THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James; T. Scott Beck; and Aisha Taylor

---

RECEIVED
JUL 13 2017
SC Court of Appeals

W.C.C. File No. 0908371
Appellate Case No. 2016-001643

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer
and Palmetto Timber S.I. Fund
c/o Walker, Hunter & Associates, Inc. Carrier ..... Appellants.

FINAL BRIEF OF RESPONDENT

W. E. Jenkinson, III, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
Post Office Drawer 669
Kingstree, SC 29556
(843) 355-2000
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE FACTS

Mr. Hannah's claim stems from his employment as a long-haul 18-wheeler tractor-trailer driver. (R. p. 303, lines 2-3) He was seriously injured in a July 14, 2009 truck rollover wreck while on the job. Employer had immediate notice of his injuries and his claim inasmuch as its agent was *on the scene* and helped to extract Mr. Hannah from the truck. (R .p. 212, lines 18-23) (R. p. 198, line 22- p. 199, line 6) Employer has consistently admitted that Mr. Hannah's neck and left elbow were injured in this wreck. (R. p. 194, lines 4-6) (R. p. 212, lines 24-25) (R. p. 167 ¶ 1) (R. p. 169 ¶ 1) (R. p. 349 ¶ 1) (R. p. 294, lines 5-6)

Mr. Hannah's medical records and other supporting documents were accepted into evidence at the 7/30/2010 hearing and again at the 9/25/2014 hearing without objection from Employer. (R. p. 192, line 15- p. 193, line 1) (R. p. 219, line 16) At the time of the rollover, Mr. Hannah was taken by ambulance to the emergency room. (R. p. 196, line 24-p. 197, line 5) The emergency room/EMT records note that Mr. Hannah described his neck pain as "sharp", at an intensity of 9 out of 10 and his "pain behavior" was observed to be "*screaming*". (R. p. 351) These records also include a diagnostic imaging report of two views of the C-spine, noting no fractures but recommending a "complete cervical spine series". (R. p. 352)

After release from the hospital, he sought medical care for his neck injury from the medical providers that Employer *initially* authorized - "Doctors Care" (R. p. 199, lines 7-22) (R. p. 240, lines 1-9) followed by Dr. Mark Triana, 5 times from September 2009 through April 2010 (R. pp. 181-184, 187-188, 189) (R. p. 204, lines 16-23) (R. p. 241, lines 9-14; p. 245)

Significantly, Dr. Triana was authorized by Employer on July 21, 2009, and accepted by Employer as an expert in the field of orthopedic surgery at his deposition. (R. p. 308, lines 12-15; R. p. 359, lines 8-9) Dr. Triana ordered an MRI as a result of Mr. Hannah's complaints of chronic

neck and back pain "*to be precise in what was going on*", but Employer refused to pay for it and Mr. Hannah arranged to obtain one on his own. (R. p. 182) (R. p. 201, line 25- R. p. 206, line 8)

Dr. Triana treated several of Mr. Hannah's serious injuries (neck, back, elbow) and prepared to perform surgery on the left elbow. While awaiting elbow surgery, Employer sent Mr. Hannah to a doctor much farther away (for unexplained reasons) (R. p. 321, line 9- R. p. 323, line 2); and this doctor, Dr. Bethea performed surgery on the elbow on 12/22/2009. (R. p. 203, line 24- R. p. 205, line 18) At his 2/10/2010 post-surgery follow-up visit, Dr. Bethea released Mr. Hannah back to work, with a 0% impairment rating to the elbow *and neck.* (R. p. 317, line 16- R. p. 318, line 18) At the same time, he imposed activity restrictions (lifting no more than 5lbs, no bending, climbing or stooping) and prescribed 60 narcotic pain pills. (R. p. 327, line 25- R. p. 328, line 14) (R. p. 207, lines 6-22; R. p. 354, lines 6-12) Dr. Bethea was only authorized to treat the elbow; he never *treated* the neck and never even saw the 2009 MRI that Mr. Hannah obtained on his own. (R. p. 319, line 17- R. p. 320, line 10; R. p. 324, lines 10-15; R. p. 325, line 20- R. p. 326, line 6)) (R. p. 246-253) (R. p. 181-184; 187-188; 189) (R. p. 317, line 16- R. p. 318, line 18)

It is undisputed that Mr. Hannah has *never* been able to return to work and was approved in early 2011 for Social Security disability based on his low back and elbow injuries, under a separate process. (R. p. 275, lines 11-14)

Mr. Hannah continued to treat his chronic neck/back pain with Dr. Triana after Dr. Bethea operated on his elbow, but Employer refused to pay for this care, due to Dr. Bethea's release and 0% rating. (R. p. 255, lines 21-24; R. p. 256, lines 3-4) Mr. Hannah obtained payment for some of Dr. Triana's visits through his health insurance but could not afford to seek more care from Dr. Triana after his 4/28/2010 visit. (R. p. 305, lines 2-4)

While Employer admitted the neck/elbow injuries, Employer consistently denied Mr.

Hannah's low back injury and his claim for benefits related to that injury was tried successfully to Commissioner Roche on 7/30/2010. (R. pp. 52-63) This was followed by reversal in Employer's favor after a Full Commission hearing on 3/22/2011. (R. pp. 64-75) Finally, the Commission's denial of benefits for the low back was affirmed by this Court, *without* any remand for explicit findings as to the neck injury. *Hannah v. MJV/Butler Trucking, Inc.*, 2012-UP-535, 2012 WL 10862800 (Ct. App. Sept. 26, 2012).

Mr. Hannah received temporary disability benefits during the first series of hearings. But, after the Commission reversed as to his low back benefits on 7/25/2011, Mr. Hannah signed a form 17 on 8/31/2011.[1] Mr. Hannah testified *at length* repeatedly explaining that he signed this form for the sole and explicit purpose of stopping the checks for which he thought he could be liable, in light of the Commission's decision on the low back claim. (R. p. 258, line 15- R. p. 260, line 8; R. p. 271, lines 2-6) This unrefuted testimony is consistent with his affidavit. (R. pp. 163-166)

The standard Form 17 that Mr. Hannah signed states, in very small font, that the claimant "agrees" that he was able to return to work on the date typed in. The date appearing there is that of Dr. Bethea's release, 2/10/2010 (after which it is undisputed that Mr. Hannah continued to treat his neck pain with Dr. Triana, who did not release him back to work and recommended spinal surgery on his neck on 4/28/2010). (R. p. 189)

Form 17 also states, directly above Mr. Hannah's signature line, in larger, darker, bold font in all capital letters:

---

[1] Employer's Brief mistakenly dates the form as 8/19/2011. (Initial Brief of Appellants, p. 3) The correct date is significant because the Commission measured Mr. Hannah's life expectancy beginning on that date. (7/6/2016 Amended Decision and Order p. 12, COL 10)

I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT OR MEDICAL CARE

(R. p. 100) (emphasis in original).

After signing this form, in the fall of 2011, Mr. Hannah's neck pain worsened. (R. p. 262, line 24- R. p. 263, line 11) By this time, he was not employed by Employer (or anyone else). (R. p. 238, lines 9-11; 14-15) His former Employer had *twice* refused to pay for treatment recommended by his doctors (the MRI in 2009 and Dr. Triana's treatment in 2010). (R. p.182) (R. p. 201, line 25- R. p. 206, line 8) (R. p. 256, lines 3-4) His benefits had been stopped and his pain was getting worse.

He had gone through the gauntlet of litigation experiences that lawyers love and clients hate - contested hearings, administrative appeals, remand, and at that time, appeal was pending to this esteemed Court. It is difficult for lawyers and jurists to comprehend just how taxing and *demoralizing* such an experience really is. But, after first winning, then losing his back-injury case over the course of years of *unrelieved* neck pain, then *worsening*, Mr. Hannah sought treatment for his neck injury without consulting his former Employer or his attorney. (R. p. 276, line 23- R. p. 277, line 3)

He used his wife's insurance to obtain necessary medical and surgical care for his admitted neck injury from autumn 2011 through 2012, and the spinal surgery performed by Dr. Brennan on June 5, 2012 finally relieved some of his neck pain. (R. p. 256, lines 3-4; R. p. 260, line 19- R. p. 269, line 3) Dr. Brennan testified that, as of 3/27/2013 Mr. Hannah's neck had stabilized and the results of his surgery were "fair" with some remaining chronic pain. (R. p. 335, lines 7-20) Employer accepted this board-certified neurosurgeon, Dr. Brennan, as an expert in the field of Neurosurgery at his 5/1/2013 deposition. (R. p. 333, lines 8-17; R. p. 334, lines 6-8) Dr. Brennan

gave Mr. Hannah a 28% permanent impairment rating for the neck and he attributed the problems surgically addressed at C6-7 to the 2009 rollover wreck, on review of the 9/16/2009 actual MRI scan as well as the MRI report (R. p. 340, lines 3-7, 15-24; R. p. 341, lines 3-22; and R. p. 343-344)

The current claim came to light because Employer filed a claim for overpayment of benefits on 11/7/2012, more than a year after Mr. Hannah signed Form 17 to stop the checks. (R. p.155) Mr. Hannah could not be reached by his counsel to discuss this claim until the first week of January 2013, when Mr. Hannah informed his counsel that he had seen doctors and undergone spinal surgery for his neck, on his own. (R. p. 261, lines 13-24)

Immediately after that meeting, Claimant filed his claim for temporary and permanent disability and payment for the medical care he received due to a change in his condition, along with his affidavit explaining his claim. (R. pp. 159-160 ¶¶ 7, 11a, 11b; R. pp. 163-166) Employer contested on the basis of *res judicata* and collateral estoppel from the prior appeal of the low back injury; laches, unauthorized treatment and related defenses raised again in this appeal. (R. p. 167) A single Commissioner heard these arguments on 1/18/2013 and entered a decision in Mr. Hannah's favor, which was then vacated and remanded for *de novo* review, due to inadequate notice to Employer. (R. pp. 40-48)

On remand, following a 9/25/2014 hearing, Commissioner McCaskill denied Mr. Hannah's claims for the "uncontested" neck injury, finding that "§42-15-60 gives the employer the authority to select the treating physician"; Mr. Hannah "took himself out from under the Workers' Compensation Act" and "abandoned his recourse under the [] Act" when he proceeded to obtain the new neck treatments without notifying and seeking authorization from his (former) Employer. (R. pp. 28, 37-39; p. 37; R. pp. 38-39)

Commissioner McCaskill also held that, because he did not award compensation to Mr. Hannah, no award existed from which to deduct Employer's claimed overpayment, per § 42-9-210. (R. p. 38, FOF 29; R. p. 39, COL 6)

Mr. Hannah successfully appealed to the Full Commission, whose panel held that Employer is not entitled to a credit for TTD benefits paid to Mr. Hannah from 2/10/2010 through 8/16/2011 and reversed as to permanent disability in a unanimous decision on 2/23/2016, which was amended on 7/6/2016, correcting scrivener's errors and granting in part Employer's 2/29/2016 motion for reconsideration as to the phrasing of the disability finding. (R. pp. 3-14)

The Commission reversed Findings of Fact 19 and 21. (R. p. 9) It reasoned that Employer's defenses of *res judicata,* collateral estoppel and laches "do not apply because the subject matter is not the same as in the prior litigation which was adjudicated based upon the lumbar spine not the cervical spine ... the Claimant was not negligent and unreasonable in his explanation or the length of time under the circumstances of his claim ... [and] there is no finding of material prejudice as required by the Doctrine of Laches." (R. p. 10)

The Commission had "particular concern" with Finding 19, which "relied upon §42-15-60 as precluding the Claimant from receiving unauthorized medical benefits" but, it held that "[n]owhere does §42-15-60 preclude a Claimant from independently obtaining a rating from a non-treating physician and receiving an unauthorized evaluation from said physician." (R. p. 10) (Emphasis added.) It described the common practice: "Claimant and employee often each secure ratings for presentation to the Commission and the employer does not pay for the rating secured by the Claimant in this situation." *Id.*

As to the specific relief Mr. Hannah seeks, the Commission explained that "*Claimant requested that the employer be liable for the cost of care with Dr. Brennan and additional*

temporary total payments during the recovery. The denial of this request does not require and should not lead to the denial of the award of permanency based on the findings of Dr. Brennan." *Id.* (Emphasis added.) Employer does not dispute this explanation.

As to Dr. Brennan's findings, the Commission found it to be "uncontroverted" that Dr. Brennan's treatment (C-spine surgery) was previously recommended by Dr. Triana, the prior, authorized treating physician. (R. p. 11) (See also, Dr. Triana's treatment note dated 4/28/2010 recommending "decompression and fusion" surgery at C5-6.) (R. p. 189) (And see, Dr. Triana's deposition testimony as to his discussion of surgical options with Mr. Hannah.) (R. p. 311, lines 17-18; R. p. 312, lines 18-23)

Dr. Triana's records refer to C5-6 twice in his treatment notes. Dr. Brennan operated on C6-7. Employer argues that this difference should preclude a finding that Dr. Brennan treated the work injury. Dr. Brennan testified and wrote in a letter to counsel that he knows Dr. Triana; he reviewed Dr. Triana's notes, the actual MRI scan and radiologist's report on that scan from 2009; he compared them with his treatment and the 2012 MRI; and, he opined that Dr. Triana's reference was likely to be a typo or dictation error because the 2009 MRI showed damage at C6-7 consistent with what Dr. Brennan operated on in 2012. (R. p. 340, lines 3-7, 15-24; R. p. 341, lines 3-22; and R. pp. 343-344) Employer presented no evidence refuting Dr. Brennan's medical opinion on this point, but it continues to argue that the opinion is "speculation". (Initial Brief of Appellants, pp. 9, 14) Mr. Hannah contends that this unrefuted medical evidence supports the Commission's finding that it is "uncontroverted" that the surgery performed in 2012 is the same as was recommended in 2009.

Employer contends that the denial of credit for overpayment of TTD payments is an error of law or, alternatively, seeks remand for detailed findings of the facts supporting the

Commission's conclusion. (Initial Brief of Appellants pp. 22-22) Mr. Hannah contends that the Order contains detailed analysis, findings and conclusions to the effect that Mr. Hannah sustained a compensable permanent work injury to his C-spine in July 2009, and he reached MMI after Dr. Brennan performed spinal surgery in June 2012, leaving Mr. Hannah, with a remaining compensable 28% permanent partial disability to his back. (R. pp. 9-14) Mr. Hannah contends that the Commission's analysis, findings and conclusions sufficiently explain the basis for denying credit for overpayment.

ARGUMENT

I. STANDARD OF REVIEW

This court must affirm the Appellate Panel's decision unless it is " 'clearly erroneous' in view of the substantial evidence on the whole record." *Nettles v. Spartanburg Sch. Dist. # 7,* 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct.App. 2000) (citations omitted)). And see, *Lark v. Bi–Lo, Inc.,* 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) ("A judgment upon which reasonable men might differ will not be set aside") (cited with approval in *Hannah v. MJV/Butler Trucking, Inc.*, 2012-UP-535, 2012 WL 10862800, at *1 (Ct. App. Sept. 26, 2012).)

The reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. *Lester v. South Carolina Workers' Compensation Comm'n,* 328 S.C. 535, 538, 493 S.E.2d 103, 105 (Ct.App.1997) *rev'd in part on other grounds* 334 S.C. 557, 514 S.E.2d 751 (1999).

II. EMPLOYER WAIVED THE ISSUE OF IMPLICIT FINDINGS IN THE PRIOR APPEAL.

Employer argues that two of the Commission's 7/25/2011 findings combine to form an *implicit* finding of MMI with no permanent disability, and, that this Court's 9/26/2012 affirmance of the Commission's decision makes the *implicit* finding the law of the case. (Initial Brief of

Appellants pp. 9, 11). But, this argument could *only* have been made in the prior appeal *from those findings*. Had it been made in that appeal, remand for *explicit* findings would have been the result. See, *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. at 588, 535 S.E.2d at 150 ("As the commission made no specific finding of fact concerning this issue, but implicitly ruled on it, we must remand the issue to the commission for a proper finding").[2]

The Commission's decision was affirmed *without* remand. *Hannah v. MJV/Butler Trucking, Inc.*, 2012-UP-535, 2012 WL 10862800 (Ct. App. Sept. 26, 2012). Employer did not raise the issue of implicit findings and did not seek remand. This Court's decision was not appealed. Employer's argument on that point is, thus, waived. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were [] not raised on appeal, but should have been[.]" *Atkins v. Wilson*, 417 S.C. 3, 17, 788 S.E.2d 228, 235 (Ct. App. 2016) (citing and quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).). "Furthermore, even if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court." *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 659, 667

---

[2] *Nettles* explained the subtle procedural difference in administrative matters behind this requirement: "The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal. While a trial court's ruling may be challenged by an aggrieved party with a motion to reconsider under Rule 59 or 60, worker's compensation law does not contain a motion to reconsider before the commission. An aggrieved party may not challenge the commission's decision with a motion to the commission, but only with an appeal to the circuit court. *See* S.C.Code Ann. § 42-17-60 (Supp.1999) ("The award of the commission ... is conclusive and binding as to all questions of fact."); S.C. ADC 67-215 ("[The commission] will not address a motion involving the merits of the claim...."); *compare Grant v. South Carolina Coastal Council,* 319 S.C. 348, 461 S.E.2d 388 (1995) (finding that an inaccuracy in the trial court's order must be raised to the trial court by way of a Rule 59(e) motion to alter or amend a judgment before the inaccuracy may be challenged on appeal), *with Lloyd v. AT & T Nassau Metals Corp.*, 299 S.C. 207, 209, 383 S.E.2d 257, 259 (Ct.App.1989) ("[T]he proper remedy [to an error in the single commissioner's order] is a timely appeal to the full Commission and then to the courts.... It is a rule of repose."). Accordingly, the commission's failure to rule on Nettles's alleged hip injury did not prevent her from raising the issue to the circuit court because she raised the issue on her Form 30 and could not have made a motion for the commission to reconsider its order." *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C.at 588, FN 4, 535 S.E.2d at 150.

S.E.2d 7, 15 (Ct. App. 2008) (citation omitted).[3]

Based on this analysis, Employer has waived its various arguments supported by "implicit findings" of " MMI with no permanent disability[4]" and those arguments should be disregarded by this Court.

III. RES JUDICATA DOES NOT APPLY.

The Commission correctly determined that *res judicata* does not apply here, because the subject matter is not the same as in the prior appeal. (R. p. 10) *Res judicata* requires identical parties (which we have); identical subject matter (which we do not have); and that the issues in question in this appeal must have been adjudicated by a prior court (which we also do not have). See, e.g., *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-251, 452 S.E.2d 832, 833 (1994). Employer argues that the prior appeal involved identical subject matter because of the contextual findings of fact in the Commission's 2011 decision referring to the history of the case on issues other than the low back. (Initial Brief of Appellants, Argument I, p. 11)

This Court's 2012 decision (without remand for explicit findings about MMI and/or permanent disability for the neck), is the final (unappealed) word on the *issues raised and adjudicated* in that case. "Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal." *Hannah v. MJV/Butler Trucking, Inc.*, 2012-UP-535, 2012 WL 10862800, at *1 (Ct. App. Sept. 26, 2012) (quoting *Stone v. Roadway Express,* 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006).

The issues "raised and ruled upon" in the prior appeal to this Court were limited to the

---

[3] Ironically, Employer cited *M & T Enterprises* in its brief to this Court in the prior appeal, for this same point. (*Hannah v. Butler*, Case #2011197631, Final Brief of Respondents, Argument II(A), p. 13)

[4] (Initial Brief of Appellants, pp. 9; 11; and 21)

viability of Mr. Hannah's *low back* injury claim (which had been granted by the single Commissioner and, on Employer's appeal, reversed and denied by a divided[5] Commission panel). In the appeal from that decision, Employer, as Respondent, argued only that Mr. Hannah had not met his burden to prove a compensable *low back injury*; that aggravation of pre-existing injury and/or combined effects analyses applied to the *low back injury*; and that Employer's alleged "doctor shopping" was not a basis for reversal of the Commission decision denying benefits for the *low back injury*[6]. (*Hannah v. MJV, Inc./Butler*, Appeal No. 2011-197631, R. pp. 144-153). Being the successful party in the Commission's decision, Employer, understandably, did not seek remand. But in doing so, it waived its right to make the 'implicit findings' argument.

Moreover, Employer's current appeal ignores the fact that the worsening pain and resulting treatment for the neck *had not yet occurred* at the time of the prior appeal, making it impossible for those issues to have been "raised and adjudicated" then.

Thus, the Commission correctly rejected the *res judicata* defense.

IV. LACHES DOES NOT APPLY.

This case does not meet the requirements for laches under Employer's own cited authority. "Laches is neglect for an *unreasonable* and *unexplained* length of time, under circumstances

---

[5] (Commissioner Williams voted to affirm the decision of the Single Commissioner in Mr. Hannah's favor; Commissioners Beck and Wilkerson concurred in reversal.) (7/25/2011 Decision and Order, p. 12.)

[6] Employer's brief in that appeal only references the neck injury in its Argument to distinguish it from the 'unrelated' low back injury: "This record indicates Appellant complained of left neck and left elbow pain. Appellant was diagnosed with a cervical neck strain and left elbow contusion and released home the same day... On July 21, 2009, Appellant presented to Doctor's Care with his only complaints being pain in the left elbow and neck. Again, on July 28, 2009, a Doctors Care report indicated Appellant presented with complaints in his neck and left elbow without mentioning Appellant's left leg or lumbar spine. Appellant continued to complain of pain in only his neck and elbow when he presented to Doctors Care on August 7, 2009. Appellant initially presented for physical therapy on July 29, 2009 with a diagnosis of a neck sprain and left elbow contusion." (Hannah v. Butler, Appeal No. 2011-197631, Final Brief of Respondents, p. 9) (Citations omitted) (Emphasis added).

affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999) (citation omitted) (emphasis added). The Commission found that Mr. Hannah was "not negligent and unreasonable in his explanation or the length of time under the circumstances of his claim[.]" (R. p. 10) Employer's appeal fails to demonstrate otherwise, in view of the whole record.

(A) IN VIEW OF THE WHOLE RECORD, MR. HANNAH'S EXPLANATION WAS REASONABLE.

> [S]ection 42-15-20 [] provides that the failure to timely notify the employer does not automatically defeat a claim. The statute specifically states that the failure to provide notice precludes compensation "unless reasonable excuse is made *to the satisfaction of the Commission* for not giving such notice and *the Commission is satisfied* that the employer has not been prejudiced *thereby*. S.C.Code Ann. § 42-15-20 (1985).

Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 129, 623 S.E.2d 860, 864 (Ct. App. 2005) (emphasis added). Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Id.* at 129–30, 623 S.E.2d at 864; *Nero v. S.C. Dep't of Transp.*, 2015-001277, 2017 WL 1161127, at *5 (S.C. Ct. App. Mar. 29, 2017).

Employer emphasizes that Mr. Hannah had counsel and was capable of reading and understanding Form 17 when he signed it on August 31, 2011. (Initial Brief of Appellants p. 15-16) But, Form 17 explicitly states that Employee does *not* waive rights to future benefits for disability or medical care and it does *not* state any requirement for additional notice to the Employer:

> **I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT OR MEDICAL CARE**

(R. p. 100) (emphasis in original).

Employer does *not* address the legal effect of this language in Form 17 and it does *not* offer any authority showing that the Commission's finding that Mr. Hannah's explanation was reasonable is an error of law. Thus, this court must affirm, because it the Commission's decision has not been shown to be "clearly erroneous in view of the substantial evidence on the whole record." *Nettles v. Spartanburg Sch. Dist. # 7,* 341 S.C. at 586, 535 S.E.2d at 149 (citations omitted)). And, see *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when an appellant "fails to provide arguments or supporting authority for his assertion"); *Eaddy v. Smurfit—Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

Mr. Hannah's delayed notice of additional treatment for his neck injury was reasonably explained to the commission's satisfaction. (R. p. 10) The "whole record" includes Employer's two prior refusals to authorize medical treatment for the neck (the MRI in 2009 and Dr. Triana's treatment in 2010 following Dr. Bethea's release). His delay is further explained by the undisputed fact that Mr. Hannah never worked for Employer after the accident of 7/14/2009; his low back injury claim was lost; but his back injury was severe enough that he obtained social security disability for it in early 2011; and his neck pain began to worsen thereafter in the fall of 2011, when he was no longer receiving any benefits from Employer.

The delay is yet *further* explained by Mr. Hannah's reasonable belief that he had no reason to consult with his attorney or notify the Employer (R. p. 258, line 24- R. p. 259, line 2; R. p. 276, lines 20-22) until, at the end of 2012, Employer served its claim for repayment of benefits paid during the pendency of the prior (low back) claim. Notably, Employer's claim was served *after* Mr. Hannah had received the additional medical care and surgical relief in June 2012, and he was

too impoverished to even have a telephone by which his attorney could reach him. (R. p. 261, lines 3-9)

"Under the doctrine of laches, if a party, *knowing his rights*, does not timely assert them, but by *unreasonable* delay causes his adversary to *incur expenses or otherwise detrimentally change his position,* then equity will ordinarily refuse to enforce these rights." *Muir v. C.R. Bard, Inc.*, 336 S.C. at 296, 519 S.E.2d at 598 (Ct. App. 1999) (citation omitted) (emphasis added). Presumably this would apply to a party knowing his *responsibilities* too. But Employer offered no evidence that, until January 3, 2013, Mr. Hannah had any knowledge of any responsibility to report to his former Employer which had refused his doctors orders twice in the past and had contested his well-documented back injury *for years*.

(B) EMPLOYER OFFERED NO EVIDENCE THAT MR. HANNAH KNEW THAT HE WAS STILL OBLIGATED TO SEEK AUTHORIZATION FROM HIS FORMER EMPLOYER IN 2011-2012.

"Importantly, delay in the assertion of a right does not, in and of itself, constitute laches." *Id.* (citation omitted). "Rather, so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches." *Id.* (citation omitted). It is intuitively obvious that Mr. Hannah would have given notice earlier, had he thought Employer could be compelled to pay for the treatment he so badly needed, or to pay weekly benefits, when he could not even afford a telephone. Thus, even if his action is deemed to be a wrong, there is no *evidence* that he had knowledge of it. And there was <u>no evidence</u> offered of any "opportunity to ascertain facts", only argument.

The "argument of counsel is not a substitute for evidence." *Brown v. Johnson*, 276 S.C. 68, 72, 275 S.E.2d 876, 878 (1981). "The party asserting laches must satisfactorily show *negligence*, the *opportunity* to have acted sooner, and *material* prejudice." *Muir v. C.R. Bard, Inc.*, 336 S.C. at

296, 519 S.E.2d at 598 (Ct. App. 1999) (citation omitted) (emphasis added). Employer offered no *evidence* of negligence or even the slightest prejudice *caused* by Mr. Hannah's delay.

(C) EMPLOYER OFFERED NO EVIDENCE OF PREJUDICE.

"Sec. 72-302 of the Code contains, inter alia, the following language: 'No defect or inaccuracy in the notice shall be a bar to compensation *unless* the employer has *proved* that its interest was *prejudiced* thereby and then *only* to the extent of such prejudice.'" *Mize v. Sangamo Elec. Co.*, 251 S.C. 250, 258, 161 S.E.2d 846, 850 (1968) (emphasis added). Employer was given the opportunity, but it offered no *evidence* of prejudice, whatsoever[7], let alone *material* or *substantial* prejudice *and* the extent of that prejudice *and* that it was caused by Mr. Hannah's delay.

At the most recent hearing before the Commission, Employer's counsel made the following *argument* that it had been prejudiced:

> Had Defendants known about it or had -- had the claimant sought authorization, they could've done a number of things. They could've sought a independent medical evaluation. They could've sent him back to Dr. Bethea. They could've deposed people, deposed witnesses, done more investigation.

(R. p. 293, lines 9-17) Argument is not evidence. *See, e.g., Brown v. Johnson*, 276 S.C. at 72, 275 S.E.2d at 878 (1981).

Employer could have sought an IME and deposed people in the year-and-a-half between notice (1/7/2013) and this hearing (9/25/2014). And, in fact, it *did* depose Mr. Hannah's surgeon, Dr. Brennan, twice. (R. pp. 330-335 and R. pp. 336-342) It clearly could have done more investigation had it *chosen* to do so and there is no evidence that anything Mr. Hannah did

---

[7] "THE COURT: All right. Witnesses, Mr. Davis? MR. DAVIS: No witnesses from the defendants." (T. 9/25/2014 p. 63 lines 21-24)

prevented Employer from exercising its right to investigate the claim.

Not only must Employer *prove* prejudice, it must prove *causation.* Consider the analysis in *Dawkins v. Capitol Const. Co.*, 252 S.C. 536, 167 S.E.2d 439 (1969):

> *The employer did offer evidence* to the effect that earlier medical attention would have enabled the employer's doctor to better diagnose the nature and extent of the injury and that earlier treatment would have likely tended to lessen the disability which eventually occurred. *Assuming* that the failure to seek earlier medical attention worked to the prejudice of the employer, *there is no evidence,* we think, in the record *tending to prove that such resulted from the failure to give the written notice* within thirty days.

Id. at 540, 167 S.E.2d at 440 (emphasis added).

Here, there was no *evidence* of prejudice of any kind. Employer does not point to the first cent in expenses or any other sort of prejudice *caused* by Mr. Hannah's delay. In fact, it offered no evidence that *timely* notice would have made any difference whatsoever. "[W]hatever doesn't make any difference, doesn't matter." *McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987); *McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

"With respect to prejudice, the law of this State is settled that the burden is upon the employer to *prove* prejudice. Code Sec. 72-302[.]" *Dawkins v. Capitol Const. Co.*, 252 S.C. 536, 539, 167 S.E.2d 439, 440 (1969). It follows that *arguing* prejudice is not sufficient.

"[W]e adhere to the principle that workers' compensation laws in general, and notice requirements in particular, are to be *liberally* construed in favor of *claimants and coverage. Etheredge v. Monsanto Co.,* 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct.App. 2002)." *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. at 130, 623 S.E.2d at 864 (emphasis added).

"[W]e recognize that it is not the claimant's burden to show the absence of prejudice, but it is the employer's burden to prove the *presence* of prejudice. *Dawkins v. Capitol Const. Co.,* 252 S.C. at 539, 167 S.E.2d at 440 (the burden of proving prejudice lies with the employer)." *Lizee v.*

S.C. Dep't of Mental Health, 367 S.C. at 130, 623 S.E.2d at 864 (emphasis added).

(D) EMPLOYER HAD NOTICE OF MR. HANNAH'S UNRESOLVED NECK INJURY AND IT TWICE REFUSED CARE.

"Finally, whether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits." *Muir v. C.R. Bard, Inc.*, 336 S.C. at 296, 519 S.E.2d at 598 (Ct. App. 1999) (citation omitted). Looking at the merits of Employer's laches defense based on late notice of the worsened condition and ensuing treatment, it is clear that Employer *had* notice of Mr. Hannah's severe and intractable neck injury, which it consistently admits was caused by the work accident. It *had* notice that his doctor (Triana) anticipated that surgery would be the next step if epidural injections did not work. It *had* notice that physical therapy, painkillers, and epidurals ultimately did not work. It responded to notice of the neck injury by refusing to authorize an important diagnostic MRI and also by refusing to authorize Dr. Triana's treatments for the neck. As a result, Employer should not be heard now to complain that Mr. Hannah gave late notice that his condition worsened. "[T]he law would not require him to do a futile thing[.]" *McIntyre v. Cameron*, 124 S.C. 232, 117 S.E. 515, 516 (1923).

Employer <u>*concedes*</u> that Mr. Hannah was not required to forego necessary care; but it states <u>*incorrectly*</u> that "there was no denial or refusal to provide [care]." (Initial Brief of Appellants, pp. 13, 18) Employer argues that, because Dr. Brennan's treatment did not arise from an *emergency* and Mr. Hannah did not request authorization for *Dr. Brennan's* care (*id.* at pp. 17-18), the following exception does not apply here: "If in an emergency, *on account of the employer's failure to provide the medical care* as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission." S.C. Code Ann. § 42-15-60(A) (emphasis added).

But, the record *establishes* that Employer *twice* refused to provide diagnostic testing and

medical care for Mr. Hannah's *admitted* neck injury, ordered by Employer's own *authorized* treating physician, Dr. Triana, who had neither released Mr. Hannah, nor placed him at MMI.

It is anticipated that Employer will reply that Employee has not previously argued that these refusals justified Mr. Hannah's delayed notice. But, this Court may affirm the Commission's decision on the basis of the refusals of record, per SCACR Rule 220(c). "Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." SCACR 208. This rule does not limit Employee to his prior arguments, nor is the Court limited by Rule 220(c) to those prior arguments: "The appellate court may affirm any ruling, order, decision or judgment upon *any* ground(s) appearing in the Record on Appeal." SCACR 220(c) (emphasis added).

Consider the analysis of *Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). In *Martin* and in this case, (1) both employees received some treatment for an admitted injury; (2) both were then released at MMI even though symptoms were unabated; (3) followed by employer's refusal to authorize additional care for that injury; and, (4) both employees sought treatment on their own and compensation thereafter. *Id.* at 283, 631 S.E.2d at 550. There are procedural and factual differences between *Martin* and this case, not the least of which is that Mr. Hannah was *not* released by the doctor who actually *treated* his injury (Dr. Triana) and was only released by the doctor who did not treat it (Dr. Bethea). But, significantly, the *Martin* court ruled in employee's favor, due to employer's refusal to authorize care, *without reference to any required emergency*:

> The appellate panel is afforded discretion to order medical treatment under section 42-15-60 when a controversy such as the one in the instant case arises. ...[T]his is a situation where the employee feels he still needs treatment and the employer fails to provide it. The appellate panel acted within its discretion and the circuit court was correct in affirming the order confirming Dr. Johnson as the authorized treating physician.

Id. at 292, 631 S.E.2d at 555.

At deposition, Dr. Triana testified that as of his 2/25/2010 office visit (the last visit before Dr. Triana's 3/31/2010 deposition), Mr. Hannah's condition had not changed and Dr. Triana recommended surgery for Mr. Hannah's C-spine injury: *"[W]e talked at length about the fact that his neck symptoms were relieved [for a short time] with his epidural injections which gave me very good evidence or confidence that if we - proceeding with surgery of his neck - that we can get a good result and relieve his symptoms."* (R. p. 331, lines 17-18; R. p. 312, lines 18-23) He also testified that Mr. Hannah had *not* reached MMI but that he expected that after surgery, Mr. Hannah's condition would be improved such that he would be able to return to work. (R. p. 358, lines 13-21)

Dr. Triana's treatment records were made available to Employer before Dr. Triana's deposition and before every hearing. (R. p. 78) His early records revealed that, as of September 30, 2009 Mr. Hannah's neck pain was unrelieved even after several different types of treatment:

> Since his accident, he has been having *neck* and left shoulder *pain* that radiates down the middle ack. He has gone through *PT [physical therapy]* at Next Step, he has had *pain medication*, and *anti-inflammatories without relief."* "We are going to obtain a *cervical epidural* and see if It is helpful in relieving his *neck ... symptoms*." "It may take a couple of months to get the complete *answers* and we will put him on some Lorcet 1-2 xl/day as needed *for pain. He certainly cannot drive while he is taking narcotic medication* and he cannot lift, bend, push, pull, crawl or ride in vibrating vehicles until we address all his concerns."

(R. pp. 181-182)

As of October 29, 2009, Mr. Hannah had received yet *another* type of treatment for his neck, with no lasting relief and the process for treating this pain was expected to take many months:

> He did get one *epidural* from Dr. Grant and it helped a little bit for a *short period of time* but *he is still getting pain in his neck* and down his arms. We are going to try another epidural. ...[W]e will keep him *out of work until we see him back.* ...We will see him back in about *6 months*.

(R. p. 183)

These records also showed that Mr. Hannah intended to continue to seek treatment for injuries that the Employer refused to authorize:

> Workman's Comp would not in any way take ownership of his lumbar pain and so he did not get his MRI completed of his lumbar spine. *He is going to go through his regular insurance to have that done*[.]

(R. p. 182)

It is *undisputed* that this accident caused Mr. Hannah's neck injury. (R. p. 70 ¶ 7; R. p. 73 ¶ 5; R. p. 72 ¶ 13) (R. pp. 347-348; R. p. 169; R. p. 349 at ¶ 4);

It is *undisputed* that Employer had notice of the severity of the injuries as early as *the date of the wreck*, because, as Employer's counsel stated at the first hearing before the Full Commission: "This is an admitted case involving a motor vehicle accident where a truck overturned. *Admittedly it was a very bad accident...* Actually, the *Employer came to the scene* and extricated the Claimant with -- EMS was there as well[.]" (R. p. 212, lines 18-23) (emphasis added) (R. p. 198, line 22- R. p. 199, line 6)

It is *undisputed* that Dr. Bethea released him at MMI (mid-treatment by Dr. Triana) without ever *treating* his neck (R. p. 252, lines 7-9), and released him to work while simultaneously prescribing narcotic pain medication and restricting him to lifting less than 5 lbs., no bending, climbing or stooping (R. pp. 187-188) (R. p. 72 ¶¶ 15-16; and see R. pp. 253-254) Mr. Hannah was unchallenged when he testified that his job *could not be performed* under these restrictions. (R. p. 207, lines 12-22)

In light of these facts, it is unclear whether Employer has any right to claim it lacked notice, or even that *further* notice was *required*. See, e.g., *Nero v. S.C. Dep't of Transp.*, 2017 WL 1161127 (Ct. App. Mar. 29, 2017). There, the employee, Nero, *never* gave formal notice of his injuries,

which, like Mr. Hannah's injuries, progressed through treatment over the course of years, culminating in spinal fusion surgery. *Id.* at *6. Also, as with Mr. Hannah, Nero's employer was *at the scene* of his accident. *Id.* at *4. The *Nero* the court noted:

> In *Etheredge* [*v. Monsanto Co.,* 349 S.C. 451, at 459, 562 S.E.2d 679 at 683 (Ct. App. 2002)], this court concluded notice is adequate, when there is *some knowledge of accompanying facts connecting the injury* or illness *with the employment*, and *signifying* to a reasonably conscientious supervisor that *the case might involve a potential compensation claim.*

Nero v. S.C. Dep't of Transp., at *3 (emphasis added) (finding that because employer was aware that employee *"never returned to work* following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, *no prejudice can be established.*" Here, Employer was only aware of some of Mr. Hannah's treatment for the neck; but *Nero* was not complicated by two employer refusals to provide care as occurred in this case. And, in any event, Employer offered no *evidence* of prejudice.

V. EMPLOYER IS NOT ENTITLED TO CREDIT FOR TTD BENEFITS PAID PRIOR TO THE COMMISSION'S EXPLICIT FINDINGS OF MMI AND 28% DISABILITY.

Employer claims a credit for "overpayment" of TTD benefits from 2/10/2010 through 8/16/2011. The single Commissioner held that no award existed from which to deduct Employer's claimed overpayment, per S.C. Code § 42-9-210. (R. pp. 38-39, FOF 29; COL 6) On appeal, the Commission held that Employer is not entitled to a credit for TTD benefits for that period and it denied Employer's motion to reconsider this ruling. (R. p. 12)

Employer's claim for a credit is based on the "implicit findings" argument that could only have been made in the prior appeal. (See Argument point II above) Employer did not make that argument in the prior appeal and cannot now claim that this Court is bound by a finding that was not made (namely, that the Commission found and concluded that Mr. Hannah reached MMI with

no permanent impairment in the prior appeal). Employer's basis for seeking a credit for TTD payments is this finding *that was never made* in the 2011 Commission decision.

Employer contends that the denial of credit for overpayment of TTD payments is an abuse of discretion or, alternatively, seeks remand for detailed findings of the facts supporting the Commission's conclusion. (Initial Brief of Appellants pp. 22-22) Mr. Hannah contends that the Order contains detailed analysis, findings and conclusions to the effect that Mr. Hannah sustained an admitted, compensable, permanent work injury to his C-spine in July 2009, and he reached MMI after Dr. Brennan performed spinal surgery in June 2012, leaving Mr. Hannah, with a remaining compensable 28% permanent partial disability to his back. (R. pp. 9-14) Mr. Hannah contends that the Commission's analysis, findings and conclusions sufficiently explain the basis for denial of a credit for overpayment.

"MMI is a factual determination left to the discretion of the appellate panel." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006). The 7/2/2016 Commission Order *did* find Mr. Hannah has reached MMI and it *did* find that he has a 28% disability. These are not implicit findings and they are amply explained throughout the analysis, findings and conclusions. These findings preclude credit for the period prior to MMI.

VI. MR. HANNAH WAS WITHIN HIS RIGHTS TO OBTAIN AN INDEPENDENT RATING AND TO SEEK DISABILITY BENEFITS ON THAT BASIS.

Employer's appeal fails to address the Commission's findings/conclusions that "[n]owhere does §42-15-60 preclude a Claimant from independently obtaining a rating from a non-treating physician and receiving an unauthorized evaluation from said physician" and "Claimant and employee often each secure ratings for presentation to the Commission and the employer does not pay for the rating secured by the Claimant in this situation." (R. p. 10)

"Appellants have the responsibility to identify errors on appeal, not the court." *Watson v.*

Underwood, 407 S.C. 443, 452, 756 S.E.2d 155, 160 (Ct. App. 2014) (citation omitted). "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Id.* (citation omitted). And, see *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when an appellant "fails to provide arguments or supporting authority for his assertion"); *Eaddy v. Smurfit—Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

"[U]nappealed findings—whether correct or not—become the law of the case." *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015), *reh'g denied* (June 18, 2015) (citation omitted). Thus, the Commission's disability ruling must be affirmed.

CONCLUSION

On the basis of all of the above and foregoing, it is respectfully requested that this Court affirm the Amended Decision and Order of the Appellate Panel of the Full Commission.

Respectfully submitted,
July 6, 2017.

W. E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Kellahan, PA
Telephone: (843) 355-2000
Facsimile: (843) 355-2010
Email: Billy@Jenkinsonlaw.com
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No.: 0908371
Appellate Case No. 2016-001643

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier, ...Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the **Final Brief of Respondent** complies with all requirements of Rule 211(b), SCACR.

July 6, 2017

W. E. Jenkinson, III, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
Post Office Drawer 669
Kingstree, SC 29556
(843) 355-2000
Attorneys for Respondent