THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1119818

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SC Court of Appeals

Shameka S. Green, Employee,..Appellant,

v.

Teleperformance Group, Inc., Employer, and
Zurich North America, Carrier, ... Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission erred in assigning greater weight to Dr. Noojin's opinions than to Dr. Jackson's IME?

II. Whether the Commission properly refused to allow Claimant to continue to supplement the record after it was closed?

III. Whether the Commission correctly held that Claimant failed to prove by a preponderance of the evidence that she had experienced a change of condition for the worse?

IV. Whether, to the extent Claimant is attempting to raise due process arguments, they are preserved for appeal and/or have any merit?

STATEMENT OF THE CASE

Claimant Shameka S. Green suffered a compensable injury to her right knee on September 23, 2011. Her employer, Teleperformance Group, Inc., and its workers' compensation carrier, Zurich North America (collectively herein "Respondents") provided medical treatment and temporary benefits. Following medical treatment, including surgery, Claimant's treating physician, Dr. Frank K. Noojin, III, indicated that she had reached Maximum Medical Improvement ("MMI") on April 23, 2013. (Def. 2013 APA pp. 18-19). Consequently, Respondents filed a Form 21 Request for Hearing, seeking a determination of Claimant's permanent benefits and a refund of any overpayments. (Decision and Order of Commissioner Avery B. Wilkerson, Jr., filed Sept. 18, 2013, pp. 3, 6 ("2013 Order")).

Commissioner Avery B. Wilkerson, Jr. conducted a hearing on July 9, 2013. In an order dated September 18, 2013, Commissioner Wilkerson found that Claimant suffered a compensable injury to her right knee. Commissioner Wilkerson also found that, at a deposition held two weeks before the hearing, Claimant testified that she did not want to undergo a recommended second knee surgery, but at the hearing testified that she did want the surgery. Commissioner Wilkerson found Dr. Noojin's April 23, 2013 medical notes to be "a driving force in this case." (2013 Order, p. 7). Those notes indicated that Claimant "may decide to do a high tibial osteotomy at some point in the future, which would be related to her arthritic condition in her right knee. Her knee is stable from the ACL standpoint." (Def. 2013 APA p. 17). Based on the Form 14B provided by Dr. Noojin, (Def. 2013 APA p. 20), Commissioner Wilkerson ordered future medical care in the form of "shots, brace and NSAIDS." (2013 Order pp. 7-9) (Def. 2013

APA p. 20). Commissioner Wilkerson found that Claimant reached MMI as of April 23, 2013, awarded her 35% disability to the right lower extremity, and held that Respondents had overpaid temporary partial benefits in the amount of $1,210.90. (2013 Order pp. 7-10).

Claimant filed a timely Form 30, raising four issues, including whether Commissioner Wilkerson erred "in denying Claimant's request that the case remain open in order for her to return to the treating physician for clarification of her restrictions to determine the efficacy of surgery; the error being that such ruling precludes Claimant's ability and right to fully develop the evidence in her case prior to a final adjudication." (Form 30, dated Oct. 2, 2013, with Attachment). The parties briefed the appeal.

In the meantime, Claimant filed a Form 50 – Change of Condition, Requesting a Hearing. (Form 50 – Change of Condition, Requesting a Hearing, dated Jan. 7, 2014 ("Jan. 7, 2014 Form 50")). Attached to the Form 50 was a medical note from Dr. Noojin dated December 2, 2013 that stated that he believed Claimant was too young for a knee replacement "so we are going to request authorization for Workman's Compensation to do a high tibial osteotomy of the right knee. This arthritis was preexisting, but it was aggravated by the injury." He noted that Claimant was "still having pain. It is about 8/10 on the medial side of her knee. It is worse with walking and standing. She is doing light duty at work." (Jan. 7, 2014 Form 50, Attachment) (Cl. APA p. 42).

Respondents filed a Form 51, denying the change of condition and noting that the issues she raised in her Jan. 7, 2014 Form 50 were on appeal to the Full Commission. (Def. Form 51, dated Jan. 24, 2014).

Soon thereafter, Claimant withdrew her appeal. (Email from Everett Garner to E. Hollmon (SCWCC) and Kelly Morrow, dated Feb. 18, 2014, withdrawing appeal). As a result, the 2013 Order with its limitations on medical treatment became a final Commission decision.

A hearing was scheduled on Claimant's Jan. 7, 2014 Form 50 for April 7, 2014 before Commissioner Wilkerson. (Notice of Hearing, dated March 5, 2014). As a result of issues raised during that hearing, Claimant withdrew her Form 50, indicating that it would be refiled. (Email from Everett Garner to Elaine Boyd (SCWCC) dated April 9, 2014).

On April 11, 2014, Claimant filed another Form 50 – Change of Condition, Requesting a Hearing. (Form 50, dated April 11, 2014 ("April 11, 2014 Form 50")). Attached to the April 11, 2014 Form 50 was an affidavit by Dr. Noojin wherein he stated that Claimant "has presented to me with worsened pain which in my medical opinion represents a progression of her arthritic condition which was aggravated by the work related accident to the point that I would now recommend the high tibial osteotomy based on my view of her overall condition," and that she was not at MMI. (Affidavit of Dr. Frank K. Noojin, dated April 2, 2014).

Dr. Noojin was deposed on May 15, 2104. During his deposition, he reached conclusions that differed from those expressed in his affidavit. (Noojin Dep.).

On May 15, 2014, the Commission notified the parties that a hearing was set for July 18, 2014 before Commissioner Gene McCaskill. (Notice of Hearing, dated May 15, 2014). On July 3, 2014, Claimant filed a motion for a continuance or to hold the record open so that she could submit the results of an evaluation by an independent orthopaedic

surgeon, who had agreed to review her case. (Motion for Continuance or Alternatively to Hold the Record Open Subsequent to the Hearing Scheduled for July 18, 2014, dated July 3, 2014 ("Motion")). Despite Respondents' opposition, Commissioner McCaskill agreed to hold the record open "[f]or the documented opinion from the Claimant's reviewing orthopedic surgeon only." (Administrative Order, dated July 10, 2014).

The parties were heard by Commissioner McCaskill on July 18, 2014. In response to the Commissioner's grant of Claimant's request to submit additional evidence, Respondents asked that they be allowed the opportunity to respond to any evidence allowed into the record after the hearing. Commissioner McCaskill granted that request. (2014 Tr. p. 9, line 14 – p. 10, line 9).

Following the 2014 Hearing, Claimant submitted an Independent Medical Evaluation ("IME") performed by Dr. Joseph P. Jackson on September 5, 2014. After reviewing what he described as "incomplete records," as well as x-rays taken in his office, Dr. Jackson opined that Claimant should not undergo "a valgus producing osteotomy," but instead should have a total knee replacement. (Notes of Dr. Jackson dated Sept. 5, 2014 and submitted under cover of letter from Claimant's counsel dated Sept. 12, 2014).

In response, Respondents provided an opinion dated September 17, 2104 from Dr. Noojin stating that nothing in Dr. Jackson's IME changed his prior opinion that Claimant had not sustained a change of condition for the worse. In addition, he stated that "the only thing that has changed relative to this claim is the Claimant's election for the high tibial osteotomy surgery," and that nothing has changed or accelerated Claimant's need for a total knee replacement, which he had recommend prior to his release at MMI in

April 2013. (Letter from Kelly F. Morrow to Frank K. Noojin, III, M.D. dated Sept. 17, 2104, as completed and signed by Dr. Noojin on Oct. 10, 2014).

Commissioner McCaskill filed his Decision and Order on December 17, 2014 (Decision and Order of Commissioner Gene McCaskill, Dec. 17, 2014 ("2014 Order"). Giving greater weight to Dr. Noojin's deposition testimony than to either his prior affidavit or Dr. Jackson's IME, Commissioner McCaskill found that Claimant failed to meet her burden of proving she sustained a change of condition for the worse. In addition, Commissioner McCaskill found that "the pain the Claimant now professes to have is not substantively different than the pain she was having at the time of the original hearing on 07/09/13." (2014 Order pp. 9-11).

Claimant filed a timely Form 30 Request for Commission Review, raising seven separate issues. (Form 30, dated Dec. 20, 2014, with attachment).

An Appellate Panel of the Full Commission heard oral argument on March 17, 2015 and issued its decision on May 29, 2015. (Decision and Order of the Appellate Panel of the Full Commission, filed May 20, 2015) ("Commission Decision"). The Commission affirmed Commissioner McCaskill's 2014 Order in its entirety. (Commission Decision pp. 11-19). The Commission held that the unappealed 2013 Order is the law of the case and, because Claimant failed to meet her burden of proving a change of condition for the worse, the 2013 Order governs Claimant's entitlement to future medical care. (Id., p. 19).

Claimant timely appealed to this Court.

STATEMENT OF THE FACTS

Claimant injured her right knee on September 23, 2011, when a desk collapsed on her knee. (2013 Tr. p. 18, line 13 – p. 19, line 13) (Cl. Dep. p. 15, lines 7-21). She began treating with Dr. Noojin in December of 2011. (Noojin Dep. 6, p. lines 5-8). On February 21, 2012, Dr. Noojin performed a right knee arthroscopy, partial medial meniscectomy and lateral meniscus repair on her right knee. (Cl. APA pp. 6-8). On a return visit two weeks later, she was doing well. (Cl. APA p. 11). In April, Dr. Noojin released her back to work at light duty. (Cl. APA pp. 14-15). In May 2012, Claimant returned to Dr. Noojin complaining of pain. At that point, he noted that she had "Grade IV changes on the tibial side and the femoral side" and that he felt she was not a candidate "for any kind of cartilanginous procedure. The only other option really realistically would be a tibial osteotomy at some point in the future ..." (Cl. APA p. 17).

In August 2012, Claimant returned to Dr. Noojin complaining of "popping and clicking in the knee," (Cl. APA p. 22), and "increasing pain at work." She continued to perform her regular job at reduced hours. (Cl. APA p. 24).

On April 23, 2013, Dr. Noojin released her at MMI. She was to continue her light duty work. He stated that Claimant would "probably need future medical care regarding [her right] knee." He recommended injections and/or braces, and noted that "she may decide to do a high tibial osteotomy at some point in the future, which would be related to her arthritic condition in her right knee." (Def. 2013 APA pp. 17-19). Dr. Noojin assigned a 16% impairment to Claimant's lower right extremity, opining that, if the pre-existing arthritic condition was also considered, that rating would be 21% to the lower right extremity. (Def. 2013 pp. 18-19). He filled out a Form 14B, stating that Claimant

would need future medical care in the form of "shots, braces, NSAIDS." (Def. 2013 APA p. 20).

At her June 2013 deposition, taken less than two weeks before the July 2013 hearing, Claimant testified that she was experiencing a popping noise in her knee, (Cl. Dep. p. 20, lines 5-6), and that her "knee hurts really bad, especially when it rains, it get cold, sitting, walking." (Cl. Dep. p. 24, lines 12-14). She testified that she experienced the pain daily, (Cl. Dep. p. 25, lines 17-19), and rated it at its worst as an 8 on a scale of 1 to 10, and only 5 or 6 at its best. (Cl. Dep. p. 27, lines 6-16). Claimant testified that Dr. Noojin had done "a very good job," (Cl. Dep. p. 17, lines 11-12), and that she was satisfied with the treatment she had received from him. (Cl. Dep. p. 40, lines 10-12). She also testified that she had been offered the high tibial osteotomy and that she did "not want the surgery because I was told that it's just help to relieve some of the pressure, not all the pressure," the recovery would be lengthy, and the long-term prognosis would be the same. (Cl. Dep. p. 42, line 2 – p. 43, line 7).

In arguing that the July 9, 2013 hearing should be postponed while Claimant pursued her medical options, Claimant's counsel asserted that "[w]e have the issue of this tibial osteotomy, the surgery that's been referred to, which has been discussed ... between Ms. Green and her doctor. She had elected at this time not to have it because of the seriousness of it and ... the questionable outcome; however if presented with ... the option of whether or not she can have it now or not have it [at] all she would prefer to have it now. So it's a situation she is kind of caught in a quandary as to possibly, very possibly, needing this surgery, which the doctor has already offered her to have and she has at this time declined." (2013 Tr. p. 11, line 16 – p. 12, line 4).

When asked about her pain levels at the July 9, 2013 hearing, Claimant testified that she was experiencing "very bad pain" in her knee that radiated down her leg, as well as swelling. She testified, "I have it very often, especially when it's cold, if it's raining, any type of strenuous – anything strenuous, any coldness, laying down for periods of time, sitting for periods of time; its' very strenuous on my knee." She testified that she was experiencing sharp pain every day which, at its worst was a 9 on a scale of 1 to 10, and at its best a 6.5 to 7. (2013 Tr. p. 25, line 16 – p. 27, line 14) (2013 Tr. p. 52, line 19 – p. 54, line 17 (testifying that most of her days her pain level is a 9)). She testified at that hearing that the proposed tibial osteotomy was "a very intense surgery" and that if she "could do it later that's fine; I would do it with the future medical as well." (2013 Tr. p. 30, lines 4-24). Her preference was to not have it right then, but to have it in the future. (2013 Tr. p. 31, lines 21-25) (2013 Tr. p. 32, line 24 – p. 34, line 5). However, when asked if she was faced with the option of having the surgery now or not having it at all, she said, "I would have it now, if given the option, yes." (2013 Tr. p. 31, lines 13-16) (2013 Tr. p. 56, line 16 – p. 57, line 9).

Claimant returned to Dr. Noojin on December 2, 2013 for a "one time reevaluation." At that appointment, Dr. Noojin reviewed x-rays that showed "more severe medial compartment arthritis on the left knee than the right," but noted that the right knee was more symptomatic. Noting that he believed she was still too young for a knee replacement, he said he would "request authorization for Workman's Compensation to do a high tibial osteotomy of the right knee." (Def. 2014 APA p. 1).

In his April 2, 2014 affidavit, Dr. Noojin stated that, when he and Claimant initially discussed the "high tibial osteotomy which is a radical surgery with an extended

recovery time of approximately 6 months," Claimant did not wish to undergo that surgery. The affidavit also stated that Claimant subsequently had presented to him "with worsened pain which in my medical opinion represents a progression of her arthritic condition ..." (Affidavit of Frank K. Noojin, M.D., dated April 2, 2014). However, after being presented with Claimant's July 9, 2013 hearing testimony, Dr. Noojin agreed at his deposition that the subjective pain levels she expressed at that hearing were consistently the same as the pain levels she expressed to him in December 2013. (Noojin Dep. p. 23, line 8 – p. 24, line 3). Dr. Noojin explained that he "had been offering the [high tibial] osteotomy for quite a time, and then [Claimant] had not wanted to do it. So, therefore, I figured the decision had been made, that she didn't want to do the surgery when we settled the case." (Noojin Dep. p. 15, lines 13-17).

Dr. Noojin compared x-rays taken in September 2012 to those taken in December 2013 and concluded that, in both, there was "roughly about two millimeters of joint space remaining on the injured knee in the medial compartment. So objectively speaking from an x-ray standpoint, which is the only objective that I have, there has been no change in the condition other than the subjective pain." (Noojin Dep. p. 30, line 10 – p. 31, line 6) (*see also* Id. p. 39, line 24 – p. 40, line 13 (Dr. Noojin explaining that the x-rays do not demonstrate "a progression of the arthritic condition")). He agreed, to a reasonable degree of medical certainty, that the only thing that had changed from when he released Claimant at MMI in April 2013 and when he saw her again in December 2013 was that she had decided to go ahead with the high tibial osteotomy. (Noojin Dep. p. 31, line 16 – p. 32, line 17). Dr. Noojin further testified that the grade four changes he observed in May 2012 was "as advanced as it goes." (Noojin Dep. p. 7, lines 6-22). Dr. Noojin

explained that the high tibial osteotomy involved breaking the bone and realigning it to take the weight bearing pressure off of the arthritic side of the knee. Although the procedure can buy a patient 10 years of pain relief, it does not cure the arthritic condition and involves three months of non-weight bearing recovery and overall recovery to MMI is about a year. (Noojin Dep. p. 11, line 9 – p. 12, line 12).

At the July 18, 2014 hearing on her current change of condition claim, Claimant testified that her pain level was a 10. (2014 Tr. p. 17, lines 11-20) (2014 Tr. p. 25, lines 5-24 (testifying that right then, during the hearing, her pain level was "a ten, the worse pain imaginable")). She agreed that the high tibial osteotomy that she was requesting in her change of condition claim was the same surgery that had been discussed at the 2013 hearing. Claimant's explanation was that now her pain was a 10 instead of a 9. (2014 Tr. p. 28, lines 4-25).

Nonetheless, she continued to work the same reduced schedule, performing the same job duties that she had performed since before the 2013 Hearing. (2014 Tr. p. 12, line 18 – p. 13, line 4) (2014 Tr. p. 25, line 25 – p. 26, line 14). She agreed that her job accommodations had not changed since the 2013 Hearing, and her description of the pain as a charley horse was the same. (2014 Tr. p. 29, line 4 – p. 30, line 23).

Pamela Fleming, Teleperformance's human resources generalist who handles workers' compensation issues, testified that, since the 2013 Hearing, Claimant had not come to her with regard to any workers compensation issues or to seek additional medical treatment for her work-related injury. (2014 Tr. p. 34, line 3 – p. 36, line 11) (2014 Tr. p. 38, line 25 – p. 39, line 8). Claimant had not complained to Ms. Fleming of any pain or discomfort. (2014 Tr. p. 37, lines 4-9) (2014 Tr. p. 40, line 25 – p. 41, line 1). Claimant

had not missed any work due to her work-related injury, although she had missed some time due to her other medical issues. (2014 Tr. p. 37, lines 15-20) (2014 Tr. p. 41, lines 20-25). Ms. Fleming testified that Claimant did not seem to be having any job performance problems and was "a pretty good employee." (2014 Tr. p. 38, lines 7-16).

Claimant testified that she trusted Dr. Noojin and, moreover, she trusted his opinions and recommendations. (2014 Tr. p. 26, line 15 – p. 27, line 18).

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) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The determination of whether a claimant has met his or her burden of proving a change of condition for the worse is a factual finding to be made by the Commission. *E.g.*, Krell v. South Carolina State Hwy Dept., 237 S.C. 584, 588, 118 S.E.2d 322, 324 (1961); Mungo v. Rental Uniform Serv. of Florence, Inc., 383 S.C. 270, 279, 678 S.E.2d 825, 829 (Ct. App. 2009) (explaining that "[t]he determination of whether a claimant experiences a change of condition is a question for the fact finder"). 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.

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." Gattis v. Murrells Inlet VFW #10420, 353 S.C. 100, 109, 576 S.E.2d 191, 195 (Ct. App. 2003). 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 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").

ARGUMENT

I. The Commission did not err by assigning greater weight to Dr. Noojin's opinions than to Dr. Jackson's IME.[1]

Claimant's argument that the Commission erred in assigning greater weight to Dr. Noojin's deposition testimony and letter response to Dr. Jackson's IME, than to Dr. Jackson's IME fails both legally and factually. First, Claimant's Arguments I & II should be rejected because she cites absolutely no legal authority in support of her arguments. *See, e.g.*, Brouwer v. Sisters of Charity Prov. Hosp., 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (refusing to consider argument "not supported by any authority"); Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("conclusory statements made without supporting authority are deemed abandoned on appeal"). In addition, she fails to provide a single cite to the Record in support of her factual allegations, in violation of Rule 208(b)(4), SCACR. Thus, her Arguments I & II should be rejected outright. Because these issues should be deemed abandoned, she should not be allowed to argue them further or cure her deficiencies in any reply brief.

However, in the event this Court considers the substance of Claimant's Arguments I & II, they have no merit. It is beyond dispute that it is the Commission's role to "take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers, 312 S.C. at 381, 440 S.E.2d at 403; Brunson, 395 S.C. at 455, 718 S.E.2d at 758. "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." Tiller v. National

[1] This section addresses Claimant's Arguments I & II.

Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). "Where the medical evidence conflicts, the findings of fact of the Commission are conclusive." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995).

Claimant's main argument with regard to the Commission's reliance on Dr. Noojin's opinion is that Dr. Jackson took x-rays some nine months after the x-rays examined by Dr. Noojin and that his opinion is as a result *de facto* more accurate. As noted above, she cites no case law for this theory, as there is none. Furthermore, Dr. Noojin, Claimant's treating physician and surgeon, compared x-rays he had taken in August 2012, (Def. 2014 APA p. 2), with x-rays taken over 14 months later in December 2013, (Def. 2014 APA p. 1), and noted that, in both sets of x-rays, Claimant had "roughly about two millimeters of joint space remaining on the injured knee in the medial compartment. So objectively speaking from an x-ray standpoint, which is the only objective that I have, there has been no change in the condition other than the subjective pain." (Noojin Dep. p. 30, line 10 – p. 31, line 6). Dr. Noojin concluded that there had been no objective change in Claimant's condition between when he initially released her at MMI and, furthermore, no subjective change in her reported pain level. (Noojin Dep. p. 32, lines 4-17). He agreed that the only thing that had changed was her decision to elect to have the surgery. (Noojin Dep. p. 31, lines 16-22) (Noojin Dep. p. 37, line 25 – p. 38, line 3).

Claimant misconstrues Dr. Noojin's testimony when she asserts he testified "that objectively speaking there had been no change in condition *other than Claimant's subjective pain.*" (App. Br. p. 4) (emphasis added). As noted above, Dr. Noojin, agreed

that Claimant's reported subjective pain was the same in December 2013 as it was at the July 2013 hearing. (Noojin Dep. p. 16, line 9 – p. 20, line 15) (Noojin Dep. p. 23, lines 8-17 ("Subjectively, [the reported pain is] consistently the same")).[2]

Given that the objective findings regarding Claimant's knee condition did not change in the more than 14 months between August 2012 and December 2013, there is no conclusive medical evidence of and no reason to believe she experienced a drastic change of condition in the nine months between December 2013 and when she saw Dr. Jackson on September 5, 2014. Dr. Noojin's medical records are not "outdated" or "antiquated," nor were they "superseded" by Dr. Jackson's set of x-rays, as Claimant suggests, and the Commission properly accorded more weight to her treating physician's opinion than to that of her hand-picked IME physician, Dr. Jackson.

Apparently, Claimant's position is that the rule should be that the latest set of x-rays or tests controls over any earlier x-rays or tests. Such a rule would result in parties jockeying to file the "last" set of x-rays or tests that support their position – virtually and impermissibly stripping the Commission of its fact finding role. *See* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 ("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"); Mullinax, 318 S.C. at 435, 458 S.E.2d at 78 ("Where the medical evidence conflicts, the findings of fact of the Commission are conclusive").

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[2] Contrary to Claimant's characterization of Dr. Noojin's deposition testimony as partially recanting his prior opinions regarding whether she had suffered a change of condition for the worse, Dr. Noojin's deposition testimony reflected his opinion after being presented with Claimant's testimony regarding her pain levels during the 2013 and 2014 hearings. (Noojin Dep. p. 16, line 9 – p. 24, line 3).

Just because Claimant personally believes Dr. Jackson's x-rays are "better tools" for evaluating her claim than those taken by Dr. Noojin just months before does not make it so,[3] and certainly does not mean the Commission erred in any way. In fact, this line of argument blatantly invites this Court to usurp the Commission's authority and become the decision-maker, which is not its role. *See* Clark v. Aiken County, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005) (explaining that "a reviewing court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact"); *see also* Krell, 237 S.C. at 488, 118 S.E.2d at 323 (it is not the appellate court's province "to determine whether the greater weight of the evidence supported the finding that a change had taken place in the condition of the claimant ...").

Furthermore, although Claimant makes much of the fact that Dr. Noojin did not review the x-rays taken by Dr. Jackson, what she fails to note is that he did review Dr. Jackson's IME report. Respondents' counsel sent Dr. Jackson's IME report to Dr. Noojin, asking him to review the report and respond to questions regarding his opinions.[4] Furthermore, Respondents advised Dr. Noojin that, if he needed any additional information in order to respond to their questionnaire, he should let them know. (Sept. 17, 2014 letter from Kelly Morrow to Dr. Frank K. Noojin). Dr. Noojin clearly was aware that Dr. Jackson had taken additional x-rays and, if he felt any need to see them, could have requested them.

Claimant characterizes the questionnaire as containing "loaded" questions. (App. Br. p. 2). Not only is this improper argument contained in her Statement of Case, in

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[3] Furthermore, Claimant's assertion that Dr. Noojin testified that "there were better tools readily available," than the ones he reviewed is simply false. Dr. Noojin made no such statement.
[4] Thus, Claimant's assertion that the evidence Dr. Noojin "was able to evaluate ended in December 2013," is plainly incorrect.

violation of Rule 208(b)(1)(C), SCACR, it misleadingly fails to note that each question contained blank lines where Dr. Noojin could explain or elaborate on his response.

This Court should affirm the Commission's decision to assign greater weight to the medical opinion of Dr. Noojin than to the IME of Dr. Jackson.

II. The Commission properly refused to allow Claimant to continue to supplement the record after it was closed.[5]

Claimant argues that she was deprived of "any opportunity to effectively prove a change of condition petition under these circumstances." However, the record was specifically left open for her to submit additional evidence and, in fairness, Respondents were afforded the opportunity to respond to that evidence. (2014 Tr. p. 9, line 14 – p. 10, line 9). A claimant is not entitled to continue to submit evidence until she believes she has a winning case or the upper hand. Instead, the admission of newly discovered evidence is governed by the Commission's regulations, which require, among other things, that "the new evidence is of the same nature and character required for granting a new trial." S.C. Code Regs. § 67-707. A "conflicting doctor's report created after a hearing does not mandate a new trial." Martin v. Rapid Plumbing, 369 S.C. 278, 287, 631 S.E.2d 547, 552 (Ct. App. 2006). Claimant has already had a second bite at the apple – she now argues she was entitled to third and fourth bites.

Claimant complains that she was unable to submit Dr. Jacksons' "test results and opinions" prior to the record being closed. However, she specifically was granted to right to obtain a second IME and submit the result of that review and examination, which she did. (Notes of Dr. Jackson dated Sept. 5, 2014 and submitted under cover of letter from Claimant's counsel dated Sept. 12, 2014). Claimant's complaint that there is evidence

[5] This section addresses Claimant's Arguments IV & V.

that the Commission was unable to review is simply incorrect. The record was held open so that she could submit Dr. Jackson's IME report. To the extent she is arguing that the Commission also should have received a copy of the x-ray films themselves, her argument is flawed. Because Dr. Jackson interpreted those x-rays, there was no need for the Commission to reach its own medical diagnosis based on the x-rays. Indeed it would be improper for it to do so. *See* Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012) (rejecting opinion in a single commissioner decision that had not been expressed by any medical provider).

Claimant complains that she was not allowed to further depose Dr. Noojin regarding his opinions. However, Claimant filed the Form 50 and, pursuant to the Commission's regulations, S.C. Code Regs. § 67-612(J) & 67-613(A), was required to present all of her evidence at the hearing. Commissioner McCaskill granted her request to hold the record open so that she could obtain a second opinion. In fairness, he allowed Respondents to respond to that evidence. (2014 Tr. p. 9, line 14 – p. 10, line 9). At the time she filed her Motion or at the hearing, she could have, but did not, request leave to submit additional evidence in addition to the anticipated IME report. At some point the record has to be closed.

Claimant also appears to complain that she was disadvantaged by the fact that Respondents did not take Dr. Jackson's deposition. First, the record was not left open for the deposition of Claimant's IME physician. Second, it is not Respondents' role to prove Claimant's case for her.

Finally, Claimant argues that the Commission abused its discretion in not ordering another IME in order to "reconcile" the conflicting opinions of Dr. Noojin and Dr.

Jackson and all of the medical evidence. This argument is premised on the assumption that the Commission is incapable of resolving the conflicts in expert evidence. To the contrary, "[w]here the medical evidence conflicts, the findings of fact of the Commission are conclusive." Mullinax, 318 S.C. at 435, 458 S.E.2d at 78; *see also* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 ("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"). The Commission did not abuse its discretion.

In essence, Claimant's counsel wants to keep supplementing the record until he gets the outcome he wishes. While his desire to promote the interests of his client are admirable, he simply is not entitled to continue to obtain IMEs and/or take depositions until he convinces the Commission that his client should win. Claimant's predicament, what put her in a "bind," was Dr. Noojin's revised opinion based on additional information that was provided to him during his deposition, as well as his review of her x-rays. (Full Comm'n Tr. p. 5, lines 15-25) (Full Comm'n Tr. p. 15, lines 16-20). However, it is no one's fault but Claimant's own if she did not provide Dr. Noojin with all of the relevant information when she asked him to sign an affidavit on her behalf.

This Court should rule that the Commission properly refused to allow Claimant to continue to supplement the record after it was closed.

III. The Commission correctly held that Claimant failed to prove by a preponderance of the evidence that she had experienced a change of condition for the worse.[6]

The determination of whether a claimant has sustained a compensable change of condition for the worse must be based "on proof by a preponderance of the evidence that

[6] This section responds to Claimant's Argument III.

there has been a change of condition caused by the original injury, after the last payment of compensation." S.C. Code Ann. 42-17-90. The determination of whether a claimant has met his or her burden of proving a change of condition for the worse is a factual finding to be made by the Commission, *e.g.*, Krell, 237 S.C. at 588, 118 S.E.2d at 324; Mungo, 383 S.C. at 279, 678 S.E.2d at 829, which should be affirmed on appeal so long as substantial evidence supports the Commission's finding. Clark, 366 S.C. at 111, 620 S.E.2d at 103.

First, Claimant's Argument III should be rejected because she cites absolutely no legal authority in support of her arguments. *See, e.g.*, Brouwer, 409 S.C. at 520 n.4, 763 S.E.2d at 203 n.4; Eaddy, 355 S.C. at 164, 584 S.E.2d at 396. In addition, she fails to provide a single cite to the Record in support of her factual allegations, in violation of Rule 208(b)(4), SCACR. Thus, her Argument III should be rejected outright. Because these issues should be deemed abandoned, she should not be allowed to argue them further or cure her deficiencies in any reply brief.

However, in the event this Court considers the substance of Claimant's Argument III, she simply has failed to meet her burden of proving a change of condition for the worse. In fact, this case bears significant similarities to the facts under consideration in Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 153 S.E.2d 697 (1967). Here, as was the case in Causby, the necessity for further surgery did not change between the initial hearing and the change of condition hearing. Instead, in both cases, "the painful condition which it was hoped might be alleviated by the proposed operation existed at and prior to the date of the original award." 249 S.C. at 230, 153 S.E.2d at 700. In both cases, the application for a change of condition properly was denied. Because the

Commission's decision in this case is supported by substantial evidence in the form of Dr. Noojin's deposition testimony and further opinion, this Court should uphold the Commission Decision.

In her conclusion, Claimant cites a number of cases for the proposition that the Act must be read with an eye toward compensation. While it is true that, in certain respects, the Act is construed liberally in favor of coverage, it also "must not be construed so as to work a hardship on the employer and/or the carrier by the interpolation of words or conditions not found in the act .... The act must be construed in justice to both parties and must not impose a burden on either." Hill v. Skinner, 194 S.C. 330, 11 S.E.2d 386, 1940 S.C. LEXIS 162 at ***14-15 (1940). Furthermore, although "compensation *law* will be construed liberally in order to effect its beneficent purpose ....; the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are." Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 831-32 (1960). In other words, "our rule which is applicable to the finding of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts." 236 S.C. at 446, 114 S.E.2d at 832.

The Commission's determination that Claimant failed to prove a change of condition for the worse is supported by substantial evidence and, therefore, should be affirmed. At the July 2013 hearing, Claimant testified that she was experiencing "very bad pain" in her knee that radiated down her leg, as well as swelling. She testified, "I

have it very often, especially when it's cold, if it's raining, any type of strenuous – anything strenuous, any coldness, laying down for periods of time, sitting for periods of time; it's very strenuous on my knee." She testified that she was experiencing sharp pain every day which, at its worst was a 9 on a 1 to 10 scale, and at its best a 6.5 to 7. (2013 Tr. p. 25, line 16 – p. 27, line 14) (2013 Tr. p. 52, line 19 – p. 54, line 17 (testifying that most of her days her pain level is a 9)). Despite the fact that Claimant had told Dr. Noojin and testified at her deposition shortly before the July 2013 hearing that she did not want to have a second knee surgery, (Noojin Dep. p. 15, lines 13-17) (Cl. Dep. p. 42, line 2 – p. 43, line 7), she testified at the July 2013 hearing that she, "would have [the high tibial osteotomy] now, if given the option, yes." (2013 Tr. p. 31, lines 13-16) (2013 Tr. p. 56, line 16 – p. 57, line 9).

At the July 2014 hearing, Claimant testified that her pain level was a 10. (2014 Tr. p. 17, lines 11-20) (2014 Tr. p. 25, lines 5-24 (testifying that right then, during the hearing, her pain level was "a ten, the worse pain imaginable")). She agreed that the high tibial osteotomy that she was requesting in her change of condition claim was the same surgery that had been discussed at the 2013 hearing. Claimant's explanation was that now her pain was a 10 instead of a 9. (2014 Tr. p. 28, lines 4-25). Nonetheless, she continued to work the same reduced schedule, performing the same job duties that she had performed since the 2013 Hearing. (2014 Tr. p. 12, line 18 – p. 13, line 4) (2014 Tr. p. 25, line 25 – p. 26, line 14). She agreed that her job accommodations had not changed since before the 2013 Hearing, and her description of the pain as a charley horse was the same. (2014 Tr. p. 29, line 4 – p. 30, line 23).

Ms. Fleming testified that, since the 2013 Hearing, Claimant had not presented any workers compensation issues or sought additional medical treatment for her work-related injury. (2014 Tr. p. 34, line 3 – p. 36, line 11) (2014 Tr. p. 38, line 25 – p. 39, line 8). Claimant had not complained to Ms. Fleming of any pain or discomfort, (2014 Tr. p. 37, lines 4-9) (2014 Tr. p. 40, line 25 – p. 41, line 1), or missed any work due to her work-related injury. (2014 Tr. p. 37, lines 15-20) (2014 Tr. p. 41, lines 20-25).

Dr. Noojin agreed that the subjective pain levels Claimant expressed at the July 2013 hearing were consistently the same as the pain levels she expressed to him in December 2013. (Noojin Dep. p. 23, line 8 – p. 24, line 3). Equally important, Dr. Noojin concluded that the objective evidence indicated that there had been no change in the condition of Claimant's knee. (Noojin Dep. p. 30, line 10 – p. 31, line 6) (*see also* Id. p. 39, line 24 – p. 40, line 13 (Dr. Noojin explaining that the x-rays do not demonstrate "a progression of the arthritic condition")). He agreed, to a reasonable degree of medical certainty, that the only thing that had changed from when he released Claimant at MMI in April 2013 and when he saw her again in December 2013 was that she had decided to go ahead with the high tibial osteotomy. (Noojin Dep. p. 31, line 16 – p. 32, line 17). He confirmed these opinions after reviewing Dr. Jackson's IME report. (Letter from Kelly F. Morrow to Frank K. Noojin, III, M.D. dated Sept. 17, 2104, as completed and signed by Dr. Noojin on Oct. 10, 2014).

The fact that Dr. Jackson's IME report might have supported a different conclusion does not change the result. Instead, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Gattis, 353 S.C. at 109, 576 S.E.2d at

195. In fact, the converse is true: because there is conflicting evidence in the record, the Commission's resolution of this factual dispute must be upheld on appeal. *E.g.*, Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528.

Given her failure to prove a change of condition for the worse, Claimant's request for further surgery is barred by the 2013 Order which limits her medical treatment to "shots, braces, and NSAIDS." (2013 Order pp. 7-9). By withdrawing her appeal of the 2013 Order, it became a final order. S.C. Code Ann. § 42-17-60.

This Court should affirm the Commission determination that Claimant failed to prove by a preponderance of the evidence that she had experienced a change of condition for the worse, and that her medical treatment is limited to shorts, braces and NSAIDS.

IV. To the extent Claimant is attempting to raise due process arguments, they are not preserved for appeal and lack any merit.

Throughout her Brief, Claimant hints at due process issues without actually labeling her "fairness" arguments as such. She did not raise any due process arguments below, (*See* Transcript of Hearing Before the Full Commission) and, as such, any veiled attempts to do so now are not preserved for appeal. *See, e.g.*, In re McCracken, 346 S.C. 87, 91, 551 S.E.2d 235, 238 (2001) (claims not raised below are not properly preserved for appeal).

In any event, Claimant was provided ample and proper opportunity to submit evidence in support of her claims. Claimant initially filed her Jan. 7, 2014 Form 50, which she withdrew shortly after it was scheduled for hearing on for April 7, 2014. Then she filed her April 11, 2014 Form 50, which allowed her additional time to marshal her evidence prior to the July 18, 2014 hearing. She also filed a Motion to hold the record open so that she could submit the results of an evaluation by an independent orthopaedic

surgeon. (Motion). Despite Respondents' opposition, Commissioner McCaskill allowed the record to remain open so she could obtain a second opinion. In fairness, he allowed Respondents to respond to that evidence. There was no requirement that Respondents either depose Dr. Jackson, as Claimant suggests, or to allow her to continually respond to Dr. Noojin's opinions. She was provided with ample (but not endless) opportunity to present her evidence. Even if this argument was properly preserved and/or presented, which Respondents dispute, due process does not entitle one side or the other endless opportunities to respond to conflicting evidence.

This Court should hold that neither the Single Commissioner nor the Full Commission erred in not providing Claimant with further opportunities to submit evidence to prove her case.

CONCLUSION

Respondents respectfully request that this Court affirm the Commission in its entirety.

Respectfully submitted,

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October 2, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

W.C.C. File No.: 1119818

Shameka S. Green, Employee,..Appellant,

v.

Teleperformance Group, Inc., Employer, and
Zurich North America, Carrier, ...Respondents.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondents** and **Designation of Matter** to be Included in the Record on Appeal on Shameka S. Green by depositing a copy of it in the United States Mail, postage prepaid, on October 2, 2015 addressed to her attorney of record:

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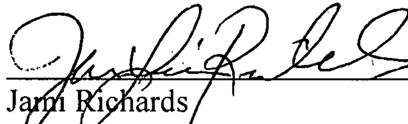

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