

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Appellate Case No. 2017-000684

Stephen Livingston, Employee

Appellant,

v.

The Building Center, Employer
And Old republic Insruacne Co.

Respondents

INITIAL BRIEF OF APPELLANT

Holly Saleeby Atkins. LLC
720 Calhoun Street
P.O. Box 1478
Columbia, South Carolina 29202
(803) 251-6406

COUNSEL FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Commission err as a matter of law and fact in finding that the greater weight of the evidence did not support a conclusion that Claimant's diagnosed impingement syndrome was caused by his repetitive work activities where there is no substantial evidence to support this conclusion and where this conclusion and the unjustified denial of the claim are based on a misreading of the record, surmise, and speculation?

- II. Did the Commission err in finding that the condition of the lipoma on Claimant's right shoulder was not, in fact, aggravated by his work duties where there is no substantial evidence to support such a finding and where this finding is unsupported by any substantial evidence?

STATEMENT OF THE CASE

Stephen Livingston, Claimant, filed a Form 50 Request for a Hearing on April 22, 2016, alleging that he had sustained a repetitive trauma injury to his right shoulder on February 12, 2016. Defendants filed a Form 51 denying the claim on April 27, 2016. A hearing was held before Commissioner T. Scott Beck on July 21, 2016. Commissioner Beck noted, “the primary issues for determination in this matter are the compensability of a repetitive trauma injury to the claimant’s right shoulder, the aggravation of a lipoma on Claimant’s right shoulder, and resulting medical care, if found compensable.”

On September 21, 2016, Commissioner Beck issued his Order denying the claim. On December 12, 2016, an Appellate Panel Review was held in Columbia South Carolina. The Appellate Panel Decision and Order was filed on February 22, 2017. This appeal follows.

STATEMENT OF FACTS

Claimant is a 51 year old high school graduate. He works an “all day job” at The Building Center starting at six o’clock in the morning and ending close to five o’clock in the afternoon. During the work day, Claimant loads and unloads trim, windows, and doors for home construction by the box truck-load. The trim is made of wood and the bundles of trim are each twelve to fourteen feet long. Claimant testified that the box truck is often loaded when he starts, but that, if the truck is not already loaded, it is his responsibility to load and then unload the truck. Claimant testified that, when he loads the truck, the “trim and stuff” is standing on the wall and “You just take your trim, you have to use your shoulder to put it on a cart.” (Depo. p. 16, lines 22-25). Claimant testified that the process of loading the building materials on a cart and loading the cart on the box truck normally takes an hour. (Depo. p. 17, lines 11-14).

Claimant testified that he unloads the box truck by lifting bundles of trim, doors and windows, onto his right shoulder and carrying the load into the home under construction. Claimant testified that it takes approximately a half an hour for him and another worker to unload the building materials for each house. He testified that he sometimes has three houses' materials to deliver and unload from his box truck. Claimant described his work, "And everything we have like trim that go inside the building on the houses, we unload them, have to put them on our shoulders and carry them on the inside of the house. And windows and doors we have to tote from the box truck into the house." Claimant testified that he lifts the trim and other building materials over his head and rests them on his right shoulder to carry. (Tr. p. 9). Claimant testified that it takes approximately a half an hour to unload the materials for a single house, but that he often has two or three houses' materials on the truck. In addition, Claimant often picks up materials from the job site to return to The Building Center.

Claimant testified that he also drives the box truck, usually to houses in Columbia, but two or three times a week, he delivers materials to sites in North Carolina or to the coast after a three hour drive. (Depo. p. 14, lines 22-25). However, most days he delivers locally in Columbia and on those days he loads and unloads more than he drives. He testified that when he loads and unloads windows and doors, the window or door rests on his shoulder as he carries it inside. Claimant testified that when he loads and unloads bundles of trim, the trim is lifted to rest on his shoulder as he carries it to the cart or to the truck. (Depo. p. 31, lines 12-16). He testified that each individual piece, whether a bundle of 14 foot trim or a window or door, takes some five minutes to load and unload. (Depo. p. 39).

On February 12, 2015, Claimant's right shoulder pain was worse and he noticed that he had a knot on his right shoulder. At that point, after he had finished unloading the box truck,

Claimant reported the injury to his supervisor and he filled out a workman comp slip on the job. (Depo. p. 32). Claimant's supervisor told him to go to the doctor; he was seen at the emergency room and by his family doctor. On March 6 2015, Claimant was seen at the ER with a report of his complaint of pain in the right shoulder. The ER examination resulted in a notation that Claimant had pain and limited range of motion in his right shoulder which was found to be suggestive of rotator cuff involvement or injury. (APA pp. 13-15). Claimant was released from the ER with instructions regarding his "rotator Cuff Injury." (APA p. 16). In *February* of 2015, Claimant had noticed pain in his right shoulder for a day or two "from toting the trim." (Depo. p. 26). On *February 29*, 2015, Claimant was seen by his family doctor with a notation that he had had right shoulder pain and a large lipoma on his right shoulder. However, Claimant testified that no further medical care was provided and that he was left waiting for workers' compensation to provide medical care.

On February 29, 2015, Claimant's supervisor sent an email indicating, "He asked about workman's comp. I had him fill out an accident report so we would have it. Under description of accident, he put shoulder injury. He also said he isn't sure when or what caused it to swell up. He is thinking it is coming from carrying trim on his shoulder." (APA Exhibit).

Claimant's attorney sent him to the shoulder doctor at Southeastern Orthopedic and Sports, Dr. David Lee for an independent medical evaluation. Claimant believed that his right shoulder pain was caused by his work; he told Dr. Lee, "...that I lift stuff on my shoulder. I have windows and doors and trim I lift on my shoulder and it couldn't come from no more than that type of work." (Tr. p. 15). On January 28, 2016, Claimant was seen by orthopedic surgeon Dr. David Lee at the West Columbia office of the Southeastern Orthopedic and Sports Medicine for an IME. Dr. Lee is a board certified orthopedic surgeon; he indicated, "I do shoulders and

knees.” (Lee Depo. p. 5). Dr. Lee has been in practice since 2002 and he diagnoses and treats workers’ compensation patients for both claimants and for the defense.

Dr. Lee did a typical shoulder physical examination. He explained that this examination includes a range of motion test “where I have the patient do some active stuff, where they do active range of motion that there looks like there’s any restrictions from an active standpoint. I will do a little passive on top of that just to make sure that they don’t have like a frozen shoulder. Because sometimes people when they have pain they won’t necessarily actively move their shoulder to where we think it should go or what we would consider normal range of motion. So, I just want to make sure that they have full normal range of motion either passive or active. And then I’ll go through the range of motion. Then I’ll do some provocative testing, whether it’s a manual muscle test to look for rotator cuff issues or when we try to elicit impingement...And also do like an O’Brien’s Test just to make sure - - you know rule out labor pathology, scapular winging, you know, instability or stability patterns and those would be more the provocative and that would pretty much suffice there or complete the exam.”

Dr. Lee testified that he performed this examination and testing on Claimant. He indicated that Claimant was some ten degrees shy of full elevation and that his testing revealed positive impingement signs. (Lee Depo. pp. 7-8). Dr. Lee explained his diagnosis: “But clearly given his work duties or obligations my concern was that there may be something rotator cuff related.” (Lee Depo. p. 9). Dr. Lee testified that when he found signs of an impingement, that finding caused him to believe there was a rotator cuff injury to some degree. He explained that Claimant’s shoulder injury to the rotator cuff could be just inflammation, tendinitis, or a partial thickness tear, but that those things “are hard to determine purely by physical examination.” Dr. Lee explained that the MRI was necessary to “get a better idea of what’s actually happened to

that rotator cuff. If it's purely a little inflammation, overuse, tendonitis or something more, like a rotator cuff tear." Dr. Lee indicated that sometimes the study isn't necessarily to confirm a diagnosis but to inform the treatment plan. (Lee Depo. p. 10). However, the recommended MRI was denied by Defendant.

Dr. Lee noted that Claimant reported carrying large objects over his right shoulder: "He specifically recalls carrying trim work which were about 12-14 feet long over the right shoulder when he began to have burning pain." (APA p.). Dr. Lee testified that Claimant told him that he carries heavy objects at work, indicating, "I believe about 12 to 14 feet long and I'm pretty sure it was wood, but something long, heavy which he basically carries directly over the top of his shoulder. Dr. Lee indicated, "Given his repetitive lifting, my concern was that there may be a rotator cuff."

Dr. Lee was asked if the fact that Claimant's job requires him to lift and tote on his shoulder but that he also has to drive intermittently, "even though there are these intermittent times in between where he's driving to the job site, it could be one hour to two or three hours, does that still meet the requirements that you see of a repetitive trauma?" Dr. Lee indicated that the description of Claimant's work activities met the requirements for a repetitive trauma injury. (Lee Depo. pp. 12-13). Dr. Lee noted that it was his opinion to a reasonable degree of medical certainty that the effects of repetitive carrying lumber on his shoulder numerous times a day was the likely cause of his rotator cuff injury.

Dr. Lee noted that x-rays of the Claimant's right shoulder demonstrate a type III acromion. Dr. Lee's examination of the right shoulder showed tenderness and decreased range of motion. Dr. Lee reported the results of his testing: "there is positive impingement signs in both the Neer and Hawkins positions." Dr. Lee noted right shoulder pain and diagnosed

Claimant as suffering from right shoulder impingement syndrome. Dr. Lee indicated, "He also has evidence of impingement. I would recommend an MRI of his right shoulder which would allow evaluation of the soft tissue mass as well as the rotator cuff. (APA p. 21).

It is Dr. Lee's stated expert medical opinion that Claimant's right shoulder injury was most likely caused by his repetitive work duties. Dr. Lee indicated that Claimant needed an MRI to determine the extent and degree of the injury to his right shoulder, which was caused by his repetitive work. (APA p. 19).

ARGUMENT

I. The Commission erred as a matter of law and fact in finding that the greater weight of the evidence did not support a conclusion that his diagnosed impingement syndrome was caused by his repetitive work activities where there is no substantial evidence to support this conclusion and where this conclusion and the unjustified denial of the claim are based on a misreading of the record, surmise, and speculation.

Workers' compensation laws were intended by the legislature to relieve workers of uncertainties of trial for damages by providing sure, swift recovery for workplace injuries regardless of fault; to give effect to this legislative intent, workers' compensation statutes are construed liberally in favor of coverage. *Peay v. U.S. Silica Co.*, 313 S.C. 91, 437 S.E.2d 64 (1993). On appeal from an appellate panel of the Workers' Compensation Commission, this court can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

Substantial evidence is not a mere scintilla of evidence, **nor the evidence viewed blindly from one side of the case**, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Miller v. State Roofing Co.*, 312 S.C. 452, 441 S.E.2d 323 (1994); *Muir v.*

C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999)(emphasis added.) “It is settled by the decisions of the Supreme Court of this State that a Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation; that there is no presumption in favor of compensability and that awards of the Industrial Commission may not rest upon surmise, conjecture or speculation, but must be founded upon substantial evidence, and that if the evidence is all one way, or if the findings of the Commission are based on surmise, speculation or conjecture, that the issue becomes one of law for the Courts and not of fact for the Commission (*see Rudd v. Fairforest Finishing Co.*, *supra*; *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841; *Sligh v. Pacific Mills*, 207 S.C. 316, 35 S.E.2d 713; *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872, and numerous other cases cited in West Publishing Company Digest, Workmen's Compensation, k1409).” *Hines v. Pac. Mills*, 214 S.C. 125, 131, 51 S.E.2d 383, 385 (1949).

In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, when there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). “[W]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed.” *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010); *Turner v. SAIIA Constr.*, 419 S.C. 98, 104–05, 796 S.E.2d 150, 154 (Ct. App. 2016), *reh'g denied* (Feb. 21, 2017).

S.C. Code Ann. § 42-1-172 (A) provides, “Repetitive trauma injury” means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events.”

Repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or “mini-accidents.” *Schurlknight v. City of North Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002). It is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury. *Id.*; *Bass v. Isochem*, 365 S.C. 454, 474–75, 617 S.E.2d 369, 380 (Ct. App. 2005).

The Full Commission Order accepted Defendants’ position that Claimant’s job duties were not repetitive and their argument that the greater weight of the evidence did not support a conclusion that Claimant’s impingement syndrome was caused by his work activities. However, as shown, while there is substantial evidence, including lay and expert medical opinion, to support the fact that Claimant sustained an injury as the result of repetitive movements at work, in contrast there is actually no substantial evidence to support the Commission’s contrary conclusion. Therefore, the Commission decision is unsupported by the substantial evidence, affected by legal error, and clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.

The Commission Order identifies several reasons for the Commission’s rejection of Dr. Lee’s opinion and testimony. The Commission first indicates that the Commission found that “Dr. Lee’s understanding of Claimant’s job duties is in opposition with Claimant’s testimony.” The Commission apparently found it significant and inconsistent that Dr. Lee noted that Claimant carried lumber on his right shoulder and that was pretty much “what he does most of the day.” The Commission found that Dr. Lee’s understanding of Claimant’s job duties was contradicted by the testimony because Dr. Lee did not consider that Claimant also does some driving from delivery to delivery and that a couple of times a week he makes deliveries out of town and out of state which require more driving. However, in fact, Dr. Lee’s description of

Claimant's loading and unloading of trim, doors, and windows is precisely right and matches the undisputed description of Claimant's work duties. Dr. Lee testified that the fact that Claimant has driving breaks between his regular periods of repetitive lifting and carrying would not alter his conclusion that Claimant had sustained a repetitive trauma injury.

The only other seeming inconsistency identified by the Commission is the fact that Dr. Lee referred to the wooden building materials Claimant loads and unloads as "lumber" when, in fact, Claimant lifts and carries trim, windows, and doors on his right shoulder and he only rarely carries two-by fours and unfinished lumber. Neither of these two identified differences is "in opposition to Claimant's testimony" and neither actually goes to the heart of Dr. Lee's medical opinion or suggests that his diagnosis is in any way inconsistent with the evidence.

The Full Commission further ruled that "Dr. Lee has not pinpointed an exact condition the Claimant has. He predicts it may be impingement, but this is backed by little evidence." To the contrary, Dr. Lee has stated definitely and to a reasonable degree of medical certainty that Claimant has clinically observable impingement syndrome. This conclusion was also reached and reported by Claimant's family doctor and the Providence ER. In fact, all the medical evidence with the exception of the questionable report of Dr. Evans fully supports the fact that Claimant's right shoulder injury is causally related to his repetitive work duties.

Dr. Lee's expert medical opinion is that Claimant's clinically observed impingement syndrome is diagnostic of a rotator cuff injury, but that the degree of that injury must be determined by MRI. Dr. Lee recommended that an MRI be conducted of the right shoulder in order to precisely diagnose and treat Claimant's shoulder injury. However, the medical testing recommended to complete the diagnosis of Claimant's right shoulder was denied. Without the recommended objective MRI testing, we know that Claimant has sustained an injury to his right

shoulder as evidenced by his objectively determined impingement syndrome - - we just don't know how bad the injury is.

Thus, the Commission's ruling unjustly places the injured worker in an unfair and untenable situation inconsistent with the purposes of the Act. Claimant can only comply with the Commission's requirement of a pinpointed diagnosis of his exact injury with an MRI; however, the recommended testing was denied by the Defendants and Claimant naturally cannot afford to obtain an MRI on his own. To be clear, the Commission found that Claimant's impingement injury is not compensable because not precisely and definitively diagnosed - - while simultaneously refusing to authorize the medical testing Dr. Lee had opined was necessary to finalize a definitive diagnosis and which was not provided by Defendant.

The Full Commission Order indicates, "Claimant is essentially asking the Defendant to provide an MRI to determine what, if any, injury exists." To the contrary, there should be no reasonable question that Claimant has observed and diagnosed impingement syndrome and that his injury to the rotator cuff undoubtedly exists as indicated by the family doctor, Providence ER, and Dr. Lee. The only question is whether the clinically observed impingement syndrome is due to rotator cuff inflammation, fraying, a rotator cuff tear, or tendinitis. Claimant is actually asking the Commission to order Defendant to provide necessary medical care and diagnosis so that his disabling condition may be properly diagnosed and treated with the goal of lessening his period of disability. *See* S.C. Code Ann. § 42-15-60(A) (2015) ("The employer shall provide medical, surgical, hospital, and other treatment ... for an additional time as in the judgment of the [Appellate Panel] will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty;" *Hall*, 371 S.C. at 82, 636 S.E.2d at 883 ("The medical benefits provision of the Workers' Compensation Act allows the Appellate

Panel to award medical benefits beyond ten weeks from the date of injury only where it determines such medical treatment would tend to lessen the period of disability.”); *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583–84, 514 S.E.2d 593, 598 (Ct. App. 1999) (noting the testimony by the claimant and the physicians that the claimant needed permanent treatment to function but remanding to the Appellate Panel for a determination of whether additional payments tended to lessen his period of disability); *Dykes v. Daniel Constr. Co.*, 262 S.C. 98, 109–10, 202 S.E.2d 646, 652 (1974) (finding further medical treatment would “tend to lessen the period of disability” when the doctor testified the claimant’s eye condition required permanent care of an ophthalmologist and “continued use of medication to relieve pain and pressure in the eye”). Notably, Dr. Lee testified that Claimant’s impingement syndrome resulted from his repetitive work activities and that those same activities would also have caused and contributed to his injury even if the condition causing his impingement turns out on MRI to be merely tendinitis.

There is no doubt that the Claimant has sustained a compensable repetitive trauma injury to his right shoulder and he was entitled to benefits for this injury regardless of the degree of the damage to his rotator cuff. The MRI was not ordered for the purpose of determining whether or not Claimant had sustained an injury; his injury has been clinically diagnosed. The MRI was recommended to determine the precise nature and degree of the damage to Claimant’s shoulder in order to inform treatment for his compensable injury.

Apparently unable to locate an orthopedic surgeon in Columbia, Defendant sent Claimant to Greenville to have an IME done by Dr. John Evans. When asked if Claimant had impingement syndrome of the right shoulder and, if so, if it was caused by carrying lumber, Dr. Evans opined,

In my opinion and to a reasonable degree of medical certainty, the claimant has nonspecific right shoulder pain that could be impingement. He was so reluctant to move the shoulder that **impingement signs could not be tested**. The pain is not caused by carrying lumber on the shoulder. His subjective complaints are not supported by objective findings.

(Defense APA, p. emphasis added). Plainly, Dr. Evans skips right from the fact that **he** did not perform the tests to clinically identify impingement syndrome to his unsupported conclusion that Claimant's painful injury was not caused by his repetitive work duties. Dr. Evans' opinion as stated is baseless where he himself did not perform the objective testing for impingement and then leapt over the void where his objective test results should have been to land on the conclusion that Claimant's complaints of pain were not supported by objective findings.

Dr. Evans' further explanations for his negative opinion are equally baseless and wholly unrelated to the medical or legal requirements for establishing a repetitive trauma injury under the Act. Dr. Evans further explained that he had concluded that the right shoulder injury was not causally related to Claimant's lifting and carrying on his right shoulder at work "because the history of the injury was unclear, because there was no documentation of his prior status, and that Claimant's objective baseline ultrasound status had not been established so that "a specific change at the time of the alleged 'injury' could not be documented." To the contrary, the history of the injury is crystal clear - - Claimant started performing repetitive lifting and carrying over his shoulder at work and, after some three years of this work, he started having pain and limitation in his right shoulder. Of course Claimant had had no prior ultrasound so no prior "baseline" is possible. Such a prior history and "baseline" is also not required to establish a repetitive injury under the Act. There is simply no legal or medical requirement that a repetitive trauma injury be established by showing that there was a "specific change at the time of the alleged injury." This is not a change of condition case - - it is a claim for a repetitive trauma

injury which came on gradually. It would appear that Dr. Evans is either unfamiliar with or he is greatly expanding the requirements for a compensable repetitive trauma injury under the Act.

Dr. Evans finally indicated that “the dating of the claimant’s symptoms to the carrying lumber is subjective and not supported by objective findings that could relate his symptoms to his work.” (APA, Page 16 Lines 8-25 to page 17 lines 1- 18). Far from constituting substantial expert medical opinion, this particularly incomprehensible statement from Dr. Evan’s is meaningless drivel, unrelated to the medical or legal requirements to establish a repetitive trauma injury. Again, a repetitive trauma injury is one of gradual onset by definition and there is no requirement that the “dating of his symptoms” be objectively established. There is simply no requirement under the Act that an injured worker establish his prior condition or a precise date when the repetitive work began to cause him injury.

The various reasons given by Dr. Evans for his conclusion that Claimant’s injury is not related to his repetitive work are completely baseless and unrelated to the legal requirements. Thus, the Commission finding that Dr. Evans opinion was entitled to dispositive weight is unsupported by the substantial evidence and impermissibly reliant on speculation, conjecture, and surmise. Dr. Lee is one of the physicians most often used by workers’ compensation insurance carriers to treat injured workers. His opinions are highly respected by the Commission. In contrast, Dr. Evans does not practice medicine; he only performs IME exams for the defense out of his home. Nevertheless, the Commission actually found that *Dr. Lee’s* opinion was speculative and that *Dr. Evans’* opinion was entitled to greater weight.

Dr. Lee was asked about Dr. Evans’ examination and stated opinion: “[Dr. Evans] indicates that he couldn’t determine if there was an impingement because Mr. Livingston didn’t want to move his arm very much. Is there any way to determine or to test for impingement when

somebody is hesitant to move their arm?" Dr. Lee answered, "Well an impingement is exactly an elicited test, meaning that it's a provocative test that you do. For example the Neer and Hawkins, Neer being straight up elevation and then Hawkins where you bring it at 90 degrees of abduction and gradually as you adduct the arm you internally rotate to basically kind of almost jam the greater tuberosity up into the undersurface of the acromion so if you have inflammation or - - and that would be subacromial impingement. So those are all passive tests. So those would be tests that the physician would be doing, not what the patient is doing. So the inability to elicit even an opinion of that test would sort of mean that the test wasn't done because it's something that I can do to anybody. They may not like it, but that's kind of the whole purpose is to find out what provocative things that a position can do that may elicit discomfort and that sort of leads you down a pathway of a differential diagnosis."

Dr. Lee was asked if Claimant was reluctant to move his shoulder during his examination. He answered, "Reluctant? I mean, he, again, had discomfort like you would expect but, again, part of our job as a clinician is to, sort of, get an idea of what we think may be happening to the patient. So, you know, somebody has a femur fracture you're still going to palpate. It may hurt them, but you need to sort of get an idea of what may be going on. It doesn't - - somebody's level of discomfort doesn't necessarily impede me from doing my physical exam. I just have to recognize and make note of it because that helps me down a different pathway." (Lee Depo. p. 17).

Dr. Lee testified that he would be able to perform the Neer or the Hawkins tests for impingement even if a patient was actively resisting. The doctor explained, "Oh, yeah. Because in order to help differentiate...I think good clinicians are able to differentiate somebody actively resisting them or you just get to the point you just can't move it anymore, whether it's the

shoulder or knee. You know, a joint. And so even if you were actively resisting me, I'd just encourage you to relax and just say, you know, just let me know if I'm hurting you. And you can tell me if I'm hurting you but I got to do my exam otherwise I can't help you. (Lee Depo. Page. 36, line 17-p. 38 line 25). Dr. Lee gingerly gave his estimation of Dr. Evans' opinion in light of Dr. Evans' failure to conduct testing for impingement, "...some of the opinions that he came up with regarding things based off of an exam I think made the opinions a little - - I don't want to say, accurate, but maybe questionable." (Lee Depo. Page 38 lines 11-14).

Dr. Lee explained that his own diagnosis was based on two things, "the repetitive lifting would be more concerning for more the actual rotator cuff issues and then the direct pressure would be the aggravating - - aggravation of the lipoma that was there." (Lee Depo. p. 19). He emphasized that the impingement "is a clinical diagnosis and that was something that was elicited by the different exams, and so he has that." (Lee Depo. p. 24).

In contrast to the strangely skeptical, hypercritical, reception given to Dr. Lee's expert medical opinion, the Commission accepted Dr. Evans' speculative conclusions and non-opinions without question or doubt. Dr. Evans' medical opinion is that Claimant's right shoulder injury was not related to Claimant's repetitive carrying of building materials on his right shoulder. The basis for Dr. Evans' opinion, other than the fact that he was hired to opine that the injury was non-compensable, is difficult to identify from his report. Dr. Evan's opinion is actually lacking in medical expertise where Dr. Evans himself indicated that he was not able to test Claimant's right shoulder for impingement. The doctor was unable to perform the necessary testing, so he just didn't do the tests and nevertheless reported that even if there *was* impingement, it was not related to his lifting and carrying at work.

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2015). An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the Court may reverse or modify a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5). While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Hum. Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)).

“Substantial evidence’ is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)); *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, No. 2015-001350, 2017 WL 920730 (S.C. Mar. 8, 2017); *Also see, Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct.App.2005) (rejecting the argument that claimant suffered a single injury on the date she began to experience problems with her arms and holding the only evidence in the record was that claimant suffered a sustained repetitive trauma injury over a period of time which later culminated in disability). Workers' compensation law is to be liberally construed in favor of

coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed. *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010); *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 384–85, 769 S.E.2d 1, 2–3 (2015), *reh'g denied* (Mar. 4, 2015).

“The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation.” *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed. *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

Here, where all substantial evidence showed that Claimant's injury was caused by his repetitive work duties, the Commission's decision to deny that Claimant had sustained a compensable accidental injury by repetitive trauma is unsupported by substantial evidence and must be reversed.

II. The Commission erred in finding that the condition of the lipoma on Claimant's right shoulder was not, in fact, aggravated by his work duties where there is no substantial evidence to support such a finding and where the notion that the pain caused by the lipoma is not aggravated by Claimant's work duties is unsupported by any substantial evidence.

In addition to the painful impingement and injury in his right shoulder, Claimant had also previously developed a large lipoma on this right shoulder. He testified that the large knot or bump is painful when he has to rest the building materials on his right shoulder. Claimant testified that, when he is lifting and carrying building materials, those materials are resting on his right shoulder; he testified that the pressure of the materials increases the pain from the lipoma.

Dr. Lee noted the soft mass on Claimant's right shoulder. Dr. Lee explained that a lipoma is a benign fatty tumor and that the existence of the lipoma on Claimant's shoulder was unrelated to his job duties. However, the doctor further indicated that in his expert medical opinion, the pressure of the building materials as they rested on Claimant's pre-existing right shoulder/lipoma, was aggravating and making more painful Claimant's lipoma condition. Dr. Lee indicated that lipomas are usually idiopathic, but that "having something heavy laying on it for however many hours a day is going to create additional pain."

Dr. Lee opined that Claimant's work duties and his persistently resting heavy building materials directly on the lipoma would aggravate the lipoma and cause worsened pain. (Lee Depo, p. 22). However, the Commission found that there was insufficient evidence to support Dr. Lee's conclusion that the lipoma was either caused or aggravated by the Claimant's employment. Of course, Dr. Lee had clearly opined that the repetitive lifting did not cause the lipoma, but reasonably maintained that putting pressure on the lipoma aggravated and increased the pain from the lipoma.

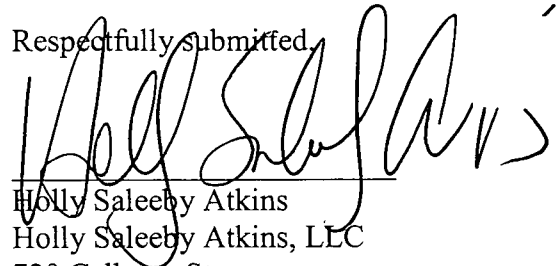
The Commission's conclusion that Claimant had presented insufficient evidence to show that the lipoma was caused or aggravated by his work duties is unsupported by the substantial evidence. Again, Claimant testified and his doctor agreed that the very large mass on Claimant's right shoulder was not caused by his work duties, but maintained that the pain from the lipoma was increased and aggravated by his work. There is no contrary evidence in the record. Thus, the Commission erred as a matter of law and fact in denying that Claimant had sustained a compensable aggravation to the lipoma on his right shoulder where that finding is contradicted by the substantial evidence in the record

CONCLUSION

For all the forgoing reasons, the decision of the Appellate Panel should be reversed and the case remanded for the provision of appropriate medical care and benefits under the Act.

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Respectfully submitted,



Holly Saleeby Atkins
Holly Saleeby Atkins, LLC
720 Calhoun St
PO Box 1478
Columbia, SC 29202
(803) 251-6406
Counsel for Appellant