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.

BRIEF OF RESPONDENTS

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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 corticosteriod 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

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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 rhabdomylosis) 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, rhabdomylosis 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")). Rhabdomylosis 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

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[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.

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[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.

McANGUS GOUDELOCK & COURIE, LLC

January 25, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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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