

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

T. Scott Beck, Commissioner
Susan S. Barden, Commissioner
Avery B. Wilkerson, Jr. Commissioner

Appellate Case No. 2015-002041

Mortesha Mouzon-Johnson, Claimant,

Appellant,

v.

MeadWestvaco, Self-Insured Employer,

Respondent.

INITIAL BRIEF OF THE RESPONDENT

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Issues on Appeal

- I. Did the Workers' Compensation Commission properly conclude that Johnson did not sustain any injury to her lungs or respiratory system by accident arising out of and in the course of her employment on June 1, 2012 pursuant to S.C. Code Ann. § 42-1-160?

- II. Did the Workers' Compensation Commission properly conclude that Johnson is not entitled to any Workers' Compensation benefits pursuant to S.C. Code Ann. § 42-9-35 because she failed to establish by a preponderance of the evidence that the alleged accident on June 1, 2012 aggravated her known pre-existing Asthma or Restrictive Lung Disease?

- III. Did the Workers' Compensation Commission properly conclude that, pursuant to S.C. Code Ann. §§ 42-9-10 and 42-9-20, Johnson's alleged loss of wage-earning capacity is not causally-related to any alleged accident or injury on June 1, 2012?

- IV. Did the Workers' Compensation Commission properly conclude that Johnson did not sustain any permanent loss of use of any body member or system as a result of the alleged accident on June 1, 2012 pursuant to S.C. Code Ann. § 42-9-30 and S.C. Code Reg. 67-1101?

Facts

The Appellant, Mortesha Mouzon Johnson ("Johnson"), claims a lung injury as a result of an alleged accident on June 1, 2012. Johnson was diagnosed with asthma seven (7) years earlier and was receiving regular treatment, including prescription medications, at the time of the alleged accident on June 1, 2012. On June 1, 2012, Johnson did not report any lung injury or respiratory problem to anyone at work, nor did she seek or request any medical treatment on June 1, 2012. Johnson admits that she did not even take her previously prescribed asthma medications on June 1, 2012.

On June 4, 2012, Johnson attended a long-standing appointment with her personal neurologist, Dr. Bahadori, who was treating Johnson for cervical radiculopathy and left upper extremity weakness and pain. Johnson did not report any injury to her lungs or respiratory system to Dr. Bahadori. While Johnson discussed an alleged incident at work with Dr. Bahadori, she specifically stated that she had "no shortness of breath" associated with the alleged incident. (APA p.1). Likewise, in subsequent evaluations, Dr. Bahadori confirmed that Johnson had no shortness of breath associated with the alleged events at work on June 1, 2012. (APA p. 3, p.5).

Johnson was evaluated by her longtime personal allergist, Dr. Davidson, on June 7, 2012, at which time Dr. Davidson described Johnson as a "30-year-old woman with a history of allergic rhinitis, allergic asthma, and a past history of facial swelling do [sic] to an allergy to shellfish..." Prior to June 1, 2012, Dr. Davidson diagnosed Johnson with allergies to pollen, dust mites, pet dander,

mold, and cockroaches. According to Dr. Davidson's records, Johnson described an alleged incident at work on June 1, 2012, but she did not report any problem with, or injury to, her lungs or respiratory system. (APA p. 12). Indeed, on June 7, 2012, Dr. Davidson stated that Johnson's pre-existing asthma was "stable."

Johnson saw Dr. Davidson again on July 3, 2012, at which time she reported that she "stopped taking her Advair regularly with the warmer weather, she states she only needs to take it regularly in the winter and she denies any respiratory symptoms." (APA p. 15). Similarly, on January 28, 2013, Johnson reported that she was "doing well and denies respiratory symptoms." (APA p. 24). When Johnson saw Dr. Davidson on May 29, 2013, she admitted "she has not been taking her Advair regularly," but even still, her only complaint was some chest congestion and nasal drainage unrelated to her employment.

Johnson was seen by Dr. Steve Herndon for an independent medical evaluation on May 10, 2013. Dr. Herndon stated

"to a reasonable degree of medical certainty, it is unlikely that the [alleged] exposures listed would cause permanent lung damage...The chemicals that she was exposed to could have certainly exacerbated her asthma at the time of the exposure, however, they are, to a reasonable degree of medical certainty, much less likely to cause permanent lung impairment (above and beyond her preexisting disease)."

Dr. Herndon has since testified that there is no objective evidence that Johnson even has asthma, as none of her physical exams have shown any abnormality and

none of her pulmonary function tests have ever shown any obstructive lung disease. Instead, Johnson's pulmonary function tests have shown only non-work-related restrictive lung disease that has been stable over many years.

Even Johnson's personal pulmonologist, Dr. Spandorfer, was forced to concede that Johnson's respiratory function has improved by every objective standard since the alleged work accident. Dr. Spandorfer also admitted that there has been no change in Johnson's medications since the alleged incident at work on June 1, 2012.

Johnson has been out of work since July 2012 due to left arm weakness. On August 14, 2012, Dr. Davidson completed forms in connection with Johnson's Long Term Disability Claim against ING stating that her diagnoses were angioedema, allergic rhinitis, and food allergy, which he further unequivocally stated were not caused by a work-related accident. (APA p. 310). By October 24, 2012, Johnson reported to Dr. Davidson that she had "been approved for disability based on left arm and shoulder weakness" and that she only had "occasional problems with dyspnea after exertion." (APA P. 21). At the time of the hearing before the Workers' Compensation Commission, Johnson was continuing to receive Long Term Disability benefits as a result of this left arm weakness. Johnson never claimed that she was prevented from working due to asthma, though she did inform her LTD carrier that she was disabled by fatigue, migraine headaches, and facial swelling. (APA pp. 753-755).

Arguments

I. The Workers' Compensation Commission properly concluded that Johnson did not sustain any injury to her lungs or respiratory system by accident arising out of and in the course of her employment on June 1, 2012 pursuant to S.C. Code Ann. § 42-1-160.

The Workers' Compensation Commission denied Johnson's claim for benefits upon the conclusion that Johnson did not sustain any injury by accident arising out of or in the course of her employment on June 1, 2012, as required by S.C. Code Ann. § 42-1-160. Johnson did not appeal this, or any of the Commission's legal conclusions, making them the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (holding that "An unappealed ruling is the law of the case and requires affirmance.")

Furthermore, the Commission's conclusion of law regarding the application of S.C. Code Ann. § 42-1-160 was proper. That section specifically states that an injury "shall not include a disease in any form, except when it results naturally and unavoidably from the accident" and further explains that an

accident “must not be construed to mean a series of events in the employment.”

Section 42-1-160’s requirement that an alleged accident must arise “in the course of” the employment has also been interpreted by the South Carolina Courts so as to require that the alleged injury occur within the period of employment. Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964). Here, the Worker’s Compensation Commission properly applied these legal principals to the facts of the case in concluding that the claim did not meet the requirements of S.C. Code Ann. § 42-1-60.

The facts supporting the Commission’s unappealed legal includes the following finding:

Based upon the greater weight of the evidence, including the Claimant’s own testimony and the records of her doctors, the Claimant began receiving treatment for asthma and restrictive lung disease approximately 7 years prior to the alleged accident and was still prescribed regular treatment for these conditions at the time of the alleged accident. In the days and weeks following the alleged accident on June 1, 2012, the Claimant not only denied having any lung or respiratory symptoms to her doctors, but she admitted that she was not even taking her regularly-prescribed medications (Advair). Even despite the fact that she was not

taking her regularly-prescribed pulmonary medicines, her allergist found that her pre-existing asthma was “stable” when he evaluated her on June 7, 2012. In addition, the Claimant’s personal pulmonologist was forced to concede that, not only have the Claimant’s medications not changed since June 1, 2012.

Johnson does not deny that she had been diagnosed with, and received treatment for, Asthma and Restrictive Lung Disease for approximately seven (7) years prior to her alleged accident at work and therefore, there can be no question that the diseases for which she seeks Workers’ Compensation benefits did not result “naturally and unavoidably from” the alleged accident on June 1, 2012, as required by S.C. Code Ann. § 42-1-160.

Likewise, substantial evidence, including Johnson’s own testimony, supports the Commission’s finding that Johnson denied having any lung or respiratory symptoms to her doctors in the days and weeks following the alleged accident, meaning that any later problem she may have experienced with her pre-existing Asthma or Restrictive Lung Disease were not even temporally related to an alleged accident arising out of or in the course of her employment on June 1, 2012, as required by S.C. Code Ann. § 42-1-160. For example, when asked what happened to her on June 1, 2012, Johnson testified that “I started having a little bit of pain in my face...my face looked swollen.” (T. pp.25, line 16—p.27, line 9). According to Johnson, she believed she was experiencing a recurrence of the

Bells Palsy that had prevented her from working for most of 2012. (APA pp. 210-211, 227, 235).

Johnson was asked to specifically describe all of the symptoms she experienced on June 1, 2012, but she testified only about “swelling of the face” and “dilation of the eyes.” (T. p.56, lines 20-23). On cross examination, Johnson was asked,

“Q. And nothing took your breath away on June 1st, 2012, did it?”

A. No.”

(T. p.75, lines 9-11). At no time did Johnson describe any injury to her lungs or problems breathing on June 1, 2012, which alone constitutes substantial evidence in support of the Commission’s conclusion that her respiratory problems were not caused by any alleged accident on June 1, 2012.¹ See S.C. Dept. of Mental Retardation v. Glenn, 291 S.C. 279, 281, 353 S.E.2d 284 (1987) (“[w]hen determining whether the record contains substantial evidence to support an administrative agency’s findings, the ... Court cannot substitute its judgment on the weight of the evidence for that of the agency.”) (internal citations omitted).

Johnson admits that on June 1, 2012 and in the days that followed, she was “not in direct respiratory distress” and that she did not even call her pulmonologist or seek medical treatment for her lungs. (T. p.64, lines 9-11). In

¹ Note that Johnson also described an incident involving a non-work-related exposure to “Sharpie” markers in the spring of 2014 causing acute “respiratory distress” and she required her inhaler. Johnson admitted that she did not experience any such acute respiratory attack at MeadWestvaco on June 1, 2012 or at any other time. (T. p.97, line 11—p.98, line 3).

fact, Johnson admits that she didn't even need to take her long-prescribed asthma medications (Advair, Albuterol) on June 1, 2012 or the weeks that followed because she didn't "note" any problems with her breathing. (T. pp.63—65).

Not only does the record show that Johnson did not experience any change in her respiratory status in the days and weeks and months following the alleged accident on June 1, 2012, but Johnson was unable to elucidate when her alleged lung injury occurred. Johnson was specifically asked when she experienced a change in her breathing, to which she testified "I don't know" and "I can't tell you" and "I can't give you an exact date." (APA p. 76, lines 8—25). Johnson later testified that she began using her inhaler more frequently in December 2012 – six (6) months after she last worked at MeadWestvaco. (T. p.90, line 7 –p.91, line 4). This testimony further supports the Commission's Conclusion that Johnson's alleged injuries were not caused by an accident arising out of or in the course of her employment on June 1, 2012, as required by S.C. Code Ann. § 42-1-160, because it appears that any change in her pre-existing respiratory problems did not even occur during the period of employment. As our Supreme Court has explained,

"an injury arises, 'in the course of employment' within the meaning of the Workmen's Compensation Act, when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while he

is fulfilling these duties or engaged in doing something incidental thereto.”

Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 17 S.E. (2d) 695 (1941). The same simply cannot be said of Johnson’s alleged injuries and; therefore, the Workers’ Compensation Commission’s conclusion that her claim did not meet requirements of S.C. Code Ann. § 42-1-160, based upon substantial evidence in the record, should be affirmed.

II. The Workers’ Compensation Commission properly concluded that Johnson is not entitled to any Workers’ Compensation benefits pursuant to S.C. Code Ann. § 42-9-35 because she failed to establish by a preponderance of the evidence that the alleged accident on June 1, 2012 aggravated her known pre-existing Asthma or Restrictive Lung Disease.

Although the Commission made a formal conclusion of law with respect to the application of S.C. Code Ann. § 42-9-35 to the facts of this case, Johnson failed to appeal this conclusion or make any legal argument with respect to the application of that statute by the Commission. Therefore, this unappealed ruling is the law of the case. See In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). See also, Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 327 n.1, 730 S.E.2d 282, 284

n.1 (2012) (finding an issue abandoned when the argument in appellant's brief was "purely a recitation of facts, devoid of any citation to legal authority," resulting in a summary conclusion).

Furthermore, the Commission's ruling with regard to S.C. Code Ann. § 42-9-35 is supported by both the applicable law and substantial evidence in the record. Johnson appears to argue that there are no conflicts in the evidence regarding the cause of her respiratory issues and that; therefore, the Workers' Compensation Commission should be reversed. However, this argument is untenable. In fact, not only are there conflicts within the medical evidence regarding the aggravation issue, the medical evidence is also in conflict with the other evidence in the record, including the Claimant's own testimony, as explained by the Commission in its finding that the alleged events of June 1, 2012 did not cause or aggravate Johnson's pre-existing Asthma or Restrictive Lung Disease. Of course, where "the medical evidence conflicts, the findings of fact of the Commission are conclusive." Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 15-16, 747 S.E.2d 430, 433-34 (2013). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). *See also*, S.C. Code Ann. § 1-23-380(5) (Supp. 2013) (providing under the Administrative Procedures Act, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact).

Among the conflicting evidence in the record is Johnson's own admission that she told the first doctor she saw following the alleged accident of June 1, 2012 --Dr. Bahadori (her neurologist)-- that she had "no shortness of breath" associated with the alleged incident at work on June 1, 2012. (T. p.67, lines 9--20; Claimant's APA p.82--83). Dr. Bahadori's July 5, 2012 office note also states that "[s]he says she had no shortness of breath" at work on June 1, 2012. (Claimant's APA p. 84). Plainly, the Claimant's admission and Dr. Bahadori's records constitute substantial evidence in support of the Commission's finding that Johnson did not suffer any injury her lungs or experience a worsening of her pre-existing asthma on June 1, 2012. Indeed, this evidence certainly conflicts with any opinion, medical or otherwise, that Johnson's lung or respiratory problems suddenly worsened as a result of an alleged accident on June 1, 2012.

Similarly, Johnson admits she did not report any problems with her lungs when she saw her allergist, Dr. Davidson on June 7, 2012 -- less than a week after the alleged work accident. (T. p.68, lines 15-22).² Johnson admits that she was not having any lung or respiratory problem on June 7, 2012 when she saw Dr. Davidson for a regularly-scheduled appointment. (T. p.68, line 20 -- p. 69, line 12; p.74, lines 2-4). She agreed that Dr. Davidson examined her on June 7, 2012 and found her lungs to be "clear to auscultation bilaterally." (Claimant's APA p. 105). Dr. Davidson did not make any changes in her medications and assessed her asthma to be "[s]table." (Claimant's APA p.105; T. p.71, lines 19--22). This

² Johnson was also seen in the MeadWestvaco Medical Department on June 7, 2012, at which time she denied having shortness of breath and denied wheezing. (Defendant's APA p.177).

evidence is also in conflict with any evidence supporting Johnson's claim that an alleged accident on June 1, 2012 caused or aggravated any lung or respiratory problem.

Even a month after her alleged accident at work, Johnson still had not experienced any problem breathing or any change in her pre-existing Asthma. According to Dr. Davidson's July 3, 2012 office note,

"Patient stopped taking her Advair regularly with the warmer weather, she states she only needs to take it irregularly in the winter and **she denies any respiratory symptoms.**" (Claimant's APA p. 108, emphasis added).

Johnson admitted at the hearing that she was not having any respiratory symptoms in the month following the alleged work accident and she did not even need to take her previously prescribed asthma medication, Advair, during that time.³ (T. p.73, line 12—p.74). She further testified "I did not have any symptoms of respiratory distress" and was only seeing Dr. Davidson for a regularly-scheduled appointment in July 2012. (T. p.74, lines 1-4). This evidence is certainly inconsistent with Johnson's argument (and the opinions of her

³ Note that the history described herein and reflected in the medical records and Johnson's sworn testimony is inconsistent with the history Johnson later gave Dr. Spandorfer, upon which he relied in addressing the issue of causation. (4/30/14 Deposition of Dr. Spandorfer, p.12, line 18 – p.19, line 5).

personal physicians rendered in the course of litigation) that her asthma was suddenly worsened as a result of an alleged work accident on June 1, 2012.

Similarly, the opinions of Dr. Herndon support the Commission's finding that Johnson's asthma was not worsened by any alleged accident at work on June 1, 2012. Herndon, a pulmonologist, evaluated Johnson on May 10, 2013 and concluded that her alleged exposure to chemicals at work "*could have certainly exacerbated her asthma at the time of exposure, however, they are, to a reasonable degree of medical certainty, much less likely to cause permanent lung impairment (above and beyond her preexisting disease).*" (Claimant's APA p. 127) (emphasis added). Dr. Herndon later qualified that opinion in his deposition, at which time he testified that he could not state with any certainty that the Claimant even had Asthma, considering her repeatedly normal physical exams and her repeated pulmonary function studies that showed no evidence of any obstructive lung disease.⁴

Dr. Herndon was also asked,

"Q. Is there any objective evidence ... that her breathing problems are caused or aggravated by any alleged exposure at work?

A. There is no objective evidence."

(Herndon T. p.26, lines 19–23). Dr. Herndon further testified:

⁴ Note that even Dr. Spandorfer was forced to admit that his diagnosis of asthma was based on nothing more than the Claimant's "subjective complaints, which haven't been verified and which are inconsistent with the reports she gave other doctors prior to coming to see [him] on August 23rd of 2012." (4/30/14 Spandorfer T. p.22, lines 1–6).

“Q. ...this pulmonary function study that you did on May 10, 2013...does it show or provide any objective evidence that she has occupational asthma?

A. No. ...It shows restrictive lung disease.

Q. Okay. And can you state to a reasonable degree of medical certainty whether or not her restrictive lung disease was caused by any alleged exposure at work?

A. No, I can't – I can't with any reasonable medical certainty.”

(Herndon T. p.40, line 21 – p.41, line 10). Dr. Herndon was also asked,

“Q.....Can you state to a reasonable degree of medical certainty whether or not Ms. Johnson has any permanent impairment of her lungs as a result of any alleged exposure at work?

A. I think it is unlikely.”

(Herndon T. p. 42, lines 17–21). Lastly, Dr. Herndon testified that he would not defer to Johnson's other physicians. In fact, Dr. Herndon noted that the pulmonary function testing done by Dr. Spandorfer did not even meet the validity criteria established by the American Thoracic Society and his tests were not valid.

(Herndon T. p.75). Therefore, Johnson's argument that “all of the medical

experts” support her claim that her pre-existing Asthma was aggravated by an accident on June 1, 2012 is simply untenable. At best, the evidence is conflicting and therefore; the Commission’s findings should be affirmed.

Even Dr. Spandorfer, Johnson’s longstanding personal physician, admitted that Johnson’s pulmonary function testing was “[b]etter” in August 2012 than it had been in February 2012, four (4) months prior to the alleged accident. (4/30/14 Spandorfer T. p.19, lines 13–18). Dr. Spandorfer admitted that Johnson’s pulmonary function had “improved” between February 2012 and August 2012. (4/30/14 Spandorfer T. p.20, lines 2–6, p.58 lines 2–7). Johnson’s pulmonary function improved even further by the last time she was seen in April 2014. (4/30/14 Spandorfer T. p.31, lines 7–12). Dr. Spandorfer admitted that he did not think Johnson was objectively worse since June 1, 2012. (4/30/14 Spandorfer T. p.58, lines 13–15).

As a result, Dr. Spandorfer was asked

“Q. ...So can you state to a reasonable degree of medical certainty that her impairment has changed or worsened since February 23rd of 2012?

A. I did not do a impairment rating on February 12, 20- -- I wasn’t
– I didn’t do one. So I can’t state that it’s changed.”

(4/30/14 Spandorfer T. p.44, lines 7–12).

Therefore, not only do Dr. Spandorfer's opinions conflict with the other evidence in the record, but they are internally inconsistent as well.⁵ As a result, the Commission was free judge the credibility of such medical opinions and accord the weight the Commission felt appropriate in ultimately denying Johnson's claim under S.C. Code Ann. § 42-9-35. "W]hile there is evidence which could arguably have raised other inferences ... it is not the task of this Court to substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." Hoxit v. Michelin Tire Corp. 304 S.C. 461, 405 S.E.2d 407 (1991) (citing S.C. Code Ann. § 1-23-380(g) (1986)). That is because "[w]here there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive." Holcombe v. Dan River Mills, 286 S.C. 223, 333 S.E. (2d) 338 (Ct. App. 1985).

III. The Workers' Compensation Commission properly concluded

that, pursuant to S.C. Code Ann. §§ 42-9-10 and 42-9-20,

Johnson's alleged loss of wage-earning capacity is not causally-

related to any alleged accident or injury on June 1, 2012.

⁵ Johnson argues that the opinions of Dr. Spandorfer and Dr. Davidson are somehow conclusive; however, because they conflict with other competent evidence in the record, the Commission was free to discount them, as explained in Tiller v. National Healthcare Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) (holding that "the Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established ...medical testimony should not be held conclusive irrespective of other evidence.") (internal citations omitted).

Like the Workers' Compensation Commission's other legal rulings, Johnson did not appeal the Commission's conclusion that her alleged loss of wage-earning capacity is not causally-related to any alleged accident or injury on June 1, 2012 pursuant to S.C. Code Ann. § § 42-9-10 and 42-9-20. Johnson's brief makes no legal argument with regard to the Commission's application of § § 42-9-10 and 42-9-20 to the facts of this case. As such, the Respondent respectfully contends that the Commission's ruling on this issue is the law of the case. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).

Furthermore, the Commission properly applied both § 42-9-10 and § 42-9-20 to the facts of this case, which required that Johnson prove, by a preponderance of the evidence, that she had a total incapacity for work as a result of the alleged events of June 1, 2012. The Commission properly determined, based upon substantial evidence in the record, that Johnson did not meet this burden of proof and therefore, the Commission's finding in this regard should be affirmed.

Most notably, Johnson herself testified that the reason she stopped working in July 2012, was not because she had asthma or respiratory problems, but because her eyes were "swollen." (T. p. 56, lines 5-6). The doctors who endorsed Johnson's short and long term disability applications in 2012 indicated that it was non-work-related problems with left arm weakness, Bells Palsy, and

facial swelling that rendered her unable to work. (Defendant's APA pp.235, 310, 486, 528, and 715). Even as of August 1, 2013 – more than a year after the alleged accident at work, Johnson mentioned no issues with her lungs or asthma in support of her Long Term Disability Claim, though she complained in detail about facial swelling and migraine headaches. (Defendant's APA pp.753–755). At the hearing, Johnson admitted that she was not out of work due to asthma or shortness of breath. (T. p.77, lines 2–5). Instead, Johnson testified that she is out of work due to Bells Palsy, radiculopathy, migraine headaches, and facial swelling. (T. pp. 78-81). As a result of these personal health problems, not any alleged work-injury, that Johnson was continuing to receive long term disability benefits at the time of the hearing.

It was upon this substantial evidence that the Commission found and concluded that Johnson's inability to earn wages since 2012 is not causally-related to any alleged accident on June 1, 2012, nor is it related to her pre-existing asthma. Clearly, Johnson had an incapacity to earn wages; however, this was true irrespective of any alleged accident on June 1, 2012. To suggest that Johnson would have been able to earn her regular wages, but for the alleged accident on June 1, 2012, would require pure, impermissible surmise and speculation. See Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E. (2d) 437 at 441 (1966) (holding that award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it.”).

IV. The Workers' Compensation Commission properly concluded that Johnson did not sustain any permanent loss of use of any body member or system as a result of the alleged accident on June 1, 2012 pursuant to S.C. Code Ann. § 42-9-30 and S.C. Code Reg. 67-1101.

Johnson's brief to the Court of Appeals makes no argument regarding the application of the legal requirements of S.C. Code Ann. § 42-9-30 or S.C. Code Reg. 67-1101. Therefore Johnson did not appeal or otherwise preserve any argument regarding the Commission's ruling that

"Pursuant to S.C. Code Ann. § 42-9-30 and S.C. Code Reg. 67-1101, the Claimant did not sustain any permanent loss of use of any body member or system as a result of the alleged accident on June 1, 2012, based upon the greater weight of the evidence in the record."

Because an unappealed ruling, right or wrong, is the law of the case, the Respondent respectfully requests that this conclusion be affirmed. See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (an unappealed ruling, right or wrong, is the law of the case and requires affirmance); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (same).

In addition, the Commission's finding and conclusion that Johnson is not entitled to any benefits for loss of use of her lungs is supported by substantial evidence and should be affirmed. Even the Claimant's own physician, Dr. Spandorfer, admitted that Johnson's pulmonary function testing was "[b]etter" in August 2012 than it had been in February 2012, four (4) months prior to the alleged accident. (4/30/14 Spandorfer T. p.19, lines 13—18). Dr. Spandorfer also admitted that Johnson's pulmonary function had "improved" between February 2012 and August 2012. (4/30/14 Spandorfer T. p.20, lines 2—6, p.58 lines 2—7). Johnson's pulmonary function improved even further by the last time she was seen in April 2014. (4/30/14 Spandorfer T. p.31, lines 7—12). Dr. Spandorfer admitted that he did not think Johnson was objectively worse since June 1, 2012. (4/30/14 Spandorfer T. p.58, lines 13—15).

As a result, Dr. Spandorfer was asked

"Q. ...So can you state to a reasonable degree of medical certainty that her impairment has changed or worsened since February 23rd of 2012?

B. I did not do a impairment rating on February 12, 20- -- I wasn't -- I didn't do one. So I can't state that it's changed."

(4/30/14 Spandorfer T. p.44, lines 7—12).

In addition, the record reveals that Johnson has been receiving medical treatment, including prescription medications and inhalers, for many years prior to the alleged accident on June 1, 2012. Since June 1, 2012, her treatment regimen has not changed. In fact, as of April 2014 when she was last evaluated by Dr. Spandorfer, Johnson was stable and did not require steroids or antibiotics and only needed bronchodilator therapy intermittently. (4/30/14 Spandorfer p. 30, lines 7–13). Dr. Spandorfer was asked by the Johnson’s attorney whether her medication has increased or decreased since February 2012, to which he responded “[i]t appears to be the same.” (4/30/14 Spandorfer T. p.56, lines 7–11). Dr. Herndon testified that “[t]o a reasonable degree of medical certainty, she likely doesn’t require any further treatments above and beyond her baseline therapy for asthma.” (Claimant’s APA p. 127).

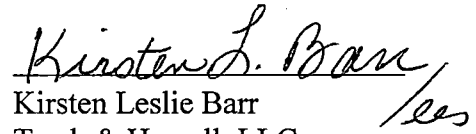
Dr. Spandorfer further testified that in addition to Asthma (an obstructive lung disease), he believed Johnson had a restrictive lung problem due to her body habitus. (4/30/14 Spandorfer T. p.39, lines 12-15). Obviously, Johnson’s body habitus and her resulting restrictive lung problem is not causally-related to her employment; however, Dr. Spandorfer admitted that he could not state with any certainty what portion the impairment rating he issues was due to this restrictive deficit, versus an obstructive deficit such as asthma. (4/30/14 Spandorfer T. p.39, lines 18-22; p.64, lines 15--19). So even if Johnson’s overall lung impairment increased after June 1, 2012 (which there is not), it would be impossible to attribute this rating to her alleged accident at work without resorting to pure, impermissible speculation.

The above-quoted testimony of Dr. Spandorfer, coupled with the testimony of Dr. Herndon that it would be unlikely that she would have any permanent impairment of her lungs as a result of any alleged exposure at work (Herndon T. p.42, lines 17-21) constitute substantial evidence in support of the Commission's finding and conclusion that Johnson does not have any permanent loss of use of her lungs or respiratory system as a result of the alleged accident on June 1, 2012. Therefore, the Commission's finding in this regard should be affirmed. See Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005) (holding that "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact...").

Conclusion

Because the Workers' Compensation Commission's rulings of law are the law of the case and because the Commission's findings of fact are supported by substantial evidence in the record, the Respondent respectfully requests that the final Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in accordance with the Administrative Procedures Act.

Respectfully submitted,


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April 8, 2016

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