THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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S.C. Supreme Court

Case No. 2012-213717

BEVERLY R. WHEELER,.....PETITIONER,

v.

SPARTANBURG SCHOOL DISTRICT SIX, and
WAUSAU BUSINESS INSURANCE COMPANY,.....RESPONDENTS.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE WORKERS' COMPENSATION COMMISSION'S DECISION THAT WHEELER FAILED TO PROVE THAT SHE SUSTAINED A COMPENSABLE REPETITIVE TRAUMA INJURY PURSUANT TO THE ACT?

STATEMENT OF THE CASE

Appellant Beverly R. Wheeler ("Wheeler") filed a Form 50 request for hearing against Spartanburg School District Six and Wausau Business Insurance Company (collectively "Defendants") on August 31, 2010. Wheeler alleged that she sustained an injury to her wrists and arms as a result of repetitive trauma arising out of and in the course of her employment. Defendants filed a Form 51 on September 7, 2010, denying that Wheeler sustained an injury arising out of and in the course of her employment. A hearing was held before Commissioner David W. Huffstetler on November 4, 2010.

Commissioner Huffstetler issued a Decision and Order on December 6, 2010. He found that Claimant failed to carry her burden of proving through medical evidence that her carpal tunnel syndrome was causally related to her job as a custodian as required by S.C. Code Ann. §42-1-172. On December 10, 2010, Wheeler filed an appeal to the Appellate Panel of the South Carolina Workers' Compensation Commission. The Appellate Panel heard oral argument on March 21, 2011. The Appellate Panel issued their Decision and Order on April 26, 2011, fully affirming Commissioner Huffstetler's Decision and Order.

Wheeler filed her Notice of Appeal with the South Carolina Court of Appeals on May 4, 2011. Chief Judge John Few, Judge H. Bruce Williams, and Judge Daniel Pieper heard oral argument on October 3, 2012. On October 24, 2012, the Court of Appeals issued Per Curiam Opinion affirming the Workers' Compensation Commission's decision. On November 8, 2012, Wheeler filed a Petition for Rehearing. On November 26, 2012, the Court of Appeals issued an Order denying Wheeler's Petition for Rehearing.

On December 27, 2012, Wheeler filed a Petition for Writ of Certiorari with this Court. On January 24, 2013, Defendants filed a Return to the Petition for Writ of Certiorari. This Court

issued an Order granting Wheeler's Petition for Writ of Certiorari on April 16, 2014. This appeal follows.

STATEMENT OF THE FACTS

At the hearing, Wheeler testified that she had worked as a custodian for Spartanburg School District 6 for approximately twenty years. (R. p. 72, lines 19-25.) According to Wheeler, her job consists of several different tasks and these tasks are done in various orders for various lengths of time. (R. p. 101, lines 8-17.) She is responsible for cleaning the sixth grade hall, the principal's office, the assistant principal's office, the teacher's lounge, and certain bathrooms. (R. p. 75, lines 5-14.) She uses chemicals, buckets, rags, a vacuum cleaner, toilet brushes, dust pans, dust mops/push brooms, regular brooms, and a long handled scraper to perform her duties. (R. p. 98, line 24 – p. 99, line 2.) She admitted that she did not use a floor buffer, drills, or power tools to perform her duties as a janitor. (R. p. 98, lines 18-23.) Wheeler also testified that she has to empty trash cans, and the most she has to lift is approximately thirty (30) pounds. (R. p. 100, lines 8-23.) According to Wheeler, she lifts this amount three (3) to four (4) times a week. (R. p. 100, line 24 – p. 101, line 1.) Wheeler testified that in her opinion her problems were caused by scrubbing commodes, scraping corners, and mopping. (R. p. 80, lines 11-21.)

Wheeler alleged that her right hand went numb on May 18, 2010. (R. p. 80, lines 2-10.) She specifically testified that she felt that her work was causing her problems as early as May of 2010. (R. p. 81, lines 21-24.) She testified that she talked to the school nurse in May and later discussed her problems with the principal, Karen Bush, in June of 2010. (R. p. 80, line 22 – p. 81, line 6.) However, she admitted that she did not tell Ms. Bush that she believed her problems were work related in June. (R. p. 82, lines 7-10.) According to Wheeler, she told Ms. Bush in late August of 2010 that her work was irritating her hands. She testified that this conversation would have been after August 17, 2010. (R. p. 88, line 19 – p. 89, line 13.) However, after being shown

a letter that her attorney wrote to Dr. Robert Ringel, Claimant testified that she told Ms. Bush her work was irritating her hands on August 12, 2010. (R. p. 92, line 22 – p. 94, line 8.)

Karen Bush, the principal at Gable Middle School, also testified at the hearing. (R. p. 104, line 21 – p. 105, line 4.) Ms. Bush testified that she is very familiar with the custodian job and all of the tasks that comprise the same. (R. p. 105, lines 17-24.) Ms. Bush testified that she first learned that Wheeler was alleging her problems were work related on October 12, 2010, when she received a call from Defense Counsel. (R. p. 105, line 25 – p. 106, line 3.) Prior to that time, Ms. Bush was aware that Wheeler was having problems with her hands, but Wheeler never informed her that she believed the problems to be work related. (R. p. 106, lines 4-8.)

Ms. Bush testified that she discussed Wheeler's problems with her in June of 2010. (R. p. 106, line 9 – p. 107, line 3.) Ms. Bush testified that Wheeler came to her office with a form that needed to be filled out, and the form asked if Claimant's problems were work related. Id. Ms. Bush testified that she read this question to Wheeler and she responded "no." Id. Ms. Bush further testified that she did not recall Wheeler coming to her in August of 2010 to report that her problems were work related. (R. p. 107, lines 4-12.) According to Ms. Bush, if Wheeler would have reported her problems as work related, an investigation of the allegations would have been conducted and the workers' compensation carrier would have been contacted. (R. p. 107, line 20 – p. 108, line 6.)

With regard to Wheeler's medical treatment, she testified that she had treated with her family doctor and Dr. Ringel for the problems with her hands/wrists. (R. p. 96, lines 5-18.) She saw her family doctor on May 10, 2010, but did not tell him that she thought her problems were work related. (R. p. 96, lines 5-12). While Wheeler saw Dr. Ringel in May of 2010, June of 2010, and July of 2010, she testified that she did not tell Dr. Ringel that she thought her problems were

work related during any of those visits. (R. p. 96, lines 13-22.) She admitted that she did not tell Dr. Ringel that she thought her problems were work related until after her attorney wrote a letter to Dr. Ringel soliciting a causation opinion. (R. p. 97, lines 5-20.) Additionally, Wheeler specifically testified that she did not go into detail with Dr. Ringel about the specific duties required of her job. (R. p. 96, line 23 – p. 97, line 20.)

The medical records indicate that Wheeler presented to Dr. Robert Ringel on May 17, 2010 with complaints of numbness in both hands. (R. pp. 180-181.) Dr. Ringel noted that his clinical findings were consistent with carpal tunnel syndrome. (R. p. 181.) On May 18, 2010, nerve conduction and EMG testing was showed results consistent with bilateral carpal tunnel syndrome. (R. p. 172-179.) Wheeler returned to Dr. Ringel on June 28, 2010 and July 9, 2010, for evaluations and treatment of her bilateral carpal tunnel syndrome. (R. pp. 169-170.) There is no indication in Dr. Ringel's notes from May 17, 2010, June 28, 2010, or July 9, 2010, that Wheeler or Dr. Ringel felt Claimant's problems were work related. (R. pp. 169 – 170, 180-181.)

On August 10, 2010, Wheeler's attorney wrote a letter to Dr. Ringel soliciting an opinion on the causal relationship between her problems and her job duties. (R. p. 188.) On August 23, 2010, Wheeler returned to Dr. Ringel. (R. p. 168.) Dr. Ringel indicated, "The findings are consistent with a repetitive work injury as a custodian, and I feel this is concurrent with her current occupation, with a reasonable degree of medical certainty." Id.

On October 19, 2010, Dr. L. Edwin Rudisill reviewed Wheeler's medical records and job descriptions. Following his review he opined, "[i]t is my opinion to a reasonable degree of medical certainty that Beverly Wheeler's bilateral carpal tunnel syndrome is not causally related to the duties associated with her job as a custodian with Spartanburg School District Six." (R. p. 187.)

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 135-36, 276 S.E.2d at 306-07.

The appellate court is prohibited from overturning findings of fact of the Commission, "unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based." Lowe v. Am-Can Transp. Services, Inc., 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct. App. 1984) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

> The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for

> further proceedings. The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law. . . .

S.C. Code Ann. § 1-23-380(A)(5) (2007).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DECISION OF THE WORKERS' COMPENSATION COMMISSION FINDING THAT WHEELER FAILED TO PROVE A COMPENSABLE REPETITIVE TRAUMA INJURY PURSUANT TO THE ACT.

Simply put, the issue in this case is factual, and there is substantial evidence in the record to support the finding that Wheeler failed to carry her burden of proof. "[W]hether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011) (citing Hopper v. Terry Hunt Constr., 373 S.C. 475, 479-80, 646 S.E.2d 162, 165 (Ct. App. 2007)). Wheeler has alleged that she sustained a compensable repetitive trauma injury arising out of and in the course of her employment with Spartanburg School District Six. Wheeler is correct in her assertion that the compensability of a repetitive trauma case must be decided pursuant to S.C. Code Ann. § 42-1-172. Murphy v. Owens Corning, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct. App. 2011). "An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." S.C. Code Ann. § 42-1-172(B) (1976). The statute goes on to say that a repetitive trauma injury arises out of employment "only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D) (1976). Medical evidence is defined as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C. Code Ann. § 42-1-172(C) (1976).

A. Wheeler failed to carry her burden of proving a compensable repetitive trauma injury pursuant to the Act.

In the instant case, Claimant has failed to show the facts necessary to prove a compensable repetitive trauma case pursuant to the Act. The Commission did not commit an error of law in this case. The Single Commissioner and the Appellate Panel applied the correct code section to the facts of the case. The Single Commissioner and the Appellate Panel weighed the evidence and found as fact that Wheeler "failed to carry her burden of proving through medical evidence that her carpal tunnel syndrome was causally related to her job as a custodian." (R. p. 58.) They also found that Wheeler's "carpal tunnel syndrome was not caused by the cumulative effects of repetitive traumatic events as required by S.C. Code §42-1-172(A)." (R. p. 59.) Finally, they found as fact that Wheeler "failed to meet her burden of proving that her carpal tunnel syndrome was a compensable repetitive trauma injury under S.C. Code §42-1-172." (R. p. 59.) The Act requires claimant's to show more than *some* evidence of a causal connection between their injury and their employment. Claimants must demonstrate, and a Commissioner must make a finding, that the *preponderance of the evidence* shows a causal connection between the employment and the injury, established by medical evidence. S.C. Code Ann. § 42-1-172 (B) (1976). Additionally, South Carolina Code Ann. § 42-1-172(D) specifically states that a repetitive trauma injury "is considered to arise out of employment only if it is established by medical evidence that there is a *direct causal relationship* between the conditions under which the work is performed and the injury." (emphasis added).

There is no denying that Dr. Robert Ringel stated to a reasonable degree of medical certainty that Wheeler's carpal tunnel syndrome was related to her employment as a custodian. (R. p. 166.) However, as is discussed above, the statute requires more. Wheeler's argument

essentially asks this court to disregard the preponderance of the evidence standard, and replace it with a standard requiring only one opinion establishing causation. The absurd result that would come from such a standard is obvious. Claimants would be able to prove a compensable case with one favorable opinion establishing causation, in the face of numerous opinions that do not. Also, Dr. Ringel stated, "[t]he findings are consistent with a repetitive work injury as a custodian, and I feel this is concurrent with her current occupation, with reasonable medical certainty." (R. p. 123). Dr. Ringel's opinion does not state there is a *direct causal relationship* as required by S.C. Code Ann. § 42-1-172(D).

The Commission found that the preponderance of the evidence did not support a finding that Wheeler carried her burden of proving a compensable repetitive trauma injury. (R. p. 59.) The Commission found that Dr. Ringel's causation opinion was based on "incomplete information at best" because there was no evidence that he "saw a job description, viewed a video of the job, nor was told by the claimant the specific job duties she alleged as the cause of her problem." (R. p. 58.) Dr. Edwin Rudisill provided an opinion to a reasonable degree of medical certainty that Wheeler's carpal tunnel syndrome was not related to her job duties with the Employer. (R. p. 187.) The Commission noted that Dr. Rudisill "had the advantage of reviewing various job descriptions and medical evidence; however, he did not actually examine the claimant." (R. p. 58.) In workers' compensation cases, the Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Brunson v. Am. Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Brunson v. Am. Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct.

App. 2011) (quoting Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004)). After weighing the evidence, the Commission found that Wheeler failed to carry her burden of proving through medical evidence that her carpal tunnel syndrome was causally related to her job. This finding was based on "a review of the evidence, both testimonial and medical." (R. p. 58.)

Wheeler contends that the Commission erred in their consideration of Dr. Ringel's statement. She contends that the mere fact that Dr. Ringel provided an opinion is proof that he believed he had the necessary information to formulate an opinion, "and it would be speculative of the Commission to assume otherwise." However, this is a double-edged sword. It would also be speculative of the Commission to assume that Dr. Ringel had enough information to formulate a reliable opinion regarding the causal relationship between Wheeler's job duties and her carpal tunnel syndrome, as Wheeler testified that she did not go into any detail with Dr. Ringel about the specific duties required of her job. (R. p. 96, line 23 – p. 97, line 20.)

Wheeler contends that the Commission committed an error of law by imposing additional evidentiary requirements with regard to job descriptions and proof of causation. However, this is a misstatement of the issue. The Commission did not impose a new evidentiary requirement, but rather considered the information on which Dr. Ringel's opinion was based in determining the weight to be afforded the opinion. This is apparent in the Appellate Panel's Order finding that Wheeler failed to carry her burden based on a review of the evidence. (R. p. 58.) Based on the substantial evidence in the record, the Court of Appeals correctly affirmed the ruling of the Commission. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999).

B. There is substantial evidence in the record to support the Commission's decision.

Wheeler contends that the Commission's decision is not supported by substantial evidence. "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 135-6, 276 S.E.2d at 307. The medical evidence is discussed at length above. There are two conflicting medical opinions in this case. However, as Lark establishes, the fact that two inconsistent conclusions could be reached does not mean that the Commission's finding is not supported by substantial evidence.

Wholly apart from the medical evidence, there is substantial factual evidence in the record to support a finding that Wheeler failed to carry her burden of proof. South Carolina Code Ann. § 42-1-172(A) defines a repetitive trauma injury as "an injury which is gradual in onset and caused by the cumulative effects of *repetitive traumatic events*." (emphasis added). Section 42-1-172(B) mandates that a claimant must establish that the job consists of repetitive activities. In the present case, substantial evidence in the record supports the Commission's findings that Wheeler's carpal tunnel syndrome was not caused by the cumulative effects of repetitive traumatic events as required by S.C. Code § 42-1-172(A) and that Wheeler's job did not consist of repetitive tasks or activities.

Wheeler alleges that her job duties are repetitive; however, her own testimony clearly establishes that her job was not a repetitive job as required by S.C. Code Ann. § 42-1-172.

Wheeler's testimony is only indicative of working. While all of the job duties she described required the use of her hands, the job duties Wheeler described all vary in the use of the hands and in the order they are performed. Wheeler testified that she uses a push broom, a regular broom, a mop, a vacuum, scrub brushes, and rags to complete her tasks. (R. p. 98, line 24 – p. 100, line 2). Additionally, she empties trash cans, but testified that she has help lifting any heavy trash. (R. p. 100, line 8 – p. 101, line 7). Indeed, the most that she has to lift is approximately thirty (30) pounds. (R. p. 100, lines 21-23). Wheeler admitted that the tasks vary and that she does not perform a couple of tasks or one (1) particular task all day:

Q. (Mr. Griggs) So, you do several different tasks throughout your day, correct?

A. (Claimant) That's correct.

Q. You don't do a couple or one particular task all day every day, correct?

A. That is correct.

Q. And, you do these tasks in varying orders?

A. Yes.

Q. For various lengths of time?

A. Yes.

(R. p. 101, lines 8-17.) While Wheeler's job with Spartanburg School District 6 required the use of her hands, her own testimony establishes that her job was not a repetitive job as required by S.C. Code Ann. § 42-1-172. Working in itself is not compensable. Substantial evidence in the record, specifically Wheeler's own testimony, clearly establishes that her job with Spartanburg School District 6 was not a repetitive job. She did not perform the same tasks throughout the day. In fact, her testimony clearly establishes that she performed a variety of tasks and that she performed each task in varying orders and for various lengths of time.

Wheeler places great emphasis on the fact that the Commission found that there was "no medical evidence to show that pushing a dust mop, cleaning windows, emptying trash cans, cleaning restrooms, dusting, or vacuuming (among other things) puts stress on the same muscle groups." (R. p. 59.) She contends that this finding is not proper because there is no medical evidence demonstrating that carpal tunnel syndrome is muscle-related. However, this is not a finding regarding the medical cause of carpal tunnel syndrome, but rather it is an additional finding that Wheeler's job duties were not repetitive in nature. (R. p. 58.) This is further supported by the Commission's finding of fact number 8. (Id.)

In support of her position, Wheeler cites Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012). This case is distinguishable from the case at bar. In Burnette, the Commission included a finding of fact that contained a medical opinion that was not supported by any evidence from a medical provider. Therefore, the Court of Appeals found that it was "the medical opinion of the single commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012). The Commission's decision in this case does not contain any medical diagnoses or opinions that are not supported by medical evidence in the record. The Commission simply found that Wheeler failed to carry her burden of proving a compensable repetitive trauma injury through medical evidence, and that she failed to prove that her job was repetitive in nature.

The Commission correctly found that Wheeler failed to describe a repetitive task. Accordingly, she cannot prove a compensable repetitive trauma injury without first proving a repetitive task as required by S.C. Code Ann. § 42-1-172. Defendants respectfully request that the Court fully affirm the Decision and Order of the South Carolina Workers' Compensation Commission's Appellate Panel.

C. Wheeler failed to provide timely notice of her injury.

Assuming arguendo that the Court finds that Claimant has met her burden of proving a repetitive trauma injury under S.C. Code Ann. § 42-1-172, which Defendants steadfastly deny, the Court must remand the case to the South Carolina Workers' Compensation Commission to make specific findings on whether or not Claimant provided proper notice as required by S.C. Code Ann. § 42-15-20(C). Remand is proper where the Commission has failed to make essential findings of fact, or the findings made are so indefinite or general as to afford no reasonable basis upon which the appellate court can determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. Turner v. Campbell Soup Co., 252 S.C. 446, 450, 166 S.E.2d 817, 818 (1969).

The Commission did not reach a decision on the issue of notice, and Defendants deny that Claimant provided her employer proper notice as required by S.C. Code Ann. § 42-15-20(C). § 42-15-20(C) states that "notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered . . . that his condition is compensable." There are exceptions to this requirement if the employee provides reasonable excuse and the employer is not prejudiced by the delay. Id.

Claimant has alleged May 18, 2010, as the date of injury. (R. p. 63). Given the date of injury, Claimant's ninety (90) day window to provide notice would have expired on August 15, 2010. It is clear that Claimant did not give notice to the employer or carrier within this window. As pointed out by the Single Commissioner, Claimant is a poor historian and gave a number of different dates as to when she initially reported her claim. (R. p. 54). Claimant seemingly testified that she reported to Ms. Bush in June of 2010, that her hands were bothering her and that the work had caused her problems; however, a review of the testimony on this point is less

than clear or compelling. (R. p. 81, lines 4-20). Additionally, on the next page of the transcript, all of this upon questioning by her own attorney, the Claimant testified that she did not tell Ms. Bush that the work was causing her hand problems:

Q. (Mr. Lister) Did you tell Ms. Bush, the Principal sitting to my right that it was caused by work or hurting you and irritated by work?

A. (Claimant) No, I didn't come out and tell her.

(R. p. 82, lines 7-10).

Later, upon questioning by the Commissioner, the Claimant testified that she did not tell Ms. Bush that the work was causing her problems until after August 17, 2010, which is after the expiration of the ninety (90) day notice window:

Q. (Commissioner Huffstetler) When did you first tell her, not co-workers, when was the first time you told your employer that you thought it was work-related?

A. (Claimant) Tell you the truth, I didn't come out and tell her I thought it was work-related. I didn't come out and tell her that.

Q. When did you?

A. Well, I did come by in August and tell her that the work was irritating my wrists.

Q. Do you know what day in August it was?

A. Let me think. I don't know -- I know it was just a couple of days before school was started, but I don't know what day it was.

Q. I don't know when school starts here, is that early August, late August?

A. I would say it was late August.

Q. Because the real question is was it before or after August 17th?

A. I will say it would be after August 17th.

(R. p. 88, line 11 – p. 89, line 13). Subsequently, Claimant's attorney attempted to rehabilitate her testimony by improperly leading her to testify that she provided notice earlier in August. (R. p. 92, line 22 – p. 94, line 8).

Nonetheless, Claimant's testimony about when notice was given is all over the board, which supports the Hearing Commissioner's finding that Claimant was a poor historian. The principal, Ms. Bush, testified that she first learned of Claimant's allegations in October of 2010, after being contacted by defense counsel. (R. p. 105, line 25 – p. 106, line 3). Ms. Bush testified that she asked Claimant directly in June of 2010, if her problems were work related and Claimant indicated they were not. (R. p. 106, lines 14-24). As for the alleged August notice, Ms. Bush testified that no notice was given. (R. p. 107, lines 4-14). In fact, Ms. Bush testified that Claimant never told her directly that she thought her problems were work related. (R. p. 107, lines 15-19).

The testimonial evidence indicates that Claimant failed to provide the required notice of her alleged repetitive trauma claim. Additionally, Claimant failed to provide a reasonable excuse for her failure to provide notice. Thus, Claimant has failed to satisfy both parts of the notice statute.

While the Commission discussed the likelihood that Claimant may not have provided proper notice to Spartanburg School District six of her alleged work injury, the Commission found that "the issue of notice is not dispositive in this case and a decision is not reached on this issue." (R. p. 59). Since the Commission failed to make essential findings of fact regarding whether or not Claimant provided notice to her employer, which would be an alternative ground to deny Claimant's claim, Defendants respectfully request the Court to remand the case to the

Commission if, and only if, it finds that Claimant has met her burden of proving a repetitive trauma injury under S.C. Code Ann. § 42-1-172.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court fully affirm the Decision and Order of the South Carolina Workers' Compensation Commission's Appellate Panel. Alternatively, if Court finds that Claimant met her burden of proving a repetitive trauma injury under S.C. Code Ann. § 42-1-172, which Defendants deny and contend is not supported by the substantial evidence in the record, Defendants respectfully request the Court to remand the case to the South Carolina Workers' Compensation Commission to make specific findings on whether or not Claimant provided proper notice as required by S.C. Code Ann. § 42-15-20(C).

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2012-213717

Beverly R. Wheeler, Claimant, ... Appellant,

v.

Spartanburg School District Six, Employer and
Wausau Business Insurance Company, Carrier, ... Respondents,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 28, 2014

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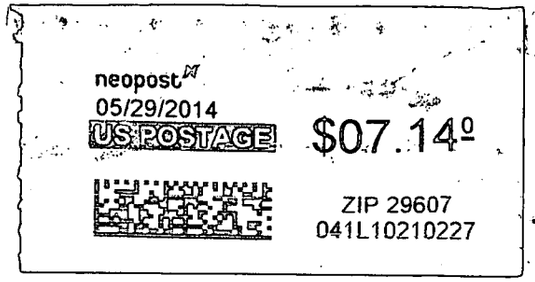

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