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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly reversed the Appellate Panel's Decision and Order as unsupported by substantial evidence?

II. Whether the Court of Appeals correctly found there was no conflicting evidence such that the opinions of Dr. Tanksley and Dr. Mazoue required reversal of the Appellate Panel's Decision and Order?

II. Whether the Court of Appeals correctly applied Schlumberger, Mauldin and Massey for the proposition that a misdiagnosis by the patient and/or doctor is not evidence that an injury is not connected to work?

STATEMENT OF THE FACTS

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

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

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

Butler-Long's arm continued to hurt, but she dealt with it and kept working. She testified

"It started hurting that particular day and then it's just progressed just the way my arm was like numb and it started just tingling. So I just went to the emergency room on that Friday." [R. p. 214, lines 5-9].

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

The ER doctors took x-rays of her right arm, shoulder and chest – as she complained of pain in these areas. As the pain was not limited to her shoulder and was accompanied by numbness and tingling into her right arm and fingers, Butler-Long did not appreciate that the injury was to her shoulder (nor did the doctors).

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

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

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

The next day, Butler-Long was still in pain, so the next day – Tuesday, April 17, 2012 – she went to the ER at Palmetto Health Richland. The report states "She has developed this right arm pain that has been going on for a week. She says it hurts more at nighttime. She was seen at

Providence and had a kind of pain in her right shoulder and progressed down her right arm . . . They did not give her any follow-up and she is just concerned as the pain has not gotten any better, it has gotten slightly worse. She states she does not know what is causing this pain but is just causing some concern." [R. p. 73].

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

Butler-Long continued to "have pain radiating from the neck all the way to the arm" – which continued to worsen. She returned to the ER at Palmetto Health Richland one week later on April 24, 2012. They again noted muscle spasms. They took cervical x-rays and stated "The patient will possibly need MRI" [R. pp. 77-8].

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

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

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

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

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

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

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

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

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

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

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

After physical therapy did not help, Butler-Long saw a shoulder surgeon, Dr. Chris Mazoue, on September 14, 2012. On that first visit, the history stated "Pain started April 10th and has not been to work since then. Does not remember a specific event. Says that pain originated at her chest and radiated out." [R. p. 133].

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

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

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[3] Dr. Sweet was the first doctor to actually diagnose shoulder pathology. After seeing Dr. Sweet and Dr. McGowan, Butler-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].

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

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

STANDARD OF REVIEW

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

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary

principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

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

ARGUMENT

1. The Court of Appeals faithfully applied the correct standard of review in holding that the Decision and Order of the Appellate Panel was unsupported by substantial evidence.

Petitioners argue that "the Court of Appeals appears to have flipped [the standard of review] and required Petitioners to disprove [Butler-Long's] claim. [Petition, page 16]. They argue "the Court of Appeals impermissibly engaged in a one-sided review of the evidence, focusing only on evidence favorable to Claimant's case, while disregarding or discounting all other evidence." [Petition, page 16].

As explained in more detail in the briefs, the evidence here – once one actually goes beyond a superficial analysis – shows that Butler-Long sustained a shoulder injury arising out of her

employment on April 11, 2012. Moreover, the analysis by the Full Commission is fatally flawed. The Commission did not analyze the evidence to determine how Butler-Long injured her shoulder. Instead, it arbitrarily rejected the proof of a work-related injury, resorting to speculation based on various misdiagnoses in the record and the inexplicable rejection of Dr. Mazoue's opinion.

All parties agree that the applicable standard of review in this case is substantial evidence. And if substantial evidence was equivalent to a scintilla of evidence, then it would be enough for the prevailing party below to find the one piece of paper that somewhat supports the decision and that would be the final answer. However, while substantial evidence is a relatively deferential standard of review, "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). See also, National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 174 S.E. 581, 173 S.C. 1 (1934)("If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.") The role of the appellate courts is to meaningfully analyze the entire record evidence under this standard – not to mine the record for inconsequential nuggets masquerading as substantial evidence nor to rubber stamp flawed fact finding.

Applying the correct standard of review, the Court of Appeals held:

> Claimant persuasively argues that she proved she suffered a work-related injury on April 11, 2012, and that the Appellate Panel erroneously disregarded the only expert medical evidence addressing causation: Dr. Mazoue's medical questionnaire and deposition testimony and Dr. Tanksley's July 30 record amending his conclusion to note the work connection for Claimant's shoulder pain. Much like Claimant, it appears Dr. Tanksley only recognized the connection between Claimant's work and her injury once a rotator cuff problem was diagnosed.

Butler-Long v. ITW Labels, Op. No. 2023-UP-291 (S.C. Ct. App. filed Aug 09, 2023).

Petitioners seek to create a conflict in the evidence where none exists. As the court noted, Dr. Mazoue and Dr. Tanksley provided the "*only* expert medical evidence addressing causation." Id. (emphasis added). "The Appellate Panel's problematic rejection of these two medical opinions is compounded by the fact that Dr. Tanksley and Dr. Mazoue were the only two physicians who actually followed and treated Claimant." Id. While other doctors examined Butler-Long, not one of them expressed an opinion on causation – nor, for that matter, correctly diagnosed her shoulder injury. With no true conflict in the evidence, the Court of Appeals was correct in reversing the Appellate Panel.

Petitioners argue that under Tiller, "this Court rejected the premise that expert medical testimony/opinion is always required or controlling." [Petition at 17]. While this is a correct statement of black letter law, the rule does not apply when, as here, the Commission bases its decision on what it finds in the medical records. In such cases, the appellate courts must determine if the medical evidence supports the Commission's findings. And where the Commission arbitrarily rejects *the only* expert medical evidence as to causation in the record, then reversal is not only warranted; it is required.[4] See Burnette v. City of Greenville, 737 S.E.2d 200, 206, 401 S.C. 417 (Ct.

[4] The Court of Appeals observed that "None of these doctors [relied on by the Appellate Panel] addressed the actual cause of Claimant's injury or opined as whether it was (or was not) work-related." Butler-Long v. ITW Labels, Op. No. 2023-UP-291 (S.C. Ct. App. filed Aug 09, 2023).

App. 2012)(reversing Commission where "We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy."). See, also 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"); 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).

Contrary to Petitioners' argument, the Court of Appeals did not resolve "the conflicts in the evidence in Claimant's favor and even going so far as to reach conclusions that patently are not supported by the Record . . ." [Petition, page 19]. This is simply a case where the decision below is unsupported by substantial evidence. See 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."). The Court of Appeals got it right. None of the factors favoring further review by this Court are present here. Therefore, the Petition for Writ of Certiorari should be denied.

2. The Court of Appeals correct held that Butler-Long proved by medical evidence that she suffered a work-related injury to her right shoulder, on April 11, 2012.

The evidence shows Butler-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]. This is undisputed and there is no evidence to the contrary.

Petitioners argue "the premise on which much of the Court of Appeals' reversal is based – that Claimant consistently told medical care providers that her pain began at work on April 10 or 11 – has absolutely no support in the Record and, consequently, must be reversed." [Petition, pages 19-20]. Yet Petitioners admit that virtually every medical record relates the onset of pain back to that date.[5]

It would seem that the gravamen of Petitioners' argument is that even though Butler-Long consistently reported her pain beginning on April 10th or 11th, her proof fails because she candidly testified "The pain did start at work, but I didn't think it came from work." [R. p. 459, lines 24-25]. As Petitioners tell it, Butler-Long's initial misapprehension over "the cause or mechanics of her injury," coupled with the multiple misdiagnoses of the doctors who first saw her, forever dooms her case.

This unforgiving regime is not supported by the case law. Our appellate courts have willingly

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[5] Providence Hospital; April 13, 2012 ("right sided shoulder and forearm pain x 3 days") [R. p. 58]. Palmetto Health Richland; April 17, 2012 ("this right arm pain that has been going on for a week.") [R. p. 73]. Family Medical Center/Dr. Tanksley; April 27, 2012 ("Pain started 3 weeks ago in the right side of her chest") [R. p. 93]. Short Term Disability Application; May 11, 2012 ("Date symptoms first appeared or accident happened Month April Day 11 year 2012 [R. p. 307]. Dr. McGowan; June 11, 2012 ("Injury Date: April 2012). [R.p. 128]. Dr. Chris Mazoue; September 14, 2012. ("Pain started April 10th and has not been at work since then."). [R. p. 131].

and necessarily stepped in to reverse the Commission when it effectively penalized injured workers because they (or their doctors) did not fully understand or appreciate the nature of their injuries. See McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by employee and her physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Cf. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(applying discovery rule to toll the statute of limitations because the employee did not suspect nor have reason to suspect her problem resulted from a work accident until she was correctly diagnosed by specialist orthopaedic surgeon); "The 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)("We find substantial evidence does not support the Appellate Panel's findings characterizing Kin"s long-term arm ache as an 'injury,' determining King discovered or could have discovered 'a couple of years ago' that he had a compensable condition, and barring King from receiving benefits for failing to satisfy the notice requirement.").

A. The medical records and testimony in this case confirm that the Full Commission's Decision is unsupported by substantial evidence.

When it started on April 11, 2013, Long's pain presented as chest, right arm and right shoulder pain. As she continued to work through Thursday and Friday, it got worse. She started getting radiating numbness and tingling down her arm into her fingers. With this onset of symptoms Butler-Long did not understand what was going on. She should not be penalized or held to an impossible standard because she did not understand her injury. "The Act requires an injured employee to be diligent, not prescient." King v. Int'l Knife, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).

Butler-Long's pain became so severe by Friday night that she went to the emergency room. At the hospital, she discussed her job as a causative factor, as the record notes "[Patient] has job in which she has repetitive arm movements." [R. p. 58]. The confusion arose because Butler-Long did not recognize what had happened to her and the doctors could not figure out what was wrong. Working diagnoses ranged from a deep vein thrombosis to rhabdomylosis, cervical radiculopathy, and brachial plexus neuropathy. It took several months, multiple doctors, and shoulder surgery before Dr. Mazoue made the correct diagnosis. If the doctors cannot figure it out, how can one expect a blue-collar factory worker with no medical experience to make the correct diagnosis?

The *only* evidence in this case is that Butler-Long suffered a work-related right shoulder and arm injury on April 10, 2012. There is no evidence of any other event that could have caused it, nor is there any evidence that the torn rotator cuff and biceps were preexisting, degenerative or idiopathic.

There has never been a requirement that a claimant identify a specific instant or event when the injury happened. In Clade, the Supreme Court criticized the Court of Appeals for "focus[ing] on [the employee's] failure to prove a specific causal event instead of her failure to prove a causal relationship." Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1997). The Court explained: "This language which requires an injured employee to identify a specific event for an injury to be compensable contradicts the established law of this state." Clade stands for the proposition that a claimant must prove "a causal relationship" between the injury and the work; not identify a "specific event" when the injury happened.

Unlike the employee in Clade, Butler consistently reported her injury as occurring with the "insidious onset" of pain at work on Wednesday, April 11, 2012. Butler testified: "the pain came

on gradually. It started hurting that Wednesday. And as it got closer to that Friday, it was hurting worse. Then by Friday, my hand was going numb and my hands and stuff were tingling. So I thought something was medically really wrong with me." [R. p. 456, lines 9-14].

We have the same situation here as in McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)("misdiagnosis does not constitute substantial evidence from which the Commission could infer that [the injury] did not result from an accident at work."). In McGuffin, the injured worker thought her initial injury was kidney pain due to a preexisting condition. The Court found her erroneous self-diagnosis was not unreasonable given that her "physicians testified her pain was consistent with kidney type pain." Id. She did not attribute her pain to her job because she had been lifting heavy pans eight-ten times a day without incident.

In the instant case, the Commission found "the claimant testified that she did not know her injury was caused by work." [R. p. 40, Finding of Fact 30]. The Appellate Panel omits the fact that Butler also testified she learned her injury was work-related when she was given the correct diagnosis of a shoulder injury. She testified: "I told Stacie [in HR] in the end of July when I found out for sure what was wrong with me." [R. p. 423, lines 13-22]. As in McGuffin, the misdiagnoses up until then, both from Butler and her doctors, is understandable given her presentation.

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

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

> been my neck or anything. I just thought something other than that was wrong with me. . . . What initially made me go is because my arm was going numb and I was scared that I could – I could possibly die or something.[6] So I went on to the doctor.

[R. p. 429, line 9 - p. 430, line 2].

The fact is Butler's treating physicians *did* diagnose her with a work-related shoulder injury. Dr. Mazoue – as noted by the Appellate Panel – "opined that those issues are work-related."[R. p. 41, Finding of Fact 33]. The Appellate Panel further found, "Dr. Mazoue does not change his opinion to any of the above [in his deposition testimony]." [R. p. 14, line 8 - p. 15, line 6]. As to Dr. Tanksley, once he learned Butler-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)].

Dr. Tanksley and Dr. Mazoue gave explicit opinions making the causal connection between work and the injury. They are also the *only* two doctors who actually followed and treated Butler. Dr. Tanksley followed Butler from May 2nd through July 30, 2012. Dr. Mazoue followed her from September 14, 2012 through December 29, 2014. Drs. Sweet and McGowan each saw her one time – and neither gave an explicit opinion one way or the other as to the cause of her injury. *No doctor has given an opinion that Butler-Long's shoulder injury is not work-related.* This is important because there is no conflict in the evidence – there is nothing to weigh. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Massey v. W.R. Grace & Co., 286

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

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.").[7]

Some of the medical records state "no trauma" or "no specific incident." This is to be expected given the insidious nature of Butler-Long's injury and difficulty in understanding exactly what the injury was. As we know from the case law, the lack of a specific event makes no difference. One only need prove the causal relationship between the work and the injury. Butler-Long met her burden by (1) consistently reporting that her pain began on Wednesday April 11, 2012, while she was at work; (2) making the causal connection to work once she was correctly diagnosed with a shoulder injury; and (3) submitting *unrefuted* expert medical testimony stating her injury was work-related by two treating physicians. Petitioners presented no evidence to contradict these medical opinions.

B. Although Petitioners were not required to produce a contrary expert opinion to refute Dr. Mazoue's opinion, they are bound by their own tactical decision not to do so.

Petitioners argue at length that the Court of Appeals required them "to disprove [Dr. Mazoue's expert] opinion by either presenting one of their own or that they should have 'successfully cross-examined him to demonstrate the error of his conclusions.'" Petitioner further state "It is not the employer's burden to disprove her claim." [Petition, pages 22-23].

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

Petitioners misunderstand both the opinion and the law. The Court of Appeals is not shifting the burden of proof. The court is merely – correctly – pointing out that the only expert medical opinion addressing causation is that of Dr. Mazoue (plus Dr. Tanksley). And because there are only these two medical opinions addressing causation, the Court of Appeals was able to follow Doe and rule as a matter of law that the Commission's holding was not supported by substantial evidence. 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").

As a tactical matter, once a claimant or plaintiff proves his or her prima facie case, a defendant has the option of presenting contrary evidence through its own witnesses or relying on the failure of the claimant's proof. In this case, Petitioners presented no evidence whatsoever. They relied on their own tactical decision not to present a case, hoping that Butler-Long's proof would fail. While this approach worked in the hurly-burly of a trial, it failed under the more thoughtful scrutiny of an appellate court.

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

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

Dr. Mazoue treated Butler-Long for more than two years – September 14, 2012 through December 29, 2014. He would have kept on treating her had she not lost her health insurance at the

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

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

As to Dr. Mazoue's opinions, Petitioners 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]. Petitioners' 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 Dr. Mazoue and Butler-Long discussed her work and the onset of her pain – noting particularly that it started in her chest and radiated outwards from the arm. Petitioners' counsel cross-examined Dr. Mazoue on these notes and selected other medical reports 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,[8] 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

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

"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 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.

Petitioners contend "Dr. Mazoue was successfully cross-examined. While it is true that he maintained his casual [sic] opinion, the basis for and validity of that opinion was seriously undermined and called into question." [Petition, page 23].

In their brief to the Court of Appeals, Petitioners closed with the argument that Dr. Mazoue met with Butler-Long's 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 (or January 26th) – less than a month after seeing Butler-Long on December 29, 2014. Respondents continue splitting hairs by arguing "Dr. Mazoue met with Claimant's counsel, who discussed the claim and presented him with materials. Later, Dr. Mazoue could not recall what materials he reviewed or, critically, on what records his causal opinion was based." [Petition, page 23]

Petitioners did not take Dr. Mazoue's deposition until August 29, 2016 – nearly two years after he completed the questionnaire. It is hardly surprising that a busy doctor could not recall every scrap of paper he reviewed in a meeting nearly two years before – especially when he is not shown the medical records in question during the deposition.

In the deposition, Petitioners' counsel asked Dr. Mazoue: "Do you know what documents you would have reviewed?" He responded: "Not right now, no, sir." [R. p. 360, lines 3-4]. As the questions continued, Dr. Mazoue asked to "review those documents." [R. p. 362, lines 6-9]. This was

at a point where Petitioners' counsel had shown Dr. Mazoue only a few of the documents, yet refused to show him the critical medical records while pressing him on "what appears to be the disconnect between this questionnaire and the records I've shown you so far." [R.p. 362].

Ultimately, both attorneys showed Dr. Mazoue *all* the relevant medical records along with Butler-Long's deposition testimony. 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]. It is simply inaccurate to say that Dr. Mazoue's opinion and testimony was "significantly undercut" by these less than candid attempts to mislead him on cross-examination.

Petitioners state "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." [Petition, page 23]. Petitioners are neither complete nor accurate in this assertion. Dr. Mazoue's treatment records confirm he discussed Butler-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, Butler-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). However, Dr. Mazoue did make the right diagnosis and gave an accurate opinion on causation. He also recognized that Butler-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].

Petitioners mischaracterize Dr. Mazoue's testimony when they state "In fact, Dr. Mazoue agreed that Claimant's medical records do 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 things." [Petition, page 30]. In this portion of his testimony, Dr. Mazoue was not discussing Butler Long's injury. He was responding to the question "when your patients think of trauma *or reporting that there was no 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 Butler-Long's injury. He never said *her* injury had been caused by any other event. The Court should summarily reject this kind of obfuscation.

Petitioners then speculate that Dr. Tanksley's statement that the shoulder pain is "related to work" [sic] is likely a typographical error. [Petition, p. 24]. Dr. Tanksley originally indicated the cause of Butler-Long's "arm pain . . . occurred not following a fall, not during sports and not in association with work." [R.p. 94]" Upon learning of the correct diagnosis, he *changed* his records

to indicate "occurred with movement, *in association with work*, not following a fall . . ." [R. p. 114 (emphasis added)]. He made the connection between the injury and work on July 30, 2012 – only three and a half months after the injury and well before the surgery. In fact, this was even *before* Dr. Mazoue saw Butler-Long for the first time. If Petitioners truly believed Dr. Tanksley did not change his opinion from "uncertain" to "in association with work" upon learning that Butler-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.

Butler-Long did not and has no need to misrepresent her testimony and the evidence to the Court. Petitioners 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 Petitioners 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.").

We all know what actually happened here. Butler-Long injured her right shoulder lifting 300-pound rolls of laminate for Blockbuster Video. [R.p. 411-415]. As the pain came on insidiously, she did not comprehend that she had injured her shoulder due to her work even though it happened at work. The doctors who initially saw her misdiagnosed her condition due to the complexity and

myriad of symptoms (pain and numbness starting in her chest and radiating to her neck and down her arm to her fingers). It was only when Dr. Mazoue made the definitive diagnosis that Butler-Long learned she had suffered a compensable shoulder injury. Instead of relying on the definitive diagnosis – confirmed under cross-examination – the Commission simply made its own medical diagnosis and denied her claim. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(were a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence).

This was legal error and was properly reversed by the Court of Appeals. The Petition for Writ of Certiorari should be denied.

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

Petitioners seek to distinguish McGuffin on the basis that McGuffin had a preexisting "congenital deformity of her kidney that could have caused her pain, Claimant had no such pre-existing condition." [Petition, page 34]. This argument fails.

This case is squarely controlled by McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)("misdiagnosis does not constitute substantial evidence from which the Commission could infer that [the injury] did not result from an accident at work."). The Supreme Court explained how the Commission's analysis was erroneous:

> [T]he Full Commission relied heavily upon the preliminary diagnosis made by the respondent and her attending physicians. The Commission put great reliance on the fact that the respondent did not immediately attribute her pain to her lifting. The respondent had been lifting these trays eight to ten times a day for four months without incident. Therefore, it was not unreasonable for her not to make the

> connection at the time. This is especially so when as her physicians testified her pain was consistent with kidney type pain. This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her kidneys but was in fact musculoskeletal.

[Id.]

The McGuffin court's incidental mention of prior kidney pain was hardly a key to the decision. The key was that the Commission, as it did here, relied on a misdiagnosis to deny a claim when the doctors who made the correct diagnosis uniformly opined the injury was work-related. This case is McGuffin *redux*.

McGuffin is not limited to its facts nor is it an outlier. Other decisions of this Court refuse to countenance punishing injured workers for relying on erroneous diagnoses from their doctors. In Mauldin, the employee had suffered a minor knee strain which was treated as a no-lost-time medical-only claim. The injury occurred on January 2, 1985. On November 1, 1987, she was seen by an orthopaedic surgeon who diagnosed her with a torn medical meniscus requiring surgery. When Mauldin filed for a hearing, her employer denied it based on the statute of limitations. This Court held the limitation period had been tolled under the discovery rule as she "only had a high school education and reasonably relied upon the diagnoses of the initial injury as medial collateral sprain and her continuing problems as arthritis by the emergency room and her family physician . . ." 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). Mauldin supports the Court of Appeals' decision in this case.

A third case is instructive. A majority of this Court reversed the denial of a claim by the Commission where "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). The majority held "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.

The dissent stated:

> Substantial evidence supported the Industrial Commission's findings. There was evidence that respondent failed to report his injury as work-related, and indeed, at one point stated it was not work-related. Even after reporting the injury, he was unable to point to any specific accident. Respondent's doctors diagnosed his injury as 'degenerative' or developing over a period of time.

Id., Gregory, J., dissenting.

As with McGuffin and Mauldin, Massey illustrates the point that fact-finding is a search for the truth – for what *really* happened. That it is not the place for the Commission or Courts to punish workers who do not realize or understand the nature of their injuries at the outset – particularly when their mistake is shared by their doctors.

This case was properly decided by the Court of Appeals. As there was no error in this unpublished opinion, there is no compelling reason for this Court to grant the Petition for Writ of Certiorari (other than to adopt and publish the Court of Appeals' decision). Therefore, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. The Opinion of the Court of Appeals should be affirmed.

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