

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1004411

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SC Court of Appeals

Cynthia Walton, Employee, Claimant,

Respondent,

v.

Union County Carnegie Library, Employer,
SC Association of Counties, SIF, Carrier,

Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR AS A MATTER OF LAW IN FINDING THAT WALTON SUSTAINED AN INJURY TO HER RIGHT SHOULDER ON MARCH 30, 2010 BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT?

STATEMENT OF THE CASE

Cynthia Walton ("Walton") sustained an admitted injury to her right wrist on March 30, 2010 as a result of a motor vehicle accident arising out of and in the course of her employment with Union County Carnegie Library. As a result, Union County Carnegie Library and its workers' compensation carrier, South Carolina Association of Counties Self-Insurance Fund, (hereinafter cited collectively as "Union County") provided Walton treatment with Dr. Daniel A. Falcon of The Carolina Hand Center in Spartanburg. (R.pp. 126-51).

On September 7, 2011, Walton filed a Form 50, Request for Hearing, alleging that in addition to her admitted right wrist injury, she also sustained a compensable injury to her right shoulder in the motor vehicle accident on March 30, 2010. (R.p. 20). Union County filed a Form 51 on September 29, 2011 admitting that Walton had sustained an injury to her right wrist but denying Walton's alleged right shoulder injury. (R.p. 21). A hearing was subsequently scheduled and held before Commissioner G. Bryan Lyndon ("Single Commissioner") on December 14, 2011 in Spartanburg, South Carolina.

At the hearing, the only issue before the Single Commissioner was whether Walton sustained an injury to her right shoulder on March 30, 2010 by accident arising out of and in the course of her employment. Walton contended that she sustained a compensable injury to her right shoulder and that she was entitled to additional medical treatment. (R.p. 45). In support of her position, Walton relied on the opinion of her personal physician, Dr. John E. Keith. (R.p. 46). Union County continued to deny that Walton sustained an injury to her right shoulder as a result of her March 30, 2010 motor vehicle accident. Union County argued that Dr. Falcon, the authorized treating physician,

treated Walton for approximately five and a half months after her accident and that Walton never made any complaints of right shoulder problems to Dr. Falcon during that time. (R.pp. 46-7). Union County pointed out that Dr. Falcon testified at his deposition (1) that he never documented any complaint from Walton of right shoulder problems and (2) that he would have included those complaints in his medical reports if Walton had reported any right shoulder problems to him. (Id.) Finally, Union County argued that Dr. Keith's opinion should be given no weight, because it was based on assumptions that were incorrect. (Id.)

On January 30, 2012, the Single Commissioner issued an Order finding that in addition to her admitted right wrist injury, Walton sustained a compensable injury to her right shoulder as a result of her March 30, 2010 motor vehicle accident. (R.pp. 6-15). On January 31, 2012, Union County filed a Form 30, Request for Commission Review. (R.pp. 18-9). Oral arguments were held before the Appellate Panel of the South Carolina Workers' Compensation Commission ("Commission") on May 22, 2012, and on July 16, 2012, the Commission issued an Order by majority vote of two to one affirming the Order of the Single Commissioner. (R.pp. 1-5).

Union County timely filed a Notice of Appeal with the South Carolina Court of Appeals on July 24, 2012. (R.pp. 16-7). This appeal follows.

STATEMENT OF THE FACTS

Walton is forty-seven years of age. (R.p. 59, lines 1-3). She was employed by Union County Carnegie Library in May of 2004, where she worked in the Children Services Department. (Id.) Her job duties required her to plan reading for children. (Id.)

On March 30, 2010, Walton was attending a work related meeting in Columbia, South Carolina. (Id.) As she was crossing the bridge on Interstate 126 near Elmwood Avenue, Walton's vehicle was rear ended by another vehicle, causing her to sustain an admitted injury to her right wrist. (R.p. 59, line 22-p. 60, line 2). Walton testified that she braced for impact because she could hear the oncoming vehicle slamming on its brakes. (R.p. 60, lines 6-20). Walton was wearing her seatbelt at the time of her accident, and her vehicle's airbag did not deploy. (R.p. 60, lines 21-24). When asked about the positioning of her hands at the time of the collision, Walton testified that she was not sure if her right arm got caught in the steering wheel. (R.p. 61, line 5-p. 62, line 14). Walton testified that she had right shoulder pain immediately after her accident. (R.p. 62, lines 15-18).

Following her accident, Walton was taken to Palmetto Health Baptist Hospital via ambulance. (R.pp. 58-61). Neither the EMS records nor the records from Palmetto Health Baptist Hospital mention any complaints of right shoulder problems. (R.pp. 100-20). Walton testified that she does not know why she did not mention her right shoulder during her initial hospital visit. (R.p. 53, lines 8-10).

On April 1, 2010, Walton presented to Dr. J.P. Thomas of Occupational Medicine/Minor Care in Spartanburg, South Carolina with complaints of right wrist pain. (R.pp. 121-22). X-rays of Walton's right wrist were negative. (R.p. 123). Walton was

diagnosed with a right wrist sprain and prescribed a wrist brace. (R.pp. 121-22). There is no mention of any right shoulder complaints in Dr. Thomas' records. (R.pp. 121-25).

Walton was subsequently referred to Dr. Daniel A. Falcon of the Carolina Hand Center on April 19, 2010. (R.p. 131). Prior to Dr. Falcon's initial evaluation, Walton completed a patient questionnaire. (R.pp. 77-8). When asked what type of injury she had, Walton stated "wrist pain, palm, and can not make fist." (R.p. 77) After examining Walton on April 19, 2010, Dr. Falcon diagnosed her with a right hand contusion, placed her in a plaster splint, and instructed Walton to perform finger motion exercises. (R.p. 131). Dr. Falcon did not document any complaints of right shoulder problems during the April 19, 2010 visit. (Id.)

On April 27, 2010, Walton returned to Dr. Falcon, who examined her and noted that her finger motion was better, with less stiffness and swelling. (R.p. 133). Dr. Falcon once again diagnosed her with a right hand contusion and instructed her to follow up in one week. (Id.) On May 4, 2010, Walton returned to Dr. Falcon for a follow up appointment for her right hand contusion. (R.p. 135). After examining Walton, Dr. Falcon instructed her to begin therapy that day and to follow up in three weeks. (Id.)

On May 4, 2010, Walton presented for her initial occupational therapy evaluation. (R.pp. 152-53). Walton reported that she had been involved in a motor vehicle accident and that she was presenting for therapy to improve the range of motion in her right wrist and hand. (Id.) Walton attended a total of eight occupational therapy sessions between May 4, 2010 and May 27, 2010, and there was no mention of any right shoulder complaints during any of these sessions. (R.pp. 152-60). On May 27, 2010, Walton

returned to Dr. Falcon “for continued care of a right hand contusion.” (R.p. 137). Dr. Falcon examined Walton and instructed her to continue therapy. (Id.)

On June 8, 2010, over two months after her motor vehicle accident, Walton presented for her tenth session of occupational therapy. (R.p. 162). During this evaluation, the therapist noted that “Patient reports shoulder discomfort that eases off with use of wall pullies.” (Id.) The therapist’s record does not indicate whether Walton’s complaints were to her left shoulder or right shoulder or whether her condition was a result of the motor vehicle accident. (Id.) Importantly, the therapist’s June 8, 2010 report is the only documented complaint of any shoulder problems in the records.

Following her June 8, 2010 session, Walton attended eighteen more occupational therapy sessions between June 10, 2010 and September 23, 2010. (*See* R.pp. 163-81). There is no mention of any right shoulder complaints during any of these subsequent therapy sessions. (Id.) Walton was presented to Dr. Falcon for follow up appointments on June 30, 2010; July 28, 2010; August 26, 2010; and September 23, 2010. (*See* R.pp. 141, 144, 146, 149). Dr. Falcon did not document any complaints of right shoulder problems during any of these evaluations. (Id.) On September 27, 2010, Dr. Falcon completed a Form 14B and opined that Walton had reached maximum medical improvement for her right hand contusion with zero percent (0%) impairment to the right hand. (R.p. 151). He further opined that she was able to return to work without restriction and that she would not need any future medical care related to her work injury. (Id.)

On December 14, 2010, Walton was sent by her attorney to Dr. John P. Keith of Orthopaedic Specialties of Spartanburg for an evaluation. (R.pp. 182-84). Dr. Keith noted that Walton complained of pain in the right hand, arm, and shoulder and that she related all

of her complaints to the March 30, 2010 motor vehicle accident. (R.p. 182). Dr. Keith specifically noted that Walton's complaints of right shoulder pain had been present since her motor vehicle accident. (Id.) With regards to the details of her motor vehicle accident, Walton reported that "her hand got torqued in the steering wheel" when she was rear ended by the other vehicle. (Id.) Dr. Keith specifically noted that Walton stated that "her air bag did deploy and that her right arm got caught in the steering wheel as she was hit from behind." (Id.) During his examination, Dr. Keith noted that Walton had positive impingement signs in her right shoulder. (R.p. 183). Dr. Keith diagnosed Walton with right impingement syndrome and recommended an MRI of the right shoulder. (R.pp. 183-84). He further opined that "her right shoulder and wrist pain are directly related to the motor vehicle accident on March 30, 2010." (R.p. 184).

Walton testified that she told Dr. Falcon on more than one occasion about her right shoulder pain. (R.p. 54, lines 6-10). However, there is no mention of any right shoulder complaints in Dr. Falcon's medical records. (*See* R.pp. 126-51). On December 5, 2011, the parties deposed Dr. Falcon. Dr. Falcon was specifically asked about each examination of Walton, and he testified that Walton never made any complaints of right shoulder problems to him. (R.p. 84, lines 6-24). He further testified that if Walton would have complained of right shoulder problems, those complaints would have been documented in his records even if he was not going to treat the complaint. (R.p. 84, line 25-p. 85, line 4).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). Under the scope of review established in the Administrative Procedures Act, an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights 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." See Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004).

Section 1-23-380(A)(5) of the South Carolina Code specifically provides:

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)(Emphasis added).

Thus, "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, 610 S.E.2d 488 (2005)(citing Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999)). The "substantial evidence" required to support the factual findings of the Commission is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the

conclusion the Commission reached in order to justify its action. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995); Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

Additionally, 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). If the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

ARGUMENTS

I.

THE COMMISSION ERRED IN FINDING THAT WALTON SUSTAINED AN INJURY TO HER RIGHT SHOULDER ON MARCH 30, 2010 BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

A claimant has the burden of proof to show such facts as will render an injury compensable under the Workers' Compensation Act. Holman v. Bulldog Trucking Co., 311 S.C. 341, 428 S.E.2d 889 (S.C. App. 1993). In the present case, substantial evidence does not support the Commission's finding that Walton sustained a compensable injury to her right shoulder. In fact, the only reasonable inference to be drawn from the substantial evidence in the record is that Walton did **not** injure her right shoulder in the March 30, 2010 motor vehicle accident.

While the Commission relied on Walton's testimony at the hearing to support its decision that she sustained a compensable injury to her right shoulder, Walton's testimony regarding her alleged right shoulder problems (1) was not credible, (2) was obviously inconsistent with the medical records in the file, and (3) was completely contradicted by the deposition testimony of Dr. Falcon, the authorized treating physician. Additionally, the Commission also relied on the opinion of Dr. Keith, Walton's personal physician, to support its finding that Walton sustained a compensable injury to her right shoulder. However, Dr. Keith's opinion was not probative or reliable, because it was admittedly based on inaccurate information.

- A. Walton's testimony, specifically her testimony regarding her alleged right shoulder problems, was inconsistent with the medical records and was clearly contradicted by Dr. Falcon's deposition testimony.

Substantial evidence in the record does not support the Commission's finding that Walton's testimony was credible, reliable or probative. First, Walton's testimony regarding her lack of right shoulder problems prior to her March 30, 2010 work-related motor vehicle accident was not truthful. At the hearing, when questioned by her attorney, Walton specifically testified that she never had any injuries or any problems with her right shoulder prior to March 30, 2010 and that she had never received any medical treatment for her right shoulder prior to March 30, 2010:

Q: [Mr. Dantin] Now, prior to March 30, 2010, had you ever had any injuries, problems, or medical treatment specifically with your right shoulder?

A: No.

(R.p. 50, lines 17-20). On cross-examination, Walton once again testified that she had never had any problems with her right shoulder prior to March 30, 2010:

Q: [Mr. Kale] Now, your testimony on direct examination was that prior to March 30, 2010 you never had any problems with your right shoulder; is that correct?

A: Right.

(R.p. 66, lines 9-12). However, a medical report from Dr. Jeffrey M. Craft of Spartanburg Internal Medicine, Walton's family doctor, dated May 9, 2008, specifically indicated that Walton presented with complaints of right shoulder pain. (R.p. 210). When shown Dr. Craft's medical record dated May 9, 2008, Walton confirmed that Dr. Craft's report indicated that she complained of right shoulder pain; however, Walton testified that her complaints of right shoulder pain on May 9, 2008 were related to gallbladder problems that she was having at the time. (R.p. 66, line 13-p. 67, line 4).

Furthermore, and most importantly, Walton's testimony regarding her alleged right shoulder problems following her March 30, 2010 motor vehicle accident was not credible. At the hearing, Walton confirmed her deposition testimony and testified that her right shoulder pain began immediately after the accident:

Q: [Mr. Kale] Now, at your deposition, you also testified that your shoulder pain began immediately at the time of the accident, correct?

A: Yes, sir; it did.

(R.p. 23, lines 15-18). Following her motor vehicle accident on March 30, 2010, Walton was transported by ambulance from the scene of the accident to the emergency room at Palmetto Health Baptist in Columbia, South Carolina. (R.p. 100). While Walton alleges that she had right shoulder pain *immediately* after her accident, there is absolutely no mention of any right shoulder pain or complaints in either the EMS report or the medical records from Palmetto Health Baptist on the date of her accident. (*See* R.pp. 100-20). In fact, on March 30, 2012, the day of her accident, the emergency room physician at Palmetto Baptist Hospital noted that Walton had full range of motion in her upper extremities. (R.p. 106). Additionally, on April 1, 2010, two days after her motor vehicle accident, Walton presented to Dr. J.P. Thomas at Regional Occupational Medicine for an evaluation. (R.pp. 121-22). While Dr. Thomas noted that Walton complained of right wrist and right hand pain, there is no mention of any right shoulder complaints. (*Id.*)

Following her evaluation at Regional Occupational Medicine, Walton was referred to Dr. Daniel A. Falcon at The Carolina Hand Center. When questioned during direct examination about her treatment with Dr. Falcon, Walton specifically testified that she told Dr. Falcon more than once about her alleged right shoulder pain:

Q: [Mr. Dantin] Did you ever mention having any shoulder pain to Dr. Falcon?

A: Yes.

Q: More than once?

A: Yes.

(R.p. 54, lines 6-10). On cross-examination, Walton further testified that she told Dr. Falcon several times about her right shoulder problems and that she was sure she told him more than five times:

Q: [Mr. Kale] Now, your testimony is you told Dr. Falcon that you were having right shoulder problems, correct?

A: Uh-huh.

Q: And how many times did you tell him that?

A: How many times have I told him that?

Q: Yes.

A: Several times.

Q: More than two?

A: Yes.

Q: More than five?

A: I don't know. I've been to the doctor at least ten times, and I just don't remember if I told him that every single time. I'm sure I did.

(R.p. 64, lines 3-15).

While Walton testified that she told Dr. Falcon about her alleged right shoulder problems numerous times, her testimony is undoubtedly contradicted by the medical records and deposition testimony of Dr. Falcon. Walton initially presented to Dr. Falcon on April 19, 2010. (R.p. 74, lines 23-25). Prior to being seen by Dr. Falcon that day, Walton completed and signed a "Patient Information" form. (R.pp. 126-27). In this form, Walton was specifically asked about what type of injury she had on March 30, 2010, and she wrote: "wrist pain, palm, and can not make fist." (R.p. 77). **Importantly,**

Walton did not indicate any complaints of right shoulder pain or problems in her “Patient Information” form. (Id.) Dr. Falcon also examined Walton on April 19, 2010, and he noted that Walton was presenting “with three weeks of right hand and wrist pain.” (R.p. 131). Dr. Falcon diagnosed Walton with a right hand contusion and placed her right wrist in a plaster splint. (Id.) **There is no mention of any right shoulder complaints in Dr. Falcon’s April 19, 2010 medical record. (Id.)**

At his deposition, Dr. Falcon was specifically asked about the “Patient Information” form Walton completed on April 19, 2010 and about his evaluation of Walton that day. Dr. Falcon confirmed that Walton did not indicate that she was having any problems with regards to her right shoulder in her “Patient Information” form. (R.p. 75, lines 8-11). He further testified that he did not recall having any conversation with Walton on April 19, 2010, about her right shoulder but that if Walton would have complained of any right shoulder problems during her April 19, 2010 visit, he would have documented those complaints in his report. (R.p. 75, line 17-p. 76, line 4).

Walton’s next appointment with Dr. Falcon was on April 27, 2010. During that visit, Dr. Falcon examined Walton and noted that her “finger motion is better, with less stiffness and swelling.” (R.p. 133). Dr. Falcon diagnosed Walton with a right hand contusion and instructed Walton to continue splinting and to follow up in one week. (Id.) **There is no mention of any right shoulder complaints in Dr. Falcon’s April 27, 2010 medical record. (Id.)** When questioned about this visit at his deposition, Dr. Falcon testified that he did not document any complaints of right shoulder pain and that if Walton would have complained about her right shoulder on April 27, 2010, he would have documented those complaints in his records. (R.p. 77, lines 9-14). On May 4,

2010, Walton returned to Dr. Falcon for a follow up evaluation of her right hand contusion. (R.p. 135). Dr. Falcon examined Walton's right hand and noted that "there is less pain and swelling," and he instructed Walton to begin physical therapy. (Id.) **Again, there is no mention of any right shoulder complaints in Dr. Falcon's May 4, 2010 medical record.** (Id.) At his deposition, Dr. Falcon confirmed that he did not document any complaints of right shoulder pain in his May 4, 2010 report, and he testified that if Walton would have complained of right shoulder problems on May 4, 2010, he would have documented those complaints. (R.p. 77, line 22-p. 78, line 2).

On May 27, 2010, Walton returned to Dr. Falcon, who examined Walton, diagnosed her with a right wrist contusion, and instructed her to continue therapy and to follow up in one month. (R.p. 137). **There is no mention of any right shoulder complaints in Dr. Falcon's May 27, 2010 medical record.** (Id.) Once again, Dr. Falcon confirmed that he did not document any complaints of right shoulder problems on May 27, 2010, and he testified that if Walton would have made any complaints of right shoulder problems, he would have documented those in his record. (R.p. 79, lines 3-8). On June 30, 2010, Walton returned to Dr. Falcon for a follow up appointment. (R.p. 141). During this visit, Dr. Falcon examined Walton and noted that her right wrist contusion was improving. (Id.) Dr. Falcon instructed Walton to continue therapy, and he added dynamic flexion splinting to her therapy treatment. (Id.) **There is no mention of any right shoulder complaints in Dr. Falcon's June 30, 2010 medical record.** (Id.) When asked specifically about Walton's June 30, 2010 visit at his deposition, Dr. Falcon testified that he did not record any complaints of right shoulder problems and that if

Walton would have made any right shoulder complaints on that date, he would have noted those in his record. (R.p. 79, line 22-p. 80, line 3).

On July 28, 2010, Walton returned to Dr. Falcon, who examined her and noted that she was continuing to make improvement with regards to her right wrist contusion. (R.p. 144). Dr. Falcon instructed Walton to continue therapy and to follow up in one month. (Id.) **Yet again, there is no mention of any right shoulder complaints in Dr. Falcon's July 28, 2010 medical record.** (Id.) Moreover, Dr. Falcon testified at his deposition that he did not note any right shoulder complaints on July 28, 2010 and that he would have documented those complaints if Walton would have actually made them. (R.p. 80, line 21-p. 81, line 1). On August 26, 2010, Walton returned to Dr. Falcon for a follow up appointment. (R.p. 146). Dr. Falcon examined Walton and instructed her to continue with range of motion therapy. (Id.) **There is no mention of any right shoulder complaints in Dr. Falcon's August 26, 2010 medical record.** (Id.) When asked at his deposition about his August 26, 2010 medical record, Dr. Falcon testified that he did not document any right shoulder complaints and that if Walton would have complained about any right shoulder problems during that visit, he would have documented those complaints in his record. (R.p. 81, lines 10-16). Finally, Walton returned to Dr. Falcon on September 23, 2010 for another evaluation. (R.p. 149). Dr. Falcon examined Walton and noted that her right hand had good sensation and that her right wrist had good range of motion. (Id.) Following his examination, Dr. Falcon opined that Walton had reached maximum medical improvement with no impairment, and he discharged her from his care. (Id.) **Once more, there is no mention of any right shoulder complaints in Dr. Falcon's September 23, 2010 medical record.** (Id.) At his

deposition, Dr. Falcon confirmed that he did not document any right shoulder complaints in his September 23, 2010 medical report, and he testified that if Walton would have actually complained of right shoulder problems during that visit, he would have documented those complaints. (R.p. 82, lines 8-15).

While Walton testified that she told Dr. Falcon “several times” about her alleged right shoulder problems, her testimony is clearly contradicted by the medical records and deposition testimony of Dr. Falcon, the authorized treating physician. As outlined above, Dr. Falcon evaluated and treated Walton on eight (8) separate occasions from April 19, 2010 through September 23, 2010, and there is not one mention of any right shoulder complaints in his medical records. Furthermore, even though Dr. Falcon treated Walton for her right hand and right wrist injury, Dr. Falcon specifically testified that he would have documented other complaints in his notes even if he was not going to treat that complaint:

Q: [Mr. Kale] Normally if somebody is having a problem to an extent that they would voice a complaint about it, even if you're not going to treat them, would you put that complaint in your notes?

A: Yes.

Q: Would you have made a referral to another doctor if you're not going to treat a shoulder problem?

A: Yes..

Q: Did that ever occur in the treatment of Mrs. Walton?

A: No.

(R.p. 84, line 25-p. 85, line 10).

Based on the foregoing, it is clear that substantial evidence does not support the Commission's decision that Walton's testimony regarding her alleged right shoulder problems was credible. As such, Union County respectfully request that the Court issue

an Order reversing the Commission's decision that Walton sustained a compensable injury to her right shoulder by accident arising out of and in the course of her employment on March 30, 2010.

B. Dr. Keith's opinion was not probative or reliable.

It is well settled that the probative value of an expert's opinion stands or falls on the existence or nonexistence of facts upon which it is based. See Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967); Glenn v. Dunegan Mills, 242 S.C. 535, 131 S.E. 2d 696 (1963). In the present case, the Commission erred in relying on Dr. Keith's opinion regarding causation of Walton's alleged right shoulder problems, because his opinion was not probative or reliable since it was based upon assumptions that were not true.

On December 14, 2010, *eight and a half months after her motor vehicle accident*, Walton was sent by her attorney to Dr. John E. Keith of Orthopedic Specialties of Spartanburg for an evaluation.¹ (R.pp. 182-84). Dr. Keith noted that Walton provided him with a history of her March 30, 2010 accident and that "[s]he states that her airbag did deploy and that her arm got caught in the steering wheel as she was hit from behind." (R.p. 182). Dr. Keith noted that Walton presented with continued complaints of right shoulder and right arm pain and that "[s]he states that they are directly related from the wreck and that these issues have not been resolved." (R.p. 183). With regards to her complaints of right shoulder pain, Dr. Keith noted that Walton pointed to her right shoulder as being the worst site of her pain and that Walton indicated she had experienced right shoulder pain since her March 30, 2010 motor vehicle accident. (R.p.

¹ It should be noted that the record does not reveal that Walton ever asked Union County to send her for an evaluation of her right shoulder prior to December 14, 2010.

182-83). After examining Walton, Dr. Keith diagnosed her with “impingement syndrome, right shoulder” and persistent right wrist pain. (R.p. 183). He further opined that “[i]t is with a high degree of medical certainty that her right shoulder and wrist pain are directly related to the motor vehicle accident on March 30, 2010.” (R.p. 184).

While Dr. Keith opined that Walton’s right shoulder condition was causally related to her March 30, 2010 motor vehicle accident, his opinion was based on a number of false assumptions. First, Dr. Keith’s opinion was based on Walton’s indication that she had complained of right shoulder pain since her March 30, 2010 motor vehicle accident. However, as discussed above, the medical records following her motor vehicle accident and the deposition testimony of Dr. Falcon clearly contradict Walton’s history to Dr. Keith that she had experienced right shoulder pain since her March 30, 2010 accident. Additionally, Dr. Keith’s opinion was based on Walton’s inaccurate history regarding her March 30, 2010 motor vehicle accident. Specifically, Walton’s indication (1) that the airbag in her vehicle deployed as a result of her accident and (2) that her arm got caught in the steering wheel when she was hit from behind by another vehicle.

Dr. Keith noted in his December 14, 2010 report that Walton’s “airbag did deploy” as a result of her accident; however, this assumption is clearly not true. (See R.p. 182). First, the EMS report, dated March 30, 2010, the date of her accident, specifically indicates “no airbag deployment.” (R.p. 100). Additionally, the emergency room physician at Palmetto Health Baptist explicitly noted that “[t]here was no airbag deployment.” (R.p. 105). In fact, when questioned at the hearing, Walton admitted that Dr. Keith’s report was inaccurate, because her vehicle’s airbag did not deploy during her March 30, 2010 accident:

Q: [Mr. Dantin] And I just want to, for the record, confirm Dr. Keith in this note writes that your airbag deployed. Is that accurate?

A: No.

Q: It never deployed, did it?

A: No.

(R.p. 51, lines 7-12).

Furthermore, Walton's history to Dr. Keith that "her arm got caught in the steering wheel as she was hit from behind" was also inaccurate. (R.p. 182). On direct examination at the hearing, Walton attempted to confirm Dr. Keith's report, and she testified that her arm got caught in the steering wheel:

Q: [Mr. Dantin] Now, he also wrote that your arm got caught in the steering wheel. Is that accurate?

A: Yes.

(R.p. 12, line 13-15). However, Walton's testimony that her right arm got caught in the steering wheel during her accident is purely self-serving and not credible. On cross-examination, while Walton testified that she braced herself because she could hear the other vehicle coming behind her, she specifically testified that she could not remember all of the details of her motor vehicle accident:

Q: [Mr. Kale] You can't remember?

A: --- I can't remember everything. But I know I was bracing 'cause I could hear.

(R.p. 60, lines 18-20). In fact, even though she testified at the hearing on direct examination that her right arm got caught in the steering wheel during her accident, Walton confirmed that she had testified at her deposition that she was holding onto the steering wheel when the accident happened and that she didn't remember anything after she braced for the accident:

Q: [Mr. Kale] Now, when I took your deposition, you recall that?

A: Yes, sir.

Q: Basically, I asked you what happened in the collision; do you recall that?

A: Yes, sir.

Q: And your response – And I'll read it to you and I'll ask you if that's your testimony. Your response at that time, "It happened so fast I actually do not know. I just remember hearing the car squeal kind of. I knew it was going to hit me, and I just kind of got real stiff and held on to the steering wheel. But I really don't know what happened after that. It was just over with." Do you remember saying that? So, your testimony at the deposition was you were holding on to the steering wheel when the accident happened; is that correct?

A: Yes, sir.

(R.p. 60, line 25-p. 61, line 16). Walton then testified that she did not mention anything at her deposition about her arm getting caught in the steering wheel and that she did not know if her arm actually got caught in the steering wheel:

Q: [Mr. Kale] There's nothing in your testimony that indicates your arm in any way got caught up in the steering wheel, is there? Is that a yes or no?

A: I guess not if I said -- I guess not.

Q: You never mentioned that in the deposition, that your arm got caught up in the steering wheel in any way, correct?

A: But my arm – I mean, I don't know. I mean, I don't know, you know.

Q: You don't know what happened?

A: I mean, I know what happened. I know everything happened really fast, and I know that my arm got hurt; I know that.

Q: But you don't know that it got caught up in any way in the steering wheel, do you?

A: Do I know for sure that it did?

Q: Yes.

A: I mean, I don't know 100 percent.

(R.p. 61, line 17-p. 62, line 9).

Walton's testimony that she did not know if her arm got caught in the steering wheel during her accident not only confirms that Dr. Keith's opinion was based on inaccurate information, but it also further displays her lack of credibility concerning her alleged right shoulder injury. As such, Union County respectfully requests that this Court issue an Order reversing the Commission's decision that Walton sustained a compensable injury to her right shoulder by accident arising out of and in the course of her employment on March 30, 2010.

C. The single mention of right shoulder "discomfort" in Walton's physical therapy records is not sufficient to support a finding that Walton sustained a compensable injury to her right shoulder as a result of her March 30, 2010 accident.

The Commission erred in relying on Walton's June 8, 2010 physical therapy record to support his finding that Walton sustained a compensable injury to her right shoulder and that her current right shoulder complaints are causally related to the March 30, 2012 work accident. As noted above, following her motor vehicle accident, Walton received treatment for her right wrist injury from Dr. Falcon, whose treatment included numerous physical therapy sessions. (See R.p. 135). In fact, from May 4, 2010 through September 14, 2010, Walton attended twenty-six (26) physical therapy sessions for her right hand and wrist. (See R.pp. 152-80). While Walton testified that she told her physical therapist more than once about her alleged right shoulder problems, there is only one mention of any shoulder complaint in the therapist's records. (See R.p. 54, lines 19-22). On June 8, 2010, Walton's therapist noted: "Patient reports shoulder discomfort that eases off with use of wall pullies."² (R.p. 162). The therapist's record, dated June 8, 2010, *over two months after her motor vehicle accident*, indicates that Walton was only

² The physical therapist did not indicate whether Walton was complaining of left shoulder or right shoulder discomfort. (See R.p. 162).

having some shoulder “discomfort” and that this “discomfort” resolved following some wall pulley exercises.

Between the time of her accident on March 30, 2010 up to her June 8, 2010 physical therapy session, Walton had been examined by physicians in Palmetto Health Baptist Medical Center’s Emergency Department, examined by Dr. Thomas at Regional Occupational Health, examined by Dr. Falcon on four (4) separate occasions, and attended nine (9) physical therapy sessions. Despite her numerous amount of prior treatment, the therapist’s June 8, 2010 note is the first mention of any right shoulder problems. Walton’s first documented complaint of shoulder “discomfort” occurred over two months after her accident; therefore, it is speculative to assume that Walton’s minor shoulder “discomfort” on June 8, 2010 was causally related to her March 30, 2010 accident.

Additionally, following her June 8, 2010 physical therapy appointment, Walton was examined by Dr. Falcon four (4) more times, and she attended sixteen (16) more physical therapy sessions; however, neither Dr. Falcon nor the therapist document any complaints of right shoulder problems in the subsequent records.³ As noted above, the therapist’s June 8, 2010 record indicates that any shoulder “discomfort” Walton was experiencing that day resolved with pulley exercises. Thus, since it appears her shoulder “discomfort” resolved and since there is no further mention of shoulder problems in any of the authorized providers’ medical records, substantial evidence clearly establishes that

³ Walton’s last physical therapy session was on September 14, 2010, and her last appointment with Dr. Falcon was on September 23, 2010. (R.pp. 180, 149). The next mention of any shoulder complaints in the medical records is when Walton was referred by her attorneys to Dr. Keith for an IME on December 14, 2010, over six months after the June 8, 2010 therapy session and nearly three months after Walton was released at MMI by Dr. Falcon. (See R.pp. 182-84).

Walton's current right shoulder problems are not causally related to her March 30, 2010 work accident.

CONCLUSION

Based on the foregoing, the only reasonable inference to be drawn from the substantial evidence in the record is that Walton did not sustain a compensable injury to her right shoulder as the result of her March 30, 2010 motor vehicle accident. As such, Appellants Union County Carnegie Library and South Carolina Association of Counties Self-Insurance Fund, respectfully request that this Court issue an Order reversing the Commission's decision that Walton sustained a compensable injury to her right shoulder by accident arising out of and in the course of her employment on March 30, 2010.

Respectfully submitted,

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November 1, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1004411

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SC Court of Appeals

Cynthia Walton, Employee, Claimant,

Respondent,

v.

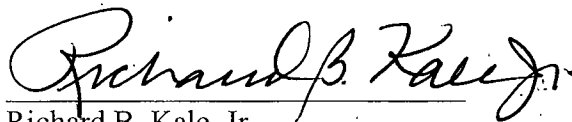
Union County Carnegie Library, Employer,
SC Association of Counties, SIF, Carrier,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs comply with Rule 211(b), SCACR.

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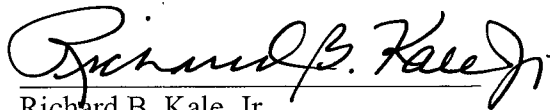
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The undersigned certifies that the Final Brief of Appellants and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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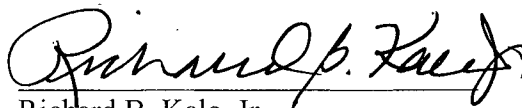
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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants and Final Reply Brief of Appellants on Cynthia Walton by depositing a copy of it in the United State Mail, postage prepaid, on November 1, 2012, addressed to her attorney of record, Jeremy A. Dantin, Esquire, Harrison, White, Smith & Coggins, P.C., P.O. Box 3547, Spartanburg, SC 29304.

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