THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR AIKEN COUNTY
South Carolina Workers Compensation Commission
Appellate Panel

Appellate Case Number 2017-001757

Sarah White, Employee, Appellant

vs.

NHC Parklane, Employer and Premier Group Insurance, Carrier, Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

Pursuant to Rule 208, SCACR the Respondents respectfully submit that the following issue is presented for the Court's consideration in this matter.

1. IS THE COMMISSION'S DECISION AND ORDER IN THIS CASE SUPPORTED BY THE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD AS A WHOLE?

STATEMENT OF THE CASE

This is a workers' compensation case. The Appellant, Sarah White, contends that she sustained an injury to her lower back on May 18, 2011 as a result of an accident arising out of and in the course of her employment with the Employer. (Appellant's Form 50). She further contends that she is entitled to payment of temporary total compensation and payment of medical expenses incurred as a result of her injury. (Appellant's Form 50). She also asserts that she has not reached the point of maximum medical improvement with regard to her alleged injury and is entitled to receive additional medical treatment. (Appellant's Form 50).

The Respondents deny that Ms. White sustained any injury arising out of and in the course of her employment. (Respondent's Form 51). They further deny that she is entitled to any compensation and benefits under the South Carolina Workers Compensation Law. (Respondent's Form 51).

This matter was initially heard by Commissioner Aisha Taylor in February 2016. (Decision and Order dated 7/26/16). Following that hearing Commissioner Taylor issued her Decision and Order denying Ms. White's claim for compensation and other benefits. (Decision and Order dated 7/26/16). Ms. White subsequently requested that the Full Commission review that decision. (Appellant's Form 30). An Appellate Panel of the Commission then conducted a review

hearing and subsequently affirmed Commissioner Taylor's decision in this case. (Decision and Order dated 7/24/17). Ms. White then filed a Notice of Appeal of the Commission's decision.

ARGUMENT

I. THE COMMISSION'S DECISION AND ORDER FOR THIS MATTER IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD AS A WHOLE.

Upon review in South Carolina, a decision of an administrative agency should be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(g)(6) (1976); Lark v. Bi-lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. Tobey v. L & P Construction Company, 296 S.C. 122, 370 S.E. 2d 897 (Ct. App. 1988).

Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency involved reached to justify its decision. Harrell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E. 2d 384, 385 (1987). The substantial evidence rule means that the court will not overturn findings of fact by an administrative agency unless there is no reasonable probability that the fact could be as related by the witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., infra. When factual findings are supported by substantial evidence, analogous to a jury's finding of fact on disputed issues, the agency's conclusions should be affirmed. Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E. 2d 613 (1986).

Ms. White contends that she injured her lower back on May 18, 2011 when a co-

worker allegedly and violently shook her chair while she sat working at a nursing station at the Employer's long-term residential care facility in Columbia. (Transcript of 2/4/16 Hearing). She testified that she immediately felt pain in her lower back following this incident. (Transcript of 2/4/16 Hearing).

Of note, Ms. White previously filed a claim against the Respondents in this case for injuries to her lower back and pelvis which she alleged occurred on March 14, 2011, and as further set forth in South Carolina Workers' Compensation Commission File No. 1103876. Following a hearing this claim was denied by Commissioner T. Scott Beck by his Decision and Order filed on December 19, 2011. (Decision and Order dated 12/19/11). Ms. White did not request review of Commissioner's Beck's decision

Extensive medical records were submitted by the Parties at the hearing held before Commissioner Taylor. Those records reflect that Ms. White sought treatment at Moncrief Army Hospital at Fort Jackson in Columbia on March 21, 2011 and complained of menstrual problems. (Respondents' APA - Moncrief Army Hospital). The report for that visit also reflects that the Ms. White was currently using Hydrocodone, a strong narcotic pain medication. (Respondents' APA - Moncrief Army Hospital). Ms. White next sought treatment at Moncrief on March 24, 2011. (Respondents' APA - Moncrief Army Hospital). The report for that visit reflects that she had experienced pelvic pain for one month. (Respondents' APA - Moncrief Army Hospital). Neither of these reports make reference to any type of injury related to any type of accident.

Ms. White sought treatment at Moncrief on March 30, 2011. (Respondents' APA - Moncrief Army Hospital). The report for that visit reflects that she complained of right flank pain for two days. (Respondents' APA - Moncrief Army Hospital). The report also makes reference to

her experiencing such problems for two months. (Respondents' APA - Moncrief Army Hospital). There is no mention in this report to any type of injury or accident.

In the report for the visit at Moncrief on March 30, 2011 reference is also made to Ms. White experiencing low back and left buttock pain which began gradually. (Respondents' APA - Moncrief Army Hospital). An MRI of her lower back was performed on March 31, 2011 which showed some degree of disc protrusion and an annular tear without disc protrusion. (Appellant's APA - Palmetto Imaging). A patient information sheet accompanying the MRI report indicates that Ms. White had experienced problems for two months. (Appellant's APA - Palmetto Imaging). In response to the question as to whether or not such problems occurred at work the words "Not sure" are written. (Appellant's APA - Palmetto Imaging).

On May 26, 2011, Dr. C. Philip Toussaint evaluated Ms. White. (Respondents' APA - Dr. Toussaint). In his report of that date he noted that Ms. White complained of lower back and leg problems following a work-related accident in March 2011. (Respondents' APA - Dr. Toussaint). He further noted that she recently developed numbness in her right arm which she related to a more recent work-related incident. (Respondents' APA - Dr. Toussaint).

A report for a series of nerve conduction studies performed for Ms. White on June 27, 2011 reflects normal findings. (Respondents' APA - Dr. Westerkam).

In a memorandum dated July 18, 2011, Larry Dillard, then a physician's assistant at Moncrief Army Hospital, wrote that Ms. White sustained a injury to her lower back on March 14, 2011. (Respondents' APA - Moncrief Army Hospital). No reference is made in this memorandum to any alleged accident or injury which occurred in May 2011.

Another MRI of Ms. White's lower back was performed on August 12, 2011.

(Appellant's APA - Palmetto Imaging). Noting the disc protrusion and tear revealed by the March 2011 MRI, the radiologist reviewing the August 2011 MRI stated "No significant deformity of the right L5 nerve root although there is a slight posterior position suggesting there may be chronic posterior deflection." (Appellant's APA - Palmetto Imaging).

As noted, Ms. White presented a claim for compensation and benefits arising out of an alleged March 2011 incident, contending that she had sustained an injury to her lower back. That claim was considered by the Commission in October 2011. (Decision and Order dated 12/19/11). No request was made to consolidate or consider at that hearing Ms. White's claim that she sustained another injury in May 2011.

Ms. White was also evaluated by Dr. Ezra Riber in August 2012. In his report of that date Dr. Riber set forth that Ms. White complained of lower back pain that started on March 14, 2011 and pain in her gluteal region which began on May 18, 2011. (Appellant's APA - Dr. Riber). In that report Dr. Riber also stated "This is somewhat challenging to sort out since she has had two different work-related injuries". (Appellant's APA - Dr. Riber).

At the hearing before Commissioner Taylor Ms. White also submitted a medical questionnaire completed by Mr. Dillard and his supervising physician, Dr. Richard Cheng. (Appellant's APA - Mr. Dillard and Dr. Cheng).

As part of her request for Commission Review of Commissioner Taylor's Decision and Order Ms. White argued that there is clear medical evidence which establishes that she sustained a new injury to her lower back in May 2011 when the co-worker allegedly and violently shook her chair, or her pre-existing problems were aggravated as a result of that incident. The Respondents respectfully submit that there is insufficient medical evidence, which meets the applicable standard

here, to support such a claim. Further, there is medical and other evidence which fully supports a contrary conclusion.

This case, unquestionably, is medically complex. The fact that Ms. White herself has presented two claims for compensation and benefits, arising out of alleged incidents within a two-month period, and involving one area of her body, gives rise to such a classification. Under such circumstances the law requires Ms. White to present reliable medical evidence, submitted by qualified medical physicians, to assist the Commission and the Court in defining the nature of the injury involved and the source and cause of that injury.

Ms. White appears to agree with that proposition, as she has offered the opinions of Mr. Dillard and Dr. Cheng to support her claim. Those opinions, however, are insufficient to meet the legal standard applicable in this case.

In support of their positions here, the Respondents respectfully submit that Dr. Cheng is a weight-loss specialist. (Respondents' APA - Dr. Cheng's Website). There is no evidence that he possesses the qualifications and background to read and interpret technical diagnostic reports and to otherwise diagnose an injury to a person's spine. In fact, there is no evidence that he actually reviewed Ms. White's diagnostic studies, including the MRIs which were performed in March and August 2011.

Mr. Dillard is not a physician. Granted, S.C. Code Ann. § 42-1-160 (1976) states that medical evidence to establish causation in a complex case includes opinions offered by a "licensed health care provider", there must be some evidence to establish that the provider has the necessary qualifications to offer those opinions. In fact, S.C. Code Ann. § 42-1-172 (1976), which deals with "Repetitive Trauma Injury" states specifically that medical evidence to establish causation must be

offered by licensed and qualified "physicians".

Moreover, if Ms. White argues that the May 2011 incident did not cause her lower back problems, but aggravated them, she still must meet the burden of producing medical evidence from a licensed health care provider which establishes such an aggravation. See S.C. Code Ann. § 42-9-35 (1976).

Further, neither Dr. Cheng nor Mr. Dillard's opinions are stated to "a reasonable degree of medical certainty", which is also required by the statutory provisions applicable here. This phrase is a term of art in the law of workers' compensation. The legislature included that phrase for a reason.[1] The bases for such reasoning is displayed in this case. A close reading of Mr. Dillard's and Dr. Cheng's joint-opinions here reveals that they believe that the alleged May 2011 incident "developed" Ms. White's "posterior deflection of the right L-5 nerve root", when the radiologist who read the MRI stated that there "may be chronic posterior deflection". In addition Dr. Cheng and Mr. Dillard state that the May 2011 incident "most certainly can" aggravate Ms. White's lower back problems, instead of whether or not it did, or most probably did, cause an aggravation of an underlying condition.

The requirement that opinions in complex cases be offered by qualified providers, and to a reasonable degree of medical certainty, ensures that the Court, the Commission and the Parties are given clear guidance from trained medical professionals as to the source, cause and nature of physical and mental injuries. And perhaps most importantly, opinions which aid those involved with developing a plan of treatment which best suits the injured worker.

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[1] One might argue that the use of the words "medical certainty" suggests that the Legislature, in fact, intended that only opinions of medical physicians be considered in cases where such evidence is required.

In fact, there are ample qualified providers involved in Ms. White's care who could have offered such reliable opinions, including Dr. Toussaint, Dr. Bethea and Dr. Riber. Having the burden of proof in this matter Ms. White should have obtained those opinions, if favorable to her.

In addition to requiring reliable and competent expert evidence be provided in certain cases the South Carolina Supreme Court, on numerous occasions, has addressed the requirement that all types of evidence, both lay and expert, be considered in reaching a decision in a workers' compensation case. In Tiller v. National Health Care Center of Sumter, 334 S.C.333, 513 S.E.2d 843 (1999) the Court reached a seminal decision in this regard, by stating:

> The Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. See Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946) (despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award); Poston v. Southeastern Construction Co., 208 S.C. 35, 36 S.E.2d 858 (1946) (lay testimony that claimant's eyes became runny and inflamed after some construction material blew into them and that claimant lost vision in eyes subsequent to the accident was sufficient to support an award, even though doctor testified vision loss was not related to job injuries).

Granted, in Tiller, and the cases cited by the Supreme Court, awards of benefits and compensation were based on lay evidence, and not expert evidence, the rule of law established by these decisions clearly flows in both directions.[2] In other words, the Commission may rely on all types of admissible evidence in determining whether or not an injured worker is entitled to certain compensation and benefits.

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[2] Of course, the ruling in Tiller was subsequently modified by legislation enacted by the General Assembly in 2007, some of which is cited here. However, that legislation did not abrogate the requirement that the Commission consider all types of evidence in reaching its decisions.

Thus, while medical testimony is entitled to great respect, the Commission as the ultimate fact finder may look to other competent evidence in the record to support its decision. Ballenger, supra. As stated by the Supreme Court, "indeed, medical testimony should not be held conclusive irrespective of other evidence." Ballenger, 209 S.C. at 467, 40 S.E.2d at 682-83. Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Poston, supra; Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949). Finally, and perhaps most importantly, expert testimony, once admitted, is to be considered just like any other testimony. Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943).

The reason and basis for this long-established precedent is clear and well-founded: just because an expert offers an opinion does not mean that it is not subject to being challenged. Such is especially the case when an expert's opinion is built upon an unstable foundation. That is, facts which are not accurate. Otherwise, the opinion rests on nothing but shifting sand and is not reliable. The Commission, in viewing all of the evidence presented in this case, chose to decide that the opinions offered by Ms. White in this case did not reach the level of such reliability as to support the foundation upon which she builds her case.

The Commission also considered other evidence to support its decision in this case. For example, Mr. Dillard issued his memorandum dated July 18, 2011, two months after the alleged May 2011 incident, and makes no reference that incident with respect to the source and cause of Ms. White's lower back problems. In that memorandum, he notes only that she injured her lower back on March 14, 2011 while working for the Employer in this case. Dr. Toussaint also mentions with specificity an incident in March 2011 which, according to Ms. White, produced progressive back and

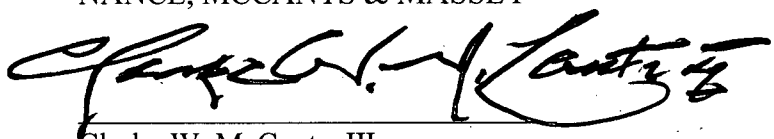
lower extremity complaints. He notes also that Ms. White related right upper extremity problems to a "more recent work related incident."

Finally, the Commission found as fact that Ms. White's testimony at the hearing in this case was non-responsive to the questions posed to her. A review of the transcript reveals that such testimony centered around questions to how and when her lower back problems truly started, and the source and cause of them. In sum, the Commission found that Ms. White's testimony in this case simply is not credible and does not support her claim for compensation and benefits.

CONCLUSION

The Respondents submit that the Commission's decision in this case is supported by the substantial evidence contained in the record for this matter. For this reason they respectfully ask that it be affirmed.

NANCE, MCCANTS & MASSEY



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Dated: January 12, 2018

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In the Court of Appeals

APPEAL FOR AIKEN COUNTY
South Carolina Workers Compensation Commission
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Appellate Case Number 2017-001757

Sarah White, Employee, Appellant

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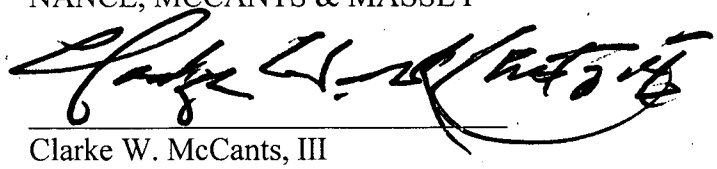
NHC Parklane, Employer and Premier Group Insurance, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of the Respondents and Designation of Matter to be included in the Record on Appeal on Counsel for the Appellant, Christopher J. Archer, Esquire, by depositing a copy of the document in the United States Mail, postage prepaid, on January 12, 2018 addressed to Christopher J. Archer, Goowwyn Law Firm, LLC, 2519 Devine Street, Suite A, Columbia, S.C. 29205.

January 12, 2018

NANCE, MCCANTS & MASSEY



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January 12, 2018

The Honorable Jenny Abbott Kitchings
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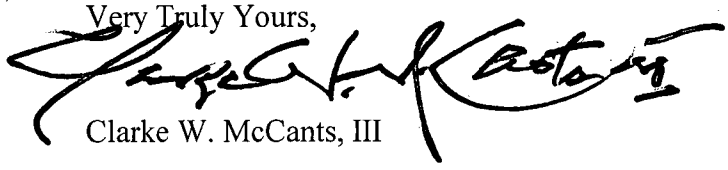
In Re: Sarah White v. NHC Parklane, et al.
Appellate Case No. 2017-001757

Dear Ms. Kitchings:

Please file in the above-referenced matter the enclosed Initial Brief of the Respondents and their Designation of Matter to be Included in the Record on Appeal, with Proof of Service thereof upon Counsel for the Appellant.

Thank you. With best regards, I am

Very Truly Yours,



Clarke W. McCants, III

CWMIII
Enclosure

cc: Christopher J. Archer, Esquire