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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM  
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-001106  
WCC File No.: 1417078

Nathan Buchanan, Employee, Claimant..... Respondent,

v.

City of Hanahan, Employer, and  
State Accident Fund, Carrier, [redacted].....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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SC Court of Appeals

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November 21, 2017

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## ARGUMENT IN REPLY

### **I. THE COMMISSION ERRED IN ABUSING ITS DISCRETION BY LEAVING THE EVIDENTIARY RECORD OPEN TO ALLOW FOR RESPONDENT'S UNTIMELY INDEPENDENT MEDICAL EVALUATION.**

In the Respondent's Brief, Respondent argues that the Commission did not abuse its discretion by leaving the evidentiary record open to allow for admission of a medical report that was not available when the hearing began. Respondent cites S.C. Code Ann. Regs. 67-612(E) which states that failing to provide a report by the deadlines prescribed in S.C. Code Ann. Regs. 67-612 (B)(1) and (2) "may" result in the report's exclusion. Respondent contends based on this subsection that the Commission acted within its discretion by allowing in the medical report that was not available at the time of the hearing. As indicated below, the evidence clearly shows that the Commission in fact did abuse its discretion by leaving the evidentiary record open to allow for admission of the untimely medical report.

As stated above, S.C. Code Ann. Regs. 67-612(E) allows the Commission to exclude any report that is not submitted timely under S.C. Code Ann. Regs. 67-612 (B)(1) and (2). In this case, there is no argument by Respondent that the IME report was submitted timely. Rather, Respondent argues that the Commission did not abuse its discretion in allowing this untimely report into evidence. Appellants argue that, by failing to indicate in any way that a compensable low back injury was being alleged up until the filing of Respondent's Pre-Hearing Brief on February 25, 2016, thirteen days before the scheduled hearing, when ample time was available to allege another body part up to that point, the Commission in fact did abuse its discretion in allowing in the untimely evidence which was used to find that Respondent had sustained a causally-related injury to his low back and was not at maximum medical improvement for that low back injury.

Respondent also argues that the Commission's discretion to allow in the untimely IME report is supported by the adjournment regulation under S.C. Code Ann. Regs. 67-613(B)(1)(c). This regulation explains that a Commissioner may postpone a hearing for good cause and that good cause includes the need to conduct additional discovery. Respondent argues that the Commission followed that procedure here by allowing the hearing to go forward at the designated time, but postponing the hearing's conclusion until after receiving the untimely IME report.

As indicated above, S.C. Code Ann. Regs. 67-613(B)(1)(c) states that a Commissioner may postpone a hearing for good cause. This regulation does not state that a Commissioner may allow a hearing to begin, yet keep the record open to allow for additional evidence that was not submitted at the start of the hearing. Respondent argues that such a scenario qualifies as postponing a hearing, but this is not what a clear reading of the statute indicates. For this reason, the Commission further abused its discretion in allowing in the untimely IME report.

Finally, as indicated in Appellants' Initial Brief, a primary purpose of the notice requirements contained in the South Carolina Workers' Compensation Regulations is to allow all parties to adequately assess a claim and prepare for an evidentiary hearing. By allowing admission of the untimely IME report, the Commission clearly violated Appellants' right of due process. As indicated above, although there was ample time to allege another compensable body part, Respondent failed to do so until thirteen days before the scheduled hearing. Further, the IME report detailing a potential low back injury was not provided until the date of the hearing. As a result, Appellants did not have an opportunity to investigate potential compensability of the low back, did not have an opportunity to have Respondent evaluated by the authorized treating physician (the untimely IME was from an unauthorized physician), or have the ability to obtain evidence to refute the alleged low back injury. The Commission's violation of Appellants' right to due process

by allowing in the untimely IME report is only further evidence that the Commission abused its discretion in allowing in the report, and for the above reasons, the Full Commission ruling should be overturned.

**II. THE COMMISSION'S FINDING THAT RESPONDENT'S KNEE INJURY AFFECTS HIS BACK IS NOT SUPPORTED BY THE EVIDENCE AND IS CLEARLY ERRONEOUS.**

Respondent argues that the Commission's finding that Respondent's knee injury affects his back is supported by the evidence and is not clearly erroneous. As indicated below, this finding by the Commission in fact is clearly erroneous and is not supported by the evidence.

As indicated in the South Carolina Supreme Court opinion of *Transp. Ins. Co. v. S.C. Second Injury Fund*, this Court can reverse or modify the decision of the Commission if the substantial rights of the Appellants 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 of the whole record. (389, S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010)).

Again, Appellants were unaware that Respondent was even alleging a low back injury until thirteen days before the hearing when Respondent filed his Pre-Hearing Brief. From the date of accident on August 9, 2014 until being released at maximum medical improvement by Dr. McCoy on August 26, 2015, Respondent made absolutely no mention of any low back pain. In fact, in Dr. McCoy's August 26, 2015 MMI note, he specifically indicated that Respondent was not having back pain. (R. p. 83). The only evidence tending to show a back injury is Dr. McConnell's IME report which, again, was submitted untimely. As the Commission abused its discretion in allowing in the untimely report from Dr. McConnell, discussed in further detail above, it should be excluded and not considered in this case.

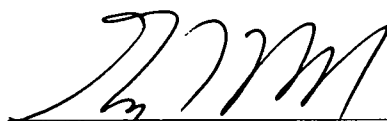
When questioned at the hearing, Respondent openly admitted that he never asked anyone at either the State Accident Fund (Carrier) or the City of Hanahan (Employer) for medical treatment for his alleged low back injury. (R. p. 39). He further admitted at the hearing that he made no complaints to his primary care physician about low back pain. (R. p. 44). Of note, at the time of the hearing on March 9, 2016, Respondent testified that he had been treated with his primary physician for approximately two years. *Id.*

As Appellants have been prejudiced because the Commission's decision is clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record, this Court should reverse the Commission's decision, remove the untimely submitted IME report, and deny Respondent's alleged low back injury.

#### **CONCLUSION**

For all the foregoing reasons, the decision of the Appellate Panel should be reversed, the untimely evidence should be removed from consideration, and Respondent's alleged low back injury should be denied.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

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

Tuesday, November 21, 2017



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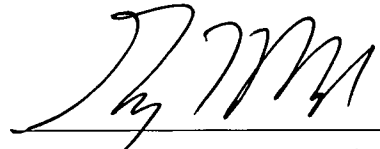
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I certify that I have served the Final Reply Brief of Appellants on the Respondents by depositing a copy of the document in the United States Mail, first class postage prepaid, on November 21, 2017, addressed to their attorneys of record, Matthew W. Jackson, P.O. Box 62888, North Charleston, SC 29419 and Black A. Hewitt and John S. Nichols, PO Box 7965, Columbia, SC 29202.

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