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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

CIRCUIT COURT

THE HONORABLE J. MARK HAYES, II

CASE NO.: 2007-CP-42-0132

Robin Carson Cantrell, Petitioner

versus

Carolinas Recycling Group, Employer, and Wasau Insurance Companies, Carrier, Respondents

---

BRIEF OF PETITIONER

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ISSUES ON APPEAL

1. Whether the Court of Appeals and Circuit Court improperly found that there was "substantial evidence" to support the Commission's decision.

2. Whether the Court of Appeals and Circuit Court incorrectly applied the applicable Standard of Review when reviewing a decision made by the Workers' Compensation Commission.

3. Whether the Court of Appeals and Circuit Court erred in failing to properly apply the law in South Carolina relating to injuries sustained on the job as a result of repetitive motion trauma.

STATEMENT OF THE CASE

This is a Workers' Compensation appeal from a decision by the Court of Appeals. The case history is as follows:

November 2, 2004:	The Claimant, Robin Carson Cantrell (Petitioner), filed a Form 50 alleging injuries to his right shoulder and right upper extremity (bicep). He later filed an Amended Form 50 specifically alleging repetitive motion trauma.
November 23, 2004:	The Employer/Carrier, Carolinas Recycling Group (Respondent), filed a Form 51, denying compensability.
February 27, 2006:	The case was tried before Commissioner J. Michelle Childs
June 23, 2006:	Commissioner Childs issued an Order finding that Petitioner's injuries were not compensable. The Petitioner appealed the Commissioner's Order to the Full Commission.
November 20, 2006:	The case was argued before the Full Commission.
January 9, 2007:	The Full Commission affirmed Commissioner Childs' Order in its entirety. The Petitioner appealed the Order to the Court of Common Pleas.
September 20, 2007:	The parties submitted briefs, and oral arguments were presented to Circuit Judge J. Mark Hayes, II.
November 17, 2008:	Judge Hayes issued an Order affirming the Full Commission in its entirety.
November 26, 2008:	The Petitioner filed a Motion to Reconsider and to Alter or Amend.
March 9, 2009:	The parties submitted briefs, and oral arguments were again presented to Circuit Judge J. Mark Hayes, II.
May 16, 2009:	Judge Hayes issued an Order denying the Motion to Reconsider and reaffirming the Full Commission's Order in its entirety. The Circuit Court's Order was appealed to the Court of Appeals.
March 29, 2011:	The Court of Appeals issued an unpublished opinion affirming the decision of the Circuit Court and Full Commission in its entirety.
April 28, 2011:	The Petitioner filed a Motion to Reconsider with the Court of Appeals, which was denied May 26, 2011.
July 12, 2012:	This Court granted the Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The Petitioner started working for the Respondent, Carolinas Recycling Group (Employer), in 1992. He drove a tractor-trailer truck, and his duties consisted primarily of picking up, securing and delivering scrap metal (R. 96-98). His job required significant overhead work and was strenuous (R. 98-101). Even the human resource director for the Employer, Betty Hammett, characterized the job as being physically demanding (R. 56, 139). The Petitioner worked 12 hour shifts and could work as much as 60 hours a week (R. 67, 140-141).

The Petitioner was an excellent employee. Up until the time of the injury associated with this action, he worked full duty and lost no time from work except for visits to the doctor (R. 57, 117). In September 1999, the Petitioner injured his right shoulder at work while unloading a trailer (R. 100, 243). This injury was treated as a Workers' Compensation injury, and the Employer filed a First Report of Injury with the Workers' Compensation Commission (R. 143-146, 243). He was treated by the company physician (Dr. Alday), but lost no time from work except to see the physician (R. 147-156).

In September 2000, the Petitioner again injured his right shoulder while opening a steel door on his truck (R. 148). He again went to the company doctor for treatment (R. 147-156, 226-239). The medical records showed that he had a possible small rotator cuff tear (R. 226-239). In fact, one of the physicians (Dr. Czuba) suggested that the Petitioner might one day benefit from rotator cuff surgery (R. 117-118).

After these two injuries to his shoulder, the Petitioner was given conservative treatment in the form of cortisone injections (R. 226-239). The injections gave some temporary relief, but The Petitioner's shoulder continued to bother him (R. 101-104). Despite being in discomfort, the Petitioner did not miss any work, and he continued to work full-time without any restrictions (R. 154-155). He controlled his pain by taking Tylenol, Aleve, and Goody Powders (R. 100-103).

Of particular significance, as the Petitioner continued to work, the pain, over time, grew in severity (R. 101-104). By June 2004, the pain had increased to the point that even shifting gears on his truck created jabbing pain (R. 102-103). Finally, on Tuesday, June 15, 2004, the Petitioner called his supervisor and related that he would not be able to come to work (R. 102-104, 106, 110, 253-254, 256-258). After calling into work, the Petitioner went to his family physician, Dr. Graham Dickerson (R. 240). Dr. Dickerson referred the Petitioner to an Orthopedist, Dr. Wallace Boyd (R. 222). An MRI was performed, which revealed a rotator cuff tear (R. 241).

In August 2004, Dr. Boyd performed surgery and repaired the torn rotator cuff (R. 262). During the surgery, Dr. Boyd also discovered a torn bicep. Both injuries were repaired at the same time (R. 262). Dr. Boyd characterized the Petitioner's injury as one of a "chronic nature," and he related that the job activities certainly could have played a part in the chronic tear of the shoulder (R. 223). The Petitioner was given an impairment rating of 14% to his shoulder based on the rotator cuff tear injury (R. 223).

A medical evaluation was also performed by Dr. Arnold Batson. This physician also concluded that the Petitioner had suffered "chronic injuries" that developed over a period of time

and became progressively worse as a result of the Petitioner's physically demanding work (R. 181-183, 188). Dr. Batson even went so far as to say that "it is most probable that [the Petitioner's] injury is related to work" (R. 224-225).

When the Petitioner called on Tuesday, June 15, 2004 to tell his supervisor that he was unable to come into work, the Employer automatically treated his claim as being non-work related, and the Employer filled out an application for short-term disability benefits (R. 60-62; 136-137, 163). The Petitioner was never informed of his options, and he did not know how the Employer was processing his injury (R. 60-65, 67-69, 75-80, 91, 104-108). The Employer just processed the claim as being a non-work related injury (R. 64-65). Betty Hammett, the Human Resource Director who handled insurance matters, was familiar with repetitive motion trauma cases, and she had handled these kind of claims in the past (R. 138). In her deposition, and at the hearing, Ms. Hammett acknowledged that had she known all of the information presented to her, she would have treated the Petitioner's injuries as being a repetitive motion trauma, compensable under the Workers' Compensation Act (R. 65, 163).

In order to receive short-term disability benefits, a weekly indemnity claim form had to be submitted. In the case at bar, the Petitioner never filled out or signed a claim form, and a reading of the record shows that the claim form submitted was not authentic. The Petitioner testified that he did not sign the short-term disability benefits form (R.104). Additionally, Betty Hammett, who was required to signed off on the form, testified that she could recognize the Petitioner's handwriting and that the handwriting and signature did not appear to be the Petitioner's (R. 61-64). Ms. Hammett, who was in charge of handling all insurance matters, testified that she could not say for certain who wrote the information on the form (R. 61-64).

She also testified that she did not know whether the Petitioner ever even saw the form until the present litigation began (R. 64). Ms. Hammett's testimony was even stronger in her deposition, where she repeatedly testified that it did not appear that the Petitioner either filled out the short term disability form or signed it (R. 157-162).

The Petitioner was ultimately terminated because the 14 weeks of post surgery physical therapy took longer than the company would allow (R. 67-70). The Petitioner never received any Workers' Compensation benefits (R. 70). It was stipulated that the Petitioner's compensation rate was the maximum for 2004, which was $577.73 (R. 59). According to his 2004 Wage Statement (W-2), he had earned income of $29,231.00 from January 1, 2004 through June 14, 2004 (R. 58). This would reflect an average weekly wage of $1,218.00 (R. 113).

After being released by Dr. Boyd, the pain in his shoulder still prevented him from steering a truck and changing gears (R. 110-113). At the time of the hearing, although he had reached maximum medical improvement, he was still taking three (3) prescription medications on a daily basis for the arm and shoulder pain: Flexeril, Lortab (a narcotic), and Celebrex (R. 114).

Because the Petitioner had not worked since June 14, 2004, he was fired on October 15, 2004, while still recovering from surgery (R. 108-110). He was able to find a job as a truck driving instructor, and he began employment on August 8, 2005 (R. 110). A driving instructor job does not require strenuous physical activity (R. 110-112). With this job, the Petitioner earned $33,000.00 per year (R. 112); he was earning $60,000.00 per year with the Employer (R. 113).

The Petitioner was also evaluated by a Vocational expert, Dr. Benson Hecker, who concluded that due to his injuries, the Petitioner was employed in the best position available with his physical limitations and was earning as much as he was capable of earning (R. 244-246).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions made by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Although an appellate court cannot substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact, the Court can reverse where the decision is affected by an error of law. Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005). On appeal, the appellate court is asked to decide whether the Commission's decision is unsupported by substantial evidence or is affected by some error of law. Id.; Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). The appellate court can reverse or modify a decision if the findings are: (a) affected by an error of law; (b) clearly erroneous in view of the reliable and substantial evidence in the whole record; (c) arbitrary or capricious; or (d) are characterized by an abuse of discretion. See Reese v. CCI Construction Co., 334 S.C. 600, 514 S.E.2d 144 (Ct. App. 1999).

In the case at bar, it is respectfully submitted that the decisions of the Full Commission, Circuit Court, and Court of Appeals fail to apply this standard of review by allowing clear abuses of discretion and errors of law, and by failing to correctly determine the substantial evidence in the Record.

ARGUMENT

The Decisions of the Court of Appeals and Circuit Court are skewed in many ways:

(a) The Courts found that substantial evidence existed to support the Commission's decision, but they did not identify substantial evidence that could legitimately support the Commission's decision;

(b) The Courts misconstrued and misapplied the applicable standard of review, and gave such an enormous amount of deference to the Commission, that the Courts prevented a thorough review of the Record on appeal;

(c) The Courts allowed an incomplete and clearly erroneous Order of the Commission (which was affected by errors of law and clear abuses of discretion) to be affirmed; and

(d) The Courts failed to properly apply the law and standard of review, and thereby failed to act as courts of review.

A reading of the Opinion of the Court of Appeals and the Order of the Circuit Court demonstrate that both appellate tribunals misapplied the law and misinterpreted their duties as appellate courts. Both Courts gave complete deference to the Commission and did not consider the actual evidence in the Record.

I. Abuse of Discretion - Evidence Indicating Shoulder Injury

On appeal from the Full Commission, the Circuit Court recognized the lack of evidence to support the Commission's findings; however, the Court gave deference to the Commission and found that substantial evidence existed (R. 16, 18, 20, 21). By way of example, the Circuit Court found that since there was a "possibility that the Carowinds trip aggravated the pre-existing medical problems" (R. 20), the holding of the Commission must be affirmed. A possibility or scintilla of evidence is not substantial evidence. The reasoning used by the Circuit Court and Court of Appeals shows multiple abuses of discretion and a complete failure to follow the law.

The Circuit Court made the following findings: (a) the "Carowinds event" is not specific in the record, and it is not discernable from the testimony of the physicians (R. 18); (b) the testimony of Betty Hammett does little to support the Respondent's position, and the source of her information is speculative (R. 18); (c) the Weekly Indemnity Claim Form was a forgery, and there was no testimony to show where the reference to Carowinds came from (R. 18); (d) the medical evidence strongly supports a finding that the Petitioner's injury was work related (R. 20); (e) based on its reading of the evidence in the Record, the Circuit Court would have reached a different conclusion (R. 21); and (f) the logic of the Commissioner is supported by substantial evidence if the medical information is not weighed. Despite these findings by the Circuit Court, the Court of Appeals held that the Circuit Court correctly found that there was evidence that the Petitioner had injured his shoulder during a trip to Carowinds.

The Court of Appeals affirmed the Circuit Court, but in doing so, only looked at three (3) sources of evidence to find substantial evidence to support a finding that the Petitioner's injury occurred at Carowinds: (1) A Weekly Indemnity Claim Form; (2) Hearsay statements made by Betty Hammett; and (3) A statement made by the Petitioner to his family physician that he had been to Carowinds the previous weekend. It is respectfully submitted that the Court erred in considering this evidence, and the Court also erred in holding that these three (3) sources constituted substantial evidence that the Petitioner's injury was sustained at Carowinds, instead of being work-related.

A. **Weekly Indemnity Claim Form** - Even though the Commission failed to rule on the authenticity of the form, the Circuit Court found the form to be a forgery (R. 18). At the

hearing, there was no evidence presented to dispute the Petitioner's testimony that he neither filled out nor signed the form. In fact, the Employer's human resource director (Betty Hammett), who was the only other witness, stated that she recognized the Petitioner's handwriting and signature, and that the Petitioner did not sign or fill out the form. She further testified that she signed the form, but she had no idea who completed it (R. 60-65, 76-77, 82-84, 92-94, 104, 157-162). In addition to the above facts, the document contains incorrect dates, as it is undisputed that the Petitioner worked on Monday, June 14, 2004, which was after the trip to Carowinds and prior to the Petitioner's phone call to the Employer in which he indicated that he was unable to come to work.

Even though the Court found the form to be a forgery, it still considered the contents of the form in making a finding that substantial evidence existed. This was an error of law and an abuse of discretion for the following reasons: (i) The form could not be authenticated; (ii) No evidence was presented to show that the Petitioner had any knowledge of the form's existence; (iii) No testimony was presented to establish where the form originated; (iv) The source of the information contained in the form could not be determined; and (v) The document was an admitted forgery.

B. Hearsay Statements / Testimony of Betty Hammett – Betty Hammett attempted to testify that Kelly Owens (co-employee) had told her that the Petitioner said he had injured his shoulder at Carowinds (R. 73). These statements were objected to as being hearsay, and this objection was sustained by the Commissioner (R. 73). However, the Commissioner, Full Commission, Circuit Court, and Court of Appeals all used these hearsay statements to conclude that substantial evidence existed to support a finding of non-compensability. A full

reading of Ms. Hammett's testimony shows that she did not know what caused the Petitioner's injury at the time the Weekly Indemnity Claim Form was submitted. However, after learning all of the information presented in the case, she was of the opinion that the Petitioner's injury was the result of repetitive motion trauma (R. 65).

In relying on the hearsay statements, the Court of Appeals held that hearsay evidence was admissible because it was corroborated with "other evidence." The Court of Appeals found that the "other evidence" was:

(1) The statement contained in the short-term disability form. [This was addressed above. And, the Circuit Court found that this was a forgery.]; and

(2) The statement made by the Petitioner to his doctor, Dr. Graham Dickerson. [The Petitioner did not state that the trip to Carowinds caused his injury. He stated that his shoulder started hurting after going to Carowinds (R. 240).] This is addressed in the next argument.

Even if we were to assume that the Petitioner made statements to Ms. Owens or to Ms. Hammett that he thought he injured his shoulder at Carowinds, these statements would not be controlling. In the case of McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992), this Court held that a layman's self diagnosis of his injury is not the standard. Causation is determined by the treating physician who is able to observe the medical evidence as an expert.

More importantly, all of the medical evidence showed that the Petitioner's injury was chronic, not acute. Thus, the Petitioner's injury developed over a period of time, and it was opined by at least one of the physicians that it was "most probable" that the injury was work related as a result of his strenuous job duties (R. 224-225). The Circuit Court even recognized that the medical evidence was strongly in favor of finding that the Petitioner's injury was work-related (R. 20).

Since the medical evidence shows that the nature of the Petitioner's injury was chronic, rather than acute, any alleged self-diagnosis made by the Petitioner should have no bearing on the finding of compensability, or the finding of whether substantial evidence existed to support the Commission's decision. Simply put, there is no evidence that the Petitioner sustained an injury while at Carowinds.

In summary, since these statements were found to be hearsay, and since these statements (if made) would constitute an uncontrolling self-diagnosis, it was an abuse of discretion to use these statements to find substantial evidence.

C. **Statement to Dr. Dickerson** - The Circuit Court and Court of Appeals placed weight on the office notes of Dr. Dickerson, the family physician of the Petitioner. The notes say that the pain "began following going to Carowinds this weekend and riding several fast moving roller coasters" (R. 240). There is no mention of Carowinds in any of the other medical records. The statement made by the Petitioner to his physician was likely historical information, which was taken out of context (R. 119-120). There is nothing contained in this statement that identifies Carowinds as the cause of the pain, and there is absolutely no evidence that the Carowinds trip caused an acute injury. [Similarly, there is nothing in Dr. Dickerson's notes which make reference to the Petitioner's 1999 and 2000 injuries, or to the Petitioner's on-going discomfort since these injuries.]

Just like the hearsay statements made by Ms. Hammett, even if we were to assume that the Petitioner told Dr. Dickerson that he thought he injured his shoulder at Carowinds, this statement is not controlling pursuant to the reasoning set forth in McGuffin, *supra*. All of the medical evidence shows that the Petitioner's injury was chronic, not acute. Any statement made

by the Petitioner to the contrary would merely constitute a self-diagnosis and would not be controlling because the statement is contrary to the actual medical evidence. It was an abuse of discretion to use this statement to find that there was substantial evidence to support a finding that the Petitioner's injuries occurred at Carowinds.

II. Standard of Review - Substantial Evidence Supports Compensability

In addition to the abuses of discretion, the Circuit Court and Court of Appeals failed to apply the appropriate standard of review with respect to "substantial evidence." Both Courts held that there was substantial evidence to support the Commission's findings of fact. However, as previously explained, there was no substantial evidence in the Record to support the Commissioner's findings. None of the evidence relied upon (as outlined above) should have been considered by either of the Courts.

A reading of the Record shows that the substantial evidence supports a finding that the Petitioner's injuries were work-related and compensable:

(a) The Petitioner began working for the Employer in 1992, and his job required strenuous overhead work (R. 56, 67, 95-101, 139-141);

(b) The Petitioner sustained two (2) work-related injuries to his shoulder, one in September 1999, and the other in September 2000, both of which required medical treatment (R. 100, 143-156, 226-239, 243). The Petitioner was even told that he may have a small rotator cuff tear and may benefit from surgery in the future (R. 117-118, 226-239);

(c) The treatment given for the 1999 and 2000 injuries was conservative, and the pain in the Petitioner's shoulder continued, and it continued to worsen (R. 100-104);

(d) The Petitioner's job duties never changed after these injuries (R. 101-104, 154-155);

(e) By mid-June 2004, even basic tasks like shifting gears in his truck caused excruciating pain (R. 102-103);

(f) The Petitioner worked on Monday, June 14, 2004, and the next day, he called in to tell his supervisor that the pain was too bad for him to come to work (R. 102-104, 106, 110, 253-254, 256-258);

(g) The Petitioner went to his family physician (Dr. Dickerson) on Tuesday, June 15, 2004, and Dr. Dickerson referred him to Dr. Boyd. An MRI showed a rotator cuff tear with no acute fracture or dislocation (R. 222, 240-242);

(h) In August 2004, Dr. Boyd performed surgery to fix the torn rotator cuff, as well as a partially torn bicep (R. 110);

(i) Dr. Boyd opined that the Petitioner's injuries were chronic in nature, and he indicated that the Petitioner's job certainly could have played a part in the chronic tear (R. 223);

(j) Dr. Arnold Batson evaluated the Petitioner and concluded that he suffered from chronic injuries that developed over a period of time and got progressively worse as a result of his physically demanding job (R. 181-183). He also opined that it was most probable that the Petitioner's injuries were work related (R. 224-225);

(k) The Petitioner did not have any other jobs, and he did not engage in any sports or other activities outside of work that involved repetitive motions (R. 100); and

(l) Compensability was denied because of an alleged injury at Carowinds; however, there is no evidence to show that an injury occurred at Carowinds. Further, the description of the injuries by the treating physicians is not consistent with an injury being sustained at Carowinds.

The evidence in this case supports only one logical conclusion: The Petitioner sustained a chronic tear to his rotator cuff as a direct result of his continuous repetitive traumatic work while working for the Employer. The undisputed evidence shows that the Petitioner sustained shoulder injuries in 1999 and 2000 while he was at work. There was also undisputed evidence that the Petitioner continued his strenuous work and that his pain continued to increase. There is no evidence to support a conclusion that the injury occurred anywhere other than at work.

All of the medical evidence shows that the Petitioner's injury was chronic, rather than acute. This fact, alone, rules out a finding that the Petitioner's injury occurred at Carowinds.

In light of the fact that there is no substantial evidence to support the Commission's decision, the Circuit Court and Court of Appeals blatantly erred by failing to apply the standard of review to reverse the Full Commission. This error is made more egregious by the fact that the

Court used hearsay evidence and the "possibility" of other evidence to conclude that substantial evidence existed to support the Commission. This is not a proper application of the standard of review.

The obvious failure of the Circuit Court and Court of Appeals to perform their duties as appellate tribunals is clearly illustrated by a statement contained in the Circuit Court's Order. After making a finding that the medical evidence supported a finding of compensability, the Circuit Court found that the Commission rightfully disregarded this medical evidence because there was a "possibility" that there was an aggravation of a pre-existing condition at Carowinds (R. 20). This finding was affirmed by the Court of Appeals. Substantial evidence is not "possible" evidence, nor is it a mere scintilla of evidence. Substantial evidence is evidence that, considering the Record as a whole, would allow reasonable minds to reach the conclusion reached by the Commission.

III. Issues Not Addressed By Court of Appeals

Because the Circuit Court and Court of Appeals found that there was substantial evidence to support the Commission's decision, they did not address the remaining issues raised on appeal. The Circuit Court acknowledged that there were "obvious items in the record" that were incorrect [R. 17]; however, the Court never identified or ruled on these matters. A Rule 59(e) Motion was filed in the Circuit Court to preserve these matters for appeal, and the Circuit Court still did not correct the matters.

A. **Petitioner's Earnings** - The Single Commissioner found that there was a stipulation that the Petitioner's "average weekly wage" was $577.73 (R. 2). This finding was clearly erroneous, yet it was affirmed by the Full Commission, the Circuit Court, and the Court of Appeals. The hearing transcript indicates that the parties stipulated that the Petitioner's "compensation rate" was $577.73 (R. 59). The Petitioner's average weekly wage was in dispute. The Employer contended that the average weekly wage was $653.04, while the Petitioner contended that his average weekly wage was substantially higher (R. 57-59, 111-113).

This erroneous ruling is illustrative of the lack of understanding by the Commissioner, as well as the indifference shown by the Full Commission, Circuit Court, and Court of Appeals.

The Petitioner made a claim for injuries to two body parts, his right arm and right shoulder. The Petitioner presented evidence on this, as well as a lessening of his earning capacity. A vocational expert found that the Petitioner's new job as a truck driving instructor was the best position available to him and that he was earning all that he was capable of earning (R. 244-246). However, the Commissioner failed to rule on whether the Petitioner had a lessening of his earning capacity as a result of the injuries.

If the Petitioner's injuries are found compensable, he has the option to proceed under the general disability sections (§42-9-10 and §42-9-20) or under the scheduled member section (§42-9-30). Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002). Therefore, findings on the Petitioner's average weekly wage and the lessening of earning capacity are important.

B. Extent of Petitioner's Injuries / Impairment – The Petitioner alleged injuries to his right bicep and right shoulder. Dr. Boyd and Dr. Batson provided testimony as to whether these were separate anatomical entities. Since the initial hearing, the Supreme Court has found that the shoulder and arm are separate anatomical entities. Therrell v. Jerry's Inc., 370 S.C. 22, 633 S.E.2d. 893 (2006). Even though this is now established law in South Carolina, the Commissioner failed to identify the body parts that were injured. This is a significant issue if the Petitioner's injuries are found to be compensable. Furthermore, even though the Commissioner was presented with evidence regarding impairment to the Petitioner's arm and his shoulder, she made no ruling as to the extent of the impairment.

C. Set-Off - The Petitioner contended that the Employer should not be permitted to set off short term disability payments from any Worker's Compensation award. Even though this was one of the issues, the Single Commissioner never made a ruling on the issue. It is respectfully submitted that this Court should issue an Order holding that the Employer is not entitled to a set off.

S.C. Code Ann. §42-9-210 provides that an employer may, subject to the Commission's approval, deduct prior payments from amounts to be paid through workers' compensation. However, in the case of Muir v. C.R. Bard, Inc., 336 S.C. 266 (Ct. App. 1999), the Court held

that in order for payments to be offset or deducted, the payments must have been made with reference to liability under the provisions of the South Carolina Workers' Compensation Act and intended to be in lieu of workers' compensation benefits.

In the case at bar, it was undisputed that the Employer did not make the short term disability payments in lieu of workers' compensation (R. 44-45). Accordingly, it is respectfully submitted that this Court should issue an Order holding that the Employer is not entitled to offset any of the short term disability payments from the workers' compensation payments to be paid to the Petitioner.

D. **Nature of Injury** – A reading of the Commissioner's Order, which was affirmed in its entirety by the Full Commission, Circuit Court, and Court of Appeals, shows that these lower courts did not understand the nature of the Petitioner's claim and they also failed to clearly review the evidence. The Petitioner made a claim for repetitive motion trauma (R. 34). The Petitioner's last day of work was June 14, 2004 (R. 7, 34-35, 57-59, 60-62, 63-64, 103-104, 106). The Commissioner, however, interpreted the claim as being for "an alleged accident" that "occurred on June 15, 2004" (R. 2, 4, 7). The Petitioner never claimed that a specific injury occurred on this date. The Record is clear that the Petitioner claimed he had ongoing pain that finally got to the point that he became unable to work.

E. **Weekly Indemnity Claim Form** – The Commissioner made specific findings with respect to the Weekly Indemnity Claim form that are not supported by the evidence. By way of example:

(i) The Commissioner gave credibility to the form, saying that Betty Hammett "had no belief that it was not the Claimant's signature on the form" (R. 7). However, Ms. Hammett's testimony, both in her deposition and at the hearing, is clear that she did not believe the Petitioner signed the form, and she clearly testified that she had no idea who completed the form (R. 61-62, 64, 157-161).

(ii) The Commissioner found that Betty Hammett discussed the Weekly Indemnity Claim Form with the Petitioner's fiancé, Kelly Owens (R. 5, 7). The Record does not support this finding. Ms. Hammett testified that she thought she got the form from a doctor (R. 73). She testified that it was possible that Kelly Owens could have assisted in the preparation of the form (R. 74). She also testified that Ms. Owens may have brought the form to her (R. 75). No evidence was presented to show a discussion about the form.

F. **Findings on Credibility** – The Commissioner made findings on the credibility of the Petitioner, as well as Betty Hammett, who was the only other witness. There was no factual basis provided in the Order to explain the rulings on credibility. Instead, the Commissioner made cursory conclusions that Ms. Hammett was credible and the Petitioner was not credible. Of significant concern is the fact that findings on "credibility" are difficult to review on appeal. In this case, the testimony of Ms. Hammett and the Petitioner were nearly identical. It is respectfully submitted that there was no need, or basis, for the Commissioner to make findings on credibility.

G. **Improper Deference to Commission** – At the initial hearing, the Single Commissioner was asked (and she agreed) to compare signatures to determine whether the Weekly Indemnity Claim Form was a forgery (R. 74-77). The Commissioner, however, failed to make a ruling.

The Circuit Court found that the Petitioner's signature on the form was a forgery. The Court held that it was "uncontested" that the signature on the form was not the Petitioner's (R. 18). Further, the Court found that there was no independent recollection on the part Betty Hammett [who had signed off on the form] to establish a foundation for the form (R. 18). Despite making these findings, the Circuit Court gave deference to the Commission, stating "the Commissioner felt the Carowinds information contained in the claim form was credible" (R. 18).

The Circuit Court held that the Petitioner's treating physicians were "less than consistent" as to causation, and the Court further held that the doctors had no opinion as to the cause of the injury (R. 20). This is not true. A reading of the medical records and depositions of the treating physicians shows that the physicians were consistent in their opinions. The physicians were of the opinion that the Petitioner's injuries were chronic, not acute. They were also of the opinion that strenuous physical activity, such as the Petitioner's employment, would worsen a previously injured shoulder. Dr. Batson even opined that the Petitioner's injury was most probably caused by his work related activities.

The Circuit Court acknowledged that there was little evidence to support the Employer's position (R. 18). The Court found that Ms. Hammett's testimony [incorrectly written as "Ms. Dooley's testimony"] was based on speculative information (R. 18). The Court found that the medical testimony was significant; that the medical evidence satisfied the test to establish

relatedness; and that the medical evidence strongly supported compensability (R. 20). The Court even indicated disagreement with the Commission's decision (R. 20-21); however, the Court felt compelled to give great deference to the Commission.

The Circuit Court's Order (R. 15-21) illustrates a serious misunderstanding and misapplication of well established law. The Circuit Court and Court of Appeals gave an extreme amount of deference to the Commission, to the point that these Courts are not even functioning as courts of review.

H. **Dr. Batson's Testimony** – The Commissioner's Order makes as a finding that "Dr. Batson testified that the Claimant complained of right shoulder problems to him on June 15, 2004 following a weekend trip to Carowinds...and that it is reasonable to assume that the Claimant's weekend trip to Carowinds may have aggravated and worsened his right shoulder" (R. 7-A). This finding is blatantly wrong. Dr. Batson had no knowledge of any trip to Carowinds (R. 171). Further, the Claimant saw Dr. Dickerson on June 15, 2004, not Dr. Batson (R. 74, 240).

With respect to the finding on Dr. Batson's opinion, this finding is taken out of context. Dr. Batson was extensively questioned on cross-examination in his deposition in order to get Dr. Batson to state that Carowinds played a part in the Petitioner's injury. While Dr. Batson stated that many things can irritate a rotator cuff (R. 176-180), he did not know anything about the Carowinds trip, and he was of the opinion that the Petitioner's injuries were chronic, not acute (R. 171, 173, 175-176 181-182,187-188). He opined that the injuries "most probably came about as a result of the physical activities involved in his position of employment." (R. 182-183, 224-225).

IV. Misunderstanding of Law on Repetitive Motion Trauma

In addition to the Circuit Court and Court of Appeals' failure to follow and apply the standard of review as the appellate tribunals, both Courts showed a misunderstanding of the law on repetitive motion trauma claims.

A. Overview of Law

The case at bar presents an issue of compensability in a repetitive motion trauma case. One of the threshold requirements for compensability in a Workers' Compensation case is that the injury must be the result of an "accident." S.C. Code Ann. §42-1-160. This element is not defined by statute, and our Courts have continued to define and redefine the element when new factual situations have been presented. The modern view of what constitutes an accident does not focus on a specific event, but rather on the injury itself. Stokes v. First National Bank, 306 S.C. 46, 50, 410 S.E. 2d 248, 250 (1991) [citing Hiers v. Brunson Construction Co., 221 S.C. 212, 231, 70 S.E. 2d 211, 220 (1952)]. Our Courts have recognized that a "causative event" is not required for an injury to be deemed an injury by accident. Sigmon v. Dayco Corp., 316, S.C. 260, 262, 449 S.E. 2d 497, 498 (Ct. App. 1994).

In South Carolina, as opposed to some other jurisdictions, a mishap is not required for an injury to be deemed an injury by accident. There only has to be an unexpected injury that occurs while the employee is performing his usual duties in his customary manner. Pee v. AVM, Inc., 352 S.C. 167, 171, 573 S.E. 2d 785, 787 (2002). The Supreme Court adopted this view based on public policy and indicated that

> [i]f [the injury] results from the conditions under which the work is carried on, there is no reason why it should not be held compensable. In such case, it is one of the casualties of business; and it is the purpose of the compensation statutes to place the burden of casualties upon the business and not upon the unfortunate employee.[1]

Id. (quoting Hiers v. Brunson Construction Co., *supra*). To put it simply, for an injury to be deemed to be "by accident," the injury only has to be unexpected from the worker's point of view. Pee v. AVM, Inc., *supra*.

The issue of the compensability of injuries that arise from repetitive motion trauma is relatively new in South Carolina. In 2002, the Supreme Court first held that an injury that arises as a result of repetitive motion trauma is a compensable injury and meets the definition of injury by accident because it is an unforeseen injury caused by trauma. Id., 352 S.C. at 174, 573 S.E. 2d at 789. In Pee, the Court addressed some concerns that are certainly applicable to the case at bar.

One of the concerns involved the lack of a definite time of the occurrence of the injury. The Court indicated that definiteness of time is certainly relevant for purposes of causation; however, it is not required for an injury to be deemed an injury by accident. Id., 352 S.C. at 172, 573 S.E. 2d at 788. The Court drew an analogy between an injury caused by repetitive trauma and an injury in the form of a disease. The Court felt that the legislature clearly intended to provide for compensability even though the injury or disease developed gradually. Id. The Supreme Court recognized that repetitive motion trauma cases are unique, and that the injury has characteristics of both an accidental injury and an occupational disease (i.e. the cumulative effect of repeated and distinct events that ultimately produce the disability) Id., 352 S.C. at 173, 573 S.E. 2d at 788; however, the Court concluded that the injury should be treated as an injury by accident, as opposed to an occupational disease.

[1] In the case at bar, the Petitioner gave the Employer 12 years of dutiful service without missing any time (R. 117).

B. Application of the Law to Present Case

A reading of the Record shows that the Commission abused its discretion in finding that the Petitioner's injuries were not compensable. The Commission's decision was clearly erroneous in view of the reliable and substantial evidence of the whole record. The legal analysis used by the Commission, which was affirmed by the Circuit Court and Court of Appeals, shows that the Commission and the appellate courts failed to understand or consider the unique characteristics of injuries caused by repetitive motion trauma.

The Commission's decision, which was affirmed in its entirety by the Circuit Court and Court of Appeals, was based on a misunderstanding of the facts and of the law. Specifically, the Commission looked at the Petitioner's claim as being one for an injury that occurred on June 15, 2004, rather than a repetitive motion trauma injury. The Court's attention is invited to the following findings by the Single Commissioner:

- Stipulation #5 - The Commissioner stated that the Petitioner was seeking benefits "based upon an alleged accident which occurred on June 15, 2004...." (R. 2).
- Statement of the Case - The Commissioner held that the Petitioner "claims he sustained injuries to his right upper extremity on June 15, 2004..." (R. 4).
- Finding of Fact #2 - The Commissioner held that the Petitioner's "alleged injury of June 15, 2004 is not compensable" (R. 7).

The Commissioner referred to the injury as occurring on a specific day (6/15/04), which the Record shows was the day that the Claimant called the Employer to state that he was unable to come to work. The Petitioner worked the previous day, but it was not until June 15, 2004 that the pain became so intolerable that he was unable to report for work (R. 101-104, 106, 253-254, 256-258).

The nature of repetitive trauma injuries is that they occur over a period of time, and each day of exposure is another "accident" causing the injury. In the present case, the last "accident" was Monday, June 14, 2004, when the Petitioner was at work. In Bass v. Isochem, 365 S.C. 454, 617 S.E. 2d 369 (Ct. App. 2005), Judge Anderson described a repetitive motion trauma injury as follows:

> There is NO substantial evidence in the record to support a factual finding that [the Claimant] suffered and sustained a single, identifiable injury by accident... The only evidence in the record is that [the Claimant] suffered and sustained a repetitive trauma injury... over a period of time resulting in disability...

The Record in the case at bar shows a factual setting similar to Bass. The Petitioner sustained an injury, which occurred over a period of time due to his repetitive physical employment activities. During this time, he served his Employer dutifully by missing no time from work, other than to see the company doctor.

The Circuit Court and Court of Appeals affirmed the Commission's decision in its entirety. While the Court of Appeals provides no legal analysis on repetitive motion trauma injuries, the Circuit Court makes findings in its Order that clearly show a failure to understand the law on repetitive motion trauma injuries.

As previously stated, one of the significant statements made by the Court which showed a misunderstanding and misapplication of the law is found on page 6 of the Circuit Court Order (R. 20). The Court made a finding that the medical evidence supported a claim for compensability; however, the Court went on to state that there was a "possibility that the Carowinds trip aggravated the pre-existing medical problems to the affected area of his upper body" (R. 20). This statement shows error in two ways:

(1) The statement shows that the Court failed to apply the standard of review. The Court recognized that there was substantial evidence in favor of compensability. However, the Court gave deference to the Commission and concluded that substantial evidence existed to support the Commission's finding by concluding that there was a "possibility" that Carowinds was the source of the injury. Under on the standard of review, a "possibility" does not create substantial evidence.

(2) The statement shows that the Court either failed to understand or failed to apply the substantive law. The Record shows that the Petitioner's injury was chronic and developed over a period of time. The Petitioner had been suffering from pain in his shoulder since 2000, and it had progressively gotten worse. After the trip to Carowinds, the Petitioner worked the following Monday. It was not until Tuesday that he called to tell his Employer that he was unable to return to work. Therefore, the last "accident," or last day of exposure that resulted in the disability, was his last day at work. Even if it were assumed that there was some aggravation at Carowinds (no evidence supports this), under the law for repetitive motion trauma, it was the Petitioner's last day at work (last day of exposure) that caused the disability.

CONCLUSION

The Record shows that the Petitioner sustained a repetitive motion trauma injury as a result of his employment duties. The finding by the Circuit Court and the Court of Appeals that the injury was caused at Carowinds is clearly erroneous. Both Courts abused their discretion by considering a forged document, hearsay statements, and speculative evidence. Both Courts failed to review the Record to determine whether substantial evidence existed to support the Commission's decision. Instead of acting as courts of review, both Courts gave excessive deference to the Commission, and a serious injustice has been created.

The Workers' Compensation Act is a statutory remedy, which takes away one's common law right to bring suit. As a result, the Worker's Compensation Act should be liberally construed in furtherance of the purposes for which it was designed, and any reasonable doubts as to construction should be resolved in favor of the claimant by including him within the coverage of the Act rather than excluding him. Davis v. S.C. Department of Corrections, 289 S.C. 123, 345 S.E.2d 245 (1986) (citing O'Briant v. Daniel Construction Company, 279 S.C. 254, 305 S.E.2d 241 (1983)). While the case at bar is not one where liberal construction is necessary to find compensability, it is readily apparent that the Commission and appellate courts failed to consider this well established principle.

The Court of Appeals' Opinion is unpublished and therefore does not create binding precedent; however, it does cause confusion with respect to the applicability of established legal principles, and the decision creates a substantial injustice. Our appellate courts not only establish law; they also serve the purpose of reviewing decisions of the lower courts to ensure uniform

application of the law. The Circuit Court and Court of Appeals failed to apply established law to the facts of this case, and they allowed an injustice by the Commission to be upheld.

In light of the foregoing, it is respectfully submitted that the Circuit Court and Court of Appeals were in error, and the Petitioner respectfully asks this Court to reverse the decision of the Circuit Court and Court of Appeals.

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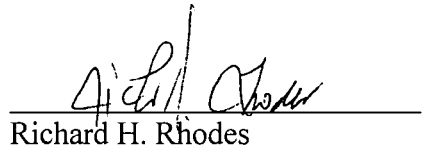
By: _____
Richard H. Rhodes
William H. Rhodes

July 24, 2012

CERTIFICATE OF COUNSEL

This is to certify that the Appendix to Petition for Writ of Certiorari complies with the South Carolina Appellate Court Rule 242 (e).



Richard H. Rhodes
Attorney for the Petitioner

August 1, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
CIRCUIT COURT
THE HONORABLE J. MARK HAYES, II

CASE NO.: 2007-CP-42-0132

Robin Carson Cantrell, Petitioner

versus

Carolinas Recycling Group, Employer, and Wasau Insurance Companies, Carrier, Respondent

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PROOF OF DELIVERY

This is to certify that on the 1st day of August, 2012, the undersigned, secretary to Richard H. Rhodes, Esq., served three (3) copies of the **PETITIONER'S BRIEF** by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

Cynthia C. Dooley, Esquire
Carmelo B. Sammataro, Esquire
P.O. Box 1473
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Attorneys for the Respondent

JO ANN CHAMPION

SWORN to before me this 1st
day of August, 2012.

(SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 11-16-15

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August 1, 2012

RECEIVED
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S.C. Supreme Court
pm 8-1-12

Ms. Linda Allen
1231 Gervais Street
Columbia, SC 29201

Re: Robin Carson Cantrell vs. Carolinas Recycling Group, et al
Appellate Case No. 2011-194426

Dear Ms. Allen:

I have enclosed an unbound set and twelve (12) additional copies of the Appendix. Also, I have enclosed an original unbound copy and fourteen (14) additional copies of the Petitioner's Brief.

Additionally, I have enclosed Proof of Service showing that I served three (3) copies of the Petitioner's Brief on the opposing counsel.

Sincerely,

Richard H. Rhodes

RHR/jc
Enc.

cc: Cynthia C. Dooley, Esquire
Carmelo B. Sammataro, Esquire
P.O. Box 1473
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