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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Workers' Compensation Commission

Appellate Case No. 2024-000734

Marcelina Santibanez, Claimant, Respondent,

vs.

Operational Resources, Inc., Employer
and Old Republic Insurance Company, Carrier, Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Appellate Panel of the Workers' Compensation Commission err in holding that Respondent suffered an injury by accident?

II. Is a determination of credibility of a witness reserved to the Appellate Panel of the Workers' Compensation Commission?

III. Did the Appellate Panel err in ordering the Appellants to pay causally related medical care?

STATEMENT OF THE CASE

A hearing was held before the Single Commissioner on May 16, 2023. The matter came before the Commission on Respondent's WCC Form 50 "Employee's Notice of Claim and/or Request for Hearing (R. pp. 7-8)." Respondent contended that she sustained a compensable injury to her left leg (knee) and right leg when she slipped and fell at work. Appellants did not file a WCC Form 51 (responsive pleading).

Respondent's position at the hearing before the Single Commissioner was that she suffered an acute injury to her left leg in an accident at work on December 5, 2022, and that she was entitled to medical care and Temporary Total Benefits (TTD) from December 5, 2022, to date and continuing, with credit for any monies paid by the Employer, if any (R. p. 158, line 24-p. 159, line 23). Although the Form 50 also claimed the Right Leg, Respondent's counsel informed the Commission that Respondent wanted to proceed, for purposes of the hearing, on the left leg claim only (R. p. 157, lines 16-25).

Appellants asserted that Respondent could not meet her burden of proof of a compensable claim. Appellants also claimed that this is a medically complex case due to the findings of an MRI showing chondromalacia arthritis that pre-existed the injury together with the lack of an acute finding on the MRI. Appellants took the position that there was not an adequate medical opinion from a qualified physician linking the medical complex issues to a compensable work

injury (R. pg. 160, line 13-p. 161, line 24). Appellants also claimed that credibility of Respondent was an issue (R. 161, line 25-p. 162, line 2).

The Single Commissioner issued an order finding a compensable injury by accident on July 7, 2023 (R. pp. 255-274). Appellants appealed to the "Full Commission" by WCC Form 30 dated July 14, 2023 (R. pp. 275-283). The Appellate Panel held a hearing on November 21, 2023, from which it issued an order dated March 25, 2024, affirming the order of the Single Commissioner (R. pp. 335-350). This appeal ensued by Notice of Appeal dated April 24, 2024 (R. p. 351).

STANDARD OF REVIEW

The Commission is the ultimate fact finder in workers' compensation cases. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Judicial review of an order of the South Carolina Workers' Compensation Commission is limited to determining whether the findings are supported by substantial evidence. Substantial evidence is that evidence which would allow reasonable minds to reach the conclusion that the Commission reached; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. Camp v. Spartan Mills, 302 S.C. 348, 396 S.E.2d 121 (Ct. App. 1990). The substantial evidence rule is also found in Lark v. Bi-Lo, 276 S.C.130, *at* 135, 276 S.E. 2d 304, *at* 306 (1981), which stated in part, "'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 that the administrative agency reached or must have reached in order to justify its action." "Substantial evidence is that evidence which, in considering the record as a whole, would

allow reasonable minds to reach the conclusion the Commission reached. " Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

"'Statutory interpretation is a question of law.' Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App.2007). This court is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S.C. 283, 287–88, 648 S.E.2d 301, 303 (Ct.App.2007). 'But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard.' Hopper, 373 S.C. at 479–80, 646 S.E.2d at 165." Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011).

FACTS

Respondent is a legal resident of the United States. She is Mexican immigrant who has lived in the United States for 25 years (R. p. 164, lines 4-12).

On December 5, 2022, Respondent was working for the Appellant Employer (staffing company), assigned to Spartanburg Meats, where she operated machinery and worked as a packer. She had worked at Spartanburg Meats for almost three (3) years (R. p. 165, lines 9-24). On December 5, 2022, she was coming back from the restroom and a door was hard to open and it threw her to the floor. She said that they were throwing down a lot of soap and there was some type grease on the floor and she didn't see it and she slipped. As she fell her left knee hit the concrete floor. Two co-workers helped her get up from the floor and took her to the staffing office where the wife of the owner, or "boss of the owners" called the staffing company to tell them of the accident (R. p. 166, line 7-p. 167, line 25). The Employer sent her to the doctor the day of the accident (R. p. 169, lines 4-5).

An incident report dated December 5, 2022, was accomplished by the Appellant Employer documenting the accident and that Respondent fell and landed on her left knee on the floor (R. pp. 95–96). The report states, "There was water on the floor in front of a door she was trying to open. When she pulled on the door, it was stuck, and she had to pull a little harder than normal. When she did that, she slipped and landed on her left knee in the floor. She said her knee was sore and she struggled to put much weight on it (R. p. 96)."

On December 5, 2022, Respondent went to SRHS Occupational Health Westside, the doctor's office that the employer told her to go to (R. p. 169, lines 18-25). She complained of pain in her left knee of 10 of 10, which was aggravated by "Bending, Moving around, Standing up and Walking (R. p. 21)." She complained of joint pain, muscle pain and swelling. Respondent was diagnosed with "Contusion of left knee" (R. p. 16). She had "Bruising and redness" of her left knee (R. p. 22). She was given an ace wrap and instructed to use a cane when walking and elevate the left leg while sitting. She was also given a hinged knee brace, for compression, for the left knee and instructed to use ice (R. pp. 25-26; 69).

Respondent testified that she had not had any problems with, or received any medical care for her left knee, prior to this accident (R. p. 172, line 20-p. 173, line 1).

On December 6, 2022, Respondent presented to the Emergency Department of Spartanburg Medical Center, complaining of worsening of her pain. She had a small bruise on the anterior aspect of the knee and a small effusion as well as tenderness to palpation of the medial and lateral joint lines and patella (R. p. 71). She was diagnosed with an injury to the left knee and possible internal derangement of the knee due to effusion. Respondent was placed in a knee immobilizer, given ibuprofen for inflammation and pain and referred to an Orthopedist for evaluation (R. p. 72).

On December 12, 2022, Respondent was evaluated at SRHS Occupational Health. She reported lower extremity pain that was achy and constant, aggravated by bending, moving around, standing up and walking. She reported 8-9 out of 10 pain. The record noted that she was using a cane to walk. The knee was diffusely tender. The contusion of the left knee was improved. They recommended sedentary work with minimal walking, use of cane, elevation, knee brace, no climbing, crawling, squatting, or kneeling, ice was recommended and an MRI (R. pp. 28-31).

On December 27, 2022, Respondent had an MRI of the Left Knee without Contrast, which whowed: "Probable **acute findings** (emphasis added) which are superimposed on chronic findings. Prepatellar dermal fat contusion. Grade 3 patellar aprex chondromalacia. Thinning of the cartilage of the weight bearing medial femoral condyle. No meniscal tear (R. pp. 36-37)." The MRI results also stated, "**Small knee joint effusion** (emphasis added) (R. p. 36)."

On January 5, 2023, Respondent was evaluated at SRHS Occupational Health. She was still having the same pain (R. p. 41) and her gait was within normal limits without the cane. The provider recommended discontinuation of the cane and physical therapy (R. pp. 43-44).

On January 19, 2023, Respondent was evaluated at ReGenesis Health Care, where she receives primary care. She complained of pain in her left knee (R. p. 50). The note states, "Left knee with limited painful passive ROM. No obvious deformity. Patient walks with abnormal gait favoring right side (R. p. 51)." She was given medications and referred to YMCA Rehab (R. p. 51).

On January 27, 2023, Respondent attended physical therapy (R. pp. 77-84). Respondent had, "Swelling: observable swelling in L knee compared to R knee. Palpation: significant tenderness along L knee region and surrounding musculature (R. p. 78)."

On February 7, 2023, Respondent was evaluated at ReGenesis Health Care (R. pp. 59-61). She continued to complain of left knee pain. Jarrell NeSmith, D.O. stated in the office visit

note, "You have mild arthritis in the knee. I believe that your pain from the fall exacerbated the arthritis (R. p. 60)." He gave her an injection in the knee and recommended she continue physical therapy (R. p. 60).

The last therapy note, dated February 27, 2023, continues to document swelling in the left knee along with tenderness. "Swelling: minimal swelling in L knee region. Palpation: significant tenderness along L knee region and surrounding musculature (R. p. 91)."

On March 21, 2023, Respondent saw Sterling Thompson, M.D., at ReGenesis, for left knee pain and popping (R. pp. 64-65). The note states, "The patient fell at work in December (R. p. 64)." Respondent had pain of 10 of 10 when she walks. She was given two injections for left knee pain. The note states, "Please refer this patient with Left Knee pain and Instability to Orthopedics for Evaluation and Management (R. p. 65)."

Respondent used a cane after the work accident, but she stopped using it the last time she went to a doctor as she was told she did not need to use it, that she was okay with the ACE bandage (R. p. 183, line 22-p. 184, line 16). On cross-examination, she was asked as to why she was not using a cane on December 16, 2022, when she went to the Solicitor's office. She responded that on that day she was using a brace that the doctors gave her that had metal pieces in it (R. p. 190, line 18-p. 191, line 15; p. 193, lines 3-13). She also responded on cross-examination as to the video of her not using a cane by testifying that the video was early in the morning and that her knee hurts her more as the day goes on (R. p. 193, line 3-p. 194, line 6).

Respondent was asked about the investigative report as part of the APA submissions. She stated that she went to the Spartanburg Solicitor's Office to discuss a case where someone tried to steal her vehicle. The investigative report said she went up the steps to the Solicitor's Office, but came back down using the elevator. She testified that the elevator was not working when she

arrived and that is why she went up the steps, but it was working when she came back down (R. p. 174, line 2-p. 177, line 2).

ARGUMENTS

I. THE APPELLATE PANEL DID NOT ERR IN HOLDING THAT RESPONDENT SUFFERED AN INJURY BY ACCIDENT.

Before going into detail in this Argument on the law and its application to the facts, Respondent wants to point out that in Appellants' Final Brief, they admit an acute injury to Respondent's left knee and assert that they provided, in their opinion, the requisite medical care. As this is indeed unusual in an appeal of a case on the grounds of compensability, Respondent would like to show the Court the following excerpts from Appellants' Brief.

"Here, Claimant slipped and fell on her left knee, bruising it (Final Brief of Appellants, p. 14)." "We are now a year and a half post-accident – a fall that caused only a knee bruise and mild PCL strain, according to both the treating doctors and the MRI. Employer provided initial medical treatment under Workers' compensation. No additional treatment is warranted for a knee bruise and ligament strain a year and a half later (Final Brief of Appellants, p. 24)."

Why are Appellants appealing an order of the Appellate Panel, which found an injury by accident to Respondent's left knee, when in their Brief to this Court they acknowledge same? Respondent would therefore ask this Court to affirm the Order of the Appellate Panel based on Appellant's admissions in their Brief under the Rule 220 (b)(1), SCACR. Appellants go on to argue in their Brief as to a lack of proof of an aggravation of a pre-existing condition. Respondent did not claim an aggravation of a preexisting condition. The Appellate Panel did not find an aggravation of a preexisting condition. It found there was not significant evidence to find one way or the other on that issue. Appellants are trying to require Respondent to prove an aggravation of

a preexisting condition in an acute injury case. They are arguing for a reversal of a non-finding as to an aggravation, while admitting Respondent had an acute injury to her knee, which was the true basis of the finding of compensability in this claim. Appellants' argument, in its entirety, is manifestly without merit.

Now, a discussion as to the law and facts of this case.

"In order to be entitled to workers' compensation benefits, the employee must show he or she sustained an 'injury by accident arising out of and in the course of the employment.' S.C. Code Ann. § 42–1–160 (1985). The term 'arising out of' in the Workers' Compensation Act refers to the origin of the cause of the accident, while the term 'in the course of' refers to the time, place, and circumstances under which the accident occurred. *Bickley v. South Carolina Electric & Gas Co.,* 259 S.C. 463, 192 S.E.2d 866 (1972). An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury. *Carter v. Penney Tire and Recapping Co.,* 261 S.C. 341, 200 S.E.2d 64 (1973)." Owings v. Anderson County Sheriff's Dept., 315 S.C. 297, 299, 433 S.E.2d. 869, 871 (1993).

The pertinent law governing cases involving preexisting conditions is set out in §42-9-35 of the South Carolina Code of Laws which is entitled, "Evidence of preexisting injury or condition." It states in part:

(A) The Employee shall establish by a preponderance of the evidence, including medical evidence, that:

(1) The subsequent injury aggravated the preexisting condition or permanent physical impairment; or
(2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

(B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent

disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

(C) As used in this section, "medical evidence" means medical expert opinion or testimony stated to a reasonable degree of medical certainty, documents, record, or other material that is offered by a licensed health care provider.

The law as to "medically complex cases" is found in §42-1-160(E) of the South Carolina Code of Laws which states:

> (E) In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. For purposes of this subsection, "medically complex cases" means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques.

It appears that Appellants are confusing a case with a potential preexisting condition with a "medically complex case." The undersigned cannot find anything in the facts of this case that puts it in the category of a "medically complex case" and no argument in Appellants' Brief links this case to the requisite statute. Appellants rely on X-Rays and MRI of the left knee in the appeal. Those type imagery are "excluded" from medically complex cases which instead require, "highly scientific procedures or technical for diagnosis or treatment <u>excluding</u> (emphasis added) MRIs, CAT scans, x-rays, or other similar diagnostic techniques."

Finding #20 of the Order of the Appellate Panel is what Appellants actually complain of in this appeal. It reads as follows:

> Upon review of the records as a whole, specifically the diagnostic tests (x-ray and MRI), I find that the Respondent did have a compensable injury to her left knee as evidenced by the bruising and swelling. Appellants are responsible for occupational health, Spartanburg Medical Center ER and MRI treatment to date. Respondent has not reached MMI and Appellants are ordered to provide additional treatment with an ortho of their choice. Since the employer did not provide the Respondent with light duty work, the Appellants are ordered to pay TTD benefits from the dated of the accident and on-going. I find that there is insufficient evidence to determine whether the aggravation of the Respondent's underlying osteoarthritis is compensable or not. This finding of fact is based upon the greater weight of the

evidence (R. pp. 347-348).

Appellants cite the case of Frampton v. S.C. Dep't of Nat. Res., 432 S.C. 247, 851 S.E.2d 714 (Ct. App. 2020) as the "leading case" on §42-9-35 of the South Carolina Code of Laws. Appellants state, "The court therefore held that the injury was not causally related to the work incident but was part of a long-term ongoing course of treatment for his progressive degenerative disc disease, which had begun years prior and was consistent with claimant's testimony that he told his doctor his symptoms began gradually over a number of years (Final Brief of Appellants, p. 12)." This is not our case, as there is no prior "long-term ongoing course of treatment" for the knee. The knee symptoms did not begin, "gradually over a number of years."

In Frampton, Chisolm Frampton, a DNR officer, claimed that on September 2, 2020, he "experienced neck pain and stiffness after riding in a pickup truck across a bumpy dove field he and another DNR officer were inspecting." Id., at 251, 716. Mr. Frampton had already been treating with a neurosurgeon, Byron Bailey, M.D., prior to the alleged accident of September 2, 2020. The Court found Frampton's claim was not compensable and the following discussion of the court in Frampton sums it up very succinctly. The Court stated,

> None of Dr. Bailey's medical records mention the dove-field incident. This, taken with the fact that Frampton had already seen Dr. Bailey at least six months before the incident for the same injury, is substantial evidence supporting the appellate panel's conclusion that Frampton's treatment with Dr. Bailey, including his surgery, was not causally related to the dove-field incident but was part of a long-term, ongoing course of treatment for Frampton's progressive, degenerative, disc disease, which had begun years prior. This conclusion is consistent with Frampton's own testimony before the single commissioner that he told Dr. Bailey his symptoms began gradually over a number of years and with Dr. Bailey's notes from the March 2010 visit in which he stated Frampton had a history of cervical radiculopathy.
> Id. at 263, 722 -723.

The case at hand differs from Frampton in that Respondent had an acute injury to her left knee when she fell at work and further, she was not receiving medical treatment for the knee prior

to the work injury. Respondent did not tell her doctor that her symptoms began gradually over a number of years.

Appellants argue that this case is similar not only to Frampton, but also to Dennis v. Williams Furniture Corp., 243 S.C. 53, 132 S.E.2d 1 (1963) and Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960) stating that Respondent had a preexisting condition in the knee and she has provided no medical evidence that the preexisting condition was aggravated by the work accident.

Dennis involved a question as to an aggravation of a preexisting injury and a potential acute injury. In Dennis the Court found,

> Aside from the medical evidence, there is nothing to support a finding of causal connection except the testimony of the claimant himself to the effect that he hurt his back on the night of August 12. However, his testimony was further to the effect that his back had been hurting him since March 1959; that he was unable to do anything but light work, and that his back was hurting him too bad to undertake the work which he attempted to do on August 11 and 12, 1960. This lay testimony on the part of the claimant is quite similar to the lay evidence in the Cross case, above cited, where the claimant contended that his pre-existing osteo-arthritis was aggravated by accidental means. His claim in this respect being unsupported by medical evidence which complied with the rule above quoted, this court held such lay evidence to be insufficient to support a finding of causal connection.
> Id. at 59 - 60, 4.

The Dennis case was one in which the Claimant was trying to prove an aggravation of a preexisting condition. That is not our case. The Court in Dennis involved two claims of injury, one on March 4, 1959 and one on August 12, 1960. The Court in Dennis found that the 1959 claim was barred by the statute.

> The questions raised on appeal are several, but, in our view, it is necessary to decide only one question. Any claim for injuries sustained in the accident of March 4, 1959 is clearly barred by the statute. We find it unnecessary to decide whether the evidence is sufficient to support a finding of fact by the Commission that the claimant sustained an injury, or aggravation thereof, by accident in the course of his employment in July 1960, (actually August 12th), even if the Commission had

> so specifically found. The key question, and we think the only one necessary to decide, is whether there is any competent evidence to support a finding of fact that the present back disability of the claimant is causally connected with any accident which may have occurred August 12, 1960.
> Id, at. 57, 3.

As to the alleged aggravation of a preexisting injury the Court in Dennis found:

> Aside from the medical evidence, there is nothing to support a finding of causal connection except the testimony of the claimant himself to the effect that he hurt his back on the night of August 12. However, his testimony was further to the effect that his back had been hurting him since March 1959; that he was unable to do anything but light work, and that his back was hurting him too bad to undertake the work which he attempted to do on August 11 and 12, 1960. This lay testimony on the part of the claimant is quite similar to the lay evidence in the Cross case, above cited, where the claimant contended that his pre-existing osteo-arthritis was aggravated by accidental means. His claim in this respect being unsupported by medical evidence which complied with the rule above quoted, this court held such lay evidence to be insufficient to support a finding of causal connection.
> Id, at 59, 60, 5.

To reiterate, Respondent did not claim an aggravation of a preexisting injury.

The evidence shows that Respondent suffered an acute injury to her left knee on December 5, 2022, while at work, which Appellants admit in their Brief. Firstly, an incident report dated December 5, 2022, was accomplished by the Appellant Employer documenting the accident and the fact that Respondent fell and landed on her left knee on the floor (R. pp. 95-96). The report states, "There was water on the floor in front of a door she was trying to open. When she pulled on the door, it was stuck, and she had to pull a little harder than normal. When she did that, she slipped and landed on her left knee in the floor. She said her knee was sore and she struggled to put much weight on it (R. p. 96)."

Secondly, Respondent complained to the company's doctor on the same day of joint pain, muscle pain and swelling. Respondent was diagnosed with "Contusion of left knee" (R. p. 16). It was noted that Respondent had "Bruising and redness" of her left knee (R. p. 22).

Thirdly, Respondent, in the Emergency Department of Spartanburg Medical Center, on December 6, 2022, had a small bruise on the anterior aspect of the knee and a small effusion on the knee (R. p. 71). She also had tenderness to palpation of the medial and lateral joint lines and patella (R. p. 71).

In Cross, the claim was about an acute injury to Mr. Cross' face and teeth, as well as another claim of an aggravation of a pre-existing hip condition. The Court stated,

> Claimant was struck in the face by the crank of a starting engine on the back of a crane. He suffered injuries to his face and teeth but he missed no time from work and the employer paid the medical and dental expenses. At the time and until some days afterward he did not mention the fall from the platform on which he stood, or any injury to his hip. The latter is the basis of the present claim.
> Id. at 442, 829.

In Cross, the expert called on Claimant's behalf as to the hip condition would not state with a reasonable degree of medical certainty that the preexisting osteoarthritis hip condition was "most probably" aggravated by the fall at work. Therefore, the case, as to the aggravation of the preexisting hip condition, was found not compensable due to lack of evidence as to causation. The Court stated,

> It is inescapable that the opinion of the witness, as first and finally expressed by him, is that the causal connection here is possible but he was unwilling to opine that it is 'most probable.' That is the fair appraisal of his testimony. Therefore, the evidence was insufficient to sustain the finding of causal connection, for which the judgment will have to be reversed and the award set aside.
> Id. at 443, 830.

In Cross the Claimant did have an acute injury to the face and teeth, which was compensable. The other issue in Cross was as to the aggravation of the preexisting hip condition. In our case, we have claimed an acute injury to Respondent's left knee, which is supported by the evidence, and even admitted in Appellants' Brief. "Here, Claimant slipped and fell on her left knee, bruising it (Appellants' Final Brief, p. 14). "We are now a year and a half post-accident – a

fall that caused only a knee bruise and mild PCL strain, according to both the treating doctors and the MRI. Employer provided initial medical treatment under Workers' compensation. No additional treatment is warranted for a knee bruise and ligament strain a year and a half later (Final Brief of Appellants, p. 24)." Respondent is not claiming, at this point in the case, an aggravation of a preexisting condition. Respondent has not received sufficient medical care and evaluation to make that claim, if it exists.

Appellants reference the MRI as support for their position(s) stating, "Here, Claimant's MRI was 'very reassuring' with only chronic degenerative arthritic changes (Final Brief of Appellants, p. 13). However, this is a misrepresentation of the findings of the MRI as Appellants fail to mention the acute findings in the MRI report. Pertinent portions of the MRI findings state: "Intercondylar notch: No ACL or PCL transection. **Mild thickening and T2 hyperintensity of the proximal half of the PCL may indicate sequelae of strain – age indeterminate (emphasis added).** Moderate T2 hyperintensity within the intercondylar notch." "Anterior Compartment: **Prepatellar soft tissue contusion (emphasis added).** No patellar fracture. Mild distal quadriceps tendinosis. Cartilage loss of the patellar apex almost to the basal plate. Patella projects normally over the trochlear groove." "Other: **Small Knee Joint effusion (emphasis added).**" (R. p. 36)

The Impression portion of the MRI states: **Probable acute findings (emphasis added)** which are superimposed on chronic findings. **Prepatellar dermal fat contusion (emphasis added).** Grade 3 patellar apex chondromalacia (R. p. 36)[1]."

The Appellate Panel made findings of an acute injury with no finding, either way, as to any aggravation of the underlying chronic conditions. The determination of whether the chronic

[1] How do Appellants represent to this Court that the MRI had "only chronic degenerative arthritic changes" when it is clear on the face of the MRI report that it contains acute findings and chronic findings?

conditions have been aggravated is not needed for the case to be compensable as to the acute injury, and is better held for further medical care and a determination as to same.

This case is not a complex medical case. Appellant fell at work and had an acute injury to her left knee.

Appellants seem to argue that Respondent must prove, *ab initio*, that any pre-existing condition was aggravated, notwithstanding an acute injury. First, this ignores the acuteness of the injury. Secondly, Appellants admit in their Brief an acute injury and, further, that they provided medical care for the injury. Appellants state, "Here, Claimant slipped and fell on her left knee, bruising it. That did not cause one on bone degenerative changes that Claimant is currently experiencing from her pre-existing arthritis (Final Brief of Appellants, p. 14)." This statement is problematic for Appellants. By admitting Respondent fell on her knee and bruised it, they are admitting a compensable work accident. Should not the appeal end with this admission? Furthermore, no medical provider found "bone on bone degenerative changes." This reference to "bone on bone" is in the record, but it is Respondent's description of the pain to her family doctor. The note states, "She feels like now she had bone against bone in her knees (R. p. 64)." Respondent's description of pain does not a medical condition make.

In the "Conclusion" section of their Brief, Appellants also admit an acute injury to Respondent's left knee. Appellants state, "We are now a year and a half post-accident – a fall that caused only a knee bruise and mild PCL strain, according to both the treating doctors and the MRI.[2] Employer provided initial medical treatment under workers' compensation. No additional treatment is warranted for a knee bruise and ligament strain a year and a half later. Neither is there

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[2] Appellants are now representing to this Court that the MRI had evidence of a "knee bruise and mild PCL strain." Earlier they represented to this Court that the MRI only showed chronic and degenerative changes. This pointing out of acute findings on the MRI also supports Respondent's contention that this appeal is manifestly without merit, as Appellants are stating Respondent had a knee bruise and PCL strain from the accident at work, a claim that, at the same time, they deny.

any permanent impairment. This is common sense. We all bruise body parts all the time. They heal with time (Final Brief of Appellants, p. 24)." Appellants are improperly rendering medical opinions in their Brief as to what medical treatment is warranted.

At least in their Brief Appellants state and admit that Respondent suffered injury to her knee. Appellants argue that they should not have to provide any further medical care for a "knee bruise and mild PCL strain." They argue this in a claim that has heretofore been denied. Prior to Appellant's Brief, there is no document filed by Appellants, or oral statement by an attorney on behalf of Appellants, evidencing any admission of a knee bruise and ligament strain that need no further treatment. This statement of Appellants is problematic for them as it admits a compensable claim. No evidence was submitted by Appellants that the acute injury occurred anywhere but work, and the timeline of the accident, the injury report, and the presentation to the company doctor support the claim. Frankly, their statements in their Brief undermine their denial of the claim as well as this appeal.

Appellants omit material facts from their Brief, which are set out in the Order of the Appellate Panel in a succinct manner in Findings of Fact #'s 4, 19, and 20, which state:

> 4) Respondent was evaluated at SRHS Occupational Health on 12/5/22. She was diagnosed with a contusion of the left knee as a result of a slip and fall. They recommended sedentary work only with minimal walking and use of a brace, rest, ice, elevation and compression. The Respondent reported 10 out of 10 pain which was aggravated by bending, moving, standing up and walking. She denied any underlying left knee problems. It was noted that Respondent had bruising, redness and swelling. The Respondent was given an ace wrap and told to use a cane. . . . (R. pp. 16-27; 344).
>
> 19) An incident report dated 12/5/22, was accomplished by the Appellant Employer. It shows a date of injury of 12/5/22, with the supervisor being notified on 12/5/22 at 2:40 p.m. The incident report states in part, "There was water on the floor in front of a door she was trying to open. When she pulled on the door, it was stuck, and she had to pull a little harder than normal. When she did that, she slipped and landed on her left knee on the floor. She said her knee was sore and she struggled to put much weight on it. It also states that required slip resistant boots were in use by Respondent (R. pp. 95-96; 347).

Finding #20, cited in its entirety herein supra, states, "Upon review of the records as a whole, specifically the diagnostic tests (x-ray and MRI), we find that the Respondent did have a compensable injury to her left knee as evidenced by the bruising and swelling (R. p. 347)."

Therefore, Appellants are appealing a case claiming Respondent has not provided a statement of causation when their own incident report and medical provider tell us that Respondent fell and suffered trauma to the knee. Where is the logic in this Appeal?

Appellants next argue, "Respondent had no statement from a doctor opining as to causation, as is required to prove her case under the Act. The only mention of causation in the entire medical records comes nowhere close to meeting the required 'most probably' standard. On February 7, 2023, two months after the accident, her family doctor's record says, 'You have mild arthritis in the knee. I believe that your pain from the fall exacerbated the arthritis' (Final Brief of Appellants, p. 15)."

The Appellants' argument fails on its own factual citing. Their argument heading states in part, "Respondent presented no medical doctor's opinion that the fall exacerbated her pre-existing arthritis" and yet they then cite a doctor's opinion that "[He] believe[s] that [her] pain from the fall exacerbated the arthritis." Even though Respondent claimed no aggravation of a preexisting condition, this is not logical. It makes no sense. They cite evidence that exists to support their argument that the evidence does not exist.

Continuing on the illogical thought process and reasoning in the argument, Appellants argue in the same paragraph that this doctor is Respondent's family doctor, not an authorized treating physician, not a specialist, nor an orthopedist. Therefore, they try to discredit the doctor who gave the opinion that they claim is required, that, according to the premise of their argument, does not exist. Again, not logical. It makes no sense.

The last "leg" of their argument is that "exacerbation is a temporary worsening of

symptoms, while aggravation is a permanent escalation of an existing condition."[3] They argue that the current symptoms could just be coming from the preexisting arthritis and not the work accident, without one iota of evidence to support the assertion. There does not exist any (nada, none) evidence in this case that Respondent's left knee was symptomatic prior to the work injury or that Respondent had received any prior medical treatment for her left knee. This argument also does not help Appellants in their appeal as they are arguing Respondent's condition is an exacerbation of the underlying condition, but not an aggravation. Is not that exactly why the Commission left the issue as to an aggravation of a preexisting condition for another day?

Appellants end their first Argument by alleging that Respondent "doctor shopped" until she got the answer she wanted and that she did this at the instruction of her attorney as "Plaintiff's attorneys want to get paid, and to do that, they need a compensable injury (Final Brief of Appellants, p. 17)." These allegations are without merit as the Appellants' own Report of Injury and the initial visit to the company doctor document the accident and acute injury and Appellants admit the injury in their Brief. The undersigned is unsure as to why this allegation is in Appellants' Brief. They seem to use it as a transition into the credibility of Respondent. Questioning the motives and credibility of her attorney is a poorly chosen method to attack the credibility of Respondent. As a professional, I know not what else to say as to this type of commentary in an Appellate Brief to the Court of Appeals.

II. CREDIBILITY OF A WITNESS IS RESERVED FOR THE APPELLATE PANEL OF THE COMMISSION.

Respondent argues, pursuant to Rule 220(c), SCACR, that the Court of Appeals need not address this point as argued by Appellants, which is manifestly without merit.

[3] This assertion is made without any supporting citation.

This Court, as well as the Supreme Court, has long held that the credibility of a witness is a finding reserved to the Appellate Panel. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Langdale v Carpets, 357 S.C. 194, 200, 717 SE2d 80, 83 (Ct. App. 2011) (citing Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct.App.2004) (citing Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995)).

Even the law that Appellants cite in their Argument does not allow this Court to weigh in on the credibility of a witness. They start this argument by quoting case law that goes against what they are asking this court to do. Appellants state in their Brief:

"The Full Commission is the finder of fact and final arbiter of the credibility of Claimant.

> The determination of witness credibility and the weight to be accorded evidence is reserved to the commission . . . . This court cannot substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. . . . The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence.

O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 29, 459 S.E.2d 324, 327-28 (Ct App. 1995) (citations omitted). *See also* Frampton v. S.C. Dep't of Nat Res., 432 S.C. 247, 851 S.E. 2d 714 (Ct. App. 2020) (Final Brief of Appellants, p. 17)."

After citing law for the proposition that, "The determination of witness credibility and the weight to be accorded evidence is reserved to the commission" the Appellants painstakingly go through credibility issues in order to try to convince this Court to make a credibility finding. It makes no sense, and the undersigned is not that sure the argument requires a response as the Appellants' own citations to the appropriate law reserves this issue for the Commission. In an overabundance of caution, the Respondent offers the following.

Appellants discuss a surveillance video of Respondent arguing it proves Respondent is not credible. The Appellate Panel made note of the video in Finding #7 (R. p. 345). The Appellate Panel did not making a finding that Respondent was not credible, as Appellants requested.

The Appellate Panel properly did not use this video to discredit the Respondent, whose Employer's own incident report documents the accident, and whose own authorized treating medical staff evaluated Respondent on the date of the accident, finding "bruising and redness (R. p. 22)." The provider assessed, "Knee – contusion – Left – Initial, acute (R. p. 24)." In addition, the MRI performed on December 27, 2022, eleven (11) days after the video and twenty (22) days after the accident showed, "Small knee joint effusion (R. p. 36)." Respondent had swelling in her knee eleven (11) days after the "investigative video" that Appellants tried to use to find her not credible in her complaints. The video changes neither the evidence of the work accident nor the objective medical findings supporting the claim.

Appellants assert, "Claimant has zero medical evidence causally linking her complaints and need for medical treatment to her work slip and fall (Final Brief of Appellants, p. 20)." How can they, with any credibility, argue such as even in their Brief they state, "Here Claimant slipped and fell on her left knee, bruising it (Final Brief of Appellants p. 14)?" They further state, "We are now a year and a half post-accident – a fall that caused only a knee bruise and mild PCL strain according to both the treating doctors and the MRI (Final Brief of Appellants p. 24)." The issue of credibility seems to be more appropriately applied to Appellants and their assertions in this appeal.

Appellants called Rachel Beckwith, the branch manager of the Appellant Employer (R. p. 195, lines 15-23). The purpose of the witness was to discredit Respondent by testimony that she only used the cane if someone was watching. They state in their Brief, "Her employer saw her put her cane under her arm once out of the building at the end of the sidewalk and walk around the car

(Final Brief of Appellants p. 20)." As is shown below, cross-examination of this witness removed any efficacy in using her as an effective witness to discredit Respondent.

She was asked if Respondent was using a cane when she brought medical records to her and she testified that she was. She said Respondent was also using a brace (R. p. 196, line 22-p. 197, line 6). This testimony is consistent with Respondent's use of a cane.

Ms. Beckwith was asked if she ever saw Respondent not using a cane and she testified that she did and then she was asked to explain. According to Ms. Beckwith, after her medical appointment on December 12, 2022, Respondent brought in paperwork. She testified that Respondent had a knee brace and was using her cane. Ms. Beckwith met Respondent in the lobby and made copies of the paperwork. Respondent then exited through the front lobby door and went left to the corner of the building. Mrs. Beckwith testified that the building has glass all along the side. She saw Respondent walk down the sidewalk to her vehicle. Ms. Beckwith was walking back to her office and paused because she saw Respondent step down off the sidewalk (R. p. 198, line 9-p. 199, line 23). She testified, "I pause [sic] because I see her step down off of the sidewalk. As she does she takes the cane and puts it under her arm, walks down around - - walks down around the vehicle that she is getting into, does not use the cane again, and gets in to her vehicle (R. p. 199, lines 16-20)."

On cross-examination, Ms. Beckwith admitted, "She was using a cane until she got to the end of the sidewalk, put it under her arm, stepped down without the cane, walked around it [the car] and got in her vehicle (R. p. 208, lines 13-16)."

The testimony was then as follows:

Q: And so she was right at the vehicle when she stepped off of the sidewalk?

A: She was at the end of the sidewalk when she stepped off without the cane.

Q: And that's where the vehicle was?

A: The vehicle was parked right there at the end of the sidewalk, that's correct.

(R. p. 208, lines 19-25)

Mrs. Beckwith then testified as follows:

Q: Okay, So, from your testimony, it sounds like you are confirming that she was using her cane and she used her cane from the time she left you until she got to her vehicle, correct?

A: Right.

(R. p. 210, lines 4-8)

What this testimony shows us is that the assertion of Appellants that "Her employer saw her put her cane under her arm once out of the building at the end of the sidewalk and walk around the car (Final Brief of Appellants p. 20)" is a misstatement of the evidence in the case. That she put the cane under her arm, "once out of the building at the end of the sidewalk" is true, but Appellants forget to mention that Respondent's car was also "at the end of the sidewalk." Mrs. Beckwith tells us in her own words that Respondent used the cane, "from the time she left [her] until she got to her vehicle (R. p. 210, lines 6-7)."

III. <u>THE APPELLANT PANEL DID NOT ERR IN ORDERING APPELLANTS TO PAY CAUSALLY RELATED MEDICAL CARE.</u>

Appellants' Argument misstates the findings of the Commission. The Appellate Panel did not find "no aggravation but order[ed] Defendants to pay causally related medical care" as Appellants' argue. The Appellate Panel found, "We find that there is insufficient evidence to determine whether the aggravation of the Respondent's underlying osteoarthritis is compensable or not (R. p. 348)." As already discussed herein *supra*, the Order leaves the issue as to whether there is an aggravation of a pre-existing condition for another day.

The Appellate Panel did however find an injury by accident to the left knee based on an acute injury. The order stated, "upon review of the records as a whole, specifically the diagnostic tests (X-ray and MRI), we find that Respondent did have a compensable injury to her left knee as evidenced by the bruising and swelling (R. p. 347)."

Interestingly, Appellants assert, "Any bruising or swelling from the fall has long since resolved; orthopedic care is not required for that (Final Brief of Appellants, p. 22)." This statement cites no evidence as support and goes beyond an attorney's argument to an attorney's medical opinion. It also admits the acute injury, which supports Respondent's argument that this appeal is manifestly without merit.

CONCLUSION

The Order of the Appellate Panel is correct on its findings of fact and conclusions of law and should be affirmed in its entirety. The record shows evidence of a work accident with an acute injury to the knee and medical care provided the same day. Objective testing by imaging and physical exam show an acute injury to the knee. The Employer Appellant's First Report of Injury documents the accident. Appellants are trying to take findings of a pre-existing arthritic condition and use it to improperly put a burden of proving an aggravation on Respondent in the case of an acute injury. Appellants admit in their Brief that Respondent "slipped and fell on her left knee, bruising it (Final Brief of Respondents, p. 14)."

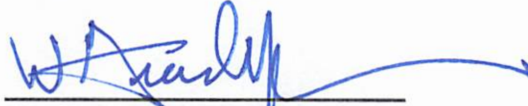
Respondent agrees with the proposition of law cited by Appellants in their Brief that the issue of credibility is reserved for the Appellate Panel. Why after stating that proposition, Appellants go on to argue that this Court should make a finding as to credibility is not understood by the undersigned.

Respondent believes that Rule 220 (b)(1) SCACR not only applies to certain arguments, but actually applies to the appeal as being manifestly without merit. Therefore, based on the

assertions already recited of Appellants in their Brief, Respondent would ask the Court to affirm the Order of the Appellate Panel under Rule 220 (c) SCACR.

For the reasons stated, this Court should uphold the Order of the Appellate Panel.

Respectfully Submitted,



September 17, 2024

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