THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appeal No.:2023-001632

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

v.

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioners Illinois Tool Works d/b/a Central Label Products and American Zurich Insurance Company/Zurich North America c/o Broadspire Reply to Claimant Doretta Butler-Long's ("Claimant") Return to Petition for Writ of Certiorari ("Return"). If anything, Claimant's Return confirms that the Court of Appeals exceeded the proper standard of review on appeal by engaging in independent fact-finding, drawing conclusions from the facts that are not supported by substantial evidence—and in some instances by no evidence at all. In addition, the Court of Appeals misapplied *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992), to the facts of this case in order to overturn the Commission Decision.

ARGUMENT

I. The Court of Appeals misapplied the proper standard of review.

This Court should grant the Petition and apply the correct standard of appellate review. Not only did the Court of Appeals engage in its own fact-finding mission in order to reach a verdict that it preferred—instead of applying the proper standard of review—its conclusions are based impermissibly on surmise, conjecture and speculation. *Hutson v. S.C. State ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) (explaining the compelling principle in worker's compensation cases "that an award may not rest upon surmise, conjecture, or speculation"). One such instance is the Court of Appeals' and Claimant's critical reliance on Dr. Tanksley's July 30, 2012 medical note and the unsupported assumption that, once he learned that Claimant's injury was a rotator cuff injury, Dr. Tanksley intentionally "corrected his records" to read that her injury was incurred "in association with work." There is no indication whatsoever in the July 30, 2012 medical record or elsewhere that the omission of the word "not" before the phrase "in

association with work" was due to his learning of the rotator cuff diagnosis. The Court of Appeals' assumption regarding Dr. Tanksley's intention requires speculation, which cannot serve as the basis for a worker's compensation award. This is especially so since Claimant was "followed" not necessarily by Dr. Tanksley but by the practice in which he was employed, Palmetto Health Family Medical Center, where she was seen by multiple physicians. The possibility that this was merely a typographical error is bolstered by the fact that Dr. Riggsbee, also with Palmetto Health Family Medical Center, subsequently noted that her right arm pain had an "[u]nsure etiology." (R. p. 120).

While it is true that Dr. Mazoue provided the only expert opinion in this case, the definition of "medical evidence" under S.C. Code Ann. § 42-1-160(G) also includes medical records. Here, the medical records do not support and, indeed, refute the conclusion that Claimant met her burden of proving a compensable injury by accident. For over three months after her alleged injury, not one single medical record notes that Claimant's pain began while she was working, let alone that it might possibly be associated with her job in some fashion. Claimant posits that the notes from Providence Hospital indicate that she "has a job in which she has repetitive arm movements" as proof "she discussed her job as a causative factor." (Return p. 14). However, even that medical record fails to note that her pain started while she was working or, indeed, any association between her physical complaints and her job. (R. p. 58). It requires speculation to reach the conclusion Claimant urges on this Court, *i.e.*, that she discussed her job as a causative factor with any medical providers.

Claimant is blatantly incorrect that "the Commission arbitrarily reject[ed] *the only* expert medical evidence as to causation in the record," and that there is "no true conflict in the evidence" as to causation. A number of medical records state clearly that her injury was "not in

association with work." (R. pp. 94, 99, 102). Thus, the Court of Appeals' conclusion, adopted by Claimant, that none of the other doctors who treated Claimant "opined as to whether it was (or was not) work-related," (Appx. p.10), is patently incorrect. And, while Dr. Tanksley's July 30, 2012 note states "in association with work," there is absolutely no indication that he changed his opinion after learning of Claimant's rotator cuff injury as opposed to having inadvertently dropped the preceding "not." Given that Claimant bears the burden of proving all the facts necessary to support her claim, which "must not be based on surmise, conjecture or speculation," *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998), it was her responsibility—not that of Petitioners—to clarify what Dr. Tanksley intended by this ambiguous note. It is undisputable that notes from Claimant's return visit to Palmetto Health Family Medical Center on August 27, 2012 reflect that her arm pain had an "[u]nsure etiology," (R. p. 118), and, critically, not that it was "in association with work." This directly refutes and contradicts the July 30 note from Palmetto Health Family Medical Center.

The only two pieces of medical evidence that support compensability are Dr. Mazoue's opinion (rendered after he was no longer treating Claimant and only after meeting with Claimant's attorney) and Dr. Tanksley's ambiguous July 30 notation. Notably, there is other medical evidence—indeed *all* of the other medical evidence—supports the Commission's conclusion that she failed to meet her burden of proof. The quartet of cases on which Claimant repeatedly relies: *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012)[1]; *Doe v. South Carolina Dep't of Disabilities & Spec. Needs*, 377 S.C. 346, 660 S.E.2d 260

[1] Although Claimant alleges the Commission "made its own medical diagnosis," she points to no finding or conclusion in support of this attempt to bring this case within the ruling in *Burnette*. Instead, the Commission correctly found, based on a careful evaluation of the record, that Claimant failed to meet her burden of proving a compensable injury by accident under S.C. Code Ann. § 42-9-160.

(2008); *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S.E.2d 639 (1992); and, *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992), simply do not support or justify overturning the Commission's resolution of the conflicting evidence in this case.

In the end, Claimant states, ironically, that "[t]he role of the appellate courts is to meaningfully analyze the entire record evidence under [the substantial evidence] standard—not to mine the record for inconsequential nuggets masquerading as substantial evidence nor to rubber stamp flawed fact finding." (Return p. 9). The Commission properly rejected Claimant's invitation to "mine the record" and engage in speculation[2] but, instead, carefully weighed the conflicting evidence before it and made the determination, based on substantial evidence, that she failed to meet her burden of proof. Unfortunately, the Court of Appeals appears to have accepted her invitation and, in the process, exceeded the proper standard of review. *E.g.*, *McGuffin*, 307 S.C. at 186, 414 S.E.2d at 163 ("A reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact"). And, Petitioners would add that appellate courts are prohibited from engaging in flawed fact finding as well, which the Court of Appeals has done here—searching the Record for evidence that might support an award in Claimant's favor and reaching factual conclusions that are not supported by the Record.

This Court should grant the Petition and correctly apply the substantial evidence standard of review.

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[2] Indeed, Claimant continues to invite this Court to engage in its own "fact-finding," as "a search for the truth—for what really happened." (Return p. 27). The Commission, however, "is the ultimate fact finder in workers' compensation cases." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

II. The Court of Appeals erred by conducting an independent review of the evidence to reach its own, erroneous, factual conclusions based on its resolution of conflicting evidence.

Although Claimant repeats the Court of Appeals' erroneous finding that her medical records "demonstrate the nexus" between her job and her right shoulder injury, and that she consistently reported to medical providers that her pain began at work on April 11, neither Claimant nor the Court of Appeals can point to a single medical record to support this flawed assertion. This alone demonstrates the Court of Appeals' overreach and requires reversal.

A. The medical records and testimony in this case constitute substantial evidence supporting the Commission Decision.

Claimant continues to engage in the same prestidigitation that she presented to the Court of Appeals, suggesting repeatedly that she "gave a history of the pain beginning at work" on either April 10 or 11, 2012 to medical providers immediately after her injury and consistently thereafter. Claimant goes so far as to assert erroneously that "[t]his is undisputed and there is no evidence to the contrary." (Return p. 12). In fact, Petitioners actively dispute this assertion, as the medical records simply do not support either Claimant's assertion or the Court of Appeals' finding that Claimant reported to any medical provider that her pain began at work, let alone that it might possibly be related to her job. Tellingly, nowhere in her Return does Claimant cite any place in the Record where Claimant reported that her pain began at work—because such evidence does not exist. And, while Claimant may have reported to the healthcare providers at Providence Hospital that she "has a job in which she as repetitive arm movements," (R. p. 58),[3]

[3] In fact, Claimant testified specifically that she did not tell the healthcare providers at Providence about her job duties. "Q: When you went to Providence Hospital [o]n April 14, 2012, did you provide your physicians there with any information at all regarding your job duties and responsibilities with ITW? A: No, sir." (R. p. 428, lines 12-16). It is the Commission's role to resolve conflicts in the evidence. *E.g.*, *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) (where there is a conflict in the evidence, either by different

this is not a repetitive injury case.[4] Moreover, there is no evidence that she reported that her pain began while she was at work to the medical providers on April 13, 2012 or at any time afterward. Simply stating the date on which her pain began is insufficient to support a causal link, as Claimant clearly did not spend 24 hours at her job on either April 10 or April 11.

Claimant crafts a strawman argument by asserting that Petitioners and the Commission penalized or held her to an impossible standard of self-diagnosing her right shoulder pain as a rotator cuff injury. Similarly, Claimant suggests—wrongly—that the Commission and/or Petitioners required her to identify a specific accident or event that caused her shoulder injury. Neither is the case. What Petitioners repeatedly point out in the Petition, and which is fully supported by the evidence, is that at no point did Claimant report to any medical provider that her pain *began* at work—much less that there might be some association to her job. While the latter conclusion may have been too far a stretch for her to realize, the former—that her pain began at work, and assuming solely for the sake of argument that that is true—would not have been.

Claimant relies on *King v. International Knife & Saw – Florence*, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), a repetitive trauma injury case, for the proposition that an employee must "be diligent, not prescient." 395 S.C. at 445, 718 S.E.2d at 231. However, *King* dealt with when the 90-day notice requirement in Section 42-15-20(c) begins to run, and not whether the claimant's injuries were causally related to his work. And, while a claimant is not held to the standard of being prescient or being able to diagnose herself correctly, if her pain actually began

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witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive).

[4] Claimant did not and cannot now challenge the Court of Appeals' affirmance of the Commission's determination that she did not prove a repetitive trauma injury under S.C. Code Ann. § 42-1-172. (Appx. p. 13).

while she was at work, there is no reason she would not have relayed that information to any of the myriad of healthcare providers she saw in the months following her injury. That is not requiring prescience; that is applying common sense and requiring Claimant to meet her burden of proof.

Claimant continues to analogize her case to *Massey v. W.R. Grace & Co.*, 286 S.C. 434, 334 S.E.2d 122 (1985). However, other than failing to report his injury as work-related and stating "at one point" that it was not work-related, there is no indication that the claimant in *Massey* visited numerous medical providers over months without relating to a single one that his symptoms appeared or began while he was at work. In addition, it is unclear what evidence the Supreme Court found to be "overwhelming" in *Massey*. Here, not only substantial evidence but the overwhelming preponderance of the evidence supports the Commission's determination that Claimant failed to meet her burden of proving an injury by accident on April 10 or 11, 2012.

Finally, Claimant attempts to rehabilitate the Court of Appeals' unfettered and improper exercise in independent fact-finding by comparing proceedings before the Commission to "the hurly-burly of a trial," suggesting that the Commission is either incapable or unwilling to perform a "thoughtful scrutiny" of the record. First, Commission proceedings are different from trials in many aspects, not the least of which is that the fact finder is not asked to render a decision immediately at the close of the presentation of evidence. In fact, the evidentiary hearing in this case took place on August 30, 2016 and the Single Commissioner's Decision was not entered until January 9, 2017. (R. p. 1). Similarly, the Appellate Panel hearing took place on April 18, 2017 and the Commission Decision was rendered on June 14, 2017, after careful review of not only the Single Commissioner Decision but all of the evidence. (R. p. 20). Moreover, Claimant's suggestion that the Commission's determination is explained in the

context of the "hurly-burly of a trial," can be viewed as an inadvertent concession that reasonable minds could differ on the evidence submitted in this case. *E.g.*, *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) ("Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached").

B. Petitioners were not required to introduce an expert opinion opposing that of Dr. Mazoue in order to disprove Claimant's case.

Because the weight of the evidence supports the Commission's determination that Claimant did not meet her burden of proving a compensable injury, *i.e.*, that she did not make out a "prima facie case," the burden shifted to Petitioners to disprove her case. The Court of Appeals incorrectly found, as a result its independent and improper fact-finding endeavor, that Claimant met her burden. As noted above and in the Petition, the only way the Court of Appeals could reach that conclusion is through impermissible speculation, *Hutson*, 399 S.C. at 387, 732 S.E.2d at 503 ("an award may not rest upon surmise, conjecture, or speculation"), and supplanting the Commission's role as fact finder. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) ("the substantial evidence test 'need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment'; and a judgment upon which reasonable men might differ will not be set aside"); *see also Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 467-468, 40 S.E.2d 681, 683 (1946) (appellate courts must not invade "the province of the Commission, the statutory finders of the facts. [citation omitted] It matters not that we may have concluded differently from the Commission upon the conflicting evidence").

And, while Claimant takes issue with an assertion made in Petitioners' Brief to the Court of Appeals, Dr. Mazoue himself acknowledged that none of his medical notes reflect that

Claimant provided him with "a description … of her … work injury or the onset of her problems" prior to his reading of her deposition transcript at his own deposition. (R. p. 383, line 1 – p. 384, line 24). Ultimately, he confirmed that, "at this point," he could not tell what records he had reviewed in order to reach his January 20, 2015 opinion, (R. p. 385, lines 16 – p. 386, line 1), only that—and this is critical—"*a significant portion of*" his opinion was based on information provided by Claimant's counsel in their meeting. (R. p. 361, lines 17-23) (emphasis added). Ultimately, Dr. Mazoue was unable to identify what record(s) or information provided to him by Claimant's counsel at their private meeting persuaded him to render his causal conclusion that it was a "likely correlation between her work and her onset" of right shoulder pain. Thus, the Commission properly and accordingly accorded his expert opinion—as opposed to his medical records—less weight.

On appeal from the Commission, "the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact." *Baryton v. Higgs*, 381 S.C. 368, 369-370, 674 S.E.2d 145, 146 (2009). This Court should grant the Petition and rule that the Court of Appeals impermissibly exceeded the proper scope of appellate review by weighing the evidence and conducting its own fact-finding and, ultimately, erroneously placing the burden of disproving Claimant's claim on Petitioners. Applying the proper standard of review, this Court should affirm the Commission Decision.

III. The Court of Appeals misapplied 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.

Like the Court of Appeals, Claimant relies heavily on *McGuffin* despite the fact that the facts of this case are meaningfully distinguishable from the facts in *McGuffin*. There, the claimant initially believed her pain was from a congenital kidney condition as opposed to a

work-related injury. Here, in contrast, there is no evidence that Claimant had an underlying condition that she believed was causing her pain. In *McGuffin*, the claimant told the first orthopedic surgeon that she saw that "she had been experiencing low back pain since lifting a heavy tray of parts at work." 307 S.C. at 187, 414 S.E.2d at 173. Here, in contrast, there is no evidence, for over three months after she began to experience pain, that Claimant told any medical provider—or anyone else—that her pain began while she was at work, let alone that there could be any connection between her shoulder pain and her job.

Claimant testified that, after seeing Dr. Sweet and by the time she "got to" Dr. McGown, she told "whoever doctor I went to, I told them it was my rotator cuff and how it could have happened on my job." (R. p. 434, line 15 – p. 436, line 12). However, the medical records following her diagnosis of a rotator cuff issue overwhelmingly do not reflect any work-relatedness. (*See* R. p. 106-108 (June 1, 2012 visit with Dr. Tanksley where he notes the neurosurgeon did not think the pain was cervical but, instead, was "more of an orthopedic shoulder problem," and noting Claimant's "bizarre presentation," but no reference to work-relatedness); pp. 110-112 (June 15, 2012 visit with Dr. Tanksley with no indication of work-relatedness); pp. 118-121 (Dr. Riggsbee notes indicating her complaints had an unsure etiology); pp. 128-130 (notes from visits with Dr. McGown which do not reference any relation of her shoulder problem to her work); pp. 131-171 (numerous visits with Dr. Mazoue that do not contain any association of her shoulder pathology with her job). Claimant continues to urge This Court to view only that evidence that supports her case, while ignoring the substantial evidence that supports the Commission. This Court should reject that invitation.

Again, Claimant is not being "punished" for relying on an erroneous diagnosis from her doctors but, instead, her claim was denied because she failed to meet her burden of proof. *Clade*,

330 S.C. at 11, 496 S.E.2d at 858. A fair and honest review of the Record in this case reveals that, beyond Dr. Tanksley's ambiguous July 30 note, she did not relate to any medical provider that her pain started while she was at work. Even Dr. Mazoue's objective medical records do not reflect any such report to him, (R. pp. 131-171), which he confirmed at his deposition. (R. p. 383, line 1 – p. 384, line 24). This case is neither "squarely controlled," by *McGuffin* nor "*McGuffin redux*." While *McGuffin* may not be an "outlier," Claimant's failure to relate to a single medical provider that the onset of pain occurred while she was at work factually and meaningfully distinguishes this case from *McGuffin*, which does not control. The fact is that she did not relate her pain to her job—or even tell anyone that her pain *began* at work—until months after her alleged injury.

Moreover, there is no basis in the record or, frankly, in logic to suggest that a shoulder injury could be work related, but that an arm or neck injury could not have been. Thus, Claimant's testimony that she did not know her shoulder was work-related until she received a proper diagnosis, (R. p. 332, lines 10-13; p. 334, lines 23-25; p. 415, lines 4-6), is entirely unconvincing and, more important, irrelevant. The fact remains that the Record in this case demonstrates that she failed to tell her treating physicians—even Dr. Mazoue—that her pain began at work, much less that it might possibly be related to her work tasks.

Furthermore, here, the Commission did not place the same emphasis on an erroneous self-diagnosis as it did in *McGuffin*. Instead, the Commission relied on numerous medical records that affirmatively state that Claimant's pain or injury was "not in association with work." (R. pp. 94, 99, 102). The Commission also relied on the fact that Claimant did not tell a single medical provider for months that she had hurt her shoulder at work or even that her pain *began* while she was at work. She was not required to make a correct self-diagnosis; however, she was

required to accurately report her symptoms, their onset, and any relevant information to her medical providers. Tellingly, the medical notes are silent about any connection between her pain and her job, even *after* she was diagnosed with a shoulder injury, with the exception of Dr. Tanksley's ambiguous note on July 30, which is followed by another note from the same practice indicating her right arm symptoms had an "unsure etiology." (R. pp. 114, 120). Thus, as the Commission relied on numerous medical records in addition to Claimant's failure to connect her shoulder pain or injury to work, *McGuffin* is distinguishable and not determinative in this case.

This Court should grant this Petition, rule that this case is factually and substantively different from *McGuffin*, and affirm the Commission Decision.

CONCLUSION

For the reasons set forth in their Petition and herein, Petitioners respectfully request that this Court grant certiorari review, reverse the Court of Appeals and affirm the Commission Decision in its entirety.

Respectfully submitted,

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