

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

Appellate Case No.: 2017-001947
W.C.C. File No.: 1512220

Rico Dorsey, EmployeeAppellant,

vs.

Allwaste Services, Inc., Employer, and Bridgefield Casualty
Insurance Company c/o Summit Holdings, Inc., Carrier Respondents.

FINAL BRIEF OF RESPONDENTS

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¹ The parties have not disputed the versions of the statutes or regulations cited in this brief as the parties did not litigate any changes in these laws; therefore, the brief includes citations to the iterations in effect at the time of the final hearing.

STATEMENT OF ISSUES

Whether the Commission committed a reversible error by closing the record as of August 3, 2016, when substantial evidence supports finding the Commission did not abuse its discretion in denying Appellant's request to leave the record open to take the depositions of Dr. Leonard E. Forrest and Dr. R. Blake Dennis.

STATEMENT OF THE CASE

Rico Dorsey alleged he sustained a work-related injury by accident on July 17, 2015. On February 25, 2016, after providing Dorsey with medical treatment and temporary total disability benefits (TTD), the employer, Allwaste Services, Inc. and its insurance carrier, Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. (collectively, "Allwaste") filed a Form 21 Request for Hearing. After multiple postponements, the hearing proceeded on August 3, 2016, before Commissioner Aisha Taylor (the Single Commissioner).

In an October 4, 2016 order, the Single Commissioner concluded Dorsey reached maximum medical improvement (MMI) on February 4, 2016, for his compensable right arm and low back injury, his right arm injury resolved with no permanent disability, he sustained an 8% permanent partial disability to his low back, Allwaste was entitled to credit for TTD paid after the date of MMI, and any alleged claim regarding the neck was denied. Further, the Single Commissioner determined the record was closed as of the date of the hearing—August 3, 2016, denying any request to leave the record open for the depositions of Dr. Leonard E. Forrest and Dr. R. Blake Dennis.

Dorsey appealed the Single Commissioner's decision to the Full Commission Appellate Panel (Appellate Panel). The Appellate Panel affirmed the decision with minor modifications. Dorsey filed a motion for reconsideration, which the Appellate Panel denied. This appeal followed.

STATEMENT OF FACTS

Dorsey's job involved loading and unloading curbside trash onto a garbage truck. (R. p. 136). Dorsey suffered an injury on July 17, 2015, when the garbage truck hit him as he was performing his job duties. Cathy Odom drove the truck and Dorsey's co-worker, Sammie Bell, was present when the incident occurred. (R. pp. 137, 367).

There is a discrepancy in the record as to the description and impact of the accident. During Dorsey's deposition on March 28, 2016, while discussing the accident, he testified as follows:

Dorsey: And [Odom] knocked me she knocked me from maybe like that wall through that wall, through a little bit through that wall (indicating).

Allwaste: Did you fly through the air?

Dorsey: Yeah. You get hit with a big piece of steel like that.

Allwaste: How far did you go?

Dorsey: I went from about that wall to that--to that to that wall to wall.

Allwaste: What ten, twelve feet? Longer? Shorter?

Dorsey: just--just

Allwaste: *I'm asking you. I'm not trying to put words in your mouth.*

Dorsey: I want to say about from--much as I got thrown from here from that wall right there to that, however--however many feet that is yeah.

...

Allwaste: And did you--were you in the air for that long, or did you just--did you just--I mean tell me how you--

Dorsey: It mostly pushed me. It mostly pushed me and like threwed me up in the air like--yeah, it pushed me and threwed me up in the air like. Because see, I--got hit with the back of the truck.

(R. pp. 328-29) (emphasis added). He further stated he fell to the ground as a result of the accident. (R. pp. 329-30).

On the day of the accident, July 17, 2015, Dorsey reported to Doctor's Care that he had been struck on the back and right arm by a truck while the truck was backing up. (R. p. 458). He denied falling as a result of the incident. (R. p. 458). In an October 7, 2015 MRI report, the radiologist who conducted the MRI noted Dorsey "was hit by a garbage truck and thrown several feet." (R. p. 508). On April 7, 2016, Dorsey presented to Southeastern Spine Institute and in his intake form, he reported being struck by a garbage truck "knocking me at least ten feet." (R. p. 82). He reported to Dr. Forrest that his symptoms started when he was struck by a garbage truck and knocked to the ground. (R. p. 416).

Dorsey's co-worker, Sammie Bell, testified in a deposition that he witnessed the July 17, 2015 accident. (R. p. 367). Bell testified that when the truck hit Dorsey, Dorsey did not fly through the air or fall to the ground. (R. p. 368). Bell testified Dorsey continued working for the rest of the day following the accident. (R. pp. 368-69).

During the August 3, 2016 hearing before the Single Commissioner, Dorsey testified on his own behalf and alleged counsel for Allwaste "put words in [his] mouth" at his deposition and he "would never tell [counsel] that [he] went ten feet high in the air." (R. p. 141). He further stated that he did not mean ten feet in the air. (R. p. 146). Later, on cross-examination, he testified, "I remember like this. I was going up in the air. I was up in the air. It lifted - - it lifted me. I'm glad it didn't knock me over." (R. p. 124).

Regarding Sammy Bell's testimony that Dorsey did not fly through the air ten feet and land the ground, Dorsey admitted Bell witnessed the accident, but questioned Bell's memory of the incident. (R. pp. 150-52). Further, Dorsey claimed Odom's testimony that she was not aware the

accident occurred until two months after the accident was a lie. (R. pp. 137, 147). Dorsey also acknowledged the inconsistencies in his description of the accident in the medical records, claiming medical records from Doctor's Care indicating Dorsey did not fall to the ground were incorrect. (R. pp. 156, 159, 162).

A. Prior Back Pain

During his deposition, Dorsey denied having issues related to his back prior to the 2015 work accident. (R. pp. 315-16). Dorsey also denied any history of back issues when he began treating with Dr. Forrest. (R. p. 416). Medical records admitted into evidence show that in January 1998, Dorsey presented to Palmetto Health Richland with complaints of low back pain radiating down his left leg. (R. p. 431). In August 2003, a surgeon performed an operation to repair Dorsey's right shaft open humerus fracture after he was involved in a motorcycle accident. (R. p. 436). Dorsey returned to that surgeon in 2005 complaining of low back, arm, and leg pain. (R. p. 439). Thereafter, the surgeon wrote a letter stating "[Dorsey's] significant back injury has now led to chronic back pain which is making him unable to work" and he "is going to be unable to work for his lifetime." (R. p. 440).

A few years later, in 2008, Dorsey presented to Fairfield Memorial Hospital with back pain and was provided Flexeril and Voltaren for treatment. (R. p. 441). In June 2010, he returned with continued back pain, reporting the pain was "severe and burning." (R. p. 444). In January 2012, he returned to the hospital with eight out of ten moderate to severe pain in his low back and admitted to "very frequently" having prior back pain. (R. p. 448). X-rays of his lumbar spine revealed "facet arthropathy at L4-5 and L5-S1." (R. p. 447). In June 2013, Dorsey again returned to Fairfield Memorial with low back pain. (R. p. 450).

At the hearing before the Single Commissioner for the current 2015 claim, Dorsey admitted

that during his deposition, he denied prior back problems and prior treatment for his back, claiming the prior issue was “never” something “serious.” (R. pp. 162-64). He claimed his motorcycle accident in 2003 had no effect on his ability to perform his job as a trash man. (R. p. 224). Nonetheless, he admitted medical records from 2003 state “the significant injury to [Dorsey’s] lower back has led to chronic back pain.” (R. p. 167). He denied awareness that a prior doctor noted in 2003 that “because of these injuries including the back and right arm, [Dorsey] is going to be unable to work for his entire life.” (R. p. 169-70). He claimed he did not recall going to Fairfield Medical Center in 2012 with eight out of ten level back pain which occurred very frequently. (R. pp. 179-80). He also denied remembering being referred to an orthopedist as a result of the Fairfield Medical Center visit. (R. p. 180).

B. Procedural Posture of the July 17, 2015 Accident

After providing Dorsey with medical treatment in 2015 and 2016 for the July 17, 2015 accident, Allwaste filed a Form 21 Request for Hearing on February 25, 2016. The Commission scheduled a hearing for April 15, 2016, before Commissioner Susan S. Barden. Allwaste filed a pre-hearing brief on March 31, 2016. Dorsey failed to file a pre-hearing brief in the time allotted under the statute.² Instead, on April 8, 2016, Dorsey filed a letter asking for the original assigned commissioner, Commissioner Barden, to be recused related to political matters. (R. p. 531). The Commission then reset the hearing for the same hearing day—April 15, 2016—before a different commissioner, the Single Commissioner. On April 12, 2016, when asked by Allwaste if he planned to file a pre-hearing brief, counsel for Dorsey responded that he had not had time to focus on this claim because he had an unrelated trial which was scheduled to take the entire week. (R.

² See S.C. Code Ann. Regs. 67-611 (2017) (requiring each attorney representing a party to file a pre-hearing brief with the Commission and serve the opposing party at least ten days before the hearing).

p. 532). He asked Allwaste to consent to a continuance. (R. p. 532). Dorsey later asked the Single Commissioner to postpone due to “preparation for trial in circuit court as well as ‘legislative duties.’” By Order dated April 15, 2016, the Single Commissioner granted Dorsey’s request to postpone due to counsel for Dorsey’s “legislative duties.” (R. p. 1). In the Order, the Single Commissioner reset the hearing for May 9, 2016, noting counsel for Dorsey *consented* to proceed with a hearing in the beginning of May. (R. p. 2). Allwaste filed pre-hearing briefs for the May 9, 2016 hearing on April 22, 2016, and May 2, 2016; however, Dorsey again requested a postponement and did not file a brief. (Supp. R. p. 7-8). On the morning of May 9, 2016, counsel for Dorsey stated to the Single Commissioner,

I just got back from a long weekend with graduation and have not received a resolution to my request for a continuance bases (sic) on legislative immunity. The hearing is scheduled for 12:30 today and I have a deposition at 9 on an unrelated matter. If there are any questions, I will be glad to call Chief Justice Pleicones to help explain Judge Toal’s order that was forwarded earlier.

(Supp. R. p. 7-8). The Single Commissioner then reset the hearing for July 22, 2016.

On July 7, 2016, without yet receiving any pre-hearing briefs for any of the previously scheduled hearing dates, Allwaste filed a pre-hearing brief for the July 22, 2016 hearing. In filing the brief, Allwaste noted it was scheduled to depose two doctors from the Southeastern Spine Institute—Dr. Forrest on August 8, 2016, and Dr. Dennis on August 18, 2016—and requested to have the record remain open to secure those depositions. (R. pp. 49, 543). Allwaste informed the Single Commissioner that based upon the anticipation that Dorsey would submit additional records from Dr. Dennis and Dr. Forrest, Allwaste scheduled their depositions as soon as it received and

reviewed records from Southeastern Spine Institute. (R. p. 543). Allwaste further informed the Single Commission that those depositions could not be scheduled before the July 22, 2016 hearing. (R. p. 543).

The pre-hearing briefs for the July 22, 2016 hearing were due July 12, 2016.³ The certificate of service for Dorsey's pre-hearing brief states the brief was emailed and mailed on July 12, 2016; however, the envelope including his brief was postmarked July 14, 2016. (R. pp. 55, 546; Supp. R. p. 5). Further, the Commission noted the brief was uploaded by Dorsey on July 13, 2016. (R. p. 545). The brief alleges injuries to the back, legs, and elbows. (R. p. 53). On July 20, 2016—two days before the hearing—Dorsey filed a supplemental pre-hearing brief, which included a questionnaire completed and executed by Dr. Forrest (the Questionnaire). (R. pp. 56-57, 524-26; Supp. R. 6). The Questionnaire has July 13, 2016, and July 18, 2016, listed on the document. (R. p. 526). Dr. Forrest answered questions drafted by Dorsey and included handwritten notes.

On July 21, 2016, the day before the hearing, Dorsey advised that a second attorney would be associating on the claim and because of the new attorney's conflict, he needed to request a continuance. On July 22, 2016, the Single Commissioner held a hearing pursuant to Allwaste's Form 21 Request for a Hearing and Dorsey's Motion to Postpone. (R. pp. 89-92). New co-counsel for Dorsey argued he had a significant and unexpected life event arise, necessitating a continuance of the hearing. (R. pp. 92-93). Allwaste sympathized with the situation but contended the hearing had previously been postponed three times because of conflicts and other issues. (R. pp. 95-97). Allwaste argued the claim was ninety days past the sixty-day requirement under the Workers'

³ See S.C. Code Ann. Regs. 67-209 (2017) ("Saturdays, Sundays, State, and Federal holidays are included unless the designated time period ends on a Saturday, Sunday, State, or Federal holiday in which case the next day that is not a Saturday, Sunday, State, or Federal holiday is included as the last day.").

Compensation Statute.⁴ (R. p. 97). Allwaste noted it had been paying temporary benefits for five months longer than it should have required to pay. (R. p. 97). Ultimately, the Single Commissioner granted the motion to postpone. (R. p. 99). Thereafter, Allwaste requested the record to be closed and maintained its objection to the timeliness of Dorsey's APA submissions. (R. pp. 99-100).

When asked about the depositions of Dr. Dennis and Dr. Forrest that were scheduled to take place after the hearing, Allwaste stated it requested and agreed to leave the record open for those two depositions. (R. p. 101). Allwaste noted that there may be another questionnaire or other evidence from those doctors that had not yet been provided to Allwaste. (R. p. 102). The Single Commissioner left the record open for the two depositions and reserved Allwaste's right to object to any and all matters Allwaste was prepared to object to that day. (R. p. 104-05).

Thereafter, a hearing on the merits took place on August 3, 2016. Allwaste again objected to Dorsey's pre-hearing brief and supplemental APAs as untimely and lacking authentication. (R. pp. 110-11). Dorsey argued the Single Commissioner should admit the evidence because Allwaste could address any issues regarding the authentication during the depositions that were previously scheduled to take place after the hearing. Further, Dorsey maintained that pursuant to S.C. Code Ann. Regs. 67-612, he was assured the depositions would proceed because Allwaste noticed the depositions. (R. pp. 114, 117).

The Single Commissioner admitted the Questionnaire into evidence over objection. (R. pp. 118, 258-59). Further, the Single Commissioner requested Allwaste submit its position regarding taking the two depositions at issue before the close of the record. (R. p. 118). Following

⁴ See S.C. Code Ann. §42-9-260 (2017) ("If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary disability payments. The hearing must be held within sixty days of the date of the employer's request for a hearing.").

all testimony, Allwaste stated it wished to wait on a ruling as to whether the Single Commissioner would allow Dorsey to take the depositions of Dr. Dennis and Dr. Forrest before Allwaste determined whether it wished to proceed with the depositions. (R. pp. 259-60). Allwaste noted that it did not want to forfeit its right to direct examination of the doctors if the Single Commissioner granted the request to leave the record open for the depositions. (R. pp. 259-60). The Single Commissioner took both parties requests to hold the record open for the depositions under advisement. (R. p. 260).

In her Decision and Order, the Single Commissioner denied both requests to hold the record open for the depositions, closing the record as of August 3, 2016. (R. p. 20). Dorsey appealed to the Appellate Panel, which affirmed the ruling pursuant to S.C. Code Ann. Regs. 67-611. (R. p. 29). Dorsey filed a motion for reconsideration, which was denied. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

"On appeal from [the Appellate Panel], this Court can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 384, 769 S.E.2d 1, 2 (2015). "In a workers' compensation case, the [A]ppellate [P]anel is the ultimate fact-finder." *Id.* at 384, 769 S.E.2d at 3. "However, whe[n] there are no disputed facts, the question of whether an accident is compensable is a question of law." *Id.* at 384-85, 769 S.E.2d at 3.

ARGUMENT

The Appellate Panel's order denying the request to leave the record open to take the depositions of Dr. Dennis and Dr. Forrest should be affirmed.

- I. Substantial evidence in record supports finding the Commission's order denying the request to leave the record open is logical and consistent with South Carolina law.**

Dorsey argues the Single Commissioner and Appellate Panel "told different versions of the

facts, and where the [S]ingle [C]ommissioner's decision gave no reason at all for disallowing the depositions, the [A]ppellate [P]anel provided an illogical reason and relied on the wrong regulations." (App. Initial Brief p. 6, 8). The underlying premise of Dorsey's arguments is misguided. A long-standing rule of workers' compensation law in South Carolina provides the Appellate Panel was free to may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the Single Commissioner. *See Lowe v. Am-Can Transp. Servs., Inc.*, 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct. App. 1984) ("When reviewing the evidence and award of the hearing commissioner, the Commission may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the hearing commissioner.").

Despite Dorsey's contentions to the contrary, the Appellate Panel correctly followed South Carolina law in affirming the Single Commissioner's order. As the Appellate Panel recognized, the determination of whether to close a record is within the sound discretion of the Commission. "A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are 'rarely' overturned." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011). "Every reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." *Id.* Here, the Single Commissioner did not abuse her discretion in closing the record as of August 3, 2016, and the Appellate Panel did not abuse its discretion in affirming that decision. *See id.* at 645, 714 S.E.2d 289 at 293 ("For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support."). As fully discussed below, the decision to close the record was not based on an error of law and was supported by substantial evidence. In fact, it would have been an abuse of discretion to require Allwaste to

spend the resources necessary to depose two doctors when Allwaste no longer sought to take the depositions.

As an initial matter, Dorsey's reliance on S.C. Code Ann. Regs. 67-613 and his argument that the Commission should have relied on that regulation is not preserved as Dorsey never made that argument to the Single Commissioner or Appellate Panel. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [Commission] to be preserved for appellate review."); *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that under our preservation rules, a "losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred"); *id.* ("This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Moreover, the regulation is inapplicable to his argument because Dorsey never requested a postponement or adjournment pursuant to S.C. Code Ann. Regs. 67-613 to secure the depositions at issue.

Instead, Dorsey repeatedly argued that pursuant to S.C. Code Ann. Regs. 67-612, he should be allowed to continue with the depositions because he was assured the depositions would proceed after Allwaste noticed the depositions.⁵ (R. pp. 114, 117, 267-68). Dorsey erroneously equated taking the deposition of these doctors to an expert report provided by the doctor as addressed in S.C. Code Ann. Regs. 67-612. In his brief to this Court, Dorsey again erroneously analogizes the depositions with medical reports from those doctors. South Carolina Code Ann. Regs. 67-612 addresses the submission of medical reports in lieu of live testimony from the medical professional.

⁵ He argued, "From a legal standpoint, as we said earlier, I believe that my reading of Regulation 67 - and I want to make sure I'm saying it correctly this time, 612." (R. 114); *see also* R. 267-68.

South Carolina Code Ann. Regs. 67-612 mandates that a moving party provide the report to the opposing party at least fifteen days before the scheduled hearing. S.C. Code Ann. Regs. 67-612(B)(1) (2017). Pursuant to this regulation which Dorsey repeatedly relied upon, Dorsey himself failed to abide by the rules he cites to support his position. As Allwaste argued to the Commission, Dorsey's pre-hearing brief was untimely. Further, Dorsey served defense counsel with the Questionnaire—which is considered a medical report—on July 20, 2016, a mere two days before the hearing. More importantly, the dates listed on the Questionnaire suggests the Questionnaire was not completed until *after* Dorsey's pre-hearing brief was due.

Furthermore, despite Dorsey's contentions otherwise, the Appellate Panel correctly affirmed the Single Commissioner pursuant to S.C. Code Ann. Regs. 67-611. As the Appellate Panel noted, the depositions of these doctors are not reports; instead, the depositions would have been testimony controlled by S.C. Code Ann. Regs. 67-611 regarding noticing live testimony. (R. p. 276). "Regulations authorized by the legislature have the force of law." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 227, 628 S.E.2d 262, 269 (Ct. App. 2006). "However, regulations may not alter or add to the terms of a statute." *Id.* South Carolina Code Ann. Regs. 67-611 (2017) of the South Carolina Workers' Compensation Commission requires that each attorney representing a party file a Form 58, pre-hearing brief, with the Commission and serve a copy on the opposing party at least ten days prior to the Workers' Compensation hearing. S.C. Code Ann. Regs. 67-611(B) (2017); *Gadson*, 368 S.C. at 226, 628 S.E.2d at 269.

The regulation requires the attorneys representing a party to provide the names and addresses of the individuals known to be witnesses concerning the facts of the case. *Id.* Further, pursuant to that section, each party is under a duty to promptly supplement a response with respect to any question directly addressed on the pre-hearing brief and amend a response if the party

obtains information upon the basis of which the party knows the response was incorrect when made, or the party knows the response thought correct when made is no longer true. *Id.* In the instant matter, Dorsey failed to timely file a pre-hearing brief indicating he sought to depose Dr. Forrest and Dr. Dennis or subpoena them to a hearing to testify live.

Moreover, even under the provision Dorsey suggests, S.C. Code Ann. Regs. 67-613, the Commissioner has significant discretion in postponing or adjourning hearings for additional evidence. Dorsey was well aware of this discretion as he requested multiple postponements in the current claim. South Carolina Code Ann. Regs. 67-613(B) (2017) allows a Commissioner to postpone a hearing for good cause, which includes the following: (1) the attorney is actually engaged in another court; (2) illness; (3) additional discovery is necessary; (4) a conflict of interest exists requiring another Commissioner hear the case; or (5) it is premature to hear the case. In order to request a postponement, the party making the request must file and serve a motion at least ten days before the hearing or as soon as reasonably possible before the hearing if an emergency arises. *Id.* As previously discussed, Dorsey never moved to postpone to take the depositions pursuant to this regulation.

Under S.C. Code Ann. Regs. 67-613(C) (2017), a party may move for adjournment at a hearing to procure additional evidence when the evidence is in existence, identified, and necessary for the decision, but unavailable at the hearing or a witness fails to appear. Dorsey has not identified what new evidence these doctors would provide that was not already included in the record and was unavailable at the hearing; therefore, even under this provision, the denial of the request was proper. *See Holcombe v. Dan River Mills/Woodside Div.*, 286 S.C. 223, 225-26, 333 S.E.2d 338, 340 (Ct. App. 1985) (finding the Appellate Panel was not required to allow the doctor's deposition to be taken and entered as evidence where the record reflected that, at the time of the

hearing before the single commissioner, the party knew of the testimony of the doctor). Accordingly, given Dorsey had already asked for and was granted multiple postponements and should have known of the testimony of Dr. Dennis and Dr. Forrest as he visited these two doctors on his own, the Appellate Panel was not required to allow the record to remain open for their testimony. *Id.*

Moreover, Dorsey's reliance on *Trotter v. Trane Coil Facility*, 393 S.C. 637, 714 S.E.2d 289 (2011), is misplaced as *Trotter* supports the position of Allwaste that the Single Commissioner has significant latitude and discretion in determining whether to close the record. This discretion applies whether the claimant or the employer request the record to remain open. Therefore, even if Allwaste never asked to leave the record open to take these depositions, *Trotter* would support the Commission's decision to deny Dorsey's request to leave the record open.

In *Trotter*, a hearing was scheduled for September 20, 2005, and prior to a hearing, the employer requested a continuance because of the difficulty it faced in scheduling the deposition of a doctor. *Trotter v. Trane Coil Facility*, 384 S.C. 109, 114, 681 S.E.2d 36, 39 (Ct. App. 2009), *rev'd*, 393 S.C. 637, 714 S.E.2d 289 (2011). The employer originally scheduled the doctor's deposition for September 7, 2005. *Id.* The employer rescheduled the doctor's deposition for September 14, 2005, partially because of the employer's plan to also depose the claimant on the same day. The doctor later canceled the deposition and rescheduled it for October 3, 2005—after the hearing. *Id.* The single commissioner denied the employer's motion for a continuance to take the deposition. *Id.* At the hearing, the employer requested the record remain open for the doctor's deposition. *Id.* at 115, 681 S.E.2d at 39. The single commissioner denied the request, finding the employer had the opportunity to depose the doctor but chose not to for strategic reasons. *Id.*

On appeal to the Court of Appeals, the employer argued the Appellate Panel abused its

discretion by affirming the single commissioner's refusal to grant the employer's pretrial motion for a continuance to take the deposition of two key witnesses, one being the doctor. *Id.* at 116, 681 S.E.2d at 40. The Court of Appeals agreed with the employer and reversed the decision of the Appellate Panel. *Id.* at 119, 681 S.E.2d 36 at 42. The Court of Appeals held the Appellate Panel abused its discretion by not allowing for either a continuance or for the record to remain open for the deposition. *Id.* The Court held the ruling was not harmless and was prejudicial to the employer because it was necessary testimony. *Id.* at 118, 681 S.E.2d at 41. The Court held the doctor's testimony was unique and crucial testimony which could not be offered by any other witness or through his medical records alone. *Id.* Further, the Court found that by not allowing the employer to take the deposition, the employer was left with no way of challenging the claimant's medical claims. *Id.*

Our Supreme Court reversed the Court of Appeals in *Trotter*, holding this Court erred in finding the Commission abused its discretion in denying the motion to keep the record open for the deposition. *Trotter*, 393 S.C. at 650, 714 S.E.2d at 295. The Supreme Court held there was no abuse of discretion where the party requesting to hold the record open had not demonstrated any prejudice and the doctor's notes were submitted to the commissioner and considered as part of the record. *Id.* at 649, 714 S.E.2d at 295.

Here, Dorsey is the only party who appealed the Single Commissioner's ruling to the Appellate Panel. Consequently, Allwaste no longer sought to leave the record open to take the depositions of the doctors, but even if it did, the Commission had the discretion to deny either request. Dorsey is now the only party seeking to have the left open and the request was properly denied as in *Trotter*. *See id.* ("A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are "rarely" overturned."); *id.* ("Every

reasonable presumption in favor of a proper exercise of the trial court's discretion will be made.”).

Dorsey cannot demonstrate prejudice in the denial of the request as Dorsey submitted the records from the doctors he now wishes to depose. Moreover, the Single Commissioner admitted the Questionnaire of Dr. Forrest over Allwaste’s objection. Further, similarly to *Trotter*, Dorsey did not indicate what additional testimony would be provided by Dr. Dennis or Dr. Forrest in addition to the records already included in evidence. *See id.* at 649, 714 S.E.2d at 295 (reversing the Court of Appeals and holding “the commissioner did not abuse her discretion in denying the requests for a continuance or to hold the record open for the deposition of Dr. James to be taken” where the party requesting to hold the record open had not demonstrated any prejudice and the doctor’s notes were submitted to the commissioner and considered as part of the record).

Allwaste’s initial request to leave the record for the depositions and later change in decision to forgo the depositions does not mandate the Commission reopen the record and allow the depositions. Dorsey could have obtained testimony from Dr. Dennis and Dr. Forrest regarding any alleged claims and provided the evidence prior to the hearing. Dorsey could have sought to subpoena them to testify live at the hearing. In fact, due to Dorsey’s multiple requests for continuances and postponements, he had well over the statutory timeframe to obtain the evidence. He cannot now use Allwaste’s initial request to bolster his own case, which was ill prepared. Because he failed to do so, Dorsey cannot now argue he deserves the opportunity to secure additional evidence via depositions.

Furthermore, if the Questionnaire or other records were insufficient or unclear, it was Dorsey’s responsibility to seek clarification well before the hearing. Instead, Dorsey waited until two days before the hearing to provide the Questionnaire to Allwaste. Contrary to Dorsey’s contentions, he does not have an unfettered right to leave the record open simply to implement a

better strategy for himself. *See id.* (“Contrary to Trane's assertion, it does not have an unfettered right to postpone the hearing simply to implement a better strategy for itself.”). The Single Commissioner acted within her discretion and the Appellate Panel was correct in affirming the order denying the request to leave the record open.

II. Requiring Allwaste to move forward with depositions which are no longer necessary to their defense of the claim would result in significant prejudice to Allwaste.

As to the second issue outlined in Dorsey's brief to this Court, Dorsey relies heavily on *Morgan v. JPS Automotive*, 321 S.C. 201, 467 S.E.2d 457 (1996), and *Brown v. La France Indus., a Div. of Riegel Textile Corp.*, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985), to support the proposition that the Commission erred because there was (1) ample notice of the need for the depositions; (2) no legitimate claim of harm from allowing them; and (3) “no sensible reason” to deny the request. (Dorsey's Initial Brief p. 9-11).

An important distinguishing factor in *Morgan* is the claimant in *Morgan* timely filed a pre-hearing brief requesting the record be left open because the claimant was being evaluated by a vocational expert shortly before the hearing and wanted the record left open to admit evidence from that specific evaluation. *Morgan*, at 201, 467 S.E.2d at 459. The Court in *Morgan* held that pursuant to S.C. Code Ann. Regs. 67-613, the records the claimant sought to include were in existence, identified, and necessary for the decision but unavailable at the hearing. *Morgan*, at 201, 467 S.E.2d at 459. By contrast, in the instant case, Dorsey failed to include a request for the specific testimony or evidence he sought to pursue from Dr. Forrest or Dr. Dennis other than what was already included in the records admitted into evidence. Furthermore, Dorsey failed to identify the specific evidence sought and outline how the evidence was necessary for the decision but unavailable at the hearing.

Similarly, *Brown* is distinguishable as the claimant in *Brown* “inadvertently” failed to request the record be left open for the testimony of a doctor. *See Brown*, at 324, 333 S.E.2d at 351 (citing to case law regarding the inadvertent omission of evidence). Here, Dorsey did not *inadvertently* fail to request the depositions of Dr. Forrest and Dr. Dennis. Furthermore, the Court in *Brown* again emphasized a single commissioner reposes considerable latitude and discretion in determining whether to close or reopen records for additional testimony. *Id.* at 325, 333 S.E.2d at 351 (“A trial judge enjoys considerable latitude and discretion in these matters. Similar discretion reposes with the single commissioner.” (citations omitted)).

As Dorsey correctly noted in his appellant brief, claimants would not typically depose their own doctors. Importantly, they would not depose their own doctors because their own doctors would have theoretically already given them the information they needed to proceed at a hearing. The employer would only need to depose that doctor to cross-examine him or her on any unfavorable opinions.

Here, the need to cross-examine Dr. Dennis and Dr. Forrest no longer existed. Dr. Forrest’s questionnaire was admitted into evidence, but the Commissioner determined Dr. Forrest’s opinion was not afforded great weight as to the neck claim as it was based on Dorsey’s subjective complaints. Furthermore, Dr. Forrest opined, “It is not clear that the neck is playing a definite role here” As to the back, he noted the “radiologist is basically indicating a normal study only noting mild noncompressive spondylosis. I would agree with that although there is perhaps some mild disc bulging in the lower lumbar spine. *Certainly nothing of a serious nature* and nothing that should cause nerve damage.” (R. p. 417) (emphasis added).

Dr. Dennis did not complete a questionnaire. As with Dr. Forrest, Allwaste only scheduled the deposition of Dr. Dennis in the event he provided additional evidence Dorsey had not yet

provided to Allwaste. (R. p. 543). The only evidence from Dr. Dennis stated Dorsey was not a surgical candidate. Dr. Dennis opined the MRI showed "normal disc signals at every level and no areas of nerve root compression" and he did "not see any evidence of a spine abnormality that might cause his lateral thigh pain." Dr. Dennis released Dorsey with no restrictions, stating his x-rays, physical exam, and lumbar MRI were all "normal." (R. p. 516).

The prejudice in requiring Allwaste to proceed with the depositions is clear. Importantly, allowing Dorsey to proceed as he has in this claim is highly prejudicial. After multiple last-minute postponements, Dorsey ambushed Allwaste with records a mere two days before the hearing and is now asking for the record to be left open only to enhance the evidence. Therefore, he is seeking to rehabilitate testimony that was already untimely submitted. Furthermore, the reports he submitted were not secured until after the sixty-day deadline for a hearing on the merits. *See* S.C. Code Ann. §42-9-260 (2017) ("If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary disability payments. The hearing must be held within sixty days of the date of the employer's request for a hearing.").

Furthermore, as additional prejudice, counsel for Allwaste would need to spend several hours of billable time preparing for the depositions. Counsel for Allwaste, who practices in Columbia, South Carolina, would then need to travel to the depositions, which are located in Charleston, South Carolina. Additionally, counsel for Allwaste would have to spend billable hours summarizing the depositions and determining recommendations for how to proceed.

Moreover, when filing its pre-hearing brief on July 7, 2016, Allwaste informed the Single Commissioner and Dorsey it scheduled the depositions of Dr. Dennis and Dr. Forrest *only* as a precaution, based upon the anticipation that Dorsey would submit additional records from Dr.

Dennis and Dr. Forrest. (R. p. 543). Given Dorsey's history of postponing the hearing and failing to provide evidence in a manner in which Allwaste would have the opportunity to defend the claim, Allwaste took the precautionary step of scheduling the depositions. Dorsey then strategically provided the Questionnaire two days before the hearing. Once the parties arrived at the July 22, 2016 hearing, Allwaste asked to leave the record open for the depositions because it was still unsure as to what evidence Dorsey may still have from these doctors but had not yet provided to Allwaste. Once it became clear that Allwaste no longer needed to cross-examine these doctors on the evidence they provided, Allwaste no longer sought to take the depositions. However, Dorsey then wanted the opportunity to depose his own doctors.

In other words, Dorsey (1) postponed the hearing several times for matters unrelated to his claim as Allwaste continued to pay TTD; (2) failed to gather sufficient evidence to support his claim from the time Allwaste filed the hearing request on February 25, 2016, until the date listed on the Questionnaire—July 13 or July 18, 2016—after the pre-hearing brief was due; and (3) then waited until two days before the hearing to provide the Questionnaire from the doctor, leaving Allwaste to wonder if he would again ambush Allwaste with unsuspecting evidence. Nevertheless, Dorsey requested the Commission and now this Court provide him opportunity to now take the deposition of these doctors. Dorsey has not provided a valid or sufficient reason as to why he should be allowed to solicit evidence from these doctors to the detriment and prejudice of Allwaste after Dorsey created this issue. Accordingly, the Single Commissioner nor Appellate Panel abused their discretion in denying the request to leave the record open. *See Hallums v. Michelin Tire Corp.*, 308 S.C. 498, 504, 419 S.E.2d 235, 239 (1992) (holding the Workers' Compensation Commission is allowed wide latitude of procedure and is not restricted to the strict rule of evidence adhered to in a judicial court).

III. The Order denying the request to leave the record open, even if erroneous, amounted to harmless error as it does not affect the ultimate decision of the Commission.

There is substantial evidence in the record showing Dorsey reached MMI as to his back claim, his arm issue resolved without permanent disability, and he did not suffer a causally-related neck injury. The Commission did not need any additional evidence to reach these conclusions. Further, Dorsey has pointed to no additional evidence which would alter these conclusions. Accordingly, the order must be affirmed as he can show no reversible error. *See Cox v. Cox*, 290 S.C. 245, 249, 349 S.E.2d 92, 94 (Ct. App. 1986) (holding the appellant must show prejudice resulting from an erroneous ruling and affirming when the appellant failed to show reversible error).

The record demonstrates Dorsey initially treated with Doctor's Care following the July 17, 2015 accident where his primary complaints were of back and left-sided rib pain. (R. p. 464). He also participated in physical therapy, treated at Fairfield Memorial, and treated with an orthopedist, Dr. James O'Leary, of Midlands Orthopedics. (R. pp. 453-56, 471-509). Dr. O'Leary ordered a MRI, which Dorsey received. Dr. O'Leary opined the MRI was "not terribly impressive" and did not reveal a disc herniation or stenosis. (R. p. 48).

In October 2015, Dr. Guillaume Dumont provided an *unauthorized* orthopedic consultation for Dorsey. (R. p. 398). There is no indication in the record showing Dorsey complained of any neck pain to Dr. Dumont as the record from the consultation does not include any references to neck pain. Later in October and November 2015, Dr. O'Leary recommended a steroid injection. On January 21, 2016, Dr. O'Leary referred Dorsey for a surgical consultation after Dorsey alleged the injection did not provide relief. On the following day, Dorsey returned to Fairfield Memorial and was reported by the medical professionals to be Norco dependent, with a history of alcohol

abuse and chronic back pain. (R. p. 14).

In February 2016, a spine surgeon, Dr. Ivan LaMotta, conducted the evaluation of Dorsey as recommended by Dr. O'Leary. (R. pp. 504-06). Upon examination, Dr. LaMotta opined "significant tenderness left trochanteric bursa with light touch, *out of proportion*" and the MRI revealed only "very mild lumbar facet arthropathy." (R. pp. 504-06) (emphasis added). Dr. LaMotta determined Dorsey was not a surgical candidate and placed Dorsey at MMI with no permanent impairment or medical restrictions. (R. pp. 504-06).

Subsequently, after multiple return visits to the hospital and being denied narcotic prescriptions because of his failure to report recent prescriptions, Dorsey presented to several doctors at Palmetto Health Richland and Palmetto Health Orthopedics with continued back pain and lateral thigh pain. (R. pp. 15, 408-412, 434-35). One of those doctors, a doctor whom Dorsey visited for an *unauthorized* surgical consultation, opined a February 2016 MRI did not reveal any evidence of disc herniation or neural foraminal narrowing. (R. p. 406). Further, the doctor opined, "physical exam findings and *subjection symptoms far exceed what we're seeing on MRI today.*" (R. pp. 406-07) (emphasis added).

On April 7, 2016, Dorsey saw one of the doctors who he now seeks to depose, Dr. Blake Dennis at Southeastern Spine Institute, complaining of back pain and left-sided neck pain. (R. p. 413). Dr. Dennis recommended a cervical and lumbar MRI, which Dorsey received. Dr. Dennis opined the MRI showed "normal disc signals at every level and no areas of nerve root compression." (R. p. 516). Additionally, Dr. Dennis stated, "I overall do not see any evidence of a spine abnormality that might cause his lateral thigh pain." (R. p. 516). Dr. Dennis confirmed Dorsey was not a surgical candidate but recommended he consider further non-operative care. Dr. Dennis released Dorsey with no restrictions. (R. p. 516). The Appellate Panel's order awarded

Dorsey future medical care in the form of epidural injections and corresponding follow-up visits.

On April 27, 2016, Dorsey presented to the second physician in Southeastern Spine Institute he now seeks to depose, Dr. Leonard Forrest, complaining of pain in his neck down his lower back. (R. p. 416). Dr. Forrest reported Dorsey's lumbar spine MRI did not reveal anything that would cause nerve damage, but nonetheless recommended a L4-5 injection. (R. p. 417). As to the neck, Dr. Forrest recommended a MRI. (R. p. 417). Dorsey reported receiving good benefit from the initial injection, noting his pain was as low as two on a ten-point scale. (R. p. 419). Dr. Forrest reported Dorsey's neck MRI revealed some mild spondylosis but no compression. (R. p. 419). He recommended Dorsey focus on the low back and undergo a second injection. (R. p. 419). Dr. Forrest also completed the Questionnaire admitted into evidence over Allwaste's objection. Again, the Appellate Panel's order awarded Dorsey future medical care in the form of epidural injections and corresponding follow-up visits.

As outlined above, it is clear that most of the records stemming from Dorsey's medical treatment prior to his release for the July 17, 2015 injury do not mention any purported neck problems. In fact, there was no mention of the neck injury on any Form 50 because Dorsey never filed a Form 50, requesting treatment for the neck, nor was there mention of the injury in Dorsey's pre-hearing brief. (R. p. 35); *see also* R. p. 53, Dorsey's pre-hearing brief (alleging injuries to the back, legs, and elbows). It was not until the "stop payment" hearing that the neck injury was mentioned at all. Notwithstanding, the Single Commissioner admitted the Questionnaire of Dr. Forrest over Allwaste's objection. To the extent Dr. Forrest's and Dr. Dennis' records can be read to support Dorsey's allegation that he mentioned the alleged neck injury, or any other injury as causally-related to this claim, the Commission was in a better position to determine the weight and credibility.

“The Appellate Panel is the ultimate finder of fact in workers' compensation cases.” *Tims v. J.D. Kitts Const.*, 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel].” *Id.* “It is not the task of this Court to weigh the evidence as found by the [Appellate Panel].” *Id.* Further, the trier of fact has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony. *Id.*

Although Dorsey claimed he alleged neck pain “from day one,” the Commission properly concluded this contention is not supported by a preponderance of the evidence and his testimony could not be relied upon. *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 465, 405 S.E.2d 407, 409 (1991) (“Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive.”); *Tims* at 508, 713 S.E.2d at 346 (“The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel].”). As shown throughout the record outlined in the fact section of this brief, Dorsey provided multiple inconsistent statements regarding the description, impact, and injuries resulting from the accident, some more exaggerated than others. Witnesses to the accident testified Dorsey’s description and exaggerations were not true. Furthermore, Dorsey flat out denied any prior back issues when the record demonstrates he had prior back issues significant enough to warrant a doctor stating he could never work again.

Further, the Commission determined Dr. Forrest’s medical record which was based upon Dorsey’s self-reports, was not afforded great weight. *See Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 431, 450 S.E.2d 112, 116 (Ct. App. 1994) (“The weight to be accorded medical opinion testimony is a matter for the Commission.”). Therefore, substantial evidence in the record

would allow reasonable minds to reach the conclusion the Appellate Panel reached—that Dorsey did not suffer a causally-related neck injury and any additional evidence on the issue should have been submitted prior to the hearing. *See Miller by Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994) (“Substantial evidence is ‘not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.’”).

As there is ample evidence in the record to support the finding that Dorsey did not sustain a causally-related injury to his neck as a result of the admitted accident and had reached MMI as to the compensable injuries, the order denying the request to take the depositions should be affirmed. Accordingly, substantial evidence in the record supports the Appellate Panel finding Dorsey was not entitled to benefits for the neck and the record was closed for the doctors who presented opinions regarding the neck. *See Williams v. Drywall*, 402 S.C. 173, 184, 739 S.E.2d 892, 898 (Ct. App. 2013) (“The Commissioner's order also noted Respondents did not receive notice of the incomplete paraplegia claim until they received Williams' pre-hearing brief. Therefore, we find substantial evidence in the record supports the Appellate Panel's finding Williams was not entitled to a claim for partial paraplegia.”).

IV. The Court should affirm for any ground appearing on the record.

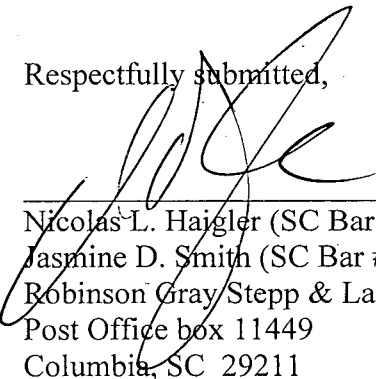
Rule 220(c), SCACR provides this Court may affirm any ruling, order, decision or judgment upon any ground appearing in the Record on Appeal.

CONCLUSION

The Appellate Panel did not commit a reversible error by closing the record as of the August 3, 2016 hearing. Substantial evidence supports finding the Commission did not abuse its

discretion in denying Dorsey's request to leave the record open to take the depositions of Dr. Leonard E. Forrest and Dr. R. Blake Dennis. Furthermore, almost every case cited by Dorsey in support of his arguments held the Appellate Panel—whether it decided to leave the record open or close it or grant or deny a continuance—did not abuse its discretion. Respectfully, one of only two cases in which this Court determined the Appellate Panel abused its discretion was reversed by the Supreme Court of South Carolina. *See Trotter*, 393 S.C. at 649, 714 S.E.2d at 295 (reversing the Court of Appeals and holding the commissioner did not abuse her discretion in denying the requests for a continuance or to hold the record open for the deposition of a doctor). Accordingly, the order must be affirmed. *see Cox*, at 249, 349 S.E.2d at 94 (Ct. App. 1986) (holding the appellant must show prejudice resulting from an erroneous ruling and affirming when the appellant failed to show reversible error).

Respectfully submitted,



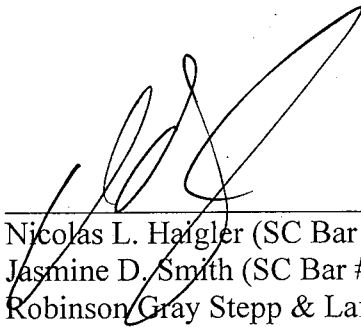
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of the Respondents complies with Rule 211 (b), SCACR.



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