THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Case Tracking No.: 2013-000439

Diane Fleher, ... Claimant/Appellant,

v.

Dolphin Cove Marina, Employer
and Carolina Casualty Ins. Co., Carrier,..... Defendants/Respondents.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Full Commission erred in assessing a fee against the Claimant for making an "appeal without merit" when the Claimant had reasonable ground for filing an appeal and when she is entitled to appeal the Commission's decision.

2. Whether the Full Commission erred in upholding the Hearing Commissioner's assessment of costs against the Claimant for prosecuting her claim "without reasonable grounds" even though the Commissioner Ordered the Claimant to appear at the hearing, on his own motion, and over the Claimant's objection.

STATEMENT OF THE CASE

The case was heard on the merits on March 1, 2013. This hearing was set pursuant to the Commission's Order, issued pursuant to Regulation 67-601. Absolutely no objection was lodged by the Claimant, on the record, to going forward on March 1, 2012. (R. pp. 159, 160, 264 – also 281, 307).

At the hearing, the Claimant alleged that, on October 12, 2010, she suffered a compensable mental/mental injury when her half-brother David Race, owner of Dolphin Cove Marina, became angry with her when she interrupted a meeting Mr. Race was holding with other employees, specifically David Ackerman, Tom Blocker, and Mike Sage. She indicated that she politely asked who had been talking about her at the Marina and, unprovoked, in response, Mr. Race jumped up, yelled at her, and shoved her down the hallway. Specifically, he told her to get the fuck out of his office, that he would make her life a living hell, and that she would feel like she had been kicked to the curb at the end of every day. The Claimant alleges that, while he was saying these things, he shoved her three times, pushing her down the hallway each time. As a result of this incident, she alleges that she suffered a mental/mental injury. She also alleges that she developed fecal incontinence, developed a facial tic, and aggravated her pre-existing lupus and fibromyalgia. She requested medical treatment and temporary total disability (TTD). She did not allege any type of physical injury to her shoulders or any other body part.

In response, Defendants asserted that the Claimant was the aggressor in the incident. Defendants called to the stand every last one of the men present at the time of the Claimant's alleged accident, specifically David Race, David Ackerman, Tom Blocker, and Mike Sage. As outlined more thoroughly below, each gentleman testified consistently that, actually, the

Claimant barged into the meeting and was shouting and yelling, making wild statements and accusations. Each man testified that Mr. Race asked the Claimant to leave, but she would not leave and continued her tirade. Each man further testified that, as the Claimant would not leave, Mr. Race placed his hands on her shoulders and guided her out of the office, only to the threshold of the door, not down the hallway. Not one person corroborated the Claimant's story of being shoved three times down the hallway, told to get the fuck out of the office, told that David Race would make her life a living hell, or told that she would feel like she would be kicked to the curb.

After hearing the testimony of the Claimant as well as David Race, David Ackerman, Tom Blocker, and Mike Sage, and reviewing the medical evidence, the Hearing Commissioner "specifically and emphatically" found that the Claimant's claim was not compensable. He specifically found that the Claimant was the aggressor in the incident and that David Race instructed the Claimant numerous times to leave his office, which she ignored. He found that the Claimant was loud, screaming, yelling, and making accusations as she interrupted the meeting. He found that David Race placed his hands on the Claimant's shoulder to guide her out of the office with a mild amount of force because she refused to leave. He found that the circumstances of October 12, 2010 did not constitute "unusual or extraordinary circumstances of employment" as required by § 41-1-160. He found the Claimant's allegations to be so unbelievable, so against the greater weight of the evidence, that he assessed hearing costs of $1,014.86 to the Claimant.

The Claimant then appealed this decision, in its entirety, to the Appellate Panel. The Appellate Panel affirmed the decision of the Single Commissioner to deny benefits and affirmed the Hearing Commissioner's assessment of $1,014.86 in hearing costs. Via a separate

Order, the Panel found that the Claimant's appeal had no merit, and assessed another $250.00 fee against the Claimant "for bringing an appeal without merit before the Commission for review and rehearing."

The Claimant then appealed to this Court.

ISSUES PRESENTED

I. **The Hearing Commissioner Properly Proceeded with a Hearing.**

   a. **Any objection to going forward on March 1, 2012 was not preserved for review or was affirmatively waived by the Claimant.**

   b. **The Hearing Commissioner had jurisdiction to hear the claim pursuant to Regulation 67-601.**

II. **The Hearing Commissioner and Appellate Panel Properly Found that the Claimant's Testimony is so Unworthy of Credence as to Make Her Entire Claim Frivolous.**

   a. **Claimant's Testimony**

   b. **Defense Witness Testimony**

   c. **Argument**

III. **The Hearing Commissioner Properly Assessed Hearing Costs.**

IV. **The Appellate Panel Correctly Assessed a Fee of $250 Against the Claimant for Bringing an Appeal Without Merit.**

V. **Defendants Request the Claimant be Assessed Costs on Appeal Pursuant to Rule 222.**

ARGUMENTS/DISCUSSION

I. The Hearing Commissioner Properly Proceeded with a Hearing.

A. Any objection to going forward on March 1, 2012 was not preserved for review or was affirmatively waived by the Claimant.

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 trial judge to be preserved for appellate review. Wilder Corp. v. Wilke, 330, S.C. 71, 497 S.E.2d 731 (S.C. 1998); Creech v. S.C. Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct.App.1986).

At no point did the Claimant object to going forward on March 1, 2012 on the record. See entire hearing transcript, (R. pp 155-307). Counsel for the Claimant was specifically asked "Are there any objections to APAs, jurisdiction, venue, or any other matter?" (R. p. 5, 281). The response was "No, Your Honor." Id. After the Commissioner outlined the Claimant's position on the record – with no mention of any objection to going forward – the Commissioner asked again "Anything in addition to that with regard to the Claimant's position, sir?" (R. p. 160, 281). The response was, again, "No, Your Honor." Id. The witness testimony then proceeded. At the end of the hearing, counsel for the Claimant was specifically asked, "Anything else?" (R. p. 264, 304). The response was "No, sir." Id. Absolutely no objection was lodged by the Claimant, on the record, to going forward on March 1, 2012. **Thus, any objection to personal jurisdiction, notice, venue, or any similar issue was not preserved for review, or the objection was affirmatively waived.**

The only "jurisdictional issue" which cannot be waived is subject matter jurisdiction.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Majors v. S.C. Sec. Comm'n, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Peterson v. Peterson, 333 S.C. 538, 547, 510 S.E.2d 426, 431 (Ct.App.1998). The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over an employee's work-related injuries. Poch v. Bayshore Concrete Prods., 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

"The Workers' Compensation Act provides the exclusive remedy against an employer for an employee's work-related accident or injury." Posey v. Proper Mold & Engineering, 378 S.C. 10, 661 S.E.2d 395 (Ct. App. 2008) (citing Edens v. Bellini, 359 S.C. at 441, 597 S.E.2d at 867 and Fuller v. Blanchard, 358 S.C. 536, 541, 595 S.E.2d 831, 833 (2004). See also Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct.App.2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer.").

At no point was subject matter jurisdiction an issue. Via the Form 50, the Claimant alleged that the Claimant and the employer were subject to the Workers' Compensation Act and that the employer/employee relationship existed. (R. p. 424). Via the Defendants' Form 51, the Defendants agreed that the parties were subject to the Workers' Compensation Act and that the Claimant was an employee on the date of accident. (R. p. 426). The Claimant testified that she was an employee of Dolphin Cove Marina at the time of her alleged injury. (R. p. 163, 282). She testified that she suffered a mental injury occurring as part of her job at Dolphin Cove Marina. (R. p. 166-67, 282-83). Thus, the Workers' Compensation

Commission was vested with exclusive original jurisdiction to adjudicate her claim for an injury occurring at work. As subject matter jurisdiction was present, and any objection to any other type of jurisdiction was waived, the Commissioner clearly had the authority to proceed with a merits hearing.

B. The Hearing Commissioner had jurisdiction to hear the claim pursuant to Regulation 67-601.

Regulation 67-601 provides that "The Commission may, on its own motion, order a hearing" once "a conflict arises." It cannot reasonably be argued that in a denied mental/mental claim that no conflict had arisen. The pleadings themselves are evidence of a conflict, as the Claimant alleges an entitlement to benefits under the Act, and the Defendants deny both the Claimant's entitlement to benefits and also the facts alleged by the Claimant. (R. pp. 424, 426). The Claimant alleged that she was "injured when she was physically assaulted by her employer" and the Defendants denied the Claimant suffered a compensable injury. (R. pp. 424, 426). There can be no credible argument that no conflict existed.

II. The Hearing Commissioner and Appellate Panel Properly Found that the Claimant's Testimony is so Unworthy of Credence as to Make Her Entire Claim Frivolous.

"Mental/mental" injuries are compensable under workers' compensation law if caused by unusual or extraordinary conditions of employment. Getsinger v. Owens-Corning Fiberglas Corp., 335 S.C. 77, 515 S.E.2d 104 (S.C. App. 1999). In Shealy v. Aiken County, the South Carolina Supreme Court defined the "unusual or extraordinary conditions in employment" as conditions extraordinary to the particular job in which the injury occurs, and not employment in general. 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000).

A. Claimant's Testimony

On the morning of the alleged accident, the Claimant began texting Portia, a new bartender, about the work schedule. (R. p. 188, 288). Then, according to the Claimant, David Race approached her and accused her of causing "hate and discontent" in the restaurant. (R. p. 190, 288). David Race then went into a meeting with David Ackerman, Tom Blocker, and Mike Sage. (R. p. 190, 288). The Claimant went to the meeting and, according to the Claimant, politely asked David Ackerman if he said that she was causing hate and discontent. (R. p. 190-191, 288-289). When he said no, the Claimant asked another employee, Annie, who said no, and the Claimant returned to the meeting. Id. At that point, according to the Claimant, she simply asked who said that she was causing hate and discontent when, unprovoked, David Race jumped up, shoving, yelling, and cursing at her. (R. p. 191-92, 289). She claimed that David Race "shoved me three times. Boom, boom, boom." (R. p. 192, 289). She claimed that David Race yelled at her, while shoving her, and told her to "get the fuck out of [his] office." (R. p. 191, 289). She claimed that David Race also said that he was going to "make [her] life such a living hell each and every day that [the Claimant was] going to feel like you've been kicked to the curb at the end of the day." (R. p. 192, 289). She then left work and went to the police station to file a police report. (R. pp. 192-93, 289).

As a result of this encounter, the Claimant alleges that she suffered numerous physical ailments, including an inability to control her bowels, rectal spasms, a facial tic, aggravation to her pre-existing fibromyalgia and lupus, and depression and anxiety. (R. pp. 167-70, 283). She testified that she cried "for days on end" and was "inconsolable." (R. p. 167, 283).

B. Defense Witness Testimony

David Race was the first witness to testify. Mr. Race explained that David Ackerman

was resigning from the Marina "due to Diane's interference" and that the new bartender had also complained about the Claimant's interference with the Marina restaurant. (R. pp. 235-37, 300). Mr. Race testified that he instructed the Claimant to not involve herself with the restaurant any more, then immediately went into the meeting in question. (R. p. 238, 300). Mr. Race then testified that the Claimant began hollering, asserting that Mr. Race was a liar, and was making "wild statements and accusations." (R. pp. 238-39, 300-01). Mr. Race testified that he instructed the Claimant to leave and she refused, so he physically pushed her out the door, one time. (R. pp. 233-34, 299). Mr. Race testified that he did not have a security guard at the Marina so he felt it his responsibility to remove someone who comes into his office uninvited and refuses to leave. (R. p. 235, 300).

David Ackerman was next to testify. He testified that the Claimant caused "constant drama" and that she would "start problems where there didn't need to be problems." (R. p. 244, 302). Mr. Ackerman confirmed the testimony of David Race with regard to the incident on October 12. (R. pp. 245-46, 302). In short, he testified that the Claimant was yelling about someone talking about her (claiming that she was starting trouble), that Mr. Race asked her to leave several times, and that the Claimant refused. Id. Mr. Ackerman did not specifically recall whether Mr. Race pushed the Claimant or whether she left on her own, but "certainly the encounter did not involve any type of distance" traveled. (R. p. 247, 303).

Tom Blocker testified next. Mr. Blocker again confirmed that the Claimant entered the meeting, "created a scene," and "disrupted the meeting." (R. p. 253, 304). Mr. Blocker also confirmed that the Claimant was yelling about someone saying that she was "causing hate and discontent" in the restaurant. Mr. Blocker confirmed that Mr. Race told her several times to leave but she refused. Then, Mr. Race went by the door and pushed her by the shoulders

with both hands, but only until she was outside the door. (R. pp. 253-54, 304).

Mike Sage was the last person to testify. He also confirmed that the Claimant entered the meeting to find out "why everybody was saying that she was causing hate and discontent up in the restaurant." (R. p. 259, 306). Mr. Sage testified that the Claimant would not leave and that David Race told her three times to leave, but she refused. He testified Mr. Race then pushed her by the shoulders out the door, maybe twice, but he was not sure. (R. p. 261, 306). Mr. Race was clear that she was pushed "just enough to get her out the door." (R. p. 262, 306).

C. Argument

The Claimant claims that what did the most damage to her psyche was "being shoved" and David Race saying that he "would make her life a living hell and that [she] would feel like [she] had been kicked to the curb each day." (R. p. 202, 291). However, not one witness supported her claim that any of these things happened. As outlined above, each and every witness to the event testified that the Claimant started the altercation by interrupting the meeting, yelling, and refusing to leave. Each and every witness then confirmed that David Race simply pushed her outside the door when she refused to leave and that he did not shove her three times down the hallway. Not one of the witnesses corroborated her story of being told that David Race told her "get the fuck out of his office" or that he would "make her life a living hell" or that she would feel like she had "been kicked to the curb."

It is axiomatic that

> the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Frame [v. Resort Services Inc.], 357 S.C. at 528, 593 S.E.2d at 495. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Smith v. NCCI Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006); DuRant v. S.C. Dept. of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004). Where there are conflicts

in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct.App.2005); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002).

Hall v. United Rentals, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006).

The Appellate Panel was absolutely correct in the decision to give greater weight to the testimony of David Race, David Ackerman, Tom Blocker, and Mike Sage. The Appellate Panel is vested with the duty to finally determine witness credibility. Id. Within that discretion, the Panel found that the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage were entitled to great weight. Finding of Fact #17, 24, 25, 26, 27, 31 (R. pp. 348-51). These findings are supported by substantial evidence, not the least of which is the fact that each gentleman's testimony was generally consistent with each of the other men.

Notably, the issues presented to this Court are simply whether the Claimant should have been assessed hearing costs and appeal costs. The underlying factual issues were not briefed by the Claimant and are, thus, abandoned. First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (S.C. 1994). **Thus, it is the law of the case that the Claimant interrupted a business meeting to which she was not invited. Finding of Fact #12 (R. p. 347). She was loud, screaming, yelling, and making accusations. Finding of Fact #13 (R. p. 348). She was instructed numerous times by her supervisor, the owner of the Marina, David Race, to leave, but she ignored this directive. Finding of Fact #14 (R. p. 348). Because she would not leave, David Race placed his hands on her shoulders, with a mild amount of force, in order to guide her out of the office. Finding of Fact #15, 16 (R. p. 348). Similarly, it is also the law of the case that the Claimant's recitation of events is not true.**

Based on this altercation, the Claimant alleges that she cried for days, was inconsolable, lost control of her bowels, developed a facial tic, and aggravated a number of pre-existing conditions. (R. pp. 167-170, 283). Defendants asserted that these alleged physical problems, similar to her untrue testimony regarding the meeting she interrupted, were utterly non-credible and unworthy of credence.

Under these circumstances, the Hearing Commissioner was well within his authority to find the Claimant's claim frivolous and assess hearing costs. The Claimant then had the audacity to appeal the entire claim, despite the overwhelming evidence against her. The Claimant did not only appeal the assessment of hearing costs, but the entire claim. The Appellate Panel agreed that there was no factual or legal basis for the Claimant's continued pursuit of her claim and assessed costs, which the Panel is permitted to do by S.C. Code Ann. § 42-17-50 and Regulation 67-703.

III. The Hearing Commissioner Properly Assessed Hearing Costs.

"If the Commission or any court before whom any proceedings are brought under this Title shall determine that such proceedings have been brought...without reasonable grounds, it may assess the whole cost of the proceedings upon the party who has brought...them." SC Workers' Compensation Law Ann., § 42-1-80.

In this case, the Hearing Commissioner felt that the proceedings were brought without reasonable grounds. After hearing the evidence, the Commissioner found that he was "at an utter loss to understand why this claim was ever filed" and assessed hearing costs.

The Claimant alleges that the hearing costs should not be assessed because she did not request the hearing. However, the Claimant has always taken the position that this case was compensable and that she was going to pursue it. See the March 26, 2012

Administrative Order. (R. pp. 308-313). Indeed, the Claimant did not even object on the record to the hearing going forward. (R. p. 160, 281). Thus, any allegation that the Claimant is somehow exempt from § 42-1-80 based on the fact that she didn't want to go forward at the March 1, 2012 hearing is, *at best*, not preserved for review and, at worst, affirmatively disputed by the Record.

It is the fact that she pursued this outrageous claim, despite the overwhelming evidence disputing her claims, that caused the Commissioner to assess hearing costs. Indeed, considering that the Commissioner clearly believed the Claimant's sworn testimony was untruthful, it was within his discretion to refer her to the Attorney General's office for investigation into insurance fraud and/or perjury. Assessment of hearing costs is not the most severe penalty to which the Claimant was exposed.

At no point has the Claimant alleged that, if she were given more time she would have obtained additional, supporting evidence for her claim, which would provide a legitimate basis for her to have pursued this claim. She has demonstrated no prejudice in going forward on that day, March 1, as opposed to any other day. She has alleged no evidence that would be different and no avenue of cross-examination that, had she been given more time, would have given credence to her claim. Thus, whether the Commission waited until the Claimant requested a hearing, or set a hearing on its own Motion, the evidence submitted by the Claimant would be the same, and it would utterly fail to support any type of award. Thus, the Commissioner was correct in his decision to assess hearing costs.

IV. The Appellate Panel Correctly Assessed a Fee of $250 Against the Claimant for Bringing an Appeal Without Merit.

S.C. Code § 42-17-50 and Regulation 67-703 specifically authorize the Appellate Panel to assess a $250 fee when "it has determined that an appeal has been brought without merit." In this case, the Commissioner so found and assessed a corresponding penalty.

The support for that penalty comes, at least in part, from the Claimant's arguments to the Appellate Panel that the Commissioner does not have authority under Regulation 67-601 to order a hearing. (R. p. 440-41). The Regulation states simply: "The Commission may, on its own motion, order a hearing." When asked what about this Regulation does not grant the Commissioner the right to request a hearing, Counsel answered "I don't know the answer to that." (R. p. 441). When pressed, Counsel stated that he has "consulted with other practitioners in the field, people who do Workers' Comp appeals, and I've been advised that the regulation is never used in the context of a denied claim." (R. p. 442). When asked for the authority for that understanding, no caselaw was cited.

However, Defendants Respondents' brief cites Richey v. Dickinson, 359 S.C. 609, 598 S.E.2d 307 (2004) which holds that the "responsibility to request a hearing following a Form 50 filing rests not only on the Claimant, but also on the responding parties and the Commission." In this case, a Form 50 was filed on July 18, 2011 but was withdrawn on September 7, 2011. No action was then taken for months. Pursuant to Richey, the responsibility to request a hearing lies with all parties, including the Commission. Defendants assert that the Claimant's conclusory assertion that the Commission does not have the authority to order a hearing – which is in direct conflict with both the plain meaning of the regulation and relevant caselaw – triggered the assessment of appeal costs. Defendants

assert appeal costs should be affirmed.

Support for the assessment of a $250 fee also lies with the merits of the underlying case, thoroughly briefed herein. There is simply no merit to the Claimant's claim, yet she continues to expend judicial resources by appealing this matter. Defendants request this Court affirm the assessment of $250 by the Appellate Panel.

V. Defendants Request the Claimant be Assessed Costs on Appeal Pursuant to Rule 222, SCACR.

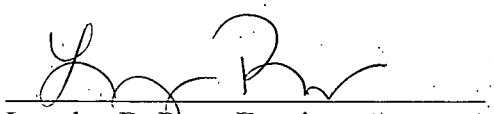
Should this Court affirm the decision of the Appellate Panel to assess hearing costs in the amount of $1014.86 and/or the Appellate Panel's assessment of a $250 fee, Defendants request that this Court tax the Claimant with costs and/or fees as permitted by Rule 222, SCACR.

CONCLUSION

For the reasons stated above, the Defendants respectfully request that this Court affirm both of the January 31, 2013 Decisions and Orders of the Appellate Panel.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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PROOF OF SERVICE

I, Lynnley D. Ross, attorney for Respondent, do hereby certify that I have served the following names individuals and/or companies with a copy of the Respondent's Final Brief by mailing a copy of the same to him/her/them in the United States mail, with sufficient postage affixed thereto and return address clearly marked, on the date indicated below.

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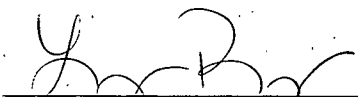

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CERTIFICATE OF COUNSEL

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

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