THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge
Case No. 2008-CP-40-2813

Appellate Case No: 2012-213482

Linda Burris, Employee.....Appellant,

v.

Lexington/Richland School District 5, Employer,
And South Carolina School Board Insurance Trust, Carrier.....Respondents.

RESPONDENTS' BRIEF

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COLUMBIA, SOUTH CAROLINA
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QUESTIONS PRESENTED

1. WAS THE CIRCUIT COURT'S DETERMINATION THAT THE APPELLANT FAILED TO PROVE SHE WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS FULLY SUPPORTED BY SUBSTANTIAL EVIDENCE?

2. DID THE CIRCUIT COURT CORRECTLY APPLY SOUTH CAROLINA CASE LAW AND THE SOUTH CAROLINA WORKERS' COMPENSATION ACT IN FINDING THAT APPELLANT DID NOT SUFFER A REPETITIVE INJURY TO HER BACK OR AGGRAVATION OR EXACERBATION DUE TO WORK ACTIVITIES?

STATEMENT OF THE CASE

Linda Burris (Appellant), who was 68 years old at the time of the hearing before the Circuit Court, sought compensation for a back injury that she claimed arose out of her duties as a teacher's aid for Lexington/Richland School District Five (Employer/Respondent). She was 58 years old at the time of the claimed injury. The Appellant retired in June 2001, and then returned to work in August 2001 under the TERI Program. (Hearing Tr. p. 5, l. 4-22, ROA p. 56) She made a claim in September 2002, requesting compensation for back problems she asserted were caused by her activities at work. She did not pinpoint a specific accident causing her contended injury, but alleged instead that the duties of her job beginning August 2001 caused repeated trauma warranting compensation. (Hearing Tr. p. 33, l. 3-14, ROA p. 84) She complained that her back began bothering her in August 2001 after retiring from the School District, subsequent to which she returned to work and worked for two years. (Hearing Tr. p. 12, l. 7-11, p. 27, l. 17-21, ROA pp. 63 and 78). The Appellant received treatment with Dr. Beaver in 2001 and had an MRI in 2002 that showed Grade 2 spondylolisthesis. (Defendant's APA pp. 1, Claimant's APA p. 1, ROA pp. 95 and 101). She had therapy for approximately one year between 2002 and 2003, and consulted with a neurosurgeon, who diagnosed lumbar instability but provided no opinion as to

causation. (Claimant's APA p. 2, 3, ROA pp. 102,103) She also had a nerve study that was read as normal, with no radiculopathy or nerve entrapment on February 20, 2002, with no evidence of nerve injury. (Defendant's APA p. 105-109, ROA pp. 96-100). The Appellant had no treatment for her back between July 2003 and January 2007. While she testified she felt her activities at work were causing her problems; in fact, her back worsened after she retired for the second time even though she was not engaged in any work activities. (Hearing Tr. p. 29, l. 11-19, ROA p. 80). While the Appellant testified in June of 2002 she was unable to walk because her back pain was so bad, at the time of the hearing on September 4, 2007, she admitted that she had not had any medical treatment to her back between 2003 and 2007, although she had treated with her family doctor, Dr. Levison, for unrelated left neck and shoulder pain. (Hearing Tr. p. 32, l. 7-15; p. 35, l. 7-25, ROA pp. 82 and 86). She also testified that she was able to engage in rigorous physical activity including taking line dancing classes and walking two and a half miles several times a week, as well as staying busy with baking, church and other activities. (Hearing Tr. p. 28, l. 3-24, ROA p. 79).

The only impairment rating before the Commissioner was 9% due to spondylolisthesis in her back that pre-existed the accident date. (Hearing Tr. p. 32, l. 18-21; Claimant's APA pp. 129, ROA pp. 83 and 229) No doctor has ever stated that the spondylolisthesis was caused by her work activities.

The Hearing Commissioner found in his Order of October 5, 2007, (ROA P. 9-16), that the Appellant did not carry her burden of proof regarding an injury by accident, repeated trauma or occupational disease. The Full Commission fully affirmed the Single Commissioner's Order on March 20, 2008, amending only Finding of Fact No. 5 to state

that: "Facts do not support an injury by repetitive trauma or occupational disease." (ROA p. 7 and 8)

In his Order of October 22, 2012, the Honorable L. Casey Manning denied the Appellant's appeal and affirmed the finding of the South Carolina Workers' Compensation Commission that substantial evidence supported its findings and that the Appellant failed to meet her burden of proof that she had sustained a compensable accident. (ROA pp. 1-6). It is from this Order that Appellant timely appealed.

ARGUMENT

I.

THE CIRCUIT COURT'S DENIAL OF WORKERS' COMPENSATION BENEFITS TO THE APPELLANT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant in her appeal contends that the Circuit Court erred in finding that the Commission ruling was supported by substantial evidence. Whether a claimant sustained an injury is a question of fact. *Therell v. Jerry's, Inc.*, 370 S.C. 22, 633 S.E.2d 893 (2006). As this Court is well aware in cases involving questions of fact:

> The Circuit Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct.App.2000); Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct.App.1999). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999). The Administrative Procedures Act restricts a Court from substituting its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact.

Furthermore:

> A decision of the Workers' Compensation Commission will not be overturned by the Circuit Court or the Supreme Court unless clearly erroneous in view of the substantial evidence. Mitchell v. Fiske-Carter

> Construction Company, 278 S.C. 180, 293 S.E.2d 701 (1982); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 301 (1981); Massey v. W.R. Grace & Company, 286 S.C. 434, 334 S.E.2d 122 (1985). The only issue in this appeal is whether the decision of the Full Commission is supported by substantial evidence. The Commission, not this Court, is the fact-finder. Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E.2d 613 (1986). The Full Commission makes the final determination of witness credibility and the weight to be given to the evidence. Further, a reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on any questions of fact. These factual findings are to be set aside only if unsupported by substantial evidence. Armstrong v. Union Carbide, 417 S.E.2d 597 (1992).
>
> Substantial evidence has been defined as something less than the weight of the evidence, but such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Id.

Clearly, the denial of this claim is supported by substantial evidence. The Appellant, who is presently 70 years old, sought compensation for a back injury that allegedly arose out of her duties as a teacher's aide for employer Lexington/Richland School District 5. She was 58 years old at the time of the claimed injury. Appellant had the burden of proof to show that an injury by accident or repetitive trauma caused her alleged injury. Respondents contend that the Single Commissioner, the unanimous Full Commission, and the Circuit Court correctly decided that Appellant failed to meet her burden of proof. While the Appellant argues the validity of the Commissioner's factual findings, the record established clearly supports the decisions below. More importantly, the evidence in the record overwhelming meets the appeal criteria that, unless the ruling is not supported by substantial evidence, the Order denying compensability of the claim must be affirmed.

Reviewing the facts in the case, the medical records and the Appellant's testimony clearly establish the factual finding that Appellant's back condition and problems existed

before her return to work in August 2001. (Hrg Tr. p. 32, line 7 – p. 33, line 2, ROA p. 83-84). Claimant's doctor diagnosed this pre-existing condition as spondylolisthesis, and gave her a nine percent impairment rating. *Id.* The Appellant has never argued, nor does there exist any medical evidence in the record, that this preexisting condition was in any way caused by her employment. Furthermore, there is no medical evidence whatsoever in the record that this condition worsened past the nine percent impairment to the back that pre-existed. The questionnaires Appellant points to from her doctor only discuss her symptoms as being related to her job duties, not the underlying condition. No evidence shows objective worsening of the spondylolisthesis. The Appellant had absolutely no treatment for her back from July 2003 to January 2007, and admitted to engaging in rigorous and continuous physical activity without back discomfort through the time of the hearing. Furthermore, she admitted that her back problems actually worsened after she retired the second time and was no longer engaged in work activities, (Hearing Tr. p. 29, l. 11-19, ROA p. 80). While Appellant in her brief cites opinions of doctors regarding the cause of her symptoms, the Commission was clearly within its rights to give greater weight to the Appellant's own testimony and lack of objective changes to support its findings. The Commission determines the weight and credit to be given to expert testimony. *Tiller v. National Health Care of Sumter*, 334 SC 333, 513 S.E.2d 843, 846 (1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's findings from being supported by substantial evidence. *Id.* The Appellate Panel is not bound by the opinion of medical experts. *Potter v. Spartanburg School District* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). However, here there is no medical evidence that shows the spondylolisthesis was caused or worsened by Appellant's activities at work.

Therefore, the evidence clearly shows that the preexisting condition did not result from her work or a work-related accident (Single Commissioner Order page 5, ROA p. 13) and it is respectfully requested that these findings be affirmed.

II.

THE CIRCUIT COURT CORRECTLY APPLIED SOUTH CAROLINA CASE LAW AND THE SOUTH CAROLINA WORKERS' COMPENSATION ACT IN FINDING THAT APPELLANT DID NOT SUFFER A REPETITIVE INJURY TO HER BACK OR AGGRAVATION OR EXACERBATION DUE TO WORK ACTIVITIES.

Appellant contends that the Commission and Circuit Court erred in finding that the Appellant did not suffer repetitive injury to her back. The factual arguments made therein are, of course, as noted above, supported by substantial evidence. There are no facts supporting any type of permanent injury, repetitive or otherwise. Additionally, her work activities are not repetitive, as she performed numerous different activities throughout the work day, as noted on pages 13 and 14 of Appellant's Brief. While Dr. Rambo did note disk instability, neither Dr. Rambo nor any other doctor has ever provided an opinion that the instability and disk bulging; that is, the spondylolisthesis, were caused by the accident, or that any worsening of this pre-existing condition was caused by her job activities. (Claimant's APA pp. 2, 3, ROA pp. 102-103).

The Commission and Circuit Court correctly assessed Appellant's routine work tasks as symptomatic activities to her preexisting condition. Any symptoms or temporary exacerbations that caused Appellant discomfort did not result in permanent injury. While *Hargrove v. Titan Textile Co.* notes that an exacerbation of pre-existing disease or injury arising out of or in the course of employment may be compensable. 360 S.C. 276, 295, 599 S.E.2d 604, 614, the Court qualifies this assertion: "The right of a claimant to compensation for aggravation of a preexisting condition arises only where there is a dormant

condition which has produced no disability but which becomes disabling by reason of the aggravating injury." *Id.* The Appellant never presented medical evidence showing a worsened spondylolisthesis condition; she never sought medical assistance for back discomfort from 2003-2007; and she admitted she engaged and continued to engage in rigorous and continuous physical activity without any back discomfort through the time of the hearing. From a medical standpoint and according to the Appellant's own admissions, Appellant did not suffer any new, permanent, or compensable injury to her back as a result of her employment from August 2001 through June 2003.

The Commission correctly assessed Appellant's alleged repeated traumas as "a variety of activities which essentially constitute working." (Single Commissioner Order Finding of Fact #4, (ROA p. 14), p. 6 affirmed by the Full Commission (ROA p. 7-8). "Physical activity of any kind can cause a preexisting degenerative back to be more symptomatic." (Single Commissioner Order Finding of Fact #6, p. 7 (ROA p. 15). "Compensation requires *injury* by an accident or repetitive trauma rather than a temporary exacerbation."

Appellant's temporary exacerbations clearly distinguish this case from that of *White v. Medical University of South Carolina.* 335 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003). Appellant aimed to construe the facts of these two cases as synonymous (Appellant's Brief page 10-11). The Commission easily recognized a separate set of facts. While the *White* claimant repetitively transported a 1500 pound "big boy" bed, Appellant Burriss suggests that cutting construction paper and reloading lamination cartridges are equally as traumatic. *Id.* at 158. The reasonable observer realizes that moving a 1.5 ton bed constitutes a repetitive trauma or "mini accident" while Appellant Burriss' self-proclaimed "awkward"

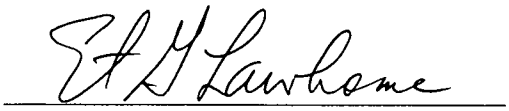
activities would not meet the *White* threshold. *Id* at 160. Furthermore, and most importantly, the repetitive trauma in *White* actually worsened Appellant's condition, manifesting into a disc herniation. *Id.* There was no worsening of Appellant's spondylolisthesis by her various job duties. Permanent disrepair from repetitive trauma differs from a temporary exacerbation. The Appellant's condition in the present case did not permanently worsen as a result of her work-related activities. She did not visit a doctor for back-pain related injuries between 2003 and 2007. There was absolutely no medical testimony that her preexisting spondylolisthesis degenerated beyond the pre-existing nine percent impairment. Her continuous and rigorous activity gave credence to this assertion. "A condition is compensable *unless* it is due solely to the natural progression of a preexisting condition." *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995) (emphasis added). In addition to the Appellant's failure to show a permanent injury, there was no evidence that her preexisting condition worsened in the slightest from the activities alleged in her claim. The Commission and Circuit Court correctly made a finding of fact that Appellant did not prove she sustained a repetitive trauma, or an aggravation. As noted by this Court, many people have progressive health problems that impact their ability to continue to work. However, the Workers' Compensation law was not intended to remedy this problem. *Havird v. Columbia YMCA*, 308 SC 397, 399, 418 S.E.2d 329, 1331 (Ct. App. 1992).

CONCLUSION

S.C. Code Ann. Section 42-1-160 requires places the burden of proof upon the employee to prove that she has sustained a compensable injury by accident, repeated trauma, or occupational disease. The Commission and Circuit Court correctly concluded that the

Appellant did not meet her burden of proof, either factually or as a matter of law. She did not sustain an injury by accident, repetitive trauma or aggravation of her admittedly pre-existing spondylolisthesis. As the Orders state, pain from a symptomatic activity attributable to a preexisting injury does not rise to the level of a compensable injury. Her failure to meet the burden of proving injury under Section 42-1-160 is clearly supported by substantial evidence. It is therefore respectfully requested that the ruling of the Circuit Court be affirmed in its entirety.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

I hereby certify that the Brief of Respondent complies with Rule 211 (b), SCACR.

Respectfully Submitted,

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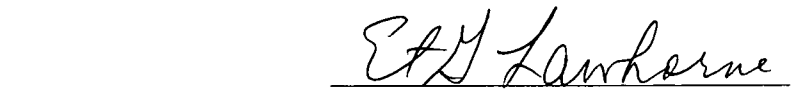

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PROOF OF SERVICE

I certify that I have served Respondent's Brief on Appellant Linda Burris through her Attorney, E. Ross Huff, Jr, Esquire by depositing a copy of same in the United States Mail, postage prepaid on July 26, 2013 addressed to Appellant's attorney of record, E. Ros Huff, Jr., Esquire, Huff Law Firm, 7244 Woodrow Street, Irmo, South Carolina 29063.

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