THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1404431

Appellate Case No. 2015-001169

Wanda Weaver, Employee, ... Appellant,

v.

SC Dept. of Disabilities and Special Needs, Employer, and State Accident Fund, Carrier, Defendants,

Of whom SC Dept. of Disabilities and Special Needs is the..... Respondent.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT
SOUTH CAROLINA
DEPARTMENT OF DISABILITIES
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Table of Contents

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I. Whether the Appellate Panel Properly Found Appellant Failed to Prove by a Preponderance of the Evidence that She Suffered a Compensable Injury?

II. Did Appellant Preserve the Issue of Whether the Appellate Panel Erred in Failing to Remand the Case to the Single Commissioner for a Medical Evaluation?

STATEMENT OF THE CASE

This appeal arises out of a workers' compensation claim filed by Appellant Wanda Weaver, who alleged she suffered injuries to her neck and left shoulder from an accident that occurred on April 11, 2014, while employed by the South Carolina Department of Disabilities and Special Needs ("the Department"). (R. pp. 8, 12). Appellant filed a Form 50 Request for a Hearing in August 2014. (R. p. 12).

In October 2014, a hearing was held before the Single Commissioner, where the Department admitted a minor accident occurred, but she asserted Appellant's injury to her left shoulder was unrelated to the minor accident due to her extensive pre-existing condition. (R. p. 8-9). On October 28, 2014, the Single Commissioner issued an order, finding Appellant suffered a compensable injury, which entitled her to temporary total disability benefits and medical treatment by Dr. Robert Elvington of Pee Dee Orthopedic Associates. (R. p. 10).

In November 2014, the Department timely filed a Form 30 Request for review by the South Carolina Workers' Compensation Appellate Panel ("the Appellate Panel"). The Appellate Panel held a hearing in February 2015. The Department argued the Single Commissioner's order should be reversed because Appellant did not prove the April 2014 accident aggravated her pre-exiting condition. (R. p. 19, ll. 21-25). In the event the Appellate Panel found Appellant's

injury was compensable, the Department asserted the Single Commissioner erred in selecting Dr. Elvington as the medical provider because it took away the Department's right to choose the medical provider.[1] (R. p. 22, ll. 20-p. 23, ll. 17).

In an order dated April 27, 2015, the Appellate Panel reversed the Single Commissioner, finding Appellant did not meet her burden of proving the April 2014 accident aggravated her pre-existing left shoulder condition. (R. p. 4). Accordingly, the Appellate panel denied Appellant's claim for temporary benefits and medical treatment. (R. p. 5).

This appeal follows.

[1] The Department had selected a different orthopedic surgeon, Dr. Kyle Watford, who was a referral from the Department's authorized medical provider.

STATEMENT OF THE FACTS

Appellant has been a nurse since 1992 and she began working for the Department around 2011, where she cared for mentally disabled adults. (R. p. 43, ll. 12-19; R. p. 44, ll. 3-5). On the morning of April 11, 2014, Appellant was passing out medications when a male patient grabbed her arm. (R. p. 44, ll. 18-p. 46, ll. 9). Appellant believed the patient was trying to get her attention because she often spoke to him around meal time to encourage the patient to eat more food. (R. p. 45, ll. 12-p. 46, ll. 9). The patient was standing to the left of Appellant and slightly behind her. (R. p. 45, ll. 16-18). Appellant claimed she "felt something like pop or snap" when he pulled her left arm. (R. p. 46, ll. 23-p. 47, ll. 4).

She recalled the patient was about 5'10" tall and weighed around 120 pounds. (R. p. 46, ll. 12-15). Appellant is approximately 5' tall. (R. p. 46, ll. 18). Appellant testified she had a prior workplace injury in 1999, which resulted in her having surgery and bone grafted along the right side of her neck. (R. p. 54, ll. 15-p. 55, ll. 4). Additionally, appellant broke her left wrist from a fall. (R. p. 55, ll. 5-8).

Following the accident, Appellant went to McLeod Occupational Health where she saw Dr. June Jones. (R. p. 75). Dr. Jones prescribed a pain reliever, directed Appellant to begin physical therapy, and instructed Appellant to limit use of her left arm. (R. pp. 75-76). Appellant began receiving physical therapy in May

2014, and the Department initially paid temporary total disability benefits and medical treatment. (R. p. 41, ll. 6-13; R. p. 121). The Department terminated disability benefits and medical treatment after receiving Dr. Jones's June 24 report, which indicated Appellant's injury to her left shoulder was a pre-existing condition and not causally related to the April 2014 accident. (R. p. 41, ll. 2-16). Dr. Jones's report stated:

> **The MRI [s]hows multiple significant changes in the left shoulder. All of the changes did not occur from this injury of pulling her left arm backwards.** Writer will recommend that you refer her to an orthopedic surgeon who will evaluate this employee and give an opinion on whether this occurred from the injury the employee describes. This explains why the[] employee wante[d] the writer to get an MRI earlier.[2] She told her therapist she should be schedule[d] for an MRI before she starts PT. The employee denies any previous injury to the left shoulder. **There are obvious changes in the shoulder that have been there for some time (years).** [W]ill make a referral to Dr. [Kyle] Watford for evaluation.

(R. pp. 117, 120) (emphasis added).

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[2] Appellant argues her supervisor had requested she receive to MRI before beginning physical therapy. (R. p. 47, ll. 16-25; App. Br. 7). Appellant's supervisor was not one of her medical providers. Dr. Jones's notes indicate Appellant requested the MRI and claimed her physical therapist required it. (R. p. 96). There are no records from Appellant's physical therapist requesting an MRI. (R. pp. 125-154).

Appellant claimed she never experienced any pain in her left shoulder prior to this accident. (R. p. 52, ll. 11-14).

At the hearing before the Single Commissioner, Appellant admitted there were no medical records indicating her shoulder injury was caused by the work accident. (R. p. 57, ll. 23-p. 58, ll. 1). After her claim was denied by the Department, she began receiving treatment from her family physician. (R. p. 57, ll. 14-16). There are no records in Claimant's APA submissions from her family physician. Her family physician referred her to Dr. Elvington, an orthopedic surgeon, at Pee Dee Orthopedic. (R. p. 50, ll. 18-p. 51, ll. 6). Appellant saw Dr. Elvington twice, but the only documentation Appellant provided to the Appellate Panel from Dr. Elvington was an out-of-work excuse. (R. p. 157).

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. See e.g., Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); see also Murphy v. Owens Corning, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct. App. 2011) (applying the substantial evidence standard of review to the Commission's factual findings of whether a claimant is entitled to compensation for aggravation of a pre-existing injury).

In an appeal from the South Carolina Workers' Compensation Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse only where the decision is affected by an error of law. Frame, 357 S.C. at 527, 593 S.E.2d at 494. This Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

LAW/ANALYSIS

I. The Appellate Panel Properly Found Appellant Failed to Prove by a Preponderance of the Evidence That She Suffered a Compensable Injury.

"[I]t is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits." Crisp v. SouthCo., Inc., 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013). Appellate courts review "the Commission's factual findings of whether a claimant is entitled to compensation for aggravation of a pre-existing condition under the substantial evidence standard of review." Murphy, 393 S.C. at 86, 710 S.E.2d at 458.

Section 42-9-35 of the South Carolina Code applies to the aggravation of a pre-existing condition and provides in relevant part:

> (A) **The employee shall establish by a preponderance of the evidence, including medical evidence**, that:
>
> (1) the subsequent injury aggravated the pre-existing condition or permanent physical impairment; or
>
> (2) the pre-existing condition or the permanent physical impairment aggravates the subsequent injury.

(emphasis added).

The employee must still meet this burden of proof regardless of whether or not the employer knows of the pre-existing permanent disability. S.C. Code Ann. § 42-9-35(D). The employee's right to compensation for aggravation of a pre-

existing condition arises when the claimant has proven the dormant condition became disabling because of the aggravating injury. Murphy, 393 S.C. at 84, 710 S.E.2d at 458. However, a condition due solely to the natural progression of a pre-existing condition is not compensable. See Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987). In Murphy, this Court found an employee was entitled to compensation under section 42-9-35 because the preponderance of the evidence showed a direct causal connection between the employee's workplace injury and the aggravation of her underlying neck condition. Id. at 86, 710 S.E.2d at 459.

Appellant argues the Appellate Panel should have assumed some of the changes shown in the MRI did occur as a result of the April 2014 accident because Dr. Jones's report indicated "all of the changes did not occur from this injury." (App. Br. 5-6). Appellant argues by stating "all of the changes did not occur from this injury" implies the possibility that some of the changes in her left shoulder could have been the result of the April 2014 accident. (App. Br. 5-6). Appellant's entire argument relies on assumptions and speculation. However, the Appellate Panel's decision cannot be based on surmise, conjecture, or speculation. Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (2012); Herndon v. Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

To prove she is entitled to compensation, Appellant must show the pre-existing condition with her left shoulder was aggravated by the April 2014 accident. See Murphy, 393 S.C. at 84, 710 S.E.2d at 458. Through her own submissions, Appellant has presented medical evidence showing proof of an extensive pre-existing condition in her left shoulder. (R. pp. 117, 120). Although she suffered a workplace accident in April 2014, Appellant failed to show the April 2014 accident was casually related to her shoulder injury. See id. at 86, 710 S.E.2d at 459 (upholding a finding the employee was entitled to compensation under section 42-9-35 because the preponderance of the evidence showed a direct causal connection between the employee's workplace injury and the aggravation of her underlying neck condition).

Based on the medical evidence, which was presented by Appellant, the Appellate Panel found she did not meet her burden of proving the April 2014 accident aggravated her pre-existing left shoulder condition. (R. pp. 4, 13). The Appellate Panel's finding was based on Dr. Jones's opinions that Appellant's extensive, pre-existing condition in the left shoulder had been present for years and Appellant knew of the condition with her left shoulder, and the fact that Appellant received treatment from two other physicians but did not present any evidence from them proving the pre-existing condition was aggravated by the April 2014 work accident. (R. 4).

Contrary to Appellant's arguments, the Appellate Panel cannot disregard medical evidence unless other competent evidence exists in the record. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). The medical evidence before the Appellate Panel was Dr. Jones's report that stated the MRI showed "multiple significant changes in the left shoulder" that did not occur because of the April 2014 accident. (R. pp. 117, 120). The only other evidence in the record was Appellant's own testimony and claim that she did not suffer a previous injury to the left shoulder; however, Dr. Jones discredited Appellant's claim back in June 2014 when she treated Appellant. (R. p. 120). Dr. Jones believed Appellant "knew she had significant damage" before this workplace accident occurred.[3] (R. p. 120).

Additionally, Appellant had the opportunity to present medical evidence showing the April 2014 accident aggravated her pre-existing condition but failed to do so. See Crisp, 401 S.C. at 645, 738 S.E.2d at 844 ("[I]t is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits."). Appellant testified she saw

[3] Dr. Jones believed Appellant had requested an MRI earlier in her treatment because Appellant knew of her pre-existing shoulder condition. Appellant argues her supervisor had requested she receive to MRI before beginning physical therapy. (R. p. 47, ll. 16-25; App. Br. 7). Appellant's supervisor was not one of her medical providers. Dr. Jones's notes indicate Appellant requested the MRI and claimed her physical therapist required it. (R. p. 96). There are no records from Appellant's physical therapist requesting an MRI. (R. pp. 125-154).

two other doctors after the Department denied medical treatment and disability benefits, but the record is devoid of any reports from those doctors. (R. pp. 24, 75-157). The only record submitted by Appellant of her visit with Dr. Elvington, the orthopedic surgeon, was an out-of-work excuse. (R. p. 157). Accordingly, the Department requests this Court affirm the findings of the Appellate Panel because there is substantial evidence supporting the finding that Appellant was not entitled to compensation for aggravation of a pre-existing condition.

II. Appellant Did Not Preserve the Issue of Whether the Appellate Panel Erred in Failing to Remand the Case to the Single Commissioner for a Medical Evaluation

Appellant argues the Appellate Panel erred by denying her referral to Dr. Watford, the orthopedic surgeon who Dr. Jones recommended, for an evaluation to determine causation. (App. Br. 8, 10). The issue of whether the Appellate Panel should have remanded the case to the Single Commissioner for a medical evaluation is not preserved for appellate review. See Stone v. Roadway Express, Employer, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006) (providing an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the Workers' Compensation Commission to be preserved for appellate review). As Appellant states in her brief, "The decision and Order of the Full Commission fails to address the issue of a medical evaluation to determine causation . . . ." (App. Br. 7). To preserve an issue for appellate review, it must

be raised to and ruled on by the Appellate Panel. Id. Because the Appellate Panel did not address the issue of whether the Single Commissioner should have required a medical evaluation to determine causation, this issue is not preserved for this Court's review.

Not only did the Appellate Panel not rule upon this issue, but Appellant did not raise this issue. In her brief to the Appellate Panel, Appellant argued the Single Commissioner properly ordered she was entitled to medical treatment from Dr. Elvington, the orthopedic surgeon recommended by her family physician. (R. pp. 73-74). Now, Appellant argues she is entitled to a medical evaluation by Dr. Watford, who was recommended by the Department's authorized treater, Dr. Jones. (App. Br. 8, 10). Appellant never requested a medical evaluation, let alone one from Dr. Watford, until now. In fact, it was the Department who argued the Single Commissioner should have ordered a medical evaluation. (R. p. 64). Appellant cannot raise an issue on appeal that was argued by the Department. See Tupper v. Dorchester Co., 326 S.C. 318, 487 S.E.2d 187 (1997) (providing an appellant cannot bootstrap an issue for appeal by way of another party's objection); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004) (providing an appellant cannot raise an issue on appeal that was raised by the respondent at trial, but on which the appellant advanced no arguments to the trial court). Accordingly, this issue is not preserved.

Even if this issue is preserved, it is meritless. As a threshold matter, Appellant cites to the incorrect standard of review for this case. The issue of statutory interpretation is not before this Court. (App. Br. 9). Rather, the issue before the Court is whether there is any substantial evidence to support the Appellate Panel's findings that Appellant was not entitled to compensation for aggravation of a pre-existing condition. See Murphy, 393 S.C. at 82, 710 S.E.2d at 456 ("But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard."). As discussed above, there is substantial evidence supporting the Appellate Panel's finding that Appellant had an extensive pre-existing condition and she knew she had prior significant damage for some time before the work accident. See Frame, 357 S.C. at 527, 593 S.E.2d at 494 (providing this Court should not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact). Further, Appellant had the opportunity to present evidence showing causation, but she failed to do so. See Crisp, 401 S.C. at 645, 738 S.E.2d at 844 ("[I]t is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits."); (R. p. 13). Appellant was treated by two physicians after the Department denied disability benefits and medical treatment, but she did not present any evidence from those physicians showing the April 2014 accident

aggravated her pre-existing condition. (R. pp. 75-157). Accordingly, even if this Court finds this issue is preserved, there is no need for a remand when Appellant had ample opportunity to meet her burden of proof before the Commission and failed to do so. See Byers v. Blumenthal Mills, 293 S.C. 82, 84, 358 S.E.2d 717, 719 (Ct. App. 1987) (denying an appellant's request for a remand to the Single Commissioner because there was no real probability that a remand would change the result).

CONCLUSION

For the foregoing reasons, Respondent South Carolina Department of Disabilities and Special Needs respectfully request this Court affirm the Order of the South Carolina Workers' Compensation Commission.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

COLLINS & LACY, P.C.

By: _____

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RESPONDENT'S FINAL BRIEF

Columbia, South Carolina
November 18, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I served **RESPONDENT'S FINAL BRIEF** upon all parties, by placing a copy in the United States mail, postage prepaid, on November 18, 2015, addressed to H. Thad White, Jr., Esquire, Lucas, Warr & White, 2917 West Palmetto Street, Florence, SC 29501.

[SIGNATURE BLOCK TO FOLLOW]

Respectfully Submitted,

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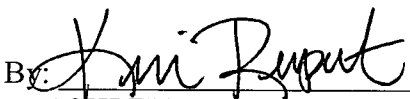
By: 

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> (1) the subsequent injury aggravated the pre-existing condition or permanent physical impairment; or
>
> (2) the pre-existing condition or the permanent physical impairment aggravates the subsequent injury.

(emphasis added).

The employee must still meet this burden of proof regardless of whether or not the employer knows of the pre-existing permanent disability. S.C. Code Ann. § 42-9-35(D). The employee's right to compensation for aggravation of a pre-

existing condition arises when the claimant has proven the dormant condition became disabling because of the aggravating injury. Murphy, 393 S.C. at 84, 710 S.E.2d at 458. However, a condition due solely to the natural progression of a pre-existing condition is not compensable. See Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987). In Murphy, this Court found an employee was entitled to compensation under section 42-9-35 because the preponderance of the evidence showed a direct causal connection between the employee's workplace injury and the aggravation of her underlying neck condition. Id. at 86, 710 S.E.2d at 459.

Appellant argues the Appellate Panel should have assumed some of the changes shown in the MRI did occur as a result of the April 2014 accident because Dr. Jones's report indicated "all of the changes did not occur from this injury." (App. Br. 5-6). Appellant argues by stating "all of the changes did not occur from this injury" implies the possibility that some of the changes in her left shoulder could have been the result of the April 2014 accident. (App. Br. 5-6). Appellant's entire argument relies on assumptions and speculation. However, the Appellate Panel's decision cannot be based on surmise, conjecture, or speculation. Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (2012); Herndon v. Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

To prove she is entitled to compensation, Appellant must show the pre-existing condition with her left shoulder was aggravated by the April 2014 accident. See Murphy, 393 S.C. at 84, 710 S.E.2d at 458. Through her own submissions, Appellant has presented medical evidence showing proof of an extensive pre-existing condition in her left shoulder. (R. pp. 117, 120). Although she suffered a workplace accident in April 2014, Appellant failed to show the April 2014 accident was casually related to her shoulder injury. See id. at 86, 710 S.E.2d at 459 (upholding a finding the employee was entitled to compensation under section 42-9-35 because the preponderance of the evidence showed a direct causal connection between the employee's workplace injury and the aggravation of her underlying neck condition).

Based on the medical evidence, which was presented by Appellant, the Appellate Panel found she did not meet her burden of proving the April 2014 accident aggravated her pre-existing left shoulder condition. (R. pp. 4, 13). The Appellate Panel's finding was based on Dr. Jones's opinions that Appellant's extensive, pre-existing condition in the left shoulder had been present for years and Appellant knew of the condition with her left shoulder, and the fact that Appellant received treatment from two other physicians but did not present any evidence from them proving the pre-existing condition was aggravated by the April 2014 work accident. (R. 4).

Contrary to Appellant's arguments, the Appellate Panel cannot disregard medical evidence unless other competent evidence exists in the record. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). The medical evidence before the Appellate Panel was Dr. Jones's report that stated the MRI showed "multiple significant changes in the left shoulder" that did not occur because of the April 2014 accident. (R. pp. 117, 120). The only other evidence in the record was Appellant's own testimony and claim that she did not suffer a previous injury to the left shoulder; however, Dr. Jones discredited Appellant's claim back in June 2014 when she treated Appellant. (R. p. 120). Dr. Jones believed Appellant "knew she had significant damage" before this workplace accident occurred.[3] (R. p. 120).

Additionally, Appellant had the opportunity to present medical evidence showing the April 2014 accident aggravated her pre-existing condition but failed to do so. See Crisp, 401 S.C. at 645, 738 S.E.2d at 844 ("[I]t is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits."). Appellant testified she saw

[3] Dr. Jones believed Appellant had requested an MRI earlier in her treatment because Appellant knew of her pre-existing shoulder condition. Appellant argues her supervisor had requested she receive to MRI before beginning physical therapy. (R. p. 47, ll. 16-25; App. Br. 7). Appellant's supervisor was not one of her medical providers. Dr. Jones's notes indicate Appellant requested the MRI and claimed her physical therapist required it. (R. p. 96). There are no records from Appellant's physical therapist requesting an MRI. (R. pp. 125-154).

two other doctors after the Department denied medical treatment and disability benefits, but the record is devoid of any reports from those doctors. (R. pp. 24, 75-157). The only record submitted by Appellant of her visit with Dr. Elvington, the orthopedic surgeon, was an out-of-work excuse. (R. p. 157). Accordingly, the Department requests this Court affirm the findings of the Appellate Panel because there is substantial evidence supporting the finding that Appellant was not entitled to compensation for aggravation of a pre-existing condition.

II. Appellant Did Not Preserve the Issue of Whether the Appellate Panel Erred in Failing to Remand the Case to the Single Commissioner for a Medical Evaluation

Appellant argues the Appellate Panel erred by denying her referral to Dr. Watford, the orthopedic surgeon who Dr. Jones recommended, for an evaluation to determine causation. (App. Br. 8, 10). The issue of whether the Appellate Panel should have remanded the case to the Single Commissioner for a medical evaluation is not preserved for appellate review. See Stone v. Roadway Express, Employer, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006) (providing an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the Workers' Compensation Commission to be preserved for appellate review). As Appellant states in her brief, "The decision and Order of the Full Commission fails to address the issue of a medical evaluation to determine causation . . . ." (App. Br. 7). To preserve an issue for appellate review, it must

be raised to and ruled on by the Appellate Panel. Id. Because the Appellate Panel did not address the issue of whether the Single Commissioner should have required a medical evaluation to determine causation, this issue is not preserved for this Court's review.

Not only did the Appellate Panel not rule upon this issue, but Appellant did not raise this issue. In her brief to the Appellate Panel, Appellant argued the Single Commissioner properly ordered she was entitled to medical treatment from Dr. Elvington, the orthopedic surgeon recommended by her family physician. (R. pp. 73-74). Now, Appellant argues she is entitled to a medical evaluation by Dr. Watford, who was recommended by the Department's authorized treater, Dr. Jones. (App. Br. 8, 10). Appellant never requested a medical evaluation, let alone one from Dr. Watford, until now. In fact, it was the Department who argued the Single Commissioner should have ordered a medical evaluation. (R. p. 64). Appellant cannot raise an issue on appeal that was argued by the Department. See Tupper v. Dorchester Co., 326 S.C. 318, 487 S.E.2d 187 (1997) (providing an appellant cannot bootstrap an issue for appeal by way of another party's objection); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004) (providing an appellant cannot raise an issue on appeal that was raised by the respondent at trial, but on which the appellant advanced no arguments to the trial court). Accordingly, this issue is not preserved.

Even if this issue is preserved, it is meritless. As a threshold matter, Appellant cites to the incorrect standard of review for this case. The issue of statutory interpretation is not before this Court. (App. Br. 9). Rather, the issue before the Court is whether there is any substantial evidence to support the Appellate Panel's findings that Appellant was not entitled to compensation for aggravation of a pre-existing condition. See Murphy, 393 S.C. at 82, 710 S.E.2d at 456 ("But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard."). As discussed above, there is substantial evidence supporting the Appellate Panel's finding that Appellant had an extensive pre-existing condition and she knew she had prior significant damage for some time before the work accident. See Frame, 357 S.C. at 527, 593 S.E.2d at 494 (providing this Court should not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact). Further, Appellant had the opportunity to present evidence showing causation, but she failed to do so. See Crisp, 401 S.C. at 645, 738 S.E.2d at 844 ("[I]t is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits."); (R. p. 13). Appellant was treated by two physicians after the Department denied disability benefits and medical treatment, but she did not present any evidence from those physicians showing the April 2014 accident

aggravated her pre-existing condition. (R. pp. 75-157). Accordingly, even if this Court finds this issue is preserved, there is no need for a remand when Appellant had ample opportunity to meet her burden of proof before the Commission and failed to do so. See Byers v. Blumenthal Mills, 293 S.C. 82, 84, 358 S.E.2d 717, 719 (Ct. App. 1987) (denying an appellant's request for a remand to the Single Commissioner because there was no real probability that a remand would change the result).

CONCLUSION

For the foregoing reasons, Respondent South Carolina Department of Disabilities and Special Needs respectfully request this Court affirm the Order of the South Carolina Workers' Compensation Commission.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

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RESPONDENT'S FINAL BRIEF

Columbia, South Carolina
November 18, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Worker's Compensation Commission
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1404431

Appellate Case No. 2015-001169

Wanda Weaver .....Employee/Appellant,

v.

South Carolina Department of Disabilities
and Special Needs, Employer, and
State Accident Fund, Carrier .....Defendants,

Of whom South Carolina Department of
Disabilities and Special Needs is the.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully Submitted,

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Of whom South Carolina Department of
Disabilities and Special Needs is the ..... Respondent.

PROOF OF SERVICE

I hereby certify that I served **RESPONDENT'S FINAL BRIEF** upon all parties, by placing a copy in the United States mail, postage prepaid, on November 18, 2015, addressed to H. Thad White, Jr., Esquire, Lucas, Warr & White, 2917 West Palmetto Street, Florence, SC 29501.

[SIGNATURE BLOCK TO FOLLOW]

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