THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Appellate Case No. 2018-002087

Dale Brooks, Employee, Appellant,

v.

Benore Logistic Systems, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

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INTRODUCTION

Appellant's goal here is to reply to issues either not covered, or adequately covered, in his initial brief that Respondents raised in theirs. This brief will not rehash Appellant's prior arguments. As such, it will be devoid of a point-by-point debate on every issue raised by Respondent's brief, since Appellant addresses the majority of these issues in his initial brief. For clarity and brevity, this brief tracks the arguments raised in Respondent's initial brief.

ARGUMENTS

1. **Substantial evidence does not support the Appellate Panel's denial of Appellant's claim for a repetitive trauma injury.**

Respondent first argues "Appellant's appeal is essentially that the Appellate Panel should have assigned more weight to Dr. Loudermilk's opinion over the ergonomics report issued by Glen Adams and/or assigned more weight to Appellant's testimony." (R. Brf., p. 9). Respondents misapprehend Appellant's argument. Appellant's primary argument is, the Appellate Panel's decision is not supported by substantial evidence because Appellant's evidence, including the medical evidence, supports causation as required by the repetitive motion statue. The Appellate Panel's decision erroneously elevates the ergonomics report to outweigh medical evidence, which subverts the legal standard, because the statute requires a medical opinion proving causation. Respondent's ergonomics report does not satisfy the required legal standard for causation because it's not a medical opinion. *See* A. Brf., pp. 9-19.

Respondents then state the Appellate Panel enjoys the final determination of witness credibility and weight given to evidence, removing this Court from ruling on those issues and requiring affirmance. (R. Brf., p. 9, citing Shealy v. Aiken Cty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)). However, this overlooks an important point of law: This Court **can** "substitute

its judgment for that of any agency as to the weight of the evidence on questions of fact [if] the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (citation omitted).

A. S.C.Code § 42-1-172 requires a claimant to prove his job repetitive to recover, for a repetitive trauma injury, which Appellant did.

Respondent observes Appellant seems to argue claimants need not prove a job repetitive for benefits under the repetitive motion statute, S.C.Code § 42-1-172. (R. Brf., p. 9). Appellant regrets the misunderstanding. Appellant proved his job repetitive as required by the statute, through his own testimony and the medical conclusion of Dr. Loudermilk.

"'[C]ompensability of a repetitive trauma injury must be determined *only* under the provisions of [§ 42-1-172].'" Michau v. Georgetown Cty. ex rel. S.C. Ctys. Workers Comp. Tr., 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012). Contrary to Respondent's argument here, its ergonomics report is *not* medical evidence the statute requires.

Respondent's brief argues the ergonomics report proves the job is not repetitive. (R. Brf., p. 11). But then, on the same page, it admits the limits of the report. At best, it merely proves Appellant's job did not "involve[] elevated risks for the development of lumbar musculoskelatal disorders." Id. at 11-12. Appellant's Brief covers why the report's not substantial evidence at pp. 9-19.

Respondents "[f]inally, and perhaps most importantly" point to an exchange between Appellant's counsel and the Appellate Panel as proving the Single Commissioner failed to make the required finding of fact that Appellant's job was repetitive. (R. Brf., pp. 12-13, citing March 19, 2018 Apellate Panel H Tr., p. 18, ll. 2-11). This misses the mark for two reasons.

First, it overlooks the rest of the transcripts. Appellant's counsel noted it could be inferred the job was repetitive because the Single Commissioner found the injury a compensable repetitive trauma injury. (March 19, 2018 Appellate Panel H Tr., p. 18, l. 2 - p. 19, l. 3, citing Single Comm. Order, FF#14). The Appellate Panel reheard the case on a later date due to a completely innocent, unintentional filing error for Respondent's reply brief to the Appellate Panel. (June 18, 2018 Appellate Panel H Tr., p. 3, l. 16- p. 4, l. 9). At that hearing, Appellant's counsel explained:

> If you look at Finding of Fact number 11, which is on page 15, we have the conclusion by the Commissioner that Dr. Loudermilk's opinions on causation to a reasonable degree of medical certainty. And here we come to the crux of what you're asking, Commissioner. At Finding of Fact 14 and 14A, the Commissioner finds a direct causal relationship between injuries and the employment. At 14B, he bases that finding on the entire record. The entire record includes the Claimant's exhaustive description of his job, which is included in the Order and it also includes the doctor's opinion to a reasonable degree of medical certainty that the injuries are related to the job.

Id. at p. 12, ll. 1-16.

Second, the argument overlooks the Single Commissioner's finding of fact *tracks the precise language endorsed by the sole case on the issue,* Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011). Appellant addresses this full in his brief at pp. 19-21.

B. The Appellate Panel's decision creates a requirement that Appellant must present an ergonomics report to prove his job repetitive.

See R. Brf., pp. 13-14. Appellant's Brief covers this at pp. 18-19. Respondents first urge dismissal of this issue because it is unpreserved, as it wasn't raised to or ruled on by the Appellate Panel. But this is not the law in workers' compensation appeals, as held by Nettles v. Spartanburg Sch. Dist. #7, 341 S.C. 580, 588, 535 S.E.2d 146, 150 (Ct. App. 2000):

> The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal. While a trial court's ruling may be challenged by an aggrieved party with a motion to reconsider under Rule 59 or 60, worker's compensation law does not contain a motion to reconsider before the commission. An aggrieved party may not challenge the commission's decision with a motion to the commission, but only with an appeal to the circuit court [now Court of Appeals since the 2007 revision to S.C.Code § 42-17-60].

C. The ergonomics report does not provide substantial evidence Appellant's job was not repetitive.

See R. Brf., p. 14-16. Appellant's Brief covers this at pp. 9-19.

D. Substantial evidence does not support the Appellate Panel's assignment of weight to Appellant's testimony.

Respondent argues "the Appellate Panel found Appellant's description of the incident lacked credibility." (R. Brf., p. 17). The Panel's decision is devoid of a finding Appellant was not credible. Still, its assignment of greater weight to the ergonomics report constituted error, as it was unsupported by substantial evidence.

Respondent then points out "inconsistencies" in Appellant's testimony in an attempt to show glaring departures from the truth. (R. Brf., pp. 17-20). Further study reveals Respondent makes mountains of molehills.

Respondent claims Appellant testified at the hearing he told every provider his injury was from "getting in and out of the truck so much", but "this allegation was not supported by some of the medical records from his initial treatment." (R. Brf. at 17, citing Single Comm. H. Tr. 41).

This raises a couple arguments from common experience. First, worst case scenario for Appellant, "some" is not all. Or even most. Second, Appellant has no editorial control over, or

right to approve, medical records for complete accuracy in recounting what transpired at a doctor visit.

Respondent leads the argument with Appellant's answer to a medical questionnaire where he gave his symptoms instead of an accident description. (R. Brf. at 17, citing R. APA p. 46). Appellant just answered the question wrong. His hearing testimony confirms it. (Single Comm. H. Tr. p. 88, ll. 10-19).

The first treatment note in the case reports Appellant "states he constantly gets in and out of trucks approximately 150 times per shift." (C. APA at 3). Records from Claimant's other providers report his injuries' relationship to work activities. At WorkWell, he reported low back pain climbing into the truck. He also reported feeling sharp low back pain while stepping into the truck and pulling himself in. (C. APA at 11). Dr. Loudermilk records Appellant climbing up and down stairs approximately 150 times a day, moving a minimum of 30 trailers per shift. He reported "switching trucks in and out multiple times during the day, opening and closing doors, bending and stooping, and climbing ladders." (C. APA at 22). Overall, Appellant consistently reported injuries from getting in and out of the truck, along with other job duties.

Then Respondents point to another questionnaire where Appellant just didn't answer the question how Respondents think he should. (R. Brf. at pp. 17-18, citing R. APA p. 44). When asked to explain symptoms, Appellant describes extreme pain. Even when Appellant answers the question asked, it affects his credibility because he doesn't assert a repetitive trauma injury at every turn.

Moving on, Respondents urge Appellant reported only a single-incident back injury occurring January 17, 2017, instead of repetitive trauma. (R. Brf. at 18, citing Single Comm. H.

Tr. 61-62). At the end of that hearing, Appellant explained that was merely a specific incident forming part of his repetitive motion injury. (Single Comm. H. Tr. P. 89, li.20- p. 90, li. 2). And the legal definition of repetitive trauma injury tells us it involves "repetitive traumatic **events**." S.C.Code § 42-1-172(A). The plain words confirm there can be no repetitive trauma without specific events. When asked if his report to the WorkWell doctor about the January 17 incident was an acute event or gradual onset, Appellant described it as a onetime incident forming part of the gradual onset. (single Comm. Tr. P. 62, li. 13- p. 64, li. 8). Thus, Appellant captured the nature of his injury as described by the statute defining it.

Respondents next claim Appellant cannot be believed due to a medical record indicating his injury occurred a week after the time he testified it started. (R. Brief 18, citing D. APA at 41 and Single Comm. H. Tr. 68). First, Appellant may be right this aspect of the record is wrong. As he pointed out, the same record reports him having cardiac surgery he never had. (C. APA at 3; Single Comm. H. Tr. p. 68, li. 12-21). Second, Appellant's overall medical reports and testimony support an injury timeframe from early January through his last day at work, January 17. Third, the law does not hold Appellant to this exacting reporting standard. "As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." Schulknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002). "By its nature, a repetitive trauma injury lacks a definite time of injury because the damage is gradual in onset and caused by the cumulative effects of repetitive traumatic events." King v. International Knife and Saw-Florence, 395 S.C. 437, 443, 718 S.E.2d 227, 230, (Ct.App. 2011), cert. denied (2014), citing S.C.Code § 42-1-172(A).

Respondents' insistence the word "**around** January 3" means "**on** January 3" in Dr. Loudermilk's record is addressed at Appellant's Brief pp. 15-16.

Respondents point to "other evidence that showed Appellant lacked credibility." (R. Brf., p. 18). They first argue text messages from Appellant to his supervisor reflect his motive for making this claim is Employer's failure to give him health insurance. Respondents cannot be blamed for attempting to capitalize on this unfortunate coincidence. But it's a red herring. Appellant testified he intended medical care for his back to be handled through workers' comp. (Single Comm H. Tr. p. 39, ll. 17-22). Further, he denied this case was brought as retaliation for employer failing to provide health insurance, even testifying Employer tried to fix it. Id. at 40, ll. 1-9.

Respondents make much of the fact Appellant once worked as a safety director for a trucking company, urging the Court to find he should've reported the work injury "immediately." (R. Brf., p. 19). Respondents misunderstand that job. In it, Appellant handled only reports of vehicle accidents without injuries, not workers' compensation claims. (Single Comm H. Tr. p. 60, ll. 5-25).

In a similar vein, Respondents aver Appellant's inexcusably overdue injury report defies all belief the injury ever happened because he knew Employer's policy to report work injuries immediately. (R. Brf., p. 19). Notably, the evidence used to advance it is Appellant's deposition, not trial testimony.

Since Respondents attack Appellant's credibility for an allegedly delayed report, it's useful to know how the law views claim punctuality. Respondent's argument fails in light of how the law defines the unique notice-triggering requirements for repetitive trauma injuries.

"As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." Schulknight v. City of N.

Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002). "By its nature, a repetitive trauma injury lacks a definite time of injury because the damage is gradual in onset and caused by the cumulative effects of repetitive traumatic events." King v. International Knife and Saw-Florence, 395 S.C. 437, 443, 718 S.E.2d 227, 230, (Ct.App. 2011), cert. denied (2014), citing S.C.Code § 42-1-172(A).

Thus, a repetitive trauma injury invites a claimant's reflection and hindsight. That's exactly what Appellant did instead of rushing into an uncertain report of injury. To more fully understand the reason for the timing of the report of injury, we should briefly review how Appellant realized his injury was work-related.

Appellant began to feel symptoms of his injury around early January 2017. (Single Comm. H. Tr. 33, li. 9-16). Then he got the flu. Id. at p. 38, li. 23- p. 39, li. 2. Within a day or so after, he texted his supervisor again he felt his injuries were work related. Id. at 39, ll. 5-16. When he sent that text, he was over the flu, confirming work made his back hurt, not the flu. Id. Significantly, Appellant testified he just needed time to figure out whether that back pain was a flu ache or low back pain he considered work-related. Id. at p. 89, li. 17-19. Our Courts endorse this discernment from claimants.

King rejected the argument Defendant makes here, that Claimant's credibility should be judged by not reporting his injury the instant he felt pain. In King, the employer urged the Court to adopt a rule that "any occurrence of pain, coupled with the employee's belief that the pain is work-related, triggers the employee's reporting obligation." Id. at 718 S.E.2d 230. The Court saw through that, holding:

> In short, Employer urges us to equate pain with a compensable condition. We decline to do so. Nothing in the Act suggests our legislature intended to

> compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related.
>
> Id.

Instead, the Court adhered to the only standard by which reporting a repetitive injury should be judged, on whether a claimant timely reported it "upon diligent discovery that his condition is compensable." Id., citing § 42–15–20(C). The Court went further, observing the law "requires an injured employee to be diligent, not prescient." Id. at 231. Under King, repetitive trauma injuries are not compensable until they either require medical care or interfere with the ability to perform the job, whichever occurred first. Id.

Knowing the law and the facts helps us understand what Respondents truly urge for Appellant's report of injury to be credible. It didn't need to be "immediate." It needed to be *instantaneous*. King rejects that.

Here, Appellant did precisely what King expects. As a considerate employee exercising responsible judgment, he diligently made sure the flu didn't cause his current pain before reporting the injury. In reporting it, he noted he needed medical care. (R. APA at 49). He reported it about two weeks after he noticed his symptoms, barely a crack in his ninety-day window to report it. Id.

Appellant wanted to be sure his symptoms related to work. King encourages that - maybe even demands it. Hence a brief, justified, and considerate wait before reporting. After that, the medical records bear witness to Appellant consistently reporting his injuries as work-related.

The heart of Respondent's argument here ignores the law and the dispositive facts. Appellant reported the injury immediately after he discovered work caused it. The Appellate Panel's decision remains without substantial evidence to support it, and it should be reversed.

E. Michau v. Georgetown County is important for its law, not its facts.

See R. Brf., pp. 20-21. Appellant's Brief covers this at pp. 11-12. Respondents first urge dismissal of this issue because it is unpreserved, as it wasn't raised to or ruled on by the Appellate Panel. But this is not the law in workers' compensation appeals, as held by Nettles v. Spartanburg Sch. Dist. #7, 341 S.C. 580, 588, 535 S.E.2d 146, 150 (Ct. App. 2000):

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Respondents distinguish Michau based on the facts. Obviously, they are different. But the significance of Michau here lies in its holding: "'[C]ompensability of a repetitive trauma injury must be determined *only* under the provisions of [§ 42-1-172].'" Id. at 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) (internal citations omitted). Section 42-1-172 requires medical evidence of causation, which Appellant presented and Respondent did not dispute. That medical evidence is backed by credible reports of injury from Appellant and the overall medical record, including the doctor's conclusion specific repetitive job acts caused the injury. Thus, the only substantial causation evidence conforming to § 42-1-172 came from Appellant, so the Appellate Panel should be reversed.

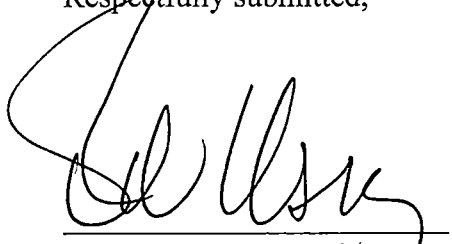
F. Murphy v. Owens Corning is the only case defining the required factual finding for a repetitive motion case, and the Single Commissioner followed it.

See R. Brf., pp. 21-24. Appellant's Brief covers this at pp. 19-21. The Single Commissioner's order reflects Murphy's requirements for the proper factual finding in a repetitive motion case, as shown in detail in Appellant's Brief.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Appellate Panel.

Respectfully submitted,



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March 11, 2019

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In The Court of Appeals

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Appellate Case No. 2018-002087

Dale Brooks, Employee, Appellant,

v.

Benore Logistic Systems, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the **Appellant's Initial Reply Brief** on the following by depositing a copy of it in the United States Mail, postage prepaid, on **March 11, 2019**, addressed to:

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March 11, 2019

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RE: Dale Brooks, Employee, Appellant, v. Benore Logistic Systems, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.
Appellate Case No.: 2018-002087

Dear Ms. Kitchings:

Enclosed for filing is an original and 1 copy of:

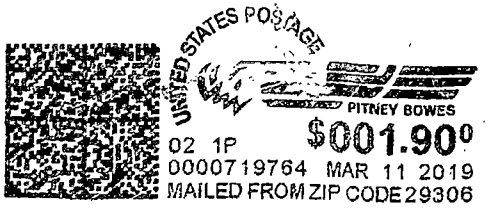
1. Appellant's Initial Reply Brief
2. Proof of service of the same on the respondent[s].

Please do send me a filed copy in the envelope provided.

Respectfully,

Robert T. Usry

RTU:cmm
cc: Daniel Eller
Client



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