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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Cynthia C. Dooley, Chair
T. Scott Beck
Melody L. James

WCC No. 1923480

Appellate Case No.: 2023-001264

Takara L. Stewart,……………………………………………………………...................Appellant,

v.

South Carolina CVS Pharmacy, LLC, Employer, and
XL Insurance America, Inc., Carrier.....……..…………………………..................Respondents.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

In her initial brief, Appellant identifies forty (40) "Claimants'/Appellants' Arguments" under the "Issues on Appeal." Although her initial brief is not clear on the actual issue, Respondents presume the main issues on appeal include the following:

I. **Did the South Carolina Workers' Compensation Commission correctly conclude that Appellant did not suffer a physical-mental injury within the meaning of South Carolina Code § 42-1-160?**

II. **Did the South Carolina Workers' Compensation Commission correctly conclude that Appellant did not establish the requirements of South Carolina Code § 42-9-35 to prove an aggravation of a pre-existing psychological condition?**

III. **Did the South Carolina Workers' Compensation Commission correctly conclude that Appellant did not establish a mental-mental injury under South Carolina Code § 42-1-160?**

IV. **Did the South Carolina Workers' Compensation Commission correctly conclude that Appellant was not entitled to benefits under the South Carolina Workers' Compensation Act?**

STATEMENT OF THE CASE

On April 8, 2020 and February 24, 2021, Takara Stewart ("Appellant") filed a Form 50 alleging a "psyche" injury as a result of a customer groping her posterior while working for South Carolina CVS Pharmacy, LLC ("Employer / Respondent") on December 26, 2019. (Form 50, dated April 8, 2020 and February 24, 2021) Employer and XL Insurance America, Inc. ("Carrier / Respondent"), collectively referred to as "Respondents", filed a Form 51 denying that Appellant sustained an injury by accident arising out of and in the course of her employment and also denying her entitlement to any benefits. (Form 51, dated May 8, 2020 and March 26, 2021).

The parties were heard by Commissioner Aisha Taylor on June 3, 2021 and, thereafter, Commissioner Taylor issued a Decision and Order on January 19, 2023 finding Appellant sustained an injury by accident arising out of and in the course of her employment and awarding benefits. Respondents timely filed a Form 30, Request for Commission Review, listing forty-two (42) separate issues for appeal. (Form 30, dated February 2, 2023).

The Full Commission, consisting of Commissioners Cynthia C. Dooley, T. Scott Beck, and Melody L. James, heard the appeal on May 8, 2023 and, thereafter, issued a Decision and Order on July 10, 2023 reversing Commissioner Taylor's Decision and Order. (Appellate Panel Decision and Order, filed July 10, 2023) The Appellate Panel found that Appellant's injury did not arise out of or in the course of her employment and, therefore, she did not qualify for benefits. *Id*.

Appellant timely appealed to this Court.

On December 8, 2023, Appellant filed her first Initial Brief and Designation of Matter to be Included in the Record on Appeal ("Designation of Matter"). On December 18, 2023, Respondents filed a Motion to Dismiss the Appeal or, in the alternative, a Motion to Strike for non-compliance. On March 28, 2024, this Court issued an Order denying Respondents' Motion to Dismiss but granting Respondents' Motion to Strike Appellant's Initial Brief and Designation of Matter.

On April 17, 2024, Appellant filed a second Initial Brief and Designation of Matter and, on April 24, 2024, Appellant filed a "Motion New Evidence" which this Court construed as a motion to amend the designation of matter or a motion to remand the case to the South Carolina Workers' Compensation Commission. On May 3, 2024, Respondents filed an Opposition to Plaintiff's Motion [for] New Evidence and on May 10, 2024, Respondents filed a second Motion to Dismiss the Appeal or, in the alternative, a Motion to Strike for non-compliance. On July 12,

2024, this Court issued an Order denying Appellant's request to amend the designation of matter or to remand to the South Carolina Workers' Compensation Commission. This Court denied Respondents' motion to dismiss the appeal, granted Respondents' motion to strike Appellant's second Initial Brief, and gave Appellant a third opportunity to correct her initial brief by filing a third Initial Brief in compliance with the South Carolina Appellate Court Rules within twenty (20) days. This Court also granted Respondents' motion to strike items 2, 3, and 4 from Appellant's Designation of Matter.

On August 1, 2024, Appellant filed a third Initial Brief. On August 7, 2024, this Court noted deficiencies in Appellant's filing. On August 11, 2024, Appellant filed a document entitled "Table of Contents." On August 29, 2024, Respondents filed a third Motion to Dismiss the Appeal or, in the alternative, a Motion to Strike for non-compliance. On September 9, 2024, Appellant filed a Return [to the Motion] opposing dismissal and striking the brief. On October 1, 2024, this Court issued an Order denying Respondents' motion to dismiss or, in the alternative, motion to strike.

BACKGROUND FACTS AND EVIDENCE

On December 26, 2019, a CVS customer touched Appellant on her posterior while she was vacuuming the store floor. Video footage of the incident shows Appellant smiling immediately afterwards and then proceeding with vacuuming the floor. (Respondents' Exhibit G). Appellant performed the remainder of her job duties that evening and closed the store. (Hearing Tr. 76:17-77:6). She did not cry after the incident, nor did she speak about it with any of her coworkers or supervisor that day. (Hearing Tr. 77:7-78:5). Ten days later, on January 5, 2020, she first reported the incident to the police. (APA pp. 3-4)

On April 8, 2020 and February 24, 2021, Appellant filed a Form 50, Notice of Claim and Request for Hearing, alleging she suffered a psyche injury as a result of a customer groping her posterior on December 26, 2019. She did not allege a physical injury. She argued she was in need of additional medical examination and treatment for her psyche and requested temporary total disability benefits over "[v]arious dates and times" since the accident. On May 8, 2020 and March 26, 2021, South Carolina CVS Pharmacy, LLC and XL Insurance America, Incorporated ("Respondents") filed a Form 51, denying Appellant sustained an injury by accident arising out of and in the course of her employment and denying the nature and extent of the injury alleged. A hearing was scheduled for June 3, 2021. On May 18, 2021, Appellant filed a Form 58, Pre-Hearing Brief, in which she answered "psyche" to the question "Type of injury and body part(s)." To date, it is still unclear to what body part she allegedly sustained a physical injury.

At the hearing, Appellant denied experiencing any pain or bruising after being touched by the customer. (Hearing Tr. 64:11-19). She also denied being physically hurt or injured from the contact (Hearing Tr. 64:7-10), and she did not report a physical injury to her physicians. (Hearing Tr. 63:23-24). In fact, she continued to work for CVS for months following the incident, and she did not call out of work or miss any time due to stress, anxiety, depression, trauma, or any psychological issues until March 14, 2020. (Hearing Tr. 63:4-14).

On April 15, 2020, through telemedicine, Appellant presented for her initial appointment with Dr. Ashley Hicks of MUSC Primary Care, her chosen primary care physician. (Appellant's APA 5, p. 19). Appellant reported, among other things, a recent sexual assault and anxiety. However, on examination, she demonstrated a normal mood and affect with normal attention span and concentration. (Appellant's APA 5, p. 20). Dr. Hicks diagnosed her with "anxiety state" and noted she had already been prescribed sertraline but had not started taking it. (Appellant's APA

5, p. 21). The parties took Dr. Hicks' deposition on March 22, 2021. During her deposition, Dr. Hicks testified she based Appellant's anxiety diagnosis on her subjective complaints. (Dr. Ashley Hicks Dep. Tr. 28:8-10). Dr. Hicks saw no objective findings of Appellant's alleged psychological problems. (Hicks Dep. Tr. 27:24 – 28:2). She indicated Appellant was looking for a new counselor and was going to decide whether she wants to start sertraline. (Appellant's APA 5, p. 21). Dr. Hicks did not assign any work restrictions or place Appellant out of work during this visit.

When Appellant returned to Dr. Hicks on May 18, 2020, Appellant indicated she had not looked for a new counselor since her last visit and that she had not started sertraline. (Appellant's APA 5, p. 23). She opined that Appellant was not compliant with her April 15, 2020 recommendations and also opined that there were no objective findings to support her subjective complaints. (Hicks Dep. Tr. 30:2-5; 33:8-10). Dr. Hicks recommended a therapist and provided Appellant with several options close to her office. (Appellant's APA 5, p. 24). She placed Appellant out of work. Just three days later, Appellant applied for unemployment benefits and certified she was ready, willing, and able to work. (Hearing Tr. 61:22 – 62:8). When confronted with this information, Dr. Hicks stated that she would support Appellant working as of May 21, 2020 if Appellant reported she felt she was able to work at that time. (Hicks Dep. Tr. 32:17-25).

Appellant failed to present for her follow-up appointment in June and July due, allegedly, to travel issues; however, she acknowledged Dr. Hicks never refused to see her via telemedicine during that time. (Hearing Tr. 68:6-22). In fact, Appellant's initial appointment with Dr. Hicks was a virtual appointment. Dr. Hicks also agreed that transportation is not an issue for her virtual appointments. (Hicks Dep. Tr. 33:23-34:4). When Appellant ultimately presented for her August virtual appointment with Dr. Hicks, Dr. Hicks indicated Appellant's anxiety had improved since she started seeing a counselor. (Respondents' APA 12, p. 37). Still, Appellant expressed she would

like to start a low-dose medication in addition to utilizing coloring books, one of her coping mechanisms, but that she was hesitant about the medication's side effects. Dr. Hicks again noted that her anxiety diagnosis was based on Appellant's subjective complaints and there were no objective signs of anxiety to support the diagnosis. (Hicks Dep. Tr. 36:3-13). It is important to note that Dr. Hicks admittedly did not give Appellant a mental status examination before diagnosing her with anxiety. Further, although her medical records recorded a new diagnosis of depression, she retracted that diagnosis during her deposition because she does not know where it came from and she can't support that diagnosis based on her documentation. (Hicks Dep. Tr. 36:14 – 37:17). Dr. Hicks prescribed sertraline, advised her to follow up in one month, and placed her out of work until her follow-up appointment. (Respondents' APA 12, p. 38). Appellant, however, did not return until October 5, 2020. (Respondents' APA 12, p. 40). That appointment was also virtual.

In her deposition, Dr. Hicks again noted that Appellant was still non-compliant with her appointments despite the fact that they were virtual, there were no objective findings to support Appellant's anxiety diagnosis, and she was not willing to write her out of work due to non-compliance. (Hicks Depo. p. 38:9-20, 39:3-13). When she returned to Dr. Hicks in November 2020, Appellant indicated she never picked up the Lexapro prescription and that she would instead prefer to continue without medications as she felt she was doing well with her coping mechanisms. Although Dr. Hicks asked Appellant to return in February 2021 for a follow up evaluation, Appellant never returned and never tried to make a follow up appointment. (Hicks Depo p. 42:25 – 43:7).

Dr. Hicks confirmed that Appellant continued to be non-compliant with her medication and follow-up visit treatment recommendations. (Hicks Depo p. 41:9-23). In her deposition, Dr.

Hicks confirmed that, during the course of treating Appellant, she only took Appellant out of work for one month on May 18, 2020 and one month on August 11, 2020. (Hicks Depo p. 39:24 – 40:22)

Although post-traumatic stress disorder was never referenced or recorded in Dr. Hicks' medical records, when presented with a record from Appellant's counselor, Dr. Hicks agreed Appellant had a diagnosis of post-traumatic stress disorder. (Dr. Ashley Hicks' Dep. Tr. 16:22-25). Thereafter, the following discussion transpired between Dr. Hicks and Appellant's attorney.

> Q. Okay. Now, I know that you don't know what happened to her when she was a child.
>
> A. No.
>
> Q. None of us do except for her and this individual, but let's assume for the purposes of this question that that occurred.
>
> A. Uh-huh.
>
> Q. Do you have an opinion to a reasonable degree of medical certainty as to whether this incident that she described in the CVS would have aggravated a pre-existing condition?
>
> A. Yes; of course.
>
> Ms. Yarborough: Object to the form, but you can answer.
>
> A. Yes.
>
> Q. Okay. And do you have any opinions to a reasonable degree of medical certainty as to whether the complaints that she made to you when she saw you were the result of that aggravation?
>
> A. Yes.
>
> Q. Okay.

(Dr. Ashley Hicks Dep. Tr. 17:1-21). Though she testified she had an opinion, she stopped short of expressing that opinion. Further, Dr. Hicks is a family medicine doctor, her only training in

psychological diagnoses was during her residency, she could not recall the diagnostic criteria for a PTSD diagnosis during the deposition, she does not know how many criteria are required to qualify for a PTSD diagnosis, and she did not consult with the DSM before giving the PTSD diagnosis. (Hicks Depo. Tr. 5:25-6:2; 43:17-23; 44:3-8).

Regarding work restrictions, Dr. Hicks explained that, when she took Appellant out of work in May and August 2020, she did so for *only* a one-month period each time and that the period was meant to cover the time between her monthly follow-up appointments. (Hicks Depo. Tr. 40:10-12). She further explained she did not take her out of work in October 2020 because Appellant had been noncompliant with treatment. (Hicks Depo. Tr. 40:19-22). She also did not write her out of work in November 2020.

On May 25, 2021, Appellant presented for an IME with Dr. Jon Snipes, a psychiatrist, and the only medical doctor seen by Appellant specially trained in diagnosing post-traumatic stress disorder. (Respondents' APA 13, p. 46). In his accompanying report, Dr. Snipes described her demeanor as "hostile" and noted it was difficult to assess Appellant's specific symptoms due to her poor cooperation and her being clearly unhappy with the interview. (Respondents' APA 13, pp. 47; 51). He provided that, at one point, "it seemed that she actually hung up and then rejoined the meeting." (Respondents' APA 13, p. 50). He also indicated she was not able to elaborate on many specific symptoms, answered most questions with somewhat vague answers, answered a lot of other questions with "I don't know", and refused to answer others. (Respondents' APA 13, p. 47).

Still, she reported a depressed mood, a sense of being easily overwhelmed, low frustration tolerance, that her mind races at times, and that she often becomes frustrated. She told him her symptoms of anxiety and stress started immediately after the accident despite being able to

continue working for three months after. (Respondents' APA 13, p. 47). When asked what she felt she needed for treatment, she responded "I wasn't given any kind of restitution, compensation." (Respondents' APA 13, p. 51). When Dr. Snipes tried to clarify that he was asking about psychiatric care and what kind of treatment she felt that she needed going forward, Appellant stated, "I'm trying to get the funds so I can pay for my classes!" When he reframed the question a third time and asked more about treatment and how to help her recover, she responded "at this point, there has to be some restitution." (Respondents' APA 13, p. 51). When asked directly about the need for medication, she reported that she does not need medication. (Respondents' APA 13, p. 51).

Dr. Snipes did not see any evidence of any psychiatric illness related to Appellant's workplace incident at that point. (Respondents' APA 13, p. 52). He explained she would not meet the criteria for post-traumatic stress disorder as she was not showing any continued symptoms of avoidance, alterations in arousal or reactivity, and did not endorse any continued intrusion symptoms. He also indicated in his report that Appellant was still able to vacuum without experiencing distressing thoughts. (Respondents' APA 13, p. 50).) He felt she was showing signs of depression that did not appear to be related to her workplace incident but rather related to her life stressors following becoming homeless. He indicated it is "very clear" from her comments that the major stressor contributing to these symptoms is her financial strain and homelessness. He noted she does not feel she needs any psychiatric treatment related to her previous incident but felt optimistic about therapy she recently started with Brenda Graham. He further provided "she is very clearly capable of returning to work, and she herself agrees with this assessment and is taking steps to find employment now." All of his opinions were given to a reasonable degree of psychiatric certainty. (Respondents' APA 13, p. 52).

Appellant testified that, after she stopped working for defendant employer, she did not "really have any . . . working income coming in." (Hearing Tr. 28:16-25). However, even prior to this incident and her subsequent unemployment, Appellant had a history of financial problems. She testified she had been involved in a bankruptcy suit in Savannah in 2010 as well as in a number of eviction-related matters spanning from 2009-2017. (Hearing Tr. 43:2-5; 43:23-46:19). Nevertheless, when presented with her renter's application for the Florence apartment she was residing in at the time of this incident, she acknowledged she indicated on the application that she had never been evicted. (Hearing Tr. 48:7-12). She also acknowledged she was late on rent "a lot of times" and that her landlord for that apartment also filed evictions against her. (Hearing Tr. 49:12-18). Five of those evictions were *before the incident* that gave rise to this claim. (Hearing Tr. 49:10-51:15).

Additionally, before this work incident, Appellant, a divorced mother, indicated she was having a "rough time" and that it was "not easy" having to work, attend school, raise a child, and pay her expenses. (Hearing Tr. 52:21-53:7). She provided her landlord notice of her intent to vacate on December 19, 2019, a week before the incident. (Hearing Tr. 54:14-22). The reason she provided on the notice was "income changed." (Respondents' Exhibit E, p. 83). She testified on direct examination that she moved out of the apartment at the end of June/early July 2020 allegedly due to an inability to pay her rent. (Hearing Tr. 29:6-22). However, when confronted with documentation during cross-examination, Appellant admitted that she moved because she was given a notice to vacate for violating the lease agreement because she had a pet. (Hearing Tr. 55:1-17).

After moving out of the apartment, she moved in with her aunt. (Hearing Tr. 56:18-20). She denied living anywhere other than at a hotel for a few nights and her aunt's place from the

time she left her apartment in Florence until the date of the hearing. (Hearing Tr. 58:19-23). Although she testified on cross-examination that she slept in her car when she could not afford a hotel (Hearing Tr. 57:11-13), when pressed further, she changed her testimony and admitted that that she never lived out of her car. (Hearing Tr. 57:17-24). This testimony is contrary to what she told Dr. Hicks who testified in her own deposition that Appellant told her that she and her daughter were both living out of her car. (Hicks Dep. p. 34:22-25). This testimony is also contrary to her report to Dr. Snipes that she was homeless and displaced. (Respondents' APA 13, p. 51).

Respondents further note that Appellant was able to continue attending Francis Marion University until she withdrew from classes nine or ten months after this work incident. (Hearing Tr. 35:23-36:6; 66:20-22). On May 21, 2020, while written out of work at the direction of Dr. Hicks, she applied for unemployment benefits, certifying she was ready, willing, and able to work. (Hearing Tr. 61:22-62:8). Around that same time, she also applied for financial assistance due to being unemployed as a result of COVID; however, she never referenced being unemployed due to a work accident. (Respondents' Exhibit D, APA p. 66). In her claim for financial assistance from Modest Needs Organization to cover her rent, she states "Not being able to work in the midst of the pandemic COVID-19 voids the part time income once received to maintain our livelihood." (Respondents' Exhibit D, APA p. 66). She then claims that she has had to increase her anti-depressants that were prescribed prior to the essential work and at-home orders issued by the government. (Respondents' Exhibit D, p. 66). There is no evidence that she was on anti-depressants before COVID and no evidence that any anti-depressants prescribed were ever taken as directed and/or subsequently increased. (APA 5, p. 12). Further, CVS Pharmacy was not shut down during the pandemic as it was very much considered an essential business.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2023) . The Commission decides questions of fact by the preponderance of the evidence standard. *Paulino v. Diversified Coatings, Inc.*, 443 S.C. 150, 155, 903 S.E.2d 503, 506 (2024). This court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are ... affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Frampton v. S.C. Dept. of Nat. Res.*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (Ct. App. 2020) (final alteration in original) (quoting § 1-23-380 (5)(d), (e)); *see also Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) ("Pursuant to the APA, this [c]ourt's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law.").

In workers' compensation cases, the Commission is the ultimate fact finder, and its findings are presumed correct and will not be set aside unless unsupported by substantial evidence in the record. *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011). "'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 ... in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)).

ARGUMENT

I. This Court should affirm the South Carolina Workers' Compensation Commission's finding that Appellant failed to establish a physical-mental injury or a mental-mental injury under South Carolina Code § 42-1-160

a. Appellant did not establish a Physical-Mental Injury

Appellant was precluded from arguing a physical-mental injury because she failed to allege on her Form 50 (or in her Form 58 Pre-Hearing Brief) that she sustained a physical injury, which is required to establish a physical-mental injury. However, even if this Court determines Appellant was allowed to pursue her physical-mental injury claim despite failing to allege a physical injury or identify a body part injured on her Form 50 or Form 58, Respondents assert and the Commission properly concluded that she failed to establish a physical-mental injury under South Carolina Code § 42-1-160 because she did not suffer a physical injury.

Our courts have recognized that physical-mental injuries do not need to be incident to an unusual and extraordinary condition of employment. *Getsinger v. Owens-Corning Fiberglas Corp.* 335 S.C. 77, 81, 515 S.E.2d 104, 106 (Ct App. 1999). If a mental condition is induced by a compensable physical injury, it is causally related to that injury. *Id*. Accordingly, the courts must determine whether there is substantial evidence the claimant's physical injury induced their mental injury. *Id*.

In cases in which the physical injury is alleged to have aggravated a pre-existing mental condition as was alleged by Appellant at the initial hearing, § 42-1-160 explains that stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is:

1. Admitted by the employer/carrier;

2. Noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition;

3. Found to be causally related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or

4. Noted in a medical record or report of the employee's physician as causally related or connected to the injury or accident.

Again, even if the above instances applied, there still must have been an actual physical injury.

In the present case, the Commission correctly determined that Appellant did not suffer a physical injury within the meaning of South Carolina Code § 42-1-160 because she denied being physically hurt or injured from the contact (Hearing Tr. 64:7-10) and denied ever reporting a physical injury to her physicians:

> Q: My question is, did you get physically hurt or physically injured from the customer coming into contact with you?
>
> A: I don't – No, I guess not.
>
> Q: Did you experience any physical pain from the customer coming into contact with you?
>
> A: No

(Hearing Tr. 64:7-13; 63:23-24)

Additionally, Appellant's physician confirmed that Appellant did not report a physical injury and the physician did not diagnose Appellant with a physical injury as a result of the incident (Hicks Dep. Tr. 46:23-47:14).

The South Carolina Legislature did not intend to remove a claimant's burden of satisfying the requirements of a mental-mental injury when an unwanted contact, without pain, physical injury, report of a physical injury, diagnosis of physical injury, and/or treatment for a physical

injury, is thrown into the mix. If such were the case, any employee who alleged a mental-mental claim due to working more hours each week, who was also touched on her arm by her supervisor as she left work on a particularly stressful day, could merely claim a physical-mental injury and lower her burden. This result is so plainly absurd that it could not possibly have been intended by the Legislature and it would defeat the plain legislative intention of requiring the heightened burden of proof.

The Commission correctly concluded that Appellant did not meet her burden of proving a physical-mental injury because no physician opined to a reasonable degree of medical certainty the incident caused or aggravated a pre-existing condition. Under § 42-1-160 (E), in medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. "Medically complex cases" means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment.[1] Under § 42-1-160 (G), "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider. The medical opinion given "to a reasonable degree of medical certainty" is not a courtesy or preferred language, it is a statutory requirement. If the causation opinion is not clearly stated to a reasonable degree of medical certainty, the inquiry ends and the claimant has not met her burden of proof for a physical-mental injury (or mental-mental injury). Making an inference or assuming what the medical provider intended to say is not sufficient under § 42-1-160.

[1] In the present case, Appellant alleges she has post-traumatic stress disorder. It is undisputed that, to diagnose this condition, a practitioner must use the Diagnostic and Statistical Manual of Mental Disorders which, in its current form, is identified as the DSM-5-TR. (See generally Hicks Dep. Tr. 43-44).

More importantly, under S.C. Code § 42-9-35, to establish that an accident has aggravated a preexisting condition:

> (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.
> . . .
>
> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty . . .

Again, this is not a courtesy or preferred language, it is a statutory requirement. If the aggravation is not established by an opinion given to a reasonable degree of medical certainty, the inquiry ends and Appellant has not met her burden of proof.

As the Commission correctly noted, Appellant presented "no evidence" showing that she was diagnosed with PTSD or any other mental health condition prior to the December 26, 2019 incident. There was also no evidence presented indicating that Appellant received mental health treatment of any kind before the incident. The Commission then went on to note that, even if there was such evidence of a pre-existing mental health condition, Appellant did not present sufficient medical evidence establishing an aggravation between the alleged injury and the alleged pre-existing condition. As indicated above, while Appellant's physician stated she had an opinion as to whether the complaints Appellant made were the result of an aggravation, she never expressed what that opinion is, which is required to establish causation. (Dr. Ashley Hicks Dep. Tr. 17:1-21). *See Lorick v. S.C. Elec. & Gas Co.*, 245 S.C. 513 at 525 (1965) (stating "[t]he rule has been established in this State that 'when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish

such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury"). Thus, even assuming a mere unwanted touch could satisfy the physical injury requirement, the Commission correctly concluded that Appellant did not establish a physical-mental injury because she did not secure a favorable causation opinion. Moreover, under §§ 42-1-160 (E) and 42-9-35, she did not meet the statutory requirements that the proof of causation be given by expert opinion or testimony stated to a reasonable degree of medical certainty.

Respondents posit Dr. Snipes is the only physician to have given a causation opinion to a reasonable degree of medical certainty. As discussed, Dr. Snipes, a psychiatrist, did not see any evidence of any psychiatric illness related to Appellant's claimed workplace incident. (Respondents' APA 13, p. 52). He explained she did <u>not</u> meet the criteria for post-traumatic stress disorder as she was not showing any continued symptoms of avoidance or alterations in arousal or reactivity, and she did not endorse any continued intrusion symptoms. (He also indicated in his report that Appellant was still able to vacuum, the activity she was performing at the time of the incident, without experiencing distressing thoughts. (Respondents' APA 13, p. 50)). He felt she was showing signs of depression that did not appear to be related to her workplace incident but rather related to her life stressors following becoming homeless. As Dr. Snipes is the only expert to render an opinion to a reasonable degree of psychiatric certainty, the Commission made the correct decision to deny the compensability of the claim as the only evidence, and very definitely the substantial evidence on the record, supports the finding that Appellant did not have post-traumatic stress disorder and the psychiatric issue she was experiencing was not related to her claimed work incident. As a result, the Commission correctly concluded that Appellant did not satisfy her burden of proving a compensable work injury.

In summary, Appellant did not prove a physical-mental injury because she (1) did not suffer a physical injury and (2) did not obtain a medical opinion rendered to a reasonable degree of medical certainty finding a causal link between her alleged psychological injury and the work incident.

b. Appellant did not establish a Mental-Mental Injury

The Commission also correctly concluded that Appellant failed to establish a mental-mental injury. § 42-1-160 of the South Carolina Code provides:

> (B) stress, mental injuries, and mental illness arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury are not considered a personal injury unless the employee establishes, by a preponderance of the evidence:
>
> 1. That the employee's employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment; and
>
> 2. The medical causation between the stress, mental injury, or mental illness and the stressful employment conditions by medical evidence.

S.C. Code Ann. 42-1-160 (B) (emphasis added).

The South Carolina Supreme Court has clarified that "extraordinary and unusual" refers to the employee's own employment rather than conditions of employment in general. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). The Court explained in *Tennant v. Beaufort County School Dist.*, 381 S.C. 617, 621, 674 S.E.2d 488, 490 (2009):

> In order to recover for mental injuries caused by emotional stress, the claimant must show these unusual and extraordinary conditions were the proximate cause of the mental disorder. *Powell v. Vulcan Materials Co.*, 299 S.C. 325, 384 S.E.2d 725

> (1989). This standard, also known as the "heart attack standard," balances the employee's interests with the employer's interests and provides a framework which ensures that the claimant shows that she suffered a work-related injury. Requiring a claimant to prove exposure to "unusual or extraordinary" circumstances in a mental-mental injury claim is consistent with the heightened burden required to prove a claim for intentional infliction of emotional distress claims, a cause of action that also allows recovery for mental injuries in the absence of physical injury. *See Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007), quoting *Ford v. Hutson*, 276 S.C. 157, 166, 276 S.E.2d 776, 780 (1981) (recognizing that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious").

While Respondents certainly do not condone the type of behavior from its customers that gave rise to this claim, as indicated above, Respondents note that this was an isolated incident, that it was over within one second, and that Appellant appeared to be smiling immediately after it was over. She was also able to continue performing her job duties that evening with no hesitation and again for months thereafter and did not report any physical injury. Accordingly, with those factors in mind, the circumstances that gave rise to this claim are not extraordinary and unusual within the meaning of § 42-1-160.

However, even assuming the circumstances that gave rise to this claim did meet the "extraordinary and unusual" threshold, Appellant did not present any medical opinions establishing the necessary causal link between her condition and this incident. As discussed, the only physician to have rendered an opinion to a reasonable degree of psychiatric certainty was Dr. Snipes, and, as has also been discussed, he concluded that she did not suffer from any psychiatric illnesses as a result of this incident. The Full Commission not only gave proper weight to Dr. Snipes opinions to conclude that Appellant did not establish a mental-mental injury, such conclusion was also supported by their finding that Dr. Hicks' testimony did not rise to the

threshold necessary to establish a causal relationship between the conditions of Appellant's employment and her alleged injury.

c. Appellant is Not Entitled to Benefits

Considering the Commission's decision that Appellant did not establish a Physical-Mental Injury or a Mental-Mental Injury, the Commission also correctly determined that Appellant was not entitled to medical or indemnity benefits under the South Carolina Workers' Compensation Act. Specifically with regard to future medical benefits, South Carolina Code § 42-15-60(A) requires an employer to provide medical benefits "as reasonably may be required . . . to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty." The requirement that medical evidence be stated to a reasonable degree of medical certainty was added to the statute in 2007. This language is a requirement to be met before future medical treatment can be ordered. It is not merely preferred language that has been requested by the General Assembly. Appellant produced no expert medical evidence, stated to a reasonable degree of medical certainty, that future medical care is needed. Although Dr. Hicks testifies that her recommendations for future treatment is "to come to visits . . . to be compliant," she does not make these recommendations or provide her opinion regarding future medical treatment to a reasonable degree of medical certainty. Again, if opinions regarding the need for future medical treatment are not clearly stated to a reasonable degree of medical certainty, the inquiry ends and the claimant has not met her burden of proof to establish entitlement to medical benefits. Making an inference or assuming what the medical provider intended to say is not sufficient under § 42-15-60. Accordingly, the Commission correctly concluded that Appellant did not meet her burden of proving a compensable injury to entitle her to benefits.

CONCLUSION

In light of the foregoing, Respondents respectfully request that this Court deny the appeal and affirm the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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