THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No · 1122307

Johnathon Ashley Richardson, Employee, ... Appellant,

v

Beal Lumber Company, Inc., Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier.. ... ... Respondents

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INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant Johnathon Ashley Richardson ("Claimant") filed a Form 50 alleging that he suffered a compensable injury to his back and neck on February 8, 2011 while working for Beal Lumber Company ("Beal Lumber"). (Cl Form 50, dated Nov. 2, 2012) He subsequently filed an Addendum to his Form 50 to include April 27, 2012 as an injury date. (Addendum to Form 50) Claimant contends that he suffered an injury while lifting lumber, twisting, and placing the lumber in a rack (Cl. Form 50, dated Nov 2, 2012) In response, Beal Lumber and its insurer, Palmetto Timber S I Fund c/o Walker, Hunter and Associates, Inc. (herein collectively "Respondents") filed a Form 51, asserting that Claimant neither suffered a compensable injury arising out of and in the course of his employment nor gave the employer timely notice of his alleged injury. (Resp. Form 51, dated Jan. 2, 2013)

A hearing was held before Single Commissioner Avery B. Wilkerson, Jr on March 24, 2014. Respondents objected to the submission of a medical questionnaire executed by Gregory S. McLoughlin, M.D., which the Single Commissioner overruled. (Single Commissioner Hr'g Tr p 5, lines 5-23) After a review of "the entire record, testimony of Claimant, medical reports, video description of the job, and Dr. McLoughlin's deposition testimony," the Single Commissioner denied Claimant's claim in its entirety, determining that "this is not a compensable repetitive trauma claim" (Decision and Order of the Single Commissioner, filed April 28, 2014 ("Single Commissioner Decision"), p 9) As part of his decision, the Single Commissioner found that Claimant was not a credible witness and that he failed to provide notice of a repetitive trauma injury to his employer (Id., pp. 8-9).

On May 12, 2014, Claimant filed a Form 30 Request for Commission Review based on the following grounds: (1) Did the Single Commissioner err in his finding that Claimant's injury was not work-related; (2) Did the Single Commissioner err in his finding that the injury was not a repetitive trauma injury; (3) Did the Single Commissioner err in his finding that no notice was given to the employer, and (4) Did the Single Commissioner err in his finding that Claimant's testimony was not credible (Cl.'s Form 30, dated May 12, 2014)

Claimant filed his original brief with the South Carolina Workers' Compensation Commission on July 11, 2014. In response, Respondents filed a motion to dismiss, arguing that Claimant's brief improperly presented new evidence without making a proper motion as required by S C Code Ann § 42-17-50, S C. Code Reg. § 67-707, and relevant case law (Resp'ts' Mot to Dismiss, dated July 21, 2014) The Commission ordered Claimant to file an amended brief after removing all references to evidence not before the Single Commissioner as of April 28, 2014 (Administrative Order, dated August 11, 2014). Claimant subsequently submitted an amended brief that still contained information and references to materials never submitted to the Single Commissioner (Amended Br. of Claimant to the Commission, dated August 20, 2014)

After conducting a hearing, the Commission rendered its decision affirming the findings of fact and conclusions of law of the Single Commissioner with one amendment: The Commission dismissed Claimant's amended brief for failure to delete references to information outside of the evidence before the Single Commissioner, as previously ordered (Appellate Panel Decision and Order, filed November 3, 2014).

Claimant timely appealed the decision of the Commission to this Court.

FACTS

Claimant worked for Beal Lumber, a hardwood sawmill, on the "green chain," which involved pulling wood off of a line, turning, and placing the wood on one of three to four packs of lumber behind the worker. (Single Commissioner Hr'g Tr p 9, line 19 – p 10, line 11) Each worker was assigned a specific type of wood to identify and pull off of the line. (Id. p. 10, lines 5-8) The lumber varied in thickness, ranging from one inch to three inches. (Id. p. 10, lines 21-24). A video depicting the typical work of an employee on the green chain was made and shown to Claimant. (Id. p 11, lines 19-23). After viewing the video, Claimant confirmed that it documented his work duties, albeit at a slower pace and involving smaller pieces of wood than his job regularly entailed. (Id., p 11, line 24 - p 12, line 15)

Claimant worked for Beal Lumber on two separate occasions. (Transcript of Deposition of Johnathon Richardson ("Cl Dep."), p 46, lines 6-8). When the Single Commissioner asked Claimant when he first went to work for Beal Lumber, he provided conflicting dates he initially testified that he was first hired in 2010 or 2011 but later testified that he was first hired in September 2009 (Single Commissioner Hr'g Tr. p. 13, lines 14-18) (Id. p. 14, lines 3-5) (Id. p. 30, lines 3-5)

Claimant testified that he experienced tightness and sharp pains in his back as well as numbness in his legs (Single Commissioner Hr'g Tr p 12, line 20 – p 13, line 13). He first sought medical attention for back pain on February 8, 2011 at Newberry County Memorial Hospital (Resp. APA p 1) The Newberry County Memorial Hospital records reflect that Claimant had an onset of back pain one day before, which was similar to the symptoms he had experienced after a car accident two years prior.

(Id.). He returned to Newberry County Memorial Hospital on March 28, 2011, complaining of back pain that began approximately three months earlier. (Resp. APA p. 6). He informed the medical staff that "two years ago I was in a car accident, my back hurt then for about three weeks and then got better " (Resp APA p. 8).

Approximately ten months later, Claimant sought treatment for back pain at Family Healthcare-Newberry. (Resp. APA p 23). The medical notes reported that Claimant was involved in a car wreck approximately two to three years prior; he was not wearing a seatbelt and was thrown from the car. (Id) When Claimant returned to Family Healthcare-Newberry in April 2012 still complaining of back pain, Michael Bernardo, M D referred him to Midlands Orthopaedics for an MRI. (Resp. APA pp 26-27) According to the records from Midlands Orthopaedics, Claimant reported experiencing back pain for two years. (Resp APA p. 40) His MRI revealed a mild spinal stenosis pattern at L1-2 and significant spinal stenosis at the L3-4 level (Resp APA pp 47-48). Troy Blanks, PA-C, issued work restrictions for Claimant, instructing him to refrain from lifting/carrying over 10 pounds (Resp APA p 44) On his May 11, 2012 follow-up visit, Claimant's work restrictions were modified to include no repetitive bending, twisting, or stooping (Resp APA pp. 31, 37) Midlands Orthopaedics also observed that Claimant had been taking his pain medication in excess of his prescription. (Resp. APA p 29)

When provided with Claimant's work restrictions, Beal Lumber assigned Claimant to light duty work. (Single Commissioner Hr'g Tr p 36, lines 20-24) (Cl. Dep p. 41, line 25 – p. 42, line 7). At the hearing before the Single Commissioner, Kenneth Hill, mill manager at Beal Lumber, testified that Claimant never reported a work-related

injury. (Single Commissioner Hr'g Tr. p 35, lines 11-15, 22-24) (Id p. 36, line 25 – p. 37, line 3). Instead, Claimant informed Mr. Hill that he injured himself outside of work while helping his father load logs into a dumpster. (Id. p. 36, lines 3-7) Frank "Skipper" Beal, president of Beal Lumber, also appeared before the Single Commissioner and testified that Claimant never reported a work injury. (Id. p. 43, lines 21-24) (Id p. 44, lines 6-8, 15-18). Claimant, however, testified that he told his supervisors on the green chain that he needed to take breaks in order to speak with Mr Hill about his back pain (Single Commissioner Hr'g Tr p. 16, lines 14-19). He asserted that he informed Mr Beal that he needed to leave work one day because of his back pain (Id. p. 17, lines 7-10). When the Single Commissioner asked when Claimant gave notice to his employer, he responded that he was not certain about the date but it was about eight months into the job (Id. p 21, lines 12-17). Claimant asserted that the last time he gave notice to his employer was the day he delivered the note with his work restrictions to his supervisor (Id. p. 21, lines 18-25).

Claimant was terminated from Beal Lumber in May 2012 (Resp APA p 116). On June 18, 2012, Claimant had an appointment with Gregory S McLoughlin, M D. (Resp APA p 49). This was the only time Dr. McLoughlin examined Claimant (Transcript of Deposition of Gregory S. McLoughlin, M.D. ("McLoughlin Dep "), p. 5, lines 13-15) Dr McLoughlin reviewed Claimant's MRI results and noted Claimant had severe central stenosis at L3-4 (Resp. APA p. 60). Dr McLoughlin explained that spinal stenosis can be congenital, caused by arthritis of the spine, or caused by trauma (McLoughlin Dep. p 26, line 7 – p 27, line 1). Dr McLoughlin diagnosed Claimant with neurogenic claudication, a condition which manifests itself as leg and back pain due

to spinal stenosis (Id p. 6, lines 5-9). He recommended surgery as a treatment option. (Resp. APA p 60).

During his deposition, Respondents questioned Dr. McLoughlin about Claimant's medical records from other providers. (Id p. 8, line 16 – p 13, line 16) When asked to list activities that may cause Claimant's symptoms, Dr. McLoughlin testified that lifting does not typically cause the symptoms experienced by Claimant, but that standing and walking can. (Id. p. 19, line 23 – p. 20, line 3) After viewing the video depicting the type of work generally performed by Claimant, Dr McLoughlin testified that Claimant's work could not cause or aggravate the narrowing of the spinal canal (Id. p 27, lines 2-20)

In fall 2012, Claimant underwent treatment at the Pinner Clinic (Resp APA p. 86). John H. Ferguson, M.D. indicated in his records that Claimant had an upcoming appointment scheduled with William Rambo, Jr., M D. at Columbia Neurosurgical Associates to receive a steroid injection. (Resp APA pp 90, 99). On October 10, 2012, Claimant's father called the Pinner Clinic to request additional pain medication for Claimant and informed the Pinner Clinic that Dr. Rambo refused to see Claimant because he had a workers' compensation claim (Resp. APA p 91). After contacting Dr Rambo's office about the cancelled appointment, the Pinner Clinic learned that Claimant, and not Dr Rambo, cancelled the appointment. (Id) After this incident, Dr. Ferguson noted in the records that "[n]othing seems to be helping and the 'story' is not consistent, so we will wean off the Stronger Medication." (Id)

At the hearing before the Single Commissioner, Claimant submitted a questionnaire from Dr. McLoughlin that had been executed more than eight months after

the doctor's deposition was taken. (Claimant's APA Tab 3, McLoughlin Questionnaire, dated December 12, 2013) Dr McLoughlin opined that Claimant's job did not cause central stenosis. (Id.). He then checked "yes" that "Johnathan [sic] A. Richardson's job, which consisted of repetitively handling heavy rough cut hardwood lumber, taking the individual boards off the chain line and stacking the lumber requiring standing, walking, lifting, twisting, and grabbing, AGGRAVATED the central stenosis of L3-4 and to a lesser extent L2-3." (Id.)

STANDARD OF REVIEW

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). Lark v Bi-Lo, Inc., 276 S C 130, 276 S.E.2d 304 (1981) A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Id., at 136, 276 S E.2d at 307 The reviewing court may not substitute its own judgment for that of the 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) Claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. Packer v. Corbett Canning Co., 238 S.C 431, 435, 120 S.E.2d 398, 400 (1961) 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 in 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 in order to justify its action. Pierre v Seaside Farms, Inc., 386 S C 534, 540, 689 S.E 2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence " Sharpe v Case Produce, Inc , 336 S.C. 154, 160, 519 S E 2d 102, 105 (1999) Instead, the findings of the 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)

"It is axiomatic that in a Workmen's Compensation case the [Commission] is the fact-finding body, and that in their review of a factual finding by the Commission the courts may not weigh the evidence, their function being limited to determination of whether or not such finding is supported by [substantial] evidence " Walker v City of Columbia, 247 S C 241, 247, 146 S.E 2d 856, 859 (1966). "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 Dep't 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")

ARGUMENTS

I. Claimant failed to appeal and/or preserve certain findings and holdings, which are now binding on him.

Only issues raised in an application for review to the Commission are preserved. Creech v. Ducane Co., 320 S.C. 559, 564, 467 S E.2d 114, 117 (Ct App. 1995). Findings and issues that are not appealed to the Commission become the law of the case Green v Columbia, 311 S C. 78, 80, 427 S.E.2d 685, 687 (Ct App 1993). The Single Commissioner's Decision contained fourteen separate Findings of Fact and four Conclusions of Law. Claimant elected, however, to raise only four issues to the Commission: (1) did the Commissioner err in his finding that Claimant's injury was not related to his work, (2) did the Commissioner err in his finding that the injury was not a repetitive trauma incident, (3) did the Commissioner err in his finding that no notice was given to the employer; and (4) did the Commissioner err in his finding that claimant's testimony was not credible (Cl Form 30).

Claimant proceeded below on the theory that he suffered from a repetitive trauma injury as defined in S.C Code Ann. § 42-1-172 (*See* Single Commissioner Hr'g Tr p 6, lines 14-15) ("[H]e sustained a *repetitive injury* to his back and his neck ") On appeal, he shifts his argument and now contends that his job actually aggravated a preexisting condition and did not cause a repetitive trauma injury *See* S C. Code Ann. § 42-9-35 (setting forth the evidence required to prove a preexisting condition) While the Single Commissioner addressed Claimant's repetitive trauma injury claim, he made no findings

regarding a claim for the aggravation of a preexisting condition. Notably absent from Claimant's Form 30 are any references to the Single Commissioner's silence on Claimant's alleged aggravation of a preexisting condition claim. He never asserted that the Single Commissioner erred by failing to examine his claim under S.C. Code Ann. § 42-9-35. Because Claimant did not raise these findings and determinations, or lack thereof, in his appeal to the Commission, they are now the law of the case. *See* Creech, 320 S.C. at 564, 467 S E.2d at 117.

Moreover, Claimant did not specifically raise the fact that the Commission did not address his aggravation of a preexisting condition claim in his Statement of Issues to this Court. Issues not raised in the statement of issues on appeal are not preserved and do not need to be considered by this Court. Burris v. Propst Lumber & Logging, Inc , 396 S C 85, 94, 719 S E 2d 695, 700 (Ct App. 2011); Rule 208 (b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal ")

At the same time that he has failed to preserve his aggravation of an underlying condition claim for appeal, Claimant concedes that his employment did not cause a repetitive trauma injury (Br of Appellant, p 20) ("Appellant's repetitive injury *did not cause* his back injury . . . ") (emphasis added). Parties are bound by the statements and concessions made on the record and in briefs filed by their counsel. *See* JASDIP Props SC, LLC v. Estate of Stewart Richardson, 395 S.C 633, 641, 720 S.E.2d 485, 489 (Ct App. 2011) (holding that "[a]n issue conceded in the trial court cannot be argued on appeal"); Shorb v. Shorb, 372 S.C 623, 628 n 3, 643 S E.2d 124, 128 n 3 (Ct App. 2007) (parties are bound by concessions made in their briefs).

Therefore, this Court can and should dispose of this appeal by ruling that Claimant failed to preserve any argument that his injury was a result of the aggravation of a preexisting condition, and that he has conceded that his employment did not cause a repetitive trauma injury. Claimant has no other remaining theories of recovery. An appellate court may affirm a ruling based on any ground appearing in the record. I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000), Rule 220(c), SCACR.

II. The Commission properly determined that Claimant did not suffer from repetitive trauma injury.

A claimant has the burden to present facts that prove an injury is compensable under the Worker's Compensation Act. Packer, 238 S.C. at 435, 120 S.E.2d at 400. First, Claimant, on appeal, concedes that his work at the lumber mill did not cause his back injury. (*See* Br. of Appellant p. 20). A party is bound by concessions in his brief. JASDIP Props., 395 S.C. at 641, 720 S.E.2d at 489; Shorb, 372 S.C. at 628 n.3, 643 S.E.2d at 128 n.3. In addition to Claimant's concession, there is no medical evidence in the record to support a repetitive trauma injury claim. The only medical evidence submitted by Claimant is the medical questionnaire completed by Dr. McLoughlin. In this questionnaire, Dr. McLoughlin explicitly stated that Claimant's job did not cause his central stenosis. (Claimant's APA Tab 3, p. 1). Thus Claimant has failed to present the required medical evidence that he suffered a repetitive trauma injury. *See* S.C. Code Ann. § 42-1-172(D) ("A 'repetitive trauma injury' is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.")

Not only did the Commission find that Claimant did not suffer from a repetitive trauma injury, it specifically determined that Claimant's job duties were not repetitive. Claimant did not appeal the Single Commissioner's finding of fact that his job duties are not repetitive, so it is now the law of the case Green, 311 S C. at 80, 427 S E.2d at 687 In addition, the Commission reviewed the entire record, including both detailed testimony from Claimant describing his work at Beal Lumber as well as a video which provided a visual representation of the physical requirements of an employee on the "green chain."[1] Thus, substantial evidence supports the Commission's conclusion which should be upheld *See* Pierre, 386 S.C. at 540, 689 S E 2d at 618

Therefore, this Court should affirm the Commission's findings that Claimant did not suffer from a compensable repetitive trauma injury and that his job duties were not repetitive.

III. Even if the Court were to consider Claimant's aggravation of underlying condition argument, the Commission found that Dr. McLoughlin could not state to a reasonable degree of medical certainty that Claimant's medical condition was caused by his work-related activities.

As argued above, any assertion that Claimant's job aggravated a preexisting condition is foreclosed because Claimant neglected to preserve the issue for appeal. Even if the Court were to consider the merits of Claimant's preexisting condition argument, however, the Commission's decision should be affirmed

Again, the only medical evidence submitted by Claimant on this point is Dr McLoughlin's medical questionnaire Although Dr. McLoughlin's questionnaire states, to a reasonable degree of medical certainty, that Claimant's job aggravated his spinal

[1] Claimant testified the video showed his job in slow motion and with smaller pieces of wood (Single Commissioner Hr'g Tr p 12, lines 1-15) Regardless of the speed of the video, the Single Commissioner could observe the specific movements performed by Claimant on a daily basis in his analysis of whether Claimant suffered a compensable injury

stenosis, the Commission does not have to accept his opinion as controlling because there is conflicting evidence in the record on this issue The Commission's role as the ultimate fact finder includes assessing the credibility of expert witnesses Tiller v National Health Care Ctr., 334 S C 333, 340, 513 S E.2d 843, 846 (Ct App. 1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony.") On the preprinted questionnaire, rendered eight months after his deposition and a year and a half after the only time he examined Claimant, Dr. McLoughlin simply marked "yes" indicating that Claimant's job, consisting of "standing, walking, lifting, twisting, and grabbing," aggravated Claimant's central stenosis (Claimant's APA Tab 3, p. 1). When the Single Commissioner allowed the questionnaire into evidence over Respondents' objection, he cautioned the parties that "I don't know what weight it will have in reference to the case " (Single Commissioner Hr'g Tr p 5, lines 17-23)

Not only did more than eight months pass between Dr. McLoughlin's deposition (March 26, 2013) and the execution of his medical questionnaire (December 12, 2013), his deposition testimony directly contradicts his opinion presented in the medical questionnaire When questioned at his deposition about the cause of Claimant's symptoms, Dr McLoughlin specifically testified that "Typically it's the standing and walking Lifting doesn't typically cause these symptoms." (McLoughlin Dep p. 19, line 23 – p 20, line 3) Lying flat could also aggravate the symptoms (Id p 33, line 23 – p 34, line 1) Standing, walking, and lying down are all activities that Claimant engages in outside of work

After viewing the video depicting Claimant's daily job requirements, Dr McLoughlin testified that Claimant's work neither caused nor aggravated his spinal stenosis.

> Q. [I]f you could imagine if the speed of the video was increased by say three-fold, with boards tacking up on themselves and the workers appearing to be more like fighting fire to get the boards out, could the motion that you saw, reaching for the boards, trying to get control of the boards, lifting the boards, twisting to get the boards where they were, if it were on a high volume, could that **cause or aggravate** the narrowing of the canal?
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> ***
>
> A. No.

(McLoughlin Dep. p. 27, lines 2-20) (emphasis added)

Moreover, Dr McLoughlin testified that, if Claimant experienced back pain prior to his employment with Beal Lumber, there could be no way to know what exactly aggravated Claimant's condition (McLoughlin Dep. p. 34, lines 23-25) (Id p 35, lines 1-5). Even Claimant's counsel recognized problems with Dr. McLoughlin's testimony. (Transcript of Hearing before Full Commission, dated September 16, 2014 ("Full Commission Hr'g Tr.") p. 5, lines 19-21) (Dr McLoughlin's "testimony was very, very confusing.").

The Commission does not have to accept or believe expert testimony. Pack, 381 S.C at 536, 673 S.E.2d at 466-67. When there is a conflict in the testimony of a witness, the factual findings of the Commission are conclusive Anderson, 343 S C. at 492-93, 541 S.E 2d at 528.

This Court should affirm the Commission finding that Dr. McLoughlin could not state within a reasonable degree of medical certainty that Claimant's medical condition was caused by his work-related activities

IV. The Commission's credibility determinations were proper.

Claimant asserts that the Commission erred in finding: (1) that Claimant's testimony was difficult to follow and he did not answer questions with clarity; (2) that Claimant's testimony was inconsistent and did not describe an injury by accident or repetitive trauma; (3) that Claimant was not credible, and (4) that Claimant exaggerated his symptoms[2] In other words, Claimant contends that the Commission erred when it found Claimant was not a credible witness However, "[t]he final determination of witness' credibility and the weight to be accorded evidence is reserved to the Full Commission." Brunson, 395 S C at 455, 718 S E.2d at 758, *see also* Sharpe, 336 S C at 160, 519 S E 2d at 105 ("[I]t is not the task of the court to weigh the evidence as found by the Commission.")

Claimant states that only two inconsistencies exist in the record: (1) Claimant testified that he informed his employer of extreme pain that did not exist before he began his job, while the employer testified that Claimant never gave notice of a work-related injury, and (2) Claimant could not remember exact dates of when his back pain started (Br. of Appellant, p 14) Not only do these discrepancies go directly to the heart of his claim, the record, contrary to Claimant's assertions, is rife with inconsistencies.

For example, Claimant gave conflicting dates as to the start of his employment.

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[2] Respondents note that, because Claimant failed to raise the finding that he exaggerated his symptoms in his Form 30 Notice of Appeal to the Full Commission, it is now the law of the case and cannot be raised to this Court Green, 311 S C at 80, 427 S E 2d at 687

Compare Single Commissioner Hr'g Tr. p. 14, lines 3-5 (testifying that he started work in February 2011)

With Single Commissioner Hr'g Tr p 29, line 23 – p 30, line 2 (February 2011 was not his start date with Beal Lumber); Id., p. 31, lines 3-4 (Unsure of start date); and Cl Dep p 11, lines 24-25 (hired in September 2009).

The dates Claimant provided as to the start of his back pain varied by more than a year. Claimant first stated that his back pain started approximately six to eight months after February 2011, or somewhere between August and September 2011 (Single Commissioner Hr'g Tr p 14, lines 3-5) (Id. p 12, lines 16-24). He later testified that his back pain started approximately eight months after beginning work in September 2009, which meant he experienced back pain in May 2010 (Single Commissioner Hr'g Tr p 30, lines 3-5) (Cl. Dep. p. 12, lines 23-25) His records from Dr. McLoughlin indicate that his pain began around June 2010 (Resp. APA p. 49) On April 27, 2012, Claimant informed Midlands Orthopaedics that his back pain began two years prior, which would have been April 2010 (Resp. APA p. 40).

Claimant's testimony that he never experienced back pain prior to working for Beal Lumber is directly contradicted by evidence in the record At the hearing before the Single Commissioner, Claimant testified that he was not injured as a result of a previous motor vehicle accident (Single Commissioner Hr'g Tr. p. 24, lines 8-13) The records from his February 8, 2011 visit to Newberry County Memorial Hospital reveal that he "had back injury after mvc 2 y ago The patient has had prior back pain." (Resp APA p 1). He testified at his deposition that he experienced soreness for approximately two weeks following the wreck. (Cl Dep. p 18, line 25 – p 19, line 4). According to the records from his March 28, 2011 visit to Newberry County Memorial Hospital, his back

hurt for three weeks after the car accident. (Resp. APA p. 8). Dr. McLoughlin's notes reported that Claimant had no symptoms following his car wreck (Resp APA p 59)

Medical professionals questioned Claimant's credibility as well. When Dr. Ferguson learned that Claimant provided false information to his office regarding another doctor's appointment, Dr. Ferguson noted that "[n]othing seems to be helping and the 'story' is not consistent, so we will wean off the Stronger Medication." (Resp. APA p. 91).

Even Claimant's arguments to this Court are inconsistent Although he tries to excuse his inconsistent hearing testimony by claiming that he is a poor historian, he asks this Court to find that he can recall exact conversations with Mr. Hill about his back pain. (*See, e g.*, Br. of Appellant, p. 17) ("Appellant's testimony was precise when he recalled Kenneth Hill's statement to Appellant about 'Everybody's back hurts.'") Claimant's testimony regarding Mr Hill's alleged reactions to the news of his back pain cannot be reconciled He first asserts that he frequently discussed his back pain with Mr. Hill, who acknowledged "everybody's back hurts . everybody's going to get sore out there." (Single Commissioner Hr'g Tr. p. 17, lines 13-15) (Br. of Appellant, p. 11). Shortly thereafter, however, Claimant contends that each time he mentioned his back pain, Mr Hill declared "There's no way, I've had guys out here doing this for years, there's no way, why are their back not messed up." (Single Commissioner Hr'g Tr p. 21, lines 7-11) (Br of Appellant p. 12).

As aptly summarized by Claimant himself, "[t]he issue is who was telling the truth" (Br of Appellant, p. 15) That exact duty is expressly reserved to the Commission, which in this case ultimately determined that Claimant is not credible. It

would be improper for this Court to substitute its judgment for that of the Commission *See* Brunson, 395 S.C. at 459, 718 S E 2d at 760 (deferring to the commission's decision to adopt the single commissioner's finding on the claimant's credibility because single commission had the benefit of observing the claimant before reaching her decision).

Claimant indirectly asserts that the Commission erred by finding Mr. Hill and Mr. Beal to be credible witnesses.[3] Mr. Hill testified that Claimant did not give him notice of a work-related injury. (Single Commissioner Hr'g Tr. p. 35, lines 22-24) Mr Beal also testified that he was never informed that Claimant suffered an on-the-job injury. (Single Commissioner Hr'g Tr p. 44, lines 6-18) In fact, the only time Claimant discussed back pain with Mr Hill was Claimant's report that he injured himself outside of work while helping his father load logs into a dumpster (Id p 35, line 25 – p. 36, line 7).[4]

Again, the Commission serves as the ultimate fact finder and ultimate arbiter of witness credibility Rogers, 312 S C at 381, 440 S E 2d at 403 This Court should affirm the Commission's credibility determinations

V. The Commission correctly determined that Claimant failed to provide notice to his Employer of a repetitive trauma injury.

Claimant contends that the Commission erred when it found that he failed to give notice of a repetitive trauma injury to his employer. Section 42-15-20(C) of the South Carolina Code provides, in pertinent part·

[3] Claimant actually asserts that the Commission erred when it found that Kenneth Hill testified that Claimant did not provide notice of an injury at work, that Kenneth Hill testified that Claimant reported injuring his back off the job, and that Frank Skipper testified that Claimant was not injured on the job (Br of Appellant pp 2-3) Respondents will interpret Claimant's challenge of these issues as contesting the finding that the employer witnesses were credible

[4] Again, Respondents note that, because Claimant failed to raise the finding that Mr Hill "testified that the Claimant reported he injured his back off the job while moving logs with his dad" in his Form 30 Notice of Appeal to the Full Commission, it is now the law of the case and cannot be raised to this Court Green, 311 S C at 80, 427 S E.2d at 687

> In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Claimant has the burden to prove compliance with this notice requirement. Lizee v South Carolina Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005)

Although notice requirements sometimes are construed liberally in favor of claimants, they should not be "treated as a mere formality or technicality and dispensed with as a matter of course." Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 414, 63 S E 2d 50, 52 (1951). Satisfaction of this burden by Claimant is mandatory: "the statutory requirement cannot be disregarded." Id. Notice provisions provide the employer with the opportunity to investigate the facts and question witnesses while also affording him the opportunity to furnish medical care to the employee, which can minimize disability and consequent liability. Bass v. Isochem, 365 S.C. 454, 473, 617 S.E 2d 369, 379 (Ct App 2005).

The findings of the Commission regarding notice of an injury to an employer should be upheld if they are supported by substantial evidence King v Int'l Knife & Saw-Florence, 395 S.C. 437, 443, 718 S E 2d 227, 230 (Ct. App 2011) Pursuant to S.C. Code Ann § 42-15-20(C), Claimant had ninety days from the date he discovered or could have discovered that he had a compensable condition to provide notice to his employer. The obligation of an employee to report a repetitive trauma injury is triggered "by the employee's diligent discovery that his condition is compensable " King, 395 S.C. at 444, 718 S E 2d at 230 The clock begins to run once an employee has an injury that requires

medical care or interferes with his ability to perform his job, whichever occurs first Id at 445, 718 S.E.2d at 231

Claimant repeatedly sought medical treatment for his back pain, beginning on February 8, 2011 (Resp APA p. 1). According to his testimony, his back pain caused him to miss several days of work (Cl Dep p 20, lines 13-19). Claimant concedes that he knew he was hurt the first time he worked for Beal Lumber and, regardless, went back to work for them (Cl Dep. p. 46, line 25 – p 47, line 7) ("But I knew I was hurt - - I knew I was hurt . I'm pretty positive the damage was done the first time I worked there, and I - - own words - - I didn't do anything but make it worse.") Using the standard set forth in King, Claimant's obligation to report a work injury to his employer had been triggered.

Although he testified that he informed his employer multiple times of his back pain, he could not identify the date of any of the alleged conversations with his employer (Single Commissioner Hr'g Tr p 23, lines 2-9) (Id. p. 21, lines 12-17) The two employer witnesses both testified credibly that Claimant never reported a work injury (Single Commissioner Hr'g Tr. p. 35, lines 22-25) (Id p 42, lines 3-8).

"Where there is a conflict in the evidence the findings of fact of the Commission are conclusive " Anderson, 343 S.C. at 492-93, 541 S.E 2d at 528 As fully addressed above, the Commission found Claimant's testimony to be unreliable Accordingly, Claimant failed to satisfy his burden of proving that he provided notice to his employer

Claimant also relies on Etheredge v Monsanto Co., 349 S C 451, 562 S.E.2d 679 (Ct. App 2002) to support his argument that he provided notice by furnishing a medical

note with work restrictions on April 27, 2012 to his employer. Etheredge, however, does not hold that the mere presentation of work restrictions constitutes per se notice to an employer of an on-the-job injury After conducting a fact-specific inquiry, the Etheredge court held that a doctor's note, "*combined* with the other facts and circumstances surrounding the situation," provided statutory notice in that case Id at 456, 562 S E 2d at 682 (emphasis added) Adequate notice connects the injury with the employment Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E 2d 97 (Ct. App 2013) (reversing a finding of notice for lack of substantial evidence when claimant told employer that he hurt his back but the record was silent as to whether he connected the injury to his employment) Here, there is no credible evidence of timely notice to the employer linking Claimant's back condition to his work.

Furthermore, the doctor's note in Etheredge is distinguishable from the note provided by Claimant. In Etheredge, the doctor setting the claimant's work restrictions elaborated that "[h]aving to do overhead work aggrevates [sic] her problems . . . She may return to work doing a job which does not require her to raise arm [sic] above the level of her shoulders" 349 S C at 453-54, 562 S E 2d at 680 (alterations in original) In contrast, the note given to Mr. Hill lacked the specific details found in the Etheredge note, he simply received a standard form with the applicable boxes checked (Resp. APA pp 37, 44) Additionally, the employer witnesses testified that Claimant did not state that the work restrictions were related to an on-the-job injury (Single Commissioner Hr'g Tr p 35, lines 22-24). In fact, the first time Beal Lumber received notice of any work-related injury was November 2, 2012, which is the date of Claimant's Form 50 and well outside of the ninety-day window provided by the statute

This Court should affirm the Commission's finding that Claimant did not give Beal Lumber timely notice of an injury by accident due to repetitive trauma

VI. The Commission committed no error when it dismissed Claimant's Amended Brief for failure to comply with its August 11, 2014 Order.

Finally, Claimant asserts that the Commission erred by dismissing his Amended Brief Because he failed to include this issue in the Statement of Issues on Appeal, it is not properly before this Court. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Burris, 396 S C. at 94, 719 S.E.2d at 700 (holding that an issue not raised in a party's statement of issues is not preserved for appellate review and the Court need not consider it).

Although Claimant has not properly raised this issue for appellate review, Respondents, out of an abundance of caution, will address the merits of the argument. In Claimant's original brief to the Commission, he presented new evidence that had not been submitted to the Single Commissioner. Parties are required to "arrange and present all evidence at the hearing." S.C Code Reg § 67-613(A). Pursuant to S.C. Code Ann. § 42-17-50, S C. Code Reg § 67-707, and relevant case law, a motion to introduce new evidence must be made by a party who wants to submit evidence to the Commission that was not submitted at the hearing before the Single Commissioner. Because Claimant failed to comply with this procedure, the Commission gave Claimant a second chance by ordering that "Claimant/Appellant shall have ten (10) days from the date of this Order to submit an amended Brief of Appellant edited to remove all references to any evidence not before the single Commissioner at the time his Order was issued on or about April 28, 2014." (Administrative Order, dated August 11, 2014) In direct violation of the Order,

Claimant submitted an Amended Brief, which still referred to evidence not before the Single Commissioner (Full Commission Hr'g Tr p 10, lines 5-25).

Claimant attempts to characterize his violation of the Order as minor. He argues that "[a]ny items that were not in the record were so indicated in his brief," (Br. of Appellant, p. 21), essentially conceding that he disregarded the Commission's Order.[5] The Commission has the discretion and power to regulate the submissions that it will review. Although the Commission dismissed Claimant's Amended Brief, it did not deny Claimant a forum to present his case, Claimant's arguments were advanced by counsel at the hearing before the Commission (*See* Full Commission Hr'g Tr p 3, line 14 – p. 6, line 18) Accordingly, the Commission did not err when it dismissed Claimant's brief for failure to comply with its August 11, 2014 Order.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision that Claimant did not suffer an a compensable injury

Respectfully submitted,

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[5] Although counsel for Claimant contends he misspoke when conceding that information regarding Claimant's fall into the dumpster was not in the record when it actually was, a review of Claimant's deposition reveals that the Amended Brief still set forth details not found in Claimant's deposition or before the Single Commissioner (*Compare* Br of Appellant, pp 21-22 *with* Cl Dep p 41, lines 3-13)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W C C File No 1122307

Johnathon Ashley Richardson, Employee, ... Appellant,

v

Beal Lumber Company, Inc , Employer, and
Palmetto Timber S I Fund c/o
Walker, Hunter & Associates, Inc , Carrier . . . . . Respondents

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PROOF OF SERVICE

I certify that I have served **Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal** on Johnathon Ashley Richardson, by depositing a copy of it in the United States Mail, postage prepaid, on April 22, 2015 addressed to his attorney of record

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