THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-001180

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SC Court of Appeals

Kim Argo, Appellant,

v.

Flexible Technologies and Liberty Insurance Corporation, Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION PROPERLY FOUND THAT APPELLANT IS NOT CREDIBLE.

II. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANT'S ALLEGED LEFT CARPAL TUNNEL SYNDROME IS NOT CAUSALLY-RELATED TO THE WORK ACCIDENT.

III. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANT'S ALLEGED BILATERAL CUBITAL TUNNEL SYNDROME IS NOT CAUSALLY-RELATED TO THE WORK ACCIDENT.

IV. WHETHER THE COMMISSION PROPERLY ALLOWED RESPONDENTS TO DIRECT APPELLANT'S TREATMENT AND TRANSFER CARE TO A QUALIFIED PHYSICIAN IN SOUTH CAROLINA.

V. WHETHER THE COMMISSION PROPERLY HELD THAT DR. RUDISILL'S REPORTS, QUESTIONNAIRES, AND OPINIONS WERE ADMISSIBLE AND NOT VIOLATIVE OF SECTION 42-15-95.

VI. WHETHER THE COMMISSION CORRECTLY APPLIED NAWA V. WACKENHUT CORP.

STATEMENT OF THE CASE

Appellant sustained an admitted injury to his bilateral hands and right forearm on or about April 18, 2013, when he was filling his forklift with propane and suffered burn injuries. On August 12, 2013, Appellant filed a Form 50, Request for Hearing, seeking additional medical treatment for alleged bilateral carpal tunnel syndrome and alleged bilateral cubital tunnel syndrome. Respondents filed a Form 51, denying compensability of Appellant's alleged bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. A hearing was held before Commissioner Susan Barden (hereinafter, "the Single Commissioner") on January 22, 2015, to determine the issues in the Forms 50 and 51.

At the hearing, Appellant alleged he suffered from bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome as a direct result of his April 18, 2013, work injury, and he sought a finding of compensability for these alleged conditions. Additionally, Appellant sought an Order for Appellant's ongoing causally-related medical treatment to be performed by the physicians at the Augusta Burn Center. Finally, Appellant objected to the introduction of all documents and opinions associated with Dr. Rudisill. Appellant asserted the documents and opinions of Dr. Rudisill violated S.C. Code Ann. Section 42-15-95.

Respondents' asserted that Appellant's alleged bilateral carpal tunnel syndrome and alleged bilateral cubital tunnel syndrome were not causally-related to the work accident of April 18, 2013, and Respondents sought an Order denying compensability of these alleged conditions. Additionally, Respondents sought an Order allowing Respondents to transfer Appellant's care from the Augusta Burn Center to a duly

qualified physician in South Carolina, because the Augusta Burn Center is not bound by the South Carolina Workers' Compensation Fee Schedule. Finally, Respondents objected to the introduction of Appellant's Exhibits "B" and "C," which consisted of internet articles.

Following the hearing, the Single Commissioner issued a Decision and Order, dated September 11, 2015, whereby she found: (1) Appellant's alleged left carpal tunnel syndrome and left cubital tunnel syndrome are not causally-related to the work accident of April 18, 2013; (2) Appellant's alleged right cubital tunnel syndrome is not causally-related to the work accident of April 18, 2013; (3) Appellant's right carpal tunnel syndrome is causally-related to the April 18, 2013, work accident; (4) Appellant is entitled to medical treatment related to his right carpal tunnel syndrome, to be provided by a local and qualified specialist designated by Respondents; (5) Appellant is entitled to ongoing medical treatment related to his burn injuries, including a Z-plasty procedure to be provided by a local and qualified specialist designated by Respondents; (6) If no qualified specialist in South Carolina will perform the Z-plasty, then Dr. Mir is authorized to perform the same; and (7) Appellant demonstrated significant credibility issues. The Single Commissioner allowed the reports and opinions of Dr. Rudisill into evidence over Appellant's objection, and she allowed Appellant's Exhibits "B" and "C" into evidence over Respondents' objection.

On September 23, 2015, Appellant filed a Form 30, Request for Commission Review, and oral arguments were held before the Appellate Panel of the Commission on December 14, 2015. By Order dated May 6, 2016, the Appellate Panel affirmed the

Decision and Order of the Single Commissioner in its entirety. On June 3, 2016, Appellant filed a Notice of Appeal to the Court of Appeals, and this appeal follows.

STATEMENT OF THE FACTS

Pre-Accident Medical Treatment

Appellant's medical history is important to this claim. Appellant suffers from preexisting diabetes which was drastically uncontrolled in the years leading up to his work accident, and he suffers from morbid obesity. Dr. Mir, a treating physician in this claim, stated during his deposition that diabetes, increased weight, and poorly controlled glucose levels are all factors which increase the incidence of carpal and cubital tunnel syndromes. (Deposition of Dr. Mir, pp. 10-16)

On March 31, 2009, Appellant presented to his family physician at Family Medicine Associates. Appellant's weight was noted to be 312 pounds with a hemoglobin A1C level of 9.90, and a reference range of 4.2 – 6.5. The doctor noted Appellant's diabetes was "not optimally controlled," and Appellant was "on maximal dose oral medication" for his diabetes. (APA, pp. 129-130) On April 28, 2009, Appellant's glucose level was 230 mg/dL, and his family doctor again noted Appellant's diabetes was "not optimally controlled." Appellant's weight was 315 pounds, and he was instructed to "watch his diet" and "keep appointment with diabetic ed." (APA, p. 131)

On October 7, 2010, Appellant's weight was 323 pounds and his family doctor indicated Appellant's glucometer was broken, preventing Appellant from checking his blood sugar levels. (APA, pp. 140-141) On March 2, 2012, Appellant's family doctor noted Appellant's weight to be 329 pounds. (APA, p. 145) On June 27, 2012, Appellant's family doctor noted Appellant's prior A1C level about a year earlier was over 10, and the doctor ordered updated A1C levels. (APA, p. 146)

Post-Accident Medical Treatment

Appellant presented to Piedmont Health Group Family Medicine on April 18, 2013, the date of his accident, with complaints of "burns to both lower arms." Appellant was referred to Self Regional Hospital. Appellant presented to Self Regional Hospital on April 18, 2013, with complaints of burns to his hands and arms. Appellant was noted to have three specific wound locations: the anterior right hand, the distal right forearm, and the anterior left hand. Appellant was referred to the burn center for specialized care. (APA, pp. 348-357)

Appellant presented to Doctors Hospital of Augusta on April 18, 2013, with complaints of burns to the bilateral hands and right forearm. Appellant was noted to have 2.5% total body surface area partial-thickness chemical burns to the bilateral hands and right forearm, and he was scheduled for debridement and placement of temporary skin substitute. (APA, pp. 1-2) Despite Appellant's history of uncontrolled diabetes, Appellant was seen for a consultation with Dr. Jon Christopher Gibbs, who indicated Appellant "says his blood pressure and diabetes are well controlled at home." (APA, p. 6) Lab studies on that date revealed a blood glucose level of 306 and 394. (APA, pp. 7, 367) Glucose levels on April 19, 2014, were recorded as 317, 331, 324, 330, 219, 306, and 225. (APA, pp. 365-366) Glucose levels on April 20, 2014, were recorded as 262, 289, and 230. (APA, pp. 365-366)

On April 20, 2013, Dr. Abu Zaheed Hassan performed a "surgical preparation of the burn wound down to the superficial dermis" and applied an allograft (cadaver skin) to the "right hand on the dorsal aspect." (APA, pp. 9-10) Appellant returned to The Wound Center on April 30, 2013, where his allografting remained intact. Appellant was

continued out of work. (APA, pp. 11-12) Appellant returned to Dr. Hassan on May 7, 2013, and Dr. Hassan noted the dorsal aspect of both hands was "healing nicely," but Dr. Hassan noted "devitalized denuded tissue to the right forearm area" and performed a "surgical preparation of the burn wound down to subcutaneous tissue and application of allograft to the right forearm...." The skin applied to Appellant's right forearm was harvested from his left lateral thigh. (APA, pp. 13-20, 373-374)

Appellant returned to Dr. Hassan on May 15, 2013, for a "focused examination of the right upper extremity," which revealed the autograft to be intact and adherent, with no shearing or loss. Dr. Hassan noted Appellant "denies any problems at this time," and there is no mention of Appellant's left hand in the May 15, 2013 narrative. Appellant was continued out of work. (APA, p. 21) On June 11, 2013, Dr. Hassan allowed Appellant to return to work with restrictions. (APA, pp. 27-28) On June 18, 2013, Appellant's right hand grip strength was tested at 45 pounds, and his left hand grip strength was tested at 85 pounds. (APA, pp. 412-413) On August 3, 2013, Dr. Hassan wrote Appellant back out of work. (APA, pp. 32-33)

On August 9, 2013, Dr. Hassan scheduled Appellant for a laser treatment of the right wrist, and the same was performed on August 13, 2013. (APA, pp. 34-38, 378-379) On August 21, 2013, Appellant's right hand grip strength, when tested 3x, was 25 pounds, 25 pounds, and 30 pounds. (APA, p. 382) On August 23, 2013, Appellant's right hand grip strength was tested at 12 pounds, and Appellant's left hand grip strength was tested at 27 pounds. (APA, p. 419)

Appellant underwent a second laser treatment on his right wrist on October 11, 2013, and a third laser treatment on January 10, 2014. (APA, pp. 39-47, 387-388) On

October 30, 2013, Appellant's right hand grip strength was tested at an average of 10 pounds, and his left hand grip strength was tested at an average of 16 pounds. (APA, pp. 420-425) On February 19, 2014, Appellant's right hand grip was tested at 20 pounds, and his left hand grip was tested at 70 pounds. (APA, p. 390) On that same date, Dr. Hassan recommended a scar release and full thickness grafting of Appellant's right wrist, and the same was performed on February 21, 2014. (APA, pp. 48-58, 394-397) On March 17, 2014, Dr. Hassan noted Appellant's range of motion was improving with therapy, and Appellant was allowed to return to work on modified duty. (APA, pp. 62-64) Appellant was continued on modified duty on April 14, 2014. (APA, pp. 65-67)

On May 16, 2014, Appellant returned to Dr. Hassan, and Dr. Hassan noted: "He continues to work light duty but states his employer is not pleased with his work." Appellant also complained of weakness "that is greater in the right hand than the left," and Appellant complained of numbness and tingling in the right hand. Dr. Hassan ordered nerve conduction studies of the bilateral upper extremities and continued Appellant on modified duty at work. (APA, pp. 68-70) Nerve conduction studies were conducted by Dr. Thomas J. Fox, Jr. at Carolina Neurology Associates on May 28, 2014, and Dr. Fox interpreted the studies to reveal "evidence of distal median neuropathy at the wrist bilaterally…" (APA, pp. 399-402) On June 2, 2014, Appellant's occupational therapist noted Appellant "reports difficulty performing driving of forklift at work but he is able to drive his personal automobile." (APA, p. 433)

Appellant returned to Dr. Hassan on June 9, 2014, and Dr. Hassan noted Appellant "complains of shooting pain to the right forearm. He also indicates that his right hand is 'drawing up.'" Dr. Hassan also noted: "The patient also provided a recent

hemoglobin A1C result and his hemoglobin A1C is 11.3 with the normal reference range of 4.8 to 5.6." Dr. Hassan reviewed the nerve conduction studies and diagnosed bilateral carpal tunnel syndrome, and he referred Appellant to a hand surgeon and wrote him out of work until evaluation with a hand surgeon. (APA, pp. 71-73) On July 7, 2014, Appellant's right hand grip strength was noted to be two pounds. (APA, p. 442)

On July 24, 2014, Appellant presented to Dr. L. Edwin Rudisill, Jr. at The Hand Center for an independent medical evaluation. Dr. Rudisill evaluated Appellant and stated:

> He is here today complaining of some tightness and burning pain around his right wrist primarily. ... However, he is an ***uncontrolled diabetic*** with lab studies in April showing a blood sugar in the 300s. ... With the rest of the exam I really noted inconsistent findings. .. With any strength testing at all I did not get any effort. ... ***I have advised him that carpal tunnel or even the burns should not give him the weakness that he is exhibiting in his hands***. Again it appears to me that he is essentially giving no effort at all. (APA, pp. 403-404) (all emphasis added.)

Appellant was seen by Dr. Haaris Mir on August 12, 2014, per the referral of Dr. Hassan. ***This is the first time Appellant saw Dr. Mir; approximately 16 months after the accident occurred.*** Dr. Mir diagnosed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and he "explained to the patient that he ***suspects*** the patient's condition occurred as a result of posturing while he was recovering. Dr. Mir 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 wrists were in a flexed position while he was recovering." (APA, pp. 74-76, emphasis added) Dr. Mir recommended carpal tunnel release and Z-plasty to the right wrist and forearm, and cubital tunnel release of the right and left median nerve. He also referred Appellant to an endocrinologist "to assist with diabetes control." (*Id.*)

Appellant presented to his family doctor on August 27, 2014, for a follow-up on his diabetes. Appellant's A1C level was 8.9. (APA, pp. 159-162) Appellant returned to Dr. Mir on September 9, 2014, and Dr. Mir noted Appellant "did not attend an endocrinology appointment; however, he did attend to his primary care doctor who re-drew his A1C and found it to be 8.9." Appellant complained of numbness and tingling to his bilateral upper extremities, most notably to the hands, and Dr. Mir again recommended surgical intervention. (APA, pp. 77-79)

On October 9, 2014, Dr. Rudisill completed a medical questionnaire, opining that bilateral carpal tunnel releases would most probably not lessen the period of Appellant's disability, and further opining there was no evidence of cubital tunnel syndrome on Dr. Rudisill's examination of Appellant, or by nerve conduction studies. Dr. Rudisill further stated: "CTS 'potentially' could be caused by his burns if he had significant hand swelling as a result of the chemical burn. ***Otherwise probably secondary to his diabetes.***" (APA, pp. 405-406)(emphasis added)

On December 26, 2014, Dr. Mir sent a letter to Appellant's attorney, whereby he stated the following:

> In my opinion to a reasonable degree of medical certainty, the patient did have predisposing condition of diabetes, which could lead to early carpal and cubital tunnel syndrome. However, 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. It is my opinion that the patient would benefit from carpal and cubital tunnel release to his bilateral upper extremities, as well as burn scar contracture release to his right first webspace and possibly his left. (APA, p. 80)

On January 8, 2015, Dr. Rudisill completed an additional medical questionnaire, opining that Appellant most probably does not suffer from cubital tunnel syndrome of the

right or left upper extremity, opining that if Appellant does suffer from cubital tunnel syndrome it is most probably not related to the work accident on or about April 18, 2013, opining that Appellant's carpal tunnel syndrome is related to Appellant's diabetes, and opining that carpal tunnel release surgery would most probably not lessen Appellant's period of disability. (APA, pp. 407-411)

Deposition of Dr. Mir

On January 21, 2015, the parties deposed Dr. Mir. Dr. Mir stated that his opinions in the letter dated December 26, 2014 remain his opinions, but he also provided the following opinions and testimony, which he agreed remained unchanged at the end of the deposition:

> Q: Do you consider the left hand injury based on the notes you've seen to be a mild burn injury?
>
> A: Yes.
>
> Q: Okay. And he had a mild burn injury that at least appears to have healed up by mid 2013?
>
> A: Correct.
>
> Q: With no further treatment?
>
> A: Right. (Deposition of Dr. Mir, p. 41, lines 7-15)

> Q: Doctor, isn't it fair that the left hand – let's just talk about the left hand – is just as likely to be caused by the diabetes and obesity?
>
> A: As if he didn't have a burn? Could he have gotten the carpal tunnel from just diabetes and his obesity? Absolutely. (*Id.*, p. 42, lines 14-19)

> Q: Would it be fair – would you be – is it your opinion then that you can't say more likely than not that the burn on the left side caused or was a contributing or an aggravating factor in his current left sided carpal tunnel?

A: It could – I could say it could be a contributing factor.

Q: Could be?

A: Yes.

Q: But you can't say more than likely?

A: I don't know. I –

Q: Okay. I don't know is I can't say more than likely?

A: I can't say more than – more – I can't say more than likely.

Q: On the left side?

A: Yes. (*Id.*, p. 43, lines 6-22)

Q: Would it be unusual if he could not operate his left hand considering the mild nature of the burn? If he said, you know, I really can't do much more than this (indicating)?

A: Would that be unusual with a mild burn?

Q: Yes, sir.

A: Yeah. (*Id.*, p. 45, lines 15-21)

Q: Would you agree that Mr. Argo might have had carpal tunnel symptoms by May 2014 even without the burns?

A: It's possible.

Q: And that would be because of his diabetic condition?

A: Correct.

Q: And his morbid obesity?

A: Correct. (*Id.*, p. 48, lines 17-25)

Q: Is it possible that he would have gotten carpal tunnel on the right side with or without a burn?

A: Yes. (*Id.*, p. 44, lines 12-15)

Q: Is it possible that Mr. Argo's current complaints of carpal tunnel syndrome in his right side are related to his diabetic condition and his obesity and not the burns; is that possible?

A: It's definitely possible.

Q: Can you say for sure that the burns have something to do with it? A hundred percent certainty?

A: I think it's a contributing factor, absolutely.

Q: Do you think it's more than likely, or greater than 50 percent a contributing factor?

A: I –

Q: You can't say that?

A: I can't answer that question. (*Id.*, p. 50, lines 6-18)

Q: I do want to just get your opinion, and I'm almost done, on the percentage – percentages again –

A: I –

Q: -- of carpal tunnel, his carpal tunnel. If you had to say, well, I would say 60 percent is diabetes, or 60 percent is – can you do that?

A: I cannot.

Q: Insofar as you believe –

A: I cannot do that because every person is different.

Q: Yes, sir.

A: And I treat a lot of these patients without diabetes, also.

Q: I understand. Insofar as you believe the burns contribute to the carpal tunnel syndrome, would you agree that the burns are one factor among many?

A: Yes. (*Id.*, p. 51, line 24 – p. 52, line 16)

Q: You would agree that the EMG nerve conduction – nerve conduction studies did not find [cubital tunnel]?

A: Correct. (*Id.*, p. 53, lines 5-8)

Q: We've agreed – I think you've agreed, at least, that the left was a minor burn that healed very quickly?

A: Right.

Q: Would you agree that he should not have been having functional limitations with the left side after a few months of that burn, after a few months of healing?

A: Yes. (*Id.*, p. 53, lines 16-24)

Q: Do you know – you used the word suspect. Do you know how he was posturing?

A: Just from, again, I started working here a year after his injury. I know in treating I have been – in my – I've been in clinical practice for 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 is used the word suspect.

Q: But you don't know specifically?

A: I don't know specifically, I was just – (*Id.*, p. 57, lines 8- 16)

Q: You would use the word may be a contributing factor? You don't know how fur sure he was posturing with just a minor left hand burn?

A: Right.

Q: Has he ever told you how he was posturing?

A: No. (*Id.*, p. 58, lines 10-16)

Q: Doctor, my understanding, is it still your opinion to a reasonable degree of medical certainty that you suspect the posturing as the cause?

A: I think it's one contributing factor amongst many. (*Id.*, p. 82, lines 11-15)

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence as found by the single commissioner. Langdale v. Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. R. L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). However, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951).

The Appellate Panel's decision must be affirmed if it is supported by substantial evidence in the record. Wise v. Wise, 394 S.C. 591, 597, 716 S.E.2d 117, 120 (Ct. App. 2011) (citing Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005)). Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the Appellate Panel reached, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Appellate Panel's finding from being supported by substantial evidence. Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007).

Section 1-23-380(A)(5) of the South Carolina Code also provides, in part:

> The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007).

Thus, appellate "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

ARGUMENTS

I. THE COMMISSION PROPERLY FOUND THAT APPELLANT IS NOT CREDIBLE.

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence as found by the Single Commissioner. Langdale v. Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). Appellant's contention that it was somehow improper for the Commission to judge Appellant's credibility is unfounded. Appellant argues that he suffered a serious and admitted work injury, and "the photographs of his injury are gruesome," so his credibility must be wholly irrelevant to "this medically driven case." (Brief of Appellant, pp. 32-34) Contrary to this contention, Appellant's credibility is a key issue in determining the issues in this claim, and the Commission properly viewed the evidence and observed Appellant's testimony, and the Commission arrived at the conclusion that Appellant is not credible. Among Appellant's primary arguments is the assertion that his alleged "posturing" during his recovery led to the development of carpal and cubital tunnel syndromes. For this to be the case, a physician must be able to rely on Appellant's *subjective* assertions. In this case, Dr. Mir did not see Appellant "posturing," nor did Appellant demonstrate "posturing" to Dr. Mir. Instead, Dr. Mir noted that he "suspected" that posturing could be a contributing factor. If posturing was the cause of Appellant's complaints, he must rely on his subjective testimony to prove his claim. Accordingly, Appellant's credibility is a key issue in deciding this case.

Appellant also argues that the Single Commissioner "discounted Dr. Mir's opinion based on [her] unqualified and speculative medical opinion," and Appellant argues it was improper for the Commission to formulate a medical opinion. (Appellant's

Brief, p. 33) In fact, the Commission merely reviewed the numerous inconsistencies in the record, in addition to Appellant's plainly exaggerative actions, and arrived at the *non-medical* opinion that Appellant is not credible. How this conclusion can be interpreted as a "medical opinion" is beyond Respondents, especially in light of the *supporting* medical evidence in the record, to include the reports and opinions of Dr. Rudisill, and even the testimony of Dr. Mir, which evidences Appellant's exaggerative behavior.

The Commission exhaustively outlined the bases for the credibility finding in the Decision and Order, including Appellant's testimony at the hearing, which was inconsistent with the medical records and statements from his doctors; Appellant's medical records demonstrating inconsistent effort on grip testing; Appellant's presentation to Dr. Rudisill; Appellant's alleged lack of strength out of proportion to his injuries; and Appellant's inconsistent testimony regarding his glucose levels, his grip strength testing, his posturing, and his recollection of his evaluation with Dr. Rudisill.

Glucose Levels

At the hearing, Appellant was asked if his blood glucose level was consistently high at his family doctor, and Appellant denied a consistently high blood glucose level. He explained that, rather than his glucose level being consistently high, "[his glucose level] fluctuated." (Hr'g Tr. 39) Appellant was then referred to numerous medical records submitted into evidence, including records noting the following:

(1) On March 31, 2009, Dr. Kolb of Family Medical Associates noted Appellant's A1-C level was 9.9. (APA, p. 129);

(2) On April 22, 2009, Appellant's glucose level was over 200 (APA, pp. 450 and 453);

(3) On April 28, 2009, Appellant's glucose level was 230 (APA, p. 131);

(4) In October of 2010, Appellant's family doctor noted that Appellant quit checking his glucose levels (APA, p. 140);

(5) On June 20, 2011, Appellant's family doctor noted Appellant was prescribed to the maximum oral medications to control his diabetes (APA, p. 142);

(6) On June 27, 2011, Appellant's A1-C level was over a 10 (APA, p. 146); and

(7) Appellant's family doctor noted that Appellant's diabetes was "uncontrolled" (APA, p. 148).

Despite Appellant's *subjective* testimony that his numbers were not consistently high, the *objective* medical records demonstrate that Appellant's glucose levels and diabetes were drastically uncontrolled. As stated by Dr. Mir during his deposition, uncontrolled glucose levels and obesity are causes of carpal and cubital tunnel syndrome, so the fact that Appellant's glucose levels and diabetes were uncontrolled harms his workers' compensation claim, providing motive to deny his history of consistently high glucose levels.

Grip Strength Testing

The results of Appellant's grip strength tests performed at various periods throughout his treatment were as follows:

(1) On June 18, 2013, Appellant gripped 85 pounds in his left hand and 45 pounds in the right; (APA, pp. 412-413)

(2) On August 21, 2013, Appellant was given three grip strength tests with his right hand, and he gripped: 25 pounds, 25 pounds, and 30 pounds; (APA, p. 382)

(3) On August 23, 2013, Appellant gripped 27 pounds with his left hand and 12 pounds with his right; (APA, p. 419)

(4) On October 30, 2013, Appellant gripped 16 pounds with his left hand and 10 pounds with his right; (APA, pp. 420-425)

(5) On February 19, 2014, Appellant gripped 70 pounds with his left hand and 20 pounds with his right; (APA, p. 390) and

(6) On July 7, 2014, Appellant gripped 2 pounds with his right hand. (APA, p. 442)

At the hearing, Appellant was asked about the inconsistencies between these grip strength testing results. Appellant was questioned why his grip started high, then decreased until February, when his grip significantly increased. Appellant responded by stating, "I don't know. All I can tell you is it's been progressively getting worse since the accident." (Hr'g Tr. pp. 55-56) When asked why his grip strength increased in February, Appellant stated, "I don't know. I don't know that it did." (Hr'g Tr. p. 56) Appellant stated that the therapist must have gotten the numbers wrong. (*Id.*)

Alleged Posturing and Lack of Strength

Dr. Mir stated he "suspected" Appellant's carpal tunnel syndrome and cubital tunnel syndrome occurred as a result of Appellant's "posturing" while he recovered from his work injuries. During the hearing, ***Appellant testified that Dr. Mir mentioned posturing during his examination, and Appellant further testified that Dr. Mir even demonstrated posturing to Appellant.*** Dr. Mir also demonstrated the posturing during his deposition. Not surprisingly, Appellant presented to his deposition, and to the hearing, holding his hands in the "posture" demonstrated to him by Dr. Mir. Appellant makes much of the fact that his alleged posturing appears similar to the posturing demonstrated by Dr. Mir, even including pictures of both individuals posturing in his Brief, but this is no coincidence, nor is it evidence that Appellant is credible; ***Appellant admitted that Dr. Mir specifically demonstrated the posturing to Appellant during his treatment.***

During Dr. Mir's deposition, he stood by the use of the word "suspect" in relation to Appellant's posturing, and he agreed he never witnessed the posturing himself. Appellant's Brief points to the definition of the word, "suspect," and notes the definition

to be: "To imagine to exist or be true, likely, or probable." (Appellant's Brief, p. 20) Appellant asserts that this definition proves the *strength* of the word selected by Dr. Mir, but Respondents would contend it shows the exact opposite. "Imagining" something to be true or likely does not show any degree of certainty whatsoever, and it certainly is not sufficient in the realm of medical causation.

The totality of the circumstances surrounding Appellant's alleged "posturing" is suspect, at best. Sixteen months after the work injury, Dr. Mir evaluated Appellant and noted that he "suspected" that posturing could have a role in Appellant's complaints. This is the first notation of any "posturing." Appellant did not tell Dr. Mir that he had been posturing, nor did Dr. Mir ever witness Appellant posturing. Dr. Mir then demonstrated the posturing to Appellant. Appellant then presented to his deposition, and to the hearing, holding his hands in the same manner as Dr. Mir demonstrated.

Appellant alleges that it was improper for the Single Commissioner to question Appellant's effort when Appellant asked for assistance to remove his compression sleeve during the hearing. Appellant calls this "sit and squirm jurisprudence," and Appellant again asserts that the Commission somehow formulated its own medical opinion. (Appellant's Brief, p. 33) Again, the Commission was not blindly asserting an opinion without basis as Appellant would like to contend. Dr. Rudisill, a board certified hand surgeon, specifically stated: "I have advised [Appellant] that carpal tunnel or even the burns should not give him the weakness that he is exhibiting in his hands. Again it appears to me that he is essentially giving no effort at all." (APA, pp. 403-404) Based on Dr. Rudisill's medical report, it is evident that Appellant's subjective physical limitations are exaggerated.

Perhaps even more telling, even Dr. Mir states that Appellant's left hand burn was a "mild" or "minor" burn injury that "healed very quickly," and ***Dr. Mir testified that Appellant should not have had functional limitations on the left side after a few months from the accident.*** (Deposition of Dr. Mir, pp. 41 and 53-54) Despite these statements from both hand surgeons, the Single Commissioner noted the following in her Order: "At the hearing, Appellant laboriously demonstrated as if he could barely move his left hand and fingers, and then only very slowly with the greatest of difficulty." (Finding of Fact No. 28) Appellant's alleged lack of strength and functional limitations in *both* of his hands is exaggerative and inconsistent with his injuries, as confirmed by both Dr. Rudisill and Dr. Mir. Accordingly, the Commission properly questioned Appellant's credibility based on the inconsistencies between his actions and the professional medical opinions of *two hand surgeons*.

Dr. Rudisill's Physical Examination

Dr. Rudisill felt that Appellant's subjective complaints and limitations were inconsistent with Appellant's injuries and diagnoses, even indicating that it appeared Appellant was giving "no effort at all." A review of Dr. Rudisill's report, alone, provides basis for the Commission's concern for a lack of credibility. Further, Appellant's testimony regarding Dr. Rudisill's evaluation was inconsistent. At the hearing, when asked if Dr. Rudisill touched him during the evaluation, Appellant stated, "I don't recall him touching me." (Hr'g Tr. p. 38) Dr. Rudisill's reports show that Dr. Rudisill performed Tinel's and Phalen's testing. Under "Physical Exam," Dr. Rudisill's medical records from July 24, 2014 state, "with Tinel's testing he complained only of a little

discomfort, volar aspect of both wrists. Phalen's and carpal compression negative on the right, positive on the left." (APA, p. 403)

A Tinel test is performed by lightly tapping a nerve; if the individual feels a tingling sensation as a result, then he or she likely has carpal tunnel syndrome. A Phalen test is performed by compressing the median nerve within the carpal tunnel to see if an individual feels characteristic sensations such as burning or tingling in his or her fingers. Both Tinel and Phalen tests required Dr. Rudisill to physically touch Appellant. Dr. Rudisill's report directly refutes Appellant's statements; statements which are clearly targeted at discrediting Dr. Rudisill's examination and opinions, further damaging Appellant's credibility.

The Commission made numerous findings addressing Appellant's credibility. These findings are based, in large part, on objective, measurable, and clear-cut inconsistencies. Based on a review of the record in its entirety, and when comparing the medical evidence to Appellant's testimony and exaggerated actions, substantial evidence supports the Commission's finding that Appellant was not credible, and the Commission committed no legal error in addressing the same. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and there is no basis to overturn the Commission's credibility findings in this instance.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANT'S ALLEGED LEFT CARPAL TUNNEL SYNDROME IS NOT CAUSALLY-RELATED TO THE APRIL 18, 2013, WORK ACCIDENT.

At the hearing, Appellant testified the burns on his left hand were located on the backside of his left hand, and the burns did not reach his left wrist. (Hr'g Tr., pp. 42-43)

Additionally, Appellant testified that he had no burns on his left forearm. (*Id.*) Appellant testified that the burns on his left hand healed by July 2013, but he testified he still had pain in his left hand after that time. (*Id.*, pp. 45-46) Despite this testimony, ***by May 15, 2013 (a little less than one month after the date of the accident), Appellant's left hand is no longer mentioned in the notes of the authorized treating physician (Dr. Hassan) in terms of complaints or treatment until approximately one year later***. No observation of edema, difficulty with range of motion, pain, etc. is documented or noted. Similarly, there are no reports of left hand issues for nearly a year in the extensive records from two separate physical therapy providers. Despite this fact, Appellant presented to the hearing demonstrating severe functional limitations with *both* of his hands; not just his right. Again, Appellant's subjective complaints of functional limitations are simply not consistent with the medical records or his injuries.

The Single Commissioner viewed Appellant's hands at the hearing and noted that she could barely see where the left hand burns had occurred. At a distance of approximately 18"-24", the Single Commissioner only saw some pinker (not red) areas on the top of the 2nd (middle) finger and the index finger. Even Appellant admits that his left hand scarring is "minimal." In fact, Appellant was asked whether he had any scarring on his left hand, and he first replied, "No," and he then stated, "It would be minimal." (Hearing Transcript, pages 47-48)

Again, it is important to note that the Single Commissioner specifically observed Appellant during the hearing, and the Single Commissioner noted Appellant to laboriously demonstrate as if he could barely move his left hand and fingers, and then only very slowly with the greatest of difficulty. Dr. Mir testified that it would be

"unusual" for someone with a mild burn injury to be unable to operate his hand. (Deposition of Dr. Mir, page 45) Dr. Mir further testified that Appellant should not have had functional limitations on the left side after a few months from the accident. (Deposition of Dr. Mir, pp. 41, 53-54) Without functional limitations, Appellant should not have been posturing by this time. This is consistent with Dr. Rudisill's opinion that Appellant's burns should not have caused the weakness that Appellant is exhibiting in his hands, and Dr. Rudisill's opinion that Appellant "is essentially giving no effort at all."

In light of (1) the fact that Appellant's medical records document no left hand complaints for approximately a year after May of 2013; (2) the fact that Appellant's left hand burns were "mild" or "minor;" and (3) the fact that both Dr. Rudisill *and Dr. Mir* agree that Appellant's alleged functional limitations are out of proportion to his injuries, the evidence plainly establishes that Appellant's alleged left carpal tunnel syndrome is not causally-related to his work injury. Instead, the evidence establishes that Appellant's alleged left carpal tunnel syndrome is far more likely to be causally-related to his diabetes. Appellant is a longtime diabetic with consistently high and uncontrolled blood glucose levels. Dr. Mir admits that Appellant's carpal tunnel syndrome could "absolutely" be caused by diabetes and obesity alone. (Deposition of Dr. Mir, pages 42-43). ***Dr. Rudisill opined that Appellant's left carpal tunnel syndrome is causally-related to his diabetes***. (APA, pp. 407-411) Either medical opinion, alone, is sufficient to constitute substantial evidence to support the Commission's denial of Appellant's alleged left carpal tunnel syndrome, and substantial evidence clearly supports the Commission's finding that Appellant's alleged left carpal tunnel syndrome is not causally-related to the work accident.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANT'S ALLEGED BILATERAL CUBITAL TUNNEL SYNDROME IS NOT CAUSALLY-RELATED TO THE APRIL 18, 2013, WORK ACCIDENT.

In his Brief, Appellant improperly states "it is undisputed that [Appellant] developed bilateral ... cubital syndrome following his burn injuries." (Brief of Appellant, p. 14) On the contrary, Respondents contend Appellant does not even suffer from cubital tunnel syndrome. Firstly, Appellant's nerve conduction studies ***did not demonstrate that he suffers from cubital tunnel syndrome***. Secondly, Dr. Rudisill's physical examination did not demonstrate that Appellant suffers from cubital tunnel syndrome, and based on the nerve conduction studies and his physical examination, Dr. Rudisill opined that Appellant most probably *does not* suffer from cubital tunnel syndrome of the right or left upper extremity. The objective nerve conduction study, the physical examination performed by Dr. Rudisill, and the professional medical opinion of Dr. Rudisill all represent substantial evidence to support a finding that Appellant does not even suffer from cubital tunnel syndrome.

The only evidence to support even a diagnosis of cubital tunnel syndrome was offered by Dr. Mir. However, Dr. Mir admittedly based his diagnosis of bilateral cubital tunnel syndrome, at least in part, on the fact that nerve conduction studies have a 40% chance of giving false negatives for cubital tunnel syndrome. This must also indicate the contrary position that nerve conduction studies have a ***60% chance of giving true negatives for cubital tunnel syndrome.***

Even in the event that Appellant *does* have cubital tunnel syndrome, substantial evidence supports a finding that the cubital tunnel syndrome is not a direct result of his

work accident on April 18, 2013. As with carpal tunnel, persons with diabetes and obesity are at a heightened risk for contracting cubital tunnel, and Appellant has a significant history of both. Dr. Rudisill opined that, if Appellant *does* suffer from cubital tunnel, ***it is not related to the work accident***, and Dr. Mir agreed that it is possible that Appellant's cubital tunnel could be caused by his glucose levels and obesity, alone. *If* Appellant suffers from cubital tunnel syndrome, there is substantial evidence to support a finding that it is not related to his work injuries.

IV. THE COMMISSION PROPERLY HELD THAT RESPONDENTS HAVE THE RIGHT TO DIRECT APPELLANT'S MEDICAL TREATMENT.

Respondents are entitled to direct Appellant's treatment pursuant to S.C. Code Ann. Sections 42-15-60 and 42-15-80. As an out-of-state provider, the Augusta Burn Center is not subject to the South Carolina Workers' Compensation Fee Schedule. Accordingly, the Commission properly found that Respondents are entitled to direct Appellant's treatment and refer Appellant for ongoing treatment with a qualified South Carolina physician. Dr. Hassan originally referred Appellant to "a hand surgeon in his local area." (APA, pp. 71, 209) Additionally, Dr. Mir stated in his deposition that he saw no reason why another surgeon could not perform the necessary procedures. (Deposition of Dr. Mir, p. 62) Based on the authority of Respondents to direct treatment, and based on Dr. Mir's agreement that another surgeon could perform the necessary procedures, the Commission properly allowed Respondents to refer Appellant for ongoing treatment with an in-state physician.

V. DR. RUDISILL'S REPORTS, QUESTIONNAIRES, AND OPINIONS WERE PROPERLY ADMITTED INTO EVIDENCE AND DO NOT VIOLATE S.C. CODE ANN. SECTION 42-15-95.

Appellant argues that Dr. Rudisill's reports and opinions should be excluded from evidence pursuant to Section 42-15-95 of the South Carolina Workers' Compensation Act. Specifically, Appellant alleges that emails and telephone calls from the nurse case manager to Dr. Rudisill's office *prior to Dr. Rudisill's evaluation of Appellant* were violative of Section 42-15-95. That Section governs communications with health care providers who are actively providing or have provided treatment to an injured worker, and the statute is inapplicable to this situation.

The applicable portions of Section 42-15-95 are subsections (B) and (C), which state the following:

> (B) A health care provider ***who provides examination or treatment*** for any injury, disease, or condition for which compensation is sought under the provisions of this title may discuss or communicate an employee's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys or certified rehabilitation professionals, ***or the commission*** without the employee's consent. 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. Section 42-15-95) (all emphasis added)

Appellant argues that this Code Section stands for the proposition that insurance carriers and employers (or their representatives) in workers' compensation claims are ***completely barred from speaking with any health care provider about the claim unless the injured worker is notified of the communication***. Respondents assert that this overly broad interpretation of the statute is incorrect, as the South Carolina Legislature made sure to specify that the statute only applies to a health care provider "who provides examination or treatment."

Firstly, the "plain meaning rule" requires that the statute be interpreted to apply only to health care providers who are actively providing, or have already provided, medical care. "The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002) (quoting Norman J. Singer, *Sutherland Statutory Construction,* § 46.03 at 94 (5th Ed.1992)); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct.App.2001). "The legislature's intent should be ascertained primarily from the plain language of the statute." State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct.App.2004); State v. Morgan, 352 S.C. 359, 366, 574

S.E.2d 203, 206 (Ct.App.2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct.App.1996).

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct.App.2005) (citing Hodges, 341 S.C. 79, 533 S.E.2d 578; Bayle, 344 S.C. at 122, 542 S.E.2d at 739). "When the terms of a statute are clear, the court must apply those terms according to their literal meaning." Georgia-Carolina Bail Bonds, 354 S.C. at 24, 579 S.E.2d at 337 (citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct.App.1999); *see also* Parsons v.

Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction.")).

Applying the "plain meaning rule" to S.C. Code Ann. Section 42-15-95, and examining the plain, unambiguous, and literal meaning of the statute, it is evident that the statute was not intended to apply to medical providers who have not yet provided treatment to the injured worker. Otherwise, the Legislature would not have needed to include the language "who provides examination or treatment," and the statute would simply state that it applies to "health care providers." Instead, the Legislature chose to specify that the statute only applies to a health care provider "who provides" treatment or examination. "Provides" is present tense. The statute does not say "may provide" or "will provide;" it says "provides." Clearly, the Legislature had a purpose in the inclusion of this language. Gordon, 362 S.C. at 403, 608 S.E.2d at 425 (noting it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing). The statute plainly states that it applies only to health care providers "who provide" treatment or examination, and it is not applicable to this situation based on the statute's plain and unambiguous language.

Secondly, if we are to assume for the sake of argument that there can be some ambiguity to be analyzed in the statute, Appellant's interpretation of Section 42-15-95 would lead to an absurd result, as the interpretation would violate the due process rights of insurance carriers and employers to adequately defend claims. Under Appellant's interpretation of Section 42-15-95, if a carrier or employer wished to retain an expert medical witness to testify or offer an opinion on a claim, the statute would disallow communication with any such expert unless the injured employee or his attorney were

copied on all written correspondences and allowed to take part in any conversations or meetings with the expert. In other words, defendants to a workers' compensation claim in South Carolina would not be allowed to speak to their own medical experts without inviting Appellants and their attorneys to come along. If the interpretation of a statute would lead to a result unintended by the legislature and plainly absurd, it should be rejected. So. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n, 297 S.C. 492, 496, 377 S.E.2d 358, 361 (Ct.App.1989) ("However plain the ordinary meaning of the words used in a statute, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the Legislature."). Appellant's interpretation would effectively bar all workers' compensation defendants from freely communicating with their own potential expert medical witnesses; a clearly absurd result.

Thirdly, the language makes clear that the purpose behind the statute is to allow the opportunity to ask medical professionals questions about a workers' compensation claim ***without violating the doctor-patient relationship***. The final sentence of subsection (B) reads: "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." By including this sentence in subsection (B), and by specifying that the statute applies only to health care providers "who provide examination or treatment," the South Carolina Legislature made clear that the purpose of the statute is to protect the doctor-patient relationship and keep third-parties (parties other than the patient and doctor) from communicating with an injured worker's health care provider without the worker's knowledge.

If the purpose of the statute was to restrict ex parte communications or avoid one party communicating with health care providers without the knowledge of the other party, surely the statute would apply to claimants, as well as defendants. The fact that claimants are not restricted from communicating with health care providers "who provide treatment" further evidences the purpose of the statute to protect the doctor-patient relationship, as there can be no violation of the doctor-patient relationship when claimants communicate with their own doctors. Perhaps even more importantly, ***Section 42-15-95 applies equally to restrict the South Carolina Workers' Compensation Commission*** from communicating with a health care provider "who provides treatment" without the employee's consent, clearly indicating that the intent of the statute is not to restrict the *parties* or the defendants to a workers' compensation claim. Instead, the basis for the restriction on carriers, employers, ***and the Commission*** (a non-party) is premised on the protection of the doctor-patient relationship. Appellant's overly-broad and burdensome interpretation of Section 42-15-95 cannot stand.

In the instant case, Appellant asserts that Dr. Rudisill's reports and opinions should have been excluded because, ***prior to Dr. Rudisill examining Appellant***, the nurse case manager communicated with Dr. Rudisill's office without copying Appellant or notifying him of the communication. However, at the time of these communications, Dr. Rudisill was not a health care provider "who provides treatment," he was merely a doctor, with no duty of confidentiality, and no doctor-patient relationship. As there is no doctor-patient privilege to protect, there is no basis for restricting communications, and Section 42-15-95 does not apply. No error of law was committed in this instance, and the Commission properly allowed Dr. Rudisill's reports and opinions into evidence.

Even if Section 42-15-95 applied to this situation, there has been no violation of the statute, as there is no evidence that the nurse case manager discussed anything beyond general scheduling issues with the doctor's office. In his Brief, Appellant purports to know the content of the telephone calls made to Dr. Rudisill's office, and Appellant purports to know with certainty that the calls were received by Dr. Rudisill, himself. Respondents find it *extremely unlikely* that Dr. Rudisill received the phone calls personally, and Respondents strongly disagree with Appellant's interpretation of the nurse case manager's handwritten notes.

Appellant contends that the nurse case manager's notes somehow indicate that the nurse case manager "deliberately intended to manipulate the treatment unfavorably by predisposing the doctor against [Appellant]." (Brief of Appellant, p. 31) Respondents contend that the interpretation of the notes which is most likely to be accurate is that the nurse case manager called the doctor's office to confirm (note says "conf") an appointment or to confirm that the office received records faxed or emailed to them. Respondents contend that any communications between the nurse and the doctor's office were most likely communications regarding scheduling and providing documents to Dr. Rudisill's office, and Appellant's contention that the nurse's notes "document ex parte telephone calls *directly* with Dr. Rudisill" is baseless. Appellant *could have* deposed Dr. Rudisill or the nurse case manager if he would like to have determined the details of the correspondences between the two, but Appellant chose not to do so. Therefore, we cannot know with any degree of certainty whether the nurse ever spoke to Dr. Rudisill, or the nature of any communications between the nurse and the doctor's office. Again, these communications are immaterial, as the communications did not violate Section 42-

15-95, regardless of the content of the communications, but even if Section 42-15-95 applies to the communications, there is no evidence that the statute was violated based on the evidence in the record, and the Commission properly allowed the doctor's reports into evidence.

VI. THE COMMISSION PROPERLY APPLIED NAWA V. WACKENHUT CORP. AS AN *ADDITIONAL* BASIS FOR DENYING COMPENSABILITY OF APPELLANT'S LEFT CARPAL TUNNEL SYNDROME.

The Commission reviewed the evidence in its entirety and found that Appellant's left carpal tunnel syndrome is not causally-related to the work accident.[1] The Commission first found that Appellant simply failed to carry his burden of proving that the alleged left carpal tunnel syndrome is causally-related to the work accident *at all.* In Finding of Fact No. 54, the Commission stated the following:

> For the reasons set forth herein, and also based on the record in its entirety, including the medical evidence and Exhibits submitted at the hearing, the deposition transcripts of Appellant and his physicians, the testimony of the hearing witnesses, the APA Submissions of the parties, the pictures in evidence, and the observations of Appellant by the Undersigned during the hearing, I find that Appellant's alleged left carpal tunnel syndrome and left cubital tunnel syndrome are not compensable.

Similarly, in Conclusion of Law No. 2, the Commission stated the following:

> Under § 42-1-160, § 42-15-60, and Nawa v. Wackenhut, Appellant's alleged left carpal tunnel syndrome and left cubital tunnel syndrome are not causally-related to the work accident of April 18, 2013.

A review of the Commission's Findings and Conclusions in their entirety make clear that the denial of Appellant's alleged left carpal tunnel syndrome was based on the simple fact that Appellant failed to carry his burden of proof, and Nawa v. Wackenhut

[1] Respondents do not believe the Commission based its denial of the *bilateral cubital tunnel syndrome* on Nawa v. Wackenhut Corp., but in the event the Commission intended to do so, the arguments below remain the same, and the Commission properly denied compensability of those conditions.

Corp., 341 S.E.2d 800, 288 S.C. 250 (Ct.App.1986), simply provided an additional basis to support a denial. As outlined in Argument Section II, above, there was substantial evidence to support the outright denial of Appellant's left carpal tunnel syndrome, and the Commission's primary finding was simply that Appellant's left carpal tunnel syndrome is not causally-related to the burn injury *in any way*, as Appellant's burn injuries on the left hand were not severe enough to cause or aggravate Appellant's carpal tunnel syndrome, and the carpal tunnel syndrome was most likely related *solely* to Appellant's underlying diabetes. Furthermore, Dr. Rudisill specifically opined: "My opinion is his CTS is related to his diabetes." (APA, pp. 407-411) Dr. Rudisill's opinion, alone, represents substantial evidence to support a denial of Claimant's left carpal tunnel syndrome.

As ***an additional and secondary basis*** to support its conclusions, the Commission noted that Appellant's burn was "at most ... but one causative factor" with regard to Appellant's left carpal tunnel syndrome. (Finding of Fact No. 52) The Commission does not state that it believes the burn *was* a causative or contributing factor, as the Commission clearly does not believe that to be the case based on Finding of Fact No. 54. However, the Commission made the point that, in the event the burns did contribute to Appellant's left carpal tunnel syndrome in any way, the burns were but one minor factor among many, but Appellant had not proven that the burns were the primary or proximate factor, and our Courts have indicated that is what is required to prove compensability in a workers' compensation claim.

In his Brief, Appellant states the following:

> Furthermore, the Appellate Panel misapplied Nawa v. Wackenhut Corp., 341 S.E.2d 800, 288 S.C. 250 (Ct.App.1986). 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). (Brief of Appellant, p. 14)

Appellant contends that Nawa is "merely a curiosity," and he contends the Fowler case set forth the appropriate standard. Interestingly enough, as noted below, the Nawa Court specifically cited the Fowler case in arriving at the appropriate standard for determining compensability.

In Nawa, the claimant died when he suffered a stroke during intercourse shortly after arriving home from work. The claimant alleged that the stress from work was a contributing factor in bringing about the stroke, and the claimant therefore sought compensability for the death. In denying compensability of the claim, the South Carolina Court of Appeals specifically reviewed the Fowler case cited by Appellant, noting the following:

> ***The Appellants contend***, and frame their arguments on appeal around the assumption, ***that an employee's death is compensable if his job is a contributing factor to any degree to his death***. They allege job related stress was a contributing cause of John's death and, relying on their proffered rule of compensability, conclude his death is compensable. The Appellants correctly concede no South Carolina case has expressly adopted such a rule. ***We decline to adopt the Appellants' interpretation of the law.***
>
> In Compton v. Town of Iva, 256 S.C. 35, 180 S.E.2d 645, 647 (1971), Justice Littlejohn, quoting Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960), stated, "An accident arises out of the employment when it arises because of it, as when the employment is a contributing proximate cause." This court held in Brown v. La France Industries, 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985) an Appellant must prove an employee's death is proximately caused by an accident arising out of the employment. ***Thus, South Carolina requires the employee's job be more than one factor, to any extent, in the injury or death.***

Based on Nawa *and* Fowler (the very case cited by Appellant), an injury is not compensable simply because the employment is ***a*** contributing factor; the employment

must be a contributing ***proximate cause***. *Black's Law Dictionary* defines "proximate cause" as "a cause that directly produces an event and without which the event would not have occurred." During his deposition, Dr. Mir testified that Appellant's carpal tunnel syndrome could "absolutely" be caused by diabetes and obesity alone, and Dr. Mir testified that the left hand burn injury "could be" a "contributing" factor. However, Dr. Mir testified that he "can't say more than likely" that the left hand burn is a contributing factor to Appellant's left carpal tunnel syndrome. (Deposition of Dr. Mir, pp. 42-43) Dr. Mir's testimony regarding causation was properly noted to be "equivocal" by the Commission. The Single Commissioner properly reviewed the evidence and determined that, *if* the burn injuries were a contributing cause to Appellant's left carpal tunnel syndrome, they were merely one factor among many and were not a proximate contributing cause so as to render the condition compensable. Accordingly, there was no legal error in the Commission's application of Nawa.

CONCLUSION

Based on the foregoing, Respondents respectfully request the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY:____________________________

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October 6, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-001180

Kim Argo, Appellant,

v.

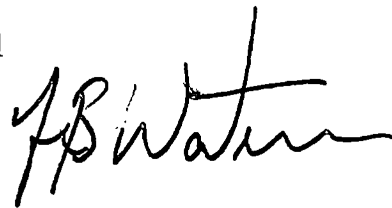
Flexible Technologies and Liberty Insurance Corporation, Respondents.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondents** and **Designation of Matter** on Kim Argo by depositing a copy of the same in the United State Mail on October 6, 2016, with sufficient postage affixed thereto and return address clearly marked, addressed to her attorney of record, Stephen B. Samuels, Esquire, addressed as follows:

Stephen B. Samuels, Esquire
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201

October 6, 2016



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October 6, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Kim Argo vs. Flexible Technologies
WCC File No.: 1304205 DOI: 4/18/2013
Carrier: Liberty Insurance Corporation - Claim No.: WC555-A96869
WJC&B File No.: 0010.03998
Appellate Case No.: 2016-001180

Dear Ms. Kitchings:

Enclosed for filing are the original and one (1) additional copy of Respondents' Initial Brief and Designation of Matter in this case, along with a Proof of Service. Please file the original and return the clocked copy in the enclosed, self-addressed stamped envelope. Thank you very much for your assistance in this matter.

By copy of this letter and enclosure to Stephen B. Samuels, counsel of record for Appellant, I am serving him with a copy of Respondents' Initial Brief and Designation of Matter, as indicated by the enclosed Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

L. Brenn Watson

LBW/icg

Enclosures

cc: Mr. Stephen B. Samuels, Esquire

jbm

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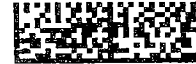

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THE SOUTH CAROLINA COURT OF APPEALS
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