THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
Susan S. Barden, Commissioner
Melody L. James, Commissioner
Aisha Taylor, Commissioner

WCC File No. 1321387 & 1407915
Appellate Case Nos. 2016-001339 and 2016-001340

Martha Perez,.....Claimant, Respondent,

v.

Alice Manufacturing Company, Inc. Employer, and Great American Alliance Insurance Company.....Carrier, Appellants.

INITIAL BRIEF OF APPELLANTS

July 21, 2016

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1) The substantial evidence does not support the compensability of the two (2) back claims (DOI: 8/8/2013 and 5/19/2014)

2) The SC Workers Compensation Commissioner erred in ruling as a matter of law and finding as a fact that the Claimant had two (2) injuries by accident (DOI: 8/8/2013 and 5/19/2014).

3) Findings of Fact 21, 22, 23, 24, 27, 28, 29 and 30 are conclusory and not supported by the evidence.

4) Conclusions of Law 2, 3, and 5 are supported by the substantial evidence.

5) The Hearing Commissioner erred in ordering medical treatment and TTD benefits for the (2) back claims (DOI: 8/8/2013 and 5/19/2014) as it is not supported by the evidence and is an error of law.

STATEMENT OF THE CASE

The claimant was hired on August 11, 2011 with the employer as a weaver. This Claimant alleged four separate accidents on four separate days. Two claims are to the back and two claims are to the legs, specifically her knees. These cases were heard together in the interest of judicial economy on May 20, 2015. The claimant was represented by W. Grady Jordan and the Defendants were represented by E. Ros Huff, Jr. The Commissioner issued an order on January 26, 2016 finding that the Claimant suffered compensable work-related injury or injuries to her back on 08/08/13 and 05/19/14. The Hearing Commissioner found that the claimant's knee issues were not compensable. The Appellate Panel of the South Carolina Workers Compensation Commission affirmed the Hearing Commissioners order regarding the back claim. It is from that order that Defendants appeal.

The Claimant was working for the Defendant Employer as a textile weaver, tending twelve (12) to fourteen (14) machines that made cloth. She testified that she would move back and forth from one machine to the other during the day. Her job was to ensure the machines kept

working/running. The one step in which the claimant had to walk up was only an eight to ten inch tall step from ground level to the level where she worked on the loom. She would step up onto the platform, work on the loom, step off the platform and go to the next loom. There were between 12 and 15 looms for which the Claimant was responsible. The activity of stepping up on the single step was an injury by accident.

On August 8, 2013, the claimant alleged that she suffered an injury to her back (WCC File # 1321387). On May 19, 2014, the claimant also contends that she suffered an injury to her back (WCC File #1407915). The claimant went to the Steadman Hawkins clinic where a negative x-ray was taken of the back. Defendants contend that the claimant did not suffer an injury by accident as the accident could not have happened in the way that the claimant described and that the activity of stepping up on a step is not an injury by accident. Further, they contend that even the claimant cannot recall how the accident occurred. Defendants further contend that the claimant is not entitled TTD from June 18, 2014, because the Claimant was responsible for obtaining her own MRI. The Defendants denied the claim, and, therefore, they were not under an obligation to pay for an MRI. On a denied claim, the Claimant has the burden of proving that the alleged claim for benefits is work related to an injury by accident. The claimant was specifically written out of work until the MRI was obtained, not because the Claimant was incapable of working due to loss of earning capacity.

ARGUMENT 1

The Single Commissioner erred in finding the back injuries compensable and awarding workers compensation benefits, the error being that this was not supported by the evidence and is an error of law.

The South Carolina's Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Brunson v. Am. Koyo Bearings, 395 S.C. 450 (S.C. Ct. App. 2011). Under the APA, the court can reverse or modify the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission when 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 considering the record as a whole. Id. Defendants first submit that the Appellate Panel's determination of compensability is a matter of law. When the evidence is susceptible of but one reasonable inference, the question becomes a matter of law. Pack v. S.C. DOT, 381 S.C. 526 (S.C. Ct. App. 2009). Alternatively, the defendants would assert that the Record is devoid of substantial evidence. "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 that the administrative agency reached or must have reached in order to justify its action. Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100 (S.C. Ct. App. 2003).

Upon review of the Record as a whole in this matter, the Appellate Panel's determination that claimant suffered a compensable injury by accident arising out of the course and scope of his employment, is not supported by the substantial evidence.

The claimant contends that she initially injured her back on August 8, 2013 when she was lifting a roll of cloth and sliding plastic sleeves into a tube. (Form 50). However, the claimant states to the doctor in June of 2014 that she is not sure of that date. (APA p. 47). The claimant again contends at a visit on April 10, 2015 that she hurt her back over a year ago. (APA p. 6). This statement is not consistent with either date for the back injuries.

The medical evidence does not support the back claims. The views of the lumbar spine were taken on August 14, 2013, and the impression was that there was no evidence for abnormality of the spine (Defendant's APA P. 107).

On August 14, 2013, she states to the doctor that she can do her regular job so the doctor sent her back regular duty. On August 28, 2013, she states that her back feels better and changes the description of how the accident occurred to say that she strained her back while trying a new job.

Even at her visit with Dr. Wilson, she states that she is not sure if the incident was in August of 2013. She also had lumbar x-rays taken on that date which were normal. At her visit on June 18, 2014, she states that she **fell** when working on a loom at work. However, the claimant specifically states in her deposition that she can't recall when an accident happened to her back and thinks it might have been in the summer. (Cl's dep. p.34; lines 15-25). This time frame also does not line up with either date of injury.

The claimant's accident description changes again in her deposition when she states that she had to jump from the machine. (Cl's dep. p. 35). In the claimant's deposition on page 44, she states that she felt pressure in the lower part of her back when she was trying to apply for another job. The claimant again states that the injury keeps her from walking in skinny heels, standing for long periods of time etc. (Cl's dep. p. 49). However, this is once again refuted by the

surveillance videos where claimant is wearing spike heels. She further states in her deposition that she cannot stand when she has heels on and has to support herself with something (Cl's deposition p. 51).

David Cooper testified in his deposition on page 9 that the platform that the claimant allegedly "jumped off of, was only 8 to 10 inches tall. This also refutes her description of her back accident. He further testified that anytime a weaver is working on a machine, they are stepping on a step (p. 12 of David Cooper's deposition). David cooper on page 11 of his deposition, describes a weavers job with respect to the platform and steps as follows:

> q. So the weaver would be at machine 1 for a couple of minutes, they would – and to do that. They would stand up on this. We call it—is it platform; can I use that word?
> a. Its called a step.
> q.The step, the 8- to 10- inch step.
> a. uh huh.
> q. Ant hen the weaver will do whatever on the machine. Step down from the step. Go to the next machine.—
> a. uh huh.
> a. –step up on the step?
> a. Yes. Sir.
> q. an then do that a couple of minutes, whatever they do at that machine?
> a. Yes.
> q. Step down, go to the next machine. Step up on the step?
> a. Yes.
> q. And. Correct me if I'm wrong, is that essentially what the weaver does during their shift?
> a. yes.

The claimant told Mr. Cooper that she was sliding plastic sleeves when she hurt her back (deposition of David Cooper p. 15). However, she also told David Cooper that she had a back claim prior to being employed with Alice Manufacturing (deposition of David Cooper p. 18). Because the record does not support the claimant's claim for a back injury, the commissioner's finding is erroneous.

ARGUMENT 2

The Commissioner erred in finding that the claimant was entitled to temporary total disability benefits when the claimant did not have a loss of earning capacity.

The substantial evidence also does not support a finding for temporary total disability. The claimant was written out of work until an MRI was obtained. In a denied claim, the defendants were not responsible for payment of the MRI, and the claimant did not pay for her own MRI. Therefore, her absence from the workforce was the result of her own conduct. She cannot meet the burden of proving loss of earning capacity and is not entitled to temporary total disability benefits. In 42-1-120, "disability" is the incapacity to earn wages because of the work injury. In this instance, the work injury did not cause an incapacity for the claimant to earn wages, rather her failure to get an MRI is the cause. Therefore, the Commission's determination was erroneous.

ARGUMENT 3

The Commissioner's order is defective and not compliant with SC Code of Laws.

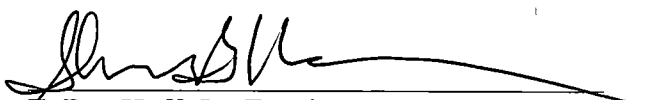
Defendants would also contend that the Commission's order is defective in that Findings of Fact 21, 22, 23, 24, 27, 28, 29 and 30 are conclusory and Conclusions of Law 2, 3, and 5 are not supported by the substantial evidence.

Section 42-17-40 and 1-23-350 outline the requirements for an order. Section 42-17-40 requires that an award have a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue. Section 1-23-350 imposes the same requirements. However, it requires that a finding of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings and they shall be separately stated. As the court in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E.d 2d 21 ()1977)

states, "If a material fact is contested, the Hearing Commissioner must make a **specific, express** finding on it." Id. at 371. Statements not specifically designated as finding of fact or conclusion of law may not be considered and may results in at least a remand. Moore v. S.C. Alcohol Beverage Control Commission, 304 S.C. 356, 404 S.e.2d 714 (S.C. App. 1991). Because the Order is deficient, it should be reversed in that respect.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Commissioners Order be reversed.



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Martha Perez,.....Claimant, Respondent,
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PROOF OF SERVICE

I certify that I have served the Initial Brief by depositing a copy of the same in the United States Mail, postage prepaid, on July 21, 2016 to the following parties, and or their representatives:

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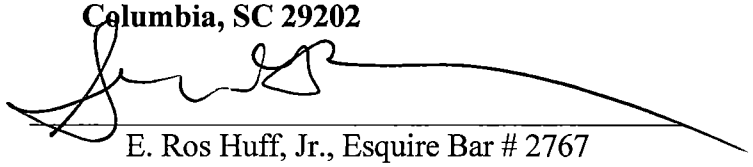

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July 21, 2016

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Alice Manufacturing Company, Inc. Employer, and Great American Alliance Insurance Company.....Carrier, Appellants.

Appellate Case No. 2016-001339

Dear Ms. Kitchings:

Please find enclosed herewith the Initial Brief, Proof of Service and Designation of Matter on appeal of appellants.

By copy of this letter, I am hereby serving Martha Perez, through her attorney, W. Grady Jordan. If you have any further questions, please do not hesitate to contact me.

Sincerely,

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