THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-001180

Kim E. Argo, Claimant, ... Appellant,

v.

Flexible Technologies, Inc., Employer, and
Liberty Insurance Corporation, Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in arbitrarily disregarding the uncontradicted expert medical opinion of the treating physician, relying on the unqualified medical opinion of the single commissioner, and imposing a heightened standard for proving proximate cause for a work injury?

2. Whether the Appellate Panel erred in failing to order Respondents to provide the necessary surgeries through the Burn Center when Appellant was forced to mitigate his damages by obtaining surgery through these doctors due to Appellants' refusal to provide any of the surgeries?

3. Whether the Appellate Panel erred in denying Appellant's motion to exclude Dr. Rudisill's opinions and records as they were procured in violation of § 42-15-95 (2007)?

4. Whether the Appellate Panel's credibility findings must be vacated irrelevant, arbitrary and based on impermissible "sit and squirm" jurisprudence?

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the Workers' Compensation Commission following a Form 50 hearing. The purpose of the hearing was whether Appellant, Kim Argo, was entitled to five additional operations for his burn injuries ordered by the authorized treating physicians. Argo suffered chemical burn injuries to both hands and his right forearm on April 18, 2013. He had already undergone seven operations at the Joseph M. Still Burn Center in Augusta, Georgia.

Argo was treated by a plastic surgeon (Dr. Hassan) and a hand surgeon (Dr. Haaris Mir) at the Burn Center. On August 12, 2014, Dr. Mir diagnosed Argo with bilateral carpal tunnel syndrome and cubital tunnel syndrome – which he opined were caused by complications from the burn injuries. Dr. Mir scheduled Argo for bilateral carpal tunnel and cubital tunnel release surgery along with a z-plasty.[1] Respondents refused to provide these additional surgeries.

Appellant filed a Form 50 on November 5, 2014. Respondents filed a Form 51 denying the surgeries on December 5, 2014. The case was tried before Commissioner Susan Barden on January 22, 2015. Argo testified at the hearing. Dr. Mir testified via deposition.

At the hearing, Appellant objected to a report from Dr. Edwin Rudisill prepared pursuant to a compulsory medical evaluation which took place on July 24, 2014. The objection was based on a violation of Section 42-15-95 by Respondents' nurse case manager (Judy Warczyglowa) – who engaged in prohibited *ex parte* communication with Dr. Rudisill prior to the evaluation. Commissioner Barden overruled the objection and Dr. Rudisill's report was entered into evidence.

The Single Commissioner issued her Decision and Order on September 11, 2015. She denied

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[1]A "z-plasty" is an operation to release contractures in the hand caused by scar tissue.

both cubital tunnel surgeries and the carpal tunnel surgery on the left arm, holding that Appellant failed to prove the causal connection to the burn injuries. She ordered Respondents to provide the carpal tunnel surgery and z-plasty surgery on the right arm, holding that these two conditions were causally related to the burn injuries.

The Single Commissioner made two additional rulings relevant to this appeal: (1) admitting Respondents' IME report and questionnaires from Dr. Rudisill over Appellant's objection that the evidence was obtained in violation of S.C. Code Ann. § 42-15-95 (2007); and (2) finding Appellant was not credible.

Appellant timely filed his Form 30 (Notice of Appeal) on September 23, 2015. Oral argument was held before the Appellate Panel on December 14, 2015. The Appellate Panel affirmed the Decision and Order of the Single Commissioner on May 6, 2016.

This appeal followed.

STATEMENT OF THE FACTS

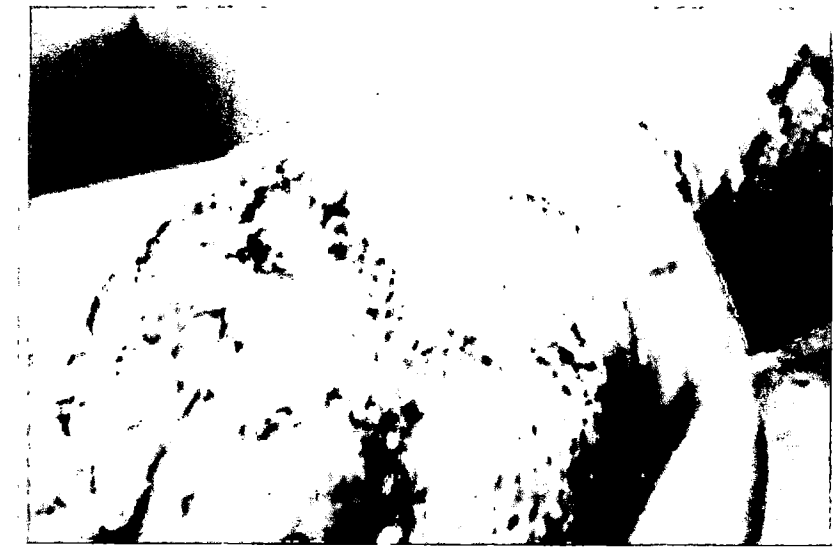
Appellant Kim Argo was employed as a Material Handler (fork lift driver) for Flexible Technologies Corporation. Argo had worked for Flexible Technologies for over 20 years.

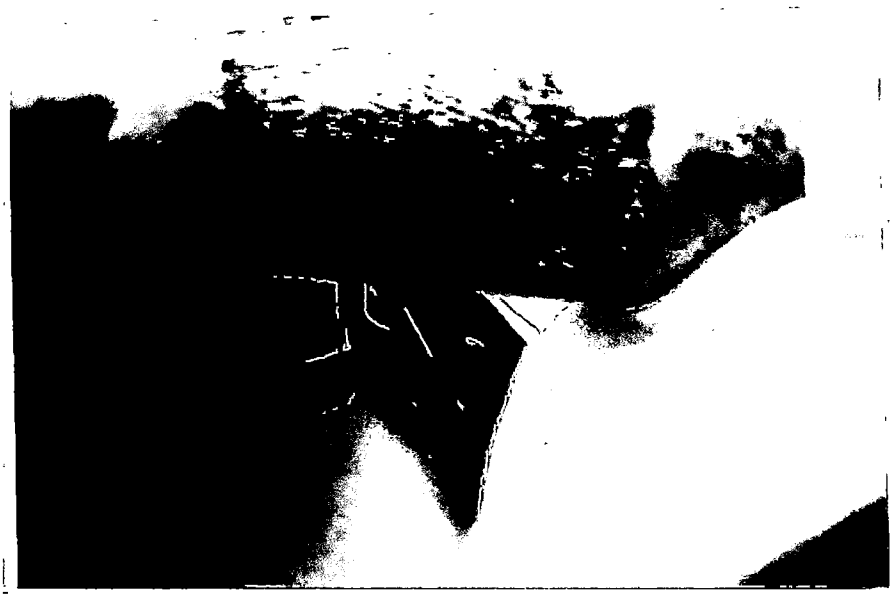
Argo was diagnosed with diabetes when he was hired by Flexible Technologies in 1994. [Tr. Page 29, lines 2-9]. During the course of his employment, he never had a problem with his hands nor did he have any signs of symptoms of carpal tunnel syndrome or cubital tunnel syndrome. [Dr. Page 32, lines 3-13].

This case arises out of chemical burn injuries suffered in a work-related accident which occurred on April 18, 2013. Argo went to refill the propane on the fuel tank on his forklift at about 11:45 a.m. The nozzle had recently been changed by the propane company, such that when Argo placed the nozzle on the fuel tank, propane started spraying out from where the seal was supposed to be. Fearing the tank would explode, Argo called for help. No one was willing to come near the tank, so Argo "grabbed the nozzle with my bare hands and struggled with it . . . and eventually, it seemed like a long time, but eventually I got it off." [Tr. Page 20, line 4-page 24, line 20].

In the process, Argo suffered severe burns to his left hand (2^{nd} degree) and right hand/arm (3^{rd} degree). After several failed efforts to be treated by the company doctors, Argo's 73 year old mother drove him to the Joseph M. Still Burn Center in Augusta, Georgia, arriving about 8:30 or 9:00 that evening. [Tr. Page 20, line 4-page 24, line 20].

Photographs taken shortly after his accident revealed the severity of the burns:





Argo was treated at the Joseph M. Still Burn Center in Augusta, Georgia, undergoing multiple skin graft and debridement surgeries. His initial diagnosis was "2.5% total body surface area partial-thickness chemical burns to the bilateral hands and right forearm." [APA page 2]. Surgery was indicated for a "partial thickness burn to both upper extremities." [APA pag 9].

On April 20, 2013, Argo underwent the first two surgeries: (1) debridement and allograft

(cadaver skin) to the right hand and fingers; and (2) debridement and allograft to the left hand, fingers and thumb. [APA pages 9-10].

On May 7, 2013, Dr. Hassan did a third surgery where he harvested a skin graft from Argo's left thigh to replace devitalized tissue on the right forearm. The tissue had become necrotic because this was a full-thickness burn. [APA pages 19-20].

Argo continued treating at the burn center. He was fitted for a custom compression sleeve and began receiving occupational therapy.

He returned to work on light duty on July 15, 2013. However, on his next visit of August 3, 2013, the doctors took him back out of work. [APA page 32].

On August 13, 2013, Argo underwent laser surgery to address painful hypertrophic scarring with pruritus (severe itching) of his right arm. [APA pages 36-37]. He had a second laser procedure on October 11, 2013 and a third on January 10, 2014. [APA page 39-40, 44-45].

On February 19, 2014, Dr. Hassan ordered "a compression glove to help with the swelling to the right hand." [APA page 48-49].

Argo underwent another surgery to his right upper extremity on February 21, 2014, for "persistent decreased range of motion to his right wrist." The surgery was for scar release and full thickness skin graft. [APA pages 54-55].

On March 17, 2014, the doctors felt Argo was improving enough to be returned to work with restrictions of "no lifting over 3-5 pounds with right hand" and "Must keep dressing clean and dry, compression garments." [APA page 64]. Argo again returned to light duty work.

On April 14, 2014, Argo returned to the Burn Center. The record notes he was receiving outpatient hand physical therapy in Greenwood. "However, his case worker is concerned about his

slow progress in physical therapy." [APA page 65].

On May 16, 2014, Argo was continuing to work light duty – although stated "his employer is not pleased with his work." The doctor noted: **"The patient *continues* to complain of weakness that is greater in the right hand than the left."** A nerve conduction study was ordered to evaluate for carpal/cubital tunnel syndrome of the bilateral upper extremities." [APA page 68-69].

On June 9, 2014, Dr. Hassan diagnosed Argo with "Carpal tunnel syndrome to the right and left wrist." He also noted "Grip strength continues to remain decreased in the right hand." Argo complained of shooting pain to his right forearm and that his right hand was "drawing up." The nerve conduction study showed distal median neuropathy of the right and left wrist." Dr. Hassan referred Argo to a hand surgeon in his local area. He ordered Argo to remain out of work until that appointment. [APA pages 71-72].

Argo attended a compulsory medical examination with a hand surgeon, Dr. Rudisill on July 24, 2014. Unknown to Argo or his attorney, the nurse case manager hired by Respondents, Judy Warczyglowa, had been conducting prohibited *ex parte* communication with Dr. Rudisill and his office staff. Her notes document *ex parte* telephone calls *directly* with Dr. Rudisill on July 23, 24 and 25, 2014. [APA pages 176-178].

Warczyglowa telephoned Dr. Rudisill on July 23, 2014 – the day before the examination. Her handwritten notes document that she had just received a note from Argo's therapist. She discussed this note with Dr. Rudisill, as he references it specifically in his report, stating: "I do not have multiple therapy notes but the one I have from 07/23 does question inconsistent effort with varied responses." [APA page 404]. Of over 400 pages of medical records, 17 pages were provided to Dr. Rudisill – all selected by Warczyglowa.

Argo had been expecting treatment from Dr. Rudisill – specifically to be scheduled for surgery. Dr. Rudisill refused, stating "If this gentleman does decide to take the effort to improve his situation then I would be happy to reassess him but otherwise I see no particular treatment to offer him." [APA page 404]. Argo then returned to his authorized treating physicians at the Burn Center for treatment by their hand surgeon, Dr. Mir.

On August 12, 2014, Dr. Mir made the following assessment:

1, Right and left carpal tunnel and cubital tunnel syndrome.
2. Late effect burn to the right and left hand.
3. Scar condition fibrosis of the skin.
4. Diabetes.
5. Obesity.

In his report, Dr. Mir

> explained to the patient that he suspects the patient's condition occurred as a result of posturing while he was recovering. Haaris Mir, MD believes that pressure was placed on the right and left elbow as the patient had received burns to the bilateral upper extremities. He also believes the patient's wrist were in a flexed position while he was recovering.

Dr. Mir ordered surgery for the carpal and cubital tunnel to be scheduled in one month. [APA pages 74-75]. Respondents refused to authorize the surgery.

Argo returned to Dr. Mir on September 9, 2014 for his preop evaluation. Dr. Mir specifically documented multiple objective confirmation of his diagnosis on the physical exam:

1. Abductor pollicis brevis wasting to the right hand;
2. Thenar wasting to the right hand;
3. Bilateral hyperthenar wasting;
4. Positive Tinel sign at the cubital tunnel at the right and left elbow;
5. Intrinsic muscle loss bilaterally;
6. Tinel sign is positive at the carpal tunnel on the right side;
7. Fibrotic scars are noted ot the right wrist and forearm that do appear to limit extension of the wrist;
8. Edema (swelling) is noted to bilateral hands. [APA pages 77-78].

On December 20, 2014, Dr. Mir opined to a reasonable degree of medical certainty that "with his injury, the swelling, the trauma, and the fibrosis to the surrounding structures, I believe the patient did develop further nerve compression in his right and left carpal and cubital tunnels, as well as burn scar contracture to his first webspace." Dr. Mir acknowledged that Argo was morbidly obese and had a "predisposing condition of diabetes." [APA page 80]. Dr. Mir affirmed his opinion in his deposition, noting particularly his belief that post-operative "posturing" was a "contributing factor that probably caused [cubital tunnel syndrome] – exacerbated its condition." [Mir Depo. Tr. Page 59, lines 22-25].

Dr. Mir actually mentioned the posturing during direct examination by Defense counsel. He demonstrated posturing during the deposition:

Argo was deposed on December 29, 2015. He sat with his hands in the same position throughout his deposition and the hearing. A similar photograph was taken during the deposition:

Dr. Mir explained that posturing is a normal reaction by burn patients to the pain they experience. He testified: "when they have hand burns with all the swelling they tend to – they tend to sit with their wrist flexed and their – and they try to keep weight off their hands by putting weight on their elbows." He added "I can take your right now to the burn unit and show you a couple of patients that are probably just without their splints just sitting like that." [Mir dep. Page 83, lines 7-25].

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, the appellate 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).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages." Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. Argo's bilateral cubital tunnel syndrome and left-sided carpal tunnel syndrome arose out of complications from his burn injuries.

The Appellate Panel erred in denying the three of the five additional surgeries ordered by Kim Argo's authorized treating physicians. In so doing, the panel ignored and overlooked the medical evidence, instead relying on the single commissioner's own unqualified medical opinions. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed). Furthermore, the Appellate Panel misapplied Nawa v. Wackenhut Corp., 341 S.E.2d 800, 288 S.C. 250 (Ct. App. 1986).[2] South Carolina is not a "sole cause" state. Our system only requires that "the employment is *a* contributing proximate cause." Id., *quoting* Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960). Pre-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Glover v. Columbia Hosp., 236 S.C. 410, 114 S.E.2d 565 (1960).

A. Argo's development of carpal tunnel syndrome and cubital tunnel syndrome.

It is undisputed that Argo developed bilateral carpal tunnel and cubital syndrome following his burn injuries. There is no evidence whatsoever that he suffered from either condition at the time of his work accident. His medical records list numerous preexisting conditions – including diabetes

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[2]Nawa has not been cited by any subsequent appellate decision. If anything, Nawa is merely a curiosity – standing for the self-evident proposition that death from a ruptured aneurysm suffered during sexual intercourse in one's home with one's girlfriend is not a compensable work-related injury.

and obesity – but not carpal tunnel or cubital tunnel syndrome. [APA page 1, Mir dep. Page 64, line 11-page 65, line 16]. Indeed, Argo testified he had no problems with his hands during his 22 year employment, stating "I was a strong man." [Tr. Page 32, lines 4-17].

The muscle weakness and wasting manifested itself roughly a year after the April 18, 2013 burn accident when Argo went back to work on light duty (although Argo's therapists had also documented his increasing weakness). On the visit of May 16, 2014, Dr. Hassan noted: **"The patient *continues* to complain of weakness that is greater in the right hand than the left."** A nerve conduction study was ordered to "evaluate for carpal/cubital tunnel syndrome of the bilateral upper extremities." [APA page 68-69 (emphasis added)]. This timeline coincides with the burn accident. Dr. Mir testified that it takes "Six months to a year" for a patient to get noticeable wasting. [Mir. Dep. Page 79, lines 4-21].

On June 9, 2014, Dr. Hassan diagnosed Argo with "Carpal tunnel syndrome to the right and left wrist." He also noted "Grip strength continues to remain decreased in the right hand." Argo complained of shooting pain to his right forearm and that his right hand was "drawing up." The nerve conduction study showed distal median neuropathy of the right and left wrist."[3] [APA pages 71-72]. Dr. Hassan referred Argo to Dr. Mir – Respondents sent him to Dr. Rudisill instead. Dr. Rudisill confirmed the diagnosis of bilateral carpal tunnel syndrome.

On August 12, 2014, Dr. Mir examined Argo. He recommended surgery for both the carpal and cubital tunnel syndrome, along with a Z-plasty to address the right hand contractures. [APA pages 74-75]. He repeated the recommendation for surgery on September 9, 2014. [APA 77-78].

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[3]Median neuropathy at the wrist is the confirming sign of carpal tunnel syndrome in a nerve conduction study.

A. Dr. Mir's opinion on carpal tunnel syndrome.

On December 20, 2014, Dr. Mir opined to a reasonable degree of medical certainty that "with his injury, the swelling, the trauma, and the fibrosis to the surrounding structures, I believe the patent did develop further nerve compression in his right and left carpal and cubital tunnels, as well as burn scar contracture to his first webspace." [APA page 80].

In regards to this report, the Appellate Panel stated:

> We considered Dr. Mir's written causation opinion – that notwithstanding Claimant's pre-existing chronic diabetes and morbid obesity, Claimant developed further nerve compression because of his injury, swelling, trauma, and the fibrosis to the surrounding structures–persuasive as only applied to right carpal tunnel syndrome. We base this finding on our **review of the complete treatment records** pre-dating Dr. Mir's first record and Dr. Mir's deposition testimony.

[Order, page 21, Finding of Fact 47 (emphasis in original)].

The Appellate Panel also noted a study written by Dr. Hassan, wherein he noted the significantly higher incidence of carpal tunnel syndrome in burn patients compared with the general population. The Panel noted (in underlined letters) that "Most carpal tunnel syndrome cases developed within 5 months of the burn injury, and then because of excessive edema in circumferential burns." [Order, page 22, Finding of Fact 48 (emphasis in original)]. The study actually notes 57% of the patients presented with burns "only in the hands and/or wrists . . ." [APA page 165].

The Appellate Panel appears to have reached its own medical conclusion that Argo's left-sided carpal tunnel syndrome is unrelated to the burn injury because the burns did not go beyond the wrist. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed). This is the only explanation for the inconsistent finding that the right carpal tunnel syndrome is causally related to the burn injury, yet the left is not. The single commissioner agreed the right sided

carpal tunnel syndrome was compensable because the "circumferential" right side burns encompassed the hand and forearm. However, while she was correct about swelling being a causative factor, denying the left carpal tunnel syndrome was not based on medical evidence. Dr. Mir was specifically asked about the burns not going "all the way up to the elbows." He explained "No, but you do get inflamation and swelling through the whole extremity, so." [Mir depo., page 60, lines 16-21]. Furthermore, Argo's burns extended to his left hand and wrist. [APA page 346].

Dr. Mir further testified:

> . . . carpal tunnel and cubital tunnel in my practice – especially with burn patients is very, very common. . . .Especially in extremity burns. And the reasons that happens in my opinion . . . but **with the acute trauma with the whole body swelling and having an inflammatory response you get acute compression on an already predisposed area.** And then you get more fibrosis and scarring around these areas. And then linked with having grafts, not having grafts, then, you know, **having to remain in a specific position while your wounds heal and not moving,** and then going back to therapy and having a scar that's already there, that's I believe that's why **it happens even in the patients without diabetes.**

[Mir depo., page17, line 7-page 18, line 3 (emphasis added)].

This is what happened to Argo. The photographs taken shortly after the accident confirm he had swelling in both hands and arms – including the less seriously burned left side.

Dr. Mir observed that swelling was still present in August and September 2014. [APA page 74-75]. Even Dr. Rudisill recorded on July 28, 2014: "He does have some swelling in the fingers, more so

right than left." [APA page 403].

B. Dr. Mir's opinion on posturing and cubital tunnel syndrome.

Dr. Mir opined to a reasonable degree of medical certainty that post-operative "posturing" was a "contributing factor that probably caused [cubital tunnel syndrome] – exacerbated its condition." [Mir Depo. Tr. Page 59, lines 22-25]. In his medical record, he:

> explained to the patient that he suspects the patient's condition occurred as a result of posturing while he was recovering. Haaris Mir, MD believes that pressure was placed on the right and left elbow as the patient had received burns to the bilateral upper extremities. He also believes the patient's wrist were in a flexed position while he was recovering. [APA page 74].

The Commission summarily rejected Dr. Mir's opinion, stating: "We find that there was no posturing until the possibility of posturing was mentioned to Appellant by Dr. Mir more than one year after the accident – well after Appellant's left hand had healed with no sequelae." This finding is the worst kind of speculation. Dr. Mir said nothing that would indicate Argo was malingering or feigning the act of posturing. In fact, Dr. Mir explicitly rejected the suggestion raised by Respondents' counsel that Argo was "feigning or malingering." [Mir dep. Page 47, lines 11-24].

Moreover, Dr. Mir noted posturing was the likely explanation for Argo's cubital tunnel syndrome. Although he had not treated Argo earlier, he was fully aware Argo had suffered burns on both hands which would have caused the level of pain that spurs burn patients to posture. Dr. Mir has extensive experience treating burn patients. When asked "Do you know how [Argo] was posturing, Dr. Mir testified: ". . . I started working here a year after his injury. . . . I've been in clinical practice of the past four years and I've seen a lot of burn patients in my training, so *I know how they all react*, so that's why I used the word suspect." [Mir dep. Page 57, lines 11-24 (emphasis added)].

Dr. Mir may not have had the ability to personally observe Argo's posturing firsthand. However, he did know the extent of Argo's injuries and he know how all such patients with hand burns react. He testified: "Typically, we – when these patients have injuries to their extremities, especially with burns and grafts, they usually end up sitting with their hands with their wrists flexed and their elbow – and weight on their elbows." [Mir dep. Page 66, lines 14-21]. As to Argo himself, Dr. Mir confirmed that the photograph taken during Argo's deposition depicts "he is sitting there with pressure on his ulnar nerve and his wrists slightly flexed." [Mir dep. Page 71, lines 18-page 72, line 13].

Photographs of Dr. Mir demonstrating posturing and Argo actually posturing at his deposition comfirm that Argo does in fact keep his hands up in the air by resting his elbows on the table. Dr. Mir confirmed sitting in this position is something that is going to cause Carpal Tunnel and Cubital Tunnel Syndrome. [Mir dep. Page 72, lines 14-19].

The question is whether there is any evidentiary basis for the Appellate Panel to find that Argo began posturing when inspired to do so by Dr. Mir – essentially finding that Argo feigned posturing in a deliberate attempt to deceive the Appellate Panel. Such an accusatory suggestion is patently speculation. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)("To use such unsupported and wildly optimistic goals which are in direct conflict with

the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it."); Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.").

The issue here is whether Dr. Mir's testimony proves the causal connection between posturing and cubital tunnel syndrome. More specifically, does Dr. Mir's use of the term "suspect" in his medical report render his opinion incompetent speculative. For the moment, put aside the suggestion by Respondents' counsel to Dr. Mir that "suspect" equates "speculate." The use of the term *speculate* originates with Respondents' counsel; not Dr. Mir. [Mir dep. Page 57, line 24; page 61, line 12].

The common definition of "suspect" is "To imagine to exist or be true, likely, or probable." Merrian -Webster's Collegiate Dictionary (10th ed. 1993) at 1197. Conversely to "speculate" is"to take to be true on the basis of insufficient evidence." Merrian -Webster's Collegiate Dictionary (10th ed. 1993) at 1129.

Dr. Mir knew Argo had suffered significant burns to both hands and ultimately developed cubital tunnel syndrome a year later. He also knows "*how they all react.*" [Mir dep. Page 57, lines 11-24 (emphasis added)]. He confirmed the photograph of Argo taken during his deposition demonstrated posturing. He testified ""I think he's sitting like this because he has pain. And I think he has pain because of his carpal tunnel. And I think he's got carpal tunnel because of diabetes, obesity, the burn, the injury." [Mir dep. Page 82, lines 18-21]. In short, Dr. Mir was not speculating. As he explained, he used the term "suspect" because he was drawing an inference from circumstantial evidence. His opinion is competent evidence because he explained his reasoning.

Conversely, the Commission engaged in pure speculation. The record confirms Argo was posturing throughout his deposition and throughout the hearing (although he himself did not "know it's posturing."). [Tr. Page 62, lines 13-20]. Argo testified that he held his hands the way he was holding them because "It's just difficult to move them, and it hurts, too." [Tr. Page 68, lines 10-18]. Argo's explanation dovetailed with Dr. Mir's testimony that burn patients posture because "they have pain and they have anxiety." [Mir dep. Page 66, lines 14-21]. There is simply no evidence to support the Appellate Panel's finding that Argo did not posture until "the possibility was suggested to him by Dr. Mir."

Dr. Mir's opinion that Argo's cubital tunnel syndrome was caused by posturing and the other after-effects of the burn injuries should be controlling. There is no other evidence to the contrary.

C. Dr. Mir's testimony on other possible contributing factors.

Dr. Mir's written opinions and testimony establish the causal connection between the burn injuries and the cubital/carpal tunnel syndrome. The Appellate Panel rejected Dr. Mir's opinions (except as to right carpal tunnel syndrome) – essentially finding that these conditions arose solely from preexisting obesity and diabetes. The legal error is exemplified by the finding: "At most, the left hand burn was a contributing cause, but not the predominant or even an equal cause as compared with Claimant's chronic diabetes, morbid obesity, and elevated A1c levels." [Order, Find of Fact 40, pages 24-25].

The question then is what about other possible contributing factors. Argo is diabetic and obese. He has been obese most of his life and a diabetic for about 18 years. Statistically, both conditions predispose an individual to developing carpal and cubital tunnel (yet, Argo did not have either condition before his burn accident). [Tr. Page 32, lines 4-17].

If we assume that obesity and diabetes were factors in Argo's condition, that would not break the chain of causation. It would merely make Argo an egg-shell plaintiff. It is well established that aggravation of a preexisting condition by a work accident is compensable. See Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987) ("It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as he finds him."). Likewise, a showing that the accident resulted only in the exacerbation of existing problems would not preclude recovery. See 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); Raley v. City of Camden, 222 S.C. 303, 72 S.E.2d 572 (1952)("A heart injury such as has been testified to here, when brought on by overexertion or strain in the course of work, is compensable, *though a pre-existing pathology may have been a contributing factor.*")(emphasis added). An injured worker need not rule out all other causes of an injury. See Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)(depression arising five years after foot injury was compensable even though not due directly to pain from injury; instead "suicidal thoughts were 'related to the fact that he is sitting at home, thinking about not being able to work anymore; related to the depression; related to the fact that he's been actively working all his life and here he is sitting at home doing nothing.'").

The evidence shows the carpal and cubital tunnel resulted from complications of the work-related burn injuries. Dr. Mir explained that swelling, histological changes, and posturing were all causative factors. Even if obesity and diabetes were also contributing factors, they either combined

with or were exacerbated by the burn injuries, resulting in the need for the surgery. Dr. Mir testified "I don't think [the burns are] a minor contributing factor." [Mir depo., page 52, lines 17-21]. In response to being asked by defense counsel if he was "able to say with greater than 50 percent certainty that the left hand burn caused or contributed to the left cubital tunnel in the elbow," Dr Mir responded affirmatively, testifying: "I think it's a contributing factor." [Mir depo., page 56, lines 11-14]. Dr. Mir affirms his original opinion.

The Appellate Panel arbitrarily discounts Dr. Mir's testimony, noting "Dr. Mir's testimony is very equivocal." [Finding of Fact 50, page 23]. Dr. Mir's testimony is not equivocal – it is simply honest. Dr. Mir acknowledges that persons with diabetes and obesity are statistically predisposed to developing cubital tunnel and carpal tunnel syndrome. He acknowledges that diabetes and obesity were possible factors in Argo's cubital and carpal tunnel syndrome. He answers these questions honestly because – as phrased by Respondents' counsel – no doctor could answer these questions otherwise. It would be impossible for any physician to state with 100% certainty that the burns (or the obesity or the diabetes) were the sole cause of these conditions – in Argo or any other patient.

The point is that this is not how it works. A workers' compensation claimant is not required to prove that the work accident is the sole (or even predominant) factor in developing the particular injury.[4] The Appellate Panel misinterpreted and misapplied Nawa. In Nawa, the employee died of

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[4]In an injury by accident, there is no apportionment between occupational and non-occupational causes. The rule is different in occupational disease cases. "If an employee contracts [an occupational] disease from multiple agents, not all of which are related to the employee's occupation, the employer's liability extends only to the proportion of the disability contributed by the occupationally related hazards. This requires 'the apportionment of an award where the occupational disease is accelerated or aggravated by other non-compensable causes.'" Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, The Law of Workers' Compensation Insurance in South Carolina (6th ed. 2012), p. 300 (internal citation omitted).

a ruptured berry aneurysm while engaged in sexual intercourse at home with his girlfriend. On appeal, the employee's dependents contended "that an employee's death is compensable if his job is a contributing factor *to any degree* (emphasis added [by the court] to his death." Nawa v. Wackenhut Corp., 341 S.E.2d 800, 288 S.C. 250 (Ct. App. 1986). The Nawa court noted "claimants correctly concede no South Carolina case has expressly adopted such a rule." Id. In analyzing the case, the court acknowledged that there was "evidence in the record job related stress contributed to John Nawa's death. This evidence is testimony by the claimant's doctor, Richard O. Ballew, who testified stress was one of several factors 'directly' related to John's death. However, this court cannot reverse the Industrial Commission merely because there is some evidence in the record favorable to the claimants." Id. The court noted ample evidence that increased blood pressure during sexual intercourse frequently causes berry aneurysms to hemorrhage. Most importantly, Dr. Ballew – who had given the opinion that stress was a contributing factor – "admitted on cross examination it is 'most probable' (emphasis added [by the court]) John Nawa would not have suffered the stroke when he did had he not been engaged in sexual intercourse." Id.

The appeal in Nawa approached the frivolous – it cannot be equated to the instant case. A stroke suffered during sexual intercourse at home simply cannot be connected to work. Even though there *may* have been a scintilla of evidence that stress was a *minor* contributing factor, the testimony that Nawa would not have suffered the stroke had he not been engaged in sexual intercourse was dispositive. The lesson from Nawa is less a legal principle and more that people should not bring untenable cases before our courts.

The relevant rule from Nawa is that "South Carolina requires the employee's job be more than one factor, to any extent, in the injury or death." Id. The term "any extent" indicates that a *de*

minimus factor will not carry the day. Put another way, an injury will not be found to be causally-related to work if the connection is remote, tenuous and ephemeral. This is especially true when there is other competent evidence explicitly connecting the injury to a non-work related cause (such as sexual intercourse in Nawa).

A claimant is not required to prove that the work injury be the sole or even predominant contributing factor.[5] The Commission cannot impose a higher burden of proof than that found in the statute and appellate decisions. See Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016)("Mindful of our standard of review of factual finding, we nevertheless conclude the Commission erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence."). This is particularly so when dealing with a complex medical condition. As Dr. Mir stated, "it's multifactoral. I think he was already predisposed to having carpal and cubital tunnel based on his medical problems and his size. And I think the injury and then the sequella of his injuries tipped him over." The injury was the "ultimate causative agent." [Mir depo., page 73, lines 5-22]. This is far more than the *de minimus* evidence of causation in Nawa. There is no evidence to the contrary. Dr. Mir's opinion is *the* evidence of the case.

Therefore, the Single Commissioner's findings that the bilateral cubital tunnel and left sided carpal tunnel syndrome are not compensable should be reversed.

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[5]Even outside the workers' compensation arena, our law does not require a plaintiff prove the injury is solely due to a particular cause. For example, to establish negligence, "the plaintiff is required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury." Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977).

2. As Respondents have refused to provide *any* of the five surgeries, the treating physicians at the Burn Center should be authorized to provide the surgery.

It would not be unreasonable for Respondents to provide the five additional surgeries (or even two of the five) with a South Carolina based hand surgeon, so as to benefit from the fee schedule (presuming another surgeon could be found who was willing to perform surgery on the Burn Center's patient).[6] However, it is unreasonable for Respondents to refuse to provide any of the surgeries at all. In so doing, they have forfeited their right to designate an in-state medical provider.

For good cause shown, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. S.C. Code Ann. § 42-15-60 (2007). When the Employer refuses to provide medical treatment, the Commission has authority to designate the treating physician. Id.; Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006).

Here, Argo willingly accepted any and all treatment offered by Respondents – including the tainted examination by Dr. Rudisill. This is not a situation where the employee has refused treatment. It is a situation where the employer has refused to provide it.

As such, Respondents should be ordered to provide the treatment through the Burn Center.[7]

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[6]The Appellate Panel ruled "If not qualified South Carolina physician is willing to perform the procedure, Dr. Mir is hereby authorized to perform it." [Order page 24, Finding of Fact 58]. Dr. Mir testified: "The only hesitation I see with somebody doing these is that a lot of – from what I have seen in practicing they usually send them to me is because they're afraid that the patient has been burned and they don't want to be liable for anything that happens, so they usually from what I have seen they usually just defer to me." [Mir dep. Page 63, lines 2-10].

[7]Given the seriousness of his condition and the refusal by Respondents to provide even the two surgeries ordered by the Single Commissioner, Argo obtained all five surgeries from the Burn Center. It was not medically advisable for him to suffer additional muscle wasting and atrophy while awaiting authorization that likely would never come. He was compelled to

3. Dr. Rudisill's opinions and records must be excluded from the Record as they were procured in violation of § 42-15-95 (2007).

At the start of the hearing, Appellant moved to exclude the medical opinion of Dr. Rudisill pursuant to S.C. Code Ann. § 42-15-95 (2007). The hearing commissioner noted the motion was raised for multiple reasons, specifically emphasizing "the nurse case manager, it appears according to the record, may have had a phone conference with Dr. Rudisill, which the [Appellants'] counsel did not get to participate in." [Tr. Page 5, lines 14-23]. The Single Commissioner ultimately ruled "I find Dr. Rudisill's report is properly before me, and therefore, Claimant's objection to its inclusion in the record is overruled." [FC order, page 9, Finding of Fact 43]. Dr. Rudisill's report loomed large in the ultimate decision in this case, as the Appellate Panel referred to his report in six of its findings of fact. [FC Order, pages 23-24, Findings of Fact 39, 43, 44, 45, 46 and 50].

The admission of Dr. Rudisill's report constitutes reversible error. The record conclusively confirms that the report was obtained in violation of S.C. Code Ann. § 42-15-95 (2007). As such, the report and all of Dr. Rudisill's opinions must be excluded as a matter of law.

The issue of a rehabilitation nurse contacting an employee's physicians over disputed causation issues first arose in Brown v. Bi-Lo, Inc., 581 S.E.2d 836, 354 S.C. 436 (2003). It has always been understood that nurse case managers have a role in coordinating medical treatment. In Brown, instead of expediting medical treatment for the injured worker (to the benefit of all parties), the nurse was employed to gather evidence favorable to the employer over a disputed legal issue. The employee's attorney objected to the *ex parte* communication, writing to the nurse warning her

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mitigate his damages. Thus, it is no longer possible to order an in-state surgeon to provide treatment. Cf. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(refusing to remand to take additional testimony would serve no purpose when witness was now deceased)

to cease and desist from discussing Brown's condition with the doctors.

The employer filed a motion with the Commission. The Commission ordered the employee's attorney to "cease and desist from obstructing contact, including contact involving ex parte communications, meetings, correspondence, and/or answering questions in written and oral form, between the treating physician and the defendant's representatives." Id. Brown appealed this ruling.

The South Carolina Supreme Court reversed. The court acknowledged that "permitting employers and their representatives to speak and/or communicate directly with physicians may, in some instances, promote 'swift and sure compensation,'which is one goal of the Act." The court interpreted the statute (as it was written at the time) as allowing health care providers to forward existing records and documents to the employer and carrier, but prohibiting the *ex parte* communication engaged in by the nurse in Brown. Id. The court noted the normal discovery rules allowed communication with doctors via deposition or when the claimant consented.

In response to concerns raised by both sides, the Legislature substantially rewrote the statute in 2007. The new statute permitted communication between doctors and the employer's representatives regarding "an employee's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments . . ." S.C. Code Ann. § 42-15-95 (2007). Communication is permitted even without the consent of the employee, who is deemed to have given his consent to the communication. Id.

The new statute did not permit the unfettered *ex parte* communication engaged in by the nurse in Brown. As a protection for the employee, the statute provided safeguards to ensure the doctor could not be improperly influenced by *ex parte* communication from the employer's representative. The Legislature recognized that employers and insurance companies already have

the authority to select an examining and treating physician, along with the resources to send nurse case managers who may have motivations other than the best interests of the patient. To that end, the statute provides:

> The employee must be:
>
> > (1) notified by the employer, carrier, or its representative requesting the discussion or communication with the health care provider in a timely fashion, in writing or orally, of the discussion or communication and may attend and participate. This notification must occur prior to the actual discussion or communication if the health care provider knows the discussion or communication will occur in the near future;
> >
> > (2) advised by the employer, carrier, or its representative requesting the discussion or communication with the health care provider of the nature of the discussion or communication prior to the discussion or communication; and
> >
> > (3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider. The employee also must be provided with a copy of the response by the health care provider.
> >
> > Any discussion or communication must not conflict with or interfere with the employee's examination or treatment.
> >
> > Any discussions, communications, medical reports, or opinions obtained in accordance with this section will not constitute a breach of the physician's duty of confidentiality.
> >
> > (C) Any discussions, communications, medical reports, or opinions obtained in violation of this section must be excluded from any proceedings under the provisions of this title.

S.C. Code Ann. § 42-15-95 (2007).

The statute applies to communication with a "health care provider who provides examination or treatment . . ." Id. No distinction is drawn between *examining* physicians (such as Dr. Rudisill)

or *treating* physicians (such as Dr. Hassan and Dr. Mir).[8]

Argo attended a compulsory medical examination with Dr. Rudisill on July 24, 2014. Unknown to Argo or his attorney, Respondents' Nurse Case Manager, Judy Warczyglowa, had been conducting *ex parte* communication with Dr. Rudisill. Her notes document *ex parte* telephone calls *directly* with Dr. Rudisill on July 23, 24 and 25, 2014. [APA pages 176-178].

Of these, the most disturbing is a phone conference with Dr. Rudisill on July 23, 2014 – the day before the examination. Warczyglowa's handwritten notes document she had just received a note from Argo's therapist. Warczyglowa's note reads:

> 7/23/14 frm therapist – notes having difficult using hands & fingers - can be done passively. Behavior changes. Avoids eye contact - memory issues. **P/C Dr. Rudisill – conf** – EM empl re [illegible]. P/C Mom – Rec/Eva OT Prog Note – EM adj./empl & attorney copy [with] note.[9]

[APA page178 (emphasis added)].

Of the over 300 pages of medical records in this case, Warczyglowa provided 17 pages to

---

[8]The Act authorizes employers to compel a claimant to "submit himself to *examination*, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission." S.C. Code Ann. § 42-15-80 (2007)(emphasis added). The employer also has authority to designate the attending physician. The employer must then provide "and the employee shall accept, an attending physician and any medical care or *treatment* that is considered necessary by the attending physician . . ." S.C. Code Ann. § 42-15-60 (2007)(emphasis added).

[9]The last notation indicates Warczyglowa copied the adjuster, employer and defense attorney on the e-mail. The e-mail was not sent to Appellant's counsel. Warczyglowa's notes confirm other e-mails – those notifying Argo of a medical appointment – were copied to all parties. Warczyglowa had permission from Appellant's counsel to contact Argo – she did not have permission to have ex parte communication with Argo's treating and examining doctors. [APA page 187 (8/15/13 note)]. Permission to contact Argo directly was withdrawn on October 17, 2014. [APA page 194].

Warczyglowa's own interpretation is not accurate. The report actually states: "Therapist observed Pt demonstating less interaction and eye contact with others. Patient unable to answer question concerning medical conditions and procedures on this date." [APA page 211]. If anything, this is evidence of depression – which would be expected given how Argo has suffered.

Dr. Rudisill. The fact she spoke to Dr. Rudisill personally the day before the examination and went out of her way to provide the particular physical therapy note to Dr. Rudisill, Defense Counsel and the adjuster (but not Argo or his attorney) confirms that she deliberately intended to manipulate the treatment unfavorably by predisposing the doctor against Argo.

The *ex parte* communication had the desired result. The essence of Dr. Rudisill's opinion is that he believes "the carpal tunnel or even the burns should not give him the weakness he is exhibiting in his hands.[10] Again it appears to me he is essentially giving no effort at all. **I do not have multiple therapy notes but the one I have from 07/23 does question inconsistent effort with varied responses."**[11] [APA page 404 (emphasis added)].

Warczyglowa had previously e-mailed Dr. Rudisill's office on June 11, 2014 and June 20, 2014. Neither e-mail was copied to Appellant's counsel. In the first e-mail she attached 6 pages including the EMG/NCS report and the A1c report. In the second, she attached 17 pages of "medical records I received *from the adjuster* regarding Mr. Argo's burn treatment at Doctor's hospital in Augusta." [APA pages 207-208 (emphasis added)].

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[10]Dr. Rudisill ignored or overlooked the severe muscle atrophy and wasting noted on Dr. Mir's August 12, 2014 physical examination. [APA pages 74-75; Mir dep. Page 47, lines 11-24; page 77, line 8-page 79, line 21]].

[11]The nurse case manager excluded medical records confirming Argo's muscle weakness and his putting forth full effort in his therapy. For example, the occupational therapy initial evaluation of October 13, 2013 states: "All weights were limited by evaluator because **client demonstrated signs of full exertion** such as increased muscle recruitment and change in technique." [APA page 266 (emphasis added)]. The October 30, 2013 evaluation for work hardening states: "The client did give **maximal consistent effort** during the evaluation. . . . He does show **strong motivation** to return his prior level of functioning and to return to normal work activities." [APA page 423 (emphasis added). Ironically, this report was cited by the Appellate Panel as evidence of inconsistent effort on grip strength testing and relied on to support the credibility finding. [Order, page 22, Finding of Fact 45].

As Warczyglowa's ex parte communication with Dr. Rudisill violated § 42-15-95, his report and questionnaire responses *must* be excluded as a matter of law. The statute is explicit, allowing for no discretion by the commissioner: "Any discussions, communications, medical reports, or opinions obtained in violation of this section *must be excluded* from any proceedings under the provisions of this title. S.C. Code Ann. § 42-15-95 (2007)(emphasis added).

Accordingly, the Appellate Panel should have excluded all evidence and opinions emanating from Dr. Rudisill. As Dr. Rudisill's opinions heavily influenced the ultimate decision in this case, the Decision and Order should be reversed.

4. The credibility finding should be vacated as it is irrelevant, arbitrary and based on impermissible "sit and squirm" jurisprudence.

The Appellate Panel erred in finding Argo not credible. Argo suffered a serious injury requiring multiple surgeries. The photographs of his injury are gruesome. His treating physician, Dr. Mir, found objective signs of severe muscle wasting in his hands – which account for his substantial hand weakness.

The suggestion that he engaged in an incredible demonstration when he required help from his mother to remove his compression sleeve is both insulting and improper.[12] Dr. Mir specifically ruled out feigning or malingering, explaining "the reason being that he had very hard signs where had muscle loss." [Mir depo., page 47, lines11-24]. Dr. Mir further testified a sense of weakness is not something that is malingering or feigned, stating: "They tend to drop objects. They feel their

[12]Argo wore a compression sleeve on his right arm prescribed by Dr. Hassan. During cross-examination, Respondents' counsel asked him to remove it so Commissioner Barden could examine the burned area on his hand and arm. Argo was unable to do so without assistance. Ultimately, his mother removed the sleeve for him. [Tr. Page 48, line 14-page 49, line 8].

hand is clumsy. And they don't have – they don't feel they have good coordination." [Mir depo., page 68, line14-page 69, line 2]. He testified posturing is not done to malingering; rather it is a normal reaction to the pain from burns. "When they have hand burns with all the swelling they tend to – they tend to sit with their wrists flexed and their – they try to keep weigh off their hands by putting weight on their elbows." [Mir depo., page 83, lines 7-25].

Here, the Appellate Panel engaged in so-called "sit and squirm" jurisprudence when it discounted Dr. Mir's opinion based on the single commissioner's unqualified and speculative medical opinion. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("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.")(emphasis added). Rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable. In "sit and squirm" jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984). This approach "will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them."). A hearing officer "may not arbitrarily substitute his own

hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

A credibility finding was improper in this medically driven case. The ultimate rulings on the cubital tunnel and left sided carpal tunnel syndromes were affected by several errors – including the arbitrary disregard of medical evidence; requiring a heightened burden of proof not supported by law (sole or predominant cause); and admission of Dr. Rudisill's opinions. Furthermore, the credibility finding was largely based on Dr. Rudisill's inadmissible report. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011)(Kittredge, J., concurring) (expert's written opinion on credibility of a witness is "patently inadmissible evidence" requiring reversal). In the event that the Court does not reverse on these other grounds, the additional error is the arbitrary and capricious credibility findings.

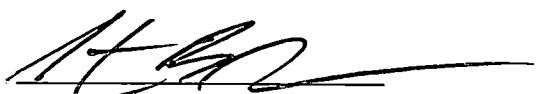
Although significant deference is given to the Appellate Panel's credibility findings, at some point even a credibility finding becomes arbitrary and unsupportable. While no one disputes the need to make credibility findings to resolve conflicts in testimony between witnesses, when a credibility finding is used to disregard and discount reliable medical evidence, the decision then becomes inherently arbitrary and subject to reversal. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing commission's factual finding because "rank speculation" is not substantial evidence); Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (credibility finding could not outweigh medical evidence). See, also Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but

its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court."). All credibility findings should be vacated. The Decision and Order of the Appellate Panel should be reversed.

CONCLUSION

For the foregoing reasons, the Court should affirm in part and reverse in part. The finding that the right sided carpal surgery and z-plasty are causally related should be affirmed. The finding that the bilateral cubital tunnel and left-sided carpal tunnel syndrome are not causally related should be reversed. The Court should also reverse the findings on credibility and the admissibility of Dr. Rudisill's reports, opinions and questionnaires. Argo should be provided medical testing and treatment as ordered by the authorized treating physicians at the Burn Center.

Respectfully Submitted,



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September 6, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-001180

Kim E. Argo, Claimant, ... Respondent,

v.

Flexible Technologies, Inc., Employer, and
Liberty Insurance Corporation, Carrier, ... Appellants.

PROOF OF SERVICE

I certify that I, Christy L. Elkin, administrative assistant for the Samuels Law Firm, LLC, have served the **Appellants's Initial Brief and Designation of Matter** upon counsel for the Appellants by depositing a copy of it in the United States Mail, postage prepaid, on September 6, 2016, addressed as follows:

L. Brenn Watson, Esq
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September 6, 2016

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September 6, 2016

Via US Mail Courier
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Kim E. Argo v. Flexible Technologies, Inc. and Liberty Insurance Corporation
Appellate Case No.: 2016-000617

Dear Ms. Kitchings:

Please find enclosed the original and one copy of **Initial Brief of Appellant** and **Designation of Matter** for filing in the above-referenced matter. Please file the original and return the clocked copy with our courier.

By copy of this letter and enclosure to L. Brenn Watson, we are serving opposing counsel with a copy of our **Initial Brief of Appellant** and **Designation of Matter** as indicated by the attached Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

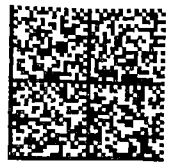
With kindest regards, I am

Respectfully,

Christy L. Elkin
Admin Assist for Stephen B. Samuels

/cle
Enclosure(s) as stated

cc: L. Brenn Watson, Esquire



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