mgc

Reply To
WESTON ADAMS, III
Direct Dial: (803) 227-2322
wadams@mgclaw.com

May 26, 2014

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SC Court of Appeals

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Shane Almquist, Employee, Appellant, v. Meditam, Employer, and Guarantee Insurance Company c/o Patriot National Insurance Group, Carrier, Respondents
Our File No.: 20748.12043
Appellate Case No. 2014-000085

Dear Ms. Kitchings:

In response to this Court's letter of deficiency, enclosed please find an original and one copy of Respondents' Initial Brief in the above-captioned matter, corrected to include Ms. Lyall as additional counsel of record. Also, please find the original and one copy of the Proof of Service. Please return the file-stamped copies to my runner. By copy of this letter, I am hereby serving this Initial Brief upon Appellant.

If you have any questions, please contact me.

Very truly yours,

Weston Adams, III

Enclosures

cc: Daniel L. Draisen, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 28 2014
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Gene McCaskill, Susan S. Barden and Andrea C. Roche

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WCC File No. 1208767

SHANE ALMQUIST, EMPLOYEE,..APPELLANT,

v.

MEDITAM, EMPLOYER, AND
GUARANTEE INSURANCE COMPANY, C/O PATRIOT NATIONAL INSURANCE GROUP,
CARRIER,..RESPONDENTS.

CORRECTED INITIAL BRIEF OF RESPONDENTS

Weston Adams, III (SC Bar No. 64291)
McAngus, Goudelock & Courie LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser (SC Bar No. 87124)
735 Johnnie Dodds Blvd., Suite 200
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Kathleen Grey Lyall (SC Bar No. 78684)
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Respondents

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COMMISSION ERR IN FINDING THAT CLAIMANT FAILED TO PROVE THAT HIS ALLEGED INJURY ON MARCH 12, 2012 CONSTITUTED AN INJURY BY ACCIDENT ARISING OUT OF THE COURSE OF EMPLOYMENT?

II. DID THE COMMISSION ERR IN FINDING THAT CLAIMANT FAILED TO PROVE THAT HIS ALLEGED INJURY ON JULY 5, 2012 WAS AN INJURY BY ACCIDENT ARISING OUT OF THE COURSE OF EMPLOYMENT ?

III. DID THE COMMISSION ERR IN FINDING THAT CLAIMANT FAILED TO MEET HIS BURDEN OF PROOF THAT HIS ALLEGED INJURY ON JULY 5, 2012 AGGRAVATED A PRE-EXISTING BACK CONDITION?

IV. DID THE COMMISSION ERR IN ITS CHARACTERIZATION OF TESTIMONY FROM CLAIMANT'S PRIMARY CARE PHYSICIAN; OR IN THE ALTERNATION, WAS ANY SUCH ERROR HARMLESS?

STATEMENT OF THE CASE

This appeal from the Worker's Compensation Commission arises from two incidents that occurred while Claimant was employed by Respondent as a medical transporter. On December 13, 2012, Claimant filed a Form 50 claiming an injury to his back arising from lifting a wheelchair on March 12, 2012, and sought temporary total disability benefits as well as permanent partial disability. On this same day, Claimant filed another Form 50 claiming injury to his back, neck, legs, and head arising from an automobile accident on July 5, 2012 that occurred while transporting patients, and sought temporary total disability benefits as well as permanent partial disability. On January 2, 2013, Respondent Carrier filed its Form 51 denying the claims on multiple grounds. Respondent's Form 51 (Jan. 2, 2013). A hearing was held on April 9, 2013 before the Single Commissioner Aisha Taylor. Decision and Order (June 18, 2013).

Before the Single Commissioner, Claimant argued that his injuries entitled him to a compensation award pursuant to S.C. Code Ann. § 42-9-35 in that the accidents aggravated his pre-existing back condition. Respondents first contended that Claimant failed to prove by a preponderance of the evidence that he suffered an injury as defined under S.C. Code Ann. § 42-1-160. Further, Respondents argued that Claimant failed to prove by a preponderance of the evidence that his subsequent injury aggravated his pre-existing condition as required under S.C. Code Ann. § 42-9-35. In an order dated June 18, 2013, the Single Commissioner agreed, concluding that Claimant did not meet his burden of proof under S.C. Code Ann. § 42-1-160 or S.C. Code Ann. § 42-9-35.

On July 2, 2013, Claimant filed a request for Commission review. Claimant's Form 30 (July 2, 2013). Claimant argued that the Single Commissioner erred in failing to consider the

evidence as a whole, failing to give weight to the testimony of an expert witness, failing to find that Claimant was injured in a car wreck, and finding that Claimant's testimony was not credible. *Id.* In addition, Claimant argued that the Single Commissioner erred in concluding that his claim was not compensable. The Appellate Panel affirmed the Single Commissioner's Order in full. This appeal followed.

STATEMENT OF THE FACTS

Claimant Shane Almquist testified in his deposition that in the early 1990s he suffered an injury to his lower back, mid-back, and neck in a car accident. Almquist Dep. p. 9, line 16 – p. 10, line 11. No medical records concerning this car accident was entered into the record. He testified that during the nine years subsequent to his car accident in 1993, his back had "never felt better." Almquist Dep. p. 10, lines 12-25; p. 27, line 14 - p. 28, line 8. Claimant testified that even up to the day of his first injury at issue here, his back injury had completely resolved. Almquist Dep. p. 27, line 14 – p. 28, line 2.

However, Claimant's medical records consistently describe reports of chronic back pain, which was treated with pain relievers and muscle relaxers. Claimant first became a patient at New Horizon Family Health Services ("New Horizon") in May 2010. APA, p. 151-152. During his initial visits, medical records note that among the medical symptoms he described was back pain, "all-over" arthritic-type joint pain, and muscle spasms. APA, p. 150, 152. A medical report on October 29, 2010 noted obesity as a health problem, and that Claimant's back pain was due to a herniated disc. APA, p. 149. On a follow-up visit on November 8, 2010, he continued to complain of back pain which the medical practitioner noted was likely due to degenerative disc disease. APA, p. 148. On February 8, 2011, he once again listed back pain among his complaints. APA, p. 147. In May 9, 2011, Claimant reported sharp pains in his back that took

his breath away at times. APA, p. 146. Claimant's medical provider noted his degenerative disc disease and that his sharp back pain was occurring more frequently. APA, p. 146. He began working at Meditam in approximately August 2011. Almquist Dep. p. 14, lines 3-6. A month before Claimant's first alleged back injury, he continued to report back pain and muscle spasms. H'rg Tr., p. 29, lines 15-19 (April 9, 2013).

Claimant testified that he initially injured himself while working for Meditam on March 12, 2012 while picking up a wheelchair and putting it into a van. H'rg. Tr. p. 38, lines 6-7 (April 9, 2013). On March 14, 2012, he went to see his doctor complaining of back pain and anxiety. APA, p. 24. His doctor noted that Claimant should refrain from lifting, and excused Claimant from work for one week. APA, p. 25. Claimant testified that he treated with a chiropractor following the March accident and that the chiropractor helped his pain. H'rg. Tr. p. 38, lines 2-5 (April 9, 2013). Claimant next testified that on July 5, 2012 he was stopped at a red light when another driver ran into the back of his van. H'rg. Tr. p. 39, lines 18-19 (April 9, 2013). All of the passengers in the van, including Claimant, were transported to the hospital by ambulance. H'rg. Tr. p. 40, lines 1-3 (April 9, 2013). The van that Claimant was driving sustained what first responders called "minor damage" to the rear bumper and door. APA, p. 8. The accident did not cause any intrusion into the passenger compartment of the van. *Id.* The van's airbags did not deploy, suggesting that the force of the collision was not severe. *Id.* at 9. Claimant was wearing a seat belt when the accident occurred. *Id.* at 8.

Claimant complained of neck pain, headache, and lower thoracic pain. APA, p. 2. He reported that he had a history of back pain. *Id.* He was transported to Greenville Memorial Medical Center. APA, p. 1. X-rays of his lumbar spine showed "no fracture, no subluxation, no bony lesion, no spondylolisthesis." *Id.* at p. 6. No paraspinous soft tissue swelling or

abnormality was found. *Id.* at p. 15. A CT scan of his neck showed no fractures and some evidence of cervical spondylosis. *Id.* at 17-18. His primary diagnosis was cervical strain (whiplash) with an additional diagnosis of back pain, not otherwise specified. *Id.* at p. 3. Claimant was prescribed pain medication and sent home with instructions to follow-up with his primary care physician. Upon his discharge from the emergency room that same day, he was walking without need of assistance. *Id.*

On July 12, 2012, Claimant went to New Horizon for a follow-up visit. APA, p. 27. He complained of back pain. *Id.* He was advised to continue taking his existing medications, and was written out of work for one week. *Id.* at 28. About a month after the car accident, on August 3, 2012, Claimant saw his primary care physician, Dr. Malvern, complaining of back pain. H'rg Tr., p. 21, lines 3-11 (April 9, 2013). She found tenderness in his lower back, and observed that he had difficulty in getting onto and off of the examination table, thus concluding that Claimant was experiencing increased back pain.[1] H'rg Tr., p. 21, line 3 – p. 22, line 9 (April 9, 2013). She opined that, to a reasonable degree of certainty, the car accident aggravated Claimant's preexisting back condition. H'rg Tr. p. 22, lines 10-16 (April 9, 2013).

Claimant was referred to Dr. Michael Reing of Anderson Bone & Joint on November 1, 2012. He was diagnosed with low back pain and physical therapy was recommended. APA, pp. 39-40. On January 24, 2013, Claimant treated with Dr. Reing, reporting that he hurts all over but mostly in the low back and that he was experiencing thoracic pain that takes his breath away. APA, p. 55. An MRI of his lumbar spine showed some degenerative changes, but no frank disc rupture. APA, p. 57. The degenerative changes were not caused by the car accident on July 5,

[1] Although Dr. Malvern attributed Claimant's difficulty in climbing onto the examination table to his back pain, during an independent medical evaluation six months later, Dr. Lee observed the same difficulty and attributed it to Claimant's obesity. H'rg Tr. p. 30, lines 1-13 (April 9, 2013); APA, pp. 155. At the time Dr. Malvern examined Claimant, Claimant weighed 307 pounds. APA, p. 29. At the time Dr. Lee examined Claimant, Claimant weighed 292 pounds. APA, p. 155.

2012. Further, Dr. Reing opined that the degenerative changes would not have been the cause of Claimant's back pain. Reing Dep. p. 21, line 23 – p. 22, line 2.

Dr. Reing initially opined to a reasonable degree of medical certainty that the car accident in July 2012 aggravated a pre-existing back condition. Specifically, Dr. Reing testified "[i]n review of the MRI and examination and his history, which he wouldn't say he had any problems, I would say that the accident was the temporal cause of his pain." Reing Dep. p. 15, lines 20-23. However, after being shown medical records from New Horizon indicating that Claimant had previously herniated his back and had treated numerous times for chronic back prior to the accident, Dr. Reing testified that he could no longer state to a reasonable degree of medical certainty that the back pain was causally related to the accident. Reing Dep. p. 40-41, 47.

Claimant was evaluated by Dr. Daniel Lee of Foothills Orthopedics & Sports Medicine Center on December 26, 2012. Dr. Lee reviewed Claimant's subjective complaints and MRI and noted that his complaints of pain do not anatomically correlate to any of his MRI findings. APA, p 155. Dr. Lee opined that the MRI findings were consistent with pre-existing degenerative changes related to normal living activities and aging. Further, he opined that he did not believe to a reasonable degree of medical certainty that the objective findings were work related. APA, p. 156.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5). *Gray v. Club Group, Ltd.*, 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to § 1-23-380(5), this Court may "reverse or modify the decision of the Commission if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions

or decisions" are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). The Full Commission is the ultimate fact finder in workers' compensation cases. *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 729 (1989). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the finding of facts of the Commission are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-493, 541 S.E.2d 526, 528 (2001). "Whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission, and its finding of fact based on conflicting evidence may not be set aside. *Owings v. Anderson County Sheriff's Dep't*, 315 S.C. 297, 299-300, 433 S.E.2d 869, 871 (1993).

ARGUMENTS

I. The Commission did not err in finding that Claimant failed to prove that his alleged injury on March 12, 2012 constituted an injury by accident arising out of and in the course of employment.

In order to be entitled to benefits under the South Carolina Worker's Compensation Act ("Act"), the claimant must show that he sustained an "injury by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of Chapter 11 of this title." S.C. Code Ann. § 42-1-160(A). An injury is an accident within the meaning of the Act if "if the worker did not intend it or expect it would result

from what he was doing." *Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 155, 719 S.E.2d 288, 291 (Ct. App. 2011). In addition, for an injury to arise of out employment, the injury must be causally related to the conditions of employment. *Clade v. Champion Labs.*, 330 S.C. 8, 11-12, 496 S.E.2d 856, 858 (1998). The burden of proof lies with the Claimant to prove the facts that will bring an injury within the Act. *Id.*

Claimant argues that the Commission committed clear error in finding that he failed to prove by a preponderance of the evidence that he sustained an injury on March 12, 2012 while lifting a wheelchair. In making this assertion, Claimant mistakenly focuses upon the event itself, not the real issue of whether an unexpected injury occurred that was causally related to work-related activity. *See Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 155, 719 S.E.2d 288, 291 (Ct. App. 2011) ("[I]n determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself.").

"[A]n injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing." *Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 155, 719 S.E.2d 288, 291 (Ct. App. 2011). In *Landry*, the claimant had a history of painful bunions on her feet. *Id.* at 151, 289. The claimant was aware that her condition would worsen if she continued to stand on her feet for long periods of time. *Id.* at 153, 290. Yet she took a job as a radiation therapist which required long hours standing. Subsequently, she reported an accidental injury to her feet. The Full Commission rejected the claim after determining that the claimant "had knowledge, through her previous doctor, that prolonged standing would worsen the condition in her feet, yet she continued to work in a job that required her to stand for long periods of time." *Id.* Because the worsening of her foot condition was an expected result of standing for hours every day, the Commission concluded that

the claimant "did not suffer an injury by accident arising out of and in the course of her employment . . . because the worsening of her foot condition was not an unlooked for or untoward occurrence." *Id.*

As in *Landry*, Claimant has failed to establish that his alleged injury on March 12, 2012 was unexpected. Claimant testified that he had a chronic back problem, which he knew would flair up if he over-exerted himself. H'rg Tr., p. 47, line 25 – p. 50, line 14 (April 9, 2013). He would over-exert himself if he undertook activity requiring bending or lifting too much weight. H'rg Tr., p. 47, line 15 – p. 48, line 5 (April 9, 2013). On March 12, 2012, Claimant allegedly injured his back while picking up a wheel chair and putting it into his van. H'rg Tr., p. 38, lines 5-7 (April 9, 2013). Claimant had a history of chronic back pain, and knew that over-exertion would trigger the back pain. Any injury caused by lifting the wheelchair was not unexpected, and therefore, not a compensable injury under the Act. *See Landry v. Carolinas Healthcare Sys.*, 396 S.C. 149, 155, 719 S.E.2d 288, 291 (Ct. App. 2011).

Moreover, Claimant failed to prove that his back pain experienced on or after March 12, 2012 was causally related to his employment. The only evidence establishing that Claimant sustained an injury by lifting a wheelchair on March 12, 2012 is the Claimant's own testimony and reporting to his healthcare provider. However, the Commission found that the Claimant was not credible. Appellate Panel Decision and Order, p. 15 (Dec. 12, 2013). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of courts to weigh the evidence as found by the single commissioner." *Langdale v. Harris Carpets*, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). On February 10, 2012, the month prior to the alleged wheelchair incident, Claimant had been treated for back pain with muscle spasms, likely due to over-exertion. H'rg Tr., p. 29, lines

15-22; p. 65, lines 5-8 (April 9, 2013). Nothing in the record indicates whether this back pain was work-related. Other than Claimant's subsequent reporting of the wheelchair incident, nothing in the record indicates whether the back pain Claimant complained of on March 12, 2012 was simply a flare-up of his back problem he sought treatment for on February 10, 2012, or was a separate injury derived from lifting the wheelchair. Claimant's orthopedist, Dr. Reing, testified that he could not trace Claimant's back pain to the wheelchair incident. Reing Dep. p. 36, lines 2-5. Without corroborating evidence, Claimant has failed to meet his burden of showing that his back pain on or after March 12, 2012 was caused by lifting a wheelchair during the course of employment.

II. The Commission did not err in finding that Claimant failed to prove that his back condition was an injury directly caused by the automobile accident on June 5, 2012.

Claimant failed to prove that his back pain experienced on or after July 5, 2012 constitutes an injury as defined under S.C. Code Ann. § 42-1-160. While there is no question that Claimant was involved in an automobile accident on July 5, 2012 while transporting patients, the issue here is whether the Commission erred in determining that Claimant failed to show by a preponderance of the evidence that he suffered a back injury directly and causally related to this accident. *Clade v. Champion Labs.*, 330 S.C. 8, 11-12, 496 S.E.2d 856, 858 (1998). "When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert." *Brown v. Peoplease Corp.*, 2013 S.C. App. LEXIS 41, 5, 2013 WL 519651 (Ct. App. 2013).

The evidence in this case is insufficient to prove a causal link between his car accident and back injury. On July 5, 2012, the medical transport van that Claimant was driving sustained what first responders called "minor damage" to the rear bumper and door. APA, p. 8. The accident did not cause any intrusion into the passenger compartment of the van. *Id.* The van's

airbags did not deploy, suggesting that the force of the collision was not severe. *Id.* at 9. Claimant was wearing a seat belt when the accident occurred. *Id.* at 8. Claimant complained of neck pain, headache, and lower thoracic pain. He reported that he had a history of back pain. *Id.* He was transported to Greenville Memorial Medical Center. APA, p. 1. X-rays of his lumbar spine showed "no fracture, no subluxation, no bony lesion, no spondylolisthesis." *Id.* at p. 6. No paraspinous soft tissue swelling or abnormality was found. *Id.* at p. 15. A CT scan of his neck showed no fractures and some evidence of cervical spondylosis. *Id.* at 17-18. His primary diagnosis was cervical strain (whiplash) with an additional diagnosis of back pain, not otherwise specified. *Id.* at p. 3. Claimant was prescribed pain medication and sent home. Upon his discharge from the emergency room that same day, he was walking without need of assistance. *Id.*

About a month after the car accident, on August 3, 2012, Claimant saw his primary care physician, Dr. Malvern, complaining of back pain. Hr'g Tr., p. 21, lines 3-11 (April 9, 2013). She found tenderness in his lower back, and observed that he had difficulty in getting onto and off of the examination table, thus concluding that Claimant was experiencing increased back pain.[2] H'rg Tr., p. 21, line 3 – p. 22, line 9 (April 9, 2013). She did not perform any diagnostic testing of Claimant's spine to determine the cause of Claimant's pain. When a medical opinion is derived merely from a "deduction drawn from certain symptoms, the final conclusion remains with the triers of fact." *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 161, 519 S.E.2d 102, 106 (1999). Dr. Malvern did not provide an opinion as to whether the car accident on July 5, 2012

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[2] Although Dr. Malvern attributed Claimant's difficulty in climbing onto the examination table to his back pain, during an independent medical evaluation six months later, Dr. Lee observed the same difficulty and attributed it to Claimant's obesity. Hr'g Tr. p. 30, lines 1-13 (April 9, 2013); APA, p. 155. At the time Dr. Malvern examined Claimant, Claimant weighed 307 pounds. APA, p. 29. At the time Dr. Lee examined Claimant, Claimant weighed 292 pounds. APA, p. 155.

directly caused a new back injury, which is the relevant question at issue at this point.[3] Instead, she opined that the car accident aggravated Claimant's previously-reported back pain which she surmised was caused by degenerative disc disease. H'rg Tr., p. 16, lines 2-14; p. 22, lines 10-16 (April 9, 2013).

Upon referral to an orthopedic specialist, Dr. Reing, an MRI was performed on December 13, 2013. Reing Dep. p. 9, lines 10-16. The MRI showed "degenerative changes to the mid and lower thoracic spine, a small left paracentral herniation of the T3-4 disc, and a subtle central/left paracentral herniation of the T9-10 disc." APA, p. 62. The degenerative changes were not caused by the car accident on July 5, 2012. Reing Dep. p. 21, lines 19-22. Further, Dr. Reing opined that the degenerative changes would not have been the cause of Claimant's back pain. Reing Dep. p. 21, line 23 – p. 22, line 2.

Dr. Reing testified that there was no way to determine if the disc herniation was caused by the car accident on July 5, 2012, or by some other cause. Reing Dep. p. 15, line 23-25. Dr. Reing initially assumed that the herniated discs were due to the July 5, 2012 car wreck. Reing Dep. p. 15, line 16 – p. 16, line 13. However, Claimant failed to inform Dr. Reing of his prior back problems. Reing Dep. p. 36, line 13 – p. 38, line 3. Upon review of medical records from New Horizon, including a medical report dated October 29, 2010 noting that Claimant had back pain secondary to herniated disc, Dr. Reing testified that he could no longer state with a reasonable degree of medical certainty that Claimant's herniated discs were caused by the July 5, 2012 car wreck. Reing Dep. p. 29, line 8 – p. 30, line 15; p. 38, lines 4-9. Because Claimant's medical records showed muscle spasms prior to the car wreck, Dr. Reing also could not state

[3] Claimant's counsel asked Dr. Malvern if she had an opinion as to whether the car wreck on July 5, 2012 aggravated his pre-existing condition, which is an entirely different question than whether the car wreck directly caused a back injury. See H'rg Tr., p. 22, lines 10-16 (April 9, 2013).

with any certainty that Claimant's back spasms were caused by the car accident. Reing Dep. p. 40, line 18 – p. 41, line 25.

Further, an independent medical examination by Dr. Daniel Lee, a certified orthopedist, found that Claimant's back pain is "consistent with preexisting degenerative changes related to normal living activities and aging." APA, p. 156. Dr. Lee noted that "Mr. Almquist's obesity is most likely a contributing factor in his preexisting degenerative changes." *Id.* He concluded that, within a reasonable degree of certainty, that the findings on Claimant's MRI were not work-related. *Id.* Dr. Lee assigned a 0% impairment to Claimant's cervical spine, thoracic spine and lumbar spine. *Id.*

Given Dr. Malvern's lack of a medical opinion concerning causation, the opinion of Dr. Lee that Claimant's back pain was not work-related, and medical records showing back pain and spasms prior to the car accident, there was substantial evidence upon which the Commission could conclude that Claimant failed to prove that his back problems were directly and causally related to the July 5, 2012 incident. Therefore, this Court is bound to uphold the Commission's decision. *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 418, 586 S.E.2d 111, 113 (2003).

III. The Commission did not err in finding that Claimant failed to meet his burden of proof that his alleged injury aggravated a pre-existing back condition.

An injured employee who has a preexisting condition may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that "the subsequent injury aggravated the preexisting condition ...." S.C. Code Ann. § 42-9-35. "A work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is compensable" ... "unless it is due solely to the natural progression of a pre-existing condition." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 295, 599 S.E.2d 604, 613-614 (Ct. App. 2004). The Commission found that Claimant failed to establish by a preponderance of the

evidence that the July 5, 2012 car accident aggravated his preexisting condition. Substantial evidence supports the Commission's finding.

Dr. Lee, after reviewing the medical evidence and evaluating Claimant, opined that Claimant's MRI findings were consistent with preexisting degenerative changes. APA, p. 156. Dr. Reing testified in his deposition that he was unable to state to a reasonable degree of medical certainty as to whether Claimant's alleged work-related accident aggravated his preexisting back condition.[4] Reing Dep. p. 40-41, 47. While Dr. Malvern opined that Claimant's back pain was aggravated by the car accident, she also testified that this opinion was based largely on Claimant's subjective complaints without the benefit of objective test results. H'rg Tr. p. 21, line 5 – p. 22, line 18; p. 30, lines 1-13 (April 9, 2013). When a medical opinion is derived merely from a "deduction drawn from certain symptoms, the final conclusion remains with the triers of fact." *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 161, 519 S.E.2d 102, 106 (1999). More importantly, where there are conflicts in the evidence over a factual issue, as is the case here, "the findings of the Appellate Panel are conclusive." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* The Commission committed no error.

Moreover, as an additional sustaining ground, the Commission properly rejected Claimant's argument that the car accident aggravated his preexisting condition because "the right of a claimant to compensation for aggravation of a pre-existing condition arises only where there

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[4] In his Brief, Claimant asserts that the Single Commissioner's reliance on Dr. Reing's deposition testimony was misplaced as he changed his opinion throughout the deposition. Appellant's Brief, pp. 8-10. However, Dr. Reing's change in opinion was solely based on new evidence presented to him at the deposition showing Claimant's significant history of back problems that Claimant did not inform him of. Reing Dep. pp. 25-36. Had Claimant been forthcoming from the beginning about his prior back problems, Dr. Reing could have potentially stated to a reasonable degree of medical certainty as to whether there was an aggravation of his pre-existing injury.

is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 295, 599 S.E.2d 604, 614 (Ct. App. 2004) (emphasis added). Here, Claimant's back condition was clearly not dormant prior to his alleged work-related injuries. Although Claimant testified in his deposition that his back injury had completely resolved prior to the first alleged work-related injury, he testified before the Single Commissioner that he had experienced problems with his back since 1993 and had never kept his back problem a secret. Almquist Dep. p. 9, lie 13 – p. 11, line 2, p. 27, line 14 – p. 28, line 14; H'rg Tr., p. 44, lines 13-20 (April 9, 2013). He testified that since 1993, he had never lived a day without pain. H'rg Tr., p. 45, lines 17-25 (April 9, 2013). Medical records show that he experienced chronic back pain for at least two years prior to the incidents at issue here. Almquist Dep. p. 27, line 14 – p. 28, line 2; APA, pp. 21-24, 26-27, 29, 145-152. Claimant's primary care physician attributed the pain to progression of degenerative disc disease. H'rg Tr., p. 16, lines 2-14 (April 9, 2013). Subsequently, an MRI confirmed the existence of degenerative changes to Claimant's spine. APA, pp. 62-63. Dr. Lee, an orthopedic specialist, opined that Claimant's back pain was caused by these degenerative changes. APA, p. 156.

IV. The Commission's finding of fact concerning Dr. Malvern is not clearly erroneous; or in the alternative, the Commission's finding constitutes harmless error.

During cross examination of Dr. Malvern, she was asked generally whether, in regard to the Claimant's complaints of back pain, she would typically defer to the opinion of an orthopedist who had examined Claimant and reviewed an MRI. Dr. Malvern answered in the affirmative. H'rg Tr., p. 25, lines 13-18 (April 9, 2013). When questioned about her opinion that the car accident aggravated Claimant's preexisting condition, Dr. Malvern stated that she would defer to the opinion of an orthopedist. H'rg Tr., p. 30, lines 1-16 (April 9, 2013). On re-direct, Claimant's counsel asked Dr. Malvern if she was saying that she was not qualified to

render an opinion on the issue of causation, and Dr. Malvern stated that she was not suggesting that. H'rg Tr., p. 31, lines 12-17 (April 9, 2013). The Commission found that "although Claimant's family physician, Dr. Malvern, testified that she believed the March 12, 2012 and July 5, 2012 injuries aggravated Claimant's pre-existing back injuries, she admitted that as an internal medicine specialist, she would have to defer to the orthopedist who treated Claimant." Appellate Panel Decision and Order, Finding of Fact 3 (December 12, 2013). Claimant asserts that the Commissioner committed reversible error by arguably misstating Dr. Malvern's testimony regarding her deference to an orthopedist. Appellant's Brief, pp. 5-6; Appellate Panel Decision and Order, Finding of Fact 3 (December 12, 2013).

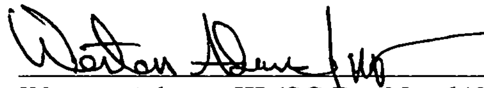
Appellant takes issue with the Commission's finding as contrary to his understanding of Dr. Malvern's testimony as only stating that she would defer to an orthopedist concerning treatment, not causation. However, on re-direct, Dr. Malvern merely said that she was qualified to render an opinion on causation, which does not negate her testimony that she would generally defer to the opinion of an orthopedist who had examined the Claimant and reviewed an MRI of Claimant's back. There is no clear error here; however, to the extent that this Court views the Commission's finding differently, such error was harmless. "An error is not reversible unless prejudice to the complaining party has resulted therefrom." *McCollum v. Singer Co.*, 300 S.C. 103, 109, 386 S.E.2d 471, 475 (Ct. App. 1989). Any error of fact in how the Commission characterized Dr. Malvern's testimony concerning her opinion or qualifications would not have changed the Commission's conclusion. Even if the Commission had accepted Dr. Malvern's opinion that Claimant's back pain was aggravated by the car accident, Dr. Lee, a certified orthopedist, opined that Claimant's complaints of back pain were not caused or aggravated by the car accident on July 5, 2012. APA, p. 156. Where there are conflicts in the evidence over a

factual issue, "the findings of the Appellate Panel are conclusive." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004).

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's Order.

Respectfully submitted,



Weston Adams, III (SC Bar No. 64291)
McAngus, Goudelock & Courie LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser (SC Bar No. 87124)
735 Johnnie Dodds Blvd., Suite 200
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Kathleen Grey Lyall (SC Bar No. 78684)
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Respondents

May 28, 2014

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION
THE HONORABLE GENE MCCASKILL, SUSAN S. BARDEN AND ANDREA C. ROCHE

WCC FILE NO. 1208767

SHANE ALMQUIST, EMPLOYEE, ... APPELLANT,

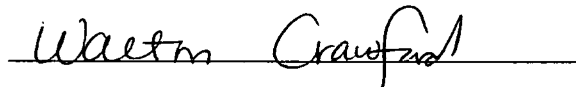
v.

MEDITAM, EMPLOYER AND
GUARANTEE INSURANCE COMPANY C/O PATRIOT NATIONAL INSURANCE GROUP
CARRIER, ... RESPONDENT.

CERTIFICATE OF SERVICE

I certify that I have served a copy of Corrected Initial Brief of Respondent by placing in the United States Mail, postage prepaid, on the 28th day of May, 2014, addressed to counsel of record, as follows:

Daniel L. Draisen, Esquire
Law Offices of Krause, Moorhead and Draisen, P.A.
207 East Calhoun Street
Anderson, South Carolina 29621



Walton Crawford
Paralegal to Weston Adams, III
McANGUS GOUDELOCK & COURIE LLC
Post Office Box 12519
Meridian 10th Floor
1320 Main Street
Columbia, SC 29211-2519
(803) 779-2300