(5)

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

RECEIVED
JUN 26 2017
SC Court of Appeals

WCC File No. 1310882

Appellate Case No. 2016-002296

Tyrone Lawrence,
Employee/Claimant

Respondent

v.

Advanced Glassfiber Yarns, Inc., Employer, and Great American Alliance Insurance Co., Carrier, Appellants.

FINAL BRIEF OF RESPONDENT

June 26, 2017

William L. Smith, II, Esquire, Bar. No. 5226
Chappell Smith & Arden
Post Office Box 12330
2801 Devine Street, Suite 300
Columbia, South Carolina 29211
bsmith@csa-law.com
Attorney for Tyrone Lawrence, Employee/Claimant, Respondent

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in finding as fact and concluding as a matter of law that Respondent sustained a compensable injury by accident?

2. Did the Commission err in deciding to believe Respondent's testimony?

3. Did the Commission err in finding as fact and concluding as a matter of law that Dr. Poletti is the authorized treating physician?

STATEMENT OF THE CASE

Tyrone Lawrence (Respondent) suffered compensable injuries to his head and neck when a light fixture and a portion of his employer's ceiling fell on him on August 14, 2013. Respondent filed a form 50 requesting a hearing on October 9, 2014. Subsequently, a hearing was held on February 11, 2016, before Commissioner Avery B. Wilkerson, Jr. Commissioner Wilkerson found Respondent's claim compensable, ordered payment of temporary total disability benefits and medical treatment, and named Dr. Poletti as the authorized treating physician but held all other issues in abeyance.

Advanced Glassfiber Yarns, Inc. (AGY) and Great American Alliance Inc. (Appellants, collectively) appealed that Order of Commissioner Wilkerson to the Appellate Panel of the South Carolina Workers' Compensation Commission on February 23, 2016. Appellants alleged Commissioner Wilkerson erred in his factual finding that Respondent suffered a compensable injury by accident arising out of and in the course and scope of his employment, and alleged Commissioner Wilkerson erred in appointing Dr. Poletti as the authorized treating physician. On the other hand, Respondent argued Commissioner Wilkerson correctly found as fact Respondent suffered a compensable injury. Additionally, Respondent contended Commissioner Wilkerson was within his rights to designate Dr. Poletti as the authorized treating physician. After a hearing on August 15, 2016, the Appellate Panel agreed with Respondent and affirmed Commissioner Wilkerson's Order as modified finding the claim compensable and naming Dr. Poletti as the authorized treating physician in their Order dated October 12, 2016.

Appellants now appeal the findings of the Appellate Panel to the South Carolina Court of Appeals. Once again, Appellants allege Respondent did not meet his burden of proof by a preponderance of the evidence despite the fact the appropriate standard of review of factual

determinations before the Court of Appeals is substantial evidence.[1] Additionally, Appellants continue to allege the Single Commissioner erred in declaring Dr. Poletti the authorized treating physician even though Appellants are currently appealing the Order of the Appellate Panel. Conversely, Respondent alleges there is substantial evidence to support the factual findings and Order of the Appellate Panel and that the Commission has the right to name the authorized treating physician.

FACTS

Respondent is a fifty-seven (57) year-old man who has been married for thirty-six (36) years to his wife Yvonne with whom he has three adult children. (R. p. 62, lines 7–18). He has worked for his employer, an appellant in this matter, for thirty-eight (38) years. (R. p. 62, lines 23–24). On August 14, 2013, while at work, Respondent was hit on the head, neck, and shoulders by falling ceiling tiles, sheet metal, and florescent lights. (R. p. 64, lines 1–19). As recorded in an accident report completed by Respondent's employer on the date of accident, Respondent was "Hit by falling light fixture in ceiling. Hit back of head and back of neck." (R. pp. 339–41). The report also states "the light fixture support was rusted and broke and fell." (*Id.*).

According to Respondent's testimony, he immediately felt "sincere pain" and feared momentarily that the entire ceiling was collapsing. (R. p. 64, lines 23–24). In his confused, fearful, and painful state, Respondent began trying to exit the building out of fear that he was in danger of receiving further injuries. (R. pp. 65–66). While attempting to exit the building, Respondent first encountered Ricky Raiford and Richard Gladden to whom he explained his fear of ceiling collapse.

[1] Appellants also integrate into their brief an argument regarding Respondent's level of impairment. This argument is not considered here, for the degree of Respondent's impairment and resulting disability have yet to be adjudicated.

(R. p. 66). He then found his supervisor, David Kelly, to whom he reported the accident. David Kelly sat Respondent down and pursued medical assistance on his behalf. (*Id.*).

Ricky Raiford (thirty-nine (39) year employee of AGY), Richard Gladden (forty-three (43) year employee of AGY), Martha Caine (ten (10) year employee of AGY), and John Padgett (forty (40) year employee of AGY), each testified as to their accounts of Respondent's accident and the scene immediately thereafter. Mr. Raiford testified that although he did not see the accident occur, he saw what he expected to be a thirty (30) pound light fixture laying on the ground and saw Respondent "in shock . . . and holding his neck." (R. pp. 127–28; R. p. 128, lines 18–19). Mr. Raiford testified in accord stating, "the ceiling is metal, it's bulging metal, it didn't have a – and it was just rotten and it all came down." (R. p. 136, lines 23–25). Ms. Caine also described the aftermath of the accident stating, "I looked up and saw [Respondent], and I saw debris from the ceiling, the light fixture was hanging from the ceiling with falling debris, and he was standing underneath at the time." (R. p. 141, lines 18–21). She further testified there was debris on Respondent, on the floor, and on the table in close proximity to the accident site. (R. p. 142, lines 6–16). Finally, Mr. Padgett testified Respondent was sent to the plant nurse, that he was aware of the accident within half an hour of its occurrence, and that the light fixture did not fall alone, but rather other debris fell as well. (R. pp. 162–66).

Respondent subsequently was examined by the plant nurse, Ann Taylor. (R. p. 67, lines 4-10). After she evaluated respondent, he was transported to Aiken Regional Medical Center. (R. pp. 67–68). When respondent reported to Aiken Regional Medical Center, he conveyed he had been hit in the head by a light fixture, which caused moderate pain that radiated into his head, was exacerbated by movement, and relieved by nothing. (R. p. 318). His physicians ordered x-rays of

the cervical spine, prescribed flexeril and anaprox for pain, and he was diagnosed with a contusion and neck sprain. (R. pp. 319–20).

Respondent next presented to Doctor's Care for a follow up on August 15, 2013. (R. p. 68, lines 4–6). At that time, Respondent reported worsening neck pain. (R. p. 312). His physician at Doctor's Care, Dale Gordineer, MD, again diagnosed Respondent with a neck strain, placed him on light duty for work, and prescribed him a cervical collar. (*Id.*). On August 19, 2013, Respondent returned to Doctors Care once again for a follow up and reported neck pain, clicking in his back, right leg weakness, and tingling and weakness in his right arm. (R. p. 308). On that date, Dr. Gordineer updated Respondent's diagnosis to include lumbar radiculopathy. (R. p. 309). Moreover, Dr. Gordineer referred Respondent to an orthopaedic specialist. (*Id.*). However, Appellants began denying Respondent's claim in September and refused to provide him with the medical care he needed. (R. pp. 69–71). Since that date, Appellants have continuously refused to offer necessary medical care so Claimant was forced to seek all the below medical treatment on his own accord.

Respondent then reported to Carolina Musculoskeletal Institute (the Institute) where he treated for many months. At his first visit with the Institute, Respondent was again diagnosed with a cervical strain. (R. p. 284). During his next visit on November 11, 2013, Respondent reported his neck pain remained persistent. (R. p. 283). On December 9, 2013, Respondent reported his pain continued, and his physician noted he was not receiving relief from his medications or exercises. (R. p. 282). Noting Respondent had suffered from pain for four months without relief in his neck and bilateral shoulder, Dr. Ty Carter ordered an MRI of Respondent's cervical spine. (*Id.*). As a result, Dr. Carter suggested he try epidural injections. (R. p. 281). Respondent

continued to treat at the Institute for the next year, but began to develop additional symptoms in his lumbar spine and his cervical spine issues worsened. (R. pp. 263–77).

On April 10, 2015, Respondent presented to the Institute again reporting left sided neck pain that radiated down his arm. (R. pp. 264–65). He was diagnosed with cervicalgia at that time. (*Id.*). However, on April 24, 2015, Dr. Carter decided Respondent's lack of positive response to medications and therapy warranted a repeat MRI. (R. p. 303). Dr. Carter and Respondent met on May 11, 2015, to discuss the results of his MRI. (R. p. 299). At that time, Dr. Carter informed Respondent that he could now see disc herniation and extruded disc fragments at C5-C6 causing severe spinal cord stenosis and foraminal stenosis. (*Id.*). Dr. Carter recommended an anterior cervical discectomy and fusion to remedy his condition. (R. p. 301). This recommendation was consistent with the opinion Respondent received from Dr. Poletti. (*See* R. pp. 248–49). Respondent finally had his surgery on June 5, 2015. (R. p. 306).

Many of the physicians with whom Respondent treated issued statements or testified as to the cause of Respondent's injury and the cause of the resulting impairment. Dr. Poletti opined on May 27, 2015, that Respondent had a clear need for cervical surgery and stated, "I do believe most likely that the reason for the surgery was because of injuries sustained in his accident in 2013." (R. p. 249). Correspondingly, Dr. Lehman who performed an independent medical evaluation stated, "additional treatments for the neck, as well as evaluation and treatment of the lower back, most probably and to a reasonable degree of medical certainty, [and] symptoms [affecting those areas are] most probably related to the work injury of [August 8, 2013]." (R. p. 260). Moreover, Dr. Carter adopted a statement on March 14, 2014, in which he agreed, "It is my opinion that [Respondent's] neck problems and shoulder pain where most probably caused by the event of the light fixture failing on his head and shoulder on August 14, 2013." (R. p. 280).

ARGUMENTS

I. THE ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Appellate Panel's findings in its October 12, 2016, Order are supported by substantial evidence. Appellants disagree with the Commission's factual findings and argue a preponderance of the evidence standard; however, the appropriate standard of review for workers' compensation cases brought before the Court of Appeals is substantial evidence. S.C. Code Ann. § 1-23-380(a)(5) (Supp. 2016). Therefore, unless the findings of the Workers' Compensation Commission's Appellate Panel are clearly erroneous, made on unlawful procedure, controlled by legal error, or are arbitrary, the South Carolina appellate courts will not overturn the Commission's findings. *E.g. Pollack v. S. Wine & Spirits of Am.*, 405 S.C. 9, 13–14, 747 S.E.2d 430, 432 (2013) (quoting *Jones v. Ga.–Pac. Corp.*, 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003)). The South Carolina Supreme Court defines substantial evidence as evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. *Id.* at 417, 586 S.E.2d at 113 (quoting *Howell v. Pacific Columbia Mills,* 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)). Under this standard, the reviewing court may not substitute its own judgment for that of the Appellate Panel as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Moreover, the findings of the Appellate Panel are presumed correct. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

Appellants challenge the Commission's finding that Respondent sustained a compensable injury by accident, but Appellants cannot meet their burden imposed by section 1-23-380 regarding any element of that finding. For purposes of this analysis, a "compensable injury by accident" is most clearly examined by distilling it to five elements: an injury, an accident, that the accident

caused the injury, and that the accident both arose out of employment, and in the course of employment. *See generally* S.C. Code Ann. § 42-1-160 (2015); *Doe v. South Carolina State Hosp.*, 285 S.C. 183, 187, 328 S.E.2d 652, 654 (Ct. App. 1985). These elements are simply derived from the definitions of the words included in the Commission's finding of a "compensable injury by accident." "Compensable" means the injury by accident arose out of and in the course of employment. *Doe*, at 187, 328 S.E.2d at 654. "Injury by accident" is essentially a question of proximate cause. "Injury" and "accident" are simply components integral to an understanding of "compensable" and "injury by accident," and are, therefore, defined and analyzed independently. These are each addressed below.

a. The records, statements, and testimony of Dr. Carter, Dr. Poletti, and Dr. Lehman constitute substantial evidence that Respondent suffered an injury.

The medical records of Respondent's physicians constitute substantial evidence that Respondent suffered an injury. Section 42-1-540 of the South Carolina Code makes clear injury, for purposes of exclusiveness of the Workers' Compensation regime, is a personal injury. The evidence plainly suggests Respondent suffered an injury to his person. Dr. Ty Carter opined on May 22, 2015, that Respondent, "has an extremely lowers disc herniation and extruded disc fragment at C5-6 causing severe spinal cord and foraminal stenosis." (R. p. 297). Dr. Poletti issued an opinion in accord with Dr. Carter, for he diagnosed Respondent with a "displaced cervical intervert disc" and with "cervical radiculitis." (R. p. 249). Moreover, Dr. Poletti stated, "it would seem to me that this man had some index injury to his cervical spine." (*Id.*). Lastly Dr. Lehman stated, "when a light fixture and part of the ceiling collapsed on [Respondent's] head and neck. This also [sic] caused an axial loading of the lumbar spine as he fell." (R. p. 260). These statements certainly constitute evidence that Respondent suffered an injury to his person.

b. The statements of Respondent, Ricky Raiford, Richard Gladden, Martha Cain, and John Padgett, and the accident report completed by Respondent's employer are evidence that an accident occurred.

There is substantial evidence to support a finding that Respondent was involved in an accident. The word "accident" is defined as an unlooked for and untoward event, which is not expected or designed by the person who suffered the injury. *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 422, 40 S.E.2d 626, 631 (1946). Essentially, so long as an injury is unexpected from the employee's point of view, it was caused by an accident. *Landry v. Carolina's Health-care Systems*, 396 S.C. 149, 155, 719 S.E.2d 288, 291 (Ct. App. 2011). For clarity, "accident" can viewed as having two elements: an event and the unintended nature of said event.

The record is replete with evidence showing the light fixture fell and that it fell on Respondent. Respondent testified extensively as to the facts leading up to the event, the event, and the aftermath. (R. pp. 63–67). He stated, regarding the specific event, "the ceiling came down on me . . . the lights and the -- like the sheet metal and the tile came down . . . it hit me on -- on the top of the head, neck, and shoulder area." (R. p. 63, line 25–p. 64, line 19). This account of the event is corroborated by the testimony of Ricky Raiford, Richard Gladden, Martha Cain, and John Padgett, each of whom testified as to seeing the light fixture and debris hanging from the ceiling, strewn across the floor and tables, and/or on respondent. (R. pp. 127–28, 137, 141–42, 162–66). Furthermore, the incident report and form 12a completed by Respondent's employer describes the event in a similar manner by stating "Hit by a falling light fixture in the ceiling." (R. p. 20, p. 339). The evidence on this point is duplicative and consistent. For these reasons, there is sufficient evidence showing the event did occur as described.

Regarding the accidental component of the event, the evidence clearly supports a finding that Respondent was involved in an "unlooked and untoward event." Ricky Raiford testified

Respondent appeared to be in shock after he was hit. (R. p. 128, lines 16–19). Respondent's testimony as to his fear and confusion after the accident evidences that the accident was unexpected by Respondent. (R. pp. 65–66). Moreover, the incident reports from Respondent's employer evidences the accident was caused by the deterioration of the light fixture and not by any intentional act. (R. p. 20; p. 339. Supplemental Record on Appeal p. ___). Therefore, the record contains substantial evidence showing an "accident" occurred, and this Court should not alter the Commission's findings that are based upon this evidence.

c. Dr. Carter, Dr. Poletti, and Lehman's statements that Respondent's injuries were caused by his workplace accident provide substantial evidence of a proximate cause/ injury by accident.

Three physicians have issued statements asserting that Respondent's injuries were caused by his workplace accident. No physician has issued an opinion in which it is stated that a cause other than Respondent's August 14, 2013, workplace accident caused his injury. Nevertheless, Appellants contend Respondent's injuries were not caused by the accident at work. This assertion is continually made notwithstanding a lack of medical evidence and three expert opinions to the contrary. Despite Appellant's assertions, there is clear medical evidence supporting the Commission's finding that Respondent's injuries were caused by his workplace accident.

Medical evidence, as defined at section 42-1-160(G) of the South Carolina Code, is an "expert opinion or testimony stated to a reasonable degree of medical certainty." Both Dr. Lehman and Dr. Poletti's opinions were stated to a reasonable degree of medical certainty. Dr. Carter was not asked if his opinion was to a reasonable degree of medical certainty, but he did use a more probable than not standard when issuing his opinion. Pursuant to *Brady v. Sacony of St. Matthews*, 232 S.C. 84, 93, 101 S.E.2d 50, 55 (1957), all that is required for medical testimony to have probative value as to causation is that a professional opinion is stated as most probably. Therefore,

Dr. Poletti and Dr. Lehman's opinions are, per se, medical evidence. Dr. Carter's opinion is, similarly, probative of causation.

Dr. Poletti stated in a deposition, "As I said in my note, I said I do believe most likely that the reason for surgery was because of injuries sustained in his accident in 2013 and the disc increased or sequestered as a consequence of going through physical therapy and nonoperative treatment." (R. p. 244, lines 18–23). Correspondingly, Dr. Lehman, who performed an independent medical evaluation, stated, "additional treatments for the neck, as well as evaluation and treatment of the lower back, most probably and to a reasonable degree of medical certainty, [and] symptoms [affecting those areas are] most probably related to the work injury of [August 8, 2013]." (R. p. 260). Moreover, Dr. Carter adopted a statement on March 14, 2014, in which he agreed, "It is my opinion that [Respondent's] neck problems and shoulder pain where most probably caused by the event of the light fixture failing on his head and shoulder on August 14, 2013." (R. p. 280). These opinions certainly amount to substantial evidence.

Regarding Appellants' claims that Respondent's injuries were not caused by his workplace accident, their brief relies upon cherry picked quotes that reflect Respondent's confusion during his deposition and hearing instead of relying upon medical evidence. For example, Appellants' assertion that Respondent admitted he was untruthful about a prior automobile accident is technically true, for he uttered those words, but the substance of those words do not reflect fact, for he was *not* untruthful. Appellants led the following line of questioning with Respondent at the hearing before Commissioner Wilkerson:

A- I didn't remember.
Q- You didn't remember having a car wreck?
A- (Shook head in a side-to-side motion).
Q- You settled that case and you even got money for it didn't you?
A- I got money from it –
Q- Yes.

A- -- yes.
Q- Okay.
A- If that was in 2006?
Q- Yes, sir. You didn't tell us about that, did you?
A- I didn't recall it sir.
Q- You didn't recall. Okay. . . .

(R. p. 94, lines 1–13). However, this line of questioning is particularly misleading. Respondent was in fact forgetful, but his forgetfulness manifested itself in his confirmation that he did not tell Appellants about the accident when he was deposed. The fact of the matter is Respondent testified to his car accident and settlement in his prior deposition in this matter. That deposition is not a part of the record of this case, but the pertinent parts of the deposition were read into the record at R. p. 114, line 12–p. 116, line 7. Included in that text is a long line of questioning from Appellants' attorney in which he provides a lengthy description of a motor vehicle accident and the question, "Have you ever been involved in a motor vehicle collision?" (R. pp. 114–15). In the deposition as read into the record, Respondent replied, "yes, once. . . . that's been over ten years ago." (R. p. 115, lines 13–15). Then Respondent was asked if he received a settlement from that accident and the deposition reflected that he replied in the affirmative. (R. p. 116, lines 1–4). While this is simply an exemplar and not the only instance of Appellants trying to force a causation issue without using medical evidence, it is representative of Appellant's meritless arguments that are contradicted by substantial evidence. Therefore, the considerable medical evidence is sufficient for this Court to affirm the findings of the Commission regarding causation.

d. The Commission's implicit finding that Respondent's injury arose out of his employment with his employer is supported by substantial evidence.

As an initial point, the Commission did not make specific findings as to the arising out of and in the course of elements, but these are implicitly a part of the Commission's finding that Claimant's injury by accident was "compensable." *See Doe v. South Carolina State Hosp.* 285

S.C. 183, 187, 328 S.E.2d 652, 654 (Ct. App. 1985); S.C. Code Ann. § 42-1-160 (2015). For an injury to arise out of out of employment, it must simply be shown that it is apparent to a rational mind that a causal relationship exists between the work being performed and the resulting injury. *Nicholson v. South Carolina Dept. of Social Services*, 41 S.C. 381, 385, 769 S.E.2d 1, 3 (2015). Essentially, "arising out of" is a question of proximate cause. *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140, S.E2d 173, 175 (1965). There is substantial evidence in the record that Respondent's workplace accident was the proximate cause of the resulting injury, for as explained above, three physicians issued causation statements and/or testified to causation. Each of these physicians agreed Respondent's injuries were most likely caused by his employment. Therefore, three physicians testified, in essence, that Respondent's injuries arose out of his employment, and this constitutes substantial evidence supporting that element of compensability.

e. The Commission's implicit finding that Respondent's injury was sustained in the course of his employment with his employer is supported by substantial evidence.

That Claimant's accident occurred in the course of his employment is obviously supported by substantial evidence, and cannot reasonably be disputed. The words "in the course of" refer to the temporal and spatial circumstances under which the accident occurred. *Eargle v. South Carolina Electric & Gas Co.*, 205 S.C. 423, ___, 32 S.E.2d 240, 242 (1944). As explained above, Claimant and several employees testified that the accident occurred. In all of this testimony, it is either explicitly stated, or fairly inferred, that Respondent was at his place of employment during normal working hours. (*See* R. pp. 63–67, 127–28, 136, 141–142, 162–66). Therefore, there is substantial evidence supporting the Commission's implicit finding that the accident occurred in the course of his employment.

II. FINDINGS OF CREDIBILITY ARE RESERVED FOR THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION.

While Appellants do not make a specific argument regarding credibility, their brief is rife with allegations and arguments related to credibility. Rather than address each of these as they are argued by Appellants, this issue will be summarily addressed here, for the arguments presented here are applicable to every instance in which Appellants address credibility. Please note, however, that many of Appellants' arguments regarding credibility appear to be addressed to the Appellate Panel of the Commission and not the Court of Appeals, for their brief makes statements tending to support Respondent's position that the Appellate Panel is the ultimate finder of witness credibility. Nevertheless, for purposes of this argument, Respondent presumes Appellant intends to make a credibility argument before the Court of Appeals.

Appellants' intention, however, is erroneous, for the Commission is the final arbiter of credibility and the weight to be allocated to evidence. *Brunson v. American Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755 (Ct. App. 2011). Moreover, *Stone v. Taylor Brothers, Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004) makes clear the appellate courts cannot overturn the Commission on questions of weight of evidence. Through juxtaposition, this Court made clear that factual findings are governed by substantial evidence, but allocation of weight to evidence is reviewable only upon allegations of legal error. (*Id.*). For this reason, Appellant's argument on credibility before the Court of Appeals is erroneous.

In addition to Appellants' credibility argument being improper before this Court, its allegations are also unfounded. First, four Commissioners have chosen to believe Respondent, but Appellants continuously allege that discrepancies in Respondent's testimony on unrelated matters must mean the accident did not happen as Respondent, four employees, and an incident report describe. For example, Appellants assert that Respondent lied about flying to London, England to

watch his son play football by citing what is clearly an inaccurate medical note. (*See* R. p. 267). Respondent's son does plays professional football, Respondent does travel to see his son play from time to time, and Respondent's son played a football game in London, England. (R. p. 69, lines 11–18, p. 111, lines 7–18). However, Respondent did not attend that game. (R. p. 111, lines 7–18). Respondent does not have a passport; he has never left the country. (*Id.*). This simply amounts to an unfounded attack on Respondent's credibility that has no bearing on the compensability of the claim.

In a similar respect, Appellants fixate upon Respondent's particular statement at a deposition in which he stated he wore his cervical collar on a trip when he was not in his hotel room. (*See* R. p. 80, lines 8–12). However, in that deposition Respondent's statement immediately prior to the above referenced quotation qualified his response and is referenced by Respondent at (R. p. 81, lines 7–12). At the hearing with Commissioner Wilkerson, respondent reiterated his statement by saying, "you asked me . . . did I wear my cervical collar all the time and I shared with you that fifty percent (50%) of the time I did, fifty percent (50%) of the time I did not." (*Id.*). Despite these responses, Appellants continue to contend Respondent was untruthful, and they fallaciously contend that surveillance footage from their investigators showing Respondent not wearing his cervical collar indicates that Respondent did not ever wear his cervical collar on his trip to Boise. Obviously, as Appellants only show very limited footage– "just a few minutes"– of Respondent from the trip, which was "three (3) days" total, that footage cannot possibly prove what Respondent did during times when he was not being recorded. (R. p. 112, lines 3–16). Therefore, Appellants make claims that are both unfounded and improper before this Court. For those reasons, this Court should affirm the relevant findings of the Appellate Panel of the South Carolina Workers' Compensation Commission.

III. THE COMMISSION CORRECTLY NAMED DR. POLETTI AS THE AUTHORIZED TREATING PHYSICIAN.

The Workers' Compensation Commission has the authority to name an authorized treating physician and appropriately used that authority to name Dr. Poletti as the authorized treating physician in this matter. S.C. Code Ann. § 42-15-60 (A) (2015) provides that the Commission may set the authorized treating physician despite a defendant's wishes if good cause is shown. Under section 42-15-60, the Commission is "awarded great discretion" and "the Commission may override the employer's choice of medical provider." *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 114, 576 S.E.2d 191, 198 (Ct. App. 2003). The Court of Appeals has offered an example of cause sufficient to warrant a Commission override of the employer's preference and explained that in "a situation where the employee feels he still needs treatment and the employer fails to provide it . . . the Appellate Panel act[s] within its discretion" by ordering an employer provide treatment with a provider the employer has not selected. *Martin v. Rapid Plumbing*, 369 S.C. 278, 292, 631 S.E.2d 547, 555 (Ct. App. 2006). Moreover, the Appellate Court's standard of review on this discretionary action that is allowed under the Commission's statutory authority is limited by section 1-23-380 (5)(b). Pursuant to *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals* "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000).

This is not simply a case where the employer fails to provide sufficient medical treatment that would tend to lessen an injured worker's disability. *See Martin*, at 292, 631 S.E.2d at 555. Instead, this is the case of an employer failing to provide *any* necessary medical care since 2013. (*See* R. pp. 69–70). As a result of that failure, Commissioner Wilkerson and the Appellate Panel

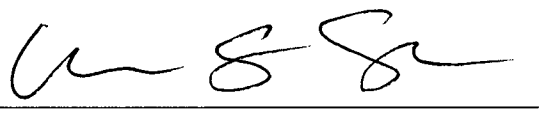
found Appellants lost the right to control medical treatment and were within their statutory rights to do so. (*See* R. pp. 5, 13; S.C. Code Ann. § 42-15-60(A) (2015)).

Appellants contend section 42-15-60 and *McKinney v. Kimberly Clark Corp*, 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008) state a denied case is not sufficient to grant the Commission authority to direct medical treatment and that defendants have the right to choose the physician, respectively. However, both contentions are flawed. There is no mention in section 42-15-60 of differing authority depending on an employer's acceptance or denial of a claim. Moreover, no case law supports that position. Instead, the appellate courts of South Carolina make clear the Commission has great discretion to appoint a physician. *E.g.*, *Gattis,* at 114, 576 S.E.2d at 198; *Martin*, at 292, 631 S.E.2d at 555; *Clark v. Aiken County Government*, 366 S.C. 102, 113, 620 S.E.2d 99, 105 (Ct. App. 2005). *McKinney*, on the other hand, simply reaffirms that, barring circumstances prescribed in section 42-15-60, the employer and not the employee has the authority to designate the authorized treating physician. 376 S.C. at 369, 658 S.E.2d at 114. That case, however, is inapplicable in this matter, for Appellants are disputing the Commission's authority to name an authorized treating physician. As between the rights of an employer and an employee, *McKinney* controls, but does nothing more than reiterate statutory law; as between the rights of the employer and the Commission, *McKinney* has no relevance. (*Id.*). Therefore, the Court of Appeals should affirm the Commission's Order naming Dr. Poletti as the authorized treating physician, for its decision is supported by substantial evidence and is within the Commission's statutory authority.

CONCLUSION

Respondent respectfully requests the Order of the South Carolina Workers' Compensation Appellate Panel be affirmed, for the Commission's findings and Order are supported by substantial evidence, exemplify an accurate application of the law, and are within the bounds of its statutory authority.

Respectfully Submitted,



William L. Smith, II
Chappell Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC 29201
PH: (803) 929-3600
bsmith@csa-law.com
Attorney for Tyrone Lawrence, Employee/Claimant, Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

WCC File No. 1310882

Appellate Case No. 2016-002296

Tyrone Lawrence,
Employee/Claimant — Respondent

v.

Advanced Glassfiber Yarns, Inc.,
Employer; and
Great American Alliance Ins.,
Carrier — Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211 (b), SCACR.

June 26, 2017

William L. Smith, II, Esquire, Bar. No. 5226
Chappell Smith & Arden
Post Office Box 12330
2801 Devine Street, Suite 300
Columbia, South Carolina 29211
bsmith@csa-law.com
Attorney for Tyrone Lawrence, Employee/Claimant, Respondent