See Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (an argument raised by an appellant that is based on different grounds from the argument presented to the lower tribunal is not preserved for appeal).

In any event, her argument is nonsensical and does not provide a basis for overturning the Commission Decision. Claimant's argument is based on the Commission's finding that, "while an argument can be made that if her work is repetitive, there is little testimony as to the repetitive nature of the job." (Commission Decision, R. p. 40). Claimant contends that the Commission "erred in creating a dead zone where the cause of the injury is proven to be work-related, yet is not compensable because in the Commission's eyes it is neither a discrete one-time inquiry by accident nor a repetitive trauma injury." (App. Br. p. 12). The Commission held no such thing and certainly did not create a "dead zone."

As is discussed in more detail both above and below, the main reason Claimant's claim was denied is because she failed to prove that the cause of her injury – whether by injury by accident *or* repetitive trauma injury – was work-related. In fact, Finding of Fact No. 28 is one of several findings following Finding of Fact No. 25, in which the Commission explains that, "as to a repetitive injury, we must determine whether there [is]

⁹ Commission Decision, R. p. 45 (affirming the Single Commissioner Decision with minor amendments).

enough evidence in the record to tip the scale in the Claimant's favor." (Commission Decision, R. p. 40). After concluding that the record does not support Claimant's assertion that she was injured at work, the Commission simply points out the lack of evidence that her job is repetitive in nature.¹⁰ In short, the Commission's finding that "there is little testimony as to the repetitive nature of the job" simply means she failed to prove a key element of a repetitive trauma injury, *i.e.*, that her job involved repetitive motions or trauma to her shoulder.

The Commission did not create any "dead zone" where, even if a claimant proves an injury is work-related, it is nonetheless denied because the claimant fails to prove a one-time traumatic injury or a repetitive trauma injury. Claimant's argument to this effect is nothing more than a "red herring" and should be rejected.

This Court should hold that the Commission properly held that Claimant failed to prove she suffered a repetitive trauma injury pursuant to either S.C. Code Ann. § 42-1-160 or S.C. Code Ann. § 42-1-172.

IV. The Commission did not err in giving Dr. Mazoue's opinion normal weight and considering all of the medical evidence.

The Commission properly weighed all of the evidence before it and accorded Dr. Mazoue's written opinion the weight it deserved. The Commission accurately stated that Dr. Mazoue gave his written opinion at a time when he was not actively treating Claimant. Although he had last seen her in December 2014, he did not see her again after that appointment.

¹⁰ As noted above, Claimant's counsel stated on the record that, "the evidence will show that this is not a repetitive type of job ..." (R. p. 395, lines 3-13). Claimant is bound by that concession. *See, e.g., Pope*, 395 S.C. at 430-431, 717 S.E.2d at 779; *Smith*, 210 S.C. at 530-531, 43 S.E.2d at 481-482 (finding party was bound by its counsel's prior statement).

In any event, the Commission's decision to not give dispositive weight to Dr. Mazoue's questionnaire opinion can and should be upheld on appeal even if this Court disagrees with the Commission's rationale. "A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010). An appellate court may affirm on any ground appearing in the record. Wright v. Bi-Lo, Inc., 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same).

First, the Commission is not bound by a medical opinion where, as here, there is other evidence in the record that contradicts it. See Tiller, 334 S.C. at 340, 513 S.E.2d at 846 ("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'"). Dr. Mazoue's written statement is in stark contrast to not only his own treatment notes, (R. pp. 131-171), but also those of every other doctor who treated Claimant from the onset of her symptoms in mid-April 2012 until the end of July. (R. pp. 57-112).¹¹ Not one of these medical records indicates her condition is or might be work-related and some affirmatively state "not in association with work." (R. pp. 94, 99, 102).

Second, it is both the Commission's role and prerogative to "take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers, 312 S.C. at 381, 440 S.E.2d at 403; see also Brunson, 395 S.C. at 455, 718 S.E.2d at 758 ("[t]he final determination of witness credibility and the

¹¹ As explained above, Dr. Tanksley's July 30 notation is, at a minimum, ambiguous.

weight to be accorded evidence is reserved to the Full Commission"). And, as is the case here, 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, 343 S.C. at 492-93, 541 S.E.2d at 528.

Third, Dr. Mazoue acknowledged at his deposition that neither his nor any other medical provider's notes indicated that Claimant had told them her pain started at work or was associated with her job. (R. p. 344, line 16 – p. 347, line 23; p. 364, line 17 – p. 366, line 23; p. 383, lines 5-10). Dr. Mazoue testified that he only "assum[ed] at some point we talked about it, and I just didn't document in the record appropriately." (R. p. 368, lines 3-11). This assumption is not only speculative, it is in conflict with his February 28, 2014 treatment note, which stated that Claimant's, "[p]ain began April 10, 2012 **no known MOI** and has had problems ever since." (R. pp. 146-149) (emphasis added). Note also that, Dr. Mazoue also testified that the cause of Claimant's shoulder pain could be, "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) (emphasis added). Such speculation is insufficient to support a workers' compensation award. Clade, 330 S.C. at 11, 496 S.E.2d at 858.

Fourth, Dr. Mazoue testified 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). As a result, he is unable to show "the factual or underlying basis for [his]

opinion” and, as such, it “lacks probative value.” Young v. Tide Craft, Inc., 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) (expert opinion “must be based upon facts ... sufficient to form a basis for an opinion Expert opinion is inadmissible if its factual foundation is nebulous”).

This Court should rule that the Commission did not err in not assigning dispositive weight to Dr. Mazoue’s opinion.

CONCLUSION

For the reasons stated herein, this Court should affirm the Commission Decision that Claimant failed to meet her burden of proving a compensable injury under either Sections 42-1-160 or 42-1-172, and that it properly weighed Dr. Mazoue’s opinion in this case.

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January 25, 2018:



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1221499

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

v.

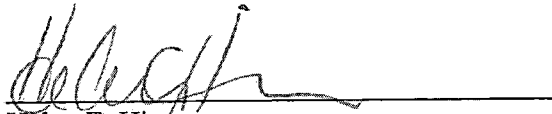
ITW Labels, Employer, and
American Zurich Insurance Company/Zurich
North America c/o Broadspire, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Respondents ITW Labels and American Zurich Insurance Company/Zurich North America c/o Broadspire complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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FEB 05 2018

SC Court of Appeals

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v.

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

REPLY BRIEF

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ARGUMENT

1. Long proved she suffered a work-related injury to her right shoulder, right arm and neck on April 10, 2012 [In Reply to Brief of Respondents, pp. 17-28].

The evidence shows Long injured herself while working as a laminator for the Employer. “She had a severe onset of chest pain that radiated outward from the arm” at work while lifting rolls of laminate on Wednesday, April 11, 2012. [R. p. 412, line 18 - p. 415, line 6; R. p. 133]. Every medical record relates the onset of pain back to that date.¹ Notwithstanding the consistent reporting of the onset of pain on a day she was at work, along with the opinions of Drs. Mazoue and Tanksley that the injury was work related, the Appellate Panel found “we are not persuaded that the Claimant had an injury by accident on or about April 10, 2012.” [R. p. 39, lines 4 - 12]. The Appellate Panel further erred in denying a repetitive trauma injury (Appellant’s alternate position) on the basis that “we find that there is no indication in the medical records – other than the opinion of Dr. Mazoue – that the Claimant was injured at work.” [R. p. 40, lines 4 - 7].

Respondents summarily dismiss the fact that neither Long nor her doctors were able to correctly diagnose her condition – let alone its connection to her employment – until she had been examined by the shoulder surgeons, Dr. Mazoue and Dr. McGowan. Dr. Sweet on May 31, 2012, was the first doctor to actually diagnose “shoulder pathology of some sort” and even his opinion was a cautious one. [R. p. 126]. Before then, even her primary care doctor, Dr. Tanksley, checked

¹ Providence Hospital; April 13, 2012 (“right sided shoulder and forearm pain x 3 days”) [R. p. 58]. Palmetto Health Richland; April 17, 2012 (“this right arm pain that has been going on for a week.”) [R. p. 73]. Family Medical Center/Dr. Tanksley; April 27, 2012 (“Pain started 3 weeks ago in the right side of her chest”) [R. p. 93]. Short Term Disability Application; May 11, 2012 (“Date symptoms first appeared or accident happened Month April Day 11 year 2012”) [R. p. 307]. Dr. Sweet; June 11, 2012 (“Injury Date: April 2012”). Dr. Chris Mazoue; September 14, 2012. (“Pain started April 10th . . .”). [R. p. 131].

“Unknown” as to whether her disability arose out of her employment.² [R. p. 307]. “If a medical expert is unwilling to state with certainty a connection between an accident and an injury, the ‘expression of a cautious opinion’ may support an award if there are facts outside the medical testimony that also support an award.” Tiller v. Nat’l Health Care Ctr., 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). “Proof that a claimant sustained an injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident.” Id.

After seeing Dr. Sweet on May 31st and Dr. McGowan on June 11, 2012, Long reported her problem to her Employer as a work injury. She testified “I told Stacie [Dash] in the end of July when I found out for sure what was wrong with me.” [R. p. 423, lines 13 - 22]. Notably neither Dash nor any other witnesses were called by Respondents to rebut Long’s report of her work injury. See Davis v. By-Pass Auto Parts, Inc., 403 S.E.2d 133, 304 S.C. 75 (Ct. App. 1991)(discussing presumption that unexplained failure to call a material witness under a party’s control raises adverse inference that the testimony would be unfavorable to the party).

Respondents acknowledge that Long “told various medical providers that her symptoms began around the April 10-11, 2012 timeframe . . .” However, they contend “that alone is insufficient to prove that she suffered a work-related injury, particularly in light of numerous records over months that fail to mention that her symptoms began while she was at work or relate her shoulder problems to her job duties.” [Brief of Respondents, p. 17].

² The fact Dr. Tanksley was initially undecided was because he had no diagnosis for her pain. Once he learned Long had a rotator cuff injury, he corrected his records to state “the context of the pain occurred with movement, **in association with work** . . .” [R. p. 114(emphasis added)].

Respondents overlook that the totality of the evidence is much more than Long having told every single doctor that her pain began on the April 10-11, 2012 timeframe. Not only did her pain start then, she also became unable to work at that same time. And while some medical records are silent on the work connection, others are not. Many records mention the type of work she did and the insidious onset of pain. The very first emergency room visit to Providence Hospital late Friday night on April 13, 2012, described a work injury, as she gave a history of the pain beginning at work and described her job. The report states: “[Patient] presents today with complaint of right sided shoulder and forearm pain x 3 days. . . . **[Patient] has job in which she has repetitive arm movements.**” [R. p. 58 (emphasis added)]. Two doctors – the ones who saw her the most – explicitly opined her shoulder injury was due to a work-related accident. As there are no medical opinions contradicting Dr. Mazoue and Dr. Tanksley, there is no substantial evidence to support the denial of Long’s claim.

Respondents seek to distinguish the cases relied on by Appellant. The essential theme running through Respondents’ Brief is that there is a conflict in the evidence, therefore Appellant must necessarily lose. It diminishes the trial and appellate process to suggest that this Court has no power to reverse the Commission. Were this truly a matter of weighing conflicting substantial evidence, the Respondents would have a valid point. Here though, there is no conflict in the evidence; only an error of law.

Long did not immediately appreciate that she had suffered a work related shoulder injury (nor did her doctors). She and her doctors misdiagnosed her injury, attributing her pain to everything from a heart attack to a slipped disc to a DVT to rhabdomyolysis. The initial misdiagnosis cannot

be grounds to deny her claim in light of the later correct diagnosis by Dr. Mazoue, particularly since Dr. Mazoue confirmed “this kind of symptom and this description is going to be a relatively complex diagnosis for a physician.” [R. p. 373, lines 3 - 19]. This fact pattern is squarely controlled by McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by employee and her physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Cf. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(applying discovery rule to toll the statute of limitations because the employee did not suspect nor have reason to suspect her problem resulted from a work accident until she was correctly diagnosed by specialist orthopaedic surgeon); White v. Medical Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003)(no substantial evidence to support commission’s denial of claim where orthopaedic surgeon opined “within a reasonable degree of medical certainty . . . [White’s] job duties [were] of such a nature that they could have aggravated or exacerbated his pre-existing chronic back pain [from 1997], ultimately resulting in disc herniation,” even though there was a medical report from claimant’s family doctor stating complaints of severe back pain, yet patient “had no injuries to the back that [White] is aware of”).

In an attempt to distinguish McGuffin from the instant case, Respondents argue McGuffin’s “mis-diagnosis was related to her pre-existing congenital kidney problems, *i.e.*, something internal and personal to the claimant In essence, this case is distinguishable from McGuffin in that, there, the claimant believed her pain was due to an internal non-work related condition, whereas here, Claimant had no such belief.” [Brief of Respondent, p. 19]. A more accurate way to put it would be to state that neither McGuffin nor Long initially recognized that their symptoms were coming from a work-related injury – a mistake neither learned until receiving a correct diagnosis

from their doctors. Both injured workers knew their pain started at work – they simply did not recognize the nature of the pain.

Another commonality is both had similar jobs. McGuffin “was required to lift heavy trays of parts eight to ten times a day.” McGuffin, at 185, 414 S.E.2d at 163. Long was required to lift heavy rolls and sheets of laminate multiple times a day. [R. p. 412, line 18 - p. 415, line 6]. Both “developed” pain as they were lifting; yet neither attributed the pain to a work injury nor mentioned their pain to anyone at work.³ And of course, the Commission denied compensation in both cases.

Our Supreme Court reversed the denial in McGuffin for the same reasons this Court should reverse the instant case:

In reversing the award of the single Commissioner, the Full Commission relied heavily upon the preliminary diagnosis made by the respondent and her attending physicians. **The Commission put great reliance on the fact that the respondent did not immediately attribute her pain to her lifting.** The respondent had been lifting these trays eight to ten times a day for four months without incident. Therefore, **it was not unreasonable for her not to make the connection at the time.** This is especially so when as her physicians testified her pain was consistent with kidney type pain. 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 respondent’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. McGuffin, at 187-188, 414 S.E.2d at 164 (emphasis added).

³ The McGuffin court noted “Although respondent denied mentioning her pain to anyone at work, a coworker testified respondent complained of back pain at the end of the day. At that time the respondent told her coworker her pain was related to her kidneys.” McGuffin, at 185, 414 S.E.2d at 163.

The two cases could hardly be more similar.⁴ If anything, the evidence in the case at bar is stronger because there is no alternative purely personal explanation for Long's injury. She had no preexisting condition and there is no other accident in her history or medical records. Some of the records report her condition without mentioning the cause (as is common with electronic medical records); several relate it to work – not a single record recounts an accident at home or on the highway nor is there any evidence that the torn rotator cuff was preexisting.

Respondents follow a similar theme in attempting to distinguish Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992). Mauldin injured her left knee at work. She reported her claim and was sent to the emergency room. Her employer's insurance company paid the medical bill and closed its file as a "medical only" minor injury. Mauldin's knee problems persisted intermittently. Her family doctor misdiagnosed her with arthritis. Ultimately, after more than two years had passed since the initial injury, Mauldin saw an orthopaedic surgeon who correctly diagnosed her with a torn medial meniscus requiring surgery. The visit with the orthopaedic surgeon was the first time Mauldin learned she had a compensable workers' compensation claim.

Respondents again state "the claimant in Mauldin mistakenly believed her chronic condition was something internal and personal to herself, arthritis." [Brief of Respondents, p. 21]. Essentially, they assert that Mauldin and McGuffin could be excused from not recognizing their injuries as work

⁴ While the Supreme Court found McGuffin's failure to connect her pain to her work "reasonable" on facts comparable to the instant case, here Respondents effectively charge Long with insurance fraud and her counsel of colluding in the fraud. They state "Regardless of whether Claimant potentially injured her neck (with accompanying radiculopathy) or her shoulder, the fact is she did not relate her pain to her job until months after her alleged injury, *presumably after she retained counsel.*" [Brief of Respondents, p. 20 (emphasis added)]. The Court should reject such inappropriate and unsupportable accusations, particularly when made against an employee of 13 years with a stellar work history. Furthermore, it should be noted that Long retained her attorney on June 13, 2013 – roughly a full year after she reported her work-related injury to her employer in July 2012.

related because their doctors misdiagnosed their symptoms as “internal and personal,” but Long cannot be because she had no known preexisting condition.

That artificial distinction holds no water. Mauldin knew she had a knee injury – yet it was still reasonable for her to rely on a misdiagnosis from her doctors. McGuffin may have confused her doctors because she did not know where her pain was coming from – reasonably thinking perhaps it was kidney pain – but once she got the correct diagnosis, the Supreme Court held her claim was not barred by her misdiagnosis.

Mauldin did not learn her problem was work-related until 2 years and 11 months since her original injury. McGuffin learned her problem was work-related 5 weeks after the initial injury. At the soonest, Long learned her problem was work-related on May 31, 2012 when she was evaluated by Dr. Sweet roughly 6 weeks after her injury. All three women knew they were in pain which began at work, yet not one recognized she had suffered a compensable work-related injury until correctly diagnosed by an orthopaedic surgeon. These cases are the same. “The Act requires an injured employee to be diligent, not prescient.” King v. Int’l Knife, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).

As to Massey, Respondents are correct that the opinion is short on detail. What detail there is comports with the essential facts of this case: “The day of the injury, claimant testified he felt a catch in his back which continued to get worse day after day. His physician testified claimant had ruptured a disc rendering him incapable of continuing work as a hard laborer.” Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985). These simple facts, again similar to the instant case, were enough for the Supreme Court to reverse and hold the “evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision

of the Industrial Commission.” Id. Indeed, as the dissent points out, “[t]here was evidence that respondent failed to report his injury as work-related, and indeed, at one point stated it was not work-related. Even after reporting the injury, he was unable to point to any specific accident.” Id. The dissent is important because it shows that the Commission will not be permitted to punish an injured worker for failing to immediately recognize pain beginning at work is an actual work-related injury.

In short, Long presented the same evidence presented in all three of these cases, all of which were deemed compensable injuries by the appellate courts despite being denied by the employer and lower tribunal. As did these other workers, Long reasonably failed to draw the connection between her pain and her work accident until she received a correct diagnosis from an orthopaedic surgeon.

A. Appellants’ Brief accurately recounts the facts and evidence.

Respondents allege “Claimant’s attempts to reconstruct the evidence in this case so as to show she reported to medical providers that her pain began either on April 10-11, 2012 either ‘beginning at work,’ or ‘while she was at work,’ . . . reveal her unspoken acknowledgment of the fatal flaw in her case. The medical evidence does not support her claim.” Yet in the very next sentence, Respondents confirm “*she consistently reported the timing of the onset of her symptoms to medical providers as April 10-11, 2012 . . .*” [Brief of Respondents, p. 24 (emphasis added)]. The *fatal flaw* in the Commission’s decision is the fact that Long’s symptoms began at work while she was doing a job that required heavy lifting (“a job in which she has repetitive arm movements”) and, in the unrefuted opinion of her orthopaedic surgeon, resulted in her shoulder injury. Her proof – conceded by Respondents as to the onset date – is sufficient to prove her injuries arose out of her employment as a matter of law. See, Barnes v. Charter 1 Realty, 411 S.C. 391, 399, 768 S.E.2d 651,

655 (2015)(“Barnes clearly established that she was performing her job when she sustained an accidental injury; we therefore hold her injuries arose out of her employment as a matter of law.”); Holley v. Owens Corning Fibreglas Corporation, 301 S.C. 519, 392 S.E.2d 804, 807 (Ct. App. 1990), *aff’d*, 302 S.C. 518, 397 S.E.2d 377 (1990)(per curiam)(“if the injury can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment.”); Nicholson v. S.C. Dep’t of Soc. Servs., 411 S.C. 381, 769 S.E.2d 1 (2015)(“We hold these facts establish a causal connection between her employment and her injuries—the law requires nothing more. Because Nicholson’s fall happened at work and was not caused by a condition peculiar to her, it was causally connected to her employment. Therefore, her injuries arose out of her employment as a matter of law and she is entitled to workers’ compensation.”).

The real thrust of Respondents’ argument is that Long never described “feeling a *particular* pain” she associated with a specific traumatic accident to her medical providers – at least not that is reflected in the medical records. Long never claimed to have done so.⁵ Had she suffered a *slip, trip, fall or other fortuitous event*, she would have known to report such to her employer and medical

⁵ At trial, Butler testified she hurt herself “[f]rom lifting the rolls and from the repetitive of just sending it through the machine from the rolls. A lot of the rolls are heavy, but I had to get my job done. They didn’t look to see whether it was heavy or not. I had to get it done. At the end of the day, it’s what I got done. . . . I didn’t notice until that Wednesday or on the 11th or the 10th, whichever day the Wednesday before the 13th. That’s when I noticed it started – it was hurting. It started hurting that particular day and then it’s just progressed just the way my arm was like numb and it started just tingling. It was hurting. So I just went onto the emergency room then on that Friday.” [R. p. 412, line 18 - p. 413, line 13].

Her deposition testimony was consistent. When asked in her deposition, “Was there a particular time or day that you recall it taking place,” Butler responded: “No, sir. My arm started hurting on the 15th – I mean, on the 10th of April, and then it continued to hurt. And at first, I just – I just – I mean, I dealt with it. When that Friday came, which was the 13th, my fingers started going numb. So when I got off from work, I went to the emergency room then.” [R. p. 328, lines 12 - 22].

providers. The fact her pain came on insidiously as she was doing her regular job explains why some of the medical reports state “no trauma.” To a normal blue collar worker – really to everyone not schooled in the nuances of workers’ compensation law – if you didn’t fall or get hit with something, then there was no trauma.⁶

As to Dr. Mazoue, Respondents state “Dr. Mazoue’s notes from her initial and subsequent visits make no mention that Claimant’s shoulder injury was related to her work or lifting boxes and/or running machines.” [Brief of Respondents, pp. 25-26]. Respondents’ assertion is really not quite accurate – which is why they refer to the note but do not quote it. The history of her first visit with Dr. Mazoue states in pertinent part: “Pain 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. Went to the ER at Providence originally DX with muscle strain.” [R. p. 131]. A second note from the same visit, states” Apparently on approximately April 10, 2012 she had an insidious onset of right shoulder pain. She, I believe, works laminating furniture but cannot recall that her work actually caused this injury. She had a severe onset of chest pain that radiated outwards from the arm.” [R. p. 133].

The notes from his initial evaluation confirm Drs. Mazoue and Long discussed her work and the onset of her pain – noting particularly that it started in her chest and radiated outwards from the arm. Respondents’ counsel cross-examined Dr. Mazoue on these notes and virtually every other

⁶ *Trauma* is defined as: “an (as a wound) to living tissue caused by extrinsic agent (surgical)” or “an agent, force, or mechanism that causes trauma.” *Merriam-Webster’s Collegiate Dictionary* 1257 (10th ed. 1993). It is hardly surprising that an injury caused by the normal activity of a job Long had been doing for 13 years was not recognized by her as resulting from trauma. Dr. Mazoue testified that when patients report “no trauma.” they are saying “That there wasn’t one specific incident that resulted in their pain.” [R. p. 370, lines 20 - 25].

medical report in the record. When asked to explain how he could “conclude that her problems most likely related to work when the medical records that I’ve shown you, at least so far,⁷ don’t say anything at all about her being injured on the job?” [R. p. 361, line 24 - p. 362, line 4]. Dr. Mazoue explained:

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. And, again, *because there wasn’t a specific event does not mean that her shoulder pain cannot be originated by work.* And this is the incredible quandary that we are put in as physicians sometimes when trying to establish a work-related cause. So you can be doing a job whereby you get an overuse injury where an individual can’t state that there was a specific event that caused the pain, but that pain was associated with work.”

[R. p. 363, lines 11 - 23 (emphasis added)].

Dr. Mazoue went on to testify that the totality of the records he reviewed – both before he gave his opinion and in the deposition – were important in reaching his opinion that “There is a direct causal relationship between the condition under which the work is performed and the injury.” [R. p. 172]. On the questionnaire itself, he added a handwritten addendum to the typewritten statement: “My opinion is based on the history and symptoms reported by the patient, the signs shown on physical examination, imaging studies, and the operative findings *and review of records with reports to onset of pain and dysfunction and subsequent medical care.*” [R. p. 172 (Dr. Mazoue’s handwritten note in italics)]. Dr. Mazoue explained he added the handwritten comment “Because I think it’s difficult to make a determination on the previous three questions, and I think that that additional documentation helped me to understand that there was a likely correlation

⁷ At this point in the deposition, Dr. Mazoue had been shown records selected by Respondents. He had not yet had his memory refreshed by being shown all the records on which he reviewed in reaching his opinion.

between her work and her onset of her right upper extremity symptoms.” [R. p. 376, line 12 - p. 377, line 6]. Most importantly, Dr. Mazoue never wavered from or changed his opinion.

Respondents then speculate that Dr. Tanksley’s statement that the shoulder pain is “related to work” [sic] is likely a typographical error. [Brief of Respondents, p. 26]. Dr. Tanksley’s report actually states: “occurred with movement, in association with work, not following a fall . . .” [R. p. 114]. Dr. Tanksley’s report is unambiguous. If Respondents truly believed Dr. Tanksley did not change his opinion from “uncertain” to “in association with work” upon learning that Long’s pathology was in her shoulder (as diagnosed by Dr. McGowan), then they would have deposed him. Otherwise, Dr. Tanksley must be presumed to have meant what he said.

Appellant did not and has no need to misrepresent her testimony and the evidence to the Court. Respondents want the Court to make the same error made by the Commission by including a non-existent requirement that a claimant identify a specific discrete accident which caused the injury. This is simply not the law. Our courts recognize that real life injuries and accidents occur in a multitude of ways – often in ways not as neat and tidy as Respondents would have it. See, e.g., Stokes v. First Nat’l Bank, 306 S.C. 46, 49, 410 S.E.2d 248, 250 (1991) (“[N]o slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident.”); White v. Medical Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003)(no substantial evidence to support commission’s denial of back injury occurring over time even though family doctor’s report noted “severe lower back pain” but also patient “had no injuries to the back that [White] is aware of.”).

Appellant met her burden of proof. There is no substantial evidence on which to affirm the denial of her claim by the Commission. Accordingly, the Appellate Panel committed an error of law and should be reversed.

B. The Commission erred in requiring Appellant to prove a specific event when the injury occurred.

Respondents contend the “Commission did not require [Long] to prove a specific event when this injury occurred.” They write Appellant’s “argument is no more than a straw man, presumably created in order to have something to knock down, as the Commission held no such thing.” [Brief of Respondents, p. 27]. For their position on this issue, Respondents look to Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1997)(“This language which requires an injured employee to identify a specific event for an injury to be compensable contradicts the established law of this state.”).

In Clade, the Appellate Panel affirmed the single commissioner on two grounds, finding that Clade “failed to prove by the necessary burden of proof that she sustained a specific injury by an accident . . . or that her back problems arose out of and in the course of her employment.” Id. (emphasis added by court). The Court of Appeals affirmed. The Supreme Court also affirmed, but modified the opinion “because injured employees are not required to prove their injuries were caused by specific events in order to recover worker's compensation benefits.” Id.

Respondents go on to argue Clade should control the result in this case. However, there are critical differences between Clade and the case at bar. In some respects, Clade is similar to the instant case, in that Clade initially told various people she did not know the cause of her pain. There are some crucial differences. In Clade, “While her treating physician did state her injury was

aggravated by driving a forklift, he never specifically determined her injury was caused by driving a forklift.” Id. In the instant case, Dr. Mazoue (and Dr. Tanksley) specifically stated “There is a direct causal relationship between the condition under which the work is performed and the injury.” Dr. Mazoue added that the “original injury was further exacerbated by continuing to work with the injury . . .” [R. p. 172]. Dr. Mazoue’s opinion is a quantum leap forward in the level of expert medical proof presented compared to Clade. He specifically determined that her “right shoulder injury occurred on April 10, 2012, while the employee was engaged in the regular duties of her employment as a laminator, particularly lifting heavy rolls.” [R. p. 172].

A second critical difference is in the nature of the injury itself. Clade’s condition was “lumbar strain.” Long suffered a serious injury to her shoulder requiring surgical repair. This was not merely pain from overwork; this was an actual tear of the tissue in her shoulder.

The third critical difference is in the nature of the work. Clade drove a forklift. The forklift did all the lifting. Clade simply began to feel pain in her back, which per her doctor was aggravated by driving the forklift. Conversely, Long had a strenuous job she described as: “It’s basically a lot of lifting materials and running materials all day long.” [R. p. 410, lines 13 - 15]. She testified the rolls can weigh as much as 300 pounds, adding “A lot of the rolls are heavy, but I had to get my job done.” [R. p. 411, line 23; p. 413, lines 19 - 24].

These three differences distinguish the case at bar from Clade. They show how the Commission erred in finding Long did not meet her burden of proving a compensable injury. Long did hard work which required heavy lifting. She suffered an actual injury – not merely a pain or a strain – which in her doctor’s opinion was caused by the work. Her proof did not fail.

Going back to Respondents' assertion that the Commission did not require a specific incident, it's impossible to explain how the Commission could have reached the decision it did unless it required Long to boil her proof down to the specific instant when she tore her rotator cuff and biceps. The theme of "no specific injury" was the centerpiece of Respondents' case at trial and before the Appellate Panel. In Dr. Mazoue's deposition, Respondents' counsel repeatedly emphasized "would you agree with me that at least a portion of [Dr. McGowan's] report he notes *she has no specific injury . . .*" [R. p. 347, lines 11 - 13]. The Commission cited this same language from Dr. McGowan in the Order. [R. p. 37, lines 8 - 16]. Dr. Mazoue was also asked a similar question about his own "report also reflect[ing] that Ms. [Long] does not remember a specific event." [R. p. 347, lines 11 - 13].

In the ultimate finding of fact, the Commission holds "there simply is not any description in the medical records or in the Claimant's testimony that persuades us that there was an injury by accident as defined by the Act." [R. p. 40, lines 8 - 10]. And, there's the rub. Butler described the insidious onset of pain as she was lifting at work on Wednesday, April 11, 2013. She named the when, where and how. Her surgeon confirmed her injury was directly caused by her work activities. How then could the Commission find her proof not persuasive, unless they required a specific event? This is no straw man. This is a legal error on the part of the Commission which should be reversed.

2. If this case is to be decided as a repetitive trauma injury, Appellant met her burden of proof [In Reply to Respondents' Brief, pp. 30-31].

Respondents argue there "is no evidence, testimony or opinion that Claimant's job involved repetitive activities or that any repetitive job duties caused her injury." [Brief of Respondents, p. 30]. To be clear, it is not the claimant's job to prove a particular job is repetitive. Ordinarily, the

employer will seek to prove the job is repetitive to move the case out of § 42-1-160 into § 42-1-172's higher burden of proof. See S.C. Code Ann. § 42-1-172 (2007)(requiring proof by medical evidence stated to a reasonable degree of medical certainty).

Respondents inexplicably argue that Dr. Mazoue's opinion does not meet the requirements of the statute. Yet, his opinion tracks § 42-1-172 almost word for word. The statute requires "evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." It also requires "A 'repetitive trauma injury' is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." Dr. Mazoue opined to a reasonable degree of medical certainty "The patient's right shoulder injury most likely occurred on April 10, 2012, while the patient was *engaged in the regular duties of her employment* as a laminator, particularly lifting heavy rolls. . . . *There is a direct causal relationship between the condition under which the work was performed and the injury.*" [R. p. 172]. It is simply illogical to state that an expert opinion stated in the exact language used in the statute "falls woefully short of the kind of evidence necessary to meet the requirements of Section 42-1-172." [Brief of Respondents, p. 29].

To the extent Respondents argue that the shortfall in Dr. Mazoue's opinion is no mention in the questionnaire of repetitive activity, this argument must fail. The Commission must make the determination of whether the job activities are repetitive, using the definition in § 42-1-160 (F). That section states:

The word "accident" as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of

time. Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172”

S.C. Code Ann. § 42-1-160(F) (2007).

If the Commission finds the job is repetitive, then it is not considered an “injury by accident” and must be examined under the “repetitive trauma injury” statute. If the evidence is analyzed under § 42-1-172, then Dr. Mazoue provided the requisite proof in his questionnaire. The only way Respondents could then defeat the claim would be by Dr. Mazoue changing his opinion on cross examination or by presenting contradictory expert testimony. As Respondents did neither, Dr. Mazoue’s opinion is dispositive. The Commission should be reversed. See Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(excluding employer’s expert’s opinion not stated to a reasonable degree of medical certainty and reversing and remanding “to decide whether the remaining competent evidence supports Employee’s claim of sustaining a compensable, repetitive trauma injury.”).

3. The issue of a “dead zone” is properly before the Court [In Reply to Respondents’ Brief, pp. 31-33].

In her brief, Appellant began her discussion of the relevant law with an explanation of the interaction between *injuries by accident* and *repetitive trauma injuries*. [Brief of Appellant, pp. 10 - 12]. Respondents’ assertion that “her argument is nonsensical” does not make it so; it merely reveals a lack of understanding of the statutory scheme. The concept is simple enough. The Legislature created a carve out whereby repetitive trauma injuries would require proof by expert medical testimony whereas injuries by accident could still be proven by lay testimony alone or in combination with medical evidence. This was in response to the Supreme Court’s decision in Pee v. AVM, INC.,

352 S.C. 167, 573 S.E.2d 785 (2002)(holding repetitive trauma injuries were compensable under the Workers' Compensation Act).

Respondents argue that a repetitive trauma injury claim is waived by counsel's "concession" that "the evidence will show that this is not a repetitive type of job . . ." [Brief of Respondents, p. 32, n. 10]. Respondents fail to realize that proving a job is repetitive is a defense to an injury by accident. The plaintiff's bar would be thrilled if they could dispose of affirmative defenses merely by repeating aloud "the evidence will show that this is not a comparative negligence case."

The point here is as stated in Appellant's brief. Long produced evidence of how, when and where her injury occurred. Her proof met the elements of an injury by accident arising out of and in the course of her employment. S.C. Code Ann. § 42-1-160(A) (2007). She also produced evidence explaining how she did not realize her condition resulted from a work-related injury by accident until she was correctly diagnosed. The only real question was whether the insidious onset of her symptoms pointed to an injury arising from an injury by accident or a repetitive trauma injury. For that reason, the case was pled and tried in the alternative. [R. p. 49]. The ultimate result – with the Commission denying both claims – shows the Commission did in fact create a dead zone between an *injury by accident* and a *repetitive trauma injury*. In fact, this is exactly what Respondents are arguing when they state "she failed to prove a key element of a repetitive trauma injury." [Brief of Respondents, p. 32].

4. It was error to disregard Dr. Mazoue's uncontradicted medical opinion as proof of causation [In Reply to Respondents' Brief, pp. 33-35].

Respondents argue "The Commission properly weighed all of the evidence before it and accorded Dr. Mazoue's written opinion the weight it deserved." [Brief of Respondents, p. 33]. Yet,

there was no other medical opinion in the record. Nor was there any evidence of an intervening accident, a previous accident, a degenerative condition, or a purely personal illness that somehow could have caused a torn rotator cuff and biceps requiring surgical repair. In short, there was no competent evidence to weigh against Dr. Mazoue's opinion. Even a feather outweighs thin air. Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006) ("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.").

As additional sustaining grounds, Respondents come up with four reasons *not listed by the Commission* as to why Dr. Mazoue's opinion should not be dispositive. All four reasons should be rejected by the Court as tenuous and speculative.

Respondents first cite to Tiller for the argument that the "Commission is not bound by a medical opinion where, as here, there is other evidence in the record that contradicts it." [Brief of Respondents, p. 33]. While a correct statement of the law, here there is no evidence to contradict Dr. Mazoue. While there are earlier records diagnosing Long with myriad possible ailments from cervical radiculopathy to rhabdomyolysis to brachial plexopathy which theoretically could be construed to contradict Dr. Mazoue, once the MRI was taken of Long's shoulder, there was no doubt Dr. Mazoue's opinion was correct and unrefuted. The fact it took several weeks or months to get to the correct diagnosis is not contradictory evidence. Nor is there any medical or lay evidence that would infer Long suffered her shoulder injury somewhere other than her workplace. No other doctors gave an opinion on causation (other than Dr. Tanksley). No lay witnesses contradicted Long's own testimony of how her pain began at work and how it progressed. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008) (reversing

Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)("evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision of the Industrial Commission.").

Respondents second argument is that it is the Commission's role to judge the credibility of witnesses and assign weight to their testimony. Again, a correct statement of the law, but not relevant to the case at bar. There was no internal inconsistency in Dr. Mazoue's opinions. He confirmed his written opinion in his sworn deposition testimony. The Commission made no finding that his testimony was not credible nor did it find Long not credible. The sole reason for not giving "normal weight" to Dr. Mazoue's opinion was because his "conclusion as to that work nexus does not come while he is actively treating the Claimant." [R. p. 41, lines 12 - 17]. This is simply wrong. Dr. Mazoue gave this opinion *twenty-two* days from the previous date of active treatment at a time when he had not released Long and expected her to continue treatment. Furthermore, this timing is not a legitimate ground to disregard medical evidence in the absence of other competing evidence. "The nature and timing of [a patient's] visits do not discredit [a physician's] medical opinion." Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

Respondents's third argument is "Dr. Mazoue acknowledged at his deposition that neither his nor any other medical provider's notes indicated that Claimant had told them her pain started at work or was associated with her job." [Brief of Respondents, p. 34]. Respondents are neither complete nor accurate in this assertion. Dr. Mazoue's medical records and opinions are discussed

in more detail earlier in this brief, *supra* pages 9-12. The records show that Dr. Mazoue discussed Long's work and onset of pain with her at the first evaluation on September 13, 2012. [R. pp. 131, 133]. He records that *she* "Does not remember a specific event" and that *she* "works laminating furniture but cannot recall that her work actually caused this injury. She had a severe onset of chest pain that radiated outwards from the arm." [R. pp. 131, 133]. As has been said, Long is a blue collar worker who worked the same job for 13 years without incident. "[I]t was not unreasonable for her not to make the connection at the time." McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by employee and her physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Furthermore, Dr. Mazoue did make the right diagnosis and gave an accurate opinion on causation.⁸ He also recognized that Long's symptoms make the diagnosis and causation more complicated, testifying: "Well, whenever someone has chest pain, you know, you get worried about other non-musculoskeletal causes. You know, cardiac issues, things like that." [R. p. 371, line 25 - p.372, line 3].

Respondents close with the argument that Dr. Mazoue met with Respondents' counsel "but could not recall the date that the meeting might have occurred." [Brief of Respondents, p. 35]. This astonishingly trivial point is meaningless as Dr. Mazoue dated the questionnaire on January 20, 2015

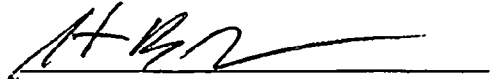
⁸ Respondents mischaracterize Dr. Mazoue's testimony when they state "Note also that, Dr. Mazoue also testified that the cause of Claimant's shoulder pain could be, 'a fall or sudden lifting, and concluded 'it could be lifting. It could be a fall. Could be a car accident. It could be any number of things.'" [Brief of Respondents, pp. 34-35]. In this portion of his testimony, Dr. Mazoue was not discussing Long's injury. He was responding to the question "when your patients think of trauma, what is that they generally seem to be saying to you?" Dr. Mazoue answered "That there wasn't one specific incident that resulted in their pain." He then went on to list examples of events his *patients* would consider to be trauma, listing lifting, falls, and car accidents. [R. p. 370, line 16 - p. 371, line 4]. At no point did Dr. Mazoue waver from his opinion that the work activities were the cause of Long's injury. He never said *her* injury had been caused by any other event. The Court should summarily reject this kind of obfuscation.

(or January 26th) – less than a month after seeing Long on December 29, 2014. Respondents continue splitting hairs by arguing “Dr. Mazoue was unable to identify what records he reviewed in order to reach his opinion that Claimant’s right shoulder injury was causally related to her work. [Brief of Respondents, p. 35]. Respondents did not take Dr. Mazoue’s deposition until August 29, 2016. Dr. Mazoue was asked “Do you know what documents you would have reviewed?” He responded “Not right now, no, sir.” [R. p. 360; lines 3-4]. It is hardly surprising that a busy doctor could not recall every scrap of paper he reviewed in a meeting nearly two years before. As the deposition continued, Dr. Mazoue asked to “review those documents.” [R. p. 362, lines 6-9]. This was at a point where Respondents counsel had shown Dr. Mazoue only a few of the documents. Ultimately, both attorneys showed Dr. Mazoue the relevant medical records and Long’s deposition. After being shown records by both attorneys, Dr. Mazoue confirmed that the review refreshed his memory as to what he had been shown when he gave his opinion on causation. [R. p. 376, lines 8-17]. As to the foundation for his opinion, he confirmed “that additional documentation helped me to understand that there was a likely correlation between her work and her onset of her right upper extremity opinions.” [R. p. 377, line 1-13].

Other than Dr. Tanksley, Dr. Mazoue’s opinion is the single expert medical opinion in the record. Respondents retained no experts nor did they persuade Dr. Mazoue to change his opinion. This opinion from Long’s treating orthopaedic surgeon is unrefuted, uncontested and unarguable. It was error for the Commission to disregard and/or give less than normal weight to Dr. Mazoue.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should issue an opinion awarding medical treatment and temporary total disability compensation to Appellant.



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February 2, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

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SC Court of Appeals

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

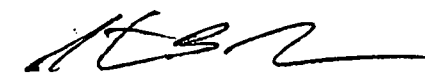
v.

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

CERTIFICATE OF COUNSEL

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

Respectfully Submitted



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