THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Appellate Case No. 2018-000359

Vickie Rummage, Employee, ...Appellant,

v.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier..... Respondents,

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INITIAL BRIEF OF RESPONDENTS

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1. Did Appellant Vickie Rummage preserve for appeal the issue of whether expert witness Dr. Thomas Gaultieri's report qualified as a sufficient medical opinion under the *Michau* standard so as to supplement the Full Commission's decision to disallow mental health benefits to Appellant, where Appellant failed to object to Dr. Gaultieri's report at the hearing; failed to raise an exception in her appeal to the Full Commission; failed to argue this issue in her brief before the Final Hearing; and raised this issue for the first time at oral argument before the Full Commission?

2. If Appellant Vickie Rummage did preserve for appeal the admissibility of Dr. Gaultieri's report, then did Dr. Gaultieri's report qualify as competent evidence when it establishes a medical and scientific basis for his testimony and is clear, substantial, and stated without equivocation?

3. Did Appellant Vickie Rummage meet her burden of proof in establishing an aggravation of a preexisting psychological condition, despite lacking "any indicia of trustworthiness" in her testimony and in her self-reporting of alleged symptoms that pre-existed her accident to her medical providers?

4. Did the Single Commissioner err in admitting a prior commission order for the purpose of establishing that Appellant Vickie Rummage had, in fact, retained a worker's compensation attorney in her prior worker's compensation case, had her deposition taken, and had a full hearing on that claim, all of which Appellant denied at her hearing in the instant case?

STATEMENT OF THE CASE ON APPEAL

Appellant/Claimant Vickie Rummage ("Appellant") suffered an admitted workplace injury on May 18, 2012. She filed a worker's compensation claim and received treatment for her injury. On November 7, 2016, the parties had a hearing before the Single Commissioner on Appellant's

subsequent allegations that the workplace injury had aggravated her pre-existing psychological condition. Appellant also sought additional treatment with a specialist for these alleged aggravated conditions.

After hearing testimony and reviewing all relevant documents and medical records, the Single Commissioner issued a Decision and Order on March 14, 2017, finding that Appellant had failed to prove a "compensable aggravation of her pre-existing psychological condition" and that Appellant was "not entitled to any workers' compensation benefits for any medical treatment for her psychological condition." The Single Commissioner also noted that Appellant lacked all credibility in every aspect of her testimony

On March 28, 2017, Appellant appealed the March 14, 2017 Decision and Order of Commissioner Barden, listing fifty-seven grounds for appeal. (Appellant's Form 30). On September 18, 2017, after briefing by the parties, the Full Commission heard oral argument on Appellant's appeal.

The Full Commission issued its Decision and Order on February 2, 2018, fully upholding the Single Commissioner's March 14, 2017 Decision and Order, and finding that Appellant failed to prove a compensable aggravation of her pre-existing psychological condition. This appeal followed.

STATEMENT OF THE FACTS

Appellant began working for Employer BGF Industries, Inc. in 2010. (Rummage Depo, p. 15). On May 18, 2012, Appellant was injured at work when she tripped and fell backwards onto the ground. (*Id.* at 22-23). She testified that she hit her head, had a cut on her scalp, and a lump on her neck. (*Id.* at 24). She did not visit the doctor that day, but that she did get some first aid assistance, receiving some glue for the laceration on her head. (*Id.* at 24-25). Appellant finally

sought medical treatment twelve days later when she saw Dr. John McLeod over intermittent headaches, neck pain, and back pain. (APA # 10, p. 161). She also continued working for another three months after the accident.

A. Appellant's Medical Issues Prior to the May 2012 Accident

Appellant had significant medical issues prior to the accident in 2012. She admitted that she had suffered from neck pain, low back pain, and depression as far back as 2005. (Single Commissioner Hearing Tr., p. 51). She had been diagnosed with cervical disc disease in September 2005, and she had been on medication for pain and depression since at least 2005, including Lorcet, Xanax, Ambien, and Prozac. (Single Commissioner Hearing Tr., p. 51-52).

In 2008, Appellant was treated for major depression and chronic pain by Dr. Fred McQueen, her family doctor. (Single Commissioner Hearing Tr., p. 55). In 2009, Appellant was treated with medication for chronic pain, chronic migraines, chronic anxiety, and depression. (Single Commissioner Hearing Tr., p. 55). In 2010, Dr. McQueen stated that he "did not know how much longer [Appellant] could continue in the work field, because her body is breaking down." (Single Commissioner Hearing Tr., p. 54). In January 2011, Appellant underwent a CT scan due to her dizziness and headaches, and her migraines were so severe that it affected her ability to go into work. (APA #14, p. 225). In May 2011, Appellant was still being treated for chronic pain via a prescription for Percocet. (Single Commissioner Hearing Tr., p. 56). In September 2011, Appellant was being treated for chronic pain and depression, and as of February 2012, was taking Percocet, MS Contin, Morphine Sulfate, and Xanax. (Single Commissioner Hearing Tr., p. 58). At the hearing, Appellant claimed to not remember much of her medical history or the medication that she had been prescribed prior to the job injury on May 18, 2012. (Single Commissioner Hearing Tr., p. 58).

B. Appellant's Medical Treatment after the May 2012 Accident

1. Appellant's Treatment by Dr. Daniel Collins

In December 2012, Appellant was referred to Dr. Daniel Collins by the workers' compensation insurance carrier. (Collins Dep. 6). Dr. Collins treated Appellant with trigger point injections, Botox, and medication, which Appellant alleged were helpful, particularly with her headaches. (Single Commissioner Hearing Tr., pp. 29-31). She stated that Dr. Collins prescribed antidepressants, pain medication, Lyrica, and Cymbalta to try to help with the pain. She also admitted that Dr. Collins prescribed Xanax and Fioricet for headaches, Effexor for anti-depression, and Amtivert for dizziness. She stated these medications did help. (Single Commissioner Hearing Tr., p. 32).

However, Dr. Collins developed serious concerns about Appellant's credibility during the time he treated her. On one occasion, he discovered that Appellant had lied to him about whether she had ever taken Lyrica; she had, but she told Dr. Collins that she had not. (Collins Dep. 23). Additionally, Dr. Collins noted that Appellant failed to tell him that many of physical problems she was complaining about to him had pre-existed her 2012 accident. (Collins Dep. 26). Appellant also failed to tell Dr. Collins that she had ever been treated by Dr. McQueen, nor did she tell Dr. Collins that she had been prescribed Lyrica, Flexeril, Percocet, Xanax, and Nuvigil as recently as four days prior to the 2012 accident. (Collins Dep. 30). Appellant also failed to tell Dr. Collins that she suffered from headaches, chronic pain, major depression, trouble sleeping, and degenerative disc disease prior to the 2012 accident. (Collins Dep. 33-34). Dr. Collins himself admitted that it would be "impossible to tell . . . how much or how little the work injury from May 2012 played into symptoms that [Appellant] had, apparently, been experiencing for a few years" already. (Collins Dep. 35).

Appellant also failed to tell Dr. Collins that she had been prescribed a narcotic pain reliever by another doctor at the same time that Dr. Collins was prescribing her narcotics, which Dr. Collins noted was sufficient grounds to terminate her as a patient. (Collins Dep. 41-42). Regarding Appellant's credibility, Dr. Collins noted that, "I have more than concerns about her honesty in the past, and there is always an issue now whether she is being honest with me. She's definitely not been honest in the past, so I would say a lack of honesty in the past makes me worrisome about a lack of honesty at present." (Collins Dep. 46).

Dr. Collins's concerns are reinforced by the fact that Appellant testified that she had not suffered from headaches, dizziness, neck problems, or depression (i.e., all of the symptoms noted repeatedly above) before her 2012 accident, a position that is demonstrably false. (Rummage Dep., p. 53).

2. Appellant's Examination by Dr. Thomas Gaultieri

In April 2015, Appellant met with Dr. Thomas Gaultieri, a psychiatrist, at Defendants' request. Dr. Gaultieri has been practicing medicine for nearly fifty years, and he has spent much of his career in the field of neuropsychiatry. He has published numerous peer-reviewed journal articles related to his field of expertise. (*See, generally,* APA #20). In 1988, Dr. Gualtieri founded NC Neuropsychiatry, where he first saw Appellant as a patient. He is a board-certified member of the American Board of Psychiatry & Neurology.

In addition to his personal observations of Appellant during their meeting and interview, Dr. Gaultieri also reviewed all of Appellant's medical records since the date of her accident in 2012. (APA #20, p. 266). Specifically, Dr. Gaultieri reviewed the records from the following medical providers: Dr. John Mcleod in 2012; Dr. Jeff Benjamin in 2012; and Dr. Daniel Collins in 2012 to 2014. Additionally, Dr. Gaultieri had the opportunity to review Dr. Salas's report

critiquing Dr. Gaultieri's findings. (*Id.* at 274). Dr. Gaultieri also administered multiple neurological and cognitive tests on the Appellant during his examination.

Dr. Gaultieri reported that Appellant "demonstrated a non-credible clinical presentation, with dramatic inconsistencies," and he found "clear evidence of symptom exaggeration" by Appellant. (*Id.* at 265). He noted that Appellant's pre-accident symptoms were remarkable similar to those she claimed to suffer from after the accident. (*Id.* at 270). Dr. Gaultieri also recognized the inherent difficulties in evaluating Appellant's condition since the medical provider had to rely fully on Appellant's self-reporting, which is suspect "in cases where compensation is involved . . . ." (*Id.* at 272). In stark contrast to Appellant's deposition testimony and her testimony at the hearing, Appellant was suddenly able to recall a "detailed history of complicated medical problems and present them with lucidity," a task she was unable to replicate when questioned by an opposing attorney at her deposition and at the hearing in front of the Single Commissioner. (*Id.* at 274). Appellant's "overt memory performance, and indeed general appearance, fluency and lucidity [was] quite a variance with her claimed symptomology," Dr. Gaultieri noted. (*Id.* at 270).[1]

Ultimately, Dr. Gaultieri concluded, based on his nearly fifty years of experience, his observations of Appellant, and his extensive and thorough review of Appellant's medical records, that that there was "no reason to believe that her current problems are related to a head injury," such as the accident in May 2012. (*Id.*). He also concluded that Appellant had already reached maximum medical improvement. (*Id.* at 270).

[1] Claimant's attorney makes several references to what he terms Dr. Gaultieri's "canned report," which Claimant's attorney bases solely on a typo of the date on which Dr. Gaultieri examined Claimant. However, a simple review of Dr. Gaultieri's report reveals the extensive testing, interaction, and medical record review that Dr. Gaultieri undertook in reaching his conclusions.

3. Other Medical Evaluations of Appellant

In May 2014, Appellant hired Dr. Tora Brawley, Ph.D. to create a report based on an interview with Appellant. (APA # 3, p. 97-98). Appellant's attorney also later asked Dr. Brawley to refute Dr. Gaultieri's report, which Dr. Brawley dutifully did. (*Id.* at 99-101).

In April 2015, Appellant hired Dr. Amanda Salas of the Palmetto Center of Psychiatry for purposes of refuting Dr. Gaultieri's damning report. (APA #2, p. 82). Dr. Salas spent less time with Appellant than did Dr. Gaultieri (*id.*), yet she was unsurprisingly able to come to a conclusion in support of Appellant and in opposition to Dr. Gaultieri's conclusions. (*Id.* at 89). Dr. Salas, it should be noted, has less than a quarter of the years of experience in her field as does Dr. Gaultieri.

In 2014, Appellant hired Dr. Donna Schwartz-Watts (Maddox) to interview Appellant and provide another report in support of Appellant's case. Dr. Schwartz-Watts issued the report nearly two years later and concurred with Appellant's other hired doctors as to the validity of Appellant's conditions. (APA #4, p. 102).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard of review for decisions by the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). South Carolina Code Section 1-23-380(5) of the APA provides that

> [t]he court may not substitute its judgment for the judgment of the agency **as to the weight of the evidence on questions of fact.** The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code § 1-23-380 (emphasis added).

"The appellate court's review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law." *Hendricks v. Pickens County*, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999); *see Roper Hosp. v. Clemons*, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997) ("On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law."). The commission's decision must be affirmed unless it is clearly erroneous in view of the substantial evidence on the whole record. *See Nettles v. Spartanburg School Dist. #7*, 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct. App. 2000).

ARGUMENTS

I. Appellant failed to preserve for appeal the issue of whether Dr. Gaultieri's report constitutes "medical evidence" if it did not include the phrase "to a reasonable degree of medical certainty."

In her Initial Brief, Appellant argues that Dr. Gaultieri's report, submitted by Respondents at the Single Commissioner hearing, does not sufficiently controvert Appellant's own experts because Dr. Gaultieri did not state his opinions to a reasonable degree of medical certainty under S.C. Code § 42-9-35. (Appellant's Initial Brief, p. 12). Appellant cites *Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust*, 396 S.C. 589 (2012), in support of her arguments on this point. Appellant contends that she provided "competent evidence" in the form of expert witnesses to support her claim, but that Respondents' expert report from Dr. Gaultieri does not constitute competent evidence because it does not include the words, "to a reasonable degree of medical certainty."

However, while Respondents submitted Dr. Gaultieri's report at the Single Commissioner hearing in 2016, Appellant did not object to the admissibility of that report at the hearing on the basis that she now raises under the *Michau* case, or on any other basis, in fact. And, after the Single Commissioner issued an order, Appellant failed to raise this issue in any of the fifty-seven grounds for appeal that she provided to the Full Commission. (*See* Full Commission Order, February 1, 2018, pp. 11-28). In fact, Appellant mentions Dr. Gaultieri's report only once in her grounds for appeal, in the thirtieth ground for appeal. (*Id.* at p. 19). In that section, Appellant attacks Dr. Gaultieri's report on the following bases: (1) that Dr. Gaultieri allegedly created his report prior to meeting Appellant; (2) that he used his own diagnostic tests when evaluating Appellant; (3) that Dr. Gaultieri's forty years in his field does not render him qualified to evaluate neuropsychological test data; and (4) that Dr. Gaultieri's findings do not line with Appellant's experts. (*Id.*). Nowhere in the grounds for appeal does Appellant argue that Dr. Gaultieri's findings are not competent medical evidence because the report lacks the phrase "to a reasonable degree of medical certainty."

Appellant fails to mention that argument and the *Michau* case at any point in this case until the parties' oral arguments in front of the Full Commission. Appellant even provided a brief prior to oral arguments that failed to mention this argument or the *Michau* case. Respondents' counsel's first knowledge of Appellant's argument on this point came when Appellant's counsel provided him with a copy of the *Michau* case in the midst of oral argument. (Full Commission Transcript of Oral Argument, p. 8-9).

Respondents were given no notice of this new ground for appeal prior to oral arguments at the Full Commission, and therefore Appellant failed to preserve this argument for appeal. This Court has already held that "[a]n issue not raised in the application for review is not preserved for the full commission's consideration. General exceptions that fail to specifically assign the grounds

for error are insufficient to preserve an issue." *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) (internal citations omitted). "The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission. . . ." *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993). "Only issues within the application for review under S.C. Code Ann. § 42–17–50 (1976) are preserved for appeal to the commission." *Brunson v. Am. Koyo Bearings,* 367 S.C. 161, 165–66, 623 S.E.2d 870, 872 (Ct. App. 2005).

The South Carolina Supreme Court has explained that the policy reasons behind this requirement of specificity ensure that "the opposite party may know what questions are to be raised in the appellate court and **may not be subjected to the danger of having new questions sprung at or just before the hearing**." *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447, 450 (1944) (emphasis added). Appellant did, in fact, spring new questions on Respondents' counsel at the Full Commission hearing, and ultimately failed to raise this issue at the appropriate time, which would have been in the grounds of appeal in Appellant's Form 30. Therefore, Appellant's arguments on the competency of Dr. Gaultieri's report were not preserved for appeal and should not be considered.

Ultimately, however, even if Appellant had preserved this issue for appeal, Dr. Gaultieri's report still constitutes competent medical evidence. Dr. Gaultieri's report, which was submitted at the Single Commission hearing, was clear and unequivocal in its findings. Dr. Gaultieri met with Appellant for several hours, reviewed her extensive medical records, and performed multiple tests. (Respondent's APA #20, page 265-75; *see also, supra,* at Fact Section B.2.). Dr. Gaultieri determined, without equivocation, that Appellant "demonstrated a non-credible clinical presentation, with dramatic inconsistencies." (*Id.* at 265). He found "clear evidence of symptom

exaggeration." (*Id.*). He also found that Appellant was at maximum medical improvement, and that despite Appellant's claims, there was "no evidence that [Appellant] had a head injury . . ." (*Id.*). Given Dr. Gaultieri's nearly fifty years of experience in this field; his status as a board certified member of the American Board of Psychiatry & Neurology; and his extensive review of Appellant's case, it is clear that his report and opinion, in conjunction with Appellant's non-credible testimony at the hearing, provide ample grounds to support the Single Commissioner's decision to deny Appellant's claim.

II. Appellant failed to meet her burden of proof, and therefore, the Full Commission's denial of her claim for aggravation of prior medical condition should be upheld.

A. Appellant's own lack of any credibility undermines any information she provided to her own doctors or to the Single Commissioner at the hearing.

The Full Commission, in adopting and affirming the Single Commissioner's findings, found that that Appellant was "**not remotely credible**," a conclusion that the Single Commissioner based on her observations of the Appellant at the final hearing, "the inconsistencies in her delivery of her testimony, her evasiveness, and on her very 'selective' memory at the hearing and at her deposition . . . ." (Single Commission Order, p. 13) (emphasis added). The Single Commissioner determined that Appellant was "wily and manipulative," a key determination by the factfinder that must guide this entire appeal. (Single Commission Order, p. 14).

Although the Full Commission is the ultimate factfinder in workers' compensation cases, "[i]t is logical for the [Appellate Panel], which [does] not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009). It is "within the single commissioner's discretion, and ultimately that of the Appellate Panel, to assess the witnesses' credibility and weigh their testimony in reaching a decision." *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 459, 718

S.E.2d 755, 760 (Ct. App. 2011). ("Because the single commissioner had the benefit of observing [the Appellant] before reaching her decision, we cannot say the Appellate Panel and the circuit court erred in adopting the single commissioner's finding on this issue."). Moreover, unlike the blind adherence to expert witnesses that Appellant demands in her brief, "[t]he Appellate Panel is not bound by the opinion of medical experts . . . ." *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 292, 638 S.E.2d 66, 70 (Ct. App. 2006). Of course, the question remains whether Single Commissioner's determination was based on "other competent evidence in the record." *Burnette*, 401 S.C. at 427-28, 737 S.E.2d at 206.

The Single Commissioner did not pull her determination out of the ether. Instead, she based her conclusions on the following evidence, among other things:

- Appellant's longstanding chronic depression and anxiety disorders, which predated her May 2012 accident (Single Commission Order, p. 14, ¶ 8);
- Appellant's selective memory when it came to her pre-accident symptoms and treatment, including medications she had been prescribed just a few days or months prior to the accident (*Id.* at pp. 15, 19, 21, 22, ¶¶ 8, 20, 22);
- Appellant's longstanding chronic migraines and sinus headaches, which predated her May 2012 accident (*Id.* at p. 16, ¶ 11);
- Appellant's longstanding sleep difficulties, which predated her May 2012 accident (*Id.* at p. 16, ¶ 14);
- The expert opinion of Dr. Gaultieri, as detailed *supra* (*Id.* at p. 18, ¶ 19);
- Appellant's longstanding situation stressors that caused her depression and anxiety for many years prior to the accident (*Id.* at p. 19-20, ¶ 21);

- Appellant's dishonesty with Dr. Collins in failing to inform him of her extensive pre-existing chronic pain, anxiety, depression, and trouble sleeping (and accompanying medication for treatment) (*Id.* at p. 22, ¶ 23); and
- Appellant's selective memory and selective disclosure of prior medical history with a series of doctors that she hired to evaluate her (*Id.* at p. 23-24, ¶¶ 24-27).

Again, as factfinder, the Single Commissioner had access to valuable information that the expert witnesses proffered by Appellant did not. The Single Commissioner was able to directly observe Appellant's demeanor when she testified, especially when Appellant was cross-examined about her pre-existing conditions. The Single Commissioner also had access to a transcript of Appellant's testimony at her deposition and could compare Appellant's responses at her deposition and the hearing to what Appellant told her various doctors in the years leading up to the final hearing. Based on this holistic view, the Single Commissioner weighed all the evidence and made her findings of facts and conclusions.

In *Fishburne v. ATI System International*, the court of appeals noted that "[t]he reliability of the documents and [the Appellant's] statements were matters of credibility for the Appellate Panel, which, in upholding the Single Commissioner's order, discounted [Appellant's] credibility because **she exaggerated her symptoms** and **made inconsistent statements at the hearing and to her treating physicians**." 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (emphasis added). The Appellant's "inconsistent statements[] caused the Single Commissioner to question [the Appellant's] credibility. Therefore, substantial evidence supports the Appellate Panel's decision that [the Appellant's] testimony was not credible." *Id.* In this case, the hearing commissioner, in her extensive and detailed findings of fact, described the multitude of inconsistent statements that Appellant made to her various doctors, as well as to the hearing

commissioner herself. That, taken in hand with the hearing commissioner's finding that Appellant lacked credibility in her presentation at the hearing, provides ample evidence that Appellant lacks credibility in key matters. And, since the nature of her alleged condition depends solely on self-reporting, Appellant's lack of credibility casts a shadow over her entire case.

B. The Single Commissioner relied upon ample medical evidence in the record in concluding that Appellant had failed to meet her burden of proof under S.C. Code § 42-9-35 and that Appellant's claims for aggravation of prior medical condition should be denied.

The Single Commissioner found that Appellant's propensity for prevarication tainted any self-reporting of symptoms that she provided to her own doctors. (Full Commission Order, p. 43, ¶ 36). The Appellant pays lip service to the Single Commissioner's discretion as factfinder to determine the credibility of witnesses, but otherwise is simply incredulous that the Full Commission would fail to find for Appellant. Yet the legal standard is clear that the Single Commissioner does not have to accept the medical opinion of Appellant's expert simply because the Appellant presents such testimony at a hearing. If that were the standard, we would not need factfinders at all. The Court of Appeals firmly states that, "[a]lthough medical evidence 'is entitled to great respect,' the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record." *Burnette v. City of Greenville,* 401 S.C. 417, 427–28, 737 S.E.2d 200, 206 (Ct. App. 2012), citing *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The ultimate question for this Court is whether Commission's determination that her review of the extensive medical evidence, including Dr. Gaultieri's report, along with the Appellant's overall lack of credibility, provided

"competent evidence in the record" to support the Full Commission's decision. We argue that it does.

Appellant's alleged symptoms, because they are neurological in nature, are different from a broken arm or injured spine. The difference is that a broken arm can be objectively determined through an x-ray or visual observation. Appellant's symptoms, such as feeling depressed or suffering from memory loss, are purely subjective and cannot be objectively observed by medical providers. The doctors that Appellant saw had to rely solely on the Appellant's word that she was suffering from depression, or headaches, or memory loss, or sleep issues. Thus, Appellant's case rises and falls on her credibility and honesty. Importantly, the Single Commissioner found that Appellant was "**not remotely credible,**" a conclusion that the hearing commissioner based on her observations of the Appellant at the final hearing, "the inconsistencies in her delivery of her testimony, her evasiveness, and on her very 'selective' memory at the hearing and at her deposition . . . ." (Single Commission Order, p. 13) (emphasis added). The Single Commissioner determined that Appellant was "wily and manipulative," a key determination by the factfinder that must guide this entire appeal. (Single Commission Order, p. 14).

Ultimately, the Court of Appeals "review[s] the Commission's factual findings of whether an Appellant is entitled to compensation for aggravation of a pre-existing condition under the substantial evidence standard of review." *Murphy v. Owens Corning*, 393 S.C. 77, 86, 710 S.E.2d 454, 458 (Ct. App. 2011). In this case, the Single Commissioner's Order is predicated on a plethora of competent and substantial evidence to support the Order's holding. Therefore, the Order should be affirmed.

III. The prior workers' comp Order was not admitted for that commissioner's opinion of Appellant's credibility, but rather was admitted to establish that Appellant's testimony in the current case—that she had little recollection of her previous worker's comp claim—was further evidence of her selective memory and lack of credibility.

Appellant argues that the Single Commissioner erred in admitting a prior hearing commissioner's order into evidence, because the Commissioner in that prior case had found Appellant to lack all credibility in that hearing as well. (Appellant's Initial Brief, p. 19). However, as a review of the hearing transcript reveals, Respondents' counsel was not entering the prior order into evidence to show that Appellant had been deemed without credibility in the prior hearing. Rather, Respondents' counsel was illustrating yet another example of Appellant's convenient lapses in memory of events that happen to undermine her case, as well as Appellant's well-established propensity for prevarication.

At her deposition in the present case, Appellant admitted that she'd had a prior worker's compensation case for an accident in 2007. (Appellant's Dep., p. 11). However, when asked in 2013 whether her prior case had gone to a hearing, Appellant said she didn't remember. (*Id.* at 12). Of course, her case *had* gone to a hearing, and Appellant had testified at that hearing extensively, as did many other witnesses. (APA # 23). When asked at her deposition in 2013 whether she'd ever had her deposition taken before, she denied it. (Appellant's Dep., p. 4). Of course, her deposition *had* been taken before and had been entered as an exhibit at her prior hearing. (APA # 23, p. 313). When asked at her deposition in 2013 whether she'd had an attorney for her 2007 claim, she affirmatively stated that she did not have lawyer. (Appellant's Dep., p. 12). Of course, she *did* have a lawyer, Steven Haymond of Harris & Graves, for her 2007 claim, who represented her case at trial. (APA # 23, p. 312).

Appellant's reliance on *Mizell v. Glover*, 351 S.C. 392, 403, 570 S.E.2d 176, 182 (2002), is misplaced. *Mizell* concerns the introduction at a current trial of credibility assessments of witnesses by judges in previous trials. However, Respondents did not argue that Appellant's credibility in the prior worker's compensation claim was evidence that she lacked credibility in the instant case. Rather, a review of the hearing transcript reveals that Respondents' counsel was clearly using the prior order for the sole purpose of impeaching Appellant's credibility on her answers to questions about whether she'd had a hearing on her prior case, whether she'd ever had her deposition taken before, and whether she'd had a lawyer in the previous case. (Single Commission Hearing Tr. pp. 58-62). Respondents' counsel made no arguments that the Commissioner's determination of credibility in the prior hearing should be used as a basis for finding that Appellant was not credible in the present case. Rather, Respondents' counsel was able to demonstrate that Appellant could not be trusted to tell the truth on even simple matters, such as having a lawyer in a prior case. Ultimately, the Single Commissioner notes that she used the prior Commissioner's order simply to compare with Appellant's testimony at her deposition in the present case, and the Single Commissioner found that "Appellant's sworn deposition testimony—regarding her prior workers' compensation claim—is untrue and evasive." Single Commissioner Order, p. 26.

Far from being reversible error, Appellant's argument on this point simply further supports the Full Commission's conclusions: Appellant has a penchant for prevarication, which further shreds her credibility in this case.

CONCLUSION

Appellant's request for additional and continuing treatment for conditions that she had been treated for in the years prior to the 2012 accident was properly denied by the Full Commission.

Appellant's own inability to offer any consistent testimony, whether at her deposition, the hearing, or to any of her multiple doctors over the years, provides substantial competent evidence to support the Single Commissioner's Order denying Appellant's request for continuing treatment. Additionally, Dr. Gaultieri's testimony and report provide additional substantial evidence to support the Single Commissioner's Order. The Single Commissioner, as factfinder, did not believe Appellant or, by extension, Appellant's expert witnesses, who had to rely solely on Appellant's self-reporting. The Single Commissioner's decision to believe one witness over another is the prime function and privilege of a factfinder. The Single Commissioner's finding that Appellant had failed to prove aggravation of her prior medical issues also finds support in other medical evidence in the record. Therefore, because the Full Commission's findings are supported by reliable, probative, and substantial evidence on the record, its Order should be affirmed and Appellant's appeal should be dismissed.

Respectfully submitted,

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September 10, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2018-000359

Vickie Rummage, Employee, ... Appellant,

vs.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, ... Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal on Andrew N. Safran, attorney for Appellant, by depositing a copy of it in the United States Mail, first class, postage prepaid, on September 10, 2018, addressed to:

Andrew N. Safran
Attorney at Law
P.O. Box 12089
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September 10, 2018

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September 10, 2018

VIA UPS
Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Vickie Rummage v. BGF Industries and Great American Alliance Insurance Company
Appellate Case No.: 2018-000359

Dear Ms. Kitchings:

I am enclosing an original and one copy of Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal. Please return a stamped filed copy of these documents to my office in the envelope provided.

By copy of this letter to Appellant's attorney, Andrew N. Safran, I am serving a copy of these documents on him.

I sincerely appreciate your cooperation and assistance.

Respectfully,

HORTON LAW FIRM, P.A.

Michael A. Farry

MAF/lc
Enclosure

cc: Andrew N. Safran (with enclosure)

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