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SC Court of Appeals

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.

REPLY BRIEF

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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 form 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

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[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].

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[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).

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[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

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[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

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[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

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[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 rhabdomylosis 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

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[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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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,

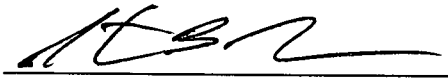
v.

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

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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