THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
G. Thomas Cooper, Jr. Circuit Court Judge

WCC File No. 1004913

Latonya Footman, Employee, ... Petitioner,

v.

Johnson Food Services, LLC, Employer, and
The Hartford, Carrier ..... Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 240(e) and 242, SCACR, Respondents oppose Petitioner Latonya Footman's, Claimant below, Petition for Writ of Certiorari ("Petition"). Claimant has raised no valid or important factual or legal issues that warrant this Court's review of her workers' compensation claim. Despite Claimant's inflated rhetoric, she presents no novel questions of law, shows no conflict between the Court of Appeals' decision in this case with a prior decision of this Court, and raises no constitutional issues or federal questions. There was no dissent in the Court of Appeals' decision in this case.

Furthermore, when stripped of its hyperbolic and misleading assertions, Claimant's arguments boil down to no more than an attack on how the Commission weighed the expert testimony and evidence presented in this case, and the Commission's disability award which Claimant's counsel candidly admitted is a factual finding, (Appx. p. 206, lines 19-22), subject to review under the substantial evidence rule. Rather than attacking the disability rating in a direct and straightforward manner, Claimant attacks from the side, picking away at some of the peripheral findings that support the Commission's award.

Although her goal unarguably is to convince this Court she is entitled to a higher disability award, Claimant attacks two of the Commission's findings of fact, both of which support but are not essential to the disability rating awarded by the Commission, as amended by the Circuit Court. First, Claimant takes issue with the Commission's finding that she was released to work without restrictions and that she has returned to work, full duty, with both of her employers. Second, she challenges the Commission's statement that it gave great weight to a medical record from Claimant's own expert that indicates inconsistencies in her right grip strength testing. Despite the Commission's statement

that its Decision was based on its review of all of the evidence and testimony presented to the hearing commissioner, (Appx. 29), Claimant wants this Court to accept, first that the two issues she raises warrant review and should be resolved in her favor, and second, by implication, that these two issues were the only "material support" for the Commission's disability rating which she argues should be overturned. She is wrong on all fronts and her Petition should be denied.

STATEMENT OF THE CASE

Claimant works as a cook for Johnson Food Services, providing meals at Fort Jackson. (Appx. p. 162, lines 4-22). She holds a second job providing in-home care and driving for the Babcock Center.

Claimant suffered work-related bilateral injuries to both of her arms on September 6, 2006. (Appx. p. 34). Specifically, Claimant alleged she suffered from bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. (Appx. p. 75).

After extensive treatment, including two carpal tunnel release surgeries, on April 5, 2011 Respondents filed a Form 21 Application to Stop Payment of Benefits. (Appx. pp. 63-68). The Form 21 was filed on the basis that Claimant's authorized treating physician, Dr. Michael S. Green, determined that Claimant reached maximum medical improvement (MMI) on March 30, 2011. After determining Claimant was at MMI, Dr. Green assigned a two percent (2%) impairment rating to the left upper extremity and a two percent (2%) impairment rating to the right upper extremity, both in 2008 and again in March 2011. (Appx. pp. 66-67). Respondents asserted that Claimant was entitled to an award of permanent partial disability benefits based on the impairment ratings provided by Dr. Green.

Claimant maintained that she was entitled to an award of permanent partial disability benefits in excess of the impairment ratings provided by Dr. Green. (Appx. pp. 75-76) (Id. p. 155, line 22 – 157,line 22). More specifically, Claimant presented the diagnostic report of Dr. Joseph P. Jackson, who conducted an Independent Medical Examination ("IME") of Claimant pursuant to a request by Claimant's attorney. In a report dated April 20, 2011, Dr. Jackson assigned a ten percent (10%) impairment rating to the left upper extremity and a ten percent (10%) impairment rating to the right upper extremity. (Appx. pp. 255-256). Claimant conceded that she was not seeking additional medical treatment absent a change of condition for the worse. (Appx. p. 157, lines 16-22).

The parties were heard by Hearing Commissioner Susan S. Barden on June 9, 2011. (Appx. pp. 152-194). At the hearing, Claimant testified that the most strenuous part of her job with Babcock Center was driving the patients to their activities in a van. (Appx. p. 163, line 22 – 164, line 1). She testified that she helped prepare meals, assisted with the clean-up as asked, and drove the patients. (Appx. p. 182, line 2 – 183, line 15). She testified that driving caused her a great deal of pain. (Appx. 176, lines 1-4).

Claimant acknowledged that she was sent to Dr. Jackson by her attorney. (Appx. p. 184, lines 16-17). Her major complaint about Dr. Green was that "he will say you need to do this and you need to do that. But he wouldn't like break it down to me what he was doing. So when I go to Dr. Jackson he basically breaks it down and explains to me what was going on." (Appx. p. 166, lines 10-14). Although she testified that she felt that Dr. Jackson was more likely to listen to her, (Appx. p. 191, lines 14-16), she also

admitted that her counsel was paying Dr. Jackson's medical bills. (Appx. p. 191, line 22 – 192, line 12).

Claimant testified that she went back to work after each carpal tunnel surgery. Although she testified that Dr. Jackson set limitations for her of only ten servings on a pan, she acknowledged that "[t]o be honest it's not practical to do that." (Appx. p. 168, line 20 – 170, line 3). She said she "looked in [her] records and saw 25 pounds" which she tried to abide by. (Appx. p. 173, lines 19-25). Claimant specifically agreed that she is able to perform her job duties and responsibilities at Johnson Food Services. (Appx. p. 178, lines 22-25). Although she testified that, if she has pain or difficulty, her supervisor, Ms. Parnell, provides her with help, when asked:

> Q: And have you gone to Ms. Parnell at times and informed her of problems you were having performing certain activities at work?
>
> A: I don't think I have ... I know at first when I was hurting or whatever I did used to complain.

(Appx. p. 179, lines 10-17). Although she continued to state that they have "a good crew. She always has somebody with us or whatever, you know," and that when she has problems, someone assists her, (Appx. p. 179, line 20 – 180, line 5), it appears that those statement's relate to "at first when [she] was hurting..." She confirmed that she was not wearing any type of brace of assistive device on her hands or wrists and the job she is doing today is essentially the same job she was doing in 2006. (Appx. p. 180, lines 9-22). She testified that she only takes over the counter pain medications "[m]aybe twice a week, if that." (Appx. p. 187, line 25 – 188, line 8).

On September 16, 2011, the Hearing Commissioner issued her Decision and Order, determining that Claimant sustained compensable injuries to the right and left

upper extremities as a result of Claimant's September 6, 2006 work-related accident. (Appx. pp. 3-15). The Single Commissioner concluded that Claimant was entitled to an award of six percent (6%) of permanent partial disability benefits to the right and left arm, respectively, pursuant to S.C. Code Ann. § 42-9-30(13). (Appx. 13-12). The Single Commissioner further concluded that the greater weight of the evidence supported a finding that the Claimant reached maximum medical improvement on March 28, 2011 and that she was not entitled to future medical treatment pursuant to S.C. Code Ann. § 42-15-60. (Appx. pp. 11-14).

Claimant filed a Form 30 Request for Commission Review ("Form 30") on September 20, 2011, raising numerous exceptions to the Decision and Order. (Appx. pp. 80-84). An Appellate Panel of the Full Commission heard argument on March 19, 2012 and, after reviewing the award and evidence presented to the Hearing Commissioner, (Appx. p. 29), issued its Decision and Order of the South Carolina Workers' Compensation Commission on May 30, 2012. ("Commission Decision") (Appx. pp. 16-39). The Commission affirmed the Decision and Order of the Hearing Commissioner in its entirety, with one exception.[1]

The Commission found Claimant reached MMI on March 28, 2011 and awarded her a permanent partial disability award of six percent (6%) to each upper extremity. The Commission noted that, although Dr. Green's assignment of impairment ratings were "somewhat inconsistent or, at the very least, ambiguous," the Commission's disability

[1] Respondents acknowledged before the Circuit Court that the Commission inadvertently decreased Claimant's award by awarding only twenty-two (22) weeks instead of twenty-six and four tenths (26.4) weeks of benefits. This was a scriveners' error. (Appx. p. 224, line 19 – 225 line 1).

award was based on "other factors as noted herein." (Appx. pp. 34-37). In particular, the Commission pointed to:

1) the rating Dr. Green gave Claimant in 2008 (Appx. pp. 270, 297);
2) Dr. Green's Form 14B dated September 18, 2008 (Appx. 302);
3) Dr. Green's 2011 expert opinion that Claimant sustained a 2% impairment to her "left upper extremity and/or right upper extremity," (Appx. pp. 66, 308);
4) Deposition testimony of Dr. Green, pages 26-28, in which he stated that "two to five percent range is certainly kind of within the realm of what [he] would ascribe" to Claimant's injuries, but he "certainly wouldn't go further than that," (Appx. p. 340, line 18 – 342, line 3); and
5) Deposition testimony of Dr. Green, pages 33-34, in which he agreed that Claimant had a two percent rating to each upper extremity, and that the two to five percent ranges he discussed earlier were "applicable to each of the carpal tunnels," (Appx. p. 347, line 18 – 348, line 15).

Although the Commission considered and weighed the impairment rating assigned by her IME physician, Dr. Jackson, the Commission gave greater weight to other factors, including the ratings provided by Dr. Green. The Commission noted that, "to his well-deserved credit (as far as being candid is concerned), after Dr. Jackson noted inconsistencies in Claimant's right grip strength testing," he pointed this out to her. The Commission gave "this record great weight for the reason that these are the notes of Claimant's own expert." (Appx. pp. 35-36). The Commission also noted that Claimant "takes no prescription medication for her causally related conditions," taking over-the-counter medications "every now and then," and that she had been "released with no restrictions and has returned to work (full duty) with both of her employers." (Appx. p. 36).

Claimant timely appealed to the Circuit Court. A hearing was held before Judge G. Thomas Cooper, Jr. on March 6, 2013. On April 1, 2013, the Circuit Court issued an Order affirming the Commission Decision, with a modification to correct a scrivener's

error related to the number of weeks of compensation awarded by the Commission. (Appx. pp. 41-60). On April 15, 2013, Claimant filed a Notice of Motion and Motion to Alter or Amend Judgment. (Appx. pp. 143-151). By Order dated June 3, 2013, the Circuit Court denied the Motion to Alter or Amend Judgment. (Appx. pp. 61-62).

Claimant timely appealed to the Court of Appeals, which decided this appeal on the Record and the briefs. In an unpublished opinion, the Court of Appeals affirmed the Commission Decision. (Appx. pp. 402-403). Claimant moved for rehearing, which was denied. (Appx. p. 420).

Claimant now seeks review by this Court.

STANDARD OF REVIEW

Review by this Court is not automatic or by right. Instead, it is a matter of "sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Those reasons include, but are not limited to, whether there is a novel question of law, a dissent in the decision of the Court of Appeals, the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, where substantial constitutional issues are directly involved, or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the U.S. Supreme Court. Id.

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The

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 an error of law. S.C. Code Ann. § 1-23-380(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).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached; at the same time, it is "something less than the weight of the evidence." Grayson v. Carter Rhoad Furn., 317 S.C. 306, 309, 454 S.E.2d 320, 321 (1995). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by

different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"). "Where there is conflicting medical evidence, the findings of fact of the commission are conclusive." Grayson, 317 S.C. at 309, 454 S.E.2d at 321-22.

ARGUMENT

I. The Court of Appeals properly affirmed the Commission's disability award.

Although Claimant does not list this as an issue in her Petition, it is clearly apparent that her real goal is to convince this Court that she is entitled to an increase in her permanent partial disability award. Reversing the two issues she does raise – whether the Commission finding that she was released to work with no restrictions, and the Commission's assignment of weight to statements made by her IME physician – provide her no substantive relief in and of themselves. Instead, she is attacking those two findings for no other reason than to argue she is entitled to a greater disability award. Respondents address this issue up front, as this issue puts the rest of her Petition in perspective.

First, as Claimant's Counsel recognizes, a disability rating is a finding of fact. (Appx. p. 206, lines 19-22); *see also* Fishburne, 384 S.C. at 86, 681 S.E.2d at 600 (the determination of the extent of an injured worker's disability "is a question of fact for

determination by the Appellate Panel and will not be reversed if it is supported by competent evidence"). That finding will be upheld on appeal so long as it is supported by substantial evidence in the record, even where there may be conflicting evidence. Determining a disability rating is, "more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses." Burnette v. City of Greenville, 401 S.C. 417, 429, 737 S.E.2d 200, 206-207 (Ct. App. 2012).

Here, the Commission's disability rating is supported by substantial evidence it specifically identified as support for its award. That evidence consists of: 1) the rating Dr. Green gave Claimant in 2008 (Appx. pp. 270, 297); 2) Dr. Green's Form 14B dated September 18, 2008 (Appx. 302); 3) Dr. Green's 2011 expert opinion that Claimant sustained a 2% impairment to her "left upper extremity and/or right upper extremity," (Appx. pp. 66, 308); 4) Deposition testimony of Dr. Green, pages 26-28, in which he stated that "two to five percent range is certainly kind of within the realm of what [he] would ascribe" to Claimant's injuries, but he "certainly wouldn't go further than that," (Appx. p. 340, line 18 – 342, line 3); and 5) Deposition testimony of Dr. Green, pages 33-34, in which he agreed that Claimant had a two percent rating to each upper extremity, and that the two to five percent ranges he discussed earlier were "applicable to each of the carpal tunnels," (Appx. p. 347, line 18 – 348, line 15).

Thus, there is reliable, probative and substantial evidence in the record that supports the Commission's disability rating. Respondents note that the Commission did not identify the two issues that Claimant raises to this Court as essential or key to its disability award. (R. pp. 34-36). The fact that there might be conflicting evidence or that

a court might reach a different conclusion is of no import. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528; Sharpe, 336 S.C. at 160, 519 S.E.2d at 105.

All of the above puts the two arguments Claimant seeks to have this Court review in perspective. Regardless of whether Claimant was released to work with or without restrictions, and regardless of how the Commission weighed the conflicting medical evidence, which is after all its prerogative, Grayson, 317 S.C. at 309, 454 S.E.2d at 321-22, reliable, probative and substantial evidence supports the Commission's disability award, Claimant's true target. Thus, there is no reason for this Court to review the peripheral issues Claimant raises in her lateral attack on the Commission award, and her Petition should be denied.

II. The Court of Appeals properly affirmed the Commission's finding of fact that Petitioner was released to return to work with no restrictions.

Although not essential to its disability award which is supported by reliable, probative and substantive evidence, the Commission's finding of fact that Claimant was released without restrictions, and returned to full duty with both of her employers is supported by substantial evidence. Dr. Green released Claimant on December 27, 2010, noting that her "strength should continue to improve as the scar tissue matures ... Patient can progressively use the hand as tolerated." She was instructed to return if she had any further problems. Dr. Green did not impose any restrictions or limitations on Claimant but released her on a "prn basis" noting that she can progressively use the hand as tolerated. (Appx. 289).

Claimant interprets this statement to mean that she was released by Dr. Green with restrictions. Respondents, and apparently the Commission, the Circuit Court and the Court of Appeals disagree. Patently, a difference in the inferences drawn from the

evidence does not constitute a lack of evidence. Instead, where "conflicting inferences may be reached from the evidence ... the findings of the Commission thereabout [are] binding on this Court ... on appeal." Canady v. Charleston County Sch. Dist., 265 S.C. 21, 27, 216 S.E.2d 755, 758 (1975).

The cases cited by Claimant do not advance her case. In Sanders v. Richardson, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968), the Commission wrongly held the employer had notice where the claimant did not tell his employer he had had an accident or injury at work, but only said that he was feeling badly during the workday. In Hutson v. South Carolina State Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012), this Court overturned a Commission decision concerning wage loss that was based entirely on the claimant's speculation that he understood what was entailed in running a restaurant and believed he could make a success out of such a venture, despite a vocational specialist's conclusion that the claimant possessed no transferrable skills from his prior years as a manual laborer. And in Glover v. Rhett Jackson Co., 274 S.C. 644, 647, 267 S.E.2d 77, 79 (1980), the claimant conceded the medical evidence did not support his theory that a work-related blow to his arm was causally related to his liposarcoma but, instead, urged the Commission to rely on his lay testimony and circumstantial evidence to prove causation.

Here, there is no lack of support for the Commission's finding, or even an absence of disputed fact, as Claimant suggests, but a difference in the inferences drawn from the evidence in the record. "In all workmen compensation proceedings the Industrial Commission is the fact finding body, and our court will not disturb its findings if supported by reasonable inferences drawn from the testimony." Compton v. Town of

Ivy, 256 S.C. 35, 41, 180 S.E.2d 645, 647 (1971). As noted above, where more than one reasonable inference can be drawn from the evidence, the Commission's findings will be upheld. Id. at 41, 180 S.E.2d at 648; Canady, 265 S.C. at 27, 216 S.E.2d at 758 (where "conflicting inferences may be reached from the evidence ... the findings of the Commission thereabout [are] binding on this Court ... on appeal"); Robinson v. City of Cayce, 265 S.C. 441, 444, 219 S.E.2d 835, 836 (1975) (the "Commission's findings may be based on reasonable inferences drawn from the testimony," and a reviewing court may not "substitute its opinion of the facts when the Commission's finding is supported by competent evidence").

Furthermore, the two cases Claimant relies on most heavily for her argument that the Commission Decision should be overturned because she did not return to work without restrictions, Grayson v. Carter Rhoad Furn., 317 S.C. 306, 454 S.E.2d 320 (1995) and Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012), involved whether the claimant had returned to work without restriction for purposes of S.C. Code Reg. § 67-504, which does not apply in this case. Unlike a ruling under S.C. Code Reg. § 67-504, a disability award does not depend on or require proof that a claimant has returned to work without restriction. Thus, neither Grayson nor Cranford advances her case, as the Commission's disability award does not depend on a finding that she has been released without restrictions and recognizes some degree of disability.

Even if those cases were applicable here, which Respondents dispute, the statements relied on in those cases are fundamentally different from Dr. Green's release. In Grayson, when the claimant was released he was "warned 'he should be somewhat careful with lifting, etc.'" 317 S.C. at 308, 454 S.E.2d at 321. In Cranford, the

claimant's physician discharged him "with instructions to refrain from 'heavy lifting or strenuous activity' and to return the following week." 399 S.C. at 69, 731 S.E.2d at 305. Here, in contrast, Dr. Green released Claimant on a "prn basis" and told her that her "strength should **continue to improve** as the scar tissue matures ... Patient can **progressively** use the hand as tolerated." She was instructed to return if she had any further problems, but not given any follow-up appointments. (Appx. 289) (emphasis added). Progressively means, "favoring or advocating progress, change, improvement, or reform, as opposed to wishing to maintain things as they are ... making progress toward better conditions ... characterized by such progress, or by continuous improvement."[2] Thus, Dr. Green clearly anticipated Claimant would be able to use her arms more and more and the speed of her progress would be dictated by how she tolerated use. He did not warn her against any particular activity or tell her she should be careful with any particular movements. Thus, his statement to her is fundamentally different from the statements at issue in Grayson and Cranford.

The fact that Dr. Jackson may have imposed restrictions on Claimant is irrelevant, given the applicable standard of review. Anderson, 343 S.C. at 487, 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive); Pack, 381 S.C. at 536, 673 S.E.2d at 466-67 (it is the Commission's prerogative to believe or disbelieve expert testimony). Given this dispute over whether Dr. Green released her with or without restrictions, her assertion that this Court can decide this issue as a matter of law is both odd and incorrect.

[2] http://dictionary.reference.com/browse/progressively%20?s=t.

Roper v. Kimbrell's of Greenville, 231 S.C. 453, 99 S.E.2d 52 (1957) and Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994) do not advance her position either. Instead, those cases confirm that a disability rating may be made on the Commission's weighing of medical and lay testimony as well as other evidence in the record. Claimant's attempts to elevate a determination as to whether a claimant has been released to work without restriction as a necessary and essential part of a disability rating are unsupported, illogical and should be rejected. Furthermore, even if this finding constituted error, which Respondents do not concede, the Commission's disability award was not based solely on its factual finding that she was released to work without restrictions, nor is that finding a "fundamental element of" its award. Instead, as noted above, the Commission's disability award is supported by reliable, probative and substantial evidence and, therefore, there is no need for this Court's review of Claimant's first issue.

Claimant's request for review of this issue should be denied.

III. The Court of Appeals properly upheld the Commission's assigning weight to expert evidence.

Claimant attacks the Commission's statement that it afforded "great weight," to certain of Dr. Jackson's medical records based on the fact that "that these are the notes of Claimant's own expert." (Appx. 35-36). The referenced medical note from Dr. Jackson is dated February 1, 2008. After pointing out that "her effort probably was not consistent on the right and on the left it probably was consistent," Dr. Jackson "pointed out [to Claimant] the consistency of effort in grip strength as a basic element of building a doctor/patient relationship." (Appx. pp. 246-247 and 309-310).

Claimant misguidedly attempts to equate the Commission's proper weighting of evidence with rendering an expert medical opinion. The two North Carolina cases on which she relies are inapplicable because both dealt with the standard for medical evidence to prove causation. Nale v. Ethan Allen, 199 N.C. App. 511, 518, 682 S.E.2d 231, 236-37 (N.C. Ct. App. 2009) (medical evidence was required to prove causation in complex medical case involving knee injury, and because the physician could not state with certainty that a causal link existed, the claimant's testimony concerning the sequence of events was also insufficient to prove causation); Edmonds v. Fresenius Med. Care, 165 N.C. App. 811, 600 S.E.2d 501 (N.C. Ct. App. 2004) (physician's testimony regarding causation was insufficient because he could only state use of anti-inflammatories possibly or could or might have caused the claimant's renal problems, and the commission's attempts to link testimony from several expert witnesses to buttress the physician's statement constituted impermissible rendering of an expert opinion). Burnette is distinguishable because there, the Commission reached its own medical conclusions based on its own examination of the MRI that no doctor in the case reached. 401 S.C. at 427-28, 429, 737 S.E.2d at 206. Here, the statement recited by the Commission clearly did originate from a medical provider. Assigning weight to some evidence or testimony over other evidence or testimony does not, in and of itself, constitute "an impermissible medical opinion," as Claimant suggests. She posits no authority for such an assertion.

Giving greater weight to one expert over another, or even one statement by an expert over another statement by the same expert is the Commission's assigned role. *See* Brunson, 395 S.C. at 455, 718 S.E.2d at 758 ("[t]he final determination of witness

credibility and the weight to be accorded evidence is reserved to the Full Commission"); Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive); Pack, 381 S.C. at 536, 673 S.E.2d at 466-67 (it is the Commission's prerogative to believe or disbelieve expert testimony) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"); Grayson, 317 S.C. at 309, 454 S.E.2d at 321-22 ("[w]here there is conflicting medical evidence, the findings of fact of the commission are conclusive").

Furthermore, even if this finding constituted error, which Respondents do not concede, the Commission did not specifically point to this finding or evidence as support for its disability rating, which is the true target of Claimant's Petition. The Commission explained why it afforded Dr. Jackson's February 1, 2008 medical record great weight, *i.e.*, because these are the medical "notes of Claimant's own expert." (Appx. p. 36). As noted above, Claimant acknowledged that her counsel was paying Dr. Jackson's medical bills. (Appx. p. 191, line 22 – 192, line 12). Thus, having been hired by Claimant's counsel specifically to bolster her case, this statement by Dr. Jackson is revealing. The fact that Claimant disputes the Commission's rationale for affording Dr. Jackson's medical record great weight does not mean it was improper or incorrect.

Claimant suggests the Commission's weighting of evidence is improper, relying on Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997). The discussion from Smith cited by Claimant concerned the due process violations committed by the single commissioner who allowed a large amount of

irrelevant testimony to be presented and then stopped the hearing, not allowing either the claimant's or respondents' counsel to question the claimant or to allow other witnesses to testify. The single commissioner concluded that the claimant was exaggerating the severity of his injuries, relying on medical evidence that was over two years old. It was this finding of exaggerated symptoms, based on old medical records, in the specific context of a truncated hearing where the claimant was not allowed to fully testify and none of his corroborating witnesses (his friends and family) were allowed to testify at all, that the date of the medical records became an issue. 329 S.C. at 497-99, 494 S.E.2d at 636-37. In contrast, Claimant here cannot argue that she was not allowed to fully develop her case or present any witnesses that she believed would strengthen her case. The Commission considered and relied on evidence from 2008 as well as 2011 to determine her disability rating, which should be upheld.

Claimant's argument that the Commission Decision on this issue was insufficiently detailed or specific is entirely misplaced. First, the Commission's disability award, the true target of Claimant's Petition, is sufficiently detailed and complies with the requirements of Drake v. Raybestos-Mahattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), Aristizabal v. I.J. Woodside, 268 S.C. 366, 234 S.E.2d 21 (1977) and Abel Communications, Inc. v. South Carolina Pub. Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986), *etc.*

Second, what weight to assign Dr. Jackson's medical record, if any, was for the Commission to determine. It was not, contrary to Claimant's assertion, a fact disputed by the parties beyond Claimant's arguments on appeal. Claimant's Pre-Hearing Brief does not contest any issue with regard to the weight that should be assigned to Dr. Jackson's

medical records and, in fact, specifically offers Dr. Jackson's records from September 212, 2006 to May 25, 2011. (Appx. pp. 75-78).

Contrary to Claimant's assertions, the Commission did not employ an "unusual finesse of reasoning," National Bank of Honea Path v. Barrett, 173 S.C. 1, 174 S.E. 581 (1934), in performing its function of weighing the evidence presented to it, nor did it have any reason to. Substantial evidence supports its disability award. Unlike in Honea Path, where the court found only one reasonable inference could be deduced from the evidence, 173 S.C. at 5, 174 S.E. at 582-83, here there was conflicting evidence on what the disability award should be. The Commission correctly pointed to reliable, probative and substantial evidence in support of its award which, by the way, did not depend on the weight assigned to Dr. Jackson's 2008 medical record. (Appx. p. 35 (Finding of Fact No. 11, specifically outlining the evidence on which the award is based)).

The Commission explained its determination that Dr. Jackson's medical record recounting "inconsistencies in Claimant's right grip strength testing" deserved "great weight for the reason that these are the notes of Claimant's own expert." (Appx. pp. 35-36). The fact that Claimant disagrees with this finding does not mean it is incorrect and/or that this issue warrants this Court's further review.

Claimant's request for review of this issue should be denied.

Finally, Claimant requests several times that this Court accept her Petition and remand to the Commission for a de novo hearing. There is no need or reason for any *de novo* hearing, other than to give her a second chance to re-try her case in hopes of a better outcome. She has presented absolutely no reason that would justify any *de novo* hearing of her case.

CONCLUSION

For the foregoing reasons, this Court should deny Claimant's Petition and affirm the Court of Appeals' opinion upholding the Commission Decision in this case.

Respectfully submitted,

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April 20, 2015

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
G. Thomas Cooper, Jr. Circuit Court Judge

WCC File No. 1004913

Latonya Footman, Employee, ... Petitioner,

v.

Johnson Food Services, LLC, Employer, and
The Hartford, Carrier ..... Respondents.

PROOF OF SERVICE

I certify that on the 20th day of April 2015, I served the **Respondents' Return in Opposition to Petition for Writ of Certiorari** on Latonya Footman by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record:

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April 20, 2015

VIA U.S. MAIL
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: LaTonya Footman v. Johnson Food Services and The Hartford
Date of Accident: September 6, 2006
WCC File No.: 0617361
Our File No.: 2071.06097
Claim No.: YKY26960 C
Appeal No.: 2015-000610

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of Respondent's Return in Opposition to Petition for Writ of Certiorari and the original and one copy of the Proof of Service in the above-referenced matter. I would appreciate your returning a clocked-in copy of same to me in the enclosed, self-addressed stamped envelope.

If you have any questions, please contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Andrew N. Safran, Esq.