THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

Doretta Butler-Long, Employee, Claimant, ... Appellant,

v.

ITW Labels, Employer and American Zurich Insurance Company/Zurich North America c/o Broadspire, Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred as a matter of law in finding Appellant did not meet her burden of proving a compensable injury by accident under Section 42-1-160 when the medical and lay testimony proved her injury arose out of her employment.

2. Whether the Appellate Panel erred as a matter of law in analyzing the case under Section 42-1-172 when it found there was no evidence Appellant's job involved repetitive tasks which would thus require her injury by accident to be found compensable under Section 42-1-160.

3. Whether the Appellate Panel erred as a matter of law in failing to apply Schlumberger, Mauldin and Massey for the proposition that a misdiagnosis by the patient and/or doctor is not evidence that an injury is not connected to work?

4. Whether the Appellate Panel erred as a matter of law in finding it would require speculation to find a compensable repetitive trauma injury when Appellant proved by expert medical evidence that her injury was directly connected to the activities of her employment as required under Section 42-1-172.

5. Whether the Single Commissioner erred as a matter of fact and law in disregarding the opinions of Dr. Tanksley that Claimant's injury happened in connection with her work.

6. Whether the Single Commissioner erred as a matter of fact and law in refusing to give "normal weight" to the opinions expressed by Dr. Mazoue in the questionnaire and deposition because "his conclusion as to that work nexus does not come while he is actively treating her," when Dr. Mazoue gave these opinions less than a month after his examination of the Claimant at a time when he would have continued treating her had she been able to afford treatment or had the claim been accepted.

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Appellant Doretta Butler-Long was employed with Respondent ITW Labels, Inc.

On June 24, 2013, Appellant filed a Form 50 (Claim) alleging she had sustained work-related injuries to her right shoulder, right arm, right hand and neck on April 13, 2012 while employed with Respondent. [R.p.].

On March 7, 2016, Appellant filed a Form 50 (Employee's Request for Hearing) repeating the allegations made in her original Form 50. [R.p.].

On March 14, 2016, Respondents filed a Form 51 (Employer's Response to Request for Hearing). Respondents admitted Long was their employee, but denied that she had suffered an injury by accident or a repetitive trauma injury. [R.p.].

The case was tried before Commissioner Gene McCaskill on August 30, 2016. On January 9, 2017, Commissioner McCaskill issued a Decision and Order denying benefits. He ruled, "I find that did not satisfy her burden of proving a compensable injury by accident and/or compensable repetitive trauma while in the course and scope of her employment with the Defendants." [Order, Finding of Fact 62].

Appellant timely filed her Form 30 (Notice of Appeal) on January 23, 2017.

Oral argument was held on April 18, 2017 before the Appellate Panel (Commissioners Susan S. Barden, Avery B. Wilkerson, Jr., and R. Michael Campbell, II). The Appellate Panel issued its Decision and Order affirming the single commissioner on June 14, 2017.

This appeal followed.

STATEMENT OF THE FACTS

Doretta Butler-Long, Appellant, was employed by Illinois Tool Works (ITW) as a laminator and finisher for over 12 years – starting on September 11, 1999. [Tr. P. 19, lines 9-13]. The job requires lifting up to 50 pounds. [APA pages 211-212]. Long's performance consistently met or exceeded the job requirements. [APA pages 226-230].

ITW manufactured and laminated printed products, such as labels and signs for McDonald's, Coca-Cola and Blockbuster. ITW shut down their plant on January 1, 2013. [Tr. P. 34, lines 6-12].

On Wednesday, April 11, 2012, Long was working in her job as a laminator and finisher. As she was lifting a load of sheets for a Blockbuster job, Long felt pain in her right arm coming from her shoulder and neck. [Tr. Page 23, line 18-page 26-line 6]. She described the way she got hurt as: "From lifting the rolls and from the repetitive motion of just sending it through the machine from the rolls. A lot of the rolls are heavy, but I had to get my job done." [Tr. Page 23, lines 18-24].

Long's arm continued to hurt, but she dealt with it and kept working. She testified "It started hurting that particular day and then it's just progressed just the way my arm was like numb and it started just tingling. So I just went to the emergency room on that Friday." [Tr. Page 24, lines 5-9].

Long was seen at Providence Hospital late Friday night on April 13, 2012. Although not realizing the nature of her injury at the time, Long plainly described a work injury, as she gave a history of the pain beginning at work and described her job. The report states: "[Patient] presents today with complaint of right sided shoulder and forearm pain x 3 days. . . . **[Patient] has job in which she has repetitive arm movements.**" [APA P. 1 (emphasis added].

The ER doctors took x-rays of her right arm, shoulder and chest – as she complained of pain in these areas. As the pain was not limited to her shoulder and was accompanied by numbness and

tingling into her right arm and fingers, Long did not appreciate that the injury was to her shoulder (nor did the doctors).

Long was given a sling for her arm and Percocet for the pain.

She was scheduled to work on Monday, April 16, 2012. She called in to work and "told Stacie [Dash] I was not coming because I went to the doctor and I was hurting. . . . from my understanding, I had a slipped disc in my neck and I'm in a lot of pain and I can't do anything. I'm hurting. I'm in pain. I can't come to work. She told me okay." [Tr. P. 27, line 9- page 28, line 3].

Long did not specifically state she had a work injury as "At that time, I didn't know it was a work injury. . . . to my understanding it was a slipped disc." [Tr. Page 28, lines 4-11].

The next day, Long was still in pain, so the next day – Tuesday, April 17, 2012 – she went to the ER at Palmetto Health Richland. The report states "She has developed this right arm pain that has been going on for a week. She says it hurts more at nighttime. She was seen at Providence and had a kind of pain in her right shoulder and progressed down her right arm. . . . They did not give her any follow-up and she is just concerned as the pain has not gotten any better, it has gotten slightly worse. She states she does not know what is causing this pain but is just causing some concern." [APA page 16].

The doctors at Palmetto Health were also unable to make a clear diagnosis. They ordered tests to rule out a Deep Vein Thrombosis and rhabdomyolysis – both of which were negative. [APA page 16]. She was ultimately released with a referral to an orthopaedic surgeon and a clinical impression of right upper extremity pain and muscle spasm. [APA pages 16-17].

Long continued to "have pain radiating from the neck all the way to the arm" – which continued to worsen. She returned to the ER at Palmetto Health Richland one week later on April

24, 2012. They again noted muscle spasms. They took cervical x-rays and stated "The patient will possibly need MRI" [APA pages 19-20].

On April 27, 2012, Long went to the Family Medical Center. She described "Right upper extremity pain - Pain started 3 weeks ago in the right side of her chest. This hurt for 2 days, then migrated to her right clavicle, and then up her right arm. She presented when she developed tingling pain down her whole arm to her fingers." The reported added "She recalls no injury. . . . she has been wearing a sling for 3 weeks now . . . The worst spot is the triceps and mid forearm." [APA page 30].

On physical exam, the doctor noted "right trapezius and paraspinal muscles in marked spasm easily visible. . . ." There was "markedly reduced ROM" in her shoulder and elbow. Long was diagnosed with "neck pain and neuropathy affecting the right arm – likely brachial plexitis." She was referred to neurosurgery. [APA pages 30-32].

Long returned to the Family Practice Center on May 2, 2012, where she was seen by Dr. Simon Tanksley. [APA page 33]. Dr. Tanksley ordered a cervical MRI. He also signed disability papers and made a notation "Very suspicious for malingering."[1] [APA pages 35-37].

Long had the cervical MRI done on May 9, 2012. It showed "focal disc protrusion and mild stenosis at C5-6. Otherwise unremarkable exam." [APA page 39].

She was not sure of the exact date, but somewhere around this time, Long attempted to return to work. She worked about an hour and a half – before her employer saw that she could not do the work and sent her home. [Tr. Page 28, line 16-page 29, line 2].

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[1]There is no evidence that Long was actually malingering. At this point, several weeks after her work injury, no doctor had correctly diagnosed the problem. Dr. Tanksley noted arm pain but ordered a cervical MRI.

Her employer had a co-worker bring her short-term disability documents. On the employee portion, Long checked "No" to whether the condition was "work-related" or "the result of an accident." [APA page 254]. As Long explained, "At the time when this paper was filled out, I was under the impression I had a slipped disc in my neck. So I didn't know it was a work-related injury." [Tr. Page 31, lines 2-15]. She also testified "The pain did start at work, but I didn't think it came from work." [Tr. Page 70, lines 24-25].

Dr. Tanksley filled out the Attending Physician Statement on May 11, 2012. He gave a date of disability beginning April 11, 2012 (the date of her injury) and a diagnosis of cervical radiculopathy. As to whether the "condition [is] due to injury or sickness arising out of patient's employment," Dr. Tanksley checked "Unknown."[2] [APA page 257].

On May 31, 2012, Long was seen by a neurosurgeon, Dr. Sweet. Dr. Sweet's impression was "asymptomatic cervical disc C5-6 and probably has shoulder pathology of some sort."[3] [APA page 66]. He referred her to an orthopaedic surgeon.

Long saw Dr. Andrew McGowan specifically for her shoulder on June 11, 2012. Under cause of pain, the note states "Started with chest pain and generated to shoulder and fingers." [APA page 67]. Dr. McGowan diagnosed Long with "Right shoulder rotator cuff tendinitis but with adhesive capsulitis." [APA pages 68-69].

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[2]The fact Dr. Tanksley was undecided was due to the incorrect diagnosis of cervical radiculopathy. Once he learned Long had a rotator cuff injury, he corrected his records to state "the context of the pain occurred with movement, **in association with work** . . ." [APA page 55 (emphasis added)].

[3]Dr. Sweet was the first doctor to actually diagnose shoulder pathology. After seeing Dr. Sweet and Dr. McGowan, Long reported her problem to her Employer as a work injury. She testified "I told Stacie [Dash] in the end of July when I found out for sure what was wrong with me." [Tr. Page 34, lines 13-22].

After physical therapy did not help, Long saw a shoulder surgeon, Dr. Chris Mazoue, on September 14, 2012. On that first visit, the history stated "Pain started April 10th and has not been to work since then. Does not remember a specific event. Says that pain originated at her chest and radiated out." [APA page 70].

Dr. Mazoue followed Long from September 14, 2012 until December 29, 2014. Surgery was recommended but not done until April 1, 2014 due to a lack of insurance. Long is currently under a 5-pound lifting restriction.

On January 20, 2015, Dr. Mazoue reviewed Long's entire medical history – including his own records and those of the other medical providers – and then completed a questionnaire. **Dr. Mazoue opined to a reasonable degree of medical certainty that her "right shoulder injury is most likely related to her activities as a laminator."** He also opined she was not at MMI and should remain under work restrictions. [APA page 111 (emphasis added)].

Dr. Mazoue agreed with the statement "My opinion is based on the history and symptoms reported by the patient, the signs shown on physical examination, imaging studies, and the operative findings." He added a handwritten notation stating: "*and review of records with reports to onset of pain and dysfunction and subsequent medical care.*" [APA page 111].

Dr. Mazoue was deposed on August 29, 2016. He was cross-examined by Defense Counsel on his opinions and shown numerous medical records – both on cross and direct examination. After reviewing the records shown by the attorneys, he added the handwritten notation "Because I think it's different to make a determination on the previous three questions, and I think that that additional documentation helped me to understand that there was a likely correlation between her work and her onset of her right upper extremity symptoms." [Mazoue Dep. Tr. Page 38, lines 1-6]. Dr. Mazoue

affirmed his opinion to a reasonable degree of medical certainty that Long had suffered a work-related injury to her right shoulder.

The case was tried before Commissioner Gene McCaskill on August 30, 2016. Commissioner McCaskill ruled " I find that did not satisfy her burden of proving a compensable injury by accident and/or compensable repetitive trauma while in the course and scope of her employment with the Defendants." [Order, Finding of Fact 62].

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2017).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages." Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. Long proved she suffered a work-related injury to her right shoulder, right arm and neck on April 10, 2012.

The evidence shows Long injured herself while working as a laminator for the Employer. "She had a severe onset of chest pain that radiated outward form the arm" at work while lifting rolls of laminate on Wednesday, April 11, 2012. [Tr. Page 23, line 18-page 26-line 6; APA page 72]. This is undisputed and there is no evidence to the contrary. Indeed, every medical record relates the onset of pain back to that date.[4] The Appellate Panel erred in disregarding the testimony and medical records when it found "we are not persuaded that the Claimant had an injury by accident on or about April 10, 2012." [FC Order, page 20, Finding of Fact 24]. The Appellate Panel further erred in denying a repetitive trauma injury (Appellant's alternate position) on the basis that "we find that there is no indication in the medical records – other than the opinion of Dr. Mazoue – that the Claimant was injured at work." [FC Order, page 20, Finding of Fact 24].

A. The statutory scheme for *injury by accident* versus *repetitive trauma injury.*

Historically, work-related repetitive trauma injuries were compensable as injuries by accident under section 42-1-160. See Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002)("We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma."). In 2007, the Legislature amended the Act to create the new category of

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[4] Providence Hospital; April 13, 2012 ("right sided shoulder and forearm pain x 3 days") [APA P. 1]. Palmetto Health Richland; April 17, 2012 ("this right arm pain that has been going on for a week.") [APA page 16]. Family Medical Center/Dr. Tanksley; April 27, 2012 ("Pain started 3 weeks ago in the right side of her chest") [APA page 30]. Short Term Disability Application; May 11, 2012 ("Date symptoms first appeared or accident happened Month April Day 11 year 2012 (APA page 257). Dr. Sweet; June 11, 2012 ("Injury Date: April 2012). Dr. Chris Mazoue; September 14, 2012. ("Pain started April 10th . . .."). [APA page 70].

"Repetitive trauma injury." S.C. Code Ann. § 42-1-172 (2007).

The vast majority of workplace injuries are still evaluated under § 42-1-160. The statute states "'Injury' and 'personal injury' mean only injury by accident arising out of and in the course of employment . . ." S.C. Code Ann. § 42-1-160 (A) (2007). As to repetitive trauma, the Legislature created a carve out whereby "[t]he word 'accident' as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease pursuant to the provisions of Chapter 11 of this title." S.C. Code Ann. § 42-1-160 (F) (2007).

If the injury arises out of a series of similar events over an extended period of times, then the case is analyzed under section 42-1-172. The statute requires "a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." S.C. Code Ann. § 42-1-172 (B) (2007). The statute creates a heightened burden because it requires "expert opinion or testimony stated to a reasonable degree of medical certainty . . ." S.C. Code Ann. § 42-1-172 (C) (2007). Conversely, an injury by accident can be proven by lay testimony alone (although medical evidence is helpful and can be required in complex cases). See e.g., Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999).

The key point here is that there is no dead zone between an *injury by accident* and a *repetitive trauma injury.* So long as there is medical causation of a connection to the workplace, the injury will be compensable under either statute. If the work activity does not involve regular, continuous or

frequent repetitive trauma over an extended period of time, the case is analyzed as an injury by accident under section 42-1-160.

As an example, work in a chicken processing plant involving processing thousands of chickens daily using the same simple hand motion every few seconds is the classic repetitive trauma injury. Conversely, the fast food worker who unloads 50 boxes from a truck once a week has not engaged in repetitive trauma. The fast food worker may realize he or she is hurting from an injury after finishing the task, yet not be able to identify which of the 50 boxes caused the injury (a scenario akin to the case at bar). The fast food injury is nonetheless compensable as an injury by accident because it did not involve repeated similar events over an extended period time.

In the instant case, the Appellate Panel found "that, while an argument can be made that if her work is repetitive, there is little testimony as to the repetitive nature of the job." [FC Order, page 21, Finding of Fact 28; APA pages 211-212]. The Appellate Panel erred in creating a dead zone where the cause of the injury is proven to be work-related, yet is not compensable because in the Commission's eyes it is neither a discrete one-time injury by accident nor a repetitive trauma injury. If there is no proof of "the repetitive nature of the job," the claim does not fail for lack of proof – it remains an injury by accident. In short, as the Appellate Panel effectively found the job was not repetitive, the analysis defaults back to section 42-1-160 and must be found compensable as an injury by accident.

B. Long's injury by accident arose out of her employment.

An injury arises out of the employment "when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Holley v. Owens Corning Fibreglas

Corporation, 301 S.C. 519, 392 S.E.2d 804, 807 (Ct. App. 1990), *aff'd.* 302 S.C. 518, 397 S.E.2d 377 (1990)(per curiam). In this regard, "if the injury can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment." Id. For an injury to arise out of employment, there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). An injury is compensable so long as it arises out of the employment "looked at in any of its aspects." Jordan v. Dixie Chevrolet, 218 S.C. 73, 79, 61 S.E.2d 654, 657 (1950). See, also Barnes v. Charter 1 Realty, 411 S.C. 391, 399, 768 S.E.2d 651, 655 (2015)("Barnes clearly established that she was performing her job when she sustained an accidental injury; we therefore hold her injuries arose out of her employment as a matter of law.")

When it started, Long's pain presented as chest, right arm and right shoulder pain. As she continued to work through Thursday and Friday, it got worse. She started getting radiating numbness and tingling down her arm into her fingers. With this onset of symptoms – and without a "slip, trip, fall or other fortuitous event" – Long did not understand what was going on. She should not be penalized or held to an impossible standard because she did not understand her injury. "The Act requires an injured employee to be diligent, not prescient." King v. Int'l Knife, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).

Long was in such severe pain by Friday night that she went to the emergency room. At the ER, she discussed her job as a causative factor, as the record notes "[Patient] has job in which she has repetitive arm movements." [APA P. 1]. The confusion arose because Long did not recognize what had happened to her and the doctors could not figure out what was wrong. It took several

months, multiple doctors, and a shoulder MRI before Dr. Mazoue made the correct diagnosis.

Long had severe muscle spasms in her right trapezius and paraspinal areas. She complained of numbness and tingling. Working diagnoses ranged from a deep vein thrombosis to rhabdomylosis, cervical radiculopathy, and brachial plexus neuropathy. No doctor figured out it was likely shoulder pathology until Dr. Sweet viewed her cervical MRI and determined her problems were likely emanating from shoulder pathology. If the doctors cannot figure it out, how can one expect a blue-collar factory worker with no medical experience to make the correct diagnosis? See McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(incorrect preliminary diagnosis by employee and her physician was not substantial evidence from which the Commission could infer that the injury did not result from an accident at work). Cf. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(applying discovery rule to toll the statute of limitations because the employee did not suspect nor have reason to suspect her problem resulted from a work accident until she was correctly diagnosed by specialist orthopaedic surgeon).

The *only* evidence in this case is that Long suffered a work-related right shoulder and arm injury on April 10, 2012. There is no evidence of any other event that could have caused it, nor is there any evidence that the torn rotator cuff and biceps were preexisting, degenerative or idiopathic. Her injury occurred at work while she was doing the normal duties of her job. The fact it came on insidiously does not change that essential fact.

There has never been a requirement that a claimant identify a specific instant or event when the injury happened. In Clade, the Supreme Court criticized the Court of Appeals for "focus[ing] on [the employee's] failure to prove a specific causal event instead of her failure to prove a causal relationship." Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1997). The court

explained: "This language which requires an injured employee to identify a specific event for an injury to be compensable contradicts the established law of this state." See Stokes v. First Nat'l Bank, 306 S.C. 46, 49, 410 S.E.2d 248, 250 (1991) ("[N]o slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident."). Clade stands for the proposition that a claimant must prove "a causal relationship" between the injury and the work; not identify a "specific event" when the injury happened.

Unlike the employee in Clade, Butler has consistently reported her injury as occurring with the "insidious onset" of pain at work on Wednesday, April 11, 2012.[5] Thus, while there was "no slip, fall or other fortuitous event," the evidence shows the injury occurred at work on April 11, 2012 – gradually worsening over the course of three days until she went to the emergency room after work on Friday. Butler testified: "the pain came on gradually. It started hurting that Wednesday. And as it got closer to that Friday, it was hurting worse. Then by Friday, my hand was going numb and my hands and stuff were tingling. So I thought something was medically really wrong with me." [Tr. Page 67, lines 9-14]. On cross-examination, she explained: "The pain did start at work, but I didn't think it came from work." [Tr. Page 70, lines 24-25].

This case is squarely controlled by McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)("misdiagnosis does not constitute substantial evidence from which the

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[5] Providence Hospital; April 13, 2012 ("right sided shoulder and forearm pain x 3 days") [APA P. 1]. Palmetto Health Richland; April 17, 2012 ("this right arm pain that has been going on for a week.") [APA page 16]. Family Medical Center/Dr. Tanksley; April 27, 2012 ("Pain started 3 weeks ago in the right side of her chest") [APA page 30]. Short Term Disability Application; May 11, 2012 ("Date symptoms first appeared or accident happened Month April Day 11 year 2012 (APA page 257). Dr. Sweet; June 11, 2012 ("Injury Date: April 2012). Dr. Chris Mazoue; September 14, 2012. ("Pain started April 10th . . .."). [APA page 70].

Commission could infer that [the injury] did not result from an accident at work."). Respondents attempt to distinguish McGuffin fails. Respondents argue "The Supreme Court's holding is wholly inapplicable because the claimant in McGuffin, unlike the Claimant in the present case, actually mentioned the nexus of the pain to the claimant's employment to both a coworker and the surgeon, but attributed her pain to her kidneys." [Respondents' Brief to the Full Commission, page 6].

Respondents' characterization is not wholly accurate. "When [McGuffin's] pain continued to worsen during the night, she sought treatment in the local emergency room. The urologist who examined her at that time testified her complaints were certainly consistent with a kidney stone." Id. After making the original diagnosis of a kidney stone, the urologist performed additional tests, ultimately concluding "the fact that she improved with bed rest and treatment for muscle strain indicated this was musculoskeletal pain." Id. McGuffin was referred to an orthopaedic surgeon. The surgeon testified "[McGuffin] told him she had been experiencing low back pain since lifting a heavy tray of parts at work." [Id.].

The Supreme Court explained how the Commission's analysis was erroneous:

> In reversing the award of the single Commissioner, the Full Commission relied heavily upon the preliminary diagnosis made by the respondent and her attending physicians. The Commission put great reliance on the fact that the respondent did not immediately attribute her pain to her lifting. The respondent had been lifting these trays eight to ten times a day for four months without incident. Therefore, it was not unreasonable for her not to make the connection at the time. This is especially so when as her physicians testified her pain was consistent with kidney type pain. This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her kidneys but was in fact musculoskeletal.

[Id.]

We have the same situation here. The single commissioner puts great weight on the fact "the claimant testified that she did not know her injury was caused by work." [Order, page 16; Finding

of Fact 31]. The single commissioner omits the fact that Butler also testified she learned her injury was work-related when she was given the correct diagnosis of a shoulder injury. She testified: "I told Stacie [in HR] in the end of July when I found out for sure what was wrong with me." [Tr. Page 34, lines 13-22]. Up until then, she had been misdiagnosed with a myriad of conditions ranging from cervical radiculopathy, brachial plexopathy; rhabdomylosis and a deep vein thrombosis. The misdiagnosis, both from Butler and her doctors, is understandable given her presentation. As reported to the Family Practice Center on May 2, 2012, "Pain started 3 weeks ago in the right side of her chest. This hurt for 2 days, then migrated to her right clavicle, and then up her arm. She presented when she developed tingling pain down her whole arm to her fingers."[6] The doctor noted "Confusing patient with unusual exam but marked pain and abnormal findings. At least 2 pathologies present-neck spasm and some neuropathy affecting the right arm – likely brachial plexitis." Not surprisingly, she was diagnosed with "Brachial neuropathic pain" on this visit – exactly three weeks after her injury. [APA page 31].

As to not immediately attributing her pain to lifting, Butler had been doing the same job for 12 years without incident. She was asked by the single commissioner, "What did you think had happened?" She responded:

> I didn't know because, see, I'm not a sickly person. So I didn't know what happened. I just knew that I was in pain and this is some kind of pain I never felt before. And

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[6]Butler's testimony at the hearing was virtually identical. She testified:

> I didn't notice until that Wednesday or on the 11th or the 10th, whichever day the Wednesday before the 13th. That's when I noticed it started – it was hurting. It started hurting that particular day and then it's just progressed just the way may arm was like numb and it started just tingling. It was hurting. So I just went into the emergency room then on that Friday. . . . I was at work [when it started hurting].

[Tr. Page 24, lines 2-13].

> then once my hand started going numb, I though something might be wrong because of, you know, kind of physical. Like I might – I mean, I just thought something might have been bad, bad wrong. I just didn't think it was my arm or could have been my neck or anything. I just thought something other than that was wrong with me. . . . What initially made me go is because my arm was going numb and I was scared that I could – I could possibly die or something.[7] So I went on to the doctor.

[Tr. Page 40, line 9-page 41, line 2].

As in McGuffin, "it was not unreasonable for her not to make the connection at the time. This is especially so when as her physicians testified her pain was consistent with [cervical radiculopathy]. This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her [cervical spine] but was in fact [her shoulder]." McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(alterations added).

The fact is Butler's treating physicians *did* diagnose her with a work-related shoulder injury. Dr. Mazoue – as noted by the Appellate Panel – "opined that those issues are work-related." Furthermore, "Dr. Mazoue does not change his opinion to any of the above [in his deposition testimony]. [Order, pages 14-15; Findings of Fact 20-23].

The Appellate Panel overlooked Dr. Tanksley's final opinion. Dr. Tanksley's original *electronic* medical record of May 2, 2012 (cited by the Appellate Panel) states: "The context of the pain: occurred not following a fall, not during sports and not in association with work." [APA page 35]. On May 11, 2012, Dr. Tanksley avoided giving an opinion when filling out the Attending Physician Statement. As to whether the "condition [is] due to injury or sickness arising out of patient's employment," Dr. Tanksley checked "Unknown." [APA page 257]. On July 30, 2012, once he learned Butler had a rotator cuff injury rather than cervical radiculopathy, he corrected his records

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[7]Dr. Mazoue testified: "Well, whenever someone has chest pain, you know, you get worried about other non-musculoskeletal causes. You know, cardiac issues, things like that." [Mazoue dep tr. Page 32, line 25-page 33, line 3].

to state "the context of the pain occurred with movement, **in association with work**..." [APA page 55 (emphasis added)].

Dr. Tanksley and Dr. Mazoue have given explicit opinions making the causal connection between work and the injury. They are also the *only* two doctors who actually followed and treated Butler. Dr. Tanksley followed Butler from May 2nd through July 30, 2012. Dr. Mazoue followed her from September 14, 2012 through December 29, 2014. Drs. Sweet and McGowan each saw her one time – and neither gave an explicit opinion one way or the other as to the cause of her injury. *No doctor has given an opinion that Long's shoulder injury is not work-related.* This is important because there is no conflict in the evidence – there is nothing to weigh. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)("evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision of the Industrial Commission."); Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965)("Expert testimony is not binding upon the fact-finding body ***if*** there is competent substantial evidence to the contrary, though in matters of such kind which are not of common knowledge, fact finding body must accept opinion of experts.").[8]

[8]Massey is particularly apropos to the instant case. In Massey, "There was evidence that respondent failed to report his injury as work-related, and indeed, at one point stated it was not work-related. Even after reporting the injury, he was unable to point to any specific accident. Respondent's doctors diagnosed his injury as "degenerative" or developing over a period of time." Id. Despite these observations, a majority of the South Carolina Supreme Court held the "evidence supporting a compensable injury is overwhelming..." Id. As in McGuffin, a claimant's misapprehension about the nature of the injury is not substantial evidence to support a decision denying the claim.

Some of the medical records state "no trauma" or "no specific incident." This is to be expected given the insidious nature of Long's injury and difficulty in understanding exactly what the injury was. As we know from the case law, the lack of a specific event makes no difference. One only need prove the causal relationship between the work and the injury. Long met her burden by (1) consistently reporting that her pain began on Wednesday April 11, 2012, while she was at work; (2) making the causal connection to work once she was correctly diagnosed with a shoulder injury; and (3) by submitting *unrefuted* expert medical testimony stating her injury was work-related by two treating physicians. Respondents presented no evidence to contradict these medical opinions. As such, the Appellant Panel should be reversed and the Appellant should be awarded appropriate benefits for her compensable injury by accident. Long should be placed on a running award of temporary total disability compensation, her past medical treatment should be paid for, and she should be returned to Dr. Mazoue for additional follow-up evaluation and treatment.

C. If not an injury by accident due to the work being repetitive, Long suffered a compensable repetitive trauma injury arising out of her employment.

Should the Court find this case involves a repetitive trauma injury, then the Commission should still be reversed as there is a lack of substantial evidence to support the Appellate Panel's holding that "we find that, even after extensive review, we cannot make a finding of compensability without speculation." [Order, page 22; Finding of Fact 34].

The statute states: "A 'repetitive trauma injury' is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172 (D) (2007). Dr. Mazoue gave exactly that opinion in the suggested statutory language: "There is a direct causal

relationship between the condition under which the work is performed and the injury. [APA page 111).

Furthermore, the Appellate Panel need not resort to speculation. If anything, the denial is based on speculation. The Appellate Panel was reversed in Burnette for adopting the medical opinion of the single commissioner when "no evidence indicates this opinion originated from a medical provider." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013) As, Dr. Mazoue explicitly provided medical evidence of causation to a reasonable degree of medical certainty, the Panel need not resort to making its own medical diagnosis. It merely needs to rely on the evidence before it.

Therefore, if the Court does not find Long suffered an injury by accident, it should find Appellant met her burden of proof by medical evidence and should be awarded compensation and medical treatment for her injuries.

2. It was error to disregard Dr. Mazoue's uncontradicted medical opinion as proof of causation.

The Appellate Panel rejected Dr. Mazoue's expert opinion, making this finding of fact:

> Based on the substantial evidence, including Claimant's testimony and the medical records of Claimant, we find that Dr. Mazoue has opined that those issues are work-related. **That being said, his conclusion as to that work nexus does not come while he is actively treating her. It comes some time later in a medical questionnaire.** (APA p. 111). As such, we cannot give that opinion the weight we would normally give such opinion offered contemporaneously to the alleged date of injury. [Order, page 22, finding of fact 33 (emphasis added)].

Dr. Mazoue treated Long for quite a long time – September 14, 2012 through December 29, 2014. He would have kept on treating her had she not lost her health insurance at the beginning of 2015. He was very familiar with her and her condition, particularly since he had seen her longer and

more frequently than any other doctor – and because he actually operated on her.

The "some time later in a medical questionnaire" referred to by the Single Commissioner and Appellate Panel was January 20, 2015. It was a mere *twenty-two* days from the previous date of active treatment. Respectfully, it is an error of law to disregard medical evidence in the absence of other competing evidence. "The nature and timing of [a patient's] visits do not discredit [a physician's] medical opinion." Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). Cf. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

Dr. Mazoue's opinion (and Dr. Tanksley's opinion) that Long's condition is work-related are unrefuted and uncontradicted. Both opinions were given close in time to when Long was actively treating with each doctor. In each case, the opinions were given with some thought behind them.

Dr. Tanksley originally indicated the cause of Long's "pinched nerve" was "unknown." Upon learning of the correct diagnosis, he *changed* his records to indicate "in association with work." [APA page 55 (emphasis added)]. He made the connection between the injury and work on July 30, 2012 – only three and a half months after the injury and well before the surgery. In fact, this was even *before* Dr. Mazoue saw Long for the first time.

Dr. Mazoue did not merely check a box on a questionnaire. He added a handwritten notation supporting his opinion. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978)("It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value."). Moreover, he defended his opinion in a deposition.

It was error to disregard the medical opinions of Dr. Mazoue and Dr. Tanksley in favor of

speculation. The Decision and Order of the Appellate Panel should be reversed.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should issue an opinion awarding medical treatment and temporary total disability compensation to Appellant.

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Columbia, South Carolina
October 9, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

Doretta Butler-Long, Employee, Claimant, ... Appellant,

v.

ITW Labels, Employer and American Zurich Insurance Company/Zurich North America c/o Broadspire, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Kaitlyn L. Cropf, legal secretary for the Samuels Law Firm, LLC, have served the **Appellant's Initial Brief and Designation of Matter** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2017, addressed as follows:

Jason W. Lockhart, Esquire
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia SC 29211

October 9, 2017

Kaitlyn L. Cropf

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SAMUELS

STEPHEN B. SAMUELS
ATTORNEYS AT LAW

October 9, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Doretta Butler v. Illionis Tool Works (F B Johnston Graphics, Inc.)
WCC File No. 1221499
Claim Number: 186548843

Dear Ms. Kitchings:

Please find enclosed the original and one copy of **Initial Brief of Appellant** and **Designation of Matter** for filing in the above-referenced matter. Please file the original and return the clocked copy to my courier.

By copy of this letter and enclosure to Jason W. Lockhart, counsel of record for the Respondent, we are serving him with a copy of our **Initial Brief of Appellant** and **Designation of Matter** as indicated by the attached Certificate of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/klc
Enclosure(s)

cc: Jason W. Lockhart, Esquire