THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Melody L. James, The Honorable Aisha Taylor,
and The Honorable Cynthia C. Dooley
Commissioners for the Appellate Panel

Appellate Case No. 2024-001822
S.C. W.C.C. File No.: 1925084

Christina Bradshaw (née Walthour), Claimant……...Respondent,

v.

Remedy Intelligent Staffing, Inc., Employer, and
XL Insurance America, Inc., Carrier……...Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On July 11, 2019, Respondent suffered an injury to her lower back and left shoulder while lifting a pallet at work. (R. pp. 759-761). On August 18, 2020, Respondent filed her first Form 50 Notice of Claim. (R. pp. 38-39). Respondent then did not do anything to prosecute her claim, and the claim was closed on May 14, 2021, but on June 4, 2021, Respondent filed a Form 50 hearing request to reopen the claim. (R. pp. 41-44). The hearing was set for October 20, 2021. (R. p. 1238). The parties reached a consent order to conduct additional discovery, which was executed by Commissioner Campbell on October 13, 2021. (R. pp. 5-6). That same day, Respondent filed a new Form 50 hearing request, and the hearing was set for February 1, 2022. (R. pp. 50-52, 1239). However, the day prior to the hearing, January 31, 2022, Respondent withdrew her hearing request. (R. p. 1265).

Following this withdrawal, Respondent did not take any further actions to prosecute her claim, and on September 16, 2022, the claim was closed by the Commission. Following closure of the Commission's file, Respondent did not take any additional actions to prosecute her claim until she filed a new Form 50 hearing request on September 1, 2023. (R. pp. 58-61). In total, from the date (January 31, 2022) Respondent withdrew her Form 50 until September 1, 2023, when Respondent filed a new Form 50 hearing request, Respondent went 19 months (which is the equivalent of 579 days or 1 year and 7 months) without taking any action to prosecute her claim.

On November 29, 2023, a hearing was conducted by Commissioner Avery B. Wilkerson.[1] (R. pp. 1240, 203-371). Prior to the hearing, on November 28, 2023, Appellants filed a motion for continuance, which was heard by the single commissioner at the hearing and was denied in part and granted in part. (R. pp. 459-464). The single commissioner determined that the claim was

[1] Commissioner Wilkerson is no longer a Commissioner with the South Carolina Workers' Compensation Commission.

compensable, and Appellants filed a notice of appeal to the Appellate Panel. (R. pp. 8-21, 66-69). Oral arguments were heard by the Appellate Panel on July 15, 2024. (R. pp. 440-458). The Appellate Panel issued its decision and order on October 3, 2024 (hereinafter the "Appellate Panel Order"). (R. pp. 22-36). The Appellate Panel upheld the single commissioner's decision and found that Respondent's claim was compensable. (Id.).

Subsequently, on October 25, 2024, Appellants timely filed a Notice of Appeal with the Court of Appeals for review of the Appellate Panel's decision and order.

However, on October 30, 2024, Justice Hewitt dismissed Appellants' Appeal as not being a final judgment under S.C. Code Ann. § 1-23-380. *See* Walthour v Remedy Intelligent Staffing, Inc., SC Ct. App. Order dated October 30, 2024. On November 14, 2024, Appellants filed a Petition for Rehearing and Reinstatement. *See* Walthour v Remedy Intelligent Staffing, Inc., Appellants' Petition for Rehearing and Reinstatement, dated November 14, 2024. On March 7, 2025, a three Justice panel for the Court of Appeals affirmed the Order issued by Justice Hewitt. *See* Walthour v Remedy Intelligent Staffing, Inc., SC Ct. App. Order dated March 7, 2025. The Order from the Court of Appeals dismissed Appellants' appeal, and ordered remittitur under Rule 221(b), SCACR. Id.

On April 7, 2025, pursuant to S.C. Code Ann. § 1-23-390, Rule 242, SCACR, Rule 221, SCACR, and Rule 260 SCACR, Appellants filed a Petition for a Writ of Certiorari with the Supreme Court seeking reinstatement of Appellants' appeal. *See* Walthour v Remedy Intelligent Staffing, Inc., Appellants' Petition for a Writ of Certiorari, dated April 7, 2025. Respondent filed her Return on May 23, 2025. *See* Walthour v Remedy Intelligent Staffing, Inc., Respondent's Return to Appellants' Petition for a Writ of Certiorari, dated May 23, 2025. On June 2, 2025, Appellants filed a Reply to Respondent's Return. *See* Walthour v Remedy Intelligent Staffing, Inc., Appellants' Reply to Respondent's Return, dated June 2, 2025. On August 14, 2025, the

Supreme Court granted Appellants' Writ of Certiorari. *See* Walthour v Remedy Intelligent Staffing, Inc., S.C.Sup.Ct. Order dated August 14, 2025.

Subsequently, on November 24, 2025, the Court of Appeals issued a notice to both parties that the Court of Appeals would be hearing Appellants' appeal on the merits and set forth the briefing schedule. *See* Walthour v Remedy Intelligent Staffing, Inc., SC Ct. App. Notice dated November 24, 2025.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard of review for Appellate Panel decisions. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, the court may reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." Mungo v. Rental Unif. Serv. of Florence, Inc., 383 S.C. 270, 279, 678 S.E.2d 825, 829–30 (Ct. App. 2009). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

"The Respondent has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. SouthCo. Inc., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) (quoting Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998)). "[A]n employer who has responded to a workers' compensation claim may assert a general denial of liability whether or not the response expressly contests compensability." Hargrove v. Carolina Orthopaedic Surgery Assocs., PA, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010). "Injury" for purposes of

workers' compensation means "only injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015); *see also* Turner v. SAIIA Constr., 419 S.C. 98, 105, 796 S.E.2d 150, 154 (Ct. App. 2016) ("For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." (quoting § 42-1-160(A))).

STATEMENT OF FACTS

The Employer is a staffing agency, and Respondent was staffed at Husqvarna when she suffered an injury at work. (R. p. 124, lines 18-23, pp. 1124-1128). On July 11, 2019, while lifting a pallet, Respondent injured her lower back and left shoulder. (R. pp. 759-761). Appellants provided Respondent with treatment at Doctors Care. (R. pp. 540-577). Respondent was seen twice at Doctors Care and diagnosed with a lumbar strain. (R. pp. 554, 577). On July 16, 2019, Respondent was released from care and returned to full duty. (R. pp. 564, 577). Respondent returned to work but was terminated for cause shortly thereafter. (R. p. 1098).

On August 11, 2019, after being terminated and thirty days after her work injury, Respondent was treated at the ER at Prisma Health Richland. (R. pp. 878-897). This medical record from the ER does not contain any reference whatsoever to an injury at work. (Id.). According to the medical report, Respondent was complaining of right shoulder pain (not left shoulder pain) that began two days prior. (R. p. 887). Respondent denied recent trauma to her neck, back or shoulder, but she did endorse a fall while getting dressed. (Id.).

On August 22, 2019, Respondent was seen by Dr. Nicholas Depace as part of a referral from South Carolina VR Disability Determination Services in connection with her application for Social Security disability benefits. (R. pp. 1162-1168). The report is detailed, yet it does not contain any reference to a work injury. (Id.). The purpose of the assessment is identified as Respondents "allegations as they relate to 'hand/wrist/arm problems, hip problem, anxiety disorder, sleep apnea, and carpal tunnel.'". (R. p. 1165). According to the report, Respondent also omitted Appellants from her work history. (Id.). Dr. Depace noted, "claimant reports that she last worked in a poultry processing plant for three months, ending in December 2018." (Id.).

On September 12, 2019, Respondent treated with her primary care provider, Hopkins Family Practice, without mention of a work injury. (R. pp. 996-998). In this September 12, 2019, medical report from Hopkins Family Practice, Respondent stated she had pain in her right shoulder and back and thought she may have pulled a muscle about a month ago, the timing of which correlates with the separate and distinct injury she treated for at the ER on August 11, 2019. (R. p. 996). Additionally, it is noted that Respondent has been using her right side as her dominant side since she had surgery for her broken scaphoid in her left arm. (R. p. 998).

Respondent was then referred to Dr. Fulton at Prisma Health Orthopaedics without mention of a work injury. (R. pp. 775-777). On September 24, 2019, Respondent was seen at Dr. Fulton's office for right wrist pain and preexisting left wrist pain. (Id.) Respondent was then referred for an EMG/NCS of her right wrist. (R. p. 776). On October 8, 2019, based on the EMG/NCS, Respondent was sent for a cervical MRI and referred to Dr. DeHoll (also with Prisma Health Orthopaedics). (R. pp. 793-794).

On October 14, 2019, Respondent was seen by Dr. DeHoll, and again there is no reference to a work injury anywhere to be found in the medical report. (R. pp. 803-805). Based on Dr. DeHoll's review of Respondent's MRI, Dr. DeHoll referred Respondent for a CT scan of her cervical spine and noted that Respondent would likely require cervical fusion surgery. (R. p. 805). On October 21, 2019, Respondent returns to see Dr. DeHoll, and again there is no mention of a work injury, or that this issue is in any way related to a workers' compensation claim. (R. pp. 816-818). Based on the results of the cervical spine CT scan, Dr. DeHoll recommended moving forward with a 3-level fusion surgery. (Id.). Respondent underwent cervical fusion surgery on November 12, 2019. (R. pp. 833-836).

Respondent's last appointment with Dr. DeHoll was on January 16, 2020, and again there is no mention of a work injury or any reference to workers' compensation. (R. pp. 860-862). At this visit, Dr. DeHoll recommended physical therapy, and scheduled Respondent for a follow up appointment on March 12, 2020. (R. p. 862). However, there are no records indicating Respondent ever participated in physical therapy, and there are no records indicating Claimant ever returned to see Dr. DeHoll after her January 16, 2020, appointment (Claimant did return to Dr. DeHoll years later).

Appellants were entirely unaware of the treatment Respondent received after being returned to work full duty on July 16, 2019.

Despite ending her treatment with Dr. DeHoll on January 16, 2020, Respondent did not file a Form 50 notice of claim until August 18, 2020, which is more than a year after her July 11, 2019, medical only, low back and left shoulder work injury. (R. pp. 38-39). Respondents August 18, 2020, Form 50 notice of claim was the very first time Appellants received notice of any kind that Respondent was alleging that she suffered a cervical spine injury and a right shoulder injury; and, these new, separate and distinct injuries were related to her July 11, 2019, work injury. Additionally, Respondent's August 18, 2020, Form 50 notice of claim was not filed until after she underwent cervical fusion surgery and ended her treatment with Dr. DeHoll. (Id.).

The claim was closed by the commission on May 14, 2021, but on June 4, 2021, Respondent filed a Form 50 hearing request to reopen the claim. (R. pp. 41-44). The hearing was set for October 20, 2021. (R. p. 1238). Respondent's deposition was scheduled for September 2, 2021, but Respondent cancelled prior to the deposition. (R. p. 1250). Respondent's deposition was then scheduled for October 12, 2021, but Respondent again cancelled. (R. p. 1243). With the hearing being 8 days away, and Appellants having been unable to conduct Respondent's deposition

through no fault of their own, Respondent agreed to a consent order to remove the claim from the docket. (R. p. 5-6).

Respondent filed a new hearing request on October 13, 2021, and a hearing was set for February 1, 2022. (R. pp. 50-52, 1239). Respondent's deposition was scheduled for January 20, 2022, but Respondent cancelled. (R. p. 1254). Respondent's deposition was then rescheduled for January 25, 2022, but Respondent again cancelled. (R. pp. 1256-1263). Additionally, during this time period, Appellants attempted to depose Dr. DeHoll. Dr. DeHoll's deposition was scheduled for November 4, 2021, but Dr. DeHoll cancelled. Dr. DeHoll's deposition was rescheduled for January 20, 2022, but Respondent's attorney cancelled. (R. p. 1254).

On January 31, 2022, prior to the February 1, 2022, hearing, Respondent withdrew her Form 50 hearing request. (R. p. 1265). Following the withdrawal of her Form 50 on January 31, 2022, Respondent did not take any actions to prosecute her claim for another 19 months (579 days or 1 year and 7 months), until she filed a new Form 50 Hearing Request on September 1, 2023.[2] (R. pp. 58-61).

Following Respondent's significant delay, she was then unable to sit for her deposition until November 16, 2023, which was only thirteen (13) days prior to the hearing scheduled for November 29, 2023, and during those thirteen days was the Thanksgiving holiday. In addition to new information obtained in Respondent's deposition, there were additional depositions and additional discovery that Appellants were unable to conduct prior the hearing. Therefore, Appellants filed a motion for continuance to conduct additional discovery. (R. pp. 459-464). However, Appellants' motion for continuance was denied by the single commissioner. (R. pp. 1269).

[2] On September 16, 2022, the claim was closed by the commission.

The hearing was conducted by Commissioner Wilkerson on November 29, 2023, in Columbia, South Carolina. (R. pp. 1240, 203-371). In addition to denying Appellants' motion for continuance, Commissioner Wilkerson took the two separate dates of injury and the separate body parts and collapsed them into one single date of injury and then found the claim compensable. (R. pp. 8-21). The Appellate Panel then affirmed the single commissioner's ruling "with amendments". (R. pp. 22-36). However, after numerous and exhaustive reviews of the Appellate Panel order, the "amendments" are only a restatement and repackaging of the single commissioner's order and do not contain any substantive changes in any way. (Id.).

ARGUMENTS

1. THE COMMISSION ERRED AS A MATTER OF LAW BY COLLAPSING TWO DISTINCT INJURY EVENTS INTO A SINGLE COMPENSABLE INJURY DESPITE THE OBJECTIVE FACTUAL EVIDENCE, ABSENCE OF NOTICE, AND CONTRADICTORY CONTEMPORANEOUS MEDICAL RECORDS.

A. Initial report and authorized Doctors Care treatment (lumbar strain; no cervical or right-shoulder complaints).

Respondent reported this injury on July 12 and stated that she was trying to lift a pallet and felt pain "on her L shoulder and lower back. (R. p. 761).

Respondent was initially treated at Doctors Care on July 14, 2019, and the subjective information contained in the report indicates Respondent injured her lower back "throwing a 150lbs pallet." (R. p. 544). At this July 14, 2019, evaluation, Ms. Comer, LPN, noted Respondent denied "saddle anesthesia" and did not have any radiation of pain or parathesis. (Id.). In her deposition testimony, Ms. Comer, LPN, testified that Respondent stated she injured her lower back, and that "she had no red flags, she had no radiation of pain, no numbness or tingling." (R. pp. 420-422, p. 420, lines 12-17). Ms. Comer, LPN, diagnosed Respondent with low back pain. (R. p. 545).

On July 16, 2019, Respondent was treated by Dr. Kim at Doctors Care. (R. pp. 564-567). Dr. Kim also diagnosed Respondent with a lumbar strain. (R. p. 565). Dr. Kim noted that Respondent told him she obtained a cortisone shot from her doctor in her back, was now feeling better and wanted to return to work. (R. p. 564). Dr. Kim noted that Respondent could return to full-duty work, and that she would not require a follow-up appointment. (R. p. 565).

In his deposition, Dr. Kim testified that Respondent had some vague tenderness over her lumbar spine, but that a straight leg raise of both legs did not produce any results, and that shoulder abduction on both sides did not produce any lower back pain. (R. p. 80, lines 22-25, p. 81). Dr. Kim testified that he diagnosed Respondent with a lumbar strain, and released her to MMI, without any work restrictions and without any future medical requirements. (R. p. 12, lines 1-10).

There is no evidence in the Doctors Care medical records, or in the deposition testimony from Dr. Kim, or Ms. Comer, LPN, that would indicate Respondent either subjectively or objectively suffered an injury to her cervical spine or right shoulder as a result of her work injury.

B. Termination after Respondent Returned to Work.

Respondent returned to work following her July 16, 2019, appointment at Doctors Care. However, the Employer noted in a computer log that Respondent did not show up to work and did not respond to the Employer's phone calls or text messages. (R. p. 1097). Do to the fact that Respondent stopped showing up to work and could not be contacted, the Employer terminated her employment. (R. p. 1098).

C. Respondent's Social Security Disability Application.

On August 22, 2019, Claimant filed an application for Social Security disability benefits, and in connection with that application a "mental status examination" was conducted by Dr. Depace. (R. pp. 1162-1168). During this evaluation, Claimant noted that her last employment was with a poultry processing plant for three months and ended in December 2018, because Claimant

stated that she was no longer physically able to perform the job. (R. p. 1165). Notably, in her deposition, Claimant testified that she left the job at the poultry plant because she got the job with Appellants, which is a different explanation than what she provided to Dr. Depace. (R. p. 127, lines 6-12). Based on Dr. Depace's report, Claimant also chose not to divulge her employment with Appellants at all. (R. p. 1165). Claimant's work injury is likewise not mentioned in Dr. Depace's report. (R. p. 1162-1168). According to Dr. Depace's report, Respondent has had three left wrist surgeries (2006, 2008, 2009), and she is in constant pain as a result.[3] (R. p. 1165). Importantly, Claimant states that she has been overcompensating with her right arm due to the pain in her left wrist. (Id.).

D. Prisma Health Richland ER: right-shoulder symptoms, no evidence of a work injury, and a denial of recent trauma.

On August 11, 2019, Respondent was treated at the Prisma Health Richland ER. (R. pp. 878-897). There is no mention in the medical records regarding a work injury, or that Respondent's pain was related to a work injury. (Id.). Respondent denied "recent trauma to her neck or back or shoulder" but she did endorse a recent fall. (R. p. 887).

At this ER visit, it is noted that Respondent's pain is to her right shoulder, not her left shoulder. (Id.). Not only is there no mention of low back pain or left shoulder pain, but this is also the first time Respondent identified radiating pain, however, Respondent advised that the radiating pain and tingling was "only in the right arm". (Id.).

The medical record notes that Respondent's "pain began 2 days ago", which would have been August 9, 2019, not July 11, 2019. (Id.). There is no mention that Respondent's pain has been ongoing since her July 11, 2019, work injury. This information correlates with the Doctors Care

[3] Claimant has not alleged that her left wrist is part of this workers' compensation claim.

records and the deposition testimony of Dr. Kim and Ms. Comer, LPN, which is that on July 16, 2019, Claimant was feeling better and was released to work without restriction.

E. Respondent's subsequent medical records do not contain any information regarding a work injury, and rather than low back pain, these records reflect right-sided shoulder and cervical pain.

On September 12, 2019, Respondent was treated by Dr. Ash-Malachi. The medical record from this visit states Respondent reported she pulled a muscle about a month ago, and now her right shoulder and back through her right arm/hand hurts. (R. p. 685). Respondent endorsed numbness and tingling in her right fingers and thumb. (Id.). Respondent's subjective statements correlate with her August 11, 2019, ER visit and not with her July 11, 2019, work injury.

Additionally, Dr. Ash-Malachi noted in the medical report from September 12, 2019, that Respondent has been using her right side as her dominant side since she had surgery for a broken scaphoid (the scaphoid is a bone in your wrist) in her left arm. (R. p. 687). Dr. Ash-Malachi then refers Respondent to Dr. Fulton, and on October 8, 2019, Dr. Clavet performs an EMG/NCS on Respondent's bilateral upper extremities. (R. pp. 785-794).

On October 8, 2019, Respondent is seen by Dr. Clavet for an EMG/NCS of her bilateral upper extremities. (Id.). Dr. Clavet notes that Respondent is complaining of neck and bilateral arm pain. (R. p. 793). However, there is no mention in the medical record of any work-related injury. (R. pp. 785-794). Based on the EMG/NCS, Dr. Clavet ordered a cervical MRI. (R. p. 794).

F. The evidence only supports two separate and distinct injuries.

In asserting her proof of compensability, Respondent ignores the fact that the medical evidence clearly shows two different dates on which Respondent suffered different injuries. Respondent suffered an injury on July 11, 2019, to her left shoulder and lower back, for which she received treatment and was released to work full duty. Respondent was then terminated by

Appellants. Following her termination, on August 11, 2019, Respondent sought treatment at Prisma Health Richland ER for a new injury to new body parts.

The record reflects Respondent knew how to report a work injury. Claimant discussed her work injury with both Dr. Kim and Ms. Comer, LPN, which is reflected throughout the Doctors Care records. (R. p. 540-577). However, after Dr. Kim released Claimant to full duty on July 16, 2019, there is no subsequent mention of a work injury in any other medical record prior to August 18, 2020, when Respondent filed her first Form 50 Notice of Claim. (R. pp. 38-39). Moreover, the body parts involved in the subsequent medical records are wholly different – July 11, 2019, work injury: lower back and left shoulder; August 11, 2019, injury – cervical spine and right shoulder. As such, the Commission's findings are not supported by substantial evidence.

2. THE COMMISSION ERRED AS A MATTER OF LAW BY RELYING ON MEDICAL CAUSATION OPINIONS THAT LACKED A RELIABLE FACTUAL BASIS AND WERE FORMED ONLY AFTER RESPONDENT'S UNREPORTED AND UNAUTHORIZED MEDICAL TREATMENT.

A. Dr. DeHoll: there isn't a single medical record that contains evidence of a work injury; his later causation questionnaire is undermined by his admitted lack of recollection.

Respondent was seen by Dr. DeHoll on October 14, 2019, upon referral from Dr. Clavet. (R. pp. 493-495). Dr. DeHoll notes that Respondent was originally referred to Dr. Fulton for a wrist problem, who then referred her to Dr. Clavet for the EMG/NCS. (R. p. 494). Dr. DeHoll further states that Respondent is experiencing numbness and tingling in her right hand and fingers, which of course does not match any of the symptoms Respondent experienced following her July 11, 2019, injury at work. (Id.)

In his review of the MRI findings, Dr. DeHoll noted that the MRI showed "right-sided extrusion at C4-5." (Id.). On October 14, 2019, Dr. DeHoll recommended a 3-level cervical fusion. (Id.).

Respondent underwent surgery on November 12, 2019. (R. pp. 487-488, 499-501). Clamant then followed up with Dr. DeHoll on a monthly basis for the next three months (November 25, 2019, December 5, 2019, and on January 16, 2020). (R. pp. 502-518).

At no point in Dr. DeHoll's medical records is there any mention of a work injury. (R. pp. 493-518). However, Claimant's application for Social Security disability benefits is addressed in the "Medical Release/Physician's Statement" contained within Dr. DeHoll's medical records, which further evidences the fact that Claimant's cervical spine and right shoulder problems are not related to her July 11, 2019, work injury. (R. pp. 513-514).

Contained within his deposition testimony, Dr. DeHoll was asked the following question as it relates to his responses to any questions that he completed as part of Respondent's questionnaire: "Dr. DeHoll, I -- I just wanna ask, again, when filling out these questions, do you have a recollection of how Ms. Walthour's injury occurred?" To which Dr. DeHoll answered, "I do not." (R. p. 195, lines 13-18).

This is one of the most important pieces of evidence. The questionnaires Dr. DeHoll completed cannot be valid if he does not know how Respondent was injured.

B. <u>The history contained in the IME (Dr. Patel) obtained by Respondent's counsel conflicts with the contemporaneous records and the factual foundation for her causation opinions</u>.

More than two years after Respondent's July 11, 2019, injury, Respondent was seen by Dr. Patel on October 21, 2021, at Lowcountry Orthopaedics for an independent medical evaluation. (R. pp. 519-523). Dr. Patel notes that Respondent stated she began having neck pain on July 12, 2019, following her work injury. (R. pp. 519-520). However, there is no evidence in the relevant medical records indicating Respondent had any neck pain at the time of her work injury on July 11, 2019.

Additionally, in this IME, Dr. Patel notes that Respondent's current symptoms are primarily located in her left posterior shoulder blade and radiate into her left arm. (R. p. 520).

However, in all the medical records subsequent to Respondent's separate and distinct August 11, 2019, injury, Respondent's pain is located in her right arm and shoulder, and there is no mention of any pain located in her left shoulder.

Dr. Patel's opinion on causation cannot be valid when he is relying on inaccurate information, which is the result of subjective information provided to him by Respondent more than two years after her July 11, 2019, injury, and subsequent to her separate and distinct August 11, 2019, injury.

C. Respondent's causation statements are based on inaccurate and unreliable facts.

Respondent's main argument is based on the causation statements obtained years after her two separate and distinct injuries to different body parts. However, a medical opinion is only as good as the facts available to the physician providing the opinion. Moreover, a causation statement cannot be valid if the doctor does not know how the Respondent was injured.

3. THE COMMISSION ERRED AS A MATTER OF LAW BY EXCUSING RESPONDENT'S FAILURE TO PROVIDE NOTICE OF A CERVICAL INJURY AND BY IMPOSING LIABILITY FOR UNAUTHORIZED MEDICAL TREATMENT OBTAINED OUTSIDE OF APPELLANTS' CONTROL.

A. Respondent Never Provided Notice of a Cervical Spine Work Injury Prior to her Self-Directed Treatment.

Respondent failed to satisfy her threshold statutory requirements governing notice and the employer's right to control medical treatment. Those requirements are not discretionary and cannot be satisfied retroactively through litigation testimony or later-formed medical opinions.

Following Respondent's July 11, 2019, work injury, Respondent reported a low back and left shoulder injury and received authorized treatment for those complaints. (R. pp 759-761, p. 540-577). At no point during Respondents two July 2019 appointments with Doctors Care did Respondent ever report cervical symptoms or right shoulder symptoms, and likewise she never provided notice of such to Appellants. (R. pp. 80-82, 420-422, 540-577, 759-761, 1095-1161).

When Respondent presented to the emergency room on August 11, 2019, she did not report a work injury, denied recent trauma, and complained of right-sided shoulder pain that began two days earlier. (R. p. 887).

Likewise, when Respondent treated at Hopkins Family Practice on September 12, 2019, she did not attribute her symptoms to a work injury and instead stated that she believed she pulled a muscle about a month ago. (R. p. 996). Thus, Appellants never received notice—actual or constructive—of any alleged cervical spine injury until her first Form 50, which was filed a year later on August 18, 2020, and is significantly outside of the ninety (90) day statutory notice requirement. S.C. Code Ann. § 42-15-20(B).

B. Respondent Usurped Employer's Statutory Right to Control Medical Care.

Despite the absence of notice, Respondent pursued extensive cervical treatment on her own. She underwent diagnostic testing, specialist care, and ultimately a three-level cervical fusion on November 12, 2019, all without Appellants knowledge or authorization. (R. pp. 80-82, 420-422, 540-577, 759-761, 1095-1161).

Respondent completed post-operative care by January 16, 2020, again without Employer involvement. (R. pp. 508-510). Even then, Respondent did not file a Form 50 notice of claim for another 8 months. During this entire period, Employer was deprived of the opportunity to: 1) investigate the alleged cervical condition, 2) direct or authorize medical treatment and was unable to evaluate alternative causes of Respondent's symptoms.

This loss of control was not the result of Appellants inaction, but of Respondent's failure to provide notice and her unilateral decision to seek care outside of the workers' compensation system. S.C. Code Ann. § 42-15-60(A).

C. There is no allegation that Respondent's cervical spine injury was related to her work injury until her August 18, 2020, Form 50.

Respondent did not assert that her cervical condition was work-related until she filed her Form 50 on August 18, 2020, more than a year after the alleged work incident and after all cervical treatment had concluded. (R. pp. 38-39). By the time Employer first learned of the cervical allegation, Respondent had already undergone surgery and been released from care, rendering Appellants statutory right to control medical meaningless.

D. The Commission's Excusal of Notice and Unauthorized Care Was Legal Error

Despite the lack of notice and the Respondent's failure to provide Appellants with an opportunity to provide and direct her medical treatment, the Commission still found Respondent's cervical condition compensable. By excusing Respondent's failure to provide notice and then retroactively validating Respondent's unauthorized medical treatment, the Commission nullified these statutory protections that are intended to operate as conditions precedent to compensability.

Notice exists to allow the employer to promptly investigate and control medical treatment. Whereas here, Respondent did not provide any notice of her injury and proceeded with extensive self-directed care. The law does not permit the Commission to shift the resulting costs to the employer after the fact.

The prejudice to Appellants is inherent and cannot be disputed. Employer was deprived of: 1) the right to contemporaneous investigation, 2) the right to direct Respondent's medical treatment, 3) the right to any meaningful evaluation of causation before surgery occurred, and 4) the opportunity to mitigate or manage medical care.

4. THE SINGLE COMMISSIONER'S DENIAL OF APPELLANTS' MOTION FOR CONTINUANCE COMPOUNDED RESPONDENT'S FAILURE TO NOTIFY THE EMPLOYER OF A NEW CERVICAL SPINE INJURY, RESPONDENT'S TREATMENT OUTSIDE OF APPELLANTS' KNOWLEDGE OR CONTROL, RESPONDENT'S FAILURE TO PARTICIPATE IN DISCOVERY, AND RESPONDENT'S 19-MONTH DELAY, RESULTING IN DEMONSTRABLE PREJUDICE TO APPELLANTS.

A. Appellants' Motion for Continuance.

The South Carolina Workers' Compensation Commission is vested with discretion in managing hearings and discovery. However, that discretion is not unfettered. A denial of a continuance constitutes reversible error where it results in prejudice, denial of a meaningful opportunity to be heard, or fundamental unfairness in the proceedings.

The issue before this Court is not whether the Commission possessed discretion, but whether that discretion was abused under the circumstances presented. S.C. Code Ann. § 1-23-380.

A Hearing was scheduled for November 29, 2023. (R. p. 1240). Respondent's deposition was not conducted until November 16, 2023, only thirteen (13) days prior to the scheduled hearing, with the Thanksgiving holiday intervening within those thirteen days (R. pp. 112-185).

Based on Respondent's deposition testimony, Appellants learned for the first time that Respondent had moved from Columbia, South Carolina to Elizabethtown, Kentucky, and then from Kentucky to Sylacauga, Alabama. (R. pp. 117-120). Since Respondent's deposition was not conducted until November 16, 2023, Appellants did not have sufficient opportunity to conduct any discovery related to Respondent's medical treatment or potential employment in these states.

Appellants also received Respondent's Form 58 Pre-Hearing Brief, APAs, and Exhibits on November 14, 2023. (R. pp. 1184-1189). Contained in Respondent's pre-hearing brief were records from Commonwealth Pain & Spine; a provider located in Kentucky. (R. p. 1187) This provider was not listed on Respondent's Form 50 Hearing Request, and Appellants did not have an opportunity to obtain these records or determine whether any depositions were necessary as a result of Respondent's treatment with this provider. (R. pp. 58-61).

After the record was left open, Appellants attempted to have Respondent execute a medical release so Appellants could obtain these records from Kentucky as quickly as possible. Respondent refused to provide a medical release for this purpose.

Appellants moved for a continuance to complete discovery made necessary by Respondent's late disclosures, relocation, and previously undisclosed medical treatment. The single commissioner denied that request. (R. pp. 1269-1276).

At the time the continuance was denied:

i) Appellants had not had an opportunity to conduct discovery related to Respondent's out-of-state treatment;

ii) Appellants had not had an opportunity to conduct discovery related to Respondent's potential employment in other states;

iii) Appellants had not had an opportunity to obtain or evaluate records from Commonwealth Pain & Spine;

iv) Appellants had not had a reasonable opportunity to assess whether additional medical or lay depositions were necessary.

Proceeding to a merits hearing under these circumstances deprived Appellants of the ability to fully and fairly defend the claim. This is especially true, when you consider the delays in discovery before Respondent withdrew her hearing on January 31, 2022, and then disappeared for the next 19 months.

The single commissioner attempted to mitigate the prejudice to Appellants by holding the record open for limited purposes. (R. pp. 1269-1276). However, holding the record open did not cure the fundamental problem: Appellants were forced to proceed to the hearing without knowing the full scope of Respondent's medical treatment, employment history, or potential witnesses.

Post-hearing discovery is not an adequate substitute for pre-hearing discovery where credibility, medical causation, and factual development are central to the outcome of the case. The cumulative effect of: Respondent's late disclosures, the inability to complete necessary discovery, the denial of a continuance, and the decision to proceed to a merits hearing, resulted in a procedurally unfair hearing and materially prejudiced Appellants' ability to present a defense.

Accordingly, the single commissioner abused his discretion, as did the Appellate Panel by affirming the decision of the single commissioner. Therefore, the Appellate Panel Order must be reversed.

B. Respondent's failure to participate in discovery and failure to prosecute her claim.

Respondent did not file a Form 50 notice of claim until August 18, 2020, which is after Respondent already underwent cervical fusion surgery and was released from care by Dr. DeHoll. (R. pp. 38-39, 493-518).

The claim was closed on May 14, 2021, although on May 26, 2021, Respondent filed a Form 50 hearing request to reopen the claim. (R. pp. 41-44). The hearing was set for October 20, 2021. (R. p. 1238). Respondent's deposition was scheduled for September 2, 2021, but Respondent cancelled prior to the deposition. Respondent's deposition was then scheduled for October 12, 2021, but Respondent again cancelled. (R. pp. 1243-1263).

With the hearing being 8 days away, and Appellants having been unable to conduct Respondent's deposition through no fault of their own, Respondent agreed to a consent order to remove the claim from the docket. (R. pp. 5-7).

Respondent then filed a new hearing request on October 13, 2021, and a hearing was set for February 1, 2022. (R. pp. 50-52, 1239). Respondent's deposition was scheduled for January 20, 2022, but Respondent cancelled. (R. pp. 1243-1263). Respondent's deposition was then rescheduled for January 25, 2022, but Respondent again cancelled. (Id.). Therefore, in total,

Respondent cancelled her deposition four times before she withdrew her Form 50 on January 31, 2022. (R. pp. 1243-1263, 1265). Respondent's failure to participate in discovery, materially prejudiced Appellants' ability to investigate the claim.

Additionally, during this time period, Appellants attempted to depose Dr. DeHoll. Dr. DeHoll's deposition was scheduled for November 4, 2021, but Dr. DeHoll cancelled. Dr. DeHoll's deposition was rescheduled for January 20, 2022, but Respondent's attorney cancelled. (R. pp. 1243-1263).

On January 31, 2022, prior to the February 1, 2022, hearing, Respondent withdrew her Form 50 hearing request. (R. p. 1265). Respondent then completely and utterly failed to further prosecute her claim for the next 19 months (579 days). (R. pp. 58-61).

Looking at it another way, subsequent to her July 11, 2019, injury, Respondent was released to full duty work on July 16, 2019. (R. p. 540-577). Respondent then treated at the ER on August 11, 2019, for a subsequent injury to her right shoulder and cervical spine. (R. pp. 878-897). 1,507 days (4 years and 1 month) passed from the date Respondent was released to full duty, until Respondent filed her September 1, 2023, Form 50 request for a hearing. (R. pp. 58-61, 540-577).

Respondent filed her first Form 50 notice of claim on August 18, 2020. (R. pp. 38-39). 1,106 days (3 years) passed from the date Respondent filed her first Form 50 until she filed her Form 50 on September 1, 2023, which is the Form 50 the November 29, 2023, hearing was in response to. (R. pp. 58-61, 1240).

A Hearing was scheduled for November 29, 2023. (R. p. 1240). Respondent's deposition was conducted on November 16, 2023. (R. p. 112). The first time since Respondent cancelled her first cancelled her deposition on September 2, 2021, 798 days earlier, Respondents were able to conduct Respondent's deposition.

Further, Respondent has not only failed to prosecute her own claim but has actively prevented Appellants from conducting discovery in a reasonable time period to make any decisions on the compensability of this claim. All of which has served to significantly and materially prejudice Appellants.

C. Waiver and Laches.

South Carolina Courts have defined laches as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard. Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). [A] claimant must prosecute his claim in a timely fashion, or it may be barred by the doctrine of laches. (quoting the commissioner's finding) McMillan v. Midlands Human Res., 305 S.C. 532, 533, 409 S.E.2d 443, 444 (Ct.App.1991). The equitable doctrine of laches is equivalent to the legal doctrine of waiver. Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465, 470 (2007). South Carolina has acknowledged the applicability of the doctrine of laches in a workers' compensation claim. Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004).

[T]o establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009) (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). If a party knows of his rights and does not timely assert them and that delay causes his adversary to incur expense or otherwise detrimentally change its position, then, under the doctrine of laches, equity will refuse to enforce those rights. Richey, 359 S.C. at 612, 598 S.E.2d at 309. The party asserting laches must show (1) negligence of the other party; (2) that party's opportunity to act sooner; and (3) as a result, the asserting party suffered material prejudice. Richey, 359 S.C. at 612, 598 S.E.2d at 309.

Laches is a defense that operates independently from the statute of limitations. The court is vested with wide discretion in determining what is an unreasonable delay. Ham v. Flowers, 214 S.C. 212, 51 S.E.2d 753 (1949). The burden of proof is upon the person claiming laches. Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct.App.1994). [W]hether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits. Muir, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct.App.1999).

Jervey v. Martint Env't, Inc., 406 S.C. 210, 750 S.E.2d 90 (2013) is the case that controls this claim. Following the ruling from the single commissioner, Martint filed an appeal to the Appellate Panel. The Appellate Panel agreed with the single commissioner that Jervey was entitled medical treatment and workers' compensation benefits; however, the Appellate Panel vacated the single commissioner's ruling that the statute of limitations in section 42–9–260 barred Martint's defense, and instead found the doctrines of waiver and laches prohibited Martint's defense. Both parties appealed to the circuit court. The circuit court affirmed the Appellate Panel's order in all respects except for the portion that vacated the single commissioner's legal conclusions concerning the impact of the statute of limitations in section 42–9–260(A). Both parties filed an appeal to the Court of Appeals. The Court of Appeals agreed with the Appellate Panel and ruled that the Appellate Panel was correct in vacating the single commissioner's finding that section 42–9–260 is a time bar for raising a defense against compensability. The Court of Appeals also agreed with the Appellate Panel and the Circuit Court that Martint was barred by the doctrine of waiver and laches. Both parties appealed to the Supreme Court. The Supreme Court ruled that "because determination as to the issues of laches and waiver is dispositive, we grant Jervey's petition for a writ of certiorari, dispense with further briefing, and vacate that portion of the Court of Appeals' opinion addressing the import of section 42–9–260."

Importantly, the Appellate Panel, the Circuit Court, the Court of Appeals, and the Supreme Court all found that Martint was barred by the doctrine of waiver and laches. In reaching this conclusion, each Court found that Martint's failure to act for approximately 450 days was unreasonable.

The Circuit Court ruled that Martint, "(a) were [sic] fully aware of the factual allegations relative to this alleged deviation from the course/scope of employment by no later than January 25, 2006; (b) nonetheless commenced the payment of temporary total disability compensation; (c) engaged in various activities during the ensuing months, which were reflective of an informed/voluntary acknowledgement of liability for Mr. Jervey's claim, notwithstanding their unquestioned possession of the same information upon which the current "good faith defense" is premised; and (d) did not attempt to raise this defense until approximately 450 days after they were notified of Mr. Jervey's injury." Jervey v. Martint Environmental, Inc., No. 2008-CP-32-2361, 2009 WL 8727100 (S.C.Com.Pl. Mar. 24, 2009).

In applying the doctrine of waiver and laches, the Circuit Court found the following: "I conclude the Commission correctly determined the current defense "was clearly waived by" Martint/General Casualty. See, Hatcher v. Harleysville Mutual Insurance Company, 266 S.C. 548, 225 S.E. 2d 181, 184 (1976). I further conclude the substantial evidence similarly validates the Commission's ruling that Martint's/General Casualty's conduct satisfied the criteria for laches, as denial of his claim at this juncture would: (a) jeopardize Mr. Jervey's continued receipt of necessary medical care, as well as disability compensation; (b) potentially require him to repay substantial sums expended toward his receipt of compensation/medical benefits during the past three years; and (c) undoubtedly result in appreciable prejudice. Id.

In its decision, the Court of Appeals stated, "Furthermore, we find because Martint knew of its defense the day of the accident, yet it paid and has continued to pay Jervey disability compensation, and it did not assert the defense until at least 450 days after the accident, the evidence supports the Appellate Panel's finding that Martint's defense is barred by the doctrine of waiver and laches." Jervey v. Martint Env't, Inc., 396 S.C. 442, 452, 721 S.E.2d 469, 474 (Ct. App. 2012), vacated in part, 406 S.C. 210, 750 S.E.2d 90 (2013). (In footnote number 4, the Court notes that Martint did not assert its defense until it filed a Form 51 on July 27, 2007, which was 510 days after the date of the accident).

The Supreme Court ruled as follows, "We deny Martint's petition for a writ of certiorari to review the Court of Appeals' decision as to the issues of laches and waiver. In light of the denial of Martint's petition for a writ of certiorari, we find it is unnecessary to address the issues raised by Jervey. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the disposition of a prior issue is dispositive). Nevertheless, because determination as to the issues of laches and waiver is dispositive, we grant Jervey's petition for a writ of certiorari, dispense with further briefing, and vacate that portion of the Court of Appeals' opinion addressing the import of section 42–9–260. Jervey v. Martint Env't, Inc., 406 S.C. 210, 211, 750 S.E.2d 90, 90-91 (2013).

To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. The party asserting laches must show (1) negligence of the other party; (2) that party's opportunity to act sooner; and (3) as a result, the asserting party suffered material prejudice.

In Jervey, The Supreme Court confirmed that a party can be subject to the doctrine of waiver and laches if it fails to act within 450 days. Martint failed to raise a defense to the claim

within 450 days, and the Court determined the delay was unreasonable and negligent, Martint could have acted sooner, and Jervey would be materially prejudiced. It is notable that none of the courts determined it necessary that Jervey have actually suffered the material prejudice, but rather found this element satisfied based on the likelihood Jervey would suffer material prejudice.

In the case at bar, Claimant was injured on July 11, 2019. Claimant filed a Form 50 hearing request on September 1, 2023, which is the pleading on which this hearing was set. From July 11, 2019, to September 1, 2023, 1,505 days passed.

Subsequent to her July 11, 2019, injury, Claimant was released to full duty work on July 16, 2019. Claimant filed her first Form 50 notice of claim on August 18, 2020. 1,106 days passed from the date Claimant filed her first Form 50 until her September 1, 2023, Form 50.

The claim was closed on May 14, 2021, and June 4, 2021, Claimant filed a Form 50 hearing request to reopen the claim. The hearing was set for October 20, 2021. Claimant's deposition was scheduled for September 2, 2021, but Claimant cancelled prior to the deposition. Claimant's deposition was then scheduled for October 12, 2021, but Claimant again cancelled. With the hearing being 8 days away, and Appellants having been unable to conduct Claimant's deposition through no fault of their own, Claimant agreed to a consent order to remove the claim from the docket.

Claimant filed a new hearing request on October 15, 2021, and a hearing was set for February 1, 2022. Claimant's deposition was scheduled for January 20, 2022, but Claimant cancelled. Claimant's deposition was then rescheduled for January 25, 2022, but Claimant again cancelled. Additionally, during this time period, Appellants attempted to depose Dr. DeHoll. Dr. DeHoll's deposition was scheduled for November 4, 2021, but Dr. DeHoll cancelled. Dr. DeHoll's deposition was rescheduled for January 20, 2022, but Claimant's attorney cancelled.

On January 31, 2022, prior to the February 1, 2022, hearing, Claimant withdrew her Form 50 hearing request. On September 16, 2022, the claim was closed by the commission. Claimant did not take any actions whatsoever to prosecute her claim from January 31, 2022, until she filed a new Form 50 hearing request on September 1, 2023. There is no reasonable explanation for this delay in the evidence of this case.

576 days passed from the date Claimant withdrew her Form 50 (January 31, 2022) and the date Claimant filed a new Form 50 hearing request (September 1, 2023). Claimant inexplicably, and without explanation, failed to prosecute her claim for 576 days. Claimant was so unconcerned about her claim, that the claim remained closed at the commission for over 12 months.

Unbeknownst to Appellants, Claimant was seen by Dr. DeHoll on July 14, 2022, which is approximately 5 months after she withdrew her Form 50 hearing request. Dr. DeHoll advised Claimant that her condition was worse and there was a high probability that she would need additional surgical intervention. Dr. DeHoll referred Claimant to a pain specialist for a steroid injection to see if surgery could be staved off. Claimant was then seen by a pain specialist on August 9, 2022. However, all of this was done unbeknownst to Appellants. 406 days passed from July 14, 2022, until Claimant filed a new Form 50 hearing request on September 1, 2023 (380 days passed from August 9, 2022).

Despite knowing that additional treatment may be necessary, Claimant unreasonably delayed 406 days. Further, Claimant has not only failed to prosecute her own claim but has actively prevented Appellants from conducting discovery in a reasonable time period to make any decisions on the compensability of this claim. Appellants were unable to conduct Claimant's deposition until November 16, 2023, which was only 13 days prior to the scheduled hearing on November 29, 2023. The first time Claimant cancelled her deposition was on September 2, 2021,

which was 798 days earlier. All of which has served to significantly and materially prejudice Appellants.

Unbeknownst to Appellants, Claimant was first seen by Dr. DeHoll on October 14, 2019. Dr. DeHoll recommended cervical fusion and performed surgery in November of 2019. According to the medical records from Dr. DeHoll, Claimant's last visit following surgery was January 16, 2020. There is no mention in Dr. DeHoll's medical records that Claimant's injury was work related. Despite the fact that Claimant finished treating with Dr. DeHoll on January 16, 2020, Claimant did not file a Form 50 notice of claim until August 18, 2020. Therefore, Claimant completely deprived Appellants of their statutory right to control medical care, or the ability to provide any medical treatment at all. Claimant's treatment was completely over by the time she filed her very first Form 50 on August 18, 2020.Appellants have been severely prejudiced by Claimant's unreasonable delay in prosecuting her case.

CONCLUSION

For the reasons stated herein, Appellants respectfully request the Court reverse the decision of the Commission.

Respectfully submitted,

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