

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION APPELLATE PANEL

SC Court of Appeals

Case No. 2016-000598

Clarence B. Jenkins Jr,

Appellant,

v.

Amazon.Com DEDC, LLC
and American Zurich
Insurance,

Respondents.

[INITIAL] BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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11. AMAZON.COM DEDC, LLC AND AMERICAN ZURICH INSURANCE ADMITTED IN THEIR MOTION TO SOUTH CAROLINA WORKER'S COMPENSATION FULL PANEL THAT SINGLE COMMISSIONER MICHAEL CAMPBELL II MADE AN ERROR WITH REGARDS TO R67-611 BUT CONSIDERED IT TO HARMLESS PERTAINING APPELLANT'S PERTINENT MEDICAL AND SUPPORTIVE DOCUMENTATIONS.

STATEMENT OF THE CASE

On February 10, 2013, Clarence B. Jenkins Jr., Appellant sustain a work related injury to the head while working Amazon Fulfillment Center in, West Columbia, SC. Respondents has admitted that Appellant did sustain the work injury on February 10, 2013 and has accepted responsibility. Appellant has been diagnose with post syndrome concussion which has become disabling with other medical problems. Appellant was placed on a leave of absent from Amazon Fulfillment Center at least three times due injury, medical symptoms and medical documentations. Appellant was initial placed on a leave of absent by family medical physician, Dr. Sharon Eden due to post syndrome concussion from May, 2013 to August, 2013 and return to work with restrictions that which Amazon adhere too. Dr. Eden also made a referral to Orangeburg Neurology and Pain of Orangeburg, South Carolina because of concussion syndrome in June , 2013. I was approved to see Dr. Mahmoud Abu-Ata at Orangeburg Neurology and Pain Clinic by Amazon. Com DEDC, LLC and American Zurich Insurance.

Dr. Mahmoud Abu-Ata of Orangeburg Neurology and Pain Clinic began providing medical care to Appellant because of concussion syndrome. I saw Dr. Mahmud Abu-Ata at least five times from August, 2013 to October, 2014. Dr. Mahmoud Abu-Ata continued work restrictions which Amazon.Com DEDC.LLC and American Zurich Insurance provided from September, 2013 to February, 2014. Dr. Mahmoud Abu-Ata continued work restrictions in February 21, 2014 to avoid bright lights and loud noises therefore employment was terminated on April 13, 2015.

I received an email from Michele Doyle of Amazon.Com DEDC, LLC Human Resources Office not allowing access to worksite because work restrictions. I was already working at Amazon.Com DEDC, LLC on work restrictions until being placed on leave by Michele Doyle of Amazon.Com DEDC, LLC Human Resources. Dr. Mahmoud Abu-Ata did not placed me put of work but Amazon.Com DEDC,LLC Human resources Office. Amazon.Com DEDC, LLC paid additional disability benefits which is verified by paystubs. I was denied short-term disability benefits even though medical documentations from Dr. Mahmoud Abu-Ata confirming medical symptoms which were ignored. I applied for long-term disability compensation and received benefits payment from July, 2014 to January, 2015. I am currently under medical care to due to health care problems sustain from work injury on February 10. 2013 and have not receive any compensation benefits. I have not receive additional worker's compensation or disability benefits since January, 2015.

Appellant provides Amazon.Com DEDC, LLC and American Zurich Insurance with medical status even though worker's compensation benefits are not being paid and suitable employment have not been provided.

FACT

Appellant received a work injury to the head on February 10, 2013 at Amazon.Com Fulfillment Center in West Columbia, South Carolina. Appellant sustained a post concussion syndrome as documented by several doctors which has been disregarded by Amazon.Com DEDC, LLC and American Zurich Insurance. Amazon.Com DEDC, LLC and American Zurich Insurance has been provided all medical records through subpoenas and provided by Appellant. South Carolina Worker's Compensation Commission violated their own policy of R67-611 and the requirement of Form14B.

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ARGUMENTS

- I. THE EGREGIOUS ERROR OF COMMISSIONER MICHAEL CAMPBELL II REGARDING R67-611 REQUIRING APPELLANT TO FILED A PRE-LEGAL BRIEF FOR MAY 21, 2015 HEARING. COMMISSIONER MICHAEL CAMPBELL II LEFT THE BENCH FOR AN ESTIMATED THIRTY MINUTES TO RESEARCH THE LAW BEFORE MAKING HIS EGREGIOUS RULING.

[R67-611 of South Carolina Worker's Compensation Laws does not requires a Pro Se Appellant to filed a pre-legal brief.]

- II. SOUTH CAROLINA WORKER'S COMPENSATION POLICY REQUIRES A FORM14B TO BE COMPLETED BY ASSIGNED WORKER'S COMPENSATION DOCTOR WHEN MAXIMUM MEDICAL IMPROVEMENT CLAIMED BY EMPLOYER. BECAUSE FRAUD MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE, THE TRIAL COURT ERRED WHEN IT CHARGED THE JURY THAT THE RESPONDENT MUST PROVE FRAUD BY A PREPONDERANCE OF THE EVIDENCE.

[Amazon.Com DEDC, LLC and American Zurich Insurance does not have a completed Form14B a physician statement because assigned worker's compensation doctor, Dr. Mahmoud Abu-Ata has refused to provide it because medical symptoms. South Carolina Worker's Compensation Commission does not have a completed Form14B on file as required.]

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

June 16, 2016

Respectfully submitted,


/s/ Clarence B. Jenkins Jr,

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kellie N. Burnette, Appellant,

v.

City of Greenville and Hewitt Coleman & Associates,
Respondents.

Appellate Case No. 2011-198006

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5059
Heard October 29, 2012 – Filed December 5, 2012

REVERSED AND REMANDED

Douglas A. Churdar, of Greenville, for Appellant.

Michael Allen Farry and David Alan Wilson, both of
Horton Drawdy Ward Mullinax & Farry, PA, of
Greenville, for Respondents.

CURETON, A.J.: Kellie N. Burnette appeals the circuit court's order affirming the decision of the Workers' Compensation Commission (Commission). Burnette argues the circuit court erred in affirming because the evidence in the record does not support the Commission's findings that (1) Burnette did not injure her lower back in her June 2007 incident, (2) Burnette is not permanently and totally disabled, and (3) Burnette's testimony was not credible. We reverse as to the June 2007 injury to Burnette's lower back, remand to the Commission for the entry of

findings of fact concerning the lumbar injury and Burnette's disability rating, and decline to address the issue of credibility.

FACTS

I. First Injury and 2004 MRI

After becoming a police officer for the City of Greenville (City¹) in 2001, Burnette suffered two work-related injuries. On August 23, 2003, she was driving a patrol car when a fleeing suspect in a stolen car collided with the driver's side in a "t-bone" accident. Burnette suffered a broken nose and injuries down her left side to her ankle, including her neck and lower back. In addition to surgery to repair her nose, Burnette received two months of physical therapy but continued experiencing chronic lower back pain. After the incident, she experienced continuing pain localized to her mid- and lower back. Although she was rated as having a 17.5% disability to her back, Burnette returned to work to full duty.

On June 21, 2004, Burnette began seeing Dr. Kopera for pain management. Dr. Kopera reviewed an MRI taken May 11, 2004, which he deemed normal. On August 19, 2004, Dr. Kopera determined Burnette had reached maximum medical improvement (MMI) but had a 5% permanent impairment to her lumbar spine. He noted Burnette presented with lower back pain but "no radicular symptoms," rated her pain at a 7 out of 10, and displayed excellent range of motion at the waist. During the course of treating Burnette, Dr. Kopera found chronic pain or tenderness in the lumbar region that by 2006 had moved to the thoracic region. He believed the pain was largely myofascial in nature. In April 2006, Dr. Kopera prescribed physical therapy for Burnette, which helped. She continued seeing Dr. Kopera until 2007, when he closed his practice and referred her to Dr. Satterthwaite.

During the summer of 2005, Burnette also saw Dr. Schwartz for pain management. Dr. Schwartz noted she presented with pain in her lower back, neck, interscapular area, and thoracolumbar region. He supplemented Burnette's oral pain medications with injections. On August 23, 2005, Dr. Schwartz opined Burnette had reached MMI from her 2003 injuries but had a permanent spinal impairment of 13%, which consisted of an 8% lumbar impairment and a 5% cervical impairment.

¹ This term also collectively references the City of Greenville and its insurance administrator, Hewitt Coleman & Associates.

II. Second Injury and Medical Retirement

On June 16, 2007, Burnette attempted to wrestle a suspect out of a car while her partner unsuccessfully tried to tase the suspect. With Burnette partially inside the vehicle, the suspect drove forward. First dragged by the car and then thrown from it, Burnette landed against a curb and felt a shock in her neck, head, and lower back. Burnette began missing work and was placed on light duty. Ten months later, on April 17, 2008, the South Carolina Retirement System placed Burnette on disability retirement from the police force with a recommendation that she be examined again in three years.

On August 28, 2007, Burnette began seeing Dr. Satterthwaite and his staff. She reported pain in the thoracic and lumbar regions that started after the 2003 car wreck. The treatment notes from Burnette's first visit indicate Dr. Hutcheson of that office reviewed her 2004 MRI and recorded seeing minimal disk bulges without stenosis at L4-5 and L5-S1. In early September 2007, Burnette reported neck and lower back pain she rated at 9 out of 10. Two weeks later, she rated the pain at 8. Dr. Satterthwaite noted Burnette had suffered "an injury in June where she hurt her neck" and that the "[c]urrent increased neck pain seem[ed] to have been [aggravated] by an injury in June when she was jerked by a car trying to leave the scene."

In October 2007, Dr. Satterthwaite examined Burnette with an eye toward making recommendations to the City's workers' compensation insurance administrator. At that time, Burnette rated her pain at 6 out of 10 but noted the pain increased when she sat or stood for long periods or entered or exited a car. In response to his question whether she might apply for a secretarial job, Burnette told Dr. Satterthwaite she was "not interested in a desk job but [did] state that she ha[d] applied for [a] teaching position, which would not require her to wear the vest and belt and [would] allow her to change positions frequently from standing to sitting." Noting the workers' compensation adjuster had asked him to define work restrictions for Burnette, Dr. Satterthwaite stated:

She is currently working unrestricted. She does not want significant restrictions that would place her at a desk job or remove her from her job completely. She does feel that she would benefit from limitations to standing and sitting to one hour at a time without rest breaks. She was

on her feet working last weekend for several hours, and that was quite uncomfortable to both her neck and back.

She has applied for [a] teaching position, which sounds ideal for her. I would strongly recommend that she be seriously considered for that position as I think she is a dedicated officer and wishes to continue working in law enforcement. It would also be good to get her out of the patrol car so that she does not have to use it for long periods with poor back support and get in and out of the vehicle. The belt and vest are quite heavy and do alter her posture with sitting and standing, increasing problems with her spinal alignment and the potential for increasing her neck and back pain.

III. 2008 MRI and Neck Surgery

Burnette did not get the teaching job, but her pain rating remained relatively stable at 7 out of 10 until February 2008, when it reached 8. In January 2008, Burnette underwent an MRI of her lumbar spine, which showed a minimal central disk protrusion without stenosis or impingement at L5-S1. A few days later, Dr. Satterthwaite's nurse practitioner noted Burnette had a herniated disk at L5-S1 and lumbar radiculopathy. In March 2008, rating her pain with medication at 5 out of 10, Burnette was experiencing spasms in her back. Dr. Satterthwaite's nurse practitioner referred her to physical therapy, noted they were "still awaiting approval for treatment of [the] neck," and indicated Burnette needed a sedentary job because she was unable to continue in her present position. A series of epidural steroid injections followed from March through September 2008. On September 15, 2008, Dr. Satterthwaite noted Burnette was suffering from increased back and leg pain. Despite receiving a pain injection two weeks earlier, on October 1, 2008, Burnette rated her pain at 9.

On October 27, 2008, Dr. Bucci performed a cervical laminectomy on Burnette, fusing together her C4 and C5 vertebrae. Following surgery, her neck pain improved, but her back pain did not. From March to May 2009, her overall pain rating decreased from 8 to 6.

Dr. Bucci assessed Burnette's postsurgical condition twice. First, on April 3, 2009, he completed a Physician's Statement for the Workers' Compensation Commission. In that document, he noted he had last seen Burnette on March 24, 2009, and she

sustained a 10% medical impairment to her cervical spine. In addition, he released her to return to work without restriction.

On August 6, 2009, Dr. Bucci revised his medical opinion when he filled out a more detailed questionnaire for Burnette's counsel. He stated Burnette suffered a 28% "permanent impairment . . . to the whole person as a result of her cervical spine injury of 6/16/07." He also acknowledged that when he completed the Physician's Statement, he was unaware of Burnette's disability retirement, 2003 lumbar spine injury, ongoing treatment for pain and depression/anxiety, or her limitations resulting from those conditions. Dr. Bucci concluded Burnette was not able to return to work without restriction.

In the meantime, on June 22, 2009, Dr. Satterthwaite completed a workers' compensation questionnaire stating Burnette had reached MMI with regard to her June 16, 2007 injuries. He assigned her a 72% impairment of the cervical spine, which translated to a 25% whole person impairment. In his treatment notes from July 1, 2009, he added that Burnette also had a 16% permanent impairment of the lumbar spine, which corresponded to a 12% whole person impairment. At that visit, Burnette rated her pain at 6 but complained it was in her neck, left arm to palm, back, and right leg.

IV. Workers' Compensation Claim

Burnette filed a Form 50, seeking total permanent disability for injuries to her neck, upper and lower back, and psyche from the June 2007 incident. The City admitted her neck and upper back injuries but denied her claims of injuries to the lower back and psyche. The City maintained Burnette had received medical treatment, had reached MMI, and needed no further care for injuries sustained in the June 2007 incident.

The parties submitted extensive medical and psychological records² for the single commissioner's consideration. In addition, Burnette supported her claims with opinions and reports from her treating physicians and Benson Hecker, Ph.D., an expert in vocational rehabilitation who evaluated her employment prospects. Dr. Hecker concluded Burnette would be "unable to perform any substantial gainful work activity which exists in significant numbers in open competition with others."

² A component of Burnette's care with Dr. Satterthwaite was psychological care from Dr. Tollison and his staff.

A. Hearing Testimony regarding Injuries

On September 3, 2009, the parties tried their case before the single commissioner. At that hearing, Burnette testified to the rigors and unpredictability of working as a police officer. She recalled wearing a uniform, duty belt, and bulletproof vest that together weighed approximately twenty-five pounds. According to Burnette, an officer's duties were physically demanding and "would vary from day to day, hour to hour." Burnette testified that after the August 2003 incident, she experienced pain in her middle and lower back and pain that radiated into her arms. At the time of the hearing, she claimed her pain went from her neck to her buttocks and, at times, radiated downward through a nerve into her leg.

Burnette also testified to suffering from depression. In addition, she claimed she experienced anxiety when riding in vehicles or being in crowds. She stated she could sit or stand comfortably for approximately twenty to thirty minutes at a time and could alternate sitting and standing for up to three hours at a time. Not only would pain prevent her from kneeling or walking more than a couple of blocks, she testified she had difficulty bending at the waist, twisting her back, squatting, or stooping.

B. Hearing Testimony regarding the Boat Cover Incident

On cross examination, Burnette acknowledged reporting to her doctors an incident that occurred in July 2009 when she and her friend were towing her parents' boat from Columbia to Greenville. According to the doctor's notes, Burnette "recite[d] an incident on the weekend in which the sun cover on the boat flew off and she and a friend had to pick it up and put it in their truck. Tuesday she start[ed] having increased lower back pain that radiates to her left and into her buttocks." Burnette stated the notes were incorrect, in that the boat belonged to her parents and the "cover" that blew off was a cushion.

Burnette further explained that the cover blew off the boat and flew onto the highway, clipping the corner of the car behind her. After Burnette pulled off the highway, her friend retrieved the cover from the road, and the two women "pushed it up in the truck." According to Burnette, her increased pain started while she was watering flowers on Tuesday following the Saturday incident.

C. Procedure and Appeals

On October 14, 2009, the single commissioner issued her order awarding Burnette seventy-five weeks of benefits for a 25% permanent partial disability to the spine.

She found the June 2007 incident resulted in injuries to Burnette's neck and upper back with psychological overlay. However, she also found the "greater weight of the evidence" did not support Burnette's claim of an injury to her lower back.

The single commissioner examined Burnette's 2004 and 2008 MRIs and found the latter showed "only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004" ³ In addition, the single commissioner accepted without question Dr. Satterthwaite's June 22, 2009 statement that Burnette had reached MMI from her cervical injury and awarded benefits based upon his determination of a 25% whole person impairment corresponding to the cervical spine injury. However, she ignored his contemporaneous determination of a 12% whole person impairment corresponding to the lumbar spine injury. Instead, the single commissioner found that "if [Burnette] aggravated her low back condition in the accident in issue, the aggravation was temporary, and her condition returned to baseline or is the result of an intervening accident," referring to either an unspecified event "in late 2008" or the boat cover incident.

She further stated she "strongly believe[d]" Burnette had "exaggerated her condition to various providers and to the undersigned in order to 'maximize' her case/award." Moreover, she stated Burnette struck her "as someone who simply [did] not wish to work (medical evidence as a whole; testimony of [Burnette], including but not limited to the issue of the amount of her monthly police disability income vis-à-vis her average weekly wage)." The single commissioner found Burnette was "conversant with various levels of the spine by name," but she dismissed much of Burnette's testimony as being "liberally laced with exaggeration." Four out of twenty-four findings of fact relied at least in part on Burnette's interaction with her parents' boat.

Both before and after the issuance of this order, Burnette sought leave to submit additional medical records in response to the boat cover incident. The single commissioner denied her motions.

On April 1, 2010, the Commission entered an order affirming and adopting verbatim the single commissioner's order. Burnette appealed to the circuit court, which affirmed in a modified Form 4 order. She then filed a motion to alter or amend the judgment, which was denied. This appeal followed.

³ The record does not reflect that any physician expressed this opinion.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

LAW/ANALYSIS

I. Injury to Lower Back

First, Burnette asserts substantial evidence does not support the finding she did not injure her lower back in the June 2007 incident. We agree.

An injured employee "who has a permanent physical impairment or preexisting condition" may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that "the subsequent injury aggravated the preexisting condition or permanent physical impairment." S.C. Code Ann. § 42-9-35 (Supp. 2011); *see also Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 436-37, 458 S.E.2d 76, 79 (Ct. App. 1995) (recognizing the "natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable," as well as the aggravation of "a [preexisting] condition, infirmity, or disease" by a work-related injury). Nonetheless, "an employee who suffers a subsequent injury which affects a single body part or

member injury set forth in Section 42-9-30 is limited to the recovery set forth in that section." § 42-9-35.

Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). However, "[w]hile a finding of fact of the [C]ommission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Edwards v. Pettit Constr. Co., Inc.*, 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979); *see also Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 309-10, 454 S.E.2d 320, 322 (1995) (affirming reversal of Commission's decision, which was supported by no evidence in the record).

We find the circuit court erred in affirming findings of fact that were unsupported by substantial evidence in the record. Particularly disturbing is the finding that the 2008 MRI showed "only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004" Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single commissioner, adopted by the Commission.

Moreover, we find substantial evidence in the record does not support the Commission's findings that Burnette neither injured nor aggravated a preexisting injury to her lower back, or that any such injury or aggravation either "returned to baseline" or resulted from an independent intervening accident. *See Potter*, 395 S.C. at 23, 716 S.E.2d at 126 (permitting the Commission to disregard medical evidence only when other competent evidence exists in the record); *Edwards*, 273 S.C. at 579, 257 S.E.2d at 755 (holding a finding of fact by the Commission "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it"). The record contains Burnette's medical records and testimony, as well as written opinions by her treating physicians and a vocational rehabilitation expert. We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy. As a result, the record provides little or no support for the findings of the Commission holding that Burnette neither injured nor aggravated a prior injury to her lower back in the 2007 incident. Consequently, the circuit court erred in affirming the Commission's

factual findings concerning the existence, exacerbation, and possible causes of Burnette's lower back injury.

We reverse the circuit court's decision and remand this issue to the Commission. On remand, we specifically instruct the Commission to reconsider this issue and enter findings of fact concerning Burnette's lumbar injury that are supported by substantial evidence in the record.

II. Permanent and Total Disability

Next, considering the combined effects of her preexisting impairments with the injuries sustained in the June 2007 incident, Burnette argues substantial evidence does not support the finding that she is not permanently and totally disabled. We remand this issue as discussed below.

In a workers' compensation case, this court does not have the authority to find facts; that authority belongs to the Commission. *Sigmon v. Dayco Corp.*, 316 S.C. 260, 262, 449 S.E.2d 497, 498 (Ct. App. 1994). Moreover, the determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses:

While an impairment rating may not rest on surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness. . . .

Further, the [Commission] is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony. Expert medical testimony is merely intended to aid the [Commission] in coming to the correct conclusion. Unless the question of the extent of partial loss of use under [section] 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible.

Sanders v. MeadWestvaco Corp., 371 S.C. 284, 291-92, 638 S.E.2d 66, 70 (Ct. App. 2006) (citations and quotation marks omitted).

Any conclusion as to the degree or permanency of Burnette's disability must take into consideration her preexisting impairments, as well as factual findings not yet made with regard to her lumbar spine. In view of our determination that substantial evidence does not support the Commission's denial of a 2007 injury or aggravation of a prior injury to Burnette's lumbar spine, we remand this issue to the Commission for (1) the entry of findings of fact concerning the extent of Burnette's lumbar injury or aggravation, (2) a determination of the medical treatment or other benefits to which Burnette may be entitled for her lumbar injury or aggravation, and (3) a recalculation of Burnette's disability rating in view of the injury to the lumbar spine.

III. Credibility

Finally, Burnette contends the Commission's findings concerning her credibility are neither material nor supported by substantial evidence. Because our decisions on the two prior issues are dispositive of this appeal, we decline to reach this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We conclude the Commission's findings holding Burnette neither injured nor aggravated a prior injury to her lower back in the 2007 incident are not supported by substantial evidence. Consequently, we reverse the circuit court's decision affirming the Commission on this issue. Furthermore, we remand this issue to the Commission with instructions to reconsider this issue and enter findings of fact concerning Burnette's lumbar injury that are supported by substantial evidence in the record.

We further conclude the recognition of an injury or aggravation to an injury to Burnette's lower back affects the extent and permanency of Burnette's disability. Accordingly, we remand this issue to the Commission for reconsideration.

Because our determinations of the two other issues dispose of this appeal, we do not address the issue of credibility.

REVERSED AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ralph Duane King, Jr., Appellant,

v.

International Knife and Saw - Florence,
Employer,

and

Peerless Insurance Company c/o
Montgomery Insurance, Respondents.

Appeal From the Appellate Panel
Of the Workers' Compensation Commission

Opinion No. 4895
Heard October 3, 2011 – Filed October 19, 2011

REVERSED

Stuart Wesley Snow, of Florence, for
Appellant.

James H. Lichty, Weston Adams, III, and
Helen F. Hiser, all of Columbia, for
Respondents.

CURETON, A.J.: After Ralph D. King, Jr., suffered work-related injuries and filed a workers' compensation claim, the single commissioner awarded him benefits. King's employer, International Knife and Saw-Florence, and its insurance carrier, Peerless Insurance Company, (collectively Employer) appealed to the Appellate Panel of the Workers' Compensation Commission (Appellate Panel). The Appellate Panel reversed. King appeals, arguing the Appellate Panel erred in: (1) concluding his repetitive trauma injury was compensable at a time when King had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury; (2) concluding the ninety-day notice period commenced before

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King was diagnosed with a repetitive trauma injury; (3) finding substantial evidence indicated King had "first noticed [a repetitive trauma injury] a couple of years ago, . . . suspected his job was causing [a repetitive trauma injury] when he first noticed it, and . . . discovered his condition was compensable a couple of years ago"; (4) finding substantial evidence that, even if King had not discovered his condition was compensable, he could have done so years earlier through the exercise of reasonable diligence; and (5) failing to address whether King had a reasonable excuse for failing to give timely notice and whether Employer suffered undue prejudice as a result. We reverse on the issue of compensability, reinstate the benefits awarded by the single commissioner, and decline to address King's remaining issues.

FACTS

From April 1995 to May 2008, King used six-, eight-, and ten-pound hammers to hammer saw blades to customer specifications for his employer. On April 17, 2008, the hammer King was using broke, and King experienced a sharp pain in his shoulder. He continued working for nearly a month before notifying his supervisor of his injury and seeking medical treatment. King stopped working on May 15, 2008.

On August 7, 2008, King filed a claim for workers' compensation benefits due to right shoulder and neck injuries. Employer denied his claim, alleging his injuries were not work-related and he failed to give timely notice of a repetitive trauma injury. King later amended his claim to include carpal tunnel syndrome in his right arm, hand, and fingers. Both the original and the amended claim indicated he sought benefits for "injury" as well as "repetitive trauma."

On November 25, 2008, the parties appeared for a hearing before the single commissioner on the issue of whether King gave Employer proper notice. King testified he stopped working for Employer in May because of pain in his "arm and shoulder and stuff." Although King denied having any problems using his hands or arms prior to that day, he conceded his right arm had hurt and ached for the past couple of years. Furthermore, he suspected the ache in his arm was connected to his work: "After slinging a hammer all day, . . . your arm's going to be tired."

King's medical records reflected that, from May to September 2008, King sought and received medical treatment for pain on his right side, from his neck to his hand, and numbness in his right hand. He received prescription pain medications, and his doctors explored possible causes in his rotator cuff, cervical spine, nervous system, and carpal tunnel. An MRI excluded King's rotator cuff and spine as sources of the pain; however, one of his treating physicians found a mild nerve impingement in his right shoulder. A steroid injection to King's shoulder relieved some of his shoulder pain.

In addition, electrodiagnostic studies revealed King suffered from moderate carpal tunnel syndrome on his right side. He underwent ETPS[1] and physical therapy. By August, King reported his right hand was still numb. His doctor recommended carpal tunnel release surgery to treat King's hand.

The single commissioner found King's report to Employer was timely and awarded benefits for total disability and medical treatment. Employer appealed, and the Appellate Panel reversed both the finding of timeliness and the award of benefits. Specifically, the

Appellate Panel found King "first noticed this injury a couple of years ago," suspected his work caused the injury, "knew well before he gave notice that he had a work-related problem," and "discovered his condition was compensable a couple of years ago." This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981).

Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). However, we may reverse the Appellate Panel's decision when it is unsupported by substantial evidence or controlled by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper, 373 S.C. at 479-80, 646 S.E.2d at 165.

LAW/ANALYSIS

King asserts the Appellate Panel erred in concluding his repetitive trauma injury was compensable at a time when he had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury. We agree.

The South Carolina Workers' Compensation Act (Act) requires employers to compensate employees who sustain injuries "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2010). The compensation to which an injured employee is entitled is "the money allowance payable to an employee or to his dependents as provided for in . . . Title [42] and includes funeral benefits." S.C. Code Ann. § 42-1-100 (1985). Employers are obligated to provide medical treatment and supplies. S.C. Code Ann. § 42-15-60 (Supp. 2010). In addition, employers must pay benefits to injured employees for their total or partial disability, according to a statutory schedule. S.C. Code Ann. § 42-9-10 to -30 (1985 & Supp. 2010). Our supreme court has observed the workers' compensation system does not compensate an employee for his injury but, instead, "provid[es an] injured employee with sufficient income and medical care to keep him from destitution." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2003).

When an employee suffers a repetitive trauma injury:

[N]otice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable,

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unless reasonable excuse is made to the satisfaction of the [Workers' Compensation C]ommission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

S.C. Code Ann. § 42-15-20(C) (Supp. 2010). The statutory notice requirements in this section "should be liberally construed in favor of claimants." Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011). The Appellate Panel's findings concerning notice are subject to the substantial evidence standard. Id. at 82-83, 710 S.E.2d at 457.

We find substantial evidence does not support the Appellate Panel's findings characterizing King's long-term arm ache as an "injury," determining King discovered or could have discovered "a couple of years ago" that he had a compensable condition, and barring King from receiving benefits for failing to satisfy the notice requirement. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

The question before us is this: in the case of a repetitive trauma injury, what event triggers an injured employee's obligation to report and commences the ninety-day reporting period established in section 42-15-20(C)? By its nature, a repetitive trauma injury lacks a definite time of injury because the damage "is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A) (Supp. 2010); see also Schurknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002) ("Repetitive trauma injuries . . . have a gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.' As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury."). Employer focuses its arguments on section 42-15-20(C)'s use of the word "condition," contending any occurrence of pain, when coupled with the employee's belief that the pain is work-related, triggers the employee's reporting obligation under section 42-15-20(C). In short, Employer urges us to equate pain with a compensable condition. We decline to do so. Nothing in the Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related. Cf. Wigfall, 354 S.C. at 116, 580 S.E.2d at 108 (observing workers' compensation laws "are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others").

An employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable. § 42-15-20(C). We must determine, then, when a repetitive trauma injury becomes compensable. Our supreme court has long recognized that the Act entitles employees injured at work to compensation on only two bases, lost earning capacity and specific, scheduled injuries. Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (citing Jewell v. R.B. Pond Co., 198 S.C. 86, 90-91, 15 S.E.2d 684, 686 (1941)); see also §§ 42-1-100, 42-9-10 to -30, & 42-15-60 (establishing and describing compensation for (1) medical care or treatment for a work-related injury and/or (2) disability). Accordingly, a work-related repetitive trauma injury does not become compensable, and the ninety-day reporting clock does not start, until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition.

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Here, the Appellate Panel found King was obligated to give Employer notice of his injury based upon his knowledge of pain "a couple of years" before he either required medical care or was unable to perform his job. In doing so, the Appellate Panel improperly required King to give notice of a condition that he had no reason to believe was compensable. Under section 42-15-20(C) and the sections addressing compensation, King had a duty to notify Employer of his injury within ninety days of the date he discovered or should have discovered it qualified him to receive benefits for medical care, treatment, or disability. The record reflects King acknowledged to the single commissioner that his arm was tired, sore, and achy for a couple of years before he became unable to work. He further admitted that he believed his arm ached because he worked "slinging a hammer all day." However, a mere work-related ache does not constitute a compensable condition, regardless of whether the employee later develops an injury. The Act requires an injured employee to be diligent, not prescient. King's condition was not compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first.

The record reflects King first missed work on May 15, 2008, and first saw a doctor for his injuries within two weeks after that date. King testified that, until May 2008, he neither required medical treatment nor experienced any condition that affected his ability to perform his job as he had done for many years. Nonetheless, his medical records reflect he reported to his physician that his pain suddenly became "much worse" in April 2008. Even assuming King should have discovered in April 2008 that his injury required medical treatment, his report of his injury to Employer in May 2008 fell well within the ninety-day notice period.

For the foregoing reasons, the Appellate Panel erred in finding King knew or should have known his injury was compensable "a couple of years" before he became disabled. As a result, the Appellate Panel's denial of benefits was error. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

We decline to address King's remaining issues because reversal on the issue of compensability disposes of this appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find an injury does not become compensable under the Workers' Compensation Act until the injured employee satisfies the statutory criteria entitling him to compensation. We further find the evidence adduced in this case indicates King had no reason to discover his injury was compensable before April 2008, and the factual determinations supporting the Appellate Panel's denial of King's claim are unsupported by substantial evidence in the record. Accordingly, we reverse the decision of the Appellate Panel, reinstate the single commissioner's award of benefits, and do not reach King's remaining issues on appeal.

REVERSED.

SHORT and WILLIAMS, JJ., concur.

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[1] The record identifies this procedure only by its initials. It appears to be a form of acupuncture accompanied by an electric current that may be used to treat carpal tunnel syndrome.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Mildred H. Shatto, Employee/Claimant, Respondent,

v.

McLeod Regional Medical Center and Key Risk
Management Services, Inc., Employer/Carrier,
Appellants,

and

Staff Care, Inc., and Travelers Insurance,
Employer/Carrier, Respondents.

Appellate Case No. 2009-130166

ON REMAND FROM THE SUPREME COURT

Appeal From The Workers' Compensation Commission

Opinion No. 5239

Submitted December 18, 2013 – Filed June 11, 2014

AFFIRMED

Weston Adams, III, and Helen Faith Hiser, both of
Columbia, and Walter Hilton Barefoot, of Florence, all of
McAngus Goudelock & Courie, LLC; Carmelo Barone
Sammataro, of Turner Padgett Graham & Laney, PA, of
Columbia, for Appellant.

John S. Nichols, Margaret Miles Bluestein, and Blake Alexander Hewitt, all of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Respondent Mildred Shatto; Candace G. Hindersman, of Willson Jones Carter & Baxley, PA, of Columbia, for Respondent Staff Care, Inc.

WILLIAMS, J.: This case comes before this court on remand after our supreme court's decision in *Shatto v. McLeod Regional Medical Center*, 406 S.C. 470, 753 S.E.2d 416 (2013), with instructions to address whether Mildred Shatto's fall while in the operating room at McLeod Regional Hospital (McLeod) was idiopathic in nature. After a review of the record, we affirm the order of the Appellate Panel of the Workers' Compensation Commission (the Appellate Panel) and find Shatto suffered a compensable, work-related injury.

FACTS/PROCEDURAL HISTORY

The facts surrounding Shatto's employment with McLeod are largely set forth in *Shatto v. McLeod Regional Medical Center*, 394 S.C. 552, 716 S.E.2d 446 (Ct. App. 2011). Shatto secured employment at McLeod after procuring the services of Staff Care, Inc. (Staff Care), a temporary medical service staffing company. Staff Care placed Shatto with McLeod as a certified registered nurse anesthetist (CRNA) to provide temporary medical services as a CRNA from November 2007 until February 2008. On December 21, 2007, Shatto fell on the operating room floor while assisting in the anesthetization of a patient. Shatto was treated in McLeod's emergency room and diagnosed with a contusion to the right eye. At the end of December 2007, Shatto's assignment with McLeod was terminated.

On April 30, 2008, Shatto filed a Form 50 against McLeod and Staff Care. After a hearing, the single commissioner concluded Shatto was an employee of McLeod and sustained an injury by accident in the course of her employment. McLeod appealed the single commissioner's decision, and the Appellate Panel affirmed the single commissioner. In McLeod's initial appeal to this court, it presented the following two questions: (1) whether Shatto was an employee of McLeod; and (2) whether Shatto's fall was compensable and not idiopathic in nature. After concluding Shatto was not an employee, this court declined to address McLeod's remaining contention regarding the compensability of her fall. *Shatto*, 394 S.C. at 567, 716 S.E.2d at 454. Shatto then appealed to our supreme court, which

concluded "the evidence, although not one-sided, preponderate[d] in favor of an employment relationship." *Shatto*, 406 S.C. at 472, 753 S.E.2d at 417. Our supreme court then instructed this court to address McLeod's additional assignment of error initially presented to, but not reached by, this court.

STANDARD OF REVIEW

The Appellate Panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Appellate Panel are presumed correct and will only be set aside if unsupported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "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 conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (internal citation omitted).

LAW/ANALYSIS

McLeod contends Shatto's fall was not compensable because it was idiopathic in nature. We disagree.

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2013).

The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Also, both parts must exist simultaneously before a court will allow recovery. "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. For an injury to "arise out of" employment, the injury must be proximately caused by the employment. An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury occurs "in the course of" employment when it happens

within the period of employment at a place where the employee reasonably may be in the performance of the employee's duties and while fulfilling those duties or engaging in something incidental to those duties.

Ardis v. Combined Ins. Co., 380 S.C. 313, 320-21, 669 S.E.2d 628, 632 (Ct. App. 2008) (internal citations omitted).

When an employee has an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, furniture, or other objects that would otherwise contribute to the effect of the fall, the majority of jurisdictions deny compensation. *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 256 (Ct. App. 1998) (citing 1 Arthur Larson & Lex K. Larson, *Workers' Compensation Law* § 12.14(a) (1997)). "The reasoning behind this viewpoint is that the basic cause of the harm is personal, and the employment does not significantly add to the risk." *Id.* As a result, an injury resulting from an idiopathic or unexplained fall is generally not compensable unless the employment contributed to either the cause or the effect of the fall. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 452-53, 88 S.E.2d 611, 614-15 (1955). To be compensable, the injury is not required to be foreseen or expected, but after the event, it must appear to have originated in a risk connected with the employment and to have come from that source as a rational consequence. *Ardis*, 380 S.C. at 321, 669 S.E.2d at 632.

We find there is substantial evidence to support the Appellate Panel's decision that Shatto's injury was not a result of an idiopathic fall. In support of its conclusion, the Appellate Panel noted Shatto was preparing to "anesthetize a patient and was walking around the patient's bed when her foot became caught on something and she fell." Moreover, the Appellate Panel further stated, "[a]lthough [Shatto] does not know the exact item she tripped over, her shoe was still at the head of the bed when [Shatto] tried to stand up after her fall."

Shatto's testimony before the single commissioner supports the Appellate Panel's conclusion as well. Specifically, Shatto testified as follows:

[McLeod]: Tell me exactly --- you say you were walking around to the side of the bed. Do you know exactly what you fell on? How would you describe what happened to you?

[Shatto]: The patient's bed was an electric one, so it had an electrical cord to connect it. There was an I.V. pole with the patient, and it had a pump on it, so that had a cord to be plugged in, and there was an extra I.V. pole on it at the head of the bed towards the left side of the bed. I don't know for sure what my foot caught on, but it was one of those three things: the I.V. pole or cords from the bed or the pump.

Based on the foregoing, we hold the Appellate Panel properly found Shatto's injury was compensable. Although Shatto did not directly and unequivocally testify to what specifically caused her to fall, there is ample circumstantial evidence in the record that Shatto's fall was the result of conditions of her employment. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 341, 513 S.E.2d 843, 846-47 (1999) (holding proof that workers' compensation claimant sustained an injury may be established by circumstantial and direct evidence); *Taylor*, 368 S.C. at 36, 627 S.E.2d at 752 (stating evidence is substantial if, considering the record as a whole, it "would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action" (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 54, 547 (2005))); *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994) (holding the circuit court's reversal of the Appellate Panel was error because although the evidence conflicted, the Appellate Panel's findings were supported by substantial evidence). Shatto had an explanation for her fall, and although she was not absolutely certain as to what caused her fall, she identified specific, non-internal reasons for tripping. *Cf. Crosby*, 330 S.C. at 495, 499 S.E.2d at 256 (finding claimant failed to present any evidence as to what caused her to fall and concluding it would be wholly conjectural to conclude her employment was a contributing cause of her injury). Because Shatto presented satisfactory evidence that "the origin of the risk was connected with [her] employment," we hold her injury flowed as a natural consequence of her work at the hospital and thus arose out of and in the course of her employment with McLeod. *See Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965) ("[The causative danger] need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." (internal quotation marks and citation omitted)).

CONCLUSION

Based on the foregoing, we hold Shatto sustained a compensable, work-related injury, and she was entitled to workers' compensation benefits for her injuries. Accordingly, the Appellate Panel's decision is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.