

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No.: 1004411

Cynthia Walton, Employee,

Respondent,

v.

Union County Carnegie Library, Employer, and
S.C. Association of Counties SIF, Carrier,

Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On December 14, 2011, the Single Commissioner heard this matter based upon the Forms 50 and 51 on the issue of compensability for the right shoulder injury suffered by Claimant/Respondent, Cynthia M. Walton (“Respondent”), in a work-related accident occurring on March 30, 2010. While Defendants/Appellants, Union County Carnegie Library and SC Association of Counties SIF (“Appellants”) admitted an injury to Respondent’s right wrist resulting from this accident, they denied the injury to her right shoulder. The Single Commissioner’s Decision and Order dated January 30, 2012, found that Respondent suffered a compensable injury to her right shoulder in addition to her admitted right wrist injury. (R.p. 15).

Appellants subsequently appealed to the Appellate Panel of the South Carolina Workers’ Compensation Commission (“the Commission”), who heard oral argument on May 22, 2012. On July 16, 2012, the Commission affirmed the Single Commissioner’s Decision and Order, with one Commissioner dissenting. (R.p. 5). Appellants now take this appeal.

BRIEF FACTUAL BACKGROUND

Respondent is a 47 year-old woman who graduated from the University of South Carolina with a degree in Psychology. (R.p. 243). Respondent has worked as a librarian in the Children Services Department at the Union County Carnegie Library since May 2004. *Id.* She has never before filed a workers’ compensation claim. (R.p. 49, lines 7-9). The incident in question is a motor vehicle accident which occurred on March 30, 2010, in Columbia, South Carolina, wherein Respondent’s vehicle was struck from behind and pushed into the vehicle in front of her. (R.pp. 59, lines 19-25; 60, lines 1-9). Appellants admitted this was a compensable, work-related accident, and they further admitted the injury to Respondent’s right wrist and arm

resulting from that accident. (R.pp. 21; 46, lines 1-4). Respondent also alleged an injury to her right shoulder from this same accident, but Appellant's denied that injury. (R.pp. 21; 45, lines 1-11; 46, lines 1-4).

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel." S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact." Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004). "Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached." Carolinas Recycling Group v. S.C. Second Injury Fund, 730 S.E.2d 324, 326 (Ct.App.2012) (citing Lark, 276 S.C. at 135, 276 S.E.2d at 306. "[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." Id. (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

ARGUMENT

Appellants argue that the Commission's Decision and Order should be reversed based upon their belief that Respondent is not credible, their belief that Dr. Keith's opinion is not reliable, and their perception that the Decision and Order in this case was based solely on a

reference to shoulder pain in the physical therapy records. As demonstrated below, there is substantial evidence to support the Commission's findings on these matters.

I. This Court may not make determinations as to the credibility of witnesses.

Much of Appellants' argument is based upon questions of credibility. Specifically, Appellants argument that Respondent's testimony is not credible is based upon two primary contentions: 1) Respondent was somehow disingenuous about prior right shoulder problems and when her right shoulder was bothering her following this accident; 2) Respondent's testimony is in conflict with Dr. Falcon's testimony. As this Court (and our Supreme Court) has noted previously:

"It is the Appellate Panel, rather than the circuit court or this court, that determines the credibility of witnesses and resolves disputes between witnesses." See Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) ("Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the [Appellate Panel] are conclusive.").

Watt v. Piedmont Auto. & Piedmont Chrysler Plymouth, 384 S.C. 203, 212, 681 S.E.2d 615, 620 (Ct.App.2009) (emphasis added). Therefore, this Court may not invade the Commission's province as to findings relative to Respondent's credibility, or as to any conflict between her testimony and that of Dr. Falcon. See Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) ("The credibility and weight of the doctor's testimony is for the trier of fact.").

II. Respondent's testimony is credible.

Even if this Court could weigh issues of witness credibility, Respondent testified credibly regarding this matter. Dr. Falcon focused his treatment solely on Respondent's wrist and hand, such that he was not addressing her right shoulder problem. As demonstrated below, there is

substantial evidence supporting the specific finding made by the Single Commissioner and the Commission that Respondent was a credible witness.

A. Respondent accurately testified regarding her right shoulder issues.

First, Appellant suggests that a single mention of Respondent's right shoulder in a medical record from 2008 demonstrates a history of right shoulder problems about which Respondent was disingenuous when testifying that she did not have any such problems prior to her work-related car accident on March 30, 2010. (R.pp. 50, lines 17-20; 66, lines 9-12). The record in question is from her family physician, Dr. Craft, dated May 9, 2008. (R.p. 210). In that record, the sole reference to her right shoulder was in the "History of Present Illness," which reads: "[H]ere today for f/u appt. with complaints [of abdominal] pain, rt shoulder, generalized pain, feels bad, flank pain, back pain, rib pain, bad indigestion and [headaches] for the past couple wks." (R.p. 210). That is the only reference to her right shoulder in this four-page long note, and specifically, there is no mention of shoulder problems or shoulder pain under the "Current Problems" section of this note. (R.pp. 210-214). In fact, of the 47 pages of records Appellants submitted into evidence from Dr. Craft, spanning a period from August 2007 through February 2009, this is the only mention of her right shoulder, period. (R.pp. 195-242).

As Respondent explained, at the time of her May 9, 2008, appointment, her understanding was the doctor believed she was having gallbladder problems, which she continues to have to this day. (R.p. 67, lines 2-4). The May 9, 2008, record, which confirms Respondent's testimony, reads: "Her epigastric discomfort and dyspepsia will be further investigated with lab work, and a subsequent GI referral for consideration of endoscopy." (R.p. 210). This is not a work-up of her right shoulder, and Respondent confirmed that she did not

have a right shoulder injury at that time nor did she receive any treatment for her right shoulder at that time. (R.p. 70, lines 16-22).

In a second attempt to question Respondent's credibility, Appellants suggest that because shoulder pain was not noted in medical records following the admitted work accident, Respondent is lying about having shoulder pain at the time of the accident. While the records from Palmetto Health Baptist Medical Center ("PHBMC") do not specify right shoulder pain, it is noted on the day of the accident that Respondent had full range of motion in her extremities "but there is some tenderness." (R.p. 106). Moreover, the injuries to Respondent's right wrist and hand are admitted in this case, yet there is no mention of these problems in the PHBMC records, either. (R.pp. 105-108). By Appellants' logic, it would follow that Respondent was also lying about hurting her right wrist, despite the fact Appellants accepted that injury.

Respondent explained that while her right shoulder hurt after the accident, her right wrist and hand injury was "visible" (due to swelling), and as such seemed to be the focus of the initial treatment. (R.pp. 55, lines 16-21; 65, lines 16-20). Therefore, her right wrist and hand were the focus of her single visit to Occupational Health two days after the accident, and in turn became the focus of the treatment that followed from Dr. Falcon (as described, below). Regardless, this has nothing to do with Respondent's credibility.

B. Dr. Falcon was only treating Respondent's right wrist and hand – not her shoulder.

While Respondent stipulated to the fact that Dr. Falcon never recorded in his notes a complaint of shoulder pain by Respondent, and agrees that Dr. Falcon repeatedly answered "yes" whenever Appellant's counsel asked him whether he would have recorded such a complaint had it been made, Appellants' fail to inform this Court about the context of Dr. Falcon's treatment. It is important to understand that Dr. Falcon testified he was only treating Respondent for her wrist,

hand and finger problems. Dr. Falcon, who is a hand specialist, explained the specific reason Respondent was referred to him was to treat right wrist and hand pain, and that he was not treating Respondent for her shoulder pain. (R.p. 86, lines 3-8). In fact, Dr. Falcon acknowledged he doesn't even handle shoulder injuries. (R.p. 88, lines 12-14).

Dr. Falcon testified he has treated patients in the past for hand injuries when they also had other injuries he was not treating, and that on those occasions, he would not necessarily be discussing those other injuries with those patients. (R.p. 85, lines 17-24). In this instance, Dr. Falcon simply didn't recall a conversation about right shoulder pain with Respondent, as he testified his exam and medical treatment plan was focused on the right wrist, hand and fingers. (R.p. 75, lines 19-25). Further, Dr. Falcon testified that upon inspection of the medical records, Respondent had several other complaints of pain he agreed appeared to be related to this work accident which he did not record in his records. (R.p. 87, lines 11-18).

Finally, Dr. Falcon reviewed Dr. Keith's evaluation and opinions regarding this matter. Dr. Falcon testified that he believes Dr. Keith is a good orthopedic surgeon and would defer to him regarding the assessment and treatment of shoulder injuries. (R.p. 88, lines 6-18). Based upon his review of the lengthy history written by Dr. Keith, it did not appear to Dr. Falcon there was any information regarding his treatment of Respondent that Dr. Keith did not have which would be critical to the assessment of her injuries. (R.p. 90, lines 9-19). Ultimately, Dr. Falcon testified he did not have any reason to question Dr. Keith's assessment of Respondent's injuries as it relates to the issue of causation. (R.p. 91, lines 9-13). As such, not only does Dr. Falcon's testimony not bring Respondent's credibility into question – it actually endorses Dr. Keith's opinion regarding the causal connection between this accident and her shoulder injury.

III. Dr. Keith's opinion that Respondent's shoulder was injured as a result of her work-related accident is not contradicted.

Dr. Keith opined as follows:

It is with a high degree of medical certainty that [Respondent's] right shoulder and wrist pain are directly related to the motor vehicle accident on March 30, 2010, which was a Workman's Compensation injury that occurred while driving to Columbia for a work related seminar.

(R.p. 184). Appellants never deposed Dr. Keith in this instance to question the basis or validity of this opinion. Appellants also never had Respondent evaluated by another orthopedist to analyze whether Dr. Keith's opinion was correct. Even after Dr. Falcon testified he did not have any reason to question Dr. Keith's opinion, Appellants still did nothing else to establish evidence of a contrary conclusion.

Rather, Appellants have chosen to parse words about the precise location of Respondents' arm relative to the steering wheel at the time of the accident (as Respondent explained, her hand and arm were in the proximity of the steering wheel at the time of impact). (R.p. 71, lines 9-11). The other point argued in Appellants' brief – that Dr. Keith inaccurately noted the air bag deployed – likewise is meaningless, as Appellants neither explain their theory as to why either of these items impacts the analysis of causation in this instance, nor did they address this matter with Dr. Keith or another qualified specialist.¹ By making no attempt to support their argument through evidentiary means, Appellants themselves treated this as the non-issue it is.

¹ Respondent consistently stated the air bag did not deploy, and she explained this on the day of the accident in the emergency room at PHBMC and in her testimony at the hearing. (R.pp. 51, lines 7-12; 60, lines 23-24; 100; 104).

IV. The evidence as a whole supports the Commission's finding that Respondent's right shoulder is compensable.

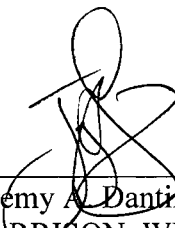
Appellants argue that it was error for the Commission to rely on the June 8, 2010, physical therapy note to support the finding that Respondent's right shoulder injury was compensable. To be sure, in the midst of suggesting Respondent was not complaining about right shoulder pain while she was treating with Dr. Falcon, the aforementioned physical therapy record notes Respondent reported shoulder discomfort during this period. (R.p. 162). Later, on July 6, 2010 (also while she was still treating with Dr. Falcon), there is another physical therapy note mentioning pain radiating up Respondent's arm. (R.p. 169). This supports Respondent's testimony that she was having problems with her shoulder and complaining about it during this period, which adds to her credibility.

Of course, this is not the only item on which the Commission based its decision. The fact that the work-related accident admittedly injured Respondent's right upper extremity, Respondent's credible testimony (which was a specific finding made by the Single Commissioner who had the opportunity to personally observe her testimony)², and the opinion of Dr. Keith (which is not contradicted by any other medical evidence) all combine with the physical therapy notes to support the decision in this case. There is no question Respondent has an injured shoulder – in fact, Dr. Keith has recommended shoulder surgery. (R.p. 194). There is no evidence Respondent could have possibly injured her right shoulder in any other way than in this work-related accident. As such, the Commission's finding that "the greater weight of the evidence" proves her right shoulder injury is compensable should be upheld. (R.p. 4).

² R.p. 14.

CONCLUSION

Appellants are in the position of trying to argue that is implausible to believe the motor vehicle accident - which they admit injured Respondent's right arm and wrist - could have also injured her right shoulder. The undisputed medical evidence establishes this accident injured Respondent's shoulder to a "high degree of medical certainty." Further, Respondent was found to be credible by the Commission, and as the trier of fact in this instance, this finding may not be disturbed by this Court. The evidence substantially supports the Commission's Decision and Order, and therefore it must be affirmed.



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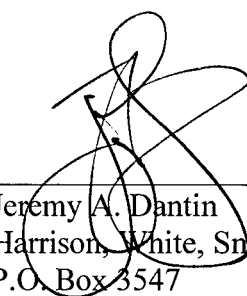
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CERTIFICATE OF COUNSEL

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

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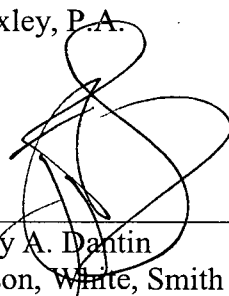
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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on the above-named Appellants, Union County Carnegie Library and S.C. Association of Counties SIF, the 5th day of November 2012, by depositing the same in the United States Mail, first class postage prepaid, addressed to their attorney of record, as follows:

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