

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1504993
Appellate Case No. 2017-000084

Horace L. Adell, Jr., ... Employee, Claimant, Respondent,

v.

Clean Streak Inc., ... Employer, Respondent,

and

Builders Mutual Insurance Company, ... Carrier, Appellant.

BRIEF OF RESPONDENT ADELL

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- I. Is there substantial evidence in the record as a whole to support the Workers' Compensation Commission Appellate Panel's finding that Mr. Adell suffered an injury arising out of and in the course of his employment?
- II. Does Mr. Adell's ability to work, standing alone, preclude the Workers' Compensation Commission from finding Mr. Adell is disabled and eligible for temporary total disability benefits?
- III. Did the Workers' Compensation Commission's Appellate Panel err as a matter of law under the South Carolina Administrative Procedures Act in reversing the hearing commissioner's decision to exclude a statement from Mr. Adell's chiropractor?
- IV. Has Appellant abandoned any issue regarding the Appellate Panel's award for payment of Mr. Adell's medical treatment and surgery?

COUNTER-STATEMENT OF THE CASE

Horace L. Adell, Jr. (Claimant) filed a Workers' Compensation Commission Form 50 giving Notice of a Claim on May 18, 2015. Claimant asserted that on March 24, 2015, he suffered an injury to his neck and back in a work-related accident. Claimant sought payment of medical treatment and temporary total disability benefits. (R.p.32).

On November 3, 2015, Claimant filed another Form 50 requesting a hearing on his claim. (S.R.p.1). Claimant alleged he "was working on a storage facility when he fractured his neck/back. He was carrying a 5 gallon bucket [of] wax when he felt a crack/pop in his neck. Claimant put ice on his neck right after the accident but the pain got progressively worse through the evening." (S.R.p.1). Again, Claimant sought payment for medical treatment and temporary total disability benefits.

Clean Streak, Inc. (Employer) and Builders Mutual Insurance Company (Carrier) filed a Form 51 (R.p.37) on December 7, 2015. Carrier alleged there was "[n]o evidence of a compensable injury by accident." Carrier denied Claimant needed or was entitled to additional medical care, and denied Claimant was entitled to temporary total benefits. Under "Further contentions," Carrier added:

All defenses applicable under the South Carolina Workers' Compensation Act including, but not limited to, §42-1-120; §42-1-130; §42-1-140; §42-1-150; §42-1-160; §42-15-20; §42-15-40; §42-15-60; *Cooper v. McDevitt & Street Co.*; and the South Carolina Code of Laws (1985 and Cum. Supp. 1995). Claimant is the owner of the employer which has employed separate counsel to mirror the Claimant's position.

(R.p.37).

Employer hired independent counsel and on December 3, 2015, filed a separate Form 51

admitting Claimant's allegations.

On February 17, 2015, the case was tried before a hearing commissioner. Claimant submitted a number of items of evidence, including a statement of Dr. Clay Seigel, a chiropractor. (R.p.73). Carrier objected on the ground that a chiropractor does not qualify as a "medical provider" for APA submissions.

On May 18, 2016, the hearing commissioner entered an order in which he sustained the Carrier's objection to Dr. Seigel's statement (R.p.73). (R.p.4). The hearing commissioner then entered the following findings of fact:

- (1) Claimant was credible (R.p.10, ¶ 2);
- (2) Claimant sustained an injury by accident on March 24, 2016 (R.p.10, ¶ 3);
- (3) Claimant's injury arose out of and in the course and scope of his employment (R.p.10, ¶ 3);
- (4) The medical treatment Claimant received from Waccamaw Community Hospital and Horry County Fire and Rescue were necessary emergent care (R.p.10, ¶ 4);
- (5) The Carrier refused to provide medical treatment because it continuously denied the claim (R.p.10, ¶ 5);
- (6) Claimant is entitled to causally related medical care from March 25, 2015 and continuing (R.pp.10-11, ¶ 6);
- (7) Claimant's injury required continuing medical care and he had not reached maximum medical improvement (MMI) (R.p.11 ¶¶ 8-9);
- (8) Claimant was entitled to temporary total disability benefits from March 25, 2015 and continuing until further order or agreement. (R.p.11, ¶ 10).

The hearing commissioner entered conclusions of law consistent with these findings and ordered Carrier to pay Claimant for temporary total disability benefits and causally related medical care. (R.pp.11-12).

Carrier sought Appellate Panel Review of the hearing commissioner's finding of compensability and the award. Claimant sought review of the hearing commissioner's exclusion of Dr. Seigel's statement.

On August 26, 2016, the Appellate Panel heard the matter and on December 16, 2016, the panel entered an order affirming the hearing commissioner as to compensability but reversing the decision to exclude Dr. Seigel's statement. (R.pp.13-30).

On January 13, 2017, Carrier served and filed its notice of appeal to this Court.

ARGUMENTS

SCOPE OF APPELLATE REVIEW

Carrier presents its arguments as if this Court may re-weigh the evidence and conclude which way the “substantial evidence” falls. Carrier presents a recitation of the facts in a light most favorable to itself, and concludes “[t]he Appellate Panel’s Decision and Order as respects is against the substantial weight of the evidence.” (App. Br. p. 16). This argument turns the correct standard for appellate review on its head, advocating the Court decide which way the substantial evidence falls.

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). *See also Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004) (“The Appellate Panel is the ultimate fact finder in [w]orkers’ [c]ompensation cases....”). 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)); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) (“Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached.”). When finding substantial evidence to support the agency’s decision, the Court need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion. *Murphy v. South Carolina Dept. of Health and Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” *Olson v. S.C. Dep’t of Health & Env’tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

Contrary to Carrier’s assertions, this Court does not review the record to determine whether the Commission’s decision is “against the substantial weight of the evidence” but, rather, whether there exists substantial evidence to support the Commission’s findings. Even if the record could support the conclusions Carrier advocates that are inconsistent with the Commission’s decision, the correct standard of judicial review would still require affirmance where there is evidence by which reasonable minds could reach the same conclusions.

Applying the correct scope of review, this Court should affirm.

I. THE RECORD AS A WHOLE CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT CLAIMANT SUFFERED A COMPENSABLE INJURY BY ACCIDENT

Carrier contends in conclusory fashion that the record does not support the findings by the hearing commissioner and the Appellate Panel that Claimant suffered a compensable injury by accident arising out of the course of his employment. (App. Br. p. 11). The upshot of Carrier's argument under this issue is that Claimant is not to be believed. (App. Br. p. 11). This Court should not be persuaded by this argument.

First, credibility determinations are for the Commission, not this Court. *Rhame v. Charleston County School Dist.*, 412 S.C. 273, 772 S.E.2d 159 (2015) (the final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel; where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive). It is not for this Court to weigh the testimony of one witness against that of another; that function belongs to the Appellate Panel alone. *Thomas v. 5 Star Transp.*, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015). The hearing commissioner expressly found Claimant to be credible (R.p.10, ¶ 2) and the Appellate Panel agreed. (R.p.27, ¶ 2).

Second, there is evidence that would lead a reasonable mind to agree with the Commission's decision that Claimant suffered an injury by accident during the course of his employment. Both the hearing commissioner and the Appellate Panel outlined the following testimony in support of finding Claimant suffered an injury within the course of his employment.

Daniel Woron, Claimant's brother-in-law, testified he attended a family gathering two days before the Claimant's date of accident. (R.p.133, ll. 10-13). Mr. Woron authenticated photos which showed Claimant holding children, smiling, and playing with them. (R.p.133, l. 15 -

p.134, l. 8; p.178). Mr. Woron further testified Claimant did not appear to be in any type of medical distress at the family gathering (R.p.134, ll. 9-11) and Claimant did not have any issues picking up children (R.p.134 ll. 12-14) or any issues doing any other lifting or any other activity that day. (R.p.134, ll. 15-18). Mr. Woron also testified he did not see any instances that would have caused any concern over the Claimant's medical condition at the family gathering. (R.p.135, ll. 5-8).

William Trembley, III testified his occupation is the sales and marketing director for Building Industry Synergy Magazine which covers Myrtle Beach, Horry, and Georgetown Counties. (R.p.138, l. 24 - p.139, l. 5). Mr. Trembley stated he first met Claimant and Claimant's wife during a home show in February 2015 at the Myrtle Beach Convention Center. (R.p.139, ll. 6-12). Mr. Trembley had an ongoing business relationship with the Adells (Claimant and his wife, Susan) (R.p.140, ll. 4-11) and met them in their office on February 25, 2015 at Cedar Run Trail in Myrtle Beach, South Carolina. (R.p.140, l. 13; p.141 ll. 16-19). Mr. Trembley stated there was "no doubt" the office seemed to be set up as an ongoing business office. (R.p. 140, l. 24 - p. 141, l. 1). When asked whether the Claimant appeared to be in any type of medical distress when they met at the Claimant's office, Mr. Trembley testified "Absolutely not. Just quite contrary. I was very impressed by his physical stature and how he carried himself and the fact he would get in there and do the jobs himself." (R.p.142, ll. 9-14).

Matthew Maziarz testified he was working with the Claimant on or around March 25, 2015, doing tile work on the Clean Streak office bathroom and helping the Claimant unload a trailer of equipment the Claimant brought from Asheville. (R.p.150, ll. 5-13). Mr. Maziarz further testified he finished the tile work, and then sometime in the afternoon he and the

Claimant started unloading the trailer of supplies (R.p.150, ll. 23-25), including five-gallon buckets of wax, equipment, sand, and cleaning stuff for the business. (R.p.151, ll. 1-6). Claimant seemed good, energetic, and definitely not hurt that morning, and Mr. Maziarz he did not notice any type of guarded movement or anything that would indicate any kind of medical distress. (R.p.151, ll. 13-20). Mr. Maziarz added he had never heard Claimant complain of any kind of neck problems before the day Claimant was injured. (R.p.153, ll. 11-14).

Mr. Maziarz testified Claimant had two five-gallon buckets, one in each arm, adding:

And I remember he was carrying them out and when he went to set them down he obviously showed some discomfort and some pain and grabbed at his neck. And then, of course, you know, he said we need to take a break and we - - you know, that's pretty much it for the rest of the day. He ended up going in and putting a pack on his neck and, you know, pretty much taking it easy for the rest of the day after that.

(R.p.151, 1.22 - p.152, 1. 6). Mr. Maziarz stated that later that night he heard something and discovered it was the Claimant, laying in the floor at the bottom of the stairs screaming and needing to go to the hospital. (R.p.153, ll. 2-6). Mr. Maziarz called 9-1-1, and the Claimant was picked up by an ambulance. (R.p.153, ll.7- 10). After waiting several hours while the Claimant was treated at the hospital, Mr. Maziarz and the Claimant went back to Asheville. (R.p.154, ll. 2-18).

On cross-examination, Mr. Maziarz testified that at the time of the Claimant's accident Mr. Maziarz was a sub-contractor (R.p.155, l. 14 - p.156, 1. 3) and at the time of the hearing he no longer was doing work for Clean Streak, as he was working full-time as a manager with Bojangles. (R.p.156, ll. 19-21). Mr. Maziarz testified that he actually saw Claimant lift up two five-gallon buckets and that was when Claimant said he hurt himself. (R.p.157, ll. 1-7). Mr.

Maziarz added that he was not aware of any other neck or back problems the Claimant had before March 25, 2015. (R.p.157, ll. 14-17).

On re-direct examination, Mr. Maziarz testified the buckets of wax weighed about 40 pounds each, and the bags of dirt or sand are "usually 80 pounds, or somewhere in there." (R.p.161, l. 20 - p.162, l. 3).

Claimant testified he was born on November 7, 1961 and at the time of the hearing he was fifty-four years old. (R.p.165, ll. 9-12). Claimant testified he is married to Susan Adell and they have a daughter named Brittany. (R.p.165, ll. 13-24). Claimant graduated from High School and then went into the military, where he served for five years in the 82nd Airborne, Green Beret, after which he was given an honorable discharge. (R.p.167, ll. 3-11).

Claimant stated he began cleaning buildings during his off-time from full-time jobs which evolved into Clean Streak. (R.p.168, ll. 15-25). Claimant has been running Clean Streak for some time, and has experienced growth for the company in the last 15 years, with 32 employees in North Carolina at the time of the hearing plus three employees in South Carolina. (R.p.169, l. 1 - p.170, l. 7).

Claimant testified he and his wife decided to purchase a home in the Myrtle Beach area, and to put the office in the home as he had done in Asheville. (R.p.171, ll. 2-24). The Claimant found a foreclosure to purchase which had garage and office space, and this was designated as the work location also. (R.p.172, ll.7-24). The office was set up with a P.O. Box for the business mail, with a designated phone line for the business, and a storage facility for the business, and business only. (R.p.172, ll. 8-23).

Claimant testified the morning of March 24, 2015 he was meeting with a vendor for paper

products, then a salesman. Claimant stated that he had never been diagnosed with any kind of disc problem in his neck nor seen a specialist for his neck before the work accident of March 25, 2015. (R.p.174, ll. 20-23; p.176, ll. 15-18).

Claimant "got hurt" when he was taking items off the trailer and putting them in the garage where he kept the materials for the business, including sand used to clean floors, paper products, and five-gallon buckets of wax. (R.p.177, l. 1 - p.178, l. 8). Claimant was moving wax when he was injured, stating "I went to go on the back of the trailer, I picked up two five-gallon buckets like I've always done, just picked it up and I turned around with it and all the sudden it felt like - you know when you straighten your arm out and your arm pop, well, just ten times that and then it immediately started burning. So I said 'Ouch.'" (R.p.178, l.23 - p.179, l. 4). Claimant felt the pop "in the middle of the neck right back here" and he felt the burn "right in the same place." (R.p.179, ll .5-10). Claimant put ice and then heat on his neck and laid down and went to sleep. (R.p.179, ll. 15-24). Claimant woke up screaming, hollering, and could hardly breathe; he called his wife, then pulled himself to the stairwell, calling for Matt, telling him to call 9-1-1. (R.p.180, ll. 1-16). The ambulance came and Claimant told them his neck hurt all the time because he did not know what else to say. (R.p.181, ll. 8-12).

Claimant stated he had never experienced that type of pain before. (R.p.181, ll. 17-19). Claimant was eventually referred to Dr. Rhoton who performed surgery on the Claimant's neck. (R.p.182, ll. 1-2, 22-25). Dr. Rhoton has been Claimant's main treating doctor, and although the treatment received from physical therapy has improved his condition, Claimant also feels he needs further treatment and that he has not been released from Dr. Rhoton's care. (R.p.183, l. 20 - p.184 l. 6). Claimant testified no doctor has said he is at maximum medical improvement, and

he hopes to go back to work (R.p.184, ll.7- 21).

Claimant made a salary of \$1,500.00 per week from Clean Streak, Inc. (R.p.176, ll. 19-21). The Claimant was taken out of work right after this accident, and has not returned to work (as of the time of the hearing) since March 25, 2015. (R.p.183, ll.5-16).

Thus, the Commission's factual determination that Claimant suffered an injury during the course of his employment is supported by substantial evidence in the record as a whole.

Third, Carrier's argument on this point is so conclusory that this Court could deem the issue to be abandoned. The argument is contained in one page without citation to any supporting authority (other than the statute governing exacerbation of pre-existing injuries which, Carrier points out, was not an argument in the case) (App. Br. p. 11). An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011).

Accordingly, the Court should reject Carrier's argument and affirm the order of the Appellate Panel.

II. CLAIMANT'S ABILITY TO WORK, STANDING ALONE, DID NOT PRECLUDE THE WORKERS' COMPENSATION COMMISSION FROM FINDING CLAIMANT IS DISABLED AND ELIGIBLE FOR TEMPORARY TOTAL DISABILITY BENEFITS

The upshot of Carrier's argument under this issue is that because there is evidence that Claimant was able to do some work, the Commission erred as a matter of law in awarding him temporary total disability benefits. (App. Br. pp. 12-15). The Court should reject this argument.

Carrier cites *Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 118 S.E.2d 812 (1961) to support its assertion that the Commission improperly awarded Claimant temporary total disability benefits. *Wynn*, however, is distinguishable in meaningful ways.

In *Wynn*, the claimant suffered a work-related heart attack. He returned to work part-time and then resigned, allegedly on doctor's orders. Both of his physicians testified, however, that he was able to work. The Supreme Court held that there was insufficient evidence to support a total disability award. In this case, however, Claimant's physician, Dr. Eric Rhoton, wrote him out of work (R.p.183, ll. 5-9; pp. 70-72) and Claimant has been unable to return to work (although he has gone into work for short periods). (R.p.183, ll. 8-16; p.212, l. 7 - p.214, l. 21).

Furthermore, the fact that Claimant was able to work in a very limited capacity, standing alone, does not preclude the Commission's finding that he suffered temporary total disability. *Cf. Clemmons v. Lowe's Home Centers*, Op. No. 27708 (S.C. Sup. Ct. filed March 8, 2017) (Shearouse Adv. Sh. No. 10 at 33) (noting that claimant's ability to work, alone, is not sufficient to rebut presumption of total and permanent disability under scheduled member statute with regard to back impairment greater than 50%); *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 109, 580 S.E.2d 100, 104 (2003) ("In the context of scheduled injuries, South Carolina recognizes a

claimant's entitlement to be deemed disabled and to receive compensation for an injury even though the claimant is able to work.").

Whether a claimant is disabled due to a work-related injury is a question of fact for the commission, *Gadson v. Mikasa Corp.*, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006), as is the extent of a claimant's disability. *Hamilton v. Martin Color-Fi, Inc.*, 405 S.C. 478, 748 S.E.2d 76 (Ct. App. 2013). *See also Clark v. Aiken County Government*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) (the Appellate Panel's finding as to the degree of impairment is a question of fact).

The hearing commissioner and the Appellate Panel both found Claimant was entitled to temporary total disability benefits. Those findings are supported by evidence in the record. The Court should affirm under the Court's limited scope of judicial review.

III. THE WORKERS' COMPENSATION COMMISSION DID NOT ERR IN ADMITTING THE STATEMENT FROM CLAIMANT'S CHIROPRACTOR

The Appellate Panel found Dr. Clay Seigel's statement was admissible under the APA and Regulations 67-611 and 67-612. (R.p.29). Carrier argues the Commission erred in admitting the statement because Claimant failed to offer Dr. Seigel's records. (App. Br. p. 15). Carrier also contends "this Court should find the negative inference that the records show years of treatment to the Claimant's neck, consistent with the [Claimant's] testimony," adding "this Court should reverse the Appellate Panel's admission of this statement." (App. Br. pp. 15-16). The Court should reject these arguments.

First, Carrier makes this argument in one paragraph without citation to any authority to support its various theories for exclusion. An issue is deemed abandoned if the argument in the

brief is not supported by authority or is only conclusory. *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *Butler v. Butler*, 385 S.C. 328, 684 S.E.2d 191 (Ct. App.2009); *State v. Howard*, 384 S.C. 213, 682 S.E.2d 42 (Ct. App.2009); *Pack v. S.C. Dept. of Transp.*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App.2009); *Bryson v. Bryson*, 378 S.C. 502, 662 S.E.2d 611 (Ct. App.2008).

Second, the two bases for the Carrier's complaint – that the statement was not admissible without supporting records and that the court should draw a negative inference from the absence of those records – were not ruled upon by the hearing commissioner or the Appellate Panel. (R.p.130, ll. 2-7; R.p.231, l. 23 - p.233, l. 14).

Furthermore, an appellant may not argue a different ground on appeal than appellant argued as the basis for an objection below. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), *superseded by statute on other grounds*, *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014).

Next, the Appellate Panel held the evidence was admissible under the APA “and Regulations 67-611 and 67-612.” (R.p.29, ¶ 5). Carrier did not challenge the conclusion that the document was admissible under the Regulations so this ruling became the law of the case. *See, e.g., Hilton v. Flakeboard America Limited*, 418 S.C. 245, 791 S.E.2d 719 (2016) (only issues raised to the Commission within the application for review of the hearing commissioner's order are preserved for review).

Even so, the Commission's ruling was correct and within its discretion. Claimant offered the statement as a report and asked the appellate panel to consider it under the APA. (R.p.234, l. 3 - p.235, l. 13). The Commission accepted the statement pursuant to its own regulations. 25A S.C. Code Ann. Regs. 67-612(B)(1) (Supp. 2016). So long as the report was provided in timely

fashion, the Commission had discretion to permit its introduction. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006). And even if the report was not provided in accordance with the regulation, the Commission had discretion to allow it upon permitting Carrier to take a deposition de benne esse of Dr. Seigel. Reg. 67-612(E), (J).

Finally, Carrier has not explained how it was prejudiced by the admission of Dr. Seigel's report. *See Cook v. Atlantic Coast Line R.R. Co.*, 196 S.C. 230, 13 S.E.2d 1 (1941) (a party claiming reversible error must demonstrate both error and resulting prejudice).

The Court should reject Carrier's arguments and affirm the Appellate Panel's decision.

IV. APPELLANT ABANDONED ANY ISSUE REGARDING THE APPELLATE PANEL'S AWARD FOR PAYMENT OF CLAIMANT'S MEDICAL TREATMENT AND SURGERY

Carrier included the following among its "Statement of Issues on Appeal":

Did the South Carolina Workers' Compensation Appellate Panel Err in Awarding Payment for Medical Treatment and Surgery when Claimant made no attempt to inform the carrier of this surgery and obtain prior authorization?

(App. Br. p. 1, Issue No. 4). However, there is no argument on this issue on the brief.

Where an appellant fails to provide arguments or supporting authority with regard to an issue on appeal, the issue is deemed abandoned and will not be considered on appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006); *Arnal v. Arnal*, 363 S.C. 268, 609 S.E.2d 821 (Ct. App. 2005), *aff'd as modified* 371 S.C. 10, 636 S.E.2d 864 (2006); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004); *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d 684 (Ct. App. 2000).

Accordingly, the Court should deem the issue to be abandoned. *See, e.g., State v. Lindsey*,

394 S.C. 354, 714 S.E.2d 554 (2011) (holding Court precluded from addressing issue identified in statement of issues on appeal but not argued in brief). *See also State v. Palmer*, 413 S.C. 410, 413 n. 1, 776 S.E.2d 558, 559 n. 1 (2015) (issue deemed abandoned where petitioner did not brief the issue).

In the brief to the Appellate Panel, Employer argued in conclusory fashion and without citation to any authority that “[t]he Commission, therefore, cannot order the Carrier to pay for such medical attention if the Carrier was never given an opportunity to investigate and authorize such surgery.” (R.pp.105-106). There was no challenge, however, to the hearing commissioner’s finding that the Carrier essentially ignored Claimant once Carrier decided to deny the claim in its entirety.

Section 42-15-60 requires Carrier to pay for medical care that will tend to lessen Claimant’s period of disability. S.C. Code Ann. § 42-16-60(A) (2016); *Rice v. Froehling & Robertson, Inc.*, 267 S.C. 155, 226 S.E.2d 705 (1976). *See also Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583–84, 514 S.E.2d 593, 598 (Ct. App. 1999) (explaining the issue of whether medical treatment, even after MMI, will tend to lessen a claimant’s period of disability is a question of fact to be decided by the commission).

Both the hearing commissioner and the Appellate Panel found Claimant entitled to medical care pursuant to Section 42-15-60. Even if Carrier had preserved this issue for this Court’s determination the Court should affirm the Commission’s decision on the merits.

CONCLUSION

For the reasons stated the Court should affirm the decision of the Appellate Panel of the Workers' Compensation Commission.

July 24, 2017

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1504993
Appellate Case No. 2017-000084

Horace L. Adell, Jr., ... Employee, Claimant, Respondent,

v.

Clean Streak Inc., ... Employer, Respondent,

and

Builders Mutual Insurance Company, ... Carrier, Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies
with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court
Order regarding personal data identifiers.

Respectfully submitted,

July 25, 2017



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