RECEIVED
Nov 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Jr., the Honorable Melody L. James,
and the Honorable R. Michael Campbell, II
Commissioners for the Appellate Panel

Appellate Case No. 2023-001155
Case No.: W.C.C. File No.: 1914733

William Oliver,
Employee.....Respondent,

v.

Syncreon, Employer, and Travelers Insurance Company, Carrier.....Appellant.

INITIAL BRIEF OF APPELLANT - FINAL

November 17, 2023

s/Christopher C. Mingledorff
Christopher C. Mingledorff
Mingledorff & Patterson, LLC
245 Seven Farms Drive, Suite 310
Box 13
Charleston, South Carolina 29492
(843) 471-1015
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in finding Respondent met his burden of proving the occurrence of a compensable work accident under the Act when both the Single Commissioner and Appellate Panel determined they could not rely upon the only testimony or evidence of a work accident.

2. Whether the Appellate Panel erred in finding Respondent met his burden of proving his alleged work accident proximately caused a compensable aggravation of his pre-existing condition when the medical evidence presented does not causally connect Respondent's alleged injury with a work accident.

3. Whether the Appellate Panel erred in finding Respondent met his burden of proving an injury by accident when Respondent knew about his work restrictions and nevertheless was employed outside the work restrictions by the unsuspecting Employer.

STATEMENT OF CASE

A. Overview of Matter.

Respondent is sixty-two (62) years old. (R. p. 605, line 15). Respondent worked for Employer as a forklift operator, initially through a temp agency then through direct employment. (R. p. 606, lines 2-13). Respondent has alleged he sustained an injury by accident to his left shoulder while under the employ of Employer on September 14, 2019, when he grabbed the cage of the forklift with his left hand to prevent him from falling after he slipped while stepping out of the forklift. (R. p. 533; R. p. 608, line 17- p. 609, line 9). This alleged accident was unwitnessed. (R. p. 6). Furthermore, both the Single Commissioner and Appellate Panel discredited the testimony of Respondent and, in fact, entered factual findings deeming the Commission "cannot rely on the testimony of the [Respondent]." (R. p. 6). No other evidence of an alleged work accident was submitted. Respondents have consistently denied any injury by accident.

B. Respondent's Undisclosed, Pre-Existing Disability and Work Restrictions.

When applying for a position with Employer, Respondent was directed to provide his most recent employers on his application. (R. p. 616, lines 5-14). He failed to do so. Respondent sustained work-related injuries, while working for the employers whom he failed to identify on his application for employment with Employer. (R. p. 617, line 22-p. 618, line 5). Significantly, Respondent failed to identify Blackbox Construction (hereinafter "BBC") as a prior employer. (R. p. 614, line 15). While at BBC, Respondent sustained a major left shoulder injury resulting in permanent work restrictions. (R. p. 614, line 16-p.615, line 7).

Specifically, Respondent suffered a torn rotator cuff in his left shoulder. (R. p. 614, line 16-p.615, line 7; R. p. 122). As a result, Respondent filed a workers' compensation claim and was provided benefits. (R. p. 615, line 4). Respondent received causally related medical treatment for

his injury with Dr. Fulton in Columbia, South Carolina, including surgical repair of his left shoulder. (R. p. 615, line 4; R. p. 122).

On March 28, 2017, Dr. Fulton released Respondent to maximum medical improvement. (R. p. 122). Dr. Fulton opined, "[m]aximum medical improvement of the left shoulder after repair of massive cuff tear and spontaneous traumatic rupture of long head of the biceps tendon..." (R. p. 122 (emphasis added)). Respondent was acutely aware the permanent work restrictions assigned to his left shoulder by Dr. Fulton prior to him commencing employment with Employer included:

1. No pushing or pulling more than twenty pounds;
2. No lifting more than ten pounds;
3. No overhead work; and
4. No working at heights, no climbing.

(R. p. 615, lines 5-25) (hereinafter, collectively referred to as the "Permanent Work Restrictions").

The Permanent Work Restrictions prevented Respondent from returning to work with BBC. (R. p. 615, line 25). Indeed, upon discussing the Permanent Work Restrictions with Respondent, Dr. Fulton explicitly noted Respondent "is in agreement with these restrictions and we will try to find some type of work he can do despite these restrictions such as a more sedentary type of job he was previously doing." (R. p. 122). Dr. Fulton added, "[b]ased on [Respondent]'s ongoing pain and dysfunction and the persistent tear of his supraspinatus tendon along with the absence of his biceps tendon and distal clavicle excision, I believe he has a 20% permanent partial impairment to the left shoulder." (R. p. 122). In turn, Respondent settled his BBC claim for $50,000.00. (R. p. 615).

Less than two years later, in early 2019, Respondent sought employment with Employer as a forklift driver with Respondent having full knowledge of the Permanent Work Restrictions.

(R. p. 20). Respondent described his job responsibilities with Employer as follows:

> They got this area called dunnage, . . . where you get the cart parts out of the crates . . . My job was to make sure . . . all the departments were cleaned with the empty dunnage cases, take them back into my area where I loaded trucks and unloaded trucks too. And then my other job was to make sure all the bins in the parts where [other employees were] taking their material car parts out of the dunnage crates, all the bins was emptied into the dumpster.

(R. p. 607, line 24-p. 608, line 9). In addition, Respondent's duties included changing the propane cylinder on the forklift and a process known as unblocking the dock. (R. p. 623, line 14-p. 624, line 1).

Respondent's job duties were in direct contradiction to the Permanent Work Restrictions. John Krampp is the Human Resources Manager for Employer. (R. p. 629). Krampp's role with Employer includes investigating, managing, and organizing workers' compensation claims. (R. p. 630). Krampp detailed that the scope of Respondent's employment with Employer as a forklift operator was outside the Permanent Work Restrictions:

1. Changing the propane cylinder, which weighs approximately thirty (30) pound when full, is outside his restrictions. (R. p. 631, line 16).
2. Unblocking the dock, which required pushing and pulling, is probably outside of his restrictions. (R. p. 631, lines 21-22).
3. Operating the truck jack would be outside of his work restrictions due to the heavy weight of the equipment. (R. p. 632, line 1).
4. Blocking the docks would be outside of the assigned restrictions. (R. p. 632, line 18).
5. Respondent's duties involving placing materials in the receiving lane, stating "if you did it manually, it would be outside of the restrictions." (R. p. 632, lines

8-10).

Krampp highlighted had Employer known of the Permanent Work Restrictions, Employer would have noted his scope of work was outside of his restrictions. (R. p. 632, line 22). Likewise, if he was already employed, Employer would have found some type of work accommodations. (R. p. 633, lines 2-4). But, Employer could not avail itself of any opportunity to keep Respondent un-injured because Respondent failed to notify Employer of his limited work capability and the Permanent Work Restrictions.

On the date of the alleged accident, Jimmy Henderson worked as a receiving supervisor for Employer. (R. p. 640, line 24). Mr. Henderson was responsible for supervising and overseeing the forklift drivers, including Respondent. (R. p. 641, lines 1-2). Mr. Henderson no longer works for Employer and is a disinterested party. (R. p. 641, lines 10-12). Mr. Henderson also testified the work demands of Respondent's position with Employer were not compatible with the Permanent Work Restrictions. (R. p. 642, line 1-p.643, line 24). Mr. Henderson testified "with restrictions such as no pushing or pulling more than 20 pounds, no lifting more than 10 pounds, no overhead work and no lifting at heights, a forklift driver would not be able to comply with the 'unblock the dock' part of the job and those same restrictions would not allow someone to change the gas cylinders nor could someone with those restrictions be able to manually place material in the receiving lane or block the dock." (R. p. 642, line 1-p.643, line 24; R. p. 518 – p. 519). Ultimately, Mr. Henderson testified he would have disqualified Respondent as a driver with Employer if he had known of the Permanent Work Restrictions. (R. p. 644, lines 4-8).

Furthermore, Mr. Henderson heard statements made by Respondent regarding complaints of left shoulder pain and discomfort prior to the date of the alleged injury. On September 13, 2019, the day before Respondent's alleged injury, Mr. Henderson "overheard [Respondent] talking with

one of the associates walking to the dock, he said that his shoulder was bothering him from a previous injury he had surgery on…" (R. p. 644, lines 19-23).

C. Unwitnessed Alleged Work Accident.

Respondent has alleged he sustained an injury by accident to his left shoulder while under the employ of Employer on September 14, 2019, when he grabbed the cage of the forklift with his left hand to prevent him from falling after he slipped while stepping out of the forklift. (R. p. 533; R. p. 608, line 17-p. 609, line 9). Appellants have consistently denied any injury by accident.

According to Respondent, he alleges as follows:

> With my left foot, I had to step out of the forklift, hold onto the railing with my left hand, reach up between the cage where the blades are and pull the lever and would dump it automatically. But that night, when I stepped on the rail, I felt my foot slipping forward and I had to grab hold to the cage to keep from falling over about 10-foot on the ground. And I'd have hit the motor that ran the dumpster.

(R. p. 533; R. p. 608, line 17-p. 609, line 9). This alleged accident was unwitnessed. (R. p. 6). The only testimony presented regarding an accident is Respondent's own self-serving testimony. Both the Single Commissioner and Appellate Panel discredited the testimony of Respondent and, in fact, entered factual findings holding the Commission "cannot rely on the testimony of the [Respondent]." (R. p. 6).

There is no other evidence of an alleged work accident. (R. p. 60).

After the alleged accident, Respondent sought treatment on his own and was evaluated by Dr. William Owens, Jr. of Palmetto Bone and Joint. During the initial appointment, the encounter notes recite "[Respondent] is employed at Syncreon as a forklift operator. He has been employed for about nine (9) months. He injured his shoulder at work on September 14, 2019." (R. p. 369 – p. 380). The encounter notes do not make any reference to a mechanism of injury nor the

requirements of Respondent's job with Employer. In a follow-up on November 21, 2019, Dr. Owens noted Respondent had "an excellent outcome" following his prior surgery "until he injured." (R. p. 372 – p. 373). This, of course, directly contradicts the discharge notes of Dr. Fulton. Again, no discussion of a mechanism of injury was provided for the left shoulder complaints. (R. p. 369 – p. 380). No mechanism of injury was provided in the encounter notes for the electrodiagnostic study on December 3, 2019. (R. p. 376). At no point does Dr. Owens remotely indicate that he himself was a witness to an accident. (R. p. 369 – p. 380).

Despite never detailing a mechanism of injury for Respondent related to any work accident in any of his encounter notes, Dr. Owens inexplicably felt capable of completing a questionnaire forwarded by Respondent's counsel and answering "yes" to the following question:

> Do you believe most probably to a reasonable degree of medical certainty that Mr. William Oliver's left shoulder injury most probably result from his performance of his job activities and/or a work-related aggravation of pre-existing condition?

(R. p. 380). Including the questionnaire, Dr. Owens's medical records and opinions are void of any description of Respondent's work responsibilities and, most important, void of any description of a mechanism of injury.

D. Procedural History.

Via the South Carolina Workers' Compensation Commission (SCWCC) Form 50, the Respondent filed a hearing request on January 27, 2020. The Form 50 alleges that, on September 14, 2019, Respondent "while in furtherance of his work duties, was attempting to unload a bin when he slipped, grabbed something to prevent from falling, causing his left arm to pull, resulting in injuries." (R. p. 533). Respondent alleged injuries to his neck, left shoulder and left arm. In response, Appellants timely filed SCWCC Form 51, denying the workers' compensation claim entirely. (R. p. 529).

Prior to the hearing, the parties timely filed their respective pre-hearing briefs with APA submissions detailing the evidence to be relied upon at the hearing. Respondent's Pre-Hearing Brief maintained the compensable nature of the alleged work accident under the South Carolina Workers' Compensation Act, relying solely on the opinion of Dr. Owens for medical evidence. (R. p. 381). Appellants' Pre-Hearing Brief denied the compensability of the claim. (R. p. 381). More specifically, Appellants identified the following as issues impacting compensability: whether the Respondent suffered a compensable accident as defined by the Act to include S.C. Code Ann. Section 42-1- 160; whether the Claimant committed fraud in the application; and whether the Claimant knowingly worked outside of his permanent work restrictions. (R. p. 382).

The matter was heard before Commissioner Gene McCaskill, Commissioner South Carolina Workers' Compensation Commission, on October 29, 2020. (R. p. 594). By Order dated April 19, 2021, Commissioner McCaskill found Respondent did not sustain a compensable injury. (R. p. 40).

Correctly so, Commissioner McCaskill assessed the claim as one which required "several questions that must be answered to determine compensability." (R. p. 58). "The first is whether there was a work-related accident on September 14, 2019." (R. p. 58). Thereafter, Commissioner McCaskill noted "the only evidence as to whether there was an accident is the testimony of the [Respondent]." (R. p. 60). After detailing numerous inconsistencies in Claimant's Hearing Testimony and Deposition Testimony (which the Commissioner read in its "entirety"), Commissioner McCaskill found he was "not persuaded" an accident occurred on September 14, 2019. (R. p. 60). In doing so, Commissioner McCaskill's factual findings detail "Dr. Owens['] medical opinion . . . assumes that what [Respondent] has told him as to how he got hurt is factual. [He is] not persuaded it is." (R. p. 60).

Returning to the "several questions" which must be "answered to determine compensability," Commissioner McCaskill next tackles the fact of the Permanent Work Restrictions and the credibility of both Employer witnesses (Mr. Henderson and Mr. Krampp) with regard to Respondent's knowing work outside the Permanent Work Restrictions. (R. p. 60 – p. 61). Ultimately, Commissioner McCaskill holds a *second* independent basis for claim denial exists – "[Respondent] was performing a job for the Employer that required him to work outside the work restrictions…[and Respondent was clearly aware of them and sought, accepted and worked a job…outside those restrictions. (R. p. 60 – p. 61).

Third and legally independent of Respondent's failure to carry his burden with regard to Commissioner McCaskill's first two "questions to determine compensability," Commissioner McCaskill found the omission of his work restrictions on his job application to be fraud in the application. (R. p. 62).

Overall, Commissioner McCaskill concluded Respondent failed to carry his burden of proof to prove a compensable injury. (R. p. 63). This Order was appealed by Respondent to the Appellate Panel of the South Carolina Workers' Compensation Commission. (R. p. 330). After hearing the matter on January 24, 2022, the Appellate Panel issued an Order on May 9, 2022. (R. p. 29).

The May 9, 2022 Appellate Panel Order reversed the Single Commissioner "as to the decision regarding fraud in the application, Vacated and Remanded back to the Hearing Commissioner to determine whether there was an injury by accident without any consideration of any fraud in the application defense." (R. p. 38). Notably, the Appellate Panel did not disturb Commissioner McCaskill's factual determinations regarding Respondent, Respondent's lack of credibility or Respondent's inability to satisfy his burden with regard to the first two, legally independent "questions to determine compensability." (R. p. 29 – p. 39).

On remand, Commissioner McCaskill reheard the legal arguments of the parties on August 12, 2022 but did not accept any new evidence. (R. p. 25). On December 12, 2022, consistent with his original Order, Commissioner McCaskill *again* determined he "cannot rely on the testimony of the [Respondent]." (R. p. 25). Quite perplexing and while initially finding Mr. Henderson credible, Commissioner McCaskill finds *now and for the first time* he cannot rely on the testimony of Mr. Henderson. (R. p. 25).

Summarily, the December 12, 2022 Order finds Respondent sustained a compensable injury under the Act because:

> 16[1]. That when the evidence is considered as a whole and with the application of the Full Commission's directive, I must find the Mr. Oliver has suffered a compensable work-related injury to his left shoulder.
>
> 17. That I have arrived at the conclusion based primarily on the medical opinion as to causation from Dr. Owens.
>
> 18. That given the most recent case law from the Court, I cannot substitute my opinion for that of a doctor. And given the directive from the Commission, my analysis of this claim is controlled by that case law.

(R. p. 26 (emphasis added)). In turn, Commissioner McCaskill found Respondent sustained a compensable injury by accident. Keep in mind, Commissioner McCaskill also found "the only evidence as to whether there was an accident is the testimony of the [Respondent]." (R. p. 60). With no new evidence or testimony, the December 12, 2022 Order is completely devoid of credible evidence of an accident. Therefore, Commissioner McCaskill's paragraph 16 statement "when the evidence is considered as a whole" is limited to the uncredible testimony of Respondent. What, therefore, is the evidence on which the Commissioner found an accident occurred?

[1] Numbering is being replicated from the December 12, 2022 Order.

In response, Appellants filed for a hearing before the Appellate Panel to address whether the Single Commissioner erred in concluding Respondent sustained a compensable injury and, as a result, is entitled to benefits under the Act. (R. p. 98). No issues were appealed to the Appellate Panel by Respondent. Appellants' Form 30 included a detailed list of thirteen errors (not inclusive of subparts). (R. p. 99 – p. 101).

The matter was heard before the Appellate Panel on March 13, 2023. (R. p. 537). The Order of the Appellate Panel was issued on June 19, 2023. (R. p. 3). The Appellate Panel Order did not address the issues presented and, instead, simply adopts the findings and conclusions of the Single Commissioner by reciting them verbatim as an Order of the Appellate Panel. (R. p. 3 – p. 14). This appeal followed via a timely Notice of Appeal.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Appellate Panel. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, an appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1–23–380(5)(d), (e); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010).

The Appellate Panel is the ultimate factfinder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, an appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. Pierre, 386 S.C. at 540, 689 S.E.2d at 618 (2010). "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion

the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). Although, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." Id. 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 conclusion the administrative agency reached in order to justify its action. Bass v. Isochem, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005).

ARGUMENT

I. Whether the Appellate Panel erred in finding Respondent met his burden of proving the occurrence of a compensable work injury under the Act when the Appellate Panel determined they could not rely upon the only evidence presented of a work accident.

"The claimant has 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." Frampton v. S.C. Dep't of Nat. Res., 432 S.C. 247, 257, 851 S.E.2d 714, 719 (Ct. App. 2020). "A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim." Turner v. SAIIA Constr., 419 S.C. 98, 108, 796 S.E.2d 150, 156 (Ct. App. 2016). "'Injury' for purposes of workers' compensation means 'only injury by accident arising out of and in the course of employment.' Frampton, 432 SC at 257, 851 S.E.2d at 719 (quoting S.C. Code Ann., 42-1-160(A)).

To further elaborate on the issue of compensability, the Act requires as follows:

> [An accidental injury] must "aris[e] out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015). 'Arising out of' refers to the injury's origin and cause, whereas 'in the course of' refers to the injury's time, place, and circumstances. For an injury to

> arise out of employment, there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury.

Turner v. SAIIA Constr., 419 S.C. 98, 107–08, 796 S.E.2d 150, 156 (Ct. App. 2016) (internal quotations marks and citations omitted).

Here, the Appellate Panel expressly relied "primarily" on the opinion of Dr. Owens in finding compensability, including, apparently, the existence of an actual accident. (R. p. 12 (emphasis added)). The questionnaire Respondent's attorney sent to Dr. Owens provides, in pertinent part, as follows:

> 1. Do you believe most probably to a reasonable degree of medical certainty that William Oliver's left shoulder injury most probably result from his performance of his job activities and/or a work-related aggravation of a pre-existing condition?
>
> Yes ____X____ No_____

(R. p. 380 (emphasis provided in the original by Dr. Owens circling the underlined portion)). However, Dr. Owens' records are void of any description of a work accident or Respondent's job responsibilities with Employer. Dr. Owens only addresses causation. Dr. Owens' opinion does not establish the veracity of the conditions, which Respondent alleges brings his alleged injury within the workers' compensation law.

As the Single Commissioner originally noted, "Dr. Owens['s] medical opinion . . . assumes that what the Claimant has told him as to how he got hurt is factual." (R. p. 60). The Appellate Panel found that it could not rely on the testimony of Respondent. (R. p. 11); See Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel"). Furthermore, the Appellate Panel found the accident was unwitnessed. (R. p. 11). Thus, there is no credible evidence upon which Respondent can rely to carry his burden of

establishing a compensable accidental injury occurred.

The Appellate Panel's liberal use of clauses such as "when the evidence is considered as a whole", (R. p. 12), does not alter the fact that, practically, the Appellate Panel cannot rely solely on the opinion of Dr. Owens in addressing compensability and, as a result, is unable to establish a causal connection between Respondent's alleged injury and his employment.

Keep in mind, Commissioner McCaskill originally found "the only evidence as to whether there was an accident is the testimony of the [Respondent]." (R. p. 60). With no new evidence or testimony, the December 12, 2022 Order is completely devoid of credible evidence of an accident. Therefore, Commissioner McCaskill's paragraph 16 statement "when the evidence is considered as a whole" is limited to the uncredible testimony of Respondent. What, therefore, is the evidence on which the Commissioner found an accident occurred?

Inexplicably, the Appellate Panel offers that "given the most recent case law from the Court, we cannot substitute our opinion for that of a doctor. And given the directive from the Full Commission, our analysis of this claim is controlled by that case law." (R. p. 13). What the Appellate Panel meant by this Finding of Fact is not readily apparent. "[M]edical testimony should not be held conclusive irrespective of other evidence." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) (internal quotation marks and citation omitted).

Here, the medical opinion of Dr. Owens does not require the Appellate Panel waive its responsibility to make credibility determinations and ignore its finding discrediting Respondent's testimony. Stated another way, unless Dr. Owens provides evidence he witnessed an accident (which he, of course, does not), then his opinions are with regard to medical diagnosis only.

Dr. Owens opinion is premised on Respondent's statements. The Appellate Panel is the fact finder for credibility determinations. The Appellate Panel has discredited Respondent. Even if Dr. Owens said a work accident occurred, which he does not, the Appellate Panel is not required

to yield to a medical professional in determining the factual issue of whether the alleged accident occurred. It appears the Appellate Panel has put the "cart before the horse," by skipping over the fact there is not credible evidence of an accident and summarily then holding a medical diagnosis supports the existence of an actual accident, and an actual accident at work.

This Court has held "conclusory" rulings by the Commission without a "factual basis" do not support a finding of compensability. Aaron v. Viro Group, 344 S.C. 321 (Ct. App. 2001). Here, Respondent has not presented credible evidence that a work accident has occurred as the Appellate Panel has determined Respondent, himself, cannot be relied upon. Therefore, Respondent has failed to carry his burden of establishing a work accident occurred on September 14, 2019 which is necessary to causally connect to his alleged injury to his employment. Consequently, the Appellate Panel's finding of a compensable work injury is not supported by substantial evidence. When the "only evidence" of an accident is Respondent's uncredible testimony, the reasonable mind is left without any way to connect Respondent's injury to his work. The result is speculation and conjecture.

II. Whether the Appellate Panel erred in finding Respondent met his burden of proving his alleged work accident proximately caused a compensable aggravation of his pre-existing condition when the medical evidence presented does not causally connect Respondent's alleged injury with a work accident.

"An injury arises out of employment if it is proximately caused by the employment." Frampton, 432 S.C. at 851, S.E.2d at 719–20 (Ct. App. 2020). "[I]t is the burden of the claimant to prove by a preponderance of the evidence, including medical evidence, that . . . the subsequent injury aggravated the preexisting condition or permanent physical impairment; or . . . the preexisting condition or the permanent physical impairment aggravates the subsequent injury in order to be eligible for compensation for that injury." § 42-9-35. Frampton, 432 S.C. at 259, 851

S.E.2d at 720–21 (Ct. App. 2020).

Here, the Appellate Panel relied solely on the opinion of Dr. Owens. The Appellate Panel misleadingly offers it arrived at its conclusion Respondent suffered a compensable work-related accident to his left shoulder "based primarily on the medical opinion as to causation from Dr. Owens." (R. p. 12). However, this statement is false. The Appellate Panel said it could not rely on the testimony of Respondent. (R. p. 11). There is no other evidence of an accident on which to rely.

Dr. Owens' medical records and questionnaire responses fall short of establishing by a preponderance of the evidence that the alleged accident proximately caused Respondent's aggravation. Dr. Owens' loose reference to Respondent's "performance of his job activities" does not suffice to causally connect Respondent's reported left shoulder aggravation with a compensable work accident. From the records, it would appear Dr. Owens has no clue how Respondent allegedly injured his shoulder and the Commission cannot engage in surmise, conjecture or speculation to close the gap.

III. Whether the Appellate Panel erred in finding Respondent met his burden of proving an injury by accident when Respondent knew about his work restrictions and nevertheless was employed outside the work restrictions by the unsuspecting Employer.

South Carolina Code Annotated § 42-1-160 defines "injury" and "personal injury" to "mean only injury by accident arising out of and in the course of employment..." The word "accident" as used here is defined as an unlooked for and untoward event which is not expected or designed by the person who suffered the injury. Radcliffe v. Southern Aviation School, 209 S.C. 411, 40 S.E.2d 626 (1946); Green v. Bennettsville, 197 S.C. 313, 15 S.E.2d 334 (1941). In Pee v. AVM, the South Carolina Supreme Court held, "[a]n injury is unexpected, bringing it within the

category of accident, if the worker did not intend it or expect it would result from what he was doing." 352 S.C. 167, 573 S.E.2d 785 (2002). "Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident." Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002).

In Landry, the Court affirmed the denial of Landry's workers' compensation claim due to no injury by accident and relied upon Pee, Capers and Havird. Landry v. Carolinas Healthcare Systems, 396 S.C. 149 (Ct.App. 2011) (relying on Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002); Capers v. Flautt, 305 S.C. 254 (Ct.App. 1991); Havird v. Columbia YMCA, 308 S.C. 397 (Ct.App. 1992)). The Court noted Landry, like Capers and Havird, was (1) "aware of her physical condition"; (2) "knew which activities would worsen her symptoms"; and (3) "was warned by her doctor" that the type of work she was doing would worsen her condition. Landry, 396 S.C. at 156. The Court concluded "Landry's injury was not unexpected." Landry, 396 S.C. at 1567.

Here, Respondent, like Landry, Capers and Havird, was aware of the Permanent Work Restrictions, knew he should have a more sedentary job and was warned by Dr. Fulton. (R. p. 57). Respondent's job responsibilities with Employer exceeded the boundaries of the Permanent Work Restrictions. (R. p. 629 – p.633) He could not push or pull more than twenty, which would have included his own body weight. Likewise, he could not work at heights or climb. (R. p. 387).

In contrast to the sedentary work Respondent agreed to pursue when discharged by Dr. Fulton, Respondent voluntarily assumed a position that required work outside the Permanent Work Restrictions. Respondent's work included job duties that required Respondent to work off the forklift; working in the dunnage area, where Respondent had to take car parts out of crates; loading/unloading trucks and unloaded trucks; changing the propane cylinder on the forklift and a process known as unblocking the dock. (R. p. 607, line 24 – p. 608, line 9; R. p. 623, line 14 -p. 624, line 1). Mr. Krampp and Mr. Henderson, individuals with a strong understanding of the job

requirements, both testified these responsibilities conflict with the Permanent Work Restrictions. (R. p. 631, line 16 – p. 632, line 22; R. p. 642, line 1 – p.643, line 24).

Recall, in Landry, the Court noted Landry, like Capers and Havird, was (1) "aware of her physical condition"; (2) "knew which activities would worsen her symptoms"; and (3) "was warned by her doctor" that the type of work she was doing would worsen her condition. Landry, 396 S.C. at 156. The Court concluded "Landry's injury was not unexpected."

Here, Respondent did not suffer an injury by accident. His left shoulder injury cannot be considered an unexpected or untoward event. Respondent is alleging he further injured his previously injured left shoulder when he knowingly took on employment which required Respondent to work in contradiction of the Permanent Work Restrictions. Respondent did not suffer an injury by accident and is not entitled to benefits. Respectfully, the Court should review the evidence and facts of this claim and determine there was not an injury by accident.

CONCLUSION

For all of the foregoing reasons, the Appellate Panel's decision should be reversed in its entirety.

s/ Christopher C. Mingledorff, Esq.
Christopher C. Mingledorff, Esq.
Mingledorff & Patterson, LLC
S.C. Bar No.: 100390
245 Seven Farms Drive, Suite 310, Box 13
Charleston, South Carolina 29492
(843) 471-1015
chris@mptrial.com
Attorney for Appellants

November 17, 2023
Charleston, South Carolina

RECEIVED
Nov 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Jr., the Honorable Melody L. James,
and the Honorable R. Michael Campbell, II
Commissioners for the Appellate Panel

Appellate Case No. 2023-001155
Case No.: W.C.C. File No.: 1914733

William Oliver, Claimant..... Respondent,

v.

Syncreon, Employer, and Travelers Insurance Company, Carrier..... Appellants.

PROOF OF SERVICE AND RULE 211 CERTIFICATE

I certify that the foregoing Brief complies with Rule 211 of the SCACR and I certify that I have served the *Initial Brief of Appellant - FINAL* by forwarding via electronic mail and/or U.S. mail on November 17, 2023 addressed to attorney of record, Jacob Smith, Esq., to the South Carolina Court of Appeals, and to the South Carolina Workers' Compensation Commission at the following:

Jacob Smith, Esq.
Smith & Jones Law
949 East Main St., Ste. B
Lexington, SC 29072
Telephone: (803) 996-3333
jsmith@smithandjoneslaw.com
Attorney for Respondent

Amy Bracy
Judicial Department
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715
judicial@wcc.sc.gov

S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

/s/Christopher C. Mingledorff
Christopher C. Mingledorff
S.C. Bar No.: 100390
Mingledorff & Patterson, LLC
245 Seven Farms Dr., Ste. 310, Box 13
Charleston, SC 29492
Telephone: (843) 471-1015
Attorney for Appellants

November 17, 2023
Charleston, SC