THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1004411

Cynthia Walton, Employee, Claimant, Respondent,

v.

Union County Carnegie Library, Employer,
SC Association of Counties, SIF, Carrier, Appellants.

REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT WALTON SUSTAINED AN INJURY TO HER RIGHT SHOULDER ON MARCH 30, 2010 BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT?

ARGUMENTS

I.

WALTON DID NOT SUSTAIN AN INJURY TO HER RIGHT SHOULDER AS A RESULT OF HER MARCH 30, 2010 WORK ACCIDENT.

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004). In the present case, the reliable, probative, and substantial evidence in the record clearly establishes that Walton did not sustain an injury to her right shoulder on March 30, 2010 by accident arising out of and in the course of her employment.

A. The medical reports from the authorized treating physicians clearly establishes that Walton did not sustain a compensable injury to her right shoulder.

First, Walton does not dispute the fact that Dr. Falcon did not document any complaints of right shoulder problems in his medical reports during the five and a half months after her work accident. (*See* Respondent's Brief, p. 5). Nevertheless, Walton argues in her brief that the reason Dr. Falcon did not document any right shoulder complaints in his records is because "Dr. Falcon simply didn't recall a conversation about right shoulder pain with [her]" and because his treatment was focused solely on her right

wrist, hand, and fingers. (*See* Id. at 6). However, this is simply not correct. Dr. Falcon's testimony clearly establishes that if Walton would have complained about right shoulder problems, he would have documented those complaints in his records. (R.p. 84, line 25-p.85, line 10). Additionally, even though he does not treat shoulder injuries, Dr. Falcon would have referred Walton to a physician that treats shoulders if she would have complained of shoulder problems to him. (Id.) Despite the fact that Walton testified she complained of right shoulder problems to Dr. Falcon on several occasions, the only reasonable inference to be drawn from the substantial evidence in the record is that she never voiced any complaints of right shoulder problems to Dr. Falcon.

Further, Walton contends that Appellants' position that she did not injure her right shoulder during her work-related motor vehicle accident is somehow flawed since Appellants admitted an injury to her right wrist even though there are no documented complaints of right wrist pain in the emergency room records on March 30, 2010, the date of her work-related motor vehicle accident. (*See* Respondent's Brief, p. 5). However, while the emergency room physicians at Palmetto Health Baptist did not document any complaints of right wrist pain immediately after her accident, Walton presented to Dr. Stephen Thomas of Occupational Medical two days later with complaints of right wrist pain that she related to her motor vehicle accident. (R.p. 121). Since Walton had documented complaints of right wrist pain within days of her work accident, Appellants properly accepted her right wrist injury. Conversely, the same cannot be said for Walton's alleged right shoulder injury. Not only was there no mention of any right shoulder problems in the emergency room records from the date of her accident, but there was not one documented complaint of right shoulder problems in

either Dr. Thomas' records or Dr. Falcon's records. In fact, the first documented complaint of right shoulder problems was on December 14, 2010, *eight and a half months after her motor vehicle accident*, when Walton was sent by her attorney to Dr. John E. Keith of Orthopedic Specialties of Spartanburg for an evaluation.[1] (R.pp. 182-84). Accordingly, Appellants' position that Walton sustained an admitted injury to her right wrist but did not sustain an injury to her right shoulder as a result of her work accident is not flawed by any means. Rather, Appellants' position is supported by the reliable, probative, and substantial evidence in the record.

B. The June 8, 2010 physical therapy report does not support a finding that Walton sustained a compensable injury to her right shoulder.

The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 435 (Ct. App. 1999).

The Commission erred as a matter of law by relying on the single physical therapy record to support its finding that Walton sustained a compensable injury to her right shoulder. (*See* Brief of Appellants, pp. 22-24). First, Walton's June 8, 2010 physical therapy record is the only documented complaint of shoulder problems in the record during Walton's authorized treatment from March 30, 2010, the day of her accident, through September 23, 2010, the date Walton was released at MMI by Dr. Falcon. (R.p. 162). On June 8, 2010, *over two months after her motor vehicle accident*, Walton's therapist simply noted that "Patient reports shoulder discomfort that eases off with use of wall pullies." (Id.) In addition to indicating that Walton's "discomfort"

[1] It should be noted that the record does not reveal that Walton ever asked Union County to send her for an evaluation of her right shoulder prior to December 14, 2010.

resolved following some wall pulley exercises, the therapist's record also does not indicate whether Walton was complaining of right shoulder or left shoulder discomfort. (Id.)

Thus, since Walton's accident over two months before the June 8, 2010 therapy record and since the therapist did not indicate which shoulder the "discomfort" was located, it was purely speculative for the Commission to rely on this report in finding that Walton sustained a compensable injury to her right shoulder as a result of her March 30, 2010 work accident. Additionally, since the therapist's report indicates that any shoulder "discomfort" Walton was having at the time resolved, the Commission engaged in further speculation by concluding that her current condition was causally related to her March 30, 2010 work accident.

Finally, in her brief, Walton attempts to bolster the Commission's decision by asserting that Walton's July 6, 2010 physical therapy record, which noted that she "reports pain radiating up her arm occasionally" also supports her allegation that she sustained a compensable injury to her right shoulder. (*See* Appellants' Brief, p. 8). However, the therapist specifically noted that Walton's pain was radiating "up" her arm, which clearly indicates that her shoulder was not the source of her pain. (R.p. 169). Further, it is purely speculative to suggest that the "pain radiating up her arm occasionally" was traveling all the way to her shoulder. In fact, when Appellants' asked Dr. Falcon at his deposition how far Walton's pain was radiating up her arm based on the July 6, 2010 therapy record, Walton's attorney objected and asserted that it would be speculative for Dr. Falcon to answer the question. (R.p. 99, lines 4-10). Despite contending that it would be speculative for Dr. Falcon to testify to how far the pain was

radiating up her based on the July 6, 2010 therapy record, Walton now asserts that this record supports the Commission's decision that she sustained a compensable injury to her right shoulder. This is the exact type of speculation that an award from the Commission cannot be based upon. *See* Jennings, *supra*.

C. The Commission erred in relying on the causation opinion of Dr. Keith.

The probative value of an expert's opinion stands or falls on the existence or nonexistence of facts upon which it is based. *See* Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967); Glenn v. Dunean Mills, 242 S.C. 535, 131 S.E. 2d 696 (1963). In the present case, as outlined in the Brief of Appellants', while Dr. Keith's opinion was based on Walton's history of (1) her airbag deploying and (2) her right arm getting caught up in the steering wheel at the time of her accident, Walton's own testimony at the hearing establishes that her vehicle's airbag did not deploy and that he arm did not get caught in the steering wheel. (*See* Brief of Appellants, pp. 18-22).

Walton contends that these two discrepancies in the history she provided Dr. Keith do not impact his opinion on causation. (*See* Brief of Respondent, p. 7). However, Walton's position is naturally flawed. Since Walton's discrepancies in her history to Dr. Keith were contained in Walton's description of how her motor vehicle accident occurred (i.e., how she allegedly injured her right shoulder) and since Dr. Keith's causation opinion was based solely on the history she provided him, these discrepancies eliminate the probative value of Dr. Keith's opinion.

Walton also argues that the discrepancies are meaningless since Appellants do not explain their theory as to why either of these items impacts the analysis of causation in this instance. The only explanation needed is that the discrepancies were contained in the

history of how Walton allegedly injured her right shoulder. Dr. Keith's opinion was based on Walton's inaccurate history of her airbag deploying and her right arm getting caught up in the steering wheel and that Dr. Keith's opinion was based on these discrepancies. Thus, Dr. Keith's opinion that Walton injured her right in her motor vehicle accident could presumably be based on either one of those inaccurate facts.

Walton's argument appears to fail to consider that it is not Appellants' burden to prove that she did not injure her right shoulder in her work accident. Instead, as this Court and the Supreme Court of South Carolina have held on several occasions, the claimant has the burden of proving facts that will bring the injury within the workers' compensation law. *See* Bartley v. Allendale County School Dist., 381 S.C 262, 672 S.E.2d 809 (Ct. App. 2009). *See* also, Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951). In the present case, the only reasonable inference when considering the substantial evidence in the record is that Walton did not sustain a compensable injury to her right shoulder as a result of her March 30, 2010 motor vehicle accident.

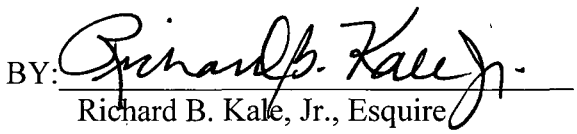
CONCLUSION

The Commission's decision that Walton sustained an injury to her right shoulder on March 30, 2010 by accident arising out of and in the course of her employment is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. As such, Appellants Union County Carnegie Library and South Carolina Association of Counties Self-Insurance Fund, respectfully request that this Court issue an Order reversing the Commission's decision that Walton sustained a compensable injury to

her right shoulder by accident arising out of and in the course of her employment on March 30, 2010.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY: 

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November 1, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

November 15, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants and Final Reply Brief of Appellants on Cynthia Walton by depositing a copy of it in the United State Mail, postage prepaid, on November 1, 2012, addressed to her attorney of record, Jeremy A. Dantin, Esquire, Harrison, White, Smith & Coggins, P.C., P.O. Box 3547, Spartanburg, SC 29304.

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